

MAASTRICHT 30:
A CENTRAL EUROPEAN PERSPECTIVE

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MAASTRICHT 30: A CENTRAL EUROPEAN PERSPECTIVE

EDITED BY
JÁNOS EDE SZILÁGYI
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THE FOREWORD OF THE EDITORS



EDE JÁNOS SZILÁGYI AND GYÖRGY MARINKÁS

1. Introduction

On the occasion of the 30th anniversary of the entry into force of the Maastricht Treaty, it is worth taking a glance at the political discourses that defined the era and examine which goals set in that exceptional historical period came into reality. This is also necessary in order to understand the current public mood and the political discourses that will shape the next thirty years of the European Union.

Two factors justify calling this era exceptional: on the one hand, European integration, under the guidance of *Jacques Delors* – probably the greatest ever President of the European Commission – and through the combined efforts of the then Heads of State and Government, has emerged from its state of so-called *Eurosclerosis* and has begun to deepen at an unprecedented pace: what had not been achieved in previous decades has now been achieved only in five years.¹ On the other hand, the dissolution of the Soviet Union and the disintegration of the Eastern bloc made it

1 The period between the entry into force of the Single European Act in 1987 and the signing of the Maastricht Treaty in 1992.

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possible for the so-called *Finlandised*² countries – Finland, Sweden, and Austria³ – to accede to the integration and then to start the accession procedure with the countries of the former Eastern bloc. At the same time, the Maastricht Treaty created the *Common Foreign and Security Policy* (CFSP), which formed the second pillar – based on intergovernmental cooperation – of the then three-pillar of the EU.⁴

In the “heightened atmosphere” – resulting from the reasons mentioned in the above paragraph –, two objectives have become the fundamental guiding principles at EU level: the continued internal deepening of integration – in other words an “ever closer union”⁵ including the establishment of the Economic and Monetary Union, which became possible after the construction of the single internal market and the continued geographical enlargement.

At the international conference “Maastricht 30” organised by the Central European Academy and the Ferenc Mádl Institute of Comparative Law on 29–30 June 2023 in Budapest, these two points were broken down into five sub-points – also related to the political discourse of the time –, namely: (1) constitutional identity versus “ever closer union”; (2) institutional reforms in connection with the Future of Europe conference, (3) the future of the EMU, (4) the dilemmas of geographical expansion – that is where are the final geopolitical boundaries of EU enlargement – and last, but not least (5) the evaluation of the Union’s energy policy. Although the latter was regulated outside the framework of the Founding Treaties at the time of the Maastricht Treaty, energy policy and security of energy supply were also a major focus of attention during this period.

In the following, the editors will provide a glance on these topics in four points, introducing the first and the second points together. The other points are introduced separately.

- 2 The model is named after the Finns who, after the Second World War, in a 1948 treaty with the Soviet Union (the *Friendship, Cooperation and Assistance Treaty*), laid down a foreign policy guideline – also known as the *Paasikivi-Kekkonen Doctrine*, named after the two Finnish presidents – under which the Soviet Union renounced its claim to Finland in exchange for Finnish foreign policy neutrality. The latter required not only military neutrality, but also a renunciation of European integration. Available at: <https://www.britannica.com/place/Finland/The-postwar-period> (Accessed: 15 September 2024).
- 3 Austria has followed a similar path to Finland. See: Ruggenthaler, 2015, p. 442.
- 4 Although the South Slavic war soon made it clear that, in the words of Jacques Delors, ‘the CFSP is a Ferrari racing car with only the engine of a lawnmower.’ – See: Molnár, 2018, p. 155, p. 287.
- 5 It is worth mentioning that the term “ever closer union” already appeared in the preamble of the 1957 Treaty of Rome.

2. Elaborating on the topics

2.1. *The issue of the constitutional identity vs. “ever closer union” and the need for institutional reform with a view to democratic deficit*

The election of Jacques Delors as head of the European Commission marked the beginning of a successful new era in the history of European integration. With the *Single European Act*, which entered into force in 1987, successfully emerged from the “paralysis” of the previous 20 years of the so called Eurosclerosis: by 1992 – that is only in five years –, the goal originally set out in the 1957 *European Economic Community* (EEC) Treaty, namely the creation of a common market, had been finally achieved. Albeit “re-labelled”, now under the name of the Single Internal Market. This euphoria culminated in the 2004 Constitutional Treaty, which in the words of *Jacques Chirac* – the then President of France –, was “only” an international treaty in legal terms, but in political terms it was a constitution for the EU.

At the same time, these rapid successes have been facilitated by the distancing of the public from decision-making. As *Vivien A. Schmidt* wrote,⁶ *technocratic governance* – in other words “policy without politics” – has always been embedded in European integration. As *Andrzej Bryk* argues in his contribution to the book,⁷ the integration was created with the inherent aim of avoiding a scenario, where “fanatic mass” makes decisions facilitating radical political movements’ rise to power. The tragic historical events in Europe between the two world wars were a lesson that the Founding Fathers learnt. The vast majority of them were devout Catholics and some of them experienced the versatility of the modern nation states’ borders,⁸ therefore according to some opinions they were pursuing the creation of a united Europe⁹ based on anti-communism, democracy and Catholic social principles¹⁰ with

6 Schmidt, 2006, p. 317.

7 Contribution by Andrzej Bryk ‘EU – 30 years after Maastricht – the Polish Perspective – from Hope to Disillusionment’.

8 Robert Schuman and Alcide de Gasperi both found their national identities changed by border shifts after the First World War, which suddenly made Schuman French and De Gasperi Italian. – Jenkins, 2014.

9 As some argue the Catholic Church always preferred periods when the political order was closer to an imperial model as the Holy Roman Empires than to nation states and that the long-time ‘natural political order’ of Europe is not the rather young system of nation states, but empires. – Driessen, 2020; see also: The Evolution of the European Union and the Responsibility of Catholics Commission of the Bishops’ Conferences of the European Community, May 2005 [Online]. Available at: <https://www.comece.eu/wp-content/uploads/sites/2/2022/04/20050509-The-evolution-of-the-EU-and-the-Responsability-of-Catholics.pdf> (Accessed: 15 September 2024); See also: Szabó, 2015, pp. 155–164.; see also Paris, 1950.

10 Jenkins, 2014.

the Vatican's explicit support.¹¹ It is not surprising that the integration – in its initial form – seemed like an elitist and Catholic club for the outsiders.¹² The price of the Founding Fathers' choice is, however, that the functioning of the institutions that govern the EU barely meet the standards of democracy expected from Member States, insofar as the focus of the analysis is on the extent to which citizens participate in decision-making. This is nothing other than the notion of a *democratic deficit* in the functioning of the EU institutions, a criticism that is often raised against Brussels. The German Constitutional Court (*Bundesverfassungsgericht*, BVerfG), the “*primus inter partes*” among the European constitutional courts, has addressed the issue on several occasions. In its so-called *Maastricht decision*,¹³ it stated that the *Federal Republic of Germany* may only participate in an international organisation on a *supranational* basis if it does not undermine the influence of the people on the decision-making and the *legitimacy* of government derived from the people.¹⁴ In *Dani Rodrik's* view – as a “political trilemma of the world economy” – a tightly globalised economy, a system of nation states and a democratic political establishment cannot be upheld simultaneously, and one of these factors must necessarily fall out.¹⁵ This is rebutted by *Jan Philipp Schaefer* who argues in his contribution to the present book¹⁶ that: ‘the occasional assertion that the expansion of the market economy is automatically accompanied by the death of the state is simply wrong.’ In his view economic supranationality does not require the abandonment of the state. On the contrary, its regulatory potential is needed to guarantee the individual rights that are essential for the functioning of capitalism and to absorb the social costs and external effects of competition.

Still, democratic deficit is present and needed to be remedied. The hardship of this endeavour is well illustrated by the failure of the so-called *Spitzenkandidate system*.¹⁷ *Tibor Navracsics* sees the reason for the failure of the system in the fact that during the 2019 EP elections the heads of state and government – led by French President *Emmanuel Macron* and the governments of the Visegrad Four – made it clear that they are not willing to make further concessions to the EP in this area, that is they will not give up their right, guaranteed by the founding treaties, to appoint the

11 Pope Pius XII welcomed the signing of the Treaty of Rome as ‘the most important and significant event in the modern history of the Eternal City’ – See: Maillard, 2015; See also: Delegation of the European Union to the Holy See (2017) ‘The Popes and Sixty Years of European Integration’, *L’Osservatore Romano*. Project supervised by: Tombiński and Maria, 2017.

12 Guth and Nelsen, 2014, pp. 1–2.

13 BVerfG, Judgment of the Second Senate of 12 October 1993 based on the oral proceedings of 1 and 2 July 1993 – 2 BvR 2134, 2159/92.

14 BVerfG, judgment of 30 July 2019, 2 BvR 1685/14, 2 BvR 2631/14; see also: Horváth et al., 2021, pp. 116–137.

15 Rodrik, 2002, p. 27.

16 Contribution by Jan Philipp Schaefer. ‘Ultra vires without end? The German perspective on the Future of Europe Conference’.

17 The European Parliament: electoral procedures (Facts about the European Union). [Online]. Available at: https://www.europarl.europa.eu/ftu/pdf/hu/FTU_1.3.4.pdf (Accessed: 15 September 2024).

president of the EU's top executive body. Even if the Heads of State and Government had been willing to cede this right to the EP, the initiative would not have achieved its main objective: based on the polling data voter activity in EP elections did not increase.¹⁸ A further example of the inadequacy of attempts to reduce this democratic deficit is the poor implementation of the recent *Conference on the Future of Europe* initiative, which, according to the final report for 2022,¹⁹ involved a minuscule number of EU citizens compared to the total population of almost 447 million.²⁰ Jan Philipp Schaefer provides a valuable contribution to this topic by elaborating on the German perspective, involving legal theory arguments on the issue of how the democratic deficit should be addressed at the next reform of the Founding Treaties. Until then, Schmidt's words from 2006 remain valid:

EU institutions may be effective in governing for and with the people, as they deliver desired policy outcomes and engage societal interests in the policy-making process. However, EU institutions fall short in governing of and by the people, since they are lacking in terms of political representation and citizen participation, for both of which the national level remains the main locus.²¹

It is worth noting, however, that as *Andrew Moravcsik* argue, the democratic legitimacy of the Union is ensured by a number of institutions and control mechanisms, including the fact that the EU's main policy-making institution, the European Council, is composed of Heads of State and Government who have won their mandate through universal, free and democratic elections. To summarise Moravcsik's argument, overemphasising the democratic deficit leads to a misjudgement, as it measures the European Union against an ideal of democracy, synthesised from the constitutional traditions of the Member States which themselves are far from being an ideal democracy. Instead they are democracies with their distinctive excellences and shortcomings.²²

18 Navracsics, 2020, pp. 7–28.

19 Conference on the Future of Europe – Report on the Final Outcome (May 2022) [Online]. Available at: <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf> (Accessed: 15 September 2024).

20 Eurostat, population of the EU (last updated 05/09/2024) [Online]. Available at: <https://ec.europa.eu/eurostat/databrowser/view/tps00001/default/table?lang=en> (Accessed: 15 September 2024); See also: Bickerton, 2021, p. 10.

21 Contribution by Jan Philipp Schaefer 'Ultra vires without end? The German perspective on the Future of Europe Conference'.

22 Moravcsik, 2002, pp. 603–624.

The emergence of *integration by stealth*²³ – or, in other words, legislation “under the shadow of the treaties”²⁴ – is also an issue that need to be dealt with. This method has also been actively undertaken by the Court of Justice of the European Union (CJEU), which has become particularly evident in the context of the CJEU’s examination of the ECB’s crisis management programmes, which have been in place since 2010 and are necessary due to the Eurozone’s initial shortcomings.²⁵ As *Zoltán Angyal* has written²⁶ in the context of the *ESMA-case*²⁷, the Court has always taken an ‘amicable attitude’ in this area. Obviously, it took into account the realities that sticking to the ‘no bail-out’ policy could easily lead to a serious and irreparable collapse of the Eurozone. While the BVerfG initially shared this attitude with certain restrictions after a warning in 2019²⁸ “pulled the handbrake” on an element of the ECB’s crisis management strategy declaring it ultra vires by its decision of 5 May 2020. The decision was frowned upon both in the political sphere and partly among academics. In its 2021 decision the BVerfG rejected the application for an enforcement order under the domestic law on the constitutional court. While in its reasoning the BVerfG claimed that in the meanwhile the German state bodies had the possibility to execute the proportionality test which the Court missed earlier and also claimed to procedural errors,²⁹ it is quite clear that political pressure from the German government and the European Commission, as well as considerations related to the future of the Eurozone clearly played a role in its decision not to make the government enforce the 2020 decision. That is the BVerfG considered that the Eurozone reeling from the COVID-19 pandemic would have faced a serious crisis if the *Bundesbank* had been forced to withdraw from the financial rescue programme.³⁰

The expansion of the EU’s powers can also be observed in several other areas. In certain areas – like handling the negative effects of the COVID-19 pandemic³¹ –, the benefits of common rules can be seen and justified. At the same time, the extension of EU competences to other areas of exclusive competence of Member States under the Founding Treaties raises the question of the infringement of the national identities of Member States, which are protected by Article 4(2) of the *Treaty on*

23 Bickerton, 2021, p. 10; In the Hungarian literature – without claiming completeness – see: Trócsányi and Sulyok, 2020, pp. 226–235.; In this respect, the so-called Political Commission of Juncker has been at the forefront. see: Alfred Sant warns against Juncker’s ‘under the radar’ EU integration calls, *Times of Malta*, 15 September 2017. [Online]. Available at: timesofmalta.com/articles/view/alfred-sant-warns-against-junckers-under-the-radar-eu-integration.658065 (Accessed: 15 September 2024).

24 Götz, Nowak and Orłowski, 2018, p. 204.

25 Marinkás, 2018, pp. 437–471; See also: Schmidt, 2016, pp. 1–21.

26 Angyal, 2015, pp. 129–143.

27 CJEU, C-270/12, *United Kingdom v Parliament and Council*, Judgment of the Grand Chamber, 22 January 2014.

28 BVerfG, 2 BvR 1685/14, 2 BvR 2631/14. Judgment of July 2019 (Banking Union).

29 BVerfG, 2 BvR 1651/15 Order of the Second Senate of 29 April 2021.

30 See in this context Marinkás, 2021b, pp. 328–339.

31 Marinkás, 2021a, pp. 138–166.

European Union. In the *Coman*-³² and *Pancharevo*³³ judgments and in the “reasoned order” in the *Rzecznik Praw Obywatelskich* case,³⁴ the CJEU, applying the principle of *portability of personal status*³⁵ on *Directive 2004/38/EC*,³⁶ adopted the so-called functional recognition. Under this notion, a Member State is obliged to recognise family relationships not recognised by its own constitutional or statutory rules solely in order to ensure the right to free movement of persons. The state is not obliged to change its constitutional rules that is in the CJEU’s view it can fulfil its obligations under EU law without curtailing its own national identity.³⁷ In the editors’ view the most important question is if a Member State is ultimately forced to give way to the unconditional primacy of EU law in a multitude of sub-areas³⁸ in a functional sense, will it have any room for manoeuvre, even though its constitution remains otherwise unchanged?

As is clear from the above, the European Union has increasingly gained powers at the expense of the Member States. At the same time, the “federal Europe” vs. the “Europe of Member States” is also an actual political issue.³⁹ Member States of the European Union therefore have to decide in which framework to continue cooperation, that is whether to west further competences on the EU and move towards federalism by amending the founding treaty, or to stop the federalisation and remain a Europe of Member States. Several contributors to this book, namely *Piotr Bajda*⁴⁰, *Andrzej Bryk*⁴¹, *Grzegorz Pastuszko*⁴², *László Trócsányi*⁴³, *Norbert Tribl*⁴⁴,

32 CJEU, Case C-673/16 *Coman*, judgment of 5 June 2018.

33 CJEU, case C-490/20 *V.M.A. v Stolichna obshtina, rayon ‘Pancharevo’*, judgment of 14 December 2021.

34 CJEU, Case C-2/21, *Rzecznik Praw Obywatelskich*, order of 24 June 2022.

35 Marinkás, 2023, pp. 177–201.

36 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (OJ L 158, 30.4.2004, pp. 77–123).

37 The proposal for a European Parenthood Certificate is currently before the EP. Recognition of parenthood: MEPs want children to have equal rights (Press Release, 14 December 2023). [Online]. Available at: <https://www.europarl.europa.eu/news/en/press-room/20231208IPR15786/recognition-of-parenthood-meps-want-children-to-have-equal-rights> (Accessed: 15 September 2024).

38 For example, when the child from the *Pancharevo* case reaches school age and the parents – who are not married under Bulgarian law, because Bulgarian law does not allow them to marry – realise that they are not eligible for any of the childcare benefits available only to spouses may launch a new lawsuit and claim that Bulgarian laws are hindering them in enjoying their rights under EU law.

39 Martonyi, 2018, pp. 3–19.

40 Contribution by Piotr Bajda ‘Institutional Reforms in the Context of the Future of Europe from the Polish Political Science Perspective’.

41 Contribution by Andrzej Bryk ‘EU – 30 years after Maastricht – the Polish Perspective – from Hope to Disillusionment’.

42 Contribution by Grzegorz Pastuszko ‘Constitutional Identity versus “Ever Closer Union” from the Perspective of a Central – Eastern European Country: Poland’.

43 Contribution by László Trócsányi ‘The Maastricht Treaty in a Thirty-Year Perspective’.

44 Contribution by Norbert Tribl ‘Constitutional Identity Versus ‘Ever Closer Union’ from the Perspective of a Central-Eastern European Country: Hungary’.

Lénárd Sándor⁴⁵ argue in favour of the latter. Summarising their line of thoughts it is the only way to “save the integration from itself” and keep it together. In his keynote writing, László Trócsányi raises a philosophical and underlying questions, namely: what is the ultimate purpose of the European integration? How can the European cooperation justify its own existence and *raison d'être*? Is it destined to replace or supersede the Member States by forming a larger entity? Or is it created as its motto says: “to unite in diversity”?⁴⁶ In Sándor’s view these issues are important since the more adequate question today is how the European integration can justify herself in the eyes of the Member States since the European integration is not an end in itself nor is it self-evident anymore. As Bajda argues, a “European demos” is needed first if one wishes to create a new state.⁴⁷ In his view, there is a fear that building a deeply integrated European Union will end with its collapse: if weaker countries are forced to accept decisions unfavourable to them, an increase in nationalist sentiment can be expected. Pastuszko argues similarly. In his view, pro-federal agenda bears the risk of “crossing the Rubicon” and, as a result, triggering disintegrating tendencies. Bryk identifies several deficiencies in the functioning and the policies of the EU. The probably most serious problem in his view is the *ultra vires* activities of the Union’s undemocratic institutions, which may lead to the federalization of the Union. Pastuszko argues that Poland has so far adopted a very assertive position, emphasising throughout its membership in the European Union a strong attachment to its constitutional identity and thus showing its readiness to defend its domestic constitutional order against external interference. Tribl also believe that constitutional identity can be understood as a natural limitation of the *ever closer union clause*, which is inherent in the nature of Europe. To support his findings, he carried out a thorough analysis on the related practice of the Hungarian Constitutional Court. Petar Bacic⁴⁸ who examines the institutional question through the lenses of legal theory argues for a clearer division of powers. In his view, the traditional *trias politica* provides the most convincing answers to the problem of avoiding the concentration of power, which is also the purpose of the EU Treaties. Sándor argues that if any treaty changes to come in the near future the main proposals from a Hungarian academic’s view would be to enhance the ties and responsibility between the representative and the electorate by providing the national parliaments with a stronger role in the European legislative and oversight process thus offering better protection to national and constitutional identities as well as to the principles of subsidiarity. Zoltán Csehi in his keynote writing⁴⁹ provides a valuable contribution by elaborating on certain recent CJEU judgments on EU citizenship and on Common Foreign and

45 Contribution by Lénárd Sándor ‘Institutional Reforms in the Context of the Future of Europe Conference from the Perspective of a Central-Eastern European Country: Hungary’.

46 Contribution by László Trócsányi ‘The Maastricht Treaty in a Thirty-Year Perspective’.

47 Haller and Ressler, 2006, 817–850.

48 Contribution by Petar Bacic ‘Institutional Dynamics of the EU after Maastricht (1993–2023): Separation of Powers as an Old Principle of Constitutionalism in New Circumstances’.

49 Contribution by Zoltán Csehi ‘The Maastricht Treaty and the ECJ in the light of its recent case-law’.

Security Policy to illustrate how the treaty changes, which introduced these in 1992 effected the current state of the *acquis*. Verena Vinzenz also provides an analysis on the CJEU case-law:⁵⁰ in her contribution she elaborates on the recognition of previous professional experience and loyalty to the employer as an important issue to provide the proper functioning of the single market. Nóra Jakab⁵¹ provides an insight for the EU's social dimension. In her contribution, she argues that decent working conditions and social protection is crucial for the economic and social security of the workforce and for well-functioning labour markets that create jobs and sustainable growth. She considers the development of the social dimension of the European Union by pursuing employment security for workers as a major achievement.

2.2. The doctrine of continuous geographical expansion

The geographical expansion of integration and the possible candidate states has been an important political issue from the outset. This is illustrated by Charles de Gaulle's opposition to British membership due to his twofold fear that, on the one hand, accession of the British would have meant letting the Americans in at the backdoor, and, on the other hand, that the British would challenge the hegemony of the *Franco-German* tandem.⁵² De Gaulle's resignation in 1969 meant the end of the French veto in this issue: in 1973, the first time ever in the history of the integration new countries were accessed: the United Kingdom, Denmark, and Ireland. The integration of the latter two was a real success story: the then "poor relatives" are now among the richest EU countries. In the next decade the inclusion of the Mediterranean countries – Greece, Portugal, and Spain – posed a new challenge for the Community: they were not only poor in terms of "Western" standards, but they also had little historical experience of democracy to say the least. The democratisation of these countries – due to different historical events –, has opened up the possibility of including them in the integration process. However, the example of Greece has clearly shown that the premature admission of a country into European Community without taking into account economic realities – but based on essentially political and strategic considerations⁵³ – can be a source of problems that last for decades.

As for the principle of continued expansion – which culminated in the 2004 enlargement⁵⁴ – certain factors are calling a halt for it.⁵⁵ One may identify as such

50 Contribution by Verena Vinzenz 'Grounds for Restricting the Free Movement of Workers – Recognition of Previous Professional Experience and Loyalty to the Employer'.

51 Contribution by Nóra Jakab 'Moving Towards Secure Flexibility – Development of the Social Dimension of the European Union'.

52 Lundestad, 2003, pp. 111–141.

53 Angelos, 2015; Somogyi, 1999, pp. 48–69; Karamouzi, 2021; see also Kalaitzidis and Zahariadis, 2015, pp. 71–84.

54 For a detailed analysis of the Hungarian legislation's efforts to protect the Hungarian arable land from buying-up under the applicable EU framework please see: Szilágyi and Szinec Csütörtöki, 2023, pp. 318–321; Szilágyi, 2022, pp. 185–188.

55 Devrim and Schulz, 2009, p. 26.

factors the burdened historical background of the Western-Balkan and these countries' lagging behind in realising a market that would be eligible to be integrated into the single market. The actuality of historical tensions is illustrated by the clashes at the Kosovo-Serbia border in 2022.⁵⁶ The contributions of *Tanja Karakamisheva Jovanovska*,⁵⁷ *Branko M. Rakić*,⁵⁸ and *Aleksandar Spasenovski*⁵⁹ provides an insight to these issues as all the above-mentioned professors are citizens of candidate states. The low willingness to meet admission requirements and the historic reasons are interdependent.⁶⁰ The reasons are multi-fold: as *Rakić* argues, there is a laconic feeling in the Serbian population due to past and present conflicts with the West – including the unsolved issue of Kosovo – and also there is a certain disappointment due to the slow progress of the accession. While he is of the view that Serbia – as a European country, completely territorially surrounded by EU member states and candidate states and sharing common culture and values – must seek its place in the EU, if there is no will for that in the EU or only under conditions that Serbia, as a sovereign country, cannot accept, Serbia has to seek for alternative solution, e.g., a close co-operation. The laconic feelings of the population are emphasised by *Spasenovski* as well, who points out that the Republic of Macedonia has been a candidate state for membership in the European Union since 2005, and in 2022 the decision to start membership negotiations was made. This 17 years in vain has led, among other things, to excessive growth of Euroscepticism in the country. As the chapter of *Tanja Karakamisheva Jovanovska* highlights,⁶¹ in the case of Macedonia – that is to say North-Macedonia as it is called officially since 2019 – the political pressure exerted by the Greek and Bulgarian governments causes bitterness in the population: while the former pushed forward the change of the country's name, the latter continuously emphasised the Bulgarian roots and identity of the population and demanded that the Bulgarian minority should be mentioned in the constitution. The amendment is in progress.⁶²

The main reason for this underdevelopment is that the economies of these countries are still not fully in line with the requirements of the single internal market.

56 'Pattanásig feszült a helyzet a szerb–koszovói határnál'. *Magyar Nemzet*, 31 July 2022 [Online]. Available at: <https://magyarnemzet.hu/kulfold/2022/07/pattanasis-feszult-a-helyzet-a-szerb-koszovoi-hatarnal> (Accessed: 15 September 2024).

57 Contribution by Tanja Karakamisheva Jovanovska 'Macedonian Constitutional Identity Versus 'ever Closer Union' Concept – Challenges, Dilemmas and Perspectives'.

58 Contribution by Branko M. Rakić 'The Dilemmas of Geographical Enlargement from the Perspective of an EU Candidate Country – the Republic of Serbia'.

59 Contribution by Aleksandar Spasenovski 'Institutional Reforms in the European Union from the Perspective of a Candidate Country for Membership (Selected Macedonian Experiences and Effects)'.

60 Bickerton, 2021, p. 10.

61 Contribution by Tanja Karakamisheva Jovanovska 'Macedonian Constitutional Identity Versus 'ever Closer Union' Concept – Challenges, Dilemmas and Perspectives'.

62 European Commission, Key findings of the 2023 Report on North Macedonia, Brussels, 8 November 2023 [Online]. Available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_5627 (Accessed: 15 September 2024).

For example, the private sector still occupies a small segment of the market, while loss-making public enterprises continue to benefit from extensive state subsidies. Some of these shortcomings maybe remedied by the Western-Balkan countries by accepting sources from other power centres – China, Russia, and Turkey – instead of executing the reforms demanded by the EU as a precondition for accession. As an example, Serbia has attracted significant Chinese investment in recent years.⁶³ There is no such thing as a free lunch, however: with the money comes the influence of the above-mentioned states, which are clearly interested in the region and ready to extend their influence, as former European Commission President *Jean-Claude Juncker* has pointed out.⁶⁴

However, every coin has two sides. There is a clear aversion to the integration of the Western Balkan countries among Western European citizens and politicians.⁶⁵ Some of the above-mentioned contributors also refer to this, namely that the population of the candidate countries, too, perceive this negative attitude after long years of waiting for membership inducing Euroscepticism even before accession. In this respect, Hungary – and the other former Eastern bloc countries – may be a useful ally for the Western Balkan countries, as the governments of the countries in the region believe that EU Member States should not lecture these countries, but offer them a helping hand – especially in view of the above-mentioned fact that the EU is not the only one to show interest towards these countries. In other words, we should facilitate their accession before they access to another alliance.

The other geopolitical factor holding back further enlargement is Russia's awakening from the "nightmare" of the inglorious period following the dissolution of the Soviet Union. Earlier too, Russia expressed its opposition to the idea of being a neighbour to NATO countries, and in 2008 the country made clear where its acceptable geopolitical borders lie with the Russo-Georgian War.⁶⁶ At the end of February 2022 Russia made it clear again, against the rules of international law, raising serious questions about Ukraine's possible future membership of the NATO and the EU. In the case of Ukraine, it should be recalled that the revival and application of the doctrine of "Finlandization" – once forgotten at the time of the signing of the Maastricht Treaty – was already suggested in 2014.⁶⁷ However, based on the Finnish

63 See also: ECFR, Mapping China's Rise in the Western Balkans: Serbia. [Online]. Available at: <https://ecfr.eu/special/china-balkans/serbia/> (Accessed: 15 September 2024).

64 Luca, 2018.

65 One manifestation of this was when Emmanuel Macron vetoed the opening of accession negotiations with Albania and Northern Macedonia in 2019. – See: Nielsen, 2019; Tcherneva and Varma, 2019.

66 Rácz, 2008, pp. 52–57; Euronews (2018) 'Európa búne, avagy az orosz-grúz háborúról őszintén', 08 August 2018 [Online]. Available at: <https://hu.euronews.com/2018/08/08/europa-bune-avagy-az-orosz-gruz-haborurol-oszinten> (Accessed: 15 September 2024).

67 Henry Kissinger, the former US Secretary of State, proposed applying 'Finlandisation' to Ukraine as early as 2014, with the difference that, unlike the original Finnish model, he did not rule out close economic and political cooperation with the European Union. – Kissinger, 2014; see also de Borja Lasheras, 2014.

experience⁶⁸, Ukrainian decision-makers rejected its application. *Sibilla Buletsa* provides an insight from the Ukrainian perspective⁶⁹ into what the Ukrainian people and their decision-makers hope from the accession – e.g., the opportunity for accelerated economic and social development –, the hardships faced by the Ukrainian party in meeting the requirements of accession in a state of war, and the progress that has been made.

It is also clear from the above paragraph that *Mark Leonard's* vision⁷⁰ of the European Union as the main guarantor of peace on the continent has not been realised. Leonard's ideas in 2005 were clearly inspired by the spirit of the times: for a moment, Europe seemed to be the moral compass against the United States, which in lack of any control in a then still unipolar world was playing the gendarme of the Globe and invaded Iraq in defiance of the rules of international law based on a spurious pretext, which later proved to be without any basis.⁷¹ However, as we can see, the EU's "mission" to pacify the world through leading by example has not been a success story:⁷² historical experience shows that exporting the European integration model achieved by economic means and consolidated by the principle of the "rule of law" to other countries not only failed in case of countries on another continents, it proved to be problematic even in case of countries at the periphery of Europe.⁷³ The very same is emphasised by *Snježana Vasiljević* in her contribution to the book:⁷⁴ while the link between diverse European national cultures and the bridge between old and new Member States can be seen in the concept of European integration in practice, what are considered fundamental values in the EU, they are not perceived in the same way outside it.

68 Even though the policy of Presidents Paasikivi and Kekkonen had no realistic alternative under the circumstances, the assessment of posterity is not positive. The Finnish-Soviet relationship remained asymmetrical throughout, and the sensitivities of Moscow had to be taken into account in shaping Finnish domestic and foreign policy. In view of the latter, even the press was censored. – See: CIA (1972) 'Finlandization in action: Helsinki's experience with Moscow (August 1972 RSS. No. 0059/72), Principal Observations, pp. i–xiv. [Online]. Available at: <https://www.cia.gov/readingroom/docs/esau-55.pdf> (Accessed: 15 September 2024)

69 Contribution by Sibilla Buletsa 'The Legal Implications of European Union Enlargement: a Ukrainian Perspective'.

70 Leonard, 2005a, p. 170; Leonard, 2005b.

71 Jervis, 2011, p. 248.

72 It is not surprising that in the light of the above lessons and the threat posed by the Russo-Ukrainian War the countries of Europe have once again resorted to the traditional means of increasing their foreign policy weight: the news is of more and more military expansions and arms modernisation programmes. – Németh and Palkovics, 2022; Huszák, 2022.

73 Bickerton, 2021, p. 10; Manners, 2002, pp. 235–258.

74 Contribution by Snježana Vasiljević 'The dilemma of geographical enlargement from the perspective of a Central Eastern European country: Croatia'.

2.3. *The promised advantages of the single currency and the reality*

While the single market of the European Union, which became fully functional by 1992 based on the provisions of the *Single European Act*,⁷⁵ is the highest level of economic integration that we can find in the world – as *Herbert Küpper* emphasises in his contribution to the book⁷⁶ –, the then EU-level decision-makers decided to make further steps: it was also at this same time that the foundations for *Economic and Monetary Union* (EMU) began to be laid in practice, a goal that had already been set out at the 1969 summit in The Hague. The so-called *Werner Plan*, presented the following year, set out in detail the timetable for its implementation,⁷⁷ but economic realities⁷⁸ prevented the execution of the plan. It was not until the successful implementation of the *Single European Act* that all the possibilities were there again to enshrine the institutional framework and rules for the functioning of EMU in a Founding Treaty. However, due to the lack of political consent, drafters of *Maas-tricht Treaty* had to dispense with certain provisions. As a result, at the outbreak of the euro area crisis in 2010, the EMU was – in the words of *Fred Bergsten*⁷⁹ – still a “half-built house”: *first*, it was far – and to say the least still far – from fulfilling the basic requirements to become an optimal currency area (OCA)⁸⁰ as elaborated on by *Robert A. Mundell*⁸¹ and *Béla Balassa*.⁸² As *Wolfgang Münchau* has written, this was due to a lack of [political] will⁸³ despite the fact that the 1969 Hague Summit stated that the implementation of the EMU would require the coordination of economic policies.⁸⁴ EMU was therefore asymmetrical from the outset – and remains so to this day – that is in fact it would be more correct to call it a “monetary union”, since a common monetary policy is accompanied by – with a slight exaggeration – 19 different economic policies.⁸⁵ These economic policies, despite the coordinating role of the Council⁸⁶, differ considerably: it is suffice to refer to the differences in

75 *Single European Act* (OJ L 169, 29.6.1987, p. 1–28).

76 Contribution by Herbert Küpper ‘Beyond Europe: Integrated Markets in Other Parts of the World’.

77 Fact Sheets on the European Union (European Parliament): History of Economic and Monetary Union. [Online]. Available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.6.1.pdf (Accessed: 15 September 2024).

78 The collapse of the Bretton Woods system in 1971 and the first oil crisis in 1973.

79 Bergsten, 2012, pp. 16–22.

80 For example, the EU budget is only 1% of the combined GDP of the EU-27, while most modern federal states have at least 15% of national GDP.

81 Mundell, 1960, pp. 657–665.

82 Balassa, 1961. p. 324.

83 Münchau, 2013, p. 539.

84 *Final communiqué of the Hague Summit* (2 December 1969), para. 8. [Online]. Available at: https://www.cvce.eu/en/obj/final_communique_of_the_hague_summit_2_december_1969-en-33078789-8030-49c8-b4e0-15d053834507.html (Accessed: 15 September 2024).

85 While some countries – led by Germany – have adopted disciplined economic policies, others have introduced 13th and 14th month salaries and pensions for civil servants and pensioners. – See: Rezessy, 2012, pp. 24–27.

86 Legal basis: Articles 120–121 of the TFEU.

budgetary policies resulting from the different temperaments of the German and the Greek people. However, the picture is much more complex: contrary to what had been expected on the basis of historical examples,⁸⁷ the common currency has not reduced the differences: on the contrary, instead of convergence, it has caused divergence among member states⁸⁸ and at the same time, hidden these difference for those viewing the Eurozone from the outside. The reason for the increase in divergence was that the poorly performing economies of the Mediterranean countries protected the well performing German economy – and those of the Northern states – from a natural economic process, the appreciation of the currency and the resulting fall in exports. As a result, Germany – the main beneficiary of the Eurozone – has been able to boost its export performance unhindered.⁸⁹ The “curtain” exerted its hiding effect mainly in debt rating: the single currency meant that the debt ratings of the German and Greek governments were the same for the credit rating agencies. The Greek government was thus able to borrow in Euros at a low interest rate of 3%, compared with the previous 18% in the Drachma era.⁹⁰ This has encouraged Greece – and other countries in similar shoes – to carry out excessive borrowing.⁹¹

The other insufficiency was that at the time it was established, the founding states did not set up an effective system of institutions for market surveillance and crisis management. The lack of proper supervision led to a situation where seriously unsound financial institutions were able to further contaminate the financial system, threatening to bankrupt the whole area in the first half of the 2010s. Lessons have been learnt and the institutional weaknesses have been largely filled by the Member States.⁹² In 2011, the EU established the *European System of Financial Supervision* (ESFS).⁹³ A year later, the *European Stability Mechanism* (ESM) was established outside the EU institutions by international treaty.⁹⁴ The reason for moving outside the institutional framework was that, under the rules governing the Eurozone, it would have been possible to take measures only under monetary policy and under the “no-bailout” clause in Article 125 TFEU, which states that:

87 See the successful catching-up of Ireland and Denmark, two former ‘poor cousins’.

88 Halmai, 2020, p. 311.

89 Artner and Róna, 2012, pp. 98–99; Sanjay, 2015, p. 115; Forgács, 2015, pp. 42–44.

90 Forgács 2015, p. 42.

91 The Giovannini Group – an advisory committee to the European Commission on financial integration – proposed as early as 2000 that public debt issuance in the Eurozone should have been subjected to Community-level co-ordination – Giovannini Group, ‘Co-ordinated Public Debt Issuance in the Euro Area’, *Report of the Giovannini Group*, 8 November 2000, p. 10. [Online]. Available at: https://ec.europa.eu/economy_finance/publications/pages/publication6372_en.pdf (Accessed: 15 September 2024).

92 Marinkás, 2020, p. 140.

93 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118, 12.5.2010, p. 1–4).

94 Treaty Establishing the ESM, signed on 2 February 2012.

The Union [and] a Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. [...].

In order to enable EU institutions to interact with the ESM, for example to participate in the development of its programmes, an amendment to Article 136 TFEU was made via simplified procedure⁹⁵ by a European Council Decision⁹⁶ adopted in 2012.⁹⁷ In its *Pringle-judgment*,⁹⁸ the CJEU – being amicable to the Eurozone as always – took the view that neither the TFEU amendment nor the ESM Treaty constituted a transfer of powers to the EU institutions. Furthermore, the Founding Treaties allow Member States to conclude an international treaty such as the ESM, provided that it does not infringe EU law. Although the original plan was to integrate the ESM into the EU institutions later, when the conditions are more appropriate, the Commission’s 2017 initiative to transform the ESM into the *European Monetary Fund* (EMF), which would have become part of the EU institutions, failed due to opposition from Member States.

Although the EMF did not come into being, the institutional shortcomings of EMU have since been filled by the establishment of the Banking Union. Its two pillars are the *Single Supervisory Mechanism* (SSM)⁹⁹ and the *Single Resolution Mechanism* (SRM).¹⁰⁰ Both mechanisms work at two levels: the ECB is responsible for the supervision of “significant” institutions according to the criteria set out in Article 6(4) of the SSM Regulation, while national competent authorities (NCAs) are responsible for the supervision of “less significant” institutions. According to Article 25(2) of the SSM Regulation, the ECB shall carry out its supervisory tasks without prejudice to its monetary policy tasks. The purpose of the SRM is to ensure a well-regulated and disciplined winding-up procedure of failing financial institutions in order to minimise the burden on taxpayers and economic operators. The scope of the financial institutions covered by the SRM Regulation is the same as that of the financial institutions covered by the SSM Regulation. While the operation of the SSM has been

95 Under Article 86(4) of the TEU.

96 2011/199/EU: Decision of the European Council of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ L 91, 6.4.2011, p. 1–2).

97 Scheinert, 2019, p. 4.

98 Case C-370/12, Thomas Pringle v Government of Ireland and others. Judgment of the Court, 27 November 2012.

99 Council Regulation (EU) No 1024/2013 of 15 October 2013 entrusting the European Central Bank with specific tasks concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, pp. 63–89).

100 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, p. 1–90).

overwhelmingly criticised positively¹⁰¹ since its inception,¹⁰² the initial operation of the SRM was considered unsatisfactory, in particular by the *Court of Auditors* in its 2018 Special Report.¹⁰³ Novel CJEU judgments¹⁰⁴ and other sources show the same picture related to these institutions.¹⁰⁵

In his contribution *Lubomír Čunderlík* examines the legislative and jurisprudential influences on the status and powers of the national central banks in the Eurozone in general and in Slovakia in particular.¹⁰⁶ He also provides an analysis on the current legal status of central bank liability in the Slovak Republic and its conformity with EU law and concludes that based on the analysis of the related CJEU case-law, one may consider the Slovak concept of strict liability incompatible with the CJEU's interpretation of Article 123 and 130 of the TFEU that is the Slovak concept of liability is contrary to the prohibition of monetary financing of the public sector and is a threat to the financial independence of the Central Bank of Slovakia.

Another interesting issue is that several EU member states with good economic indicators – the Czech Republic, Denmark, Hungary, Poland,¹⁰⁷ and Sweden – have deliberately chosen to stay out of the Eurozone. While Denmark has exercised its opt-out¹⁰⁸ from the very outset in this respect, Sweden committed itself to enter in the first round, however, stepped back in the last minute. The Czech Republic, Hungary and

101 Exceptions to this are the Court of Auditors and Bruegel. See: ECA, Single Supervisory Mechanism – Good start but further improvements needed. *Special Report No. 29* (2016); Schoenmaker and Véron, 2016.

102 European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism established pursuant to Regulation, COM(2017) 591 final, Brussels, 11.10.2017, pp. 18–19; German Federal Ministry of Finance, The Single Supervisory Mechanism: Lessons Learned after the First Three Years. January 2018, pp. 4–5. [Online]. Available at: <https://www.bundesfinanzministerium.de/Monatsberichte/2018/01/Inhalte/Kapitel-3-Analysen/3-1-Single-Supervisory-Mechanism.html> (Accessed: 15 September 2024).

103 ECA, Special report No. 23/2017: Single Resolution Board: work on a challenging Banking Union task started, but still a long way to go, paras. 34, 55–56, 60, 63, 64–68, 103, 114, 125, 141. [Online]. Available at: <https://op.europa.eu/webpub/eca/special-reports/srb-23-2017/en/> (Accessed: 15 September 2024.); see also: Véron, 2018.

104 T-510/17, Antonio Del Valle Ruiz v. European Commission Single Resolution Board, Judgment of the GC, 1 June 2022 and T-481/17, Fundación Tatiana Pérez de Guzmán el Bueno and Stiftung für Forschung und Lehre (SFL) v. SRB, Judgement of the GC, 1 June 2022; CJEU, C-551/22 P, Judgment of the Court, 18 June 2024 in appeal against the General Courts judgment in T-481/17 Fundación Tatiana Pérez de Guzmán el Bueno and SFL v SRB case.

105 European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism Established Pursuant to Regulation (EU) No. 1024/2013. Strasbourg, 18.4.2023 COM (2023) 212 final; Culpepper and Tesche, 2020, pp. 134–150; Smoleňská, 2022, pp. 42–53.

106 Contribution by Lubomír Čunderlík ‘The Limits of the Powers of the Central Bank in Slovakia (Liability for Damage Caused by National Central Bank in EU)’.

107 Poland is the ‘new player in the field’ – see Bukowski and Paczos, 2021; see also: Fredriksson, 2019.

108 Maastricht Treaty, Additional Protocol on certain provisions relating to Denmark; see also Abildgren, Kim (2010) Monetary History of Denmark 1990–2005 (PDF), Copenhagen: Danmarks Nationalbank. p. 216.

Poland, are bound by the Founding Treaties¹⁰⁹ to join the Eurozone. As newcomers, these countries did not have a choice when they signed their accession treaties. All this stems from the holistic view – articulated by Juncker – that the euro area and its prosperity are a *sine qua non* for the further development of the single internal market.¹¹⁰ In the words of *Angela Merkel*: ‘The failure of the euro would be the failure of Europe.’¹¹¹ *György Matolcsy*, the governor of the Hungarian Central Bank (*Magyar Nemzeti Bank*), earlier did not share Juncker’s and Merkel’s views: in his opinion, the introduction of the single currency is the result of the “false dogma” that its introduction is “necessary” or at least a “natural next step” on the road to a united Europe.¹¹² His 2023 statements hit a more amicable tone in this regard even emphasising the Euro’s positive effects.¹¹³ *György Marinkás* endeavours to introduce how the official Hungarian position on the euro changed through the past three decades and also to analyse the pros and cons for accession from the Hungarian perspective and Hungary’s readiness for accession based on convergence criteria. The contribution of *Michal Petr* also provides a thorough overview on the issues of the Czech euro.¹¹⁴ As he highlights, the mild support for the euro turned into the strongest opposition among the non-Eurozone member states.¹¹⁵ While he dismisses the most common arguments – e.g., the loss of monetary sovereignty – against the euro as unconvincing, he deems that the ultimate argument against the adoption of the euro is the unpredictable future of the EMU itself, which in a long-term heading towards a fiscal union, characterised by mutualisation of debt and extensive financial transfers. As he points out, it will be a political choice whether the Czech Republic is willing to participate in such a project. The Hungarian perspective, which throughout the last decades has been very cautious regarding the common currency, is introduced by *György Marinkás*.¹¹⁶ The Polish perspective is introduced by *Natalia Kohtamäki*,¹¹⁷ who provides a thorough analysis on the single financial market. Similarly to Petr, she emphasises the versatile nature of the EMU’s future, claiming that the single financial market is still *in statu nascendi*. The perspective of Bosnia and Herzegovina – a candidate country – is introduced by *Kanita Imamović-Čizmić*,¹¹⁸ who elaborates on the semi-official euroisation of the coun-

109 Maastricht Treaty, Additional Protocol on the transition to the third stage of Economic and Monetary Union.

110 Götz, Nowak and Orłowski, 2018, p. 206.

111 As *Angela Merkel* stated: ‘If the euro falls, Europe falls’ – See: Spiegel, 2014.

112 Matolcsy, 2019.

113 Heinrich, 2023.

114 Contribution by Michal Petr ‘The Future of the Economic and Monetary Union from the Perspective of Czech Republic’.

115 See: Eurobarometer 465 18 May 2018. [Online]. Available at: <https://europa.eu/eurobarometer/surveys/detail/2187> (Accessed: 15 September 2024).

116 Contribution by György Marinkás ‘Current Issues of the ‘Hungarian Euro’ with Special Regard to the Self-set ‘Maastricht 2.0’ Criteria’.

117 Contribution by Natalia Kohtamäki ‘The Future of the European Single Market for Financial Services from a Polish Perspective’.

118 Contribution by Kanita Imamović-Čizmić ‘Euroization and monetary Policy in Bosnia and Herzegovina – situation and perspectives’.

try's economy. She argues that the currency board that ties the domestic currency to the euro is paving the way to the fulfilment of the master conditions for entry into the European Monetary Union. Viewed from that point of view and considering the existing economic and political situation in Bosnia and Herzegovina, the introduction of discretionary monetary policy is not an acceptable solution.

2.4. Energy policy

The general underlying principle of the conference and the book suggest that in order to understand the internal notions currently forming the European Union and forming the future of the community we have to take a step back in time to the influential period of the Maastricht Treaty can consistently be applied to issues surrounding energy. The Maastricht era saw the adoption of the first energy packages, the *European Energy Charter* (1991) and the *Energy Charter Treaty* (1994), from which the EU and the Euratom is now withdrawing.¹¹⁹ Although regulated outside the framework of the Founding Treaties, energy policy and the security of energy supply were also a major focus of attention during this period. To be more precise, it has always been important for the integration project. The Founding Fathers of the integration realised that cheap and stable energy flow is essential to economic prosperity. The 1956 Suez and the 1973 oil crises proved this, just like the ongoing war in Ukraine. As Miklós Vilmos Mádl argues in his contribution,¹²⁰ the European Union's predecessors – namely the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom) – was founded on the pillar of energy. Although in today's modern world energy is a commodity needed in every aspect of life, in the eye of the European public it was taken for granted and largely disregarded besides the vocal arguments about pro and contra certain energy sources. However, this status quo was turned upside down in recent years and energy came into the spotlight.

Energy prices have significantly started to rise due to a multitude of reasons in 2021,¹²¹ but the real shock that changed the perspective of how we view energy came with the 2022 outbreak of the *Russian-Ukrainian war*. Energy prices have skyrocketed in the following period to levels never seen before.¹²² The increase was so huge that it was felt by every consumer, be it industrial or domestic, and for the first

119 The reason behind the withdrawal is that the Energy Charter Treaty, which supports investments in fossil fuels is no longer in line with the climate ambitions enshrined in the European Green Deal and the Paris Agreement. The Treaty is currently undergoing a modernisation procedure after which individual member states can approve the modernised treaty.

120 Contribution by Miklós Vilmos Mádl 'The EU's Energy Policy from the Perspective of a Central-Eastern European Country: Hungary'.

121 For example, the growing demand for energy following the opening after the Covid-19 pandemic at a period when the supply was still not high.

122 Eurostat, gas prices for household consumers from the second half of 2021 to the second half of 2022 have increased by an average of 80%, electricity prices for household consumers in the same period have increased by an average of 60%.

time in a decade the number of people without access to modern energy was rising globally.¹²³ In Europe what made the situation particularly difficult was our Continent's dependence on Russian primary energy sources. There are several reasons why this reliance on Russia has developed. Factors like geographical proximity and existing infrastructure limitations play significant roles in the development of this dependence.¹²⁴ The crises exposed how vulnerable the prevailing concept of satisfying our European primary energy needs truly was and also raised questions about the adequate working of the European internal energy market in which due to interconnectivity even those not physically dependent on Russian supplies experienced the devastating effects of the energy crisis. The scepticism towards the adequacy of the current framework in energy logically raises the idea to take a look at the origins and the motivations behind the adoption of such concepts and this subsequently connects us to the period around the Maastricht Treaty.

Throughout the history of the Community, there has been a constant dichotomy concerning energy issues.¹²⁵ It was always an area that has been approached with caution both in terms of market structures¹²⁶ and the selection of energy sources. Notwithstanding the importance of the issue at the foundation of the community, the following decades were characterised by a general reluctance towards deepening the role of the community in the sphere. This attitude was down to the fact that the strategic and political importance of energy with respect to national sovereignty was so significant that the member states were not keen on giving it up in favour of the community.¹²⁷ The only area that prompted a degree of increased cooperation was in addressing concerns about energy security. This began in 1968 with preventive measures to maintain minimum stocks of oil¹²⁸ and then followed by the 1973 oil crisis when an emergency system was established that in hindsight did not have significant practical implications.¹²⁹ Nevertheless these events have highlighted the issue of vulnerability in the sector and the importance of greater cooperation in tackling the challenges.¹³⁰

Then came the period of the Maastricht Treaty when the previously prevailing concepts of managing energy began to be challenged. There were attempts to include a separate chapter on energy within the Maastricht Treaty but in the end it was not successful.¹³¹ Nevertheless, the Maastricht Treaty provided the possibility to treat energy as part of the European common market and to regulate this commodity

123 IEA, 2022, p. 29.

124 Paillard, 2010, pp. 65–67.

125 Vasconcelos, 2015, p. 19.

126 Talus, 2013, p. 99.

127 Talus, 2016, p. 3.

128 Contribution by Martin Svec 'EU Membership: Implications for the Czech energy security'.

129 Lehotay, 2020, p. 264.

130 Contribution by Marija Vljakovic 'The EU Energy Policy from the perspective of an EU Candidate Country: The Republic of Serbia'.

131 Thaler, 2016, pp. 574–575.

as a product rather than a national public service.¹³² As a result of the growing dissatisfaction with the then prevailing market structures in the energy sector¹³³ and inspired by the positive experiences of certain states that have liberalised their energy markets,¹³⁴ the years following the Maastricht Treaty saw the adoption of the first energy packages beginning the liberalisation of the electricity and gas markets. Also, the same period saw first the adoption of the Energy Charter in 1991 and later, in 1994, the Energy Charter Treaty that enhanced energy security through promoting cooperation and safeguarding investment in the energy sector. Moreover, this was the time that saw the emergence of environmental issues firstly in the Single European Act¹³⁵ and then later with much more emphasis in the Maastricht Treaty. In essence the three strands of the European Union energy policy which are the internal energy market, the security of supply, and the protection of the environment¹³⁶ in a sense can all be traced back to the period around the Maastricht Treaty.

The works in the chapter reflect these three strands of European Union energy policy. The issue of energy security is addressed by multiple papers of the chapter. *Martin Svec* in his contribution focuses on the problem of energy security from the perspective of the Czech Republic. The chapter explains the evolution behind the dependency of the community on the import of Russian primary energy sources and the strategic consequences of this high-level dependency. While examining the evolution of achieving greater energy security in the Czech Republic and discussing this issue in the time frame of its European Union membership, the author also explores how energy security was addressed at the level of the European Union, highlighting the EU's role as the cornerstone in ensuring energy security. The paper provides a great overview of the general issues surrounding energy security in the European Union while also pointing to the specificities of a state formerly behind the Iron Curtain through the example of the Czech Republic. To this analysis, *Marija Vlajkovic's* paper serves as a valuable complement as it delves into topics like the Energy Community, which among other things bolstered energy security by fostering increased cooperation with the neighbouring countries of the European Union. Furthermore, *Tamás Szendrei* provides a contemporary perspective on how the EU combatted the supply security implications of the Russian-Ukrainian war.¹³⁷

The second theoretical strand of the EU energy policy, i.e., the internal energy market, is also addressed by multiple authors of the chapter. The contribution by Miklós Vilmos Mádl gives an overview of the development of the internal energy market. Within the topic of market liberalisation, the paper examines the evolution

132 Béres Zsuzsa Presentation 'Maastricht 30 conference 'Maastricht 30' from the Perspective of the Current Energy Crisis'.

133 Penttinen, 2021, p. 82.

134 Pollitt, 2018, p. 2.

135 Single European Act: Declaration on Article 130r of the EEC Treaty.

136 Thaler, 2016, p. 574.

137 Contribution by Tamás Szendrei 'The European Union's Energy Policy from the perspective of a Central-Eastern European Country: Romania'.

in the electricity sector by elaborating on the origins of the concept of market liberalisation, discussing the liberalisation packages of the electricity sector and the current stage of liberalisation. The contribution also approaches the issue at hand from the perspective of a member state by addressing how the packages have influenced the Hungarian legislation and market structure.¹³⁸ Furthermore, the work also looks at the outcomes of the liberalisation by analysing whether it was successful in reaching its desired goals.¹³⁹ Other authors of the chapter have also highlighted important aspects of the internal energy market. *Marija Vlajkovic* addressed how the liberalisation packages had their effects on candidate countries such as Serbia while Martin Svec in his paper elaborated on the energy security implications of the internal energy market.

None of the authors have specifically analysed the third strand of the European Union's energy policy concerning environmental aspects. However, all of them have touched upon this issue within the context of their respective topics. Tamás Szendrei in particular provided an interesting perspective through the detailed analysis of the Romanian energy mix demonstrating how the ever-growing emphasis on climate concerns within the European Union influences national energy mixes.¹⁴⁰ Furthermore, Miklós Vilmos Mádl's contribution highlights the period during the establishment of the internal electricity market when environmental concerns were becoming increasingly addressed in the secondary legislation.¹⁴¹

Over the decades, the European Union's competencies in the energy sector have been slowly but constantly expanding resulting in many interesting legal concepts that are worth addressing. This chapter does not seek to address all of the energy law implications of the European Union as that would not fit into the limitations of this book, but it seeks to provide the readers with a comprehensive understanding of those main energy action areas of the European Union that used to and still shape the sector. The authors enrich their analysis of these main areas by delving into the historical context of the discussed issues, allowing the reader to better understand the factors that drive the development of the sector.

3. Concluding thoughts

As it was mentioned in the introduction, at the “Maastricht era” the continued internal deepening of the integration and the continued geographical enlargement

138 Fazekas and Németh, 2022, pp. 91–101.

139 Rathke, 2015, pp. 1–39.

140 Contribution by Tamás Szendrei ‘The European Union's Energy Policy from the perspective of a Central-Eastern European Country: Romania’.

141 Noreng, 2018, pp. 228–229.

became the two key principles for the future of the EU. It has become clear in the thirty years since 1992, however, that the EU has hit “the walls” in both areas. In the process of deepening, which could result in a federal Europe, *national sovereignty* and *national identity* became the walls that halted this strive or at least slowed down. The failure of the Constitutional Treaty’s ratification process in 2005 was the first sign that, despite the attempts to strengthen a common European identity, the European citizen’s national identity comes first, with a common European identity taking only the second place. Although considerable time has passed since then, the issue of national sovereignty is more topical than ever both in the political and legal sphere.

As for the continued expansion, certain factors are calling a halt to further expansion. The long accession process of the Western Balkan countries makes it clear that there are still many conflicts to be resolved in the region once referred to as the “Powder keg of Europe.” It is suffice to recall here the case of Kosovo, a potential candidate state, which is probably the most difficult conflict that must be resolved before both Serbia and Kosovo enter the EU. The other factor that puts a stop to further enlargement is that in the last decades Russia has repeatedly made it clear where its acceptable geopolitical borders lie, for example in the so-called “five-day-long war” – the Russian-Georgian war in 2008 – and the Russo-Ukrainian War started in 2022. In both cases, Russian aggression was triggered by Moscow’s perception that the actions of the attacked countries – namely their cooperation with the EU and especially NATO – posed a threat to Russian national security.

The probably most successful venture out of those goals set in the Maastricht Treaty was the creation of the Economic and Monetary Union. While the EMU started to function with serious shortcomings, namely it was far from being a so-called optimum currency area and lacked proper supervisory mechanisms, the latter was remedied after the Eurozone crisis. The Banking Union and its institutions proved to be effective tools in safeguarding the stability of the financial system of the Eurozone. One may identify it as a positive aspect that membership in the Eurozone is not coerced by the already club members, despite treaty obligations. All those countries accessed so far did it because they deemed that the accession would facilitate the economic growth of their countries. As a Central-European peculiarity, the decision makers of the Czech Republic and Poland do not regard accession to the Eurozone as advantageous for the economy of their countries. Hungary used to share this attitude, however, in 2023 high ranking decision-makers started to talk about a possible – and yet not official – target date, namely 2030.

As mentioned earlier, the shortage of fossil energy sources in Europe made energy policy an important issue, even at the time of founding the integration. Since this issue still existed in the Maastricht era and international experiences were positive with liberalised energy markets, the years following the Maastricht Treaty saw the adoption of the first energy packages beginning the liberalisation of the electricity and gas markets of the EU. However, the Russo-Ukrainian War proved that there is still a long road ahead of the Union in this regard.

As can be seen from the above, few of the goals set at the time of the EU's creation as we know it today – the signing of the Maastricht Treaty – have been realised in the form envisaged by its framers: the political realities of the past thirty years have largely overridden the euphoric mood of the time. It is therefore necessary to draw the conclusions from the lessons presented, thereby to decide on the objectives for the next thirty years. The editors provided a framework for various authors to introduce their thoughts and opinions as a valuable contribution to the scientific debate about European integration. Even if the editors do not always identify themselves with these opinions, they wish to invite the reader to derive these conclusions through a comprehensive examination of the chapters within the book.

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THE MAASTRICHT TREATY IN A THIRTY-YEAR PERSPECTIVE



LÁSZLÓ TRÓCSÁNYI

Abstract

The Maastricht Treaty represents a crossroad and turning point in the evolution of the European integration. The current paper explores the main characteristics of the period before and after this turning point including the relations between the Member States and the judicial power in the European cooperation. It also gives insights into the fault lines and tensions of the institutional structures following the conclusion of the Maastricht Treaty. The paper explores the cornerstones of a harmonious European cooperation: the principle of subsidiarity, the consensus-seeking and the preservation of cultural diversity.

Keywords: Maastricht Treaty, European Court of Justice, national constitutional and high courts in the European cooperation, subsidiarity, diversity.

1. Introduction

At this conference we recollect the thirtieth anniversary of the Maastricht Treaty.¹ Maastricht is not simply a Dutch town. It has become a crossroad of the history of European integration and marked several significant milestones. First of all, it signalled the end of the Cold War: it was the first reform Treaty that was negotiated

1 European Union, Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

László Trócsányi (2025) 'The Maastricht Treaty in a Thirty-year Perspective'. In: János Ede Szilágyi and György Marinkás (eds.) *Maastricht 30: A Central European Perspective*, pp. 59–69. Miskolc–Budapest, Central European Academic Publishing.

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and adopted after the collapse of the Soviet Union and the fall of the Iron Curtain. Second, it closed a successful chapter for those who took part in the first decades of European integration. Third, it marked a strong desire of the Western countries to fundamentally transform and broaden European cooperation.

Fundamental questions were raised: are the Member States exercising their sovereignty jointly or are their sovereignties emptied out by a supranational entity? Did Maastricht try to provide a framework for a common “European dream”? Or did it miss an opportunity to unify the continent based on its longstanding civilisation? Did it provide a vision, or did it create an illusion? To what extent can the European institutions replace those of the Member States? Thirty years after Maastricht, these are important and timely questions to answer for lawyers and non-lawyers alike. It is necessary to understand why we stand at the point where we are right now. Moreover, these questions are all the timelier and the more essential if we intend to unlock and understand the current European political and legal debates and if we wish to imagine an intellectually sound and prosperous future for Europe.

2. The period leading up to Maastricht

European cooperation began as a voluntary association among the Western European countries. However, this cooperation was formed in the shadow of the Iron Curtain that kept Europe apart for long decades. The cooperation of the initial period was economy- and market- focused. In contrast with previous divisions, their aim was to achieve a European unity through economic and market integration. Therefore, in the first three decades, European cooperation was largely devoid of ideological elements. Even though the solidification of the law of the European Union was not without judicial conflicts, there was a widespread and strong consensus among the Member States about the need to create an internal market along with the four freedoms: the free movement of goods, people, capital and to establish and provide services.

The innovative and evolutive Treaty interpretation of the Court of Justice of the European Union (hereinafter: European Court) soon emphasised the distinct, so-called *sui generis* nature of the European law. The 1963 van Gen den Loos decision² declared that European law ‘is directly applicable so that individuals, whether they are corporations or natural persons, can rely directly on the European law and can enforce it before their national courts’. The 1964 Flaminio Costa v. E.N.E.L. judgement³ declared that domestic law cannot enjoy priority over European law.

2 Case 26/62 Van Gend en Loos v Nederlandse Tariefcommissie [1963] E.C.R. 1.

3 Case 06/64 Costa vs. ENEL [1964] E.C.R. 585.

This was reinforced in the 1970 *Internationale Handelsgesellschaft* case⁴ in terms of the constitutions of the Member States. These judgments of the European Court brought to life a European law that many times defines itself against the law of the Member States.

However, the common economic goal and vision and the strong consensus behind it provided the European institutions with strong legitimacy. The result of this focus-oriented strong consensus was referred to as *les trente glorieuses* or the thirty glorious years of European integration. This was the consensus of all the Member States. This success made this model of cooperation attractive that also led the Central-European countries, who were still kept behind the Iron Curtain, to dream about and aspire for membership in the European integration. The fall of the Iron Curtain seemingly brought the attainment of this objective much closer to them. As they were freed from the grip of soviet-communism, they wanted to be part of the success story of the European common market and the four freedoms.

3. The Maastricht turn

For various reasons, the early 1990s represented a decisive moment in World history as well as in the history of European integration. The failure of the planned economic model gave way to the spread of the market economy and neoliberal economic theory. With the end of the Cold War, European countries and Europe once again, at least to a certain extent, regained the ability to take their destiny into their own hands. This was the first time since the end of the Second World War that Europe got a chance to stand on its own feet. European cooperation was on the rise with many encouraging results. It seemed to have a bright future ahead.

The euphoric moment of neoliberalism and globalisation as well as general political optimism gave an impetus and led to the formulation of the Maastricht Treaty. Accordingly, one of the major watershed moments in the historical development of the European Union was the adoption of the Maastricht Treaty in 1992. In retrospect, the Maastricht Treaty represented an important crossroad. However, this treaty reform was not easy to pass. France and Denmark, among others, had their reservations. Therefore, Maastricht never enjoyed the same consensus as the Treaty of Rome.⁵ Nevertheless, it was an opportunity for European cooperation to seize this historic moment and the many achievements of integration to become a driving force in the decades to come, or else this moment would be lost.

4 Case 11/70 *Internationale Handelsgesellschaft* vs. Einfuhr- und Vorratsstelle für Getriebe und Futtermittel [1970] E.C.R. 1125.

5 European Union, Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957.

With the adoption of the Maastricht Treaty, Member States decided to expand the scope of integration to include political fields of cooperation for political purposes. At the same time, an increasing number of areas began to be governed under the shared competence of the European Union and Member States. A more profound and political integration were given priority over the Eastward enlargement that would only take place more than a decade later in 2004 and 2007. As a consequence, the competence of the European Union expanded and now applies in a vast number of areas beyond the original, largely economic fields. The European Union has acquired its own fundamental rights document, namely the EU Charter on Fundamental Rights⁶ which applies, *inter alia*, in situations where Member States have implemented EU law. This development has also reinforced the political aspects and the centralising force of European integration. To many thinkers, the notion of an *ever closer union* has become equal to an ideology that envisions a more centralised political union.

The Maastricht Treaty introduced the concept of Union citizenship that is originally built on and is complementary to national citizenship. However, this concept was later used as a means to create the concept of a European citizen and European demos, increasingly independent and isolated from national citizenship. Even though the competences of the European Parliament have been expanded, peoples of the Member States have less and less influence on the actual decision-making process or on the law formation of the European Union. Beyond centralisation, the Treaty of Maastricht unleashed a process of homogenisation. This homogenisation process included both economic and political aspects of European integration. With regard to the political dimension, for example, the intention is to differentiate between European and non-European political parties regarding the values they represent. In respect of the economic dimension, what we can see is a general discouragement of creativity and natural rivalry and competition between the Member States.

As a result of the process set off with the adoption of the Maastricht Treaty, integration has become less and less diverse, and the influence of the Member States has been continuously decreasing. In reality, it has become questionable whether the Member States would remain the Master of the Treaties. Even though the Maastricht Treaty introduced the principle of subsidiarity, it was underused and did not become a driving principle of European integration. This has been the case even though history has taught us that the strength and richness of European civilisation lies in its variety and diversity. In Europe, you can wake up in the land of Montaigne, walk ten minutes across a bridge and find yourself in the land of Goethe. This is the cultural diversity that European nations have been proud of. And this diversity has been the source of strong liberty, and has always bestowed a vision upon Europe. No single power has ever been strong enough to subjugate the entire continent for long. And this is the sort of variety that truly characterises the constitutions of European

6 European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.

countries. They have different governmental arrangements and institutional settings. Each European country has its own governmental structure, established to exercise national sovereignty in a way that is appropriate to the national constitutional culture. They define the contours and boundaries of liberty and responsibilities in their own ways that are slightly different from each other. Consequently, the national constitutions are also reflections of the histories, cultural identities and struggles of the respective European nations. The separation of church and state has a different meaning in France and Denmark. And the list goes on. These features make each European constitution unique, albeit being part of the same European civilisation.

But this diversity is now weakened under the weight and dramatic expansion of the European institutions. The increasing efforts to centralise begin to devastate the inner cohesion of the integration.

By the time the Eastward enlargement transpired, European integration already headed in a direction different from the one that Central European countries once dreamed of and aspired for.

4. The failure of the Constitutional Treaty and the challenges of Lisbon

The Constitutional Treaty would have been the fulfilment of the process that started in Maastricht. In a symbolic sense, this would have been a step forward towards the establishment of a federation. However, this was rejected by the French and Dutch referenda.

The Lisbon Treaty⁷ was adopted as a reform treaty to replace the failed Constitutional Treaty. However, the Lisbon Treaty has been “shaky” for a long time. The past decades revealed serious tensions and dividing lines within European cooperation. Is there a productive dialogue or a destructive confrontation between the national constitutions and the Treaties that enable the operation of European integration? Do we have an adequate framework that can settle the potential clashes or did we outgrow the established framework? Certain institutions of the European Union want to pull the Lisbon Treaty in the direction of Constitutional Treaty, while the Member States aim to defend their national identities and sovereign competences.

I was fortunate that I have had the chance to witness some of the interactions between the Hungarian constitution, the Fundamental Law, including the historical constitutional traditions, and the European Treaties. Moreover, I saw these unique interactions – at times dialogues and at times confrontations – from different angles. I was a Member of the Hungarian Constitutional Court when the Lisbon Treaty was

7 European Union, Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, 2007/C 306/01.

adopted in 2009 and the Court reviewed the document based on the constitution. We emphasised that the Lisbon Treaty did not create a super state. Instead, Member States shared their sovereignties within the framework of an international cooperation. Somewhat anticipating the constitutional confrontations of recent years, I attached a concurring opinion. This opinion points out that by signing the Lisbon Treaty, Member States have not renounced the essence of their statehood, their sovereignty and independence, the freedom to determine the foundations of their polity and statehood. Therefore, the Member States have retained their right to control the constitutional principles that are essential to maintain their statehood and constitutional identity.

As Hungary's Ambassador to Paris, I witnessed the European and international reactions to the then recently adopted Fundamental Law.⁸ Many of these reactions were negative and malicious partly because of misunderstandings and partly because of intentional ideological attacks. My efforts were concentrated on explaining the background that led to the adoption of the Fundamental Law as well as its debated provisions and overall values.

As Minister of Justice of Hungary, I was confronted by similar challenges. I was entrusted with the task of guarding the constitutional identity of the country and defending it in its international relations. Every constitution has two faces. The first one is looking inward, regulates the institutional arrangements of the government and recognises the freedoms and responsibilities of its citizens. On the other hand, the second one is looking outward. A constitution enables a political community to secure their place on the world map. It empowers the country to express its sovereignty along with its actual or desired identity. Indicating its independence, it also signals that the country cannot be conquered or colonised. The '89 Hungarian constitution was a result of a recognised compromise between the old and new political elites and was designed to create the preconditions of and thus bring about the change of regime. However, its true purpose did not go beyond this. The adoption of the Fundamental Law brought us back to our historical roots and the constitutional development of the country by incorporating the achievements of the historic Constitution. It also expresses the objectives and commitments of the Hungarian nation as well as the virtues and values the nation aspires to pursue. This is of increasing importance in an expansionist and ambitious European integration, as it defines the constitutional boundaries of the European Union. As Minister of Justice, I experienced the increasing intensity of the pressures that European integration imposes on national constitutional identity.

It is not surprising though that there is an increasing number of cases in which the national constitution of one Member State – as interpreted by its constitutional or supreme court – may give a particular answer and the Treaty or EU law may not give the same answer. This is obviously an area which is ripe for tension. This is particularly true when one gets into more constitutionally sensitive topics such as

8 Hungary: Fundamental Law of Hungary, 25 April 2011.

asylum, national security, family or religion. Thus, one of the fundamental tensions of European cooperation stems from the conflict between the sovereignty of the Member States and the theory of the absolute or unconditional primacy of EU law along with the monopoly of the European Court to interpret EU law and the powers of the EU institutions. The European Court has not been able to relieve this tension. The European Court has barely applied the principles of subsidiarity and proportionality or the principle of conferral in its 70-year history. Furthermore, the European Court put increasing emphasis on the Charter of the Fundamental Law and on Article 2 of the Treaty that includes these values. The important question is whether the European Court can and is willing to take into account the cultural diversity of the Member States. In contrast, since the beginning, the European Court has continuously strengthened the instruments that ultimately foster centralisation. Thus, it cannot be considered as a fair and reliable arbiter between the EU and its Member States.

Furthermore, European institutions such as the European Parliament or the European Commission intend to propagate a more centralised integration and prepare a transition towards a European federal state. As a current Member of the European Parliament as well as of the AFCO Committee, I can now witness this side of the coin. The long proposed transnational list that considers the entire territory of the European Union as one constituency, as well as the establishment of a centralised European political party system, aim to introduce a top-down approach to European integration. I think that the Conference on the Future of Europe was also organised in a top-down approach.

The original idea behind the establishment of the European Commission was to have an independent, technocratic and non-biased guardian of the European legal order. However, as a reaction to the criticism, the institutions of the EU are suffering from democratic deficits, and the Commission has become more politicised. It has been shifting and becoming more politicised for the sake repairing the democratic deficit. At the same time, however, it would lose focus with regard to its traditional functions. The European Commission performs its political role at the expense of its traditional functions. The current “political Commission” has become much more concerned with the political concerns of the Member States, perhaps even more than with other political bodies of the European Union.

Through the idolised concept of the rule of law that is taken out of context, the European Commission and the European Parliament have been engaged in endless and pointless debates about Member States, especially about Hungary and Poland. These debates reveal a general narrow-mindedness and stifled atmosphere that unfortunately characterise current European politics. While the European Parliament, along with other institutions, makes a great effort to shape Europe’s cooperation to fit its own image, it runs the risk of destroying its very foundations. Laying down the most important moral principles of our modern European culture, *Voltaire* once pointed out that ‘I disapprove of what you say, but I will defend to the death your

right to say it.”⁹ European cooperation shows just the opposite. How has the weight and current of European integration become so strong? What is the role played or to be played by the national constitutions in European cooperation?

Consequently, the right question is whether and how EU institutions should be checked and whom they should be accountable to. Neither the European Court nor the European Parliament seem to be able to exercise such control. The European Union is built upon European democracies. It aspires to be the democracy of democracies. Since the European Union will ultimately be democratically accountable to its founding Member States, the national parliaments would have to play a leading role in this process. They are and ought to be the primary guardians of national and constitutional identities as well as of the principle of subsidiarity. The so-called “yellow card procedure” already institutionalised the participation of national parliaments in the European decision-making process. However, it is poorly understood and underutilised.

In the absence of the participation of strong national parliaments and against the backdrop of the EU’s desire for centralisation and absolute supremacy, we are witnessing the advent of an ultimate and emergency defence mechanism. The national institutions entrusted with constitutional review power serve as the final guardians of national constitutional arrangements and constitutional identity in cases where democratic accountability is not able to provide the constitutionality of the European decision-making process. Their important task includes defining the ultimate limits of EU law. Based on their respective constitutions as well as on the identity clause set out in Article 4 paragraph 2 of the Treaty, they identify the confines of the primacy of EU law. From German to Danish to Polish to French experiences, national courts declared that national constitutions remain the supreme norm over the national legal system even in the face European integration. On the one hand, it serves as the basis for the implementation of EU law. On the other hand, the constitutional identity may supersede and prevent this implementation. In its milestone decision of 2016, the Hungarian Constitutional Court declared that European legislation can be reviewed on the basis of the Fundamental Law: whether it oversteps its competence, whether it violates fundamental rights or Hungary’s sovereignty or its identity based on the achievements of its historical constitution.

5. Challenges and conclusions

The stake of any future reform is nothing less than the harmonious cooperation between the European Court and the national high courts or constitutional courts in the European judicial system. The legal systems that form part of the European

9 Tallentyre, 1906, p. 199.

legal community, as well as the supreme or constitutional courts that serve as keystones, are on an equal footing. Thus, the relationship between the European Court and national constitutional courts should not be addressed in terms of hierarchy. They are better to be addressed in terms of competences. The more complex a legal or constitutional question becomes, the more the constitutional courts should be involved in the decision-making process. Resolving the conflicts between courts or facilitating the “judicial dialogue” assume a certain judicial mentality. Judges and courts need to be more open to institutionalised dialogue. Additionally, it would be useful for the national constitutional courts to be involved in the decision-making process of the European Court. It would resolve some of the tensions if national constitutional courts could present their positions before the European Court. Another reform avenue would be the introduction of a reverse preliminary ruling procedure. In cases that might concern constitutional identity, it would be reasonable if the European Court received guidance from national constitutional courts. Making the decisions of the European Court more inclusive would be a significant step forward.

It is my sincere hope that such a judicial and extra-judicial dialogue will not only help overcome challenges, but will also contribute to sustaining European unity in the diversity of nations. A European unity that is willing to understand and embrace the history and cultural legacies of the European nations. A European unity that thinks of itself neither as a market, nor as a neutral place or a narrow-minded ideology, but as a civilisation that gave birth to the world’s most astounding cultural variety. A European unity that sees itself as a civilisational basis that binds European nations together in a community of destiny.

For various reasons, European integration remained without an alternative. Countries are increasingly interdependent due to the forces of economic globalisation and telecommunication. For individual European countries to be successful on the world market, the single European market has no alternative; only an institutionalised cooperation could achieve lasting peace on the continent. Do we need a new treaty or the amendment of the treaty? Undoubtedly, it would open an opportunity for everyone to rethink their positions.

Consequently, European integration needs to consider three factors: (1) It should be built on the principle of subsidiarity. Centralisation will be counterproductive and will lead to inefficient results. (2) The aspiration to forge a consensus is also a key element of European integration. Only European policies that enjoy the consensus of Member States can be successful in the long run. The lack of consensus will always result in division. Member States that disagree will sooner or later see themselves as the losers of integration. (3) The third factor is the importance of cultural diversity. Beyond the European policies, this should also be embraced by the case-law of the European Court, especially when the Court deals with cases beyond the four freedoms and the single market.

We are also being reminded of more philosophical and underlying questions. What is the ultimate purpose of European integration? How can European cooperation justify its own existence and *raison d’être*? Is it destined to replace or supersede

the Member States by forming a larger entity? Or is it created, as its motto says: to unite in diversity? In other words: is it the objective to make the Member States more competitive, strong and resilient in an age of globalisation and big powers? Nowhere in the Treaty do we find the idea that there should be one single European people or a single European nation. It would be a major deviation from the objective of the Founding States. European integration owes its existence to Member States and their constitutions. They have different governmental arrangements and institutional settings. Each European country has its own governmental structure. They define the contours and boundaries of liberty and responsibilities in their own way that slightly differ from each other. Therefore, the national constitutions are also reflections of the histories, cultural identities and struggles of the respective European nations. For example, we, Hungarians see and consider the five-pointed red star in a different way than Western-European countries, for historical reasons. The separation of church and state has a different meaning in France and Denmark. And the list goes on. These features make each European constitution unique, albeit part of the same European civilisation.

Ideally, a Treaty and their institutional setting would reflect the ultimate purpose of European integration: *in varietate concordia*.

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THE MAASTRICHT TREATY AND THE ECJ IN THE LIGHT OF ITS RECENT CASE LAW



ZOLTÁN CSEHI

Abstract

The Maastricht Treaty introduced the Court of First Instance into primary law of the Union as a first instance court in certain matters. This paper discusses the evolution of the system of appeals against the decisions of that court before the ECJ. The development of the case law of the ECJ concerning the sanctioning of Member States for non-compliance with the judgments of the ECJ, which was introduced by the Maastricht Treaty, shows some particularity, as addressed in the second chapter of the paper. EU citizenship is the third topic elaborated on in the paper in connection with the loss of the nationality of a Member State and Brexit. The CFSP, which is also a novelty of the Maastricht Treaty, proves to be a field of ongoing ECJ competence issues, as attested by the recent case law of that court.

Keywords: Maastricht, Court of Justice of the European Union, General Court, sanction mechanism, lump sum or penalty payment, EU citizenship, CFSP

1. Introduction

With the adoption of the Maastricht Treaty¹, the then twelve Member States established new legal bases for cooperation within the European Community, introduced the principle of subsidiarity² and, along with that, modified and extended the jurisdiction of the European Court of Justice (ECJ). The Maastricht Treaty opened the way for cases with new themes and topics and established new rules for the organisation and the powers of the ECJ. As to the former, some of the new fields of primary law included trans-European transport, telecommunications, energy networks, environment, consumer protection, promotion of European culture, and preparation of the European Monetary Union³, all of which over the last thirty years have evolved into separate chapters of EU law. Of these, I would like to highlight particularly EU citizenship. Another significant change has been the introduction and regulation of the Common Foreign and Security Policy in primary law. I will present a few reflections on this topic based on the recent case law of the ECJ. As regards the rules directly affecting the ECJ, this is where I shall start my presentation.

2. Court of First Instance – the General Court

The Maastricht Treaty introduced two important changes regarding the judicial architecture. The first is the introduction of the Court of First Instance into primary law, the second is the creation of a new procedure for fining (sanctioning) Member States for non-compliance with judgments of the ECJ requiring fulfilment of an EC Treaty obligation. I will first touch briefly on the significance of the new Court of First Instance and then on the new areas of jurisdiction of the ECJ.

The Single European Act, which was signed in 1986 and entered into force on 1 July 1987, allowed for the establishment of a Court of First Instance of the European Communities. To this end, the Council was authorised to set up such a court by unanimous decision, after consulting the Commission and the European Parliament. The Council took this decision in 1988, and the Court of First Instance became operational in September 1989, entrusted with jurisdiction to hear and determine certain cases at

1 Anderheiden, 2018.

2 Article G (5) of the Treaty of Maastricht introduced Article 3b in the Treaty establishing the European Community.

3 Additional topics: Agreement on Social Policy, European Union Citizenship, Economic and Monetary Policy, European Monetary Union.

first instance, notably competition cases and staff cases. This provided for a two-tier court system.⁴

Following this significant change, judgments and orders adopted at first instance can be appealed to the ECJ by requesting a review – limited to points of law – of the decisions adopted by the Court of First Instance.⁵ Over the years, the division of the workload between the two courts has changed significantly. In 2009, the Court of First Instance became the General Court. After the reform of the General Court in 2015,⁶ the latest reform was formally launched about six months ago by the ECJ itself.⁷ Extending the 2019 reform, the recent proposal of the ECJ provides for the extension of the mechanism for determining whether an appeal is allowed to proceed against judgments or orders of the General Court to other matters.

In addition to the current matters⁸, it would be extended to decisions of independent boards of appeal of the following authorities: (1) the European Union Agency for the Cooperation of Energy Regulators; (2) the Single Resolution Board; (3) the European Banking Authority; (4) the European Securities and Markets Authority; (5) the European Insurance and Occupational Pensions Authority; (6) the European Union Agency for Railways.⁹ As a consequence, the General Court would become the forum that ultimately decides on certain EU law issues, an EU administrative court with one instance, as is already the case, for example, in intellectual property law disputes as a result of the 2019 reform. This is a fundamental and significant change in the judicial architecture of the European Union which renders the General Court even more significant, although statistics show that on average, 20% of the approximately 800–900 decisions taken by the General Court each year are appealed by

4 Article G (50) of the Treaty of Maastricht introduced the new Article 168a. After the fundamental reform of the Court of First Instance / General Court in 2015, a new reform is ongoing (see Note 7 above).

5 The procedural changes were introduced in certain type of actions in 2019, see [Online]. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-04/cp190053en.pdf>. (Accessed: 9 December 2023).

6 Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union (OJ 2015 L 341, p. 14).

7 Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union [Online]. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-12/demande_transfert_ddp_tribunal_en.pdf. (Accessed: 9 December 2023).

8 The European Union Intellectual Property Office, the Community Plant Variety Office, the European Chemicals Agency and the European Union Aviation Safety Agency, respectively.

9 In addition to the decisions of the General Court relating to the performance of a contract containing an arbitration clause, within the meaning of Article 272 of the Treaty on the Functioning of the European Union, proposed to include the “filtering” system of preliminary authorisation of an appeal.

the parties.¹⁰ These procedural changes will further increase the importance of the General Court which decides at the final level in several matters of European law.¹¹

The second main element of the currently pending reform proposal is to have the General Court deal with references for preliminary ruling in certain areas, such as VAT or excise duty.¹²

3. Sanctioning Member States for non-compliance with the judgments of the ECJ

The new powers introduced in the Maastricht Treaty allow the ECJ to impose a fine on a Member State that does not comply with an ECJ ruling.¹³ Under the current rules, the applicant in an infringement action is the Commission under Article 260 (1) of the TFEU, which brings the action before the ECJ following a preliminary procedure. Several judgments can be mentioned, for example, as Italy failed to enforce the 2012 State aid judgment¹⁴, the ECJ in 2020 imposed a fine of EUR 7.5 million – known as a lump sum payment – and a daily penalty payment of EUR 80,000 for the period until the enforcement of the judgment (C-576/18). In another 2018 judgement, Slovakia was ordered to pay a lump sum payment of EUR 1 million and a daily penalty of EUR 5,000 for non-enforcement of a 2013 ECJ judgment for breaching EU environmental rules. The amount of the fine is proposed by the Commission, which issued a communication on its calculation.¹⁵ The ECJ emphasised that it was not bound by the proposal of the Commission concerning the calculation and amount of the fine. The communication of the Commission should serve transparency, foreseeability and legal certainty in the application of the relevant rules rather than imposing constraints on the ECJ.

Case C-204/21 concerned the infringement of EU law by a reform of the Polish judiciary, including the creation of a disciplinary chamber within the Supreme Court. In parallel with the case, the Commission requested an interim measure, in respect of which the Vice-President of the ECJ, acting as a single judge, by order of

10 The status and history of the Civil Service Tribunal, which ceased its activity on 1 September 2016 and the competence of which was transferred to the General Court, is not discussed here.

11 The possibility of revision before the ECJ is very restricted with respect to the final judgments of the General Court.

12 When the Court of First Instance began its work, the necessity of an Advocate General was considered, but there were only four cases with an Advocate General involved.

13 Article G (51) of the Treaty of Maastricht reformulated Article 171.

14 C-243/10, EU:C:2012:182 of 29 March 2012, relating to the decision of the Commission of 2 July 2008.

15 Recently, Communication from the Commission – Updating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice of the European Union infringement proceedings (2022/C 74/02).

14 July 2021, suspended the application of certain Polish legislative measures until the delivery of the judgment in the main case. The Commission then argued that Poland had failed to comply with the Vice-President's order and therefore initiated a separate infringement procedure. Poland took the view that the Vice-President of the ECJ, acting as a single judge, is not entitled to render a new interim order because of failure to enforce a previous one, that there was essentially no legal basis for such a decision, and that in any event it should be issued by the Grand Chamber of the ECJ (a panel of 15 judges).¹⁶ Poland also referred to a previous case, Case C-121/21 *R Czech Republic v Poland* (Turów lignite mine), where in the first order of 21 May 2021, the Vice-President required the immediate discontinuation of mining activity at the Turów mine, and following the order of 20 September 2021, the Vice-President ordered Poland to pay a daily penalty of EUR 500,000. In Case C-204/21, Poland argued that the determination of the amount of the periodic penalty payment – its basis and its calculation – was not reasoned in any way in the Turów mine interim order of the Vice-President.¹⁷ The Vice-President of the ECJ, acting as a single judge in the Polish disciplinary chamber case, granted the Commission's request and, by order of 27 October 2021, ordered Poland to pay a periodic penalty payment of EUR 1 million per day for failure to comply with the previous interim order until Poland complies with the previous orders or until judgment in the main proceedings is delivered. After this decision, Poland requested the revocation of that order and a reduction in the penalty imposed, which the Vice-President granted by order of 21 April 2023 by reducing the amount to half million euros per day.¹⁸ The judgment in the main case was delivered on 8 June 2023, declaring the condemnation of Poland.

The above shows that this addition to the jurisdiction of the ECJ that the Maastricht Treaty introduced into EU law evolved in a relatively short period of time and under rather peculiar circumstances, leading (amongst other things) to an increase in the significance of interim orders. How this situation will develop in the future and which Member States will be affected by these new competences depend essentially on the Commission¹⁹. On the one hand, the infringement procedures initiated by the Commission against a Member State follow a consolidated case law regarding the amount of the penalty, on the other hand, the interim orders of the Vice-Presidents of the ECJ show a new trend, highlighting the discretionary power they have

16 In case C-441/17 R, EU:C:2017:877 of 20 November 2017, *Commission v Republic of Poland*, the interim order was rendered by the Grand Chamber; however, the previous order, C-441/17 R, EU:C:2017:622 of 27 July 2017, *Commission v Republic of Poland*, in the same case, was rendered by the Vice-President.

17 See points 50–51 of the order.

18 C-204/21 R-RAP, EU:C:2023:334 of 1 April 2023, *Commission v Republic of Poland* (Indépendance et vie privée des juges).

19 Or, as the Turów mine case shows, another possible plaintiff, Member State.

in that context.²⁰ Some authors have assessed the effectiveness of the infringement procedure in connection with the new legal instrument of EU law – the withholding of EU funds to enforce rule of law principles.²¹ Without examining the factual and legal basis of this new instrument and its recent practice, the question is rather to what extent the imposition of such a fine is effective and, when it is not complied with, what impact it has on the credibility of EU law and its enforcement, and on the ECJ's perception in general.²²

4. EU citizenship

EU citizenship was established by the Maastricht Treaty²³ thirty years ago, its basic rules in their current formulation are laid down in the Treaty on European Union in Article 9, and in the Treaty on the Functioning of the European Union in Article 20.²⁴ The wording of the provision is clear: 'Every person holding a nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be complementary to national citizenship and not a substitute for it.' Article 20 (2) TFEU lists various elements of this right: the right to move and reside freely, the right to vote and stand as a candidate in elections to the European Parliament, diplomatic and consular protection, the right of petition, the right of access to the European Ombudsman and the right of appeal to EU bodies. Each right is further detailed in Articles 21–24 TFEU, which relate to Articles 39–46 of the Charter of Fundamental Rights. Over the last thirty years, these rules and the secondary legislation based on them have enabled the concept of EU citizenship to make a significant contribution to judicial practice and become one of the strongest catalysts for the development of EU law (together with the requirement of equal treatment and the rights enshrined in the Charter of Fundamental Rights). In particular, freedom of movement and residence has generated new momentum in areas, such as social entitlements, taxation, the right to university education, educational benefits, language use in criminal proceedings, family name choice and data protection, to name a few examples of the ever-widening scope of the application of EU law.²⁵

20 In case C-441/17R, EU:C:2017:877 of 20 November 2017, *Commission v Republic of Poland*, the interim order of 20 November 2017 of the Grand Chamber required a daily penalty of EUR 100,000 (see point 118 of the interim order, under certain conditions).

21 Nguyen, 2021.

22 Gibson and Gregory, 1998, pp. 63–91.

23 Point C of Article G of the Maastricht Treaty on European Union inserted Articles 8–8e (five articles). Point 1 of Article 8 declares that Citizenship of the Union is hereby established.

24 Ehlermann, 2013, pp. 481–490.

25 Gyeney and Szabó, 2023.

In the context of the jurisprudence relating to certain social rights of EU citizens, we see that, since 2004, access to social benefits for economically inactive EU citizens in a Member State other than that of their nationality or of their original residence has been significantly affected by the economic interest of that other Member State.²⁶ The case law indicates an extensive consideration of Member States' interests in the field of the rights that arise from EU citizenship and can be claimed under EU law.

Family members of EU citizens from third (non-EU) countries enjoy derived EU rights stemming from the family-law relationship with the EU citizen. Thus, the right of residence of a person with such a status is essentially linked to that of his/her EU relative. The benefits under EU law to which the child is entitled directly affect the legal situation of the third-country parents. This also shows the spill-over effect of EU citizenship. One of the strong points of EU asylum and immigration law is that it allows family relationships to break through even strict legal walls: family relationship, child-parent or spousal relationship has been the basis of numerous exceptions in this field of EU law, demonstrating the European Union's appreciation of the importance of family-related values.²⁷

EU citizenship establishes a direct legal link between the citizens of the Member States and the European Union, while it remains attached to national citizenship, nationality. The link between EU citizenship and Member State nationality has raised a number of questions, some of which are currently pending before the ECJ. The baseline of the problem is that while legislation on nationality is an exclusive competence of the Member States, loss of nationality entails the loss of EU citizenship together with the broad range of rights arising from it. Bearing this in mind, the ECJ has ruled that the acquisition and deprivation of nationality of a Member State may be subject to certain limitations stemming from EU law. According to the case law, in exceptional cases, EU citizenship can provide protection against the loss of nationality. The rules on the loss of nationality must not disregard the principle of proportionality. Proportionality first and foremost requires an individual assessment of the consequences of the loss of nationality for the persons concerned, with special attention to the loss of rights attached to EU citizenship. While each Member State is free to determine the substantive legal elements of its nationality policy, deprivation of nationality cannot take place automatically without such an examination.

In Case C-689/21, the question was whether the requirements of EU law can put limitations on the application of certain rules on the statutory loss of nationality that is based on lack of attachment between the citizen and the Member State of nationality. The applicant in that case lost his Danish nationality by the force of law at the age of 22 based on the fact that he spent no more than 44 weeks in the country altogether until that age. When turning 22 years old, the applicant no longer had

²⁶ Gyeney and Szabó, 2023, Chapter 3.

²⁷ Recently, C-273/20 and C-355/20 joint cases, C-279/20, EU:C:2022:617 of 1 August 2022, Bundesrepublik Deutschland (family unification); and C-279/20, EU:C:2022:618 of 1 August 2022, Bundesrepublik Deutschland.

the option of an individual assessment of his case by the national authorities. In his opinion published on 26 January 2023, Advocate General Szpunar advised the ECJ that the statutory loss of nationality which results in the loss of EU citizenship must *in all cases* be subject to an individual assessment, including, where appropriate, the possibility of restoring the person's nationality with *ex tunc* effect. This case provided the ECJ with the opportunity to further clarify what requirements can be derived from EU law with regard to the protection of EU citizenship. The ECJ followed the opinion of the Advocate General in so far as it accepted that on the basis of the principle of effectiveness and proportionality, the Member States shall provide the opportunity, for the person concerned, to lodge, within a reasonable period of time, an application for the retention and recovery of their nationality. In the context of that procedure, the competent national authority shall examine the proportionality of the loss of the nationality from an EU point of view and, where appropriate, allow the retention and recovery *ex tunc* of that nationality. In the view of the ECJ, the Danish model of loss of nationality based on the pure lapse of time, after attaining the age of 22, in the absence of a genuine link between that person and the Member State concerned, and without prior notice to the person by the Member State about the potential loss of nationality and its consequences, does not comply with the principle of effectiveness and proportionality. However, with all those principally procedural guarantees ensured – such as proper prior notice to the person concerned, the possibility to lodge an application at a certain age, an individual assessment by the authorities – as set forth by the ECJ in its judgment, the Member State shall remain competent to lay down the conditions for the acquisition and the loss of nationality, in connection with a genuine link between the state concerned and its citizens.

That being said, the latest rulings of the ECJ establish that once a Member State has left the European Union, the national of that (former) Member State can no longer rely on any of the rights attached to EU citizenship. The case law that has developed in the context of Brexit clearly and very firmly state the well-known dictum: 'Brexit means Brexit'. The withdrawal of the United Kingdom leads to the automatic loss of EU citizenship and surrender of the rights deriving from that status.

In the case of *Préfet du Gers* (C-673/20), decided in 2022, the referring court questioned the validity of the Withdrawal Agreement based on which British nationals who had transferred their residence to a Member State would be deprived of their right to vote and to stand as a candidate in municipal elections in their Member State of residence. The ECJ made it clear that British nationals no longer enjoyed the status of citizen of the European Union and pointed out that EU citizenship required possession of the nationality of a Member State. Since United Kingdom nationals have been, from 1 February 2020, nationals of a third country, they lost the status of citizen of the Union as from that date. This is an automatic consequence of the sovereign decision taken by the United Kingdom to withdraw from the European Union. Therefore, neither the principle of proportionality nor any other general principle of EU law may be called upon to challenge the validity of that decision or deny its legal effects.

Although EU citizenship is indeed destined to be a fundamental status, it remains rooted in Member State nationality. The argument, therefore, that once EU citizenship has been acquired, it can no longer be withdrawn, cannot hold true. Even though the ECJ has established important safeguards around EU citizenship, the consequences of losing EU citizenship cannot be circumvented.²⁸ The line remains clear between the rights of EU citizens and non-EU citizens, there is no third way.

5. CFSP

Moving on to another important achievement of the Maastricht Treaty, cooperation between the Member States in the field of common foreign and security policy (CFSP) was provided with a legal basis in 1992, established as the second pillar of the European Union.²⁹ Although in 2007 the Treaty of Lisbon abolished the pillar structure, the CFSP retained its intergovernmental nature and its separation from other EU policies. In matters falling within this field of law, the Union Courts have only exceptional and limited jurisdiction (Article 24(1) TEU and Article 275(1) TFEU). More precisely, they have jurisdiction to review CFSP decisions on restrictive measures against natural and legal persons (Article 275(2) TFEU). Furthermore, they may monitor compliance with the principle that the implementation of the CFSP cannot affect the European Union's non-CFSP external action and *vice versa*.

The text of the Treaties seems to be clear in that regard. However, the determination of the details of these powers in CFSP-related matters is far from being evident and, moreover, their scope is less constrained than it might appear at first sight. The question of which issues fall within the jurisdiction of the ECJ, and which fall within the jurisdiction of national courts is often highly debated. Indeed, the ECJ has a major role in developing and defining the precise scope of its jurisdiction in CFSP-related matters. It follows from the case law that the limitations on its jurisdiction in CFSP-related matters must be understood as an exception to the general rule that the Union Courts shall provide for effective judicial review in all matters of EU law (under Article 19 TFEU). Any deviation from this requirement is an exception and, as such, has to be construed narrowly.

This narrow interpretation means, among others, that the mere fact that a decision is adopted in a CFSP context does not in itself mean that it is excluded from the jurisdiction of the Union Courts. This was the view taken by the ECJ in the case

28 In the “Pancharevo” case – C-490/20, EU:C:2021:1008 of 14 December 2021 – the ECJ considered that it was irrelevant in the case that one of the parents of the child concerned was a national of the United Kingdom, which is no longer a Member State (p. 66).

29 Title V Provisions on a Common Foreign and Security Policy of the Treaty on European Union, Article J – Article J.11, and the competence was established by new Article 228a, inserted by Art G (81) of the Treaty of Maastricht.

of *H v. Council*.³⁰ The case was brought by a staff member of the EU Police Mission in Bosnia and Herzegovina established under the CFSP³¹, who was then redeployed to another location in the country. The applicant turned to the General Court, seeking the annulment of the decision taken and also the award of damages. The General Court initially found the case inadmissible on the grounds that the question was related to the CFSP where the Union Courts cannot exercise jurisdiction.³² On appeal, the ECJ took a different approach and held that the General Court indeed had jurisdiction to hear and determine the case. The ECJ did not deny that the contested decision was related to the CFSP but argued that this alone could not be a reason for establishing lack of jurisdiction. The ECJ found that the decision was also an act of staff management, and thus the General Court had jurisdiction to deal with it as a dispute between the European Union and its civil servants. Consequently, the General Court, and the ECJ in the event of an appeal, have jurisdiction to review such acts. The case was eventually judged on the merits by the General Court and the applicant received compensation.³³

This case is also an example of the ECJ relying on general constitutional principles of the EU in determining the scope of judicial review in CFSP matters, such as the requirement for complete judicial review to ensure compliance with EU law.

Perhaps the most prominent and interesting ECJ judgement concerning external relations was delivered in 2008 in the case of a Saudi national, *Y.A. Kadi* (C-402/05 P, 415/05 P).³⁴ In this case the ECJ established its jurisdiction by relying on another general constitutional principle of the EU, the protection of human rights. The ECJ had to decide whether a Community measure implementing a UN Security Council resolution could be subject to judicial review. The answer was affirmative and the ECJ reviewed the validity of the restrictive measures in the light of the fundamental right to property. The ECJ established that the Community judicature had to ensure complete judicial review of the compliance of Community acts with fundamental rights. Obligations arising from an international agreement cannot prejudice the Community's principle that all Community acts must respect fundamental rights, such respect being a condition of their legality. The ECJ underlined that the European Community did not authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms.

30 C-455/14 P, EU:C:2016:569 of 19 July 2016, *H v Council*.

31 Council Joint Action 2002/210/CFSP of March 2002 on the European Union Police Mission (EUPM). The EUPM was established to follow on from the United Nations International Police Task Force in Bosnia and Herzegovina.

32 T-271/10, not published, EU:T:2014:702 of 10 July 2014, *H v Council*.

33 T-271/10 RENV, EU:T:2018:180 of 11 April 2018, *H v Council*, after an appeal against this judgement, the Court in its judgement C-413/18 P, not published, EU:C:2019:1044 of 9 December 2019, *H v Council*, partially annulled and resent the case to the General Court. Final judgment: T-271/10 RENV II, EU:T:2020:548 of 18 November 2020.

34 The *Kadi* judgments were analysed by several authors, see list; Art. 215 TFEU Osteneck, in: Schwarze, 2012, p. 1982.

The Kadi case is also the one where the ECJ first established its jurisdiction to review the lawfulness of so-called “smart sanctions”, individual restrictive measures in the area of CFSP. This jurisdiction was then incorporated into EU primary law, providing a legal basis for the review of CFSP sanctions. A literal interpretation of this legal basis in Article 275 (2) TFEU could lead to a conclusion that a direct action for annulment is the only option for reviewing the legality of targeted sanctions. However, in the Rosneft Case (C-72/15), the ECJ in 2017 adopted an interpretation that the legal base provides for review of the validity of decisions on CFSP sanctions, regardless of the type of procedure. Therefore, the Court established its jurisdiction in cases where the validity of the decision is raised as a preliminary question by a national court. In addition, in the case of Bank Refah Kargaran v Council (C-134/19), the ECJ established its jurisdiction to hear an action for damages for the harm caused by a CFSP decision imposing individual sanctions.³⁵ The Court referred to the requirement of a complete system of legal remedies, and underlined that such review was necessary in order avoid a lacuna in the judicial protection of the persons concerned.³⁶

To summarise, both branches of the Union judicature, namely, the General Court and the ECJ, have jurisdiction to review restrictive measures in the area of CFSP. On the one hand, the specific decisions of the Council can be challenged before the General Court and annulled to the extent necessary. In addition, applicants can also bring an action for damages in connection with the unlawfully imposed EU sanctions. As far as the jurisdiction of the ECJ is concerned, it can furthermore rule on the validity of CFSP decisions (restrictive measures) if such a question arises in a preliminary ruling procedure.

The ECJ plays a decisive role in clarifying the scope of review in CFSP matters. I briefly refer here to two pending cases. In the Neves 77 Solutions SRL case (C-351/22), the ECJ has to decide whether it has jurisdiction to *interpret* certain restrictive measures taken in view of Russia’s actions. Here, it is not the validity of the CFSP decision that is at stake but the interpretation of its content.³⁷ Another case, that started before the General Court, is KS and KD v Council and Others (T-771/20, on appeal C-29/22 P). This case concerns a matter which the national court previously refused to hear on the basis, *inter alia*, that the matter should be decided by the Union Courts. The question is, on the background of the established case law and

35 Former cases before the Court of First Instance: T-184/95, EU:T:1998:74 of 28 April 1998, Dorsch Consult v Council and Commission; T-341/07, EU:T:2011:687 of 23 November 2011, Sison v Council, in which the Court said that the violation of the fundamental rights was not “sufficiently serious” for establishing the non-contractual liability of the Community, para 80.

36 See also the Opinion of AG Capeta in joined cases C-29/22 P and C-44/22 P, EU:C:2023:901, KS and KD v Council and Commission v KS and KD, point 84, that the effective judicial protection shall make possible a claim based on the infringement of the fundamental rights by EU institutions and bodies in the exercise of the CFSP.

37 The validity of the national measure for confiscation of the proceeds of the transaction violated Decision 2014/512/CFSP.

in view of the principle of a complete system of legal remedies, whether the jurisdiction of the Union Courts should be extended to actions for damages outside the scope of individual restrictive measures. The damage claim at stake, based on the infringement of fundamental rights, is an action for damages against the Council, the Commission and the EEAS brought by family members of individuals who were tortured and killed or who disappeared in 1999 in Kosovo. In 2009, the European Union established a Human Rights Review Panel with a mandate to examine complaints of human rights violations by Eulex Kosovo in the implementation of its executive mandate. The review panel is an independent, external accountable body which, after reviewing those complaints, found violation of certain rights of the concerned family members, notably violation of Article 2 (right to life), Article 3 (prohibition of torture) and Article 13 (right to an effective remedy) ECHR,³⁸ but no proper remedy was given. An action before the High Court of Justice (England & Wales), Queen's Bench Division (United Kingdom) against the European Union on the ground of failure to investigate the war crimes at issue was refused based on lack of jurisdiction. The action for damages was filed with the General Court on account of breach of fundamental human rights, and concerns policy or strategic matters connected with defining Eulex Kosovo's activities, priorities and resources and with the decision to establish a review panel without giving it the power to provide legal aid to qualifying applicants or the power to enforce its decisions or provide a remedy for the breaches found. On 10 November 2021, the General Court dismissed the action for damages based on the lack of jurisdiction.

The judicial review in CFSP-related matters raises a number of complicated and complex questions, some of which are currently pending before the ECJ. Whatever the outcome of these cases may be, it is clear from the existing case law that there are no easy, obvious answers. The general principles of EU law have an important role to play in guiding the interpretation of the legal bases in the Treaties. However, reliance on these principles may at a certain point reach its limits in the sense that the ECJ cannot step beyond the boundaries of its jurisdiction as defined in the Treaties. Although the jurisdiction of the ECJ in CFSP-related matters has seen an important development since its introduction in the Maastricht Treaty, the limits of the scope of judicial review in CFSP-related matters is a legacy of the former pillar structure that has not yet vanished. The extent to which this pillar residue is compatible with some of the foundations of the EU legal system, which is based on the rule of law and a complete system of legal remedies and procedures³⁹, remains to be decided by the ECJ.

The briefly presented cases show how the novelties of the Maastricht Treaty became the object of the case law of the ECJ and how the abstract rules of that Treaty were transformed into concrete rules of the Union European, and how this case law in interaction with other rules of the Union built new chapters of that legal system.

38 Breitler, 2022.

39 Breitler's analysis goes further in connection with Opinion 2/13 of the Court.

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PART I

CONSTITUTIONAL
IDENTITY VERSUS 'EVER
CLOSER UNION'

CHAPTER 1

EU – 30 YEARS AFTER MAASTRICHT – THE POLISH PERSPECTIVE – FROM HOPE TO DISILLUSIONMENT



ANDRZEJ BRYK

Abstract

After the reunification of Germany, the Maastricht Treaty and the Treaty of Lisbon, the European Union underwent a radical transformation on an axiological, political and systemic level. It has become a messianic project of integration, led by oligarchic elites. The ideology of this legal and political process is a monistic emancipatory liberalism, formed under the influence of a Western European left sympathetic to Marxism and Soviet communism. Its aim is the supposed abolition of oppression and all discrimination with the help of EU Court of Justice jurisprudence and legislation. In reality, the technocrats who run the EU, seek to dismantle the rootedness of citizens of East-Central European nation states in the family, in religions and traditional values. EU legislation, especially the Charter of Fundamental Rights, which is essentially an ideological manifesto, must be viewed and interpreted in this context.

Non-liberal values are regarded by the EU establishment as a source of discrimination and oppression of individuals. Only liberal emancipation from any relationship and community that is not based on completely free, autonomous choice is to guarantee the freedom and happiness of citizens of a new European-wide empire led by Germany.

The plan to build such a total empire with Germany at its head threatens the independence of the post-communist countries of Central Europe, including Poland. It is also reminiscent of the epoch of Soviet dominance. Neo-colonial cooperation between local post-communist elites and centers of power in Brussels and Berlin is also important. A significant proportion of citizens, disillusioned by the imitative

Andrzej Bryk (2025) 'EU – 30 Years After Maastricht – The Polish Perspective – From Hope to Disillusionment'. In: János Ede Szilágyi and György Marinkás (eds.) *Maastricht 30: A Central European Perspective*, pp. 87–130. Miskolc–Budapest, Central European Academic Publishing.

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modernization and post-1989 economic policies, are turning to parties offering alternative.. Elites deprecate this phenomenon by referring to it with the pejorative term “populism”, thus attempting to disqualify their opponents as enemies of human rights, of the rule of law and of the so-called “European values”.

Keywords: Poland after 1989, emancipatory liberalism, German neo-imperialism, liberal vision of European integration, technocracy, ‘democratic deficit’ in the EU, European populism

1. Introductory remarks

The histories of Hungary and Poland can be defined, as one of the Hungarian historians somewhere said, as “*a string of victories in defeats*”. It seemed that with the end of Soviet type Communism in 1989 and the subsequent entry of the East Central European post-Communist countries to NATO and the European Union, our defeats turned into victories. Economic recovery and a sense of security seemed to end the geopolitical curse of both countries. The “end of history” was declared, the future looked great and the European Union – content with its “peace benefit” – went “on vacation”, hoping to form now, without any interruptions, the equal, just and “ever closer Union”, the aim enshrined in the European Treaties. Optimism and infantile gestures seemed to cloud sound reasoning and a sense of reality. This pertained especially to the elites and societies of the new post-Communist Member States, for which this historical change of fortune seemed like a miracle. This “miracle” was in a large part a result of the hard work of the people themselves and their ability to use the rational ways of economic activity which were now available to them but had been dysfunctional and inefficient under Communism.¹

- 1 One of the myths concerning the EU is that the rise of prosperity in Poland was a result of EU funding, especially structural funds. In fact, the funds were not big in comparison to the bulk of economic transactions and were focused on specific projects not necessarily immediately needed for growth, like aquaparks, bicycle paths etc. But the transfer of money from the West was not a gift but a brutal mutual transaction. For opening its 40-million market of consumers in Poland, a similar process to what happened in all the countries of the post-Communist East Central Europe counting altogether 100 million consumers, Western firms got in fact a free hand in Poland, taking over inefficient companies for peanuts. Out of every Euro invested in Poland, over 60-80 cents were returned as profits to the Western companies stimulating growth there (85 cents out of every Euro transferred to Poland from Germany were returned there). Moreover, Poland exported tens of thousands of highly educated specialists to these countries who had studied at Polish universities: medical doctors, computer scientists, chemists, biotechnologists, nurses, etc., apart from a couple of millions of cheap labourers. See data by Forbes and also an analytical account of this process in Armand, 2019.

But history has not ended, the internal as well as geopolitical problems within the EU began to mount, and a naïve image of the Union turned into a much more nuanced and sophisticated approach. It is obvious that this predominant perception of the Union as a political and economic project was idealistic. The EU Treaties have often been violated and we may say that they are just a useful formal device to mask *ultra vires* activities of the Union's undemocratic institutions. Moreover, one of the most important dimensions of the Union's actions so far has not been given the attention it deserved. The Union itself is also an ideological construction with its driving principle of “emancipation” from all the previously existing cultural and social institutions defined as oppressive according to the 1968 counterrevolutionary generation, which controls the EU's institutions today. For the people of East-Central Europe who had just left the ideological iron cage of Communism, some aspects of this ideological dimension began to create a sense of an ominous *déjà vu*.

2. Poland and the dynamics of the EU power structures

Within such a general picture we may now look at the Polish political, economic, social and cultural landscape to assess its condition thirty years after the Maastricht Treaty and nearly twenty years after joining the European Union.

2.1. Idealised road to recovery

Public opinion surveys in Poland reveal a rather unclear and confused attitude to the Union. Some show that a slight majority now thinks that the EU has slowly began to be detrimental to Polish economic development and the rationale for staying in it is connected more to security reasons at the time of a volatile geopolitical situation. Other surveys indicate that a substantial and rising number of the people in Poland think that there is life beyond the EU. At the same time, they overwhelmingly want to be within the Union provided it is reformed. Additionally, the picture has been blurred by the Russian invasion of Ukraine, and structural geopolitical changes which forced everybody to sober up from this infantile idea that “history” was something which happens to other people but not the people of Europe.

But this infantile enthusiastic approach towards the EU and the West, which was visible in most of Polish society after the end of Communism and which had essentially an economic rationale, is gone. 30 years after the Maastricht Treaty, a mental revolution took place in Poland, which may partially be attributed to a spectacular rise of relative affluence in Poland, even if not evenly distributed. The Union and the “West” lost their allure due to many blatantly *ultra vires* measures imposed on the “new” members by the non-democratic institutions of the EU and Germany, which has a decisive say in them. Of these, the immigration dictate in 2015 was a

brutal catalyst. The “West” ceased to be a model to be just implemented after the communist debacle. This change of mood was of course connected to a sense of disillusionment stemming from the failure of “the end of history” model proclaiming Western liberal superiority. Affluence is still the goal of East Central European societies but an awareness that the EU has turned out to be wasteful and inefficient in many respects and might be detrimental to this goal has been creeping into Polish consciousness.

The EU ideological program also hit hard on the heritages of the East Central European countries. The policies of multiculturalism and emancipation from communities and relations that are considered anachronistic, such as the nation, the natural family or faith, which are traditional sources of identity for large sections of the societies in this region, were also recognised, especially in Poland, as too reminiscent of the rejected Communist past. The loss of sovereignty, however limited yet, due to federalisation/centralisation plans is also considered a danger. Not only because having an independent state is a value in itself but it also a precondition of economic prosperity. In other words, this mental change stemmed from a painful growing up and disillusionment.²

The end of Communism in 1989 required us to clearly define the new situation and the axioms upon which Polish politics was to be based. They were in fact simple. The most important was a desire to escape from subordination to Soviet and then post-Soviet Russia, which turned out to be culturally and economically dysfunctional and destructive in all its dimensions. In addition to eliminating remnants of the Communist legacy, that is, to purge the apparatchiks from the state structures often infiltrated by the Soviet and then Russian secret service, it was necessary to reform the judiciary, destroy its Communist legacy and to privatise state property in a more or less equitable way. In addition to disclosing documents about former Communist informers, not only so they would be excluded from holding any important state functions but to prevent any danger of blackmailing them from either the Russian or the Western side – especially Germany, where Stasi files were taken over by the new government – as such blackmail could make Polish politics vulnerable to being controlled from the outside. This escape from the East required nevertheless an integration into Western Europe and its organizations as quickly as possible. The strategic goal was to join the EU and NATO.

This was not, properly speaking, a return to Europe. Poland has been part of Europe for over one thousand years. What we wanted to achieve was a rational, efficient economy based on the healthy principles of the market operated by an ethics of solidarity, political democracy and the rebuilding of social and cultural life after the devastations of Communism. This latter task also involved a recovery of the history falsified by Communism, including all its victims buried in unknown graves. In general, Poland wanted prosperity, security, liberty and patriotism, which meant the rebuilding of all the institutions destroyed or made dysfunctional by the rule of

2 See Cichocki, 2018, pp. 323–326.

Communism. All of this was mixed with a very rosy view in the public opinion of what Western Europe and the European Union represented in all these dimensions which we thought were crucial to the development of Poland. If one may use the analytical category of modernisation, Poland was to finish the Western modernisation the of the 19th and the 20th century, the fruits of which were partially denied to us by a crippled development due to partitions in the end of the 18th century, then by the devastations of the First and Second World War, and finally by the Communist rule.

2.2. Emancipation through bureaucratic structures

However, at the turn of the 21st century, the European Union was already in a different stage of modernisation, defined by the post-1968 countercultural elites in much broader and comprehensive ways. EU defined itself as a post-political, post-heroic, post-national and post-religious project. Nation states and nationalisms/patriotism stood at the very centre of this ideological approach as being allegedly responsible for World War II. The EU was to end such criminal competition between the states. The fallacy of this idea was obvious, but its purpose was to hide a neo-Marxist project. It was the two empires, the Third Reich and the USSR, which used their universalist ideology of race and class to execute genocidal policies, who were responsible for the war, not the nation states.

The post-nation state approach was long in the making, already suggested by an influential book *The Authoritarian Personality* published in 1950 in New York by Theodore Adorno, a member of the Frankfurt School.³ He claimed that it was the entire project of Western culture that had caused the calamities of the 20th century. Emancipation from the shackles of European heritage was a guarantee that such a catastrophe would never happen again. This message corresponded with the revolutionary project of the Western 1968 generation, which rebelled against the legacy of racism and colonialism and considered the program of emancipation as a tool of transformation, beginning from culture and then reaching into the entire bourgeois economic and social structure. This idea was first contemplated by Italian Communist Antonio Gramsci, who spoke about a “*long march through the institutions*”. The generation of 1968 added another slogan to it: “the personal is political”, meaning that all human relations are based on oppressive structures and need to be liberated according to the equality principle ultimately defined as equal human rights.

There was, some claimed, an alternative model for the unification of Europe, in fact vehemently promoted by its political “Founding Fathers”, that is Christian Democrats like Robert Schuman, Konrad Adenauer and Alcide De Gasperi, with their natural law ethos as the ethical code of Europe. This model of unification was based on a union of nation states and reverence for the European heritage, which had been betrayed by the totalitarian empires of Germany and the Soviet Union. But once the

3 Adorno et al., 1950.

unification speeded up and once the generation of 1968 began to be responsible for it, the project evolved into another one. Its “Founding Father” was an Italian Communist, Altiero Spinelli, and his ideas were expressed in the Manifesto of Ventotene of 1944 with a post-national and universalist vision of overcoming European heritage. His universalist cosmopolitan project corresponded perfectly with the emancipatory, post-national, post-historic, post-heroic and post-religious perspective of the generation of 1968, amounting to a destruction of the entire European heritage as utterly corrupted by Nazism, colonialism and racism. This approach looked at European history through the prism of ideology, applying to it the so-called “Hitler screen”. This intellectual device defined the past as a string of violence intertwined with worthless customs and empty rituals. History had to begin anew, and the only proper course of action was to create, from the top down, a new “correct”, “non-discriminating” historical narrative. This “new history” was to be read backwards in the light of the “European values” created out of a mixture of radical emancipatory policies.⁴ This dominating post-1968 liberal left cultural criticism understood culture essentially as a battle between “oppressors” and the “oppressed” for the final emancipation, which would end history. The new class conflict was going to create a tolerant, inclusive, non-judgmental moral education overcoming the classical one, which was by definition hierarchical thus unequal, and used moral distinctions of “good” and “bad”, which were now branded as suspect.⁵

“European values” combined with the liberal understanding of human rights were to form the new, uniform ideology of the united Europe. But this ideological project already had at hand a useful model for this transformative purpose, proposed at the beginning of forming a united Europe next to the model of the Founding Fathers. This model was created by Alexandre Kojève and some French bureaucrats, who looked at Europe as a material for transformation by technocratic experts. Their task was to transform the Europe of nation states into a post-national and post-democratic empire, capable to compete with the USSR and the United States. This globalist cosmopolitan model of Kojève and the expert bureaucrats found a useful ally in the clearly formulated ideology of emancipation. It was exactly here that we may find the origins of this unity of the global neo-liberal economic plan and the liberal-left cultural emancipation, working together towards a transformation of the world from one populated by people living in their different nation states, communities, cultures and religions into a world liberated from these and populated by sheer consumers of goods and individually chosen values.

4 A perfect embodiment of this ideological approach is the Museum of European History in Brussels, in which European history is presented, to simplify it, as a string of sorry events finally leading to a glorious European Union with, among other artefacts of this paradise, the abortion forceps on display. For the Eastern European observer, this approach was a kind of *déjà vu* reminder of an ideological approach to history used not so long ago as a tool of forming a “new man” with a properly shaped consciousness.

5 See Bryk, 2008, pp. 119–151.

2.3. Backwards tendencies instead of smooth metamorphosis

It was exactly here where this model of the European unification, officially part of the post-Maastricht development, began to clash with the cultural codes of the East-Central European states. What they wanted to rebuild, besides a devastated economy, was their history and culture equally devastated and falsified by the Communist way of modernization. This cultural conflict was to explode, also in all kinds of political clashes, dubbed by the liberal establishment of the EU with the vague but derogatory term “populist”. These new post-1968 elites, who were building the united Europe, considered themselves as a revolutionary avant-garde of a radical emancipatory project. Their aim was to create new Europeans with a new consciousness, cut off from the past and looking towards the future. This solidified itself into the official European ideology, based on “European values”, a mutation of “liberalism”. This project was without doubt allied with the acceleration after 1990 and its “end of history” globalist dream of rearranging the world. It was based on liberal internationalism, a global open market tied with the democratic plan to extend it to the entire world and possibly to create global post-political expert elites, guaranteeing uninterrupted economic growth without crises and fundamental political conflicts according to the image they had of stability.

This order was to be promoted not only by the West under the supervision of the US but also by the global liberal elites represented in international organizations, NGOs with an extended network of lawyers, universities and people working in the field of media and culture, who were pushing to realise such a vision beyond any control, while monopolising the language and cultural code of the global discourse in general. The main language of this project became the language of liberal human rights, replacing the Christian as well as humanistic Enlightenment world view with their distinctive anthropology and axiology, so far universally present in the Western world. As a consequence, the EU became in fact an ideological project, with the aim of uniting Europeans solely around an ideal lying in the future, the eschatological horizon to be realised in history, which, to be successful, required an escape from historical Western heritage defined as an obstacle on the way to an ideal Europe. Its past was to be remembered essentially as a string of calamities, only the future mattered as it was planned by uncontrolled liberal elites. The culture of Europe was to be secular messianism and its constitutional structure was to be founded on the post-1945 German model of constitutional patriotism. Any form of particularity which was contrary to European universalism (religious, national etc.), and which might provoke judgments and a moral hierarchy leading to conflicts and inequality, was to be avoided. This messianism with its dream of eternal peace reflected a utopian dream to end human alienation.

Public opinion did not fully realise that such a thorough ideological modernisation required emancipation from everything that shapes Polish identity, that is, national consciousness, tradition, Christianity, natural family, in fact culture, which not much earlier Communists had wanted to destroy as part of their plans of brutal emancipation

from the 'old world' by primitive political and economic means. Polish people wanted to restore these devastated institutions and to become a normal democratic state.

From this perspective, Poland and post-Communist East Central Europe in general was immediately defined as a problem by the 1968 post-national, post-historical, post-religious and post-heroic emancipatory elites. For them, the modernisation of Poland was not to be limited to the post-Communist economic underdevelopment but had to comprise a thorough emancipation from the entire cultural paradigm to fit the already established Western model. Chantal Mouffe, Belgian feminist coming out of the 1968 generation, stated this in the most unequivocal words when, while discussing the enlargement of the European Union to include the post-Communist countries, she stressed that liberal society found itself in search of a new enemy to be killed and it found it in the East Central Europe, which

has to have its democracy enlarged and deepened so all repressed and excluded could be liberated from the traditional ties of oppression –the place of family, religion, so to gain a bigger freedom to “difference and expression” (...) there exists cultural and political “house of slavery” built on superstitions of tradition and interpersonal relationships.⁶

What for Poland was its treasure, that is, history and memory, strong institutions like family or faith, which were pillars of resistance against totalitarianism, suddenly were branded as oppressive and in need of modernization, that is, emancipation to true freedom. The challenge of the new situation wrongly recognised was well captured by a Polish philosopher Ryszard Legutko, saying that for Poland and the East-Central European countries the major problem was

not so much the restoration of political freedom, this was done nearly automatically, but rather rebuilding of the 'old' surviving remnants of the pre-communist past. It was necessary to formulate anew or to activate the basic distinctions, unveil the new meanings of the old conceptions, to reactivate mores, enliven institutions, to mend the ruptured past. And it was this problem which caused the major explosion of discussions in the post-communist world. The recaptured negative freedom did not solve the problem. There were many controversies concerning the question to which to build bridges to the currents of the past, how to define concepts, how to perceive the human nature, how to form the hierarchy of aims. For some, anything old was worthless and they tried – like in the state of nature – to build the rules from scratch; others were searching for solutions by importing the rules from outside. The argument got complicated because there were no consent as to which fragments of reality survived a destruction of communism, and which were lost.⁷

6 In: Bielik-Robson, 2001, p. 16. Today Mouffe would mention sex and nature as “houses of slavery” in need of emancipation and the application of gender ideology.

7 Legutko, 2007, p. 79.

3. Facing ideologically driven integration

Poland found itself in a situation in which a weaker civilization meeting a stronger one faced the dramatic question how to modernise without at the same time losing elements of its cultural identity. The only culture which was now to be a glue in this new Europe was to be based on abstract liberal human rights equal for all and based on a very definite revolutionary anthropology. The problem with such rights was that they were endlessly proliferating, since this anthropology defined a human being as an autonomous bearer of subjective identity demanding rights from society, which had no legitimate criteria of distinguishing between them.⁸ This emancipation from culture had already begun to become dysfunctional in the West, and now it was about to undermine the foundation of Poland's classical understanding of modernisation, which was looking with suspicion both on the emancipatory cultural model of the 1968 revolt and also on the most radical neo-liberal market economic reforms.

In other words, the moment Poland joined the EU, the latter had a very clear ideological orthodoxy, a peculiar mixture of ideas born out of the traumas of the Second World War and the neo-Marxist approach to culture. What the European Union after Maastricht wanted to finish in terms of the implementation of the abovementioned principles was exactly what the East Central European countries experienced under Communism. It was not a coincidence that the entire post-communist elite, which had found itself a comfortable place in post-1989 Poland, recognised the EU project as a great chance to convert Poland into this emancipatory cultural model in a much more effective and subtle way than the unsophisticated Soviet-backed Communist officials were able to do. Additionally, the post-Communist elite found a safe haven against any attempts to punish them for their previous sins.

3.1. *The enforcement of an arbitrarily defined axiology*

Here lies till today a major line of cultural rupture Poland and other East-Central European states experience, because the idea of the EU is based on such an “emancipatory” model of “European values” brutally imposed by undemocratic Brussels institutions, including the courts. They interpret them as the Communist once interpreted “socialist values:” their meaning is subject to the interests of the most oligarchical and ideological lobbies within EU bureaucracy. In other words, from the beginning of its inception, the EU defined itself not only as an economic or political project but integrally, a *déjà vu* for the East Central European countries, as a community not of laws but of new values, derived from a particular ideological and anthropological vision.⁹

8 See Puppink, 2018.

9 One of the first persons who warned against this danger was an outstanding German philosopher, Robert Spaemann. See his article Spaemann, 2005.

Today, 20 years after joining the EU, the real challenge for Poland, its politics and economy, is not “escaping” Russia and its influence, even after the invasion in Ukraine. If there is any Russian influence, it resides in the West, in Brussels, Paris and Berlin, through all kinds of political links, money transfers, foundations and sentiments which treat East Central Europe increasingly as a problem for both sides. For these, obviously weaker, countries, the EU is a challenge because it has become imperial and oligarchical, that is, a fundamentally undemocratic project. Here the conflict provokes the division between the liberal oligarchical elites and the so called “populists,” or in other words, between uncontrolled global transnationalists, sometimes called “anywheres”, and democrats called “somewheres”, who rebel against post-democratic post-politics. The conflict can be defined as a conflict between post-democratic liberalism and democratic post-liberalism.

One of the most visible problems of the EU today is turning a living, functioning democracy, mainly in Eastern and Central Europe, into a supervised democracy, while at the very same time turning political problems into governance problems of an expert, technocratic management by means of procedures, directives and regulations created by the EU commissars (again a *déjà vu* and a familiar term in the collective memory of the post-Communist states) without any effective control by the people.

These EU legislative measures function increasingly as a justification and creation of institutions and social rules which are only considered legitimate if they support the messianic project of unification at any cost. Formal law is shaped in a way to justify a particular project, to shape Treaties in a proper way, which is exactly an application and deepening of the bureaucratic governance mentioned above. This voluntarism is deepened by the nebulous provisions of the EU Charter of Fundamental Rights, which have at their core the “European values” as in fact understood by their authors to be the same as human rights and the dignity of man, and a general clause that “all discrimination is forbidden”. These nebulous provisions could be and have been used in the interpretation of the Treaties to provide justifications for changes not in line with the Treaties, or even contrary to them. In turn, the European Court of Justice, which does not constitute an appeal level of national courts and tribunals but is authorised to judge only within the strictly delineated spheres of competences granted by the Treaties, tries to create a doctrine which would make Union law superior to the Constitutions of Member States. It gets support from all the non-democratic institutions of the EU while viciously criticising

the constitutional courts of nation states, especially in case of Poland, which uphold the supremacy of national constitutions.¹⁰

3.2. Bogus democracy with artificial demos

The mantra incessantly repeated by the liberal elites of the EU is their alleged readiness to remedy the most visible structural constitutional flaw of democratic deficit, which is supposed to limit this technocratic, bureaucratic and increasingly oligarchical and corrupt governance beyond control. It is oligarchical not only in political or economic terms but also, and this is especially poignant for the people who experienced Communism in East-Central Europe, oligarchical in the ideological sense, that is, imposing a monistic liberal anthropology as a basis of the non-negotiable axiology of the EU, attacking e.g. religious freedom or parents' rights to bring up their children, even if, formally, such freedoms are guaranteed by law.

But this recurrent refrain about democratic deficit waiting to be remedied is propagandistic babble. In the EU, this “lack of democracy” is not a deficit but a consequence of a plan consciously imposed, without which the overreaching aim of centralisation and federalisation of the Union could not be realised. Democracy, regardless of how many forms it has taken, is based on two principles: the responsibility of the rulers, something which Americans called a possibility to “throw the rascals out of office” understood as a public service, and representation. But the latter is not possible in the EU because the European demos does not exist. The real demos, which also plays a controlling role, functions only on the nation state level. The nations of Europe, this demos within different nation states, resist federalisation and bureaucratisation beyond their control, even if this resistance is chaotic and hereto unsuccessful. This failure is partially due to the fact that EU elites pursue federalisation in cooperation with a large chunk of the liberal elites of nation states, who place their loyalty outside their country and into the European Union's internationalism for ideological or comprador reasons. Moreover, support for all-European electoral rolls is a fraud from a democratic point of view, since such rolls have the same credibility and power to control the rulers as the electoral rolls uniting all the nations of the USSR in one Soviet nation and citizenship.

10 But there are “equal” and “more equal” states within the Union. The bodies of the EU do not take action when the German Constitutional Court reaches a decision which defines European law as unconstitutional, blatantly showing the double standard policy of Western countries against the post-Communist ones which joined the Union in 2014, but also indicating that such a verdict of the German Constitutional Court is politically and constitutionally “safe” since it is Germany which will govern the European Union within the prospective federal Europe, creating a superstate along the lines of the Second Reich (the German Empire established in 1871).

The plan is to base the citizenship of Europe on the new morality of “European values”, which are supposedly synonymous with human rights, reflecting the universal project of human brotherhood, of which the EU is to be a vanguard. But these “European values” allegedly reflecting human rights were in fact just liberal human rights with their crippled idea of equality. The ideological character of such human rights was obvious.

The major problem with them was that the principle of equality in liberal “emancipatory” reasoning became hostage to the idea of autonomous equality. But as Antoine Saint-Exupéry wrote:

one can be equal only in relation to something (...). An ordinary soldier and a captain are equal in relation to the nation. Equality is an empty word without any meaning if it cannot be related to anything.

In other words, a liberal in such a situation chooses the commandments which he wants to obey himself. But such morality, the very essence of today’s liberal theory of emancipation, makes the individual’s senseless rebellion the highest value. Within such an approach to culture, nothing can stand and be accepted as *sui generis* good, and every cultural code can automatically be defined as oppression. Such a liberal questioning of everything must stand finally in the face of emptiness and accept that as the highest value. This stance is allegedly a way to achieve an endless auto-creation of one’s authentic self in all dimensions, a proper definition of true human being and the very idea of freedom. But as Roger Scruton observed, ‘*Freedom is a very good horse, but you have to ride it somewhere*’. Such a concept of freedom is in fact a rebellion in the name of instinct, the affirmation of the barbarian never recognising any authority, moral hierarchy, never bending his neck in the face of greatness. To obey such an authority or objective morality would mean, by the liberal definition, a condition of inequality which is discriminatory by definition, and at the same time a form of false consciousness.¹¹

The idea that the dry and anthropologically very shallow “European values”, which are identical with human rights, can be the glue to keep the Europeans together, since they assume that such values constitute a state of their true emancipation from historical oppression, obligations and institutions, and that this idea would provide legitimacy to the entire project, was really an act of desperation. As Pierre Manent commented

Europe’s situation today is quite grim [because] the project of nurturing and cultivating the European spirit turns into a permanent, systematic criticism of the European life and history. The European authorities and institutions speak on behalf of the new man, who cuts himself off from the actual, true history of Europe. It cares mainly to preserve and praise its newest innocence. Today’s Europe is first of all a

11 See Scruton, 2002, p. 278.

destruction – in the name of human rights – of everything, which in our manners and moral views betrays the slightest manifestations of Christianity. The human rights doctrine cut off from any references to the common good becomes exclusively a discourse accompanying devaluation of human relations. Religion of rights, deprived of any other orientation, cannot create anything and be any support. True resources and natural riches of Europe cannot be found in the political apparatus or ideology of the Union. If they have not yet been exhausted, they can be discovered in the old nations and the old religion of Europe (...) [we have] no other sources of community life which would have any meaning and sense and which could be called European, retaining the minimum validity requirements. Whatever else it might be, and it is many other things, Europe cannot be understood and cannot be kept alive without taking into account its Christian roots. European Christianity is not a “spiritual point of honor” or “the place of memory” or the “Monument of History”. It takes part in the process of European life.¹²

3.3. An empire of forced emancipation

The head-on clash with the aspirations of Poland within the EU could not be more glaring, even if at the beginning it somehow went unnoticed because of the economic rewards, which lifted the country out of relative poverty and made it one of the most dynamic economies in Europe. Additionally, this growth was the reward which the majority of society expected from joining the EU and considered as crucial. But the general misconception was that Poland was entering “classical” Western Europe and the EU, which people thought represented the vision of Schuman, Adenauer or de Gasperi, not realising that it was already in its most advanced emancipatory stage of the post-1968 period.

This challenge was strictly connected with the problem of Germany after its unification in 1990 and its soon-to-be-gained dominance over the EU after the Maastricht and especially the Lisbon Treaty. The postmodern, post-national, post-religious, post-historical and post-heroic public ethic of the EU corresponded well with the German problem of self-definition after its defeat in the Second World War, the legacy of genocidal policies, the American imposition of the democratic system, which Germany, in contrast with the rule of law, had never had until then. Germany had to redefine itself, and it converted this redefinition into a tool of political and ideological domination. Germany knew that they could not find anything positive in their history in political terms, thus its thinking was straightforward: we committed horrible crimes, but we repented and became, as one of the German journalists rather hubristically remarked, the “moral empire”. Thus, we will be now arbiters, judging who a “good” European is and who is not, how to look at history and what should be a proper “memory” of it. Germany knew it did not have any “good” history which could provide it with a basis of identity. For this reason, their history was to be in

12 Manent, 2014, pp. 72–73.

the future, the utopia of the Union, of which Germans were to be a crucial keystone and the only patriotism worthy of the name was to be “constitutional patriotism”.

For this to happen, all other elements of identity that have historically existed, including nation states and memory, were to be defined as “nationalistic” and “racist”, as potential sources of oppression and disruption. In other words, Germany defined their unique, horrible history as the universal history of the European states.¹³ In that sense, the European Union was – apart from being an economic and political project – in its essence a monistic axiological project in which, as mentioned, “European values”, a kind of liberal monism excluding plurality and true freedom, were an integral part of the modernisation enterprise which the EU wanted to apply to East-Central Europe. Modernisation was more than just a civilisational project of accepting economic or managerial rationality, which would enable the post-Communist states to rebuild the devastated material basis of their communal existence. It was at the same time a total rejection of the “old gods”, just like the pagan idols were rejected during the conversion to Christianity in the 9th and 10th centuries, a complete transformation of minds and souls, if need be, by the force of laws, courts, the media and educational systems, as well as economic blackmailing with an incessant pressure to conform. This was an unintended parody, a *déjà vu* of the recently discarded Communist logic, if not methods, of modernisation, that is, the creation of the “new man”, the European man.¹⁴

This total modernisation understood as emancipation also constituted a bridge through which the modernisers of the EU made a deal with the post-Communist political elites and the liberal-left intelligentsia mainly originating in their particular nation states. For instance, Poland was defined as a non-emancipated “problem” despite Communists efforts since 1944 to do exactly this.¹⁵ They claimed that the Communist modernisation failed because it was openly coercive, primitive and thus inefficient. But now the EU was to achieve modernisation in a more subtle and efficient way. The leading liberal-left intellectual of post-Communist Poland and a former opposition leader remarked that he was not afraid of the post-Communists and their policies but of what would emerge out the ruins of Communism, that is, the ugly face of Polish antisemitism, nationalism and all forms of bigotry and xenophobia.

It was for this reason that this side of the Polish post-Communist elite monopolised the language of communication with the EU elites. They were simply speaking the same language of modernisation and emancipation. Poland was to be its subject.

13 For a comprehensive account of this German transformation and its influence on Europe see Krasnodębski, 2006.

14 Within such a perspective of modernisation which was to be global or cosmopolitan, like the Communist one was, the nation state and Christianity as anthropological competitors to this monistic liberal anthropology and its practical consequences, were to vanish. The challenge of such a modernisation was especially acute for Poland.

15 As a Stalinist philosopher Tadeusz Kroński remarked to Polish poet Czesław Miłosz in a letter in 1948: ‘We with the Soviet rifle butts teach the people in this country to think rationally without alienation’ (Miłosz, 1999).

The strength and paramount influence of that post-Communist elite, united with the liberal-left intellectuals who formed one wing of the opposition against Communism, came not only from their loyalty towards the present-day EU and its ideology of emancipation, due to which they received protection from Brussels and Berlin (they all hoped that nation states would eventually be dissolved). This strength also came from how the post-Communist transformation took place in Poland. It was based on two corrupting axioms, which introduced into Polish politics and society a conflict between two camps speaking different languages about reality, the very classical definition of a culture war.

One axiom was based on the so-called “round table” talks between Communists and the liberal wing of the opposition based, to simplify this process a bit, on the idea of an “ordered”, gradual transfer of power to the democratic people in exchange for a transfer of state property to the former Communists as private proprietors. The second, which was connected to the first, was to guarantee that the post-Communists and their institutions, as well as their initial dealings in free Poland – some of the most important of which were the judiciary and the media – were not to be reformed. This shaky security of these elites naturally made them consider the structures of the post-1968 EU as their major ally, which led them to abandon Polish interests.

In other words, post-Communist elites immediately positioned themselves as typical comprador-type neocolonial elites.¹⁶ The process of getting out of the Communist economic debacle was corrupted, amounting in some respects to a form of economic colonisation. The same “xerox” type policy was applied to all aspects of cultural, economic and political life. The language of transformation was monopolised by the liberal-left EU elites, and the neo-liberal economic model of transformation was accepted. This “imitation” type transformation disregarded both political culture and down-to-earth common sense. This transformation was the “original sin” of Polish politics, which corrupted public discourse, made Polish elites full of complexes, and divided them permanently into two still existing camps: those considering Poland as an independent state within the language of the Treaties with their basic idea of subsidiarity, and those who transferred their loyalty to the bureaucratic centres of Brussels and Berlin, the idea of the federal EU state and Poland as its self-governing province or a region similar to German lands. This resulted in a permanent division of labour within the Union into centre and periphery, or to put it in another way, a developing centre and the auxiliary providers for this centre.¹⁷ Liberal elites, the beneficiaries of the transformation, also accepted a permanent division of society into winners and losers without any social safety valves; moreover, they began to look down on the victims of this brutal transformation as people

16 More on this in the context of the centre-periphery model to which East-Central Europe was to be reduced by the old Western European elites: Zarycki, 2009, pp. 169–181.

17 This policy accepted as its axiom the principle “there is no alternative” to the already set model of development. The best work showing this complicated web of dependencies and negative consequences is Krasnodębski, 2003; on the economic aspects of these oligarchical transformations see Kieżun and Bielecki, 2013.

with crippled personalities and ignorant minds, full of envy, hatred and dangerous “populist” emotions.¹⁸

Within such a general picture of the Polish transformation, the 18th century mental division of Europe was reasserted with full force. It began after the partitions and the elimination of the Polish state in 1795 when Russia, Prussia and Austria, the empires which destroyed the country, began to treat this zone of Europe as a place under their tutelage, while imposing on Western Europe a language of justification of this international crime. They defined this region as backward, incapable of ruling itself and capable of modernisation only by the logic of these empires. It was then that the very term Eastern Europe was created, denoting a troubling, festering region which needs to be civilised.¹⁹ When Germany was created in 1871 as a unitary state, the German sense of mission towards the East, which had already been formulated by its liberals during the Frankfurt Parliamentary debates at the time of the Spring of Nations in 1848, began to be brutally applied. This message, with clear racial overtones combined with the *Kulturtrager* mentality, defined Poles as a problem to be put under constant supervision and ultimately as a population destined for forceful assimilation or destruction. It was an image of the East in relation to which German universalism defined itself as a form of cosmopolitanism. Their idea of liberty was always an idea of a Promethean mission to be carried to the backward regions, the liberty of the “iron” necessity.²⁰ This attitude was reborn after Germany was unified in 1990 and rose spectacularly to political superiority, which quickly defined the European Union as a tool of this mission.²¹ That was bound to clash with the attitude

18 This of course is a typical attitude of the global liberal elites today. For instance, liberal Hilary Clinton, a competitor for the presidency of the US against Donald Trump, branded his supporters as “deplorable”.

19 See an analysis of this Enlightenment creation of the “inferior” Eastern Europe as a region to be civilised: Wolff 1994.

20 The German theory of the state, which was subtly connected with the Volk mythology, was based on an idea that the state was an entity apart from society. The state was “hovering” over society in charge of guarding the very essence of universality embodied, the essence of perfect rationality. The entire German philosophy and political thinking has always tended to absolutise the state. The state was the equivalent of the absolutist king along the lines of Jean Bodin’s *Six Books of the Commonwealth* of 1576. Because of this, the idea of sovereignty as Germans understood it historically played a role separated from the sovereignty of the people. They tried to combine this idea of the state, the Reich, the imperial idea with their cultural idea of the nation as *Volk*, which resulted in calamities. It is no coincidence that today this German universalism of the state-empire has difficulty to subject itself to the modern idea of the nation and the nation state. See Krasnodębski, 2023, pp. 360–361, 367–370. Thus, Germany faces ‘the same dilemma as before – either to be a sovereign nation state among other sovereign states, with which one can create more or less close alliances, or to return to its old messianism of building transnational [post-national-AB] European “polity” – to a political unification of Europe, which has so many times ended with catastrophe, also for the Germans’ (Krasnodębski, 2023, p. 337).

21 As P. Manent observed, ‘German power is today simply disproportionate. What is natural, this power is essentially used exclusively in the national interest of Germany. In Europe, which was to put an end to the reign of the nation states, the real advantage belongs to the Germans, which makes the idea of the European community nonsensical’ (Manent, 2014, p. 73).

of the East Central European states, which after decades of Communist oppression wanted to build their own place under the sun in a free Europe, as cooperating nation states within the general framework of the Treaties.²²

The states of this post-Communist zone desperately wanted to have their nation states since they realised, a mental frame that history has many times corroborated, that without truly independent states, their very existence might again be endangered. Again they experienced enormous pressure from the strongest players of Western Europe to deprive them of this right of self-determination and independent governance. This, especially German, attitude of “supervision” was shared with Russia, which formed an economic alliance with Germany, but with geopolitical implications. In fact, that was nothing new, since during the epoch of Communist dominance over Central and Eastern-European states, this zone was happily ceded to the USSR for modernisation and then forgotten.

When the Communist period was over, Germany immediately assumed the role of a supervising teacher over “retarded” Poland in need of upbringing – not only in pragmatic, economic matters but also cultural and moral ones of teaching Poland what the true “European values”, defined by them, were supposed to be. This was a tool of propaganda, one aspect of a neocolonial dominance.²³ Hungarian writer Péter Esterházy observed wryly on this German and European liberal critique of East Central Europeans about the enlarged Europe after joining the EU in 2004:

For a long time I was an Eastern European, after that I rose to the club of Central Europeans (...). [Not long ago] I became a new European. but before I managed to adjust a little to this fact, I have learned now that I am not an original European.²⁴

In Poland and other countries of the “new” Europe, this attitude radically activated a brutal “imperial” type intervention *per fas et nefas* of the EU bureaucracy, with Germany as its main engine. Any democratic government, elected in Poland or elsewhere, which does not meet the German and the EU oligarchy’s criteria of “true” liberty and “European values” is viciously attacked economically and politically with an orchestrated media campaign. This German imperialistic universalism, whether it showed itself in the form of the Holy German Empire, the Enlightenment idea or the liberal idea of the emancipatory European Union, is the source of the constant

22 See Cichocki, 2018a, pp. 295–326.

23 Thompson, 2006.

24 The statement was in response to Jürgen Habermas, a leading proponent of the European Union as an ideological project and the most senior member of the Frankfurt School, which shaped the imagination of Western European intellectuals and politicians of the 1968 generation. Péter Esterházy is quoted in *Ci wspaniali rdzenni Europejczycy* in: Cichocki, 2005, p. 176; In other words, as Tony Judt observed in 1996 in an influential article (Judt, 1996), entering a club requires accepting the rules of the game, even if this is bitter experience. But even after joining the club, the countries of East Central Europe were immediately threatened that the old boys would retain the upper position and make decisions about the future shape of the European Union.

inability to build a Europe, today the EU, on equal terms. There is no indication that Germany has changed that superior cultural or other attitude towards Poland, since that stems not only from Germany's self-definition as a "moral superpower" but also from a strategic aim of the entire German policy to build around itself a federal "European state". This "European state" allows Germans to cut themselves off from their imperialist and genocidal heritage, while at the very same time realise their eternal dream, always present in various cultural, legal and political forms, of being the superpower by means of the circle of European marches dependent on Berlin.

Thus, the most important challenge for Poland as well as for the other East Central European countries in the EU has been how not to be reduced to dependency, not only in economic terms, but also in the cultural sense of not being crushed by the emancipatory ideology sealed into an unofficial secular "religion" of the Union. Here from the beginning an enormous role was played by a neo-colonial takeover of an overwhelming part of the Polish media market by Western proprietors.²⁵

In addition to the media market, Poland was flooded with liberal foreign foundations, NGOs and other institutions of the so-called "civil society", many financed by global liberal organizations like the Soros Foundation. They are supported if they realise emancipatory programs which uproot people from religious structures, the natural family and patriotic organisations, defined by liberals as nationalist and even fascist, which do not share the liberal-left canon of values.²⁶ Thus, it is not surprising that Poland and other post-communist states sensed that they were escaping from one ideological regime to the other. As a political scientist Andrew Janos wrote:

- 25 Any attempt to demonopolise the media market in Poland controlled by foreign owners, predominantly of liberal left sort, is immediately attacked as a violation of free press and speech, even though in Western countries, drastic legal limitations of such monopolistic practices are a standard procedure.
- 26 This is connected with a change of language and a reversal of meanings of particular concepts. When Polish patriots organise annually the so called "March of Independence" (pol. Marsz niepodległości) to commemorate Polish independence won in 1918, it is habitually treated as a "fascist" gathering. One of the most vocal liberal-left members of the European Parliament and a hater of nation states, especially Poland, Guy Verhofstadt shouted in indignation in Parliament after one of these marches: '60 thousand fascists marched in the streets of Warsaw –neo-Nazis, white supremacists. I am talking about Warsaw, Poland, 300 kilometres (...) from [World War II Nazi German death camps] Auschwitz and Birkenau'. This was one of the most outrageous speeches one could get from any politician in Europe today. He was not only a totally ignorant apparatchik of the Brussels oligarchy but an ideologically brainwashed mind, who had to be an utter idiot to combine Polish patriotism with Auschwitz, and with what the martyrdom of about 1 mln Jews there, as well as 80 thousand ethnic Poles, means to the collective memory of Poland. A German journalist after the March in 2019 exclaimed with horror 'They waved Polish flags, the right-wing extremism'. In turn, a journalist from one of the most liberal left newspapers in Poland shouted on TV after the march: 'Horror, they shouted racist and fascists slogans: "God, Honor, Homeland"'. German leftist activists come to such marches to battle the military history reconstruction groups (which portray, for instance, the anti-German resistance units during the war, branding them as "fascists"). An editorial of the leading liberal left newspaper *Gazeta Wyborcza* after the military parade on a day of "Polish troops' festival" in August wrote: 'Patriotism is like racism'. These statements represent the most striking examples of a totalitarian, emancipatory mind (Karp, 2019, p. 74).

the differences between the old (Soviet) and new (western) hegemony are, of course fundamental, but to see the differences between these two regimes, the observer could not ignore certain elements of continuity. First of all, we have to remember that the transition does not mean a change from hierarchy to equality, but from the one form of hierarchy to other. There is no doubt who is the leader in today's Central and Eastern Europe, or (...) who is "missionary" and who a "local native", whose fate is to wait for a conversion to the universalistic canon (...). Communism tried to create "a new man", when the new missionaries of the new universalism want to create new liberal personalities, equipped with transnational sentiments of the new age and liberated from the traditional social ethic and different taboo.²⁷

4. Liberalism against liberty

Many thinkers, not only of a conservative disposition, realise that today the ideological menace is not in fact coming from the East. Russia is still a military threat and was partially an economic one when it tried to take over some strategic branches of the Polish energy infrastructure already after 1990 and when the German-Russian pipelines North Stream I and II were strategically aimed against Poland. True, there are some remnants of the post-Communist, post-1989 legacies in politics, economy or even intelligence, but they are not influencing the main tone of Polish politics anymore. After the invasion of Ukraine, the menace from Russia might be military, but it has lost any ideological or cultural influence. It is the ideological, cultural menace from the West and its UE's institutions infected by it.

This menace might be defined as a motley of modern post-Marxist doctrines presenting themselves as different forms of emancipation.²⁸ The program of the drastic redefinition of all aspects of communal and relational life by the ideology of emancipation is being perceived as another totalitarian attempt to create a "new man". When the dominant, mainstream liberal authors in Western Europe, in alliance with their colleagues in Poland and other East Central European states, develop a narrative of the destruction of liberal democracy in these countries defined solely in their terms, their opponents discover with shock that the core of this allegedly liberal democratic narrative is woven out of the old Marxist ideas, sometimes overtly Communist, in other words, that liberal democracy of this sort repeats the cultural program of Communists not so long rejected in the East, of uprooting from the cherished values, relations and institutions.²⁹ This identity-based resistance, dubbed by

²⁷ Janos, 2000, cited in: Krasnodębski, 2008.

²⁸ This ideological Communism and its Marxist core were in fact coming from Western Europe.

²⁹ See for instance Krasnodębski, 2023c, pp. 237–277; Wildstein, 2020, Legutko, 2021; Kołakowska, 2016.

the emancipatory European liberal elites as “populism” in contradistinction to the acceptable, non-relational identities (e.g. the sexual ones) has been a constant feature of Poland till today, even if on the level of politics, the dominating liberal elites formed an alliance with the EU liberal elites.³⁰

Liberty in East Central Europe is also defined as resistance against any attack on national identity and culture, a danger Western countries never experienced. This attack was first of all an attack against communities which could nurture them, the nation and its culture, a fundamentally anti-imperialist idea, which today is also understood as a resistance against this totalising emancipatory ideology. The liberal-left deputies crushingly dominating in the European Parliament refused to give Poland its legitimate money (a loan for recovery from the COVID pandemic) because they did not like its conservative government, which was democratically elected in 2015.

They wanted, as one German deputy, Katerine Barley, *nomen est omen*, stated, to “starve Poland” and overthrow it, not listening to any arguments but looking at the whole situation solely through an ideological lens, by definition distorting and falsifying reality. They began to criminalise Poland by associating it with words such as “dictatorship”, “lawless” and even “fascist”. The attack was officially about Poland violating the “rule of law” despite the fact that all the judiciary reforms branded that way were common in Western European countries. This criticism was explained by some EU bureaucrats as legitimate in relation to Poland, a state too immature to make any reforms without supervision, a neocolonial attitude in a Union allegedly of equal partners. But the deeper cause of the attack was fear that this ideological liberal orthodoxy, never regulated by the EU Treaties and thus illegal, might be subverted by the very fact that a “politically incorrect” government was elected by the Polish people.

This shows that today’s liberalism has turned into an EU “religion”, with its “European values” catalogue never legally and precisely defined. Such a liberal “religion” was created to realise a secular eschatology or, to put it in another way, its aim was to impose one, universal state morality on all. The European Union lives in this modernising universalism understood as emancipation in the name of a crystal-clear final humanity, of which the end station is an emancipation from the world marred by evil of which gender, transgender and transhumanism experiments are just a beginning. This is a new form of gnostic thinking, where pure will and subjective choice will liberate us from an existential evil, a hubristic attempt to

30 Identity is a universal concept. The main aspect of identity which characterises its liberal or liberal-left interpretation is its subjective, individualist form, rooted in the autonomy principle in contrast to relational or communal obligations. The other side stresses exactly this communal (patriotism, religion, family) and relational character of identity. It may be defined as conservative or communitarian, but it applies to many forms of resistance against the liberal form.

create a universal and unifying story of humanity but without a unifying narrator.³¹ Liberal secular “religion” tries to strengthen the institutions of the state for the sole purpose of keeping in check people and groups (religious, conservative movements, traditional families etc.) that do not share the liberal anthropology and its exclusive definition who a human being is and should be. Thus, everybody can have a different view of reality provided this is the same view as the liberal one, in other words ‘*there is no liberty for the enemies of liberty*’, the words attributed in 1793 to a Jacobin of the French Revolution, De Saint Just. Different views are tolerated in private, but their public dissemination, and the “contamination” of the volatile public opinion, cannot be tolerated. This is a monistic, rigid and fundamentalist worldview, imposed on all people through institutions not tolerating competitive views. Moreover, it is being defined as the only rational one capable of discerning universal values representing one truly global human civilization fighting dangerous phenomena of “illiberalism”, “illiberal democracy” and “populism”.³²

4.1. The transformation of conscience through soft coercion

The aforementioned universal project of toleration and non-judgmental attitude towards any opinion stemming from moral autocreation might be misjudged as relativism or nihilism, but this is a misconception. In fact, it is a highly moralistic agenda, trying by all kinds of micro-rules (one of the most important ones is the hazy legal category of “hate speech”) to create social peace, which requires the elimination of competitive moral systems.

Liberal absolutism, so forcefully applied in East Central Europe the same way as it was applied already in Western Europe, does not tolerate the “enemies of humanity” defined situationally and ideologically as “populists”, “racists”, “bigots”, “homophobes”, “transphobes” etc. The category of judgment is emancipation from any relational (not created by choice), moral and social entities of the nation, religion, family or sex. Human rights are defined in an antagonistic way, destroying the normative, relational dimension of everything which determines an individual: the cultural, religious, moral, national. Their social and moral role is to bring a unity of sentiment and will, eliminating evil, which is allegedly not rooted in the nature of man but just a passing phase humanity is going through. Unified progress has been well advanced and thus all remnants of the old reactionary sentiments, discriminations and judgments must be eliminated, not necessarily by force, but by attempts to shame people out of their opposition to the “new brave world”.

- 31 Such a universal narrator making sense of the world existed in the moral nature of the Greeks, the idea of natural law, or as the Biblical God of Jews and Christians. See Jenson 2010. But ‘if man’s very being depends on his will alone, however, there is no reason why we ought to remain what we are. This belief that man can make a better man than the one God created is what prevents us from appreciating what we are’, this is a source of modern existential uneasiness (Schall, 2018/19).
- 32 See on this: Legutko, 2016; Bryk, 2021b, pp. 3–32; also, Bryk, 2021a.

Western Europe condemned fascism and Nazism, identified nationalism and right-wing extremism with patriotism, and it was with horror that they suddenly saw it in Eastern Europe. Globalism was to void the love of one's country defined as tribal selfishness, one has to be a citizen of the world and accept the universalist perspective with human rights as its moral content. Cultural identity was defined as withdrawal into oneself, the cult of heroes and heroism were things of the past, and the warriors were to be supplanted by merchants, while the Judaic and Christian moral code was an anachronism. Law and morality were to be provided by the multicultural kaleidoscope regulated by administrative rules. All such rules were to ensure that not only wars and menacing ideologies would be terminated but human evil as such, as a social phenomenon, might finally end.³³ This universalist, emancipatory approach clashed head-on with the cultures of the East-Central Europe nations, which Communism had wanted to destroy, which, when threatened with annihilation, wanted to rebuild these cultures as an important basis of their economic and technical modernisation. This liberal emancipatory universalism began suddenly to resemble a new totalitarian coercion, even if for now in a soft form.³⁴

This is utopia without physical terror but with the public annihilation of those thinking differently, with psychotherapy or brainwashing people in various "workshops" about diversity and sensitivity. Social engineering is organised by the strongest in the market of ideas, organizations, law and economy.³⁵ Such a project of the EU causes the project to be not only illegible, but also dysfunctional on many levels and treated as a cover for warming up and instigating many powerful interests, rhetorically using the ideological mace of the European project to realise their own goals. These clashes of perceptions between Poland and the European Union establishment have caused a deep division in Polish society. This is apparent in the refusal to grant legitimacy to any democratically elected government which does not fully accept this ideological definition of the European Union imposed by its increasingly oligarchical liberal establishment, in alliance with the comprador elites of these countries focusing on this ideological European project. It was visible especially after the conservative government was formed by the winning party PiS (Polish: *Prawo i*

33 Delsol, 2018.

34 Legutko, 2016.

35 This is a universal theme of all totalitarian utopias, for which, as Orwell or Huxley described, the main task is to erase the past, the memory of what happened, because that would give a chance for comparison and enable the discernment of the lie of such totalitarian projects and as a consequence would foster resistance. The paradox of such an approach in Europe is that there is only enmity towards the (Western) European heritage, while they idealise other traditions, the purpose of which is usually to treat them as weapons for destroying the European ones. This is one of reasons for the "open borders" policy of uncontrolled, illegal immigration.

Sprawiedliwość, that is, “Law and Justice”).³⁶ It was immediately branded as populist and acting against “European values” by the EU establishment because it wanted, in a very inefficient way, to limit the consequences of two strategies of the European Union which violated the Treaties.

One was a cultural, in fact ideological, emancipation strategy with sexual revolution and gender ideology as its core, as well as the corresponding censorship of hate speech, the forced acceptance of illegal immigrants as a practical realisation of multiculturalism focused on the dissolution of the nation state, and finally an understanding of human rights in a very narrow, liberal way.

The other, the economic strategy was a plan to impose on the weaker states a classical centre–periphery division within the EU, in which Poland, as well as other East Central European states, were given a subsidiary role in a just-to-be-formed federal state (in fact centralised bureaucratic state) controlled by Germany via Brussels. Poland under the PiS government tried to achieve a modicum of subjectivity within this economic centre–periphery model. In cultural matters, it tried to defend its sovereignty; these matters are left exclusively to the nation states by the Treaties but this is totally disregarded by the EU liberal-left establishment. The Polish opposition treated the PiS approach as showing foolish ambitions and in cultural and moral spheres as exactly contrary to the ideological emancipatory aim of the EU, which the opposition supported. For this purpose, having the total support of the liberal establishment of the EU and especially Berlin (which had in fact declared a propaganda, political and economic war on Polish government since 2015), the opposition began

36 The government was conservative, at least rhetorically, in the cultural sense, but not in the sense of pursuing the neo-liberal model of economic development. In the latter sense it was social-democratic or pursuing a policy known in Germany as ordoliberalism, as this term was understood in Europe in the 1950s and 1960s. In Poland, it partially represented a tradition of the Polish Solidarity Movement of 1980-81. This greatest freedom movement of modern Europe had nothing to do with the emancipatory movements of the 1968 generation but much more with a return of the true source of Polish and European tradition and institutions destroyed by Communism.

to use a tactic of criminalisation by association, defining the government as “illegal”, “unconstitutional”, “anti-European”, “against European values”.³⁷

4.2. Poorly hidden antidemocratic attitudes of the liberal-left elite

The PiS government, which ruled Poland for 8 years, tried to treat seriously the formal clauses of the Treaties, thinking naively that it really was law, not a law driven by ideology, which indeed was the game in the EU. Its policy was naïve, since if one sits at the table playing poker with a cheater one can still win because the rules are clear, but if one sits with a cheater who is ideologically intoxicated one cannot. PiS did not define the enemy properly, as someone who might be termed a global progressive “liberalocracy”, which thinks that a conservative government may rule only if it respects the rules established by it and can be changed only by it. This division has been permanently set. We live in a world in which progressive or postmodern liberalism is a hegemonic cultural code and its language defines reality, the air you breathe. Any attempt to pull the reins is declared as illegitimate and requiring decisive actions both on a political level (against “populists”) and on a legal level, in defence of the “rule of law”.³⁸

37 The PiS party won in the election of 2023, but it was unable to form a government. The opposition formed a coalition government, and such attacks immediately ceased because this government adjusted immediately to all the economic, social and cultural goals of the EU liberal-left establishment (including climate policy, the relocation of illegal immigrants, gender indoctrination etc.). It also communicated right at the beginning that it was going to use the constitution in a clearly ideological way. If it was necessary to undo the “anti-European” policies of the PiS party, the law and the constitution were to be disregarded. Only an orthodox liberal-left regime was allowed, excluding any pluralistic diversity. The most striking example of this attitude is a statement of a new minister of justice who remarked that ‘we have a situation in which we are restoring constitutionality [of everything] and are looking for a legal basis to do this’. (quoted after: Czerwiński, 2024). This is a statement similar to a dictum attributed to Stalin’s General Prosecutor Andrej Wyszynski: ‘give me a man (an enemy) and I will find a (legal) paragraph (to sentence him)’. Prime minister Donald Tusk remarked: ‘All we are going to do is to be done according to the rule of law as we understand it’. A judge of the European Union’s Court of Justice and a former chief Judge of the Polish Constitutional Court, Marek Safjan, an enemy of the PiS government, a classic example of the globalist pro-centralist European elite, added, ‘We have to break free from the trap of formalism’. These remarks represent a classical approach to law as proposed by Nazi constitutionalist Carl Schmitt, the so called decisionism, according to which what is valid is not the general legal norm but the decision of the one who has power. Another former chief Judge of the Polish Constitutional Court, Andrzej Zoll, orienting itself towards the German understanding how the United Europe should look like and very much, even if subconsciously, applying to Poland the German experience and understanding of history and law stated, ‘As for introducing the rule of law, the new government cannot do it by legislative (parliamentary) means’. In other words, if one wants to fight fascism, one must destroy it forcefully and then establish true democracy and constitution (as the Americans did it in Germany in 1945).

38 It is not a coincidence that a rebellion against PiS government was started by the judges who were not at all decommunised after 1989, and who think that the EU is their natural ally protecting their interests. And now they do not want to recognise judges nominated legally by the organs they consider illegitimate, like the president.

Culture is also a battlefield, where any attempt to question emancipation policies from any relational and normative context is treated as a counterrevolution, thus the ideological language, at the very centre of which is “homophobia”, “transphobia” and anything else that has been defined by the “liberalocracy” as “hate speech”. This reaction, nowadays very visible in Poland, has a very strong class component but is quite different from the historical aristocracy or nobility, which had nevertheless a deep sense of obligation towards those of the lower ranks. The new aristocracy looks at the lower classes with disdain, considering them a mob which has no right to demand anything from them, since they are a meritocratic elite which does not have any debt or obligations towards others. It also has ample legal, financial, cultural etc. means to deal with the consequences of their cultural policies of eradication/emancipation, which devastate the weakest. Their definition of liberty is not a human concept but an ideology which places freedom solely at the service of the autonomous, subjective individual no matter what. This is the essence of the modern alliance between the economic elite and the cultural one.³⁹

For example, this elitist disdain is visible in a commentary of the prominent liberal-left English intellectual Timothy Garton Ash, once quite a good observer of the changes in post-transitional East-Central Europe but now a “court intellectual” of the most orthodox “liberalocracy” and a self-nominated “enlightened” educator of the rebellious Poles. In 2022 he wrote in the most prominent liberal-left paper “Gazeta Wyborcza” about Poland before the election of president Duda, who represented the PiS: ‘Democracy dies in darkness. The night is approaching over one of the weakest democracies of the European Union (...) democracy will be castrated’, then he called Giorgia Meloni “post-neofascist” and warned against ‘the creeping normalization of the far right’, a typical babble of this sort of blinded liberal-left European intellectuals. After the elections in which PiS lost power, he continued: ‘the process of cleaning up after PiS in Poland is underway, which Americans should watch closely. Perhaps the same thing awaits them after the end of Trump’s possible second term (...). [The Tusk’s government] continues to clean the strongholds of the PiS state with an “iron broom”’.⁴⁰

In other words, in the case of Tusk’s coalition even the most illegal actions, which *per se* are legitimate against conservative government, constitute a test ground of how to deal with other possible conservative governments which might challenge the liberal establishment in the EU and the US. It is the right, not the law, that is the problem of the liberal elites and to eliminate this danger, extraordinary measures can be taken, including a coup, provided it is a liberal one.⁴¹ This class/cultural

39 See Benoist, 2022, pp. 42–63; Bryk, 2021b.

40 Ash 2024; the quote is a reference to Tusk’s statement in 2022: ‘give me 400 days and I will make order with an “iron broom”’.

41 Such an attitude of disdain is visible across the Atlantic Ocean as well. This is the attitude which Hilary Clinton showed when it she said that such people were ‘deplorable’ and Mark Tushnett, professor at Harvard University (!) defined them as losers, especially the religious ones, who should be, in fact, locked up in cultural ghettos and the courts should be used for this task (Tushnett, 2016).

conflict is now defining Western politics with the “liberalocracy” using all means available to defeat its opponents should they ever manage to come to power by democratic means.

5. Towards ‘a new empire’

With such an opponent one can either upset the table and walk away, a drastic move not even contemplated by anyone in the Polish conditions, or you can play fox and save what you can. In this game, the major line of contention was which law was sovereign, the EU *acquis* or the constitutions of the Member States. The Treaties never granted such a power to the EU, meaning such a law had to be accepted by the nation states as sovereign law through the ordinary constitutional procedure, but the European Union’s Court of Justice interpreted the EU law the other way round, working hand in hand with the bureaucracy of Brussels.

This illegal activity of the EU was dealing also the most dramatic issue challenging the Union, that is, immigration policy. Driven by the “*herzlich willkommen*” policy of Angela Merkel and stemming from the universal but misguided compassion of universalist ethics, this policy violated the European Treaties, forcing the EU countries to accept the erroneous German policy, which had no logic behind it and created a huge mafia of human trafficking, operating hand in hand with NGOs financed from European state budgets.⁴² These misguided policies were forcefully rejected by Poland and other East and Central European countries as illegal and stemming, apart from other causes, from the fear and paralysis of European leaders, the post-colonial complexes of Western countries as well as a ram to destroy nation states through a great replacement experiment.⁴³

42 The mafias were acting out of incredibly lucrative financial interests. In turn, non-governmental organizations operate on the basis of the ethics of global humanity and a presumed right of immigration for every human being in the world regardless of the laws of states and the consequences of abandoning the principles of prudence and political and social responsibility.

43 The administrative relocation of illegal immigrants (invited illegally by Germany in 2015 in fact on behalf of the UE) was an act of desperation of EU bureaucracy controlled by the strongest states (mainly Germany) because it was not able to cope with them. It is against the European Treaties, and therefore the EU leaders created ideas to justify it as “forceful solidarity”. Moreover, such a policy requires that countries in which immigrants do not want to settle should keep them by force because if not even social benefits are given to such immigrants in a country which will have to accept them, it would prevent them from migrating to richer ones. The immigration policy is one of the most dysfunctional, ideologically driven, and helpless policies of the EU. See for instance Murray, 2017.

5.1. *Centralising opportunism*

Nevertheless, EU bureaucracy treats every crisis as a chance to strengthen the federalisation project. A mechanism was created to react to internal and external dangers, which is to centralise decisions and resources which are necessary to finance the new obligations and limit the space of manoeuvring of the nation states. The war in Ukraine gave the EU a chance to strengthen the Union's centralization process orchestrated around Germany, along with France and the Benelux countries. A possible end of *Pax Americana* in conjunction with the Russian menace is looked upon by Germany and its allies in need of centralisation as a great chance. Germany, which in fact had an interest in the Russian aggression against Ukraine, as it gave them a chance to cut Europe away from Russia at least for a time before they centralise it, is the real winner here. Its historical obsession with subjugating Europe is currently being realised by means of the EU, of which they are planning to become the hegemon. This is a role they understand well, since Germany has never in fact been a nation state but a state which controlled its subjects irrespective who they were, a classical empire. So today, federalisation will follow, after which they might make a decision to sustain the Ukrainian resistance by all kinds of help and finally to freeze the war there and resume cooperation with Russia, leaving Ukraine devastated and exploited by both Russia and Germany in cooperation with Ukrainian oligarchs. Poland and East Central Europe will not only economically be squeezed into the centre-periphery model but also deprived of its equal role within the NATO, because East Central Europe will be redefined as a Russian sphere of interest. This would mean finally kicking the Americans out of Europe, and ending the *Pax Americana* on a global level. This common strategy of Germany and Russia will pose a real threat to Polish subjectivity in the European Union.

It seems then that the Ukrainian crisis, after the financial one in 2018, the Covid pandemic and the illegal immigration catastrophe, has been used to transfer power from the nation states to the EU oligarchy. This centralised, undemocratic empire of the European Union, with different nations governed by comprador administrative elites subordinated to the centre governed by Germany *à la* Second Reich, meets surprisingly little effective resistance in a situation where the formal democratic process becomes more and more useless, merely an empty ritual, the so-called “feast of democracy”. Potentially, the cultural paradigm within Europe must change before such a political strategy could even be contemplated.

This “federalisation” project of the EU seems to be deprived of any safety valve to prevent it from making wrong decisions and losing competitiveness in the world. There is an atmosphere of gloomy uncertainty, including in Poland. Whether the EU will experience its Spring of Nations again no one knows, but many things in it have gone wrong, which might evoke a creeping sense of loss of legitimacy of the entire project among the people. Right now, the EU cosmopolitan establishment has invested too much in this project not to use all the necessary measures to mend it and silence its opponents. But sooner or later, something might crack.

At present, the liberal elites of the EU seem to have put everything on one card, a race in which the EU bureaucracy tries to build the European superstate before they might be effectively challenged by all-European antiglobalistic movements centred on freedom and the nation state.

In such a European Union there is no place for a free and independent Poland, moreover, no place for a Poland treated as an equal partner. Poland has again found itself in in a very precarious crush zone between Germany and Russia. The American attitude is here also very important, because the American liberal elites today are the twin brother of the European liberal elites, who do not put their strength into a defence of liberty but into the ideology of all-encompassing social and cultural emancipation. The neoliberal economic elites joined hands here with the cultural neo-Marxist universal elites at the expense of ordinary people.⁴⁴

5.2. Liberal “restoration of order” in practice: the Polish case

All the aforementioned geopolitical challenges can be found in Poland, which is torn by bitter internal conflicts. The elections of 2023 showed what was in fact the major dividing line. A large part of Polish society does not mind the further federalisation/centralisation of the EU under the German plan. For them, the Polish state functions already as an equivalent of the European/German land or region and its political, economic and cultural field of sovereign manoeuvring within the EU does not have any value.⁴⁵ They are convinced of their moral superiority and the new government formed by the Civic Coalition (Polish: *Koalicja Obywatelska*, KO) in the autumn of 2023, which represents these people, thinks that it can act *per fas et nefas* because no one will control it. The PiS government operated in an extremely hostile environment, despite the fact that its alleged breach of the rule of law, especially the constitution, could never be proved by its opponents, even if some of the government’s actions could legally be interpreted as stretching the law. The PiS government was hated not for its actions but for what it was. It defended the nation state as a unit of the EU, the cultural identity and plurality of the media market and finally a substantial amount of economic field of manoeuvring in the form of investments and reforms blocked by Brussels according to the plan of a Union economically divided according to the centre-periphery model.

All this was a defence, in accordance with the Treaties, of the minimum of sovereignty and the room for independent political manoeuvre. But PiS voters were not

44 This includes also the messianic zeal to fight global warming, behind which there are no rational scientific arguments but big corporate money. Global warming is a fact but human responsibility for it is negligible. Literature on this is already voluminous, even if the scientific establishment has its own financial reasons not to tolerate ‘heretics’. See Koonin, 2021; a good review of the subject is also Hayward, 2021/22.

45 Recent surveys conducted after the 2023 election showed that 14% of the population consider the Polish state to be unimportant to them and they think it should be sucked into the European Union as an unimportant administrative region. 28% would not have any objections if that happened.

treated as second class citizens by Brussel's liberal establishment because it hated PiS and its policies. It hated the PiS party because it hated its voters for representing this type of European "populism", existing in many other European states, claiming they have not been sufficiently modernised and educated, in wit emancipated from the reactionary past and still harbour illegitimate views.⁴⁶ The government had to fight the powerful machinery of the ideologically obsessed oligarchy of the EU, liberal western media, George Soros's net of foundations and money, and a strong internal opposition. It was also incessantly attacked by the opinion- shaping elites, who use the dominant and free liberal media controlled by Western corporations, acting in a monopolistic way unimaginable in Western Europe. But despite this, Poland still has a pluralistic media market, there is a choice available, a situation unimaginable in countries which are in principle pluralistic, but nearly all write the same commentaries in the language of the same monistic liberal narrative.

The new government will have all these actors, the EU, liberal media, foundations financed by big money not against but supporting it no matter what. They will ignore, hide and justify anything this government does because it acts on the "progressive" side of history.

As professor Kim Scheppele of Princeton University, somewhere stated, when "restoring democracy" by the new government of Poland, the letter of the law cannot be necessarily observed, the "real constitution" is in the minds of the people, and not on paper. And if what is on paper does not represent the values which are in human heads, then one does not need to limit oneself. Some Polish apologists for the KO government were thus convinced that violation of the constitution is justified if such a move could restore state's constitutionality, which for such commentators was exactly violated.⁴⁷

Klaus Dieter Bachmann, a typical journalist of the liberal German establishment and thus by implication a European centralist, who has been in Poland for years, attacked the PiS government officially in the name of "true" democracy. Staying there in fact to guard the German interests and follow the line of the German government he wrote:

Tusk's government – to repair the state – must introduce authoritarian rule: remove judges from the Constitutional Court and the Supreme Court, bypass the president's

46 Among an avalanche of ignorant, often ideologically motivated articles about Poland in the Western press, which are full of lies and bad will, one stands out for truly trying to understand what Poland under the PiS government wanted to achieve and why it was hated for this (see Caldwell, 2021/22). Unfortunately, the political and economic goals of the PiS party did not necessarily translate into very effective results. Even though the resistance of the Brussels establishment and the liberal media was colossal, there were also other reasons for this failure. Political naivety and a kind of neo-feudal reverence for superior masters, thought to be powerful, also needs to be diagnosed.

47 One is reminded of Lenin's statement made in 1919: 'Our moral code is absolutely new (...). We can do everything because we are the first in the world who draw a sword not to enslave but in the name of liberty and liberation from subjugation', *Krasnyj miecz*, 18 VIII 1919, as quoted by: Bäcker, 1992.

veto and the Constitutional Court's rulings, take over the state media, bypassing procedures, introduce the power of a police state.⁴⁸

Donald Tusk himself said on the X platform: 'The PiS occupation of the country has just ended (...), only the occupiers' reputation will stay with them for a long time.'⁴⁹ That is why Tusk's actions will never be criticised by the EU establishment. On the contrary, his policies will be applauded and supported with all means, because he was sent from the chambers of the Brussels "crystal palace" to "put things in order in Poland". Comments like the opinions of Bachman and Tusk quoted above show that for such people 'dictatorship in the defence of liberal democracy' is justified and democratic elections are to be treated as legitimate only if they represent the values defined solely by liberal oligarchical elites.⁵⁰

This is what the future looks like not only for Poland but for the entire European Union. Liberal elites have realised that a rising resistance against their globalist, monistic ideology has been so strong and gaining ground that their power might be endangered. So, they will use all the means possible to retain it, since, as the old adage says, 'there can be no freedom for the enemies of freedom [as we understand this]'.⁵¹

As a part of this "restoration of democracy", the incessant work on people's consciousness must be intensified. The Civic Coalition (KO) government formed after the election in 2023 has thus as its aim not to reform the economy and many historically inefficient state institutions, but to modernise social consciousness into a monistic ideology of liberal emancipation defined as orthodoxy by the European Union. This ideology as the official secular "religion" of the EU must never be challenged again by "heretics". The new government consists mainly of the members of the old post-Communist elites and former anti-Communist oppositional activists who allied with them, plus new radicals coming from the "green" camp, as well as the neo-Marxist cultural emancipatory groups of the coalition parties. This is in part a repetition of the original alliance of the first government created after the fall of Communism in 1989. Together they placed their loyalty in the EU project, the former group for the safety of their position and the property they had acquired in exchange for giving up

48 Bachmann, 2023, cited in Buczyńska, 2023.

49 As quoted by: Bruszewski, 2024.

50 This recalls a minister of Great Britain, Robert Stewart Castlereagh, who during the Vienna Congress in 1815 said that 'the fundamental problem of politics (...) is not to control lawlessness, but to limit a temptation to pursue righteousness'.

51 The liberal elite treat society as a 'problem' waiting to be emancipated, which causes enormous social dysfunctions, violence and chaos. This is the same program which the oligarchs in some Ancient Greek cities swore to implement when they were taking office: 'I will be an enemy of the people and in this Council I will do as much harm to them as I can' (in Glotz, 1968, 114 and 326, cited in Delsol, 2017).

power, the latter for the ideological reasons of sharing the liberal-left aims of emancipatory transformation of a not-properly-modernised Poland.⁵²

Dictatorship under the banner of liberal democracy might be a small price to pay for retaining power and realising the all-European centralising plans, which in itself do not have much to do with democratic government. Prime minister Tusk boasted that his task must be treated as an experiment on a global scale, a laboratory of dealing with “populists”, that is, rebellious nations which have to learn that they can vote but it does not mean they can freely choose.⁵³

One of the most perceptive commentators of the Polish political scene, after a month of Tusk’s KO government, especially focusing on its attempts to subvert the constitutional prerogatives of the president by just a parliamentary majority vote, observed that

the originality of the construction of a limited state emergency based on an idea to suspend one of the [president’s] prerogatives is in fact a (...) revolutionary idea (...). In the entire modern European history such a case has not been recorded. It means subverting the legal force of one of the crucial constitutional institutions of a country, including courts established by its laws, now proclaimed as “not courts”. It is interesting to observe the consequences of this unprecedented act, in its [Polish] and international dimensions. One has to have crystal clear understanding what happened. Something like this has never happened in any country – not with the Third Reich courts during denazification process, not with the Soviet Union courts, or the satellite states after the fall of communism. Neither in Nuremberg nor in the Hague, nor in any other tribunal, no one would even think, to declare the nazi or the soviet courts as “not courts” and their verdicts as not existing. And in Poland [after 1989] even [the most radical parties] demands to break off the continuity of the state with the [Polish communist state] did not consider Stalinist courts as *per non est*, but only created procedures to invalidate their judgments. The scale of the attack on the

52 One of the most important “modernising” goals of this coalition it is to neutralise the cultural and moral influence of the Catholic Church as well as its historical role in the anti-Communist resistance. That is why the departments of education were given to the most radical neo-Marxist cultural leftists, whose aim is to “modernise” students’ minds. The Church is plagued by its big internal problems. They are not dissimilar to the ones American or the European Churches experience, although they are not as grave in Poland as in other countries, and in addition, the mills of the emancipatory revolution (including many aspects of the most radical forms of the sexual revolution) have so far not led to its collapse as in Ireland. Secularisation in Poland is slower and this also stems from a collective distrust towards any ideological thinking, of which the liberal-left emancipatory ideology, the official ideology of the EU, is a visible example.

53 In the supporting reactions of the liberal leaders of the EU and also of the American Biden administration, including the current ambassador of the US who became a tool of propaganda for the cultural revolution in Poland, the country is treated as an important experiment, in other words a testing ground how far non-democratic means can be applied without social resistance.

rule of law that the Polish state is now facing is, in this sense, a new phenomenon beginning a completely new era on our continent.⁵⁴

The final aim is to destroy the opposition and its status of representing the interests of Poland within the EU, so it will not threaten the neocolonial plans of Germany in Poland within a centralised Europe, which it controls politically and economically. The new pro-centralisation KO government has already decided to slow down, if not altogether stop, investments which were to be a competition to German economy, for instance the cargo port in Świnoujście, the Central Communication Port near Warsaw, which had been planned to be the main passenger and logistical investment in East Central Europe, possibly the nuclear energy plants and armaments contracts signed with Americans and the South Koreans. It also plans to introduce the Euro, a dysfunctional currency, which punishes weaker countries, handicapping their economies.⁵⁵

5.3. Changing paths in American politics

Relations with the United States is another issue. One option is that Americans will give up on Poland and East Central Europe and give Germany and the EU total political as well as economic control over it. If this happens, for reasons having to do with costs, geopolitical overstretching or its internal “civil war”, Americans might be easily betrayed by Germany, which is dreaming about strategic independence and being open to China and eventually Russia, thus the US would lose its most loyal European ally. Today Germany is triumphant, since it thinks that it has more influence in Europe than even a year ago, since despite the perturbations it benefits from the Russo-Ukrainian conflict. Russia might finally accept a negotiation offer from the Franco-German partners, but the spheres of power will have to be redefined according to her wishes. Nothing stands in the way of Germany to subordinate all European states and renew cooperation with Russia.

This is the way Europe will perish under the blows of totalitarian Germany and Russia in the absence of a clear US strategy, of which the most erroneous and constant objective is to support Germany as *primus inter pares* in Europe. Americans seem to support the centralisation of the continent under the German banner, which seems to stabilise Germany and thus the entire continent. But it is doubtful that once Europe is centralised the US will have control over it. And totally ruined Ukraine, which orients itself towards Germany and against Poland, will have to pay the price by being subjected to the economic and political exploitation of Germany. The Ukrainian nation will be a toy in this process, besides the fact that Ukraine will be played against Poland by both Germany and Russia. In order for this not to

54 Rokita, 2024.

55 The issues of nuclear power plants and armament contracts will not be nullified altogether because of a danger of multibillion lawsuits for breaking them.

happen, the United States should resurrect the idea of the Tree Seas Initiative, which would require a massive American investment there, at the moment a very unlikely move.

In the meantime, the American Democratic Party and president Biden are much closer ideologically to the new KO government than to the PiS party. In their eyes, KO politicians are allies in the common cause of globalism, a generic name for a motley of ideologies concerning open borders and immigration, climate policy, abortion support and gender ideology. The new government can be a useful tool for realising this policy in Poland, and this is also in line with the liberal neo-Marxist ideological policy and centralization plan of the EU. Democratic values, which the US administration and the liberal establishment support today all over the world and consider to be the *sine qua non* condition of universal humanity, are much more focused on LGBT+, abortion and gender issues.⁵⁶ The PiS government, professing conservative cultural values and defending sovereignty, seemed to be an oddity to the Western liberal establishment, and a dangerous “populist” one. For them, everyone who is against this cultural neo-Marxist emancipatory revolution, cannot by definition be a democrat and must be neutralised. Even pope Francis considered Catholic Poland, in its cultural, not necessarily confessional, dimension, as a brake to introducing changes in the universal Catholic Church which would match the postulates of the liberal-left global establishment, making the Church a tool of the global revolution, with aims and values contrary to the basics of Catholic theology.⁵⁷

The geopolitical interests of Americans can be equally well served by the KO government, and here its policy towards Ukraine, that is, unconditional support, has not changed at all. Today, for the West and its dominant liberal elites, what is called right-wing populism, that is, the defence of national sovereignty, resistance to opening borders to mass illegal immigration and a preservation of religious and traditional identity not emancipated from all natural relations and authorities, means a danger to be battled endlessly. The belief in our “common Western values”: freedom of the press and speech, the rule of law and reverence for human dignity, once existing in Poland and East Central Europe, are now subject to a severe test and seem

56 It is not a coincidence that the present ambassador of the US to Poland, Mark Brzezinski, has focused among other cultural issues on LGBT+ rights and abortion issues, thus fraternising with the political and cultural liberal elites, which hated the PiS government, and trying to make the impression that LGBT+ people are somehow persecuted. This can of course be defined this way only if you consider the denial of homosexual so-called ‘marriage’ and the adoption of children by them as rights in a universal sense of the term, which is of course nonsense. For these institutions to be introduced, one needs first to redefine the anthropology upon which such rights can be created, which is in itself an imposition, in a sense of a “state religion”. All the rights of such people are otherwise fully respected in Poland, such as cultural, financial rights, rights stemming from mutual human relations etc.

57 The green light for liberal-left media and politicians in Poland to attack John Paul II and Benedict XVI for their theological and moral issues, the latter unsupported by any proof, came first from Vatican (!).

to be for many an expression of naivety.⁵⁸ The same can be said about the Polish attitude towards the West in general, which is characterised by disillusionment and *déjà vu* because of its present monistic ideological self-definition, which resembles too much, even if in a mild form, to the not-so-long-discarded Communist regime.⁵⁹

5.4. *Hidden but constant conflict*

Poland is entering a period of confusion and chaos, since its partners, opponents and enemies try to use undemocratic methods to influence its internal as well as foreign policies. For the last several years, Poland has experienced a permanent hybrid *de facto* war orchestrated by Germany, the aim of which was to overthrow the PiS government. Poland was also an inspiration for rising democratic movements all over Europe, which have had enough of the policies that were bringing them economic crises and increasing, for too many, an ideologically generated poverty. For this purpose of overthrowing the government, the liberal establishment of the EU, helped by the global elites, mobilised all available economic, political, and media resources.

The issue was not a defence of the “rule of law” in Poland against “populism”, the official mantra of the EU bureaucracy, which to the older generation of Poles sounds too similar to the once used phrase, coming from Moscow, “the defence of socialist values” during the “Solidarity” movement in 1980-81. From the beginning of the PiS government in 2015, Brussels decided to get rid of this hated “right-wing, nationalist, conservative government”, and a reason for this was obvious. If the very aim of European bureaucrats and ideologues was centralisation and thus the imposition of one global ideology on all states, then treating sovereignty and independence as a point of reference, which the PiS government stressed, was a scandal. Not only did it block the very aim of centralisation, but together with other states it could become a source of rebellion. Brussels did not hide what it wanted to achieve. All the states of the EU were to submit to gender ideology, with special emphasis put on the ideologically defined rights of LGBT people, open borders and the outrageous climate change policy.⁶⁰

58 The exceptional pro-American positive public attitude in Poland is over and hostile attitudes are already clearly visible across all groups of the Polish society.

59 Cf. Bryk, 2021b.

60 Here what is especially imminent is the ‘open borders’ policy, and the most dramatic question which the EU, the United States and the West in general must answer is whether it can still show an existential self-preservation instinct to somehow control the global migration of people, which has demolished all the established categories of political rule, such as citizenship, subsidiarity, nation state etc. Western democracy is changing into a useless ritual, in which citizens are being deprived of real alternatives, and must support the liberal establishment policies, otherwise they are delegitimised in many areas of public and increasingly also of private life. This is in fact a clash of the global ideology of ‘humanity’ with nation states within a framework of international law and cooperation. A good overview of this dilemma is given by Amstutz, 2015.

These have been the preeminent goals which were to lead to the destruction of the nation state and to the impoverishment of the European citizens. The EU was playing a game with the PiS government, which this government did not understand, therefore it was not fit to govern. Or if it understood the EU game and did not resist it openly, then it was cowardly, pretending that one could earn something by pretending to govern independently. When the chairman of the PiS party, Jarosław Kaczyński said that ‘we made a grave mistake’, ‘the rule of law’ game was a fraud and the issue was that ‘not these certified to rule in Poland ruled it in fact, and that the EU today is in a state of complete degeneration’, he might have been right.⁶¹ But such statements sound like crying over spilled milk. The PiS government managed to veto the COVID money given on condition that “the rule of law” must be observed (which the commissars defined endlessly as not yet achieved without giving any definition what it meant), veto the climate change policy craziness, support the self-government structures in Poland which enacted A Charter of Family Rights and resisted the LGBT indoctrination of children for which the EU gave enormous money, and finally denounce the Istanbul Convention, which imposed gender ideology on all countries.⁶²

All these measures should have been taken not only in the name of sovereignty and the defence of the nation state, but in the name of human freedom including freedom of speech – now under threats due to “hate speech” being punishable by criminal law –, of association, of religion, and finally of parents to bring up their children.⁶³ The new government will be totally subservient to the EU’s aims, since the prime minister plays a role of a comprador envoy to ensure that this will happen. The Polish case and to a certain degree the Hungarian case, with the EU threatening today to destroy Hungary’s economy, shows that Brussels no longer has any

61 As quoted in Stelmach, 2024.

62 Many countries of the EU either rejected or have not ultimately ratified this ideological convention. Recently it was the Czech Senate which refused to ratify it (Górny, 2024).

63 Such a resolution to punish “hate speech” has been passed by the EU Parliament, and the KO government wants to put such a clause in the criminal code mainly to stop the criticism of the LGBT ideology. This ideology constitutes a fascinating example of an alliance of the most oligarchical global corporations and the neo-Marxist cultural liberal-left, the most powerful tool to destroy traditional relations between the sexes with the objective to turn people into an uprooted mass. It has nothing to do with the persecution of such people. Poland has never had any criminalisation of homosexuality since its first independent Criminal Code of 1932, and the LGBT index of discrimination and acts of violence in Poland is one of the lowest in Europe. All examples of alleged discrimination focus on a redefinition of natural marriage, which has never been for all, and the adoption of children, rights which might be extended to all on the condition that the anthropology of marriage is to be changed. All the civil rights of LGBT people are observed in Poland. The issue is in fact a ban on any criticism of gender ideology by means of “hate speech” laws, a form of liberal despotism, of which the major example is the Irish law against “hate speech”. But this is an American as well as all-European problem. For instance, half of German population thinks that it cannot express its opinions on political matters without fear, which today means everything, since cultural Marxism proclaiming the axiom that “the personal is political” is based on unequal power relations in need of emancipation, and it is this axiom which drives progressives of all sorts.

inhibitions in its imperialistic aims, it breaks all norms. It is not only anti-democratic but in many aspects degenerated, desperately inept, economically degrading and demographically dying, with flocks of venal, corrupted bureaucrats. Finally, in many respects it is systemically criminal because, in fact even if not in principle, it is ex-territorial in a judicial sense of the word, as demonstrated by an incessant string of covered-up corruption cases.⁶⁴

6. Conclusions

It seems that as for now, Poland has lost its “window of opportunity”. It has been unable to change the geopolitical game by convincing the US to send masses of armaments to Ukraine to let its army to break out of the trap of ‘enough to survive, too little to win’, gain initiative and effectively put Russia on the defensive. Immediately extending unprecedented help to the millions of the Ukrainian refugees with all the social benefits of the Polish citizens and sending huge amounts of armaments, it was naïve and unaware of how quickly Ukrainian oligarchical elites would take a vassal position vis-à-vis Germany, which was playing its own game. Finally, a large part of Polish society became hysterical and subject to a demonization of the PiS government (which committed too many mistakes on their own), delivering power to the representatives of, in many respects, foreign interests. It was tired of endless fights against EU institutions, pushed by the Western partners and bombarded with propaganda by a media controlled from the outside of Poland, and concluded that giving away power to the KO and its leader Donald Tusk would bring peace. The majority of Polish people, politically immature as they might be, decided not to support a course of sovereignty-building regional independence. Poland again will be a playing field of foreign interests without any ability to realise its own ones, a situation reminiscent for many of the 18th century.

64 In this context, one is tempted to quote liberal-left Katherine Barley, a German deputy of the EU Parliament interviewed by the German public radio station Deutschland Funk in 2020. Even though she is, being one of the EU parliament members, “an intellectually challenged person”, she stated that Poland breaks “the rule of law” and thus it is necessary to “starve it financially”. Well, Germans have great experience in such practices. Barley is commonly known as not only being one of the most intellectually limited members of Parliament, but also as a person showing revolutionary zeal in fighting against Polish “fascists”, one of alas many such politicians in the Parliament. One cannot resist the thought that in Germans there must be a certain atavistic urge not only to constantly instruct all the people defined as inferior but to subjugate, kill or starve everyone who does not subject to their will. In the ears of the older generation of Poles, her comment immediately recalled the killing by starvation of a Catholic priest, Father Maksymilian Kolbe, in the Nazi German Auschwitz concentration camp, who was finally killed with a lethal injection. He gave his life in exchange for another prisoner sentenced to death in the camp. For Barley’s statement see e.g. Pankowska, 2020.

6.1. A split rooted in culture and ideology

This part of Polish society, for which an independent Polish state is not a value, supported institutionally by the EU, dominant liberal media networks, NGOs and the present government, place their loyalty in Brussels and Berlin. They treat Poland as a culturally and socially anachronistic remnant of the past, to be transformed according to the new emancipation ideology. Brussels and Berlin are the places of true authority, power and distribution of prestige for them, not the democratically elected government of their own country, let alone the Polish community, with which they do not want to have anything in common. They thus side with EU authorities, which in the alleged name of the rule of law, and the “defence of liberal democracy” punish any sovereign decisions of Poland if those do not accord with their aims. Therefore, this part of the Polish population defends the right of these foreign authorities to interfere and have veto power over anything which the legal authorities of Poland do. For them, the Polish reason of the state in its most fundamental aspects should be defined outside of Poland. They understand Poland, as one of the most perceptive analysts of the contemporary divide summed up, as a region

as a so called small homeland, a geographical –ethnic region with a specific past, not as a political entity, not as a state, but as part of a larger political whole – the European Union, on which they pin their hopes, and which arouses their fascination. They are supporters of modernization understood as a closer and closer inclusion of Poland to the UE, what is supposed to be a guarantee of security, development and prosperity of Poles. Polish culture, Polish ethos are to be reformulated accordingly, so that they can fit into this larger whole, so as to get rid of the elements, which from this point of view have become unnecessary and anachronistic, together with the traditional religiosity.⁶⁵

This outside interference, which this part of the Polish society supports, is mixed with the already mentioned historically grounded prejudice that East Central Europe must be incessantly watched over, otherwise liberal democracy, as defined by Brussels and Berlin, will slide towards bloody nationalism and authoritarianism. This interference constitutes a kind of a moral imperative. In Poland, this attitude was born in the 18th century. After a long period of anarchy and decline, the reforms of the Commonwealth were fiercely resisted by opponents who in the name of “liberty” called on neighbouring autocratic empires to intervene, and this soon destroyed the Republic altogether.⁶⁶

For an equally large part of Polish citizens, the sovereign Polish state, even if limited by EU Treaties, is and should continue to be of paramount value in politics, economy and culture, if Poland does not want to decline into a state exploited by

65 Krasnodebski, 2023b, p. 425.

66 See Butterwick, 2020, an excellent recent study.

foreign interests. They view contemporary Poland as a historical continuation of its earlier forms, a state with its distinctive cultural and political code worth defending, which represents a real contribution to the cultural, political and economic well-being of the European heritage. This heritage, constantly redefined and enriched, also adapting to contemporary challenges and needs, is a value in itself and should be a source of worthy obligations. For this reason, they are sure that there exist

important reasons to strengthen the state decision center, at the expense of professional corporations, self-government, and even against the principle of separation of powers (which even in the countries of the European core never were so divided as to paralyze the state actions). This ethos grows out of a conviction that the nature of man or politics has not basically changed. The European Union does not end political and economic rivalry between the states.⁶⁷

This Polish divide and conflict are visible in different societies of the entire European Union, even though in varying degrees of intensity. But in Poland and East Central Europe, there is the additional gloomy factor that this region has historically been treated as “God’s Playground”, characterised by calamities and a loss of control over one’s fate. For these countries, especially Poland, their own state has a more important, one may even say existential value.⁶⁸ From this perspective, security within the EU seems to many people to be precarious, since in some respects this project resembles dangers well-known from history. We may thus say that today in Poland there is

an ongoing dispute between these two ethos, influenced by various processes, which take place in all of Europe. The future will show, how it will be resolved. One thing is certain: this will decide the fate of Poland.⁶⁹

We may thus say that Polish society has grown up. Today, interests, obligations, loyalties and conflicts are much more visible, and the mindless enthusiasm of the first years after joining the EU has changed into a much more realistic attitude, although Polish society has become deeply divided, possibly permanently. The main division concerns the attitude towards a separate, independent nation state and whether such a state is a prerequisite for escaping a trap of the so-called “average development” (middle-income trap), the logic of which, that is, the centre-periphery model, is dictated by the strongest in the EU. Poles have mentally escaped the trap of average development, they expect something more than additional allowances for wages, for the unemployed, for children, for loans and for pensions, provided by the

67 Krasnodębski, 2023b, p. 425.

68 The phrase is taken from the title of Davies, 1981.

69 Krasnodębski, 2023b, p. 425.

state or by the EU, for which in the end they must pay anyway with lower-paid jobs, higher prices, inferior education, and exorbitant prices for apartments.⁷⁰

What still unites these two camps is the dominant aim of economic advancement. It may well be that if the EU's internal and geopolitical problems continue to grow at this rate, the conflicts might accelerate in the most unpredictable way. Whether this happens will depend, in fact, on cultural and mental factors, that is, the realisation that the structure of the EU resembles not a truly federal state *à la* American republic but a classical oligarchy using public resources for private gains, and whether this oligarchy will have enough “bread and circuses” to mask this reality. The EU as a whole has practically stopped developing, it has plunged into economic stagnation, and in some areas it is shrinking economically.⁷¹

The reasons for that are manifold: the crazy climate change policy, opening the borders to illegal (!) mass immigration, a recent opening of the EU market to the Ukrainian agricultural products.⁷² The latter move has much less to do with helping a fighting country (which would require transferring this agriculture produce to Africa etc. where it is needed, as it was originally declared), than with destroying European agriculture and helping Ukrainian and European (Dutch, French, German) oligarchs to get more profits. Poland, incidentally, is the main victim of this policy. Finally, there is political correctness, a mild term for a uniform totalitarian thinking, at the very centre of which stands idealistic

70 See remarks made by the chairman of the Warsaw Enterprise Institute Tomasz Wróblewski quoted in Cygan 2024.

71 Still in 2008, the EU economy was larger than that of the US, although even then it was visible that the so-called Lisbon Agenda of 2000, which was going to speed up development in the EU, was just wishful thinking with its idea that in 2010, the GNP per capita in the EU would be higher than in the US. In 2008, the GNP was 16.3 billion dollars in the EU and in the US, 14.8 billion. In 2022, the EU GNP was 16.6, a very insubstantial growth, while the American one was 25.5 billion. The GNP of France had declined by 5%, that of Spain by 14%, that of Italy by 17 %. The GNP of Germany rose by 8.5%, but in 2023 it entered a phase of a deepening, structural recession, and the IMF predicts that in the next years it will be the worst of the developing economies. And *The Economist* called Germany “the sick man of Europe”. It is for this reason that Germany pushes for centralisation with itself at the helm, since it wants to support itself with the economies of other countries, especially those in the Euro-zone, and to neutralise investments which might be competitive to Germany, like the Central Communication Port in Poland or making Poland the major recipient of the German windmills with a blockade to atomic energy plants. Even if the contracts with Americans (Westinghouse) will be honoured on paper, the additional environmental rules of the European Commission might make it difficult to implement them, with Poland paying the costs of these regulations. We do not have to deal with a temporary economic crisis but a stable tendency in the EU, a permacrisis, as the Centre of European Politics named it. Europe is shrinking. Eurostat shows that 8.3% of EU citizens cannot afford a warm meal every second day. The German Statistical Bureau announced that 21% of Germans (17.3 million people) are in danger of poverty or social exclusion. One may of course argue that the data on poverty etc. are not so different from the US, but they are radically different if they are compared with Europe decades ago and until the 1990ies.

72 For someone who remembers Communism it is truly amusing to define ‘the climate’ as a new god and declare the global world rulers as priests of the new cult, who want to decide about every aspect of our life and demand a sacrifice of people’s freedoms and rights in the name of saving the planet.

nihilism.⁷³ But there is no doubt that this is the only region of the world which is not developing economically while its social fabric, let alone its cultural one, with war beyond its borders, has been unravelling for some time. If this awareness is awakened in people, the section of the Polish society which supports full centralisation out of laziness, resignation, or true ideological zeal might change its attitude. A real factor aiding this process might be resistance against the so called, loosely defined “woke” ideology, which right now is being considered by Brussels the “faith” of the Union, to be imposed on all as the official “state religion” followed by all.⁷⁴

In general, we may conclude that with a gradual but nevertheless inescapable loss of sovereignty, which is visible on the horizon, and with a determined plan of Germany since 1991 to use the EU as a non-military tool of its imperial politics, a discussion in Poland must and will finally begin over the pros and cons of our membership in the EU. The so-called “Polexit” might be inevitable unless the present structure of the European Union is radically changed, and the ideological follies of its oligarchical bureaucracy blocked. But this will finally be decided by the next generations of Poles, as well as by all the nations of Europe, who will have to decide

73 I borrow this term from R.R. Reno, who, applying this term to the US, defined an ideology which is applicable to the EU as well. Reno defined it as a drive to educate society ‘to believe that there is no transcendence. Human beings are a bundle of instincts, they’re told, or software in meat hardware, or some other reductive explanation. And yet utopian progressive goals are championed with great conviction and unstinting ardor. It’s hard to square the circle. On the one hand the natural sciences, social sciences, and humanities teach an implicit (and sometimes explicit) nihilism; on the other hand, activists tout revolutionary idealism. All truth is “socially constructed”, but the postmodern mind somehow knows that the rainbow flag represents the best and noblest aspirations, not just for our society, but for the entire world. [This constitutes this] strange combination of idealism and nihilism’. (Reno, 2024).

74 In fact, “woke” ideology, understood in the most general terms of emancipation ideology (climate policy, multiculturalism, hate speech, gender ideology, transhumanism) and the centralisation of the EU go hand in hand and support each other. Emancipation from established relations, bonds of solidarity, love and in general any communal roots, including religion, nation states, family with a disdain of motherhood and fatherhood, history and memory, makes centralisation an easy enterprise and a Darwinian ‘fight of all hyper-individualists against all other hyper-individualists’, carriers of ever-changing genders with constantly fluid identities, with a language of liberal rights as its cover, is a perfect environment for globalist purposes, and other civilizations are ready to take advantage of it, especially China.

whether the Polish state, even within a very extensive network of all European cooperation, is of any value for them.⁷⁵ But as T.S. Eliot put it:

there is no such thing as a Lost Cause because there is no such thing as a Gained Cause. We fight for lost causes because we know that our defeat and dismay may be the preface to our successors' victory, though that victory itself will be temporary; we fight rather to keep something alive than in the expectation that anything will triumph.⁷⁶

75 With this comes a question of culture and identity, something which Abraham Lincoln in the American context called the "mystic chords of memory". The decision is thus in fact existential, cultural, and the threats are not so much military but cultural, as they come from this "mythical", once-dreamed-about "West", which has ceased to be mythical, and its new form shows its imperialistic fangs towards the truly weakest at every level of meaningful human life. With this comes a general question: 'If Europe is one, what unites its Western and Eastern part?' Not in terms of civilisational historical belonging, since for instance Poland has always belonged culturally to the West, in its Roman, not German, version, but today the European West has ceased to be the historical "West", becoming an anti-West. The two parts of the continent are different. We are not a community of fate, since our historical experiences are different. Nearly all the countries between Germany and Russia have had a long period when they did not exist as states. That is why we look differently at a policy of open borders or the centralisation zeal of Brussels bureaucrats. We are not a community of memory. We still remember the German and the Soviet genocidal occupation during the Second World War and the Communist period, which the Western European countries did not experience. Our heroes from the times of the war or the anti-Communist resistance are not heroes for the other half of Europe, in fact in many times they are considered there as anti-heroes. Marxism, in its cultural form as well, for us is not a hope of humanity as for Brussels ideologues, but rather a blind alley. That is why in Eastern Europe we look with suspicion and disdain at all utopian plans of social engineering. Also, we are not a community of values, since many of the values enshrined in Western European elites and treated as universal or European ones are not values for us, and we still believe that this aspect of the EU, which the Treaties leave within the jurisdiction of individual countries, should never be imposed on us, because that would constitute an act of sheer ideological violence, a bitter *déjà vu* of the Communist past. This concerns issues like gender ideology or the role of religion, not so much in confessional terms as in cultural terms. What can unite us, and this was a great project of unity, was a community of plural organisms governed by laws. That is, a Europe of nation states, not a centralised, inefficient and ideologically driven Mammoth wearing a pickelhaube with a rainbow stick on it. See on this a very deep analysis in Spaemann, 2005.

76 Eliot 2014, p. 49.

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CHAPTER 2

MACEDONIAN CONSTITUTIONAL IDENTITY VERSUS “EVER CLOSER UNION” CONCEPT – CHALLENGES, DILEMMAS, AND PERSPECTIVES



TANJA KARAKAMISHEVA-JOVANOVSKA

Abstract

In the past 33 years of Macedonia's independence, the country was involved in many economic, political, and inter-ethnic crises which were produced not only by internal, but also by external forces. Five of them have shaped the 33 years of political games and Macedonian struggles as an independent and sovereign country. From the non-recognition of its sovereignty through ethnic divisions to serious internal interferences by foreign ambassadors and mediators in the work of the domestic political institutions, Macedonia went through many heavy disruptions and challenges in the internal political reality and in the national and constitutional identity.

The first major crisis happened in 1992 when Greece blocked Macedonia's accession to full membership in the United Nations (UN), under its constitutional name Republic of Macedonia.

The second crisis was triggered by the armed conflict in 2001. The public is still waiting for the answer to what kind of conflict it was. Was it a military conflict or a civil conflict with ethnic background? Was it a terrorist attack against a sovereign country and its independent institutions by armed forces which came from Kosovo, or was it a conflict for gaining more human rights, as the armed forces have claimed? The third serious political crisis happened at the end of 2014 and lasted very intensively in the following three years when the then opposition party, and now ruling party, publicly announced a massive scandal with illegal wiretapped conversations of then ruling politicians. The possession of recorded phone audio material by the opposition was announced after the failed meeting between the then leader of the

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opposition, later prime minister of the Macedonian Government, who tried to make the former Prime Minister into forming a technical government. What really made this political game so heated was not just the alleged seriousness of the illegal wire-tapped materials which were in the opposition leader's possession, but also the two parallel discourses which were formed around this issue that have completely polarized the Macedonian society.

In the meantime, the fourth crisis occurred after the opposition took over the government, and after the Prespa Agreement was signed in 2018, which meant compulsory acceptance of the constitutional name change. This was done under very dubious circumstances when charges against MPs and their relatives were dropped so that the government could reach the two-thirds majority in the Parliament needed for the name change. The Prespa Agreement did not only change the country's name, but it also changed the constitutional and national identity and history. The goal of this agreement was not to put an end to the decade-long dispute opposed by Greece on Macedonia, but to make serious changes in the collective identity and the history of the Macedonian people. This Agreement seriously violated the international law, number of international human rights accords, which will be the subject of analysis of this paper.

The fifth crisis happened in 2022 in correlation with the previous Bulgarian veto on the country's EU accession talks. France presented a proposal for the resolution of the dispute between two the countries. The so-called French proposal contained an obligation of Macedonia to change its Constitution again and to acknowledge a Bulgarian minority in the constitutional Preamble as well as in other constitutional provisions. The French proposal was passed by the Bulgarian and Macedonian parliaments. Unfortunately, the truth is that with this French framework, nationalism is enshrined and it renders the country hostage to the whims and impulses of Sofia. Bulgaria wants to change the Macedonian identity, abusing the EU accession process and imposing its own distorted version of history. This version infringes not only Macedonian history, but also the history of the EU, including its anti-fascist roots. Many Western analysts underestimate this issue, without having sufficient background to properly judge what the stakes are. Unfortunately, the "Macedonian question" is as relevant again as it was in 1913.

In the 21st century in the heart of Europe, two EU Member States abuse its position in the Union publicly denying Macedonia's national and constitutional identity, making the acceptance of such denial from the Macedonian people as a condition for the start of negotiations with the EU.

Keywords: politics, democracy, human rights, sovereignty, identity, crisis, international law, Constitution

1. Understanding Macedonian constitutional identity

The Macedonian¹ contemporary constitutional identity is usually analysed from two distinct yet intertwined perspectives: one which considers the development of Macedonia while being part of the former Socialist Federal Republic of Yugoslavia (SFRY), and another which places the emphasis on the period following the Republic of Macedonia's attainment of independence in the early 1990s.

Looking back, the events related with the creation of the Kruševo Republic in 1903 had a serious impact on the overall national and constitutional identity within Macedonia, as did the period after the Second World War², when the Macedonian state reaffirmed its existence in the documents adopted at the Anti-Fascist Assembly of the People's Liberation of Macedonia, in August 1944.³ As part of the SFRY, the legal and political development in Macedonia was largely viewed in close correlation with the Yugoslav federation.⁴

Moreover, it is worth stressing that today's borders of the Republic of Macedonia practically date back to 1946 when the People's Republic of Macedonia became a constituting part of the Federal People's Republic of Yugoslavia. With the outbreak of the Yugoslav state crisis and Macedonia's proclamation of independence, the new setting was accompanied by major changes in the political, economic, and social spheres, altogether reflecting the previously passed constitutional changes. More precisely, the constitutional amendments in 1990 had explicitly proclaimed the right of the Macedonian people to self-determination, including the right to secession from the former Yugoslavia, the adoption of which required a two-thirds majority of the Members of the Parliament. The citizens were given the right to express their opinion in a referendum, the success of which required a simple majority of votes.⁵

In accordance with the new election law, as well as a new law regarding political organisation of the citizens, the first democratic parliamentary elections took place in November 1990, coinciding with the first elections for the municipal councils, altogether involving participation of numerous political parties.⁶ The new Macedonian assembly initiated the adoption of the Declaration for independent and sovereign state of Macedonia in January 1991. Following the Macedonian people's overwhelming support for independence in September (with more than 95 percent voting in favour

1 Stefov, 2018.

2 Available at: <https://vmacedonia.com/history/independent-macedonia/the-republic-of-macedonia-from-a-member-state-of-the-yugoslav-federation-to-a-sovereign-and-independent-state.html> (Accessed: 15 June 2023).

3 See: Brown, 2003. Recent Macedonian history revolves around three historical events, nationally heralded as the “three Ilindens”: the Kruševo Republic created by the Ilinden Uprising on 2 August 1903, the Antifascist Council of National Liberation of Macedonia (2 August 1944), and the referendum for independence (8 September 1991). See: Vankovska, 2012, p. 13.

4 Lijphart, 1968; Lijphart, 1977; Lijphart, 1984; Lijphart, 1999.

5 Duncan, 1997, pp. 226–281.

6 Klimovski, Karakamisheva-Jovanovska and Spasenovski, 2016, pp. 256–321.

of it), the Assembly of the Republic of Macedonia adopted the first constitution of the independent and sovereign Republic of Macedonia in November 1991.⁷

In practice, the new constitution meant the beginning of the national political, economic, and legal struggle, largely conditioned by the neighbouring Greece, but also other neighbours of Macedonia. While the problem that Greece has had with Macedonia primarily relates to the name issue, it has also touched upon the ethnic identity of the Macedonians and the Macedonian language. Accordingly, Macedonia's constitutional name and the national flag (the Vergina Star) represented the main obstacle for the country's membership in the United Nations as an independent and sovereign country.⁸

In fact, in order to stop the recognition of Macedonia under its constitutional name, the Greek state, already a member of the then European Community, pressured other Member States during the adoption of the Lisbon Declaration to side with Athens,⁹ prohibiting any territorial pretensions towards Greece, hostile propaganda, or, in general, the use of the term "Macedonia" by the Republic of Macedonia.¹⁰

Since Macedonia's attainment of independence, Greece has claimed that the word "Macedonia" is part of the Hellenic civilisation and that every use of the word, particularly as an official name of the state, usurps the exclusively Greek culture and tradition by the Macedonians.¹¹

Despite numerous arguments offered by historians, politicians, and international experts, altogether pointing out that Greece has never officially used the word "Macedonia" for any part of its territory until 1988 (when the then-prime minister Georgios Papandreou's government decided to start using it for one of the country's northern

7 Mircev, 2001.

8 Ragazzi, 1992, pp. 1488–1526.

9 The European Council Lisbon, 26–27 June 1992, Documents in the dossier include: Lisbon European Council Reproduced from the Bulletin of the European Communities, No. 6/1992, available at: http://aei.pitt.edu/1420/1/Lisbon_june_1992.pdf (Accessed: 17 June 2023).

10 Kotsovilis, 2005, as well as Shea, 1997, p. 280.

11 In 1988, Greece officially renamed its "Northern Greece" province to "Macedonia". It was also in the 1980s that Greek experts coined the phrase "Macedonia is Greek", which suggested to the Europeans that Greece had territorial ambitions toward the People's Republic of Macedonia. See: Evangelos, 1999, as well as Presidential/governmental decisions: "District of Central and Western Macedonia" and "District of Eastern Macedonia and Thrace" were established with article 1 of the Presidential Decree 268, "Official Gazette of the Greek Republic", 4th of October 1973, Issue A, 268, and "Ministry of Macedonia and Thrace" was named with the Y 704/13.8.1988 Decision of the Prime Minister, "Official Gazette of the Greek Republic", 19th of August 1988, Issue B, 575. "District of Western Macedonia", "District of Central Macedonia" and "District of Eastern Macedonia and Thrace", article 61 of Law 1622/86 and Presidential Decree 51/1987, "Official Gazette of the Greek Republic", 14 July 1986, Issue A, 92 and 6 March 1987, Issue A, 26. "General Secretariat of Macedonia and Thrace" as a subdivision within the Ministry of Interior, article 3 of the Presidential Decree 185/09, "Official Gazette of the Greek Republic", 7 October 2009, Issue A, 213.

regions)¹², the problem with the Republic of Macedonia’s constitutional name has remained on the UN agenda. The fact that until 1988 Greece never officially used the term “Macedonia” confirms in *de jure* terms that the existing dispute with Macedonia has been constructed purposefully by the Greek leadership.¹³

From the very beginning, Macedonia has been subject to political pressures in relation to its territory or, for that matter, anything else linked to the Macedonian aspect. Indeed, in the period from 1992 to 1995, Macedonian authorities pursued several political and legal steps to convince Athens that the young Macedonian state had no territorial pretensions and did not represent a threat to Greece.¹⁴

Having adopted a very rigid position towards the Macedonian state from the very beginning, Greece has been responsible for the Republic of Macedonia’s entire agony.¹⁵ Back in 1993, it was forced to accept the so-called “compromise” solution – a temporary Former Yugoslav Republic of Macedonia (FYRoM) name reference, which

12 The first concessions that Macedonia made regarding Greek (and European Union) demands were articulated in constitutional amendments of January 1992. Amendment I declares that the Republic of Macedonia has no territorial pretensions vis-à-vis any neighbouring state, while Amendment II states that the Republic will not interfere in the sovereign rights of other states or in their internal affairs. The latter is an addendum to the provision from Article 49 that declares that the Republic cares for the status and rights of those persons belonging to the Macedonian people in neighbouring countries, as well as Macedonian expatriates, assists their cultural development, and promotes links with them. These bizarre amendments are not only rare in a comparative constitutional perspective but also ridiculous having in mind the size and the weakness of Macedonia in comparison to the NATO member states. They did not satisfy Greece, however. The next step was compliance with the demand to change the state flag allegedly because it offended this neighbour’s national feelings. Vankovska, 2012, p. 15. On the other hand, in response to Macedonia’s desire to be recognized as a country and as the Republic of Macedonia, Greece renamed its Thessaloniki airport from “Micra” to “Macedonia;” the airport in Kavalla was renamed “Alexander the Great;” and warships were “rebaptized” with ancient Macedonian names. Furthermore, the University of Thessaloniki was renamed to the University of Macedonia, Alexander the Great’s image was plastered onto coins, the star of Vergina (Macedonia’s national flag) was painted on all city buses, and that same symbol then was used to represent Greece’s annexed portion of geographic Macedonia. See: Sinadinovski, 2022.

13 Floudas, 2002.

14 Neophytos, 2007, p. 24. Political analysts are divided on how to interpret Greece’s position. Some, including Americans Janusz Bugajski and David Augustin, criticized Greece for ‘provoking nationalist feeling by aggravating fears over alleged Macedonian expansion,’ instead of contributing to the regional stability as a local superpower by ‘drawing the fragile and non-threatening Macedonians into a closer alliance. William Dunn, another American analyst, believed Greece’s desire for “cultural purity” dictated its position. He stated that the main political parties in Greece based their policies on a ‘myth of continuity with classical antiquity and a notion of exclusive entitlement to symbols, conquerors, kingdoms, and territories of the ancient world.’ Dunn also noted that Greece did not call any part of its territory “Macedonia” until 1988, when Andreas Papandreou’s Greek government changed the name of “Northern Greece” to “Macedonia.” See details in: Pop-Angelov, 2010.

15 The words of President Gligorov regarding the provisional reference were the following: ‘funny reference solely for couple of months...’, available at: <http://eprints.ugd.edu.mk/6307/1/45.%29%29%29%20Precedent.pdf>, p. 14 (Accessed: 13 June 2023).

was, according to the then Foreign Minister Stevo Crvenkovski and President Kiro Gligorov, supposed to last for two months only.¹⁶

However, it remained in use for more than a quarter of a century and under its temporary reference, the Macedonian state gained membership not only in the UN, but in other international organisations, such as the World Bank and the International Monetary Fund as well. Nevertheless, the Greek leadership imposed a trade embargo on Macedonia which lasted until 1995, clearly damaging Macedonian economy due to its dependence on access to Greek ports.¹⁷

Moreover, as argued by prof. Igor Janev, the “compromise” solution, involving a temporary name reference, was in contrast with the international law and it actually represented a legal paradox never seen before in international law.¹⁸

Prof. Janev is also right to note that the forcing of Macedonia to accept the temporary reference FYRoM before its UN membership represents an additional condition that is not foreseen in Article 4, Paragraph 1 of the UN Charter, which foresees general but no additional conditions for membership in the UN.¹⁹ On the other hand, the term “Republic” which stood before the name Macedonia was never taken into consideration, although it clearly denoted a distinction between the Macedonian state, on the one hand, and the region of Macedonia in Greece, on the other.

In 1995, a temporary agreement was signed under the sponsorship of the UN.²⁰ As such, the Interim Accord was supposed to serve as a guarantee that Greek authorities would not block Macedonia’s membership and integration in international

16 Available at: <https://www.euractiv.com/section/enlargement/news/court-blames-greece-for-blocking-macedonia-s-nato-bid/> (Accessed: 13 June 2023).

17 Janev, 1999, p. 159.

18 The following conditions are expressly set forth in Article 4, paragraph 1 of the UN Charter, which provides: ‘Membership in the United Nations is open to all other [i.e., other than the original UN members] peace-loving states which accept the obligations contained in the present Charter and, in the judgment of Organization, are able and willing to carry out these obligations.’ The next paragraph of the article states the procedural rule that ‘[t]he admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.’

19 Available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/MK_950913_Interim%20Accord%20between%20the%20Hellenic%20Republic%20and%20the%20FYROM.pdf (Accessed: 10 July 2023).

20 ‘The name of a country is a name that comes from and is created by the people who created this country and live in it. The state created by the Macedonian people is called the Republic of Macedonia. The Macedonian people will never refer to their country with a name other than the Republic of Macedonia. We can never accept to change something that we’ve used for centuries, a name that has been carried by this state for more than 50 years, unlike the northern Greek province’. See: Skaric, 2000, p. 30. National self-determination is inherent to international law (*ius cogens*), a principle often seen as a moral and legal right that all peoples have, the right to freely determine their political status and freely pursue their economic, social and cultural development. Article 23 of the International Covenant on civil and political rights seems that implicit at least within self-determination lies an acknowledgment that peoples at the maximum may freely pursue their own forms of culture and identity. It would follow that it is for these peoples to determine the content of their culture or identity, including their collective name. See: Reimer, 1995, p. 359.

organisations. However, the whole shortcoming of the Interim Accord lied precisely in this condition; its Article 5 allowed Greece to negotiate with the Republic of Macedonia about its name, which represents direct violation of the right to self-determination.²¹

The same made “compromise” the UN presented in the 1993 Security Council’s Resolutions 817 and 845.²² Although the Security Council concluded that the Republic of Macedonia fulfilled all general criteria and conditions for UN membership, it nonetheless observed that there were discrepancies regarding the country’s name. It is exactly this difference that became a condition for the Republic of Macedonia’s UN membership and an obligation on the country to negotiate about its name, which constituted violation of the Macedonian people’s right to self-determination. With this in mind, the Interim Accord as well as the 2018 Prespa Agreement which

21 The Security Council in its Res. 817 (1993) [2], after affirming that ‘the applicant fulfils the criteria for membership laid down in Article 4 of the Charter of the United Nations’ [3], has nevertheless added that the applicant state shall be ‘provisionally referred to for all purposes within United Nations as ‘the former Yugoslav Republic of Macedonia’, pending settlement of the difference that has arisen over the name of the state’. The second part of the above sentence implies an obligation on the new UN member to negotiate over its name with a neighbouring state (Greece). Both imposed conditions on Macedonia at the moment of its admission (namely: (i) to accept a provisional name for all purposes within the UN and (ii) to negotiate with Greece over its name), defining its UN Membership status, are in sharp violation of Article 2 (1) (“*sovereign equality of Members*”) of UN Charter. Moreover, the provision in SC Res. 817 (1993) that the applicant should negotiate over its name with another state is in violation with Article 2(7) of the UN Charter prohibiting United Nations to intervene in matter(s) of the domestic jurisdiction of states (‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state’). The condition (ii) is also in violation of Article 1(2) of the Charter (the principle of “*equal rights and self-determination of peoples*”). The violations of Articles 1(2), 2(1) and 2(7) of the UN Charter in SC Res.817 (1993) represent serious breaches of the Charter. We note that the UN General Assembly admitted Macedonia to UN membership (GA Res. 47/225 (1993)) [4] on the basis of SC Res.817 (1993) (with the addition conditions therein). The SC Res. 817 (1993), by imposing two additional conditions (obligations) on the applicant state for its admission to UN Membership (after affirming that the applicant meets ‘the criteria for membership laid down in Article 4 of the Charter of the United Nations’) is in severe conflict with the Advisory Opinion of International Court of Justice (ICJ) of May 28, 1948 [5], related to the conditions required for admission of a state to UN membership, and accepted by the General Assembly in its resolution A/RES/197 (III) on December 8, 1948. The opinion of the International Court of Justice was that ‘the conditions stated in paragraph 1 of Article 4 must be regarded not merely as necessary conditions, but also as the conditions which suffice’ (for admission). Furthermore, it stated: ‘Nor it can be argued that the conditions enumerated (in paragraph 1 of Article 4) represent an indispensable minimum, in the sense that political considerations could be superimposed upon them and prevent the admission of an applicant which fulfils them’. See: Janev, 2019, pp. 50–59.

22 Amerikanski profesor po pravo: Dogovorot so Grcija vi e machka vo vrekja [An American Professor of Law: The Agreement with Greece Is a ‘Pig in a Poke’], *Off Net* 28 July 2018 [Online]. Available at: <https://m.off.net.mk/lokalno/razno/dogovorot-so-grcija-vi-e-machka-vo-vrekja> (Accessed: 20 June 2023). See also: Letter to the Editor: Academics Take Issue With Prespa Agreement, *Balkan Insider*, 29 August 2018 [Online]. Available at: <https://www.balkaninsider.com/letter-to-the-editor-academics-take-issue-with-prespa-agreement/> (Accessed: 20 June 2023).

replaced it and saw the country's constitutional name change to the Republic of North Macedonia, were adopted in order to justify a breach of the international law.²³

The issue concerning Greece's opposition to the name of Macedonia should not have been resolved through mediation by the United Nations because the whole issue was about the right to self-identification. According to international law, the Republic of Macedonia and the Macedonian people have the right to self-identify themselves with any name they choose, having in mind the fact that the country has an equal status in the international legal system as any other state.

However, the UN put the Republic of Macedonia in a position to prove its right to self-identification. In June 1995, the International Court of Justice (ICJ) stated that the right to self-determination had an *erga omnes* meaning, even though this was not taken into consideration when drafting the Interim Accord.²⁴ With Article 5 of the interim agreement of 1995 (and in contrast with the UN Charter's understanding of the right to self-determination as a *ius cogens* norm that no one can violate), negotiations concerning Macedonia's right to self-determination was heavily obstructed, which was a solid ground for the agreement's annulment. Indeed, from the present perspective, it makes sense to ask whether the Interim Accord really helped in shading light on the problem that Greece had with Macedonia and whether it actually provided legal basis for its overcoming.

In tackling the above dilemma, we should point out that Article 11 of the Interim Accord explicitly foresaw an obligation for Greece not to oppose Macedonia's membership in international organisations under the interim reference (FYRoM), something that was also foreseen in the UN Security Council Resolution 817.

In fact, when receiving an invitation for NATO membership, the Republic of Macedonia respected this provision and agreed, in the procedure for joining NATO, to be referred to as FYRoM, as foreseen in Article 2 of the Resolution 817. However, despite its obligation, during the April 2008 NATO Summit in Bucharest, Greece

23 Available at: <https://www.icj-cij.org/files/case-related/84/084-19950630-JUD-01-00-EN.pdf> (Accessed: 20 June 2023).

24 In April 2008, at the NATO summit in Bucharest, Greece exercised a veto over Macedonia's NATO membership under the provisional reference, which effectively led to the Judgment of the International Court of Justice in favour of Macedonia, proclaiming that Greece has breached the 1995 Interim Accord. Unfortunately, the judgment had no practical implications on solving the name dispute. A year later, the dispute also transferred to the EU stage. The European Commission recommended the start of accession negotiation noting that 'maintaining good neighbourly relations, including a negotiated and mutually acceptable solution to the name issue, under the auspices of the UN, remains essential.' In December 2009, Greece vetoed the start of Macedonia's EU membership negotiations, available at: <https://www.esiweb.org/index.php?lang=en&id=562> (Accessed: 12 June 2023).

directly stood against the reception of the Republic of Macedonia in NATO, and then in 2009, it also stood against the EU accession of the Republic of Macedonia.²⁵

Because of the related NATO and EU vetoes, Macedonian authorities launched a procedure before the ICJ in late 2008, demanding the Court to establish whether Greece violated its obligations under the Interim Accord.²⁶ Even though the Court ruled that Greece had violated the Agreement, it did not accept the plea from the Republic of Macedonia to order the Greek leadership to end this opposing in the future since the Court found that there was no reason to assume that the country whose behaviour was deemed illegal by the ICJ would continue to behave in the same manner, mostly due to the assumption of good faith from that country. Furthermore, the Court found that ‘this obligation remains in force and the judgement of the Court would have continuous applicability with regard to the future implementation of the Interim Agreement (paragraph 51), i.e. it is assumed that having in mind the decision of the Court, Greece will not oppose our Euro-Atlantic integration in the future (paragraph 168).’

However, despite the belief of the Court, Greece have never changed its approach and continues to violate the international law and show disrespect towards the ICJ’s ruling.²⁷

25 Available at: <https://www.icj-cij.org/files/case-related/142/142-20111205-JUD-01-00-EN.pdf> (accessed: 13 June 2023). Available at: <http://www.mfa.gov.mk/images/stories/Dokumenti/Summary-ICJ-ENG.pdf> (Accessed: 13 June 2023). Available at: <https://www.loc.gov/law/foreign-news/article/greece-international-court-of-justice-judgment-on-blocking-entry-of-the-former-yugoslav-republic-of-macedonia-into-nato/> (Accessed: 13 June 2023).

26 Available at: <http://umdiaspora.org/2019/01/28/on-the-prespa-agreement-and-beyond-by-professor-dr-gordana-siljanovska-davkova/> (Accessed: 15 June 2023).

27 Former president Kiro Gligorov and former foreign minister Blagoj Handziski told “Bosnia Report” that Macedonia is an island of stability in a dangerous neighbourhood, but that continued peace and development are closely linked to integrating Macedonia into Euro-Atlantic structures, especially the EU. Available at: <https://www.rferl.org/a/1341362.html> (Accessed: 14 June 2023). In its short political history, the Republic of Macedonia has been called “a success story” at least twice. Having avoided violent secession and when it welcomed the first UN preventive mission (UN Preventive Deployment Force, UNPREDEP), the country was commended as “a success story” of preventive diplomacy. It proved difficult to maintain peace in the turbulent region, so the violence spilled over from Kosovo and fanned the flames of existing internal contradictions, leading to an outbreak of conflict in 2001. The short-lived inter-ethnic conflict was terminated with the help of international mediation by the USA and the EU. See: Vankovska, 2018 and [Online]. Available at: https://www.researchgate.net/publication/334363857_A_Diplomatic_Fairytale_or_Geopolitics_as_Usual_A_Critical_Perspective_on_the_Agreement_between_Athens_and_Skopje (Accessed: 2 July 2023).

2. The 2001 conflict and the Ohrid Framework Agreement (OFA) – second step of Macedonian constitutional identity change

The first decade following Macedonia's independence was characterized by a rather unique transition, involving a scandalous process of privatization (which created a small but politically powerful network of oligarchs), as well as a range of scandals dominating the country's political scene.

However, different evaluations tended to portray Macedonia an "island of stability,"²⁸ mostly because it was the only nation-state to emerge from the former Yugoslav federation without some sort of a military conflict and/or intervention.²⁹

In early 2001, the notion of an "island of stability" lost its relevance and Macedonia became a new testing ground for experiments of power-sharing. What seems to have remained unanswered is what really happened in Macedonia in 2001.

Was the conflict imported from Kosovo, with Kosovo terrorists having illegally crossed the border in order to destabilize Macedonia? Did the "imported" armed group wish to start "a fight for human rights"? Did Macedonia witness a restricted civic conflict that was supposed to produce a much larger military intervention, or was it an inter-ethnic conflict between the Macedonians and the Albanians? Was it a civil conflict or a conflict that some authors³⁰ described as a war without state of war being declared?³¹

The 2001 conflict was resolved by the EU-US-sponsored OFA. In the background, negotiators presented the OFA as the only possible resolution to the conflict; as the US chief negotiator James Pardew later observed, the agreement provided Macedonia with an opportunity 'to avoid destructive divisions and to develop as a democracy.'³²

Indeed, it is undeniable that the OFA substantially altered the country's institutional landscape in political, legislative, and social terms, having established itself

28 Gligorov, 2006.

29 Vankovska, 2007.

30 Ragaru, 2005.

31 Pardew, 2011, pp. 21–23. Other authors have different views for the 2001 conflict in Macedonia. 'The conflict in Macedonia in 2001 could be seen as a further manifestation of the will to greater autonomy, self-rule and even independence by the ethnic Albanian community. What was unique about that particular moment in time was the confluence of forces that encouraged militant armed struggle. The conflict of 2001 can be seen as an extension of the process of violent breakup of Yugoslavia that began with the brief conflict between the Slovenian National Guard and the Yugoslav Army in 1990. The fighting that eventually broke out in Croatia, Bosnia and Kosovo in the ten years that followed finally spilled over into Macedonia in 2001. The exact moment of the outbreak of violent armed conflict depended upon a number of factors.' For more details see: available at: http://jsis.washington.edu/ellison/file/REECAS%20NW%202012/Seraphinoff_REECASNW.pdf (Accessed: 10 June 2023).

32 Available at: <https://www.idea.int/sites/default/files/publications/democracy-conflict-and-human-security-handbook-volume-1.pdf> (Accessed: 12 June 2023).

as a key political and legal filter in decision-making processes. Its glorification by both domestic and international actors made Macedonia a testing ground, where members of ethnic communities began to enjoy a great portion of their rights based on statistical variables, thus making Macedonia a rare example in constitutional theory where collective rights were recognized on the grounds of a statistical rather than civil basis.³³

Moreover, the creation and consequent elevation of the status of the OFA has developed hand in hand with Macedonia's European integration. During the 2001 crisis a lot of attention was suddenly paid to Macedonia within the context of the EU foreign policy agenda, and by the end to the conflict, Skopje had officially launched its European agenda through the implementation of the Stabilization and Association Agreement with the EU.³⁴

In the view of the Brussels administration, Macedonia was a multicultural and multi-ethnic society whose members had overcome their prior religious and ethnic divisions, so that they could cooperate and work together for a common good. Here, it is likely that the EU used the US experience with the 1995 Dayton Peace Accords, which ended the war in Bosnia and Herzegovina, and having seen the previous mistakes, decided to adopt another approach with the Ohrid Framework Agreement. More precisely, while the Dayton agreement was about separation of the three ethnic communities (Serbs, Croats and Bosnians) territorially and politically, turning Bosnia and Herzegovina into a federal government, the idea behind the OFA was to preserve the unitary character of Macedonia, with the intention of achieving 'inter-ethnic peace by encouraging the two main ethnic communities (the Macedonian and Albanian) to resolve their own problems through a process of integration and institutional bargaining and compromise, both at local and state level.'³⁵

However, the main issue arising from practical application of the OFA relates to whether its purpose has truly fitted within the milieu of the principle of rule of law, an essential aspect and criteria for Macedonia's European integration.

Accordingly, the question to ask is whether the concept of rule of law sometimes takes a backseat in the application of the OFA and whether the OFA negates the so-called Europeanised values that are core to the ideals of the EU. As such, the OFA has several downsides, the most important being about the model of power-sharing it has brought along.³⁶

In fact, there is no similar model in any other institutional design for multi-ethnic states,³⁷ which in return allows for different and contradictory interpretations of its provisions.

33 See: EU Enlargement: The Former Yugoslav Republic of Macedonia. Available at: http://ec.europa.eu/enlargement/candidatecountries/the_former_yugoslav_republic_of_macedonia/relation/index_en.htm (Accessed: 10 June 2023).

34 Vankovska, 2007.

35 Siljanovska Davkova and Nikolovska, 2001; Binningsbø, 2013, p. 16; Daskalovski, 2009.

36 Pettifer, 2001, p. 143.

37 Lijphart, 1977.

More to the point, following the implementation of the OFA, the Macedonian system has resembled a consociational power-sharing model, although it does not fully correspond to Lijphart's consociational democracy model.³⁸

The OFA did not manage to offer an adequate response to the 2001 conflict, but that increased the tensions, with the majority believing that inter-ethnic relations have become worse. Such an impression is largely due to the ethnicisation aspect, meaning the new power-sharing and quota distribution system, which make it unclear whether the OFA transformed the country into a bi-national state rather than a multi-ethnic society.³⁹

While the OFA certainly prevented conflict escalation or conflict re-emergence and managed to resolve some old issues (such as the provision of higher education in Albanian), it nevertheless failed to fundamentally transform the interethnic relations in Macedonia. The changes put forward by the OFA are quite asymmetrical and many Macedonians describe the agreement as a loss for the Macedonian side.

The agreement was widely perceived as a zero-sum game, where one community's gain inevitably signifies a loss for another. In essence, many Macedonians view the OFA as a platform in order to accommodate Albanians in the state, whereas many Albanians consider the agreement as a foundation for building future relations with the Macedonians and with other communities in the country.

One of the main challenges regards the OFA's implementation (the model of inter-ethnic relations) which has been at stake due to the disproportionate political power-sharing model. Another challenge is about the so-called bargaining power and in this context the implementation of the OFA has been entrusted to political actors who often ignore institutions so they can carry out their plans.

38 Today there is almost nothing left of the idea of the "civic approach" articulated in the document. Multi-ethnicity has been sacrificed and replaced by binationality, while the power-sharing arrangement makes democracy look like a pipedream (Vankovska, 2006). Up to now all polls show that the Albanian community is much more in favour of OFA than any other community in Macedonia. This is partly a result of an "albanianisation" process that initially was meant to be in favour of all the citizens of Macedonia. Here below, are some main criticisms that one could find in research papers, media articles and blog posts, and are related to the implementation of Ohrid framework agreement: (a) The implementation of the OFA has damaged the other ethnic minorities, meaning the minorities that are below the "magic number" of 20%. (This is the principle of double majority voting suggested and accepted at the Ohrid Framework Agreement OFA. It is in fact a right to veto, or else known as the *Badinter principle*, basically meaning that laws with a significant impact on ethnic minority communities may not be adopted by a simple majority but require a "double" majority, including a majority among political representatives of the minority). (b) The implementation of the OFA is exclusively an Albanian-oriented process. (c) The process of the implementation of the OFA is quantity-oriented and not quality-oriented. (d) The implementation of the OFA is mostly focused on ensuring equitable representation of Albanians, by that the Secretariat for Implementation of the Framework Agreement (SIOFA) has turned in Agency for Employment of Albanians. (e) The implementation of OFA has forgotten its main concept of civic approach and multiculturalism, and they are replaced by the concept of binationality. (f) The OFA turned out to be all about numbers and percentages. For more details, see: Maliqi and Hani, 2011.

39 Karakamisheva-Jovanovska, 2014; and available at: http://jtl.columbia.edu/wp-content/uploads/sites/4/2017/05/Ruffer_Macedonia-Framework-Agreement-1.pdf (Accessed: 20 June 2023).

A third challenge is that the OFA has not come up with any new instruments that would elevate community interests above the interests of political parties. Because of the supremacy of political parties, every inter-ethnic debate becomes a political issue, making discussions of community interests without party involvement impossible. Moreover, ethnic representation in institutions has often implied party representation, resulting in a fair amount of intra-ethnic discrimination.⁴⁰

In addition to challenges arising from the OFA's implementation, the agreement has also created a knotty link between demographics and language usage, by linking the use of language to 20 percent of the population at the state and local level. While such a link is not innately problematic, it can result in an exceptionally constricted interpretation of language rights capable of causing new tensions; for example, if language rights are withdrawn in a municipality where a community narrowly fails to reach the 20 percent threshold in a census.

The agreement further politicised the population census which had already been highly controversial back in the 1990s and, as some would argue, led to census failure in 2011. Yet, possibly the largest problem is that the OFA is often viewed as a full-fledged solution to interethnic problems in Macedonia. In reality, the agreement only addresses the basic legal and institutional issues; it does not provide for tools to build intercommunal trust and support for the institutions the agreement itself created or transformed.

Nonetheless, the OFA is still perceived as a founding stone in the Macedonian legal system, where it consistently overshadows constitutional and legal norms. This comes as a result of the fact that not only domestic actors, but also the international community continually talk about the implementation of the OFA instead of implementation of the constitution and the rule of law.

However, the OFA is not a legal act; it is a political act which was never ratified by the Macedonian parliament, meaning it is neither part of the legal system nor it can have greater political or legal power than the constitution.

The OFA has led Macedonia to being defined as a state of communities rather than a state of its citizens. If this model is seen as vital and irreplaceable for the survival of the country, then it is necessary to conclude that the country can only prevail on a significantly less than democratic foundation.

In this sense, the OFA has proven to be an excessively flexible compromise agreement that has gone through many “creative” interpretations and readings. Careful observers have no doubt that it is only a transitional solution.

Furthermore, the policy-making process has become non-transparent; it is hard to identify the bearers of accountability for any action or decision. Power remains concentrated in the party leadership, which enables cronyism, corruption, and centralism within the political parties.⁴¹ The parties themselves cease to be mediators

40 Siljanovska-Davkova, 2011, p. 1.

41 Available at: <http://data.consilium.europa.eu/doc/document/ST-15914-2005-REV-1/en/pdf> (Accessed: 19 June 2023).

between the citizens and the power elite, but rather turn into a major mechanism for the articulation of (ethnic, communal) group interests.

3. Continuity of the constitutional identity crisis

In 2005, the EU officially approved the candidate status of the Republic of Macedonia under its temporary reference⁴², after the government agreed to sign and implement the disgraceful OFA, and later also the new Law on territorial reorganization, a controversial law which introduced territorial division of the country based on ethnic lines.

Despite the opposition from the citizens who clearly said “no” to the new territorial division on local referendums, the Government still adopted the new law, thus introducing new ethnic division in the local communities.⁴³

By merging the rural with the urban communities, this law created a completely new ethnic reality in bigger towns, i.e., made them bilingual (Macedonian and Albanian), which, instead of a true European local government decentralisation, which never happened, brought to the country a fortified ethnic composition in most of its western and northern area.⁴⁴

Instead of the state and the government to be interested in Macedonia’s Europeanisation by introducing European standards that will improve the local government,⁴⁵ they kept on putting the focus on the ethnic divisions, thus striving to make one ethnic group (the Albanians) equal with the majority and Macedonians, at the expense of the smaller ethnic groups (Turks, Roma, Serbs, Vlach, etc.), but also at the expense of the majority – the Macedonians. The alleged “fight for more human rights” promoted with the 2001 conflict created tectonic shifts within the country’s system and brought along discrimination against the rights of the other ethnic communities and the majority community, giving benefits only to the Albanian community. Even though Macedonia respected and applied all international conventions for minority rights protection, and even though Macedonia is probably the country with the highest standard of minority rights protection in general, still, a step further was made exclusively for the Albanian community so that their ethnic appetites are satisfied.

The Constitution suffered changes with the introduction of the consensual model of democracy despite the fact that the country does not meet the minimum criteria

42 Ragaru, 2005, pp. 163–204.

43 Gjorgje, 2000.

44 Available at: <https://rm.coe.int/bpp-best-practice-programme-for-local-governments/1680746d97> (Accessed: 10 September 2022).

45 Lijphart, 1968; Lijphart, 1977; Lijphart, 1984; Lijphart, 1999.

as foreseen in the Liphart’s theory for its implementation in our political system (at least three ethnic communities present in the country, none of which is majority).⁴⁶

Macedonia accepted changes to the Constitution aimed at “equitable and adequate representation”⁴⁷ of non-majority communities, as well as granting rights based on the number of population of the community, conditions that are contrary with the European standards for a system of merits and professional and educational qualifications, first of all during employment. A new provision was incorporated in the Macedonian Constitution that granted rights based on the percentage of the total population in the country (at least 20%).

This discrimination against the smaller communities vis-à-vis the Albanian community received its confirmation in 2018, when under the pressure from the Albanian political structures, the controversial Law on the Use of Languages was adopted (i.e., the Law on the Use of the Albanian language).⁴⁸

This law was adopted in a highly problematic procedure and without the signature of the President of the State, which is compulsory before any law is published in the “Official Gazette”.⁴⁹

The main factor in the ongoing political crisis in the country was the permanent partisanship of the system, present since the day the country gained independence. The parties were and remained the main factor during employment in the state and public administration. The parties and the employment based on partisan membership, and not on professional qualifications damaged the system and made it

46 Macedonian Constitution, Amendment VI, 1. Equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life, available at: https://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia-ns_article-constitution-of-the-republic-of-north-macedonia.nspix (Accessed: 11 July 2023).

47 Available at: <https://balkaninsight.com/2018/01/12/opposition-mounts-against-macedonia-s-language-law-01-12-2018/> (Accessed: 2 July 2023).

48 The Law on the Use of Languages is unconstitutional as a whole. It will mean the introduction of a complete bilingualism on the overall territory of the Republic of Macedonia. The law will mean bilingualism in every state authority and body on a central and local level, public institutions and enterprises, natural persons, social and legal entities. The purpose of the Law on the Use of Languages is to bypass the changing of the Constitution of the Republic of Macedonia by which bilingualism on the whole territory of the country would become official, which is being done with the draft law. The Law on the Use of Languages cannot be given a place above the Constitution as the highest legal act in the country. There is no law that can be above the Constitution. Furthermore, bilingualism on the whole territory of the Republic of Macedonia is not a part of the OFA. The OFA is put into the constitutional amendments (from Amendment IV to Amendment XVIII proclaimed by a Decision of the Assembly of the Republic of Macedonia from the 16th of November 200 by which the legislative frame of that agreement is done and finished. Every further reference to the OFA, which is already *ad acta* politically and is not a legal document, does not lead to respecting the law and the principles of the rule of law as the fundamental value of the constitutional order of the Republic of Macedonia. Available at: <http://library.fes.de/pdf-files/bueros/skopje/15211.pdf> (Accessed: 3 September 2022). Available at: <https://www.refworld.org/pd/fid/3de774134.pdf> (Accessed: 2 September 2022). Available at: <https://www.ganintegrity.com/portal/country-profiles/macedonia/> (Accessed: 30 August 2022).

49 Siljanovska-Davkova, 2005, pp. 26–62.

dependant on the decisions of the parties and their leadership, quite often on the decisions of the leaders themselves. Macedonia rightfully gained the epithet “captured state”,⁵⁰ captured by a few political parties who have been coming and going from power in the past decades.

The partisanship and nepotism in the system, the presence of corruption and organised crime within the party leadership continue to be the main characteristics of the Macedonian political system.⁵¹

The criminal privatisation of the state capital in the nineties, together with the inefficient fight against organised crime, corrupted judiciary and public prosecution, dependence of the police from the politics are only some of the problems that still exist within the Macedonian system.⁵²

The parties simply cannot find the strength to democratise themselves. They were and continue to be a Sultan parties which simply refuse to undergo deep, structural and inner-democratic reforms.⁵³

The most significant political crisis in the country took place with the major case of wiretapped conversations of current politicians and other public figures, an affair that was revealed by the former opposition led by today’s prime minister.⁵⁴ Also, before the 2001 conflict, Macedonia faced another wiretapping affair code-named “the Big ear” which was revealed in the Parliament, however, it had much smaller effects than the new wiretapping affair.

By presenting telephone conversations to the public, the former opposition, contrary to the laws in the country, and with direct help from the foreign factor, forced the former prime minister to resign, which led to early elections in the country.

The wiretapped conversations, parallel with the pressure from the international community, forced the former government to make numerous unconstitutional compromises and to agree with the signing of the problematic Przino 1 and Przino 2⁵⁵ agreements, i.e., with the introduction of a special prosecutor’s body (the Special Public Prosecutor’s Office) that will pursue criminal acts originating from the wiretapped conversations, introduction of additional ministers in the “Government for

50 Available at: <https://www.nytimes.com/2015/06/22/world/europe/macedonia-government-is-blamed-for-wiretapping-scandal.html> (Accessed: 10 June 2023).

51 Available at: <https://www.osce.org/odihr/elections/fyrom/235701?download=true> (Accessed: 10 June 2023).

52 Available at: <https://www.aljazeera.com/news/2016/06/macedonia-protest-demonstrators-160604153228127.html> (Accessed: 10 July 2023).

53 Available at: <https://balkaninsight.com/2015/07/27/macedonia-parties-discuss-implementing-crisis-deal/> (Accessed: 20 June 2023).

54 Available at: <https://balkaninsight.com/2017/03/01/macedonian-president-rejects-awarding-pm-mandate-to-opposition-leader-03-01-2017/> (Accessed: 18 June 2023). Available at: <https://www.rferl.org/a/macedonia-democrats-opposition-zaev-prime-minister/28332662.html> (Accessed: 18 June 2023).

55 Available at: <https://www.bbc.com/news/av/world-europe-36440895/protesters-in-macedonia-stage-colourful-revolution> (Accessed: 10 June 2023).

conducting elections,” also known as the Przino Government, it also agreed with the installation of ad-hoc bodies for monitoring (censoring) of the “hostile” media.

The former opposition and today’s government also invented phantoms in the Voters’ List, they suggested impossible census for gaining a parliamentary mandate by Macedonian citizens living abroad, they committed numerous electoral frauds, bribery, paralysed the judiciary and the public prosecution, all in order to get the government.

These events took place parallel with the protests of the so-called Colourful Revolution,⁵⁶ whose activists threw paint on the façades of the institutions of the system and on several memorials, thus expressing their dissatisfaction with the politics of the former government. The bargaining on the system reforms at leaders’ and inter-party meetings outside the state institutions remained to be a burden for the state system, which even further intensified the partisan supremacy over the state institutions.⁵⁷

At the 2016 early parliamentary elections, despite the fact that the former government won the majority of the seats in parliament, after the leader of the winning party returned the mandate to the President of the State for failing to form a government, the opposition, helped by the DUI party from the Albanian bloc, managed to do that and to win the central government.⁵⁸

The events that followed intensified the legal and political crisis in the country. The citizens, revolted by the “Colourful Revolution” protests,⁵⁹ and additionally by the behaviour of the then opposition which announced that they would accept the controversial Tirana platform,⁶⁰ i.e., the introduction of the Albanian language as an official language on the entire territory of the country, gathered for a 70 days-long protest in the streets of Skopje and several major towns throughout Macedonia under the motto “For common Macedonia.” Unfortunately, the peaceful protests were misused by the former opposition in their interest and on 27 April 2017 committed an unconstitutional and illegal “election” of the President of the Assembly, contrary to the Assembly Rulebook.⁶¹

56 Available at: <https://europeanwesternbalkans.com/2017/04/07/ivanov-essence-of-tirana-platform-is-to-change-constitutional-order/> (Accessed: 18 June 2023).

57 Karakamisheva-Jovanovska, 2018.

58 Available at: <https://www.rferl.org/a/north-macedonia-sentences-parliament-invasion/29824558.html> (Accessed: 1 July 2023).

59 Available at: <https://vlada.mk/sites/default/files/dokumenti/spogodba-en.pdf> (Accessed: 10 July 2023).

60 The inherent right of a state to have a name can be derived from the necessity that a juridical person must have a *legal identity*. In absence of such identity, the juridical person, such as a state, could to a large extent lose its capacity to interact with other juridical persons (e.g., conclude agreements, etc.) and independently enter into and conduct its external relations. The name of a state is, thus, an essential element of its juridical personality and of its statehood. See: Janev, 2019, pp. 50–59.

61 Available at: <http://www.ekathimerini.com/resources/article-files/aggliko-1.pdf> (Accessed: 1 July 2023); Sarlas, 2018.

Revolted by the violations of the Constitution and the Rulebook, some of the citizens who protested before the Parliament broke into the Parliament building because of what they called parliamentary lawlessness. Certain individuals misused this situation and tried to physically deal with the MPs who elected the parliament's speaker, and who did that without the sufficient number of votes, without any minutes, literally on the parliament's stairway. Most of these individuals were later sentenced for terrorism and received draconic sentences of 15 years in prison.⁶²

After the illegal election of the president of the Assembly, the procedure for election of the new government took place and soon after that the process of changing the state name.

The change of the name "Republic of Macedonia" to the "Republic of North Macedonia" with the new amendments that foresee both internal and international use, and which came as an ultimatum from the final agreement, are not only contrary to international and national legislation, but also contrary to the good legal practice. There is no other case in Europe or in the world for a neighbouring country or an international organisation to order to another sovereign entity, to another state to change its historic and constitutional name to join certain international organisation.

Additionally, this change confronts with the rule of law as a single most important principle in the work of the international organisations, as well as of the democratic countries. The suggested change of our historic name also violates our right to self-determination as Macedonians, as well as our national dignity and integrity. In the international law, as well as in the European and in the Macedonian law, it is noted that all disputes among the states that concern violation of the obligations for mutual trust and respect, will be resolved before the court or arbitrarily.

Therefore, it is logical to ask, who in the country, why, and based on which international law, allowed the dispute that Greece had with our country to remain trapped in the hands of the mediator Nimitz, i.e., on a level of some biased mediation? Why no judicial dispute was initiated, besides the dispute over the Interim accord?

62 See: The Practitioner's Guide to International Law, 2nd edition, International Law Committee, The Law Society of New South Wales (New South Wales Young Lawyers International Law Committee), available at: <https://www.lawsociety.com.au/sites/default/files/2018-05/NSWYL%20-%20The%20Practitioner%27s%20Guide%20to%20International%20Law%2C%20Second%20Edition-ilovepdf-compressed.pdf> (Accessed: 20 June 2023).

4. The Prespa Agreement concluded between Greece and the “Second Party”⁶³

The presence of *mala fides*, bad intention in the process of concluding international agreement according to the international law always entails the nullification of that agreement. In the legal systems of the European countries, the annulment and the cancellation of any legal act or legal effect is envisaged if that act or action is committed to “bad intention/*mala fides*”. The international documents and laws of the EU and of the UN also provide for a sanction in the event that certain bilateral or international problem are tried to be solved with bad intentions, i.e., through the direct violation of the basic rules and principles of the international law and of the *jus cogens* norms.⁶⁴

Starting from this very important legalistic point of view, Macedonians should seek invalidity of the already signed bilateral agreement, because the content of the agreement is in direct conflict with the *jus cogens* norms that have absolute character and that must not be injured by anyone, especially not by UN and EU representatives.

The annulment of this bilateral agreement should be based by refereeing Vienna Convention on the Law of Treaties, specifically Article 44, paragraph 2 which reads:

A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty except as provided in the following paragraphs or in article.⁶⁰

Under Article 53 of the Vienna Convention, all agreements or treaties that are contrary to the imperative norms of general international law (*jus cogens*) are null and void. If the agreement at the time of its conclusion is contrary to the imperative norms of general international law, according to the Vienna convention, it could be null and void. *Jus cogens* norms are imperative norms that are accepted and recognized by the international community. These are the norms that can't be changed with new treaties norms.

63 In 1953, Sir Hersch Lauterpacht, the ILC's Special Rapporteur, said: 'A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.' According to Lauterpacht, there were certain peremptory norms, otherwise known as *jus cogens* norms, that reflected 'overriding principles of international law' and: '[M]ay be regarded as constituting principles of international public policy (...) expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations which the International Court of Justice is bound to apply.' See: Sue, 2017.

64 Available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>. (Accessed: 20 June 2023).

Referred to in Article 30, paragraph 1 of Vienna Convention, it could be remarked that in defining nullity for violating the imperative norm of the international law, we are taken into consideration Article 103 of the UN Charter:⁶⁵ ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.’

If there is contradiction between the obligations of two or more States, the United Nations must act in accordance with its Charter on the one hand, and in accordance with the obligations arising under any other international agreement only if they are consistent with the Charter of the United Nations on the other hand.

In our case, the bilateral agreement is contrary to the principles and objectives stipulated in the UN Charter. Article 2 of the UN Charter⁶⁶ provides for that the organization and its members, in pursuit of the purposes stated in Article 1, shall act in accordance with the following principles: (1) The Organization is based on the principle of the sovereign equality of all its members. (2) All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

The important element is that in the UN, the obligations are set out in the Charter prevail. International disputes by peaceful means could be solved in such a manner that international peace and security, and justice, are not endangered. ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’

In particular, the bilateral agreement concluded between Greece, and the “Second Party” is contrary to the principle of sovereign equality of all of its States (Article 2, paragraph 1).

The legal equality of the “Second Party” (meaning: the Republic of Macedonia) as sovereign state, a country equal to Greece within the UN is not protected. This bilateral agreement breach Article 2, item 7 of the UN Charter:⁶⁷

Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The bilateral Agreement allows Greece to interfere directly in the internal, sovereign affairs of Macedonia.

65 Available at: <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (Accessed: 20 June 2023).

66 Available at: <http://legal.un.org/repertory/art2.shtml> (Accessed: 10 July 2023).

67 Available at: <https://www.un.org/en/sections/un-charter/un-charter-full-text/> (Accessed: 20 June 2023).

“Second Party” as Macedonia is referred to in the Agreement accepts many obligations, to change all its history, constitutional name, national identity, etc. – obligations that are part of strict internal jurisdiction of the Republic of Macedonia. With this, Greece flagrantly violates the sovereignty of the Republic of Macedonia and internal constitutional legal order of the Republic of Macedonia. This Agreement also violates Article 4, paragraph 1 of the Charter referring to the Macedonian admissibility in the UN having in mind that specific conditions for our membership were applied as a unique precedent.

The Agreement opposes the OSCE Helsinki Final Act⁶⁸ which commits all countries to respecting the sovereign equality and individuality of the states, as well as the rights arising from the sovereignty, including the right of each state to legal equality, territorial integrity, and political independence.

The Act also establishes the obligation of all countries to respect the right of other countries to make their own choices and to develop their own political, social, economic, and cultural systems, as well as the right to make and set their own laws and regulations. The agreement does not respect the right of the Republic of Macedonia to make its own laws and Constitution independently, nor to develop its political, cultural, social, and economic system independently.

This agreement is of a definitive nature, it is radically asymmetrical in terms of obligations, as it creates a number of obligations only for the Macedonians, i.e., to create new Macedonian history, new identity, new features and new present and future of the Macedonian people. The agreement also calls for the protection of the principles and values of the Council of Europe – respect for human rights, development of democracy and dignity – but its content means flagrant harm and the abolition of the fundamental rights of Macedonians, their fundamental right to dignity, to their own cultural and national identity in accordance with the right to self-determination and with international law.

From all of the above it could be concluded that the only way out of this drastic illegal situation is to urgently demand that this agreement be declared null and void. The flagrant violation of the international law and the national Constitution is contrary to the imperative *jus cogens* norms.

68 Available at: <https://www.osce.org/helsinki-final-act?download=true> (Accessed: 20 June 2023).

5. Bulgarian veto for Macedonian EU accession talks – Whether the Balkans return to the route set by the Bucharest Agreement from 1913?

The Bulgarian “state-yes, nation-no” formula was present from the very beginning of Macedonian independence. In these initial years of transition, several assertions regarding Macedonians seemed to be largely shared and characterized by the general understanding on the Macedonian question in Bulgaria which is expressed in the following statement:

Today’s Macedonians are former Bulgarians who had to live separately for a long time because of turbulent historic developments and thus have forgotten their “Bulgarian-ness.” The so-called Macedonian language is simply a dialect of the Bulgarian language. Macedonian identity, consequently, is “artificial” and does not really exist. There is, therefore, no historical and ethnic Macedonian nation.⁶⁹

Since the beginning of the transition, Bulgarian nationalism regarding Macedonia has established itself in “table-folk nationalism” who denied the existence of an independent Macedonian nation. In 2017, Macedonia and Bulgaria signed so-called Friendship Treaty immediately after the Social Democrats came to power. Soon after signing the Treaty, the EU document setting out the EU’s conclusions on starting negotiations with Skopje has been published, after the fulfilment of a long list of Bulgaria’s demands together with the non-recognition of the Macedonian language.⁷⁰

After the decades-long drama with Greece over the name issue, now Bulgaria has set its mind to change the Macedonian route to Brussels via Sofia. Bulgaria wants to change the Macedonian identity, abusing the EU accession process and imposing its own distorted version of history. This version infringes not only Macedonian history, but also the history of the EU, including its anti-fascist roots. Unfortunately, the “Macedonian question” is as relevant again as it was in 1913.

In 21st century in the heart of Europe, two EU member states abuse their positions in the Union, publicly denying Macedonia’s national and constitutional identity,

69 Available at: <http://www.newbalkanpolitics.org.mk/item/Bulgarian-%E2%80%98Macedonian%E2%80%99-Nationalism-in-the-Post-1989-Decade> (Accessed: 20 June 2023).

70 Available at: <https://www.intellinews.com/balkan-blog-is-bulgaria-the-next-serious-hurdle-on-north-macedonia-s-eu-path-182814/> (Accessed: 10 July 2023). The treaty seems to be a Trojan horse for Macedonians as many hidden demands from the Bulgarian side may emerge from it. Under the friendship treaty, Skopje and Sofia formed a mixed commission on historical and educational issues, whose work was suspended by the Macedonian party in December 2019 due to the insurmountable disagreements about national hero Goce Delcev, who fought for Macedonia’s independence during the Ottoman Empire – for Macedonians he was a Macedonian and for Bulgarians he was a Bulgarian.

making the acceptance of such denial from the Macedonian people as a condition for the start of the negotiations with the EU.

Examining the negotiation and membership criteria, it's clear that there are no EU criteria related to changes of the national identity, historical and linguistic features of a nation and of a country. But Macedonia had an obligation to change its constitutional name, under the Greek political pressure, and to make corrections in the Macedonian national identity according to Bulgaria's requirements should the country want to continue its European accession process.

The official statements from the Bulgarian politicians that Macedonia must accept changes in its national history and must accept that the Macedonian language is a dialect of Bulgarian language seriously affect the region and the EU, injecting poison by nationalism and conflicts.⁷¹ Imagine France setting conditions for the Netherlands that the modern Dutch language comes from French, or that Norwegian language was created based on Swedish dialectal speeches. It is impossible to imagine such a thing, because it is unthinkable!

And honestly, we should not worry about the behaviour and statements of the officials in Sofia. They are so obsessed with the Macedonian national question and what it means for them as a state and society, we see that governments are falling because of that “issue”, just like in Greece at the time in the early nineties.

We should be more concerned about the indolent and hypocritical attitude of the European leaders, who, violating all European rules and norms and international law, repeatedly impose anti-civilization conditions on us on our road to Europe. Without pathos and subjectivity, in these three decades of its independence, Macedonia has become a training ground for the violation of international law.

6. Conclusion

Since it gained independence, Macedonia has gone through a number of political, legal and economic crises, and its people went suffered repeatedly, being denied of their national and constitutional identity, name and history. What can be concluded for certain is that all the above-mentioned and explained processes transformed Macedonia into a hostage of the numerous unreasonable policies led by the leaders of the political parties, a hostage to their obsession with foreign ambassadors and the obedience towards them.

71 Bulgaria has sent a memorandum to the other 26 countries insisting that EU documents need to acknowledge that ‘the official language used in today’s Republic of North Macedonia can be only considered as a written regional norm of the Bulgarian language.’ Available at: <https://www.politico.eu/article/bulgaria-north-macedonia-eu-accession-talks-language-dispute/> (Accessed: 10 July 2023).

During the past years, the national parties failed to develop authentic policies in favour of the Macedonian people and other ethnic communities living in Macedonia; instead, their political activities remained fully dependant on the instructions they received from the different centres of power.

The previous national dependence and affiliation with Belgrade as a centre of all developments within the Yugoslav federation was transformed into national obedience and political dependence towards Washington and Brussels. Parties and politicians in Macedonia failed to profile their short-term and long-term policies based on the interests and needs of the Macedonian citizens, which is the first and probably the most negative characteristic of the national system. For this general political and economic dependence and obedience, I do not want to blame the foreign factor but only the national parties, who could not or did not want to become mature political entities who are able to take responsibility for the creation and implementation of the national policies.

In a situation of incompetent and politically powerless political parties, and in the context of an ethnically divided society, the international factor noticed the weaknesses and became a key factor in shaping the politics in Macedonia.

The second characteristic of the Macedonian political system is its openness to different political experiments, most often imposed unconditionally from outside. The model of consensual democracy which came from the Ohrid Framework Agreement, as it was elaborated before, did not correspond with the political and ethnic reality of the country, because in conditions of an apparent majority of 64,17% Macedonians and several minorities, of whom the Albanian minority is the largest, there are not even theoretical assumptions to apply this model of democracy and to make it functional or efficient.

Additionally, the consensual model of democracy was opposed to replace the majority model of democracy after the country had lost in the conflict that was opposed from outside, which was practically seen as another defeat for the majority in the country. If we add to this the scandalous law on the languages that was adopted in 2018, and which gave to the Albanian language the status of second official language on the entire territory of the country contrary to the Constitution, then it is quite safe to say that Macedonia is not moving towards integration, but towards ethnic disintegration and possibly – federalisation.

The third, and possibly most painful characteristic of the Macedonian politics is that practically all problems in the past and today were solved without any respect for international and national law. This was particularly visible when Greece was allowed to dispute our constitutional name and our Macedonian identity. Neighbouring Bulgaria also denies Macedonia's identity and national history. But, instead of resolving all the open issues with respect to international law, Macedonia and the international community allowed these issues to be "solved" by controversial mediations contrary to international law, and with ultimatums that had nothing to do with agreements.

In this chaotic mediation process, the international community plays the leading role because it agreed that the problem Greece had with Macedonia's constitutional name and Bulgaria had with Macedonia's national identity should be “solved” in a highly disputable procedural and material constellation of relations and allowed the disputes to be resolved by the foreign ministers of the two countries, outside their constitutional and legal mandate.

The fourth characteristic is the absence of the rule of the law in the country and the lack of legal security as perceived by the citizens. Macedonia is a country without a rule of law, Macedonia is a country that belongs to the political elite and to the political mafia. In many cases it became obvious that the politics has a higher status than the law and that it determines the judicial decisions and the work of the prosecutors. It is a fact that the judiciary and the prosecution in the country are far from being independent and politically impartial and that in most of the cases, the politics misuses judges and prosecutors so that they make decisions in the interest of the politicians and their business interests. Macedonia is a country with political prisoners, people sentenced for being terrorists although they have not committed any act of terrorism.

Macedonia is far from being a legal state and a state in which the Constitution and the laws are above all, especially above the politicians. The political pressure over the MPs in the Parliament in 2018 led to the non-democratic changes in the Constitution. The wiretapped conversations that contained conversations of MPs and current politicians, although recorded illegally, which means they could not have been used in the court, were used as a tool for direct pressure on the MPs to support constitutional changes. With this political pressure and with the dismissal of charges against some of the MPs, the constitutional changes came to realisation, changing the constitutional name, the Macedonian identity, everything that was Macedonian, contrary to the will of the citizens that was expressed in the referendums in 1991 and in 2018.

The fifth characteristic of the Macedonian system is its economic impotence. With the criminal privatisation of the social capital in the nineties of the last century and with the ongoing growth of the national debt through credits from foreign banks, Macedonia has become an economically unsustainable country, in other words, a country facing bankruptcy. The politics of attracting foreign investments and intensifying infrastructure projects that were emphasised by the previous government were completely annulled by the current government that did not demonstrate any knowledge in the development of macro- and microeconomic policies. Apart from the huge foreign debt, blooming organised crime, the recent major scandal of racketeering, the bribery and regime manners, the new government failed to demonstrate anything else. The Macedonian economy is facing a total collapse.

The political and economic suffering of Macedonians must come to an end. For three decades, the country has suffered from misguided policies characterised by complete dependence from the foreign centres of power, without any autonomous idea or courage to demonstrate vision for improving the quality of life in the country.

Macedonia is a cradle of false elitism, incompetent people in high political positions, some of them misusing their political positions to advance their private or family businesses. National and foreign resources are misused to advance the personal wealth of the politicians, EU IPA funds included, the state suffers from incompetent administration, from people who did not get into their positions on the basis of merit, but due to partisan employment, nepotism and corruption. The country and its people have become victims of the politicians and their arrogance, supremacy and corruptive behaviour.

Macedonia suffers from captured institutions.

Also, Macedonia has a huge number of examples where direct violations against international law went unnoticed by the international community (the problem that Greece had with our constitutional name, the controversial law on languages, the Tirana platform, the Prespa Agreement, and the Treaty with Bulgaria as a Trojan horse).

Macedonia was and still is an experimental ground for the West!

Who wins, how much and how?

This is the question that will have to be answered by the current generations if they seek for a road sign to create a new, authentic Macedonian strategy for the country with preserved national and constitutional identity.

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CHAPTER 3

CONSTITUTIONAL IDENTITY VERSUS “EVER CLOSER UNION” FROM THE PERSPECTIVE OF A CENTRAL-EASTERN EUROPEAN COUNTRY: POLAND



GRZEGORZ PASTUSZKO

Abstract

This article is devoted to one of the most important aspects of Poland's membership in the European Union. Strictly speaking, it aims to answer the question of what the constitutional identity of the Republic of Poland is as a member state in the context of the treaty formula “ever closer union”. The following chapters of the study analyze the following issues: the concept of “ever closer union” and the historical development of the EU, “Ever closer union” and the constitutional identity of the Third Republic of Poland in the pre-accession period, “Ever closer union” and the constitutional identity of the Third Republic of Poland in the post-accession period, “Ever closer union” during the Lisbon Treaty period. The key research conclusion indicates variability, but also differences of opinion, in the perception of the concept of constitutional identity in Polish conditions.

Keywords: Ever closer union, constitutional identity, Poland, European Union

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1. The concept of “ever closer union” and the historical development of the EU

From its inception, the process of European integration was aimed at building a strong and multifaceted community of European states and peoples. Already the founding fathers emphasised the need for efforts in this direction, laying solid foundations for the construction of a new political organism of a unified Europe. The legal expression of this thinking was given for the first time by the formula “ever closer union among the peoples of Europe” contained in the preamble of the 1957 Treaty of Rome, which – by the way – ‘(...) has remained in the EU Treaties ever since, surviving several Treaty amendments and one attempt to remove it and another to replace it with the phrase “federal union”’.¹ It became clear to the European political establishment that the future fate of the continent would be determined by the search for further areas of political consensus and the strengthening of the ties that united them. A consolidating Europe was to discard old habits of international rivalry and replace them with deepening economic, social and political cooperation. It was also to expand, as far as politically possible, its territorial reach and the number of its constituent states.

The assumption made in the first phase of the creation of the Community underpinned the thinking of the European elite and started a long path of evolutionary change. It was obvious to all those involved in the new project that Europe had to develop into an increasingly unified entity, while at the same time taking on the characteristics of a systemic distinction. Jean Monnet’s philosophy of “small steps” in integration and the plan to strengthen cooperation in various fields certainly served this purpose. Interestingly, the concept of the “ever closer union” at this stage of evolution was not accompanied by any concrete visions of the future or ideas as to how the Community should be organised. Its implementation was therefore not linked to the pursuit of a specific goal, but remained focused on the need for continuous development. For the concept meant

(...) that the European Union is defined not by its but by its movement: we do not commit to a federal Europe or to the United States of Europe. We are only committed to getting gradually closer to each other.²

At that time, still, one might think, its essence was ‘subsidiarity, the principle that decisions are made at the lowest appropriate level’³, but above all the widely promoted idea of peace among Europeans.

1 Miller, 2015, no page.

2 De Ruyt, 2018, p. 1.

3 De Ruyt, 2018, p. 1.

Already in the 1970s and 1980s, there was a clear shift in the understanding of the indicated clause, showing everyone that a much deeper meaning could be ascribed to it, related to the construction of a centralised Europe and the creation of a leading centre of power at European level. The proposals made at the time to transform the Community into a federal state were an important influence on this line of thinking. Their appearance in European discourse revealed a strong current of aspiration to enter a new stage of political and constitutional change. Advocates of federalisation, led by Antonio Spinelli, emphasised the benefits of this idea and, at the same time, drew attention to the need to realise such a model of development for a unifying Europe⁴. The idea they put forward was to enact a new European treaty conceived as a new constitution for Europe. With this document, they wanted to bring about a far-reaching political and constitutional consolidation of the Union and thus give the European Union the attributes of a federal state. In doing so, they completely ignored the actual state of social and political relations, including in particular the still pronounced divisions between the individual Member States. It is therefore not surprising that the concept promoted by these circles, which was in fact a negation of the idea of evolutionary integration, was met with dissatisfaction by most national authorities. Spinelli's project, despite the clear approval of a large part of the European elite (as evidenced by the green light given by a European Parliament resolution adopted in 1984), ultimately collapsed as too bold an initiative. This did not, however, spell the end of pro-federalisation activities, nor did it bury the very idea of federalisation. It continued to live on in the minds of European politicians, inspiring and encouraging further efforts to strengthen the integration process and contribute to the introduction of further systemic reforms. As is widely known, these reforms have resulted in successive treaties binding the Union together and tightening the bonds of its constituent states. All of them, with their references to the “ever closer union” clause, had at their bottom the need to realise pro-federation aspirations (Single European Act of 1986: Member States were ‘moved by the will to ... transform relations as a whole among their States into a European Union’; Maastricht Treaty of 1992 – Preamble: ‘Resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity’; The Amsterdam Treaty of 1997 and Nice Treaty of 2001: “ever closer union”: ‘in which decisions are taken as openly as possible and as closely as possible to the citizen’). Therefore, as a result of their adoption, there was a process of seizure of further competences belonging to the nation states, resulting in an automatic expansion of the sphere of authority allowing for the management of the community from the central level. Under the new dynamics, the Union was becoming an increasingly integrated organism, characterised by an increasing influence of the centre on the functioning of the member states. Thus, the organisational form, based in its beginnings on an international agreement between several capitals, was slowly

4 Matusik, 2009, p. 117.

losing its original character and taking on features typical of a state organisation. Its place was being taken, in an evolutionary manner, by a structure which, from a constitutional point of view, could be seen as a creature suspended between a state and a confederation, operating through meetings of ministers and a joint bureaucracy.⁵ It was thus undoubtedly a new developmental stage of the organisation, determined by a full awareness and a strong desire to give the Union a quasi-state format. The concept of the “ever closer union” retained its relevance in ideological terms, but the process of its implementation gained a distinctly different context.

The idea of imposing a rigidly defined constitutional concept on an integrating Europe and adopting a European constitution to this end was put on hold for almost 20 years. Throughout this period, the Community continued to gain an increasingly clear political identity and legal and institutional structure, but this was due in part, step by step, to the modifications to the Treaties. The idea of a comprehensive and profound reform of the system came only at the beginning of the 21st century as a result of the then already prepared enlargement of the EU to include the countries of Central Europe. Under its influence, work began on the famous Treaty establishing a Constitution for Europe, culminating in the presentation of a draft of this act. Once again, the concept of the “ever closer union” was confronted with an attempt to speed up the process of change, and once again the idea of an evolutionary development of the EU that had originally been inscribed in it was defended. For, as is well known, the aforementioned treaty ultimately collapsed as a result of its rejection by referendum by the French and Dutch peoples (Kuzalewska, 2011).

The failure of the proponents of this direction was compensated by the adoption of the last of the treaties of the integrating Union so far – the Treaty of Lisbon. This act, too, contained explicit references to “ever closer union” (Lisbon Treaty of 2009: The Preamble to the Treaty on European Union: ‘resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity’; Article 1 TEU ‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’; The Preamble to the Treaty on the Functioning of the European Union: ‘determined to lay the foundations of an ever closer union among the peoples of Europe (...)’) and created an additional sphere of supranational links and new EU competences. In this sense, it was already part of a permanent and established line. More important than the provisions of the Treaty, however, were the developments that could be observed after the entry into force and during the subsequent period of the Lisbon Treaty. Indeed, this period was full of phenomena that clearly strengthened the European Union and brought with it an increase in the importance of its key institutions, especially the European Commission. The latter could, moreover, be seen as a kind of paradox, if one takes into account the fact that, in the layer of normative declarations, the Lisbon Treaty promised to

5 Kissinger, 2017, p. 93.

elevate the role of the European Parliament in EU decision-making processes and, at the same time, to include national parliaments in these processes.⁶ Undoubtedly, the anti-crisis measures taken centrally to create instruments to facilitate the Union’s passage as a community through the 2009 financial crisis, the 2015 migration crisis or the COVID-19 pandemic crisis of 2020 and 2021; the friction between Brussels and some Member States, especially in the area of the so-called rule of law; or, finally, the geopolitical developments caused by the war in Ukraine starting in 2022 and the resulting geopolitical implications in Europe and the world.

On the other hand, however, it must be acknowledged that the post-Lisbon period was marked by a parallel partial regression in the implementation of the “ever closer union” clause. For it should not escape our notice that it was precisely at this time, i.e. in the second half of the last decade, that the United Kingdom left the EU structures, resulting in the first shrinkage in the history of the European Union of the community of nations and states on which it is based. To the disappointment of many Europeans, the Union proved to be a less forward-looking and promising organisation than it might have seemed. Fears grew that the process of disintegration would extend to other states in the future and thus lead to further decomposition of European structures.

Interestingly and tellingly at the same time, Brexit coincided with increased calls for accelerating the processes of federalisation of the European Union. Both in Brussels and in leading European capitals such as Berlin and Paris, supporters of this project spoke out and began openly arguing for this direction of political and constitutional change.⁷ From there, demands for a revision of the current state of treaty regulation and the adoption of a new treaty grew. And hence the legislative initiative in 2023 to launch work on a new formula for the organisation of the European Union as a supranational federation.

2. “Ever closer union” and the constitutional identity of the Third Republic of Poland in the pre-accession period

Following the collapse of the communist regime: the Polish People’s Republic in 1989, Poland’s integration into the structures of the European Union became one of the greatest aspirations of society and the authorities of the Third Republic. For this reason, from the very beginning, activities were initiated which treated accession as a national priority and which were calculated to realise this direction. The enthusiasm that unleashed these aspirations had its origins in a critical assessment of communism and, at the same time, a positive perception of the European Union.

6 Wójtowicz, 2012, pp. 184–185.

7 Reding, 2012; Scholz, 2022.

Undoubtedly, public opinion and the political elite, discouraged by the economic and social consequences of belonging to the Soviet sphere of influence, saw the Union as an organisation ensuring prosperity and promoting the values that guaranteed the success of Western democracies after the Second World War. For the majority of Poles, the Union was a kind of “promised land”, a “land of everlasting happiness”, in other words: a place from which it was worthwhile to draw all kinds of patterns. Such thinking must have influenced the process of transformation of the state’s political order and thus contributed to the shaping of its new constitutional identity.

Indeed, at the beginning of the 1990s, when the constitutional foundations of Poland’s young democracy were being laid, solutions known in several Western European countries were widely applied. For the legislator, who was faced with the necessity to carry out this task, reaching for democratic standards was quite obvious. Already at that time he was fully aware that, if the Republic of Poland was to join the ranks of the Member States of the European Union in the future – and this was, after all, a great Polish aspiration – the formation of a constitutional system that would meet those standards was a *sine qua non* condition for the success of the efforts undertaken in this field. He was well aware that in the Union’s documents to date, such as the Treaties, but also in the declarations devoted to systemic issues (Declaration on European Identity of 1973, Declaration on the European Union of 1983), the model of liberal democracy was presented as the preferred systemic model of the Member State. This included basic assumptions such as the rule of law, the protection of individual rights, the separation of powers, democratic elections, etc.

It is therefore not surprising that the successive constitutional acts adopted at the beginning of the 1990s (amendments to the 1952 Constitution of the People’s Republic of Poland and two later constitutions: the so-called Small Constitution of 1992 and the Constitution of 1997), aiming at the reform of the state system of the Republic, were within the limits set by the norms commonly recognised in the West. In this respect, the Third Republic of Poland and its legislative system achievements have never raised any major objections. Interestingly, however, the adopted direction of change did not mean using only legal solutions found in other European countries. It should be noted that the Polish legislator, while remaining open to models coming from outside, at the same time reached very widely to the legislation of the People’s Republic of Poland and adapted the legal constructions and institutions shaped within its framework for the use of the new regime. In this way a new constitutional identity of the Polish state was formed, which was a “mixture” of elements of the communist system and Western European systems, especially German and French ones; something which combined values and institutions stemming from the domestic systemic tradition and those derived from the systems of liberal democracies. In this respect, the adopted system of government was particularly distinctive, as it was characterised by clear references to the solutions of the previous era in the shaping of the legal position of the Parliament (especially of its first chamber – the Sejm) and, at the same time, by broad references to German and French models in the way the executive organs were shaped (a strong legal position of the Prime

Minister on the German model, and a significant role of the Head of State on the French model). In its construction, as if in a lens, the remnants of the past and the present times are simultaneously concentrated.⁸

It is characteristic that during the indicated period almost no one in Poland noticed the already visible federalisation tendencies of the EU system and the European elites' understanding of the “ever closer union” clause embedded in this context. The mainstream of public debate focused almost exclusively on the positive aspects of Poland's participation in EU structures and, at the same time, completely marginalised voices pointing to the existence of this phenomenon. These, if they appeared at all, were formulated very rarely, mainly by representatives of groupings operating outside the political mainstream. As a result, there was no serious discussion of the aims behind the introduction of successive treaties, which, although they consolidated the Union on important issues that required consolidation, had aspirations towards the creation of a European state somewhere underneath. There was no consideration of the real problems afflicting the Union, problems that had been the subject of heated debates in Western countries, especially after the Maastricht Treaty came into force. There was thus no recognition of the democratic deficit, with all its dangers, including – or indeed above all – the lack of democratic control by the public over politicians endowed with enormous powers. The absence of the principle of tri-partition of power in the way the institutional architecture of the EU was shaped and the impossibility of meeting the standards that a democratic political system excludes excessive concentration of power and emphasises the necessity of a mechanism of mutual braking and balancing of powers (as it is known, in the EU we are dealing with a system of institutional balance, which is something completely different from tri-partition⁹ was also overlooked. Finally, the associated dangers to the legal status of the individual were not perceived, strictly speaking the fact that the EU institutions operating within such a structured system of government have extensive arbitrary power and thus have broad possibilities to violate the individual's fundamental rights.

It was in this atmosphere that the accession negotiations to bring Poland into the European Union were inaugurated in 1998. Poland was entering them as a solidified, though obviously still very young, democracy, with a fully developed constitutional system and fully formed structures of a modern state. There was full awareness on the part of the authorities and society that accession would mean giving up part of its sovereignty and participating in an organisation subject to constant change. Essentially, however, no one took into account the fact that, in the long term, this could mean Poland becoming a constituent part of a pan-European federation and the consequent need to lose its own statehood. This carefree perception was influenced by the previous experiences of other Member States, the content of the provisions of the treaties already in force at the time, the course and results of the

8 Grzybowski, 2012, p. 130; Kruk, 1998, pp. 28–29.

9 Poboży, 2015, p. 1; A. Moravcsik, 2002, p. 609.

negotiations conducted, and finally the declarations formulated by European politicians. These factors put to sleep any suspicions, giving rise to the conviction that both the constitutional identity of the Republic of Poland and its subjective status as a sovereign state would be fully respected by the EU authorities.

3. “Ever closer union” and the constitutional identity of the Third Republic of Poland in the post-accession period

A lack of reflection on the direction in which the European Union was heading was also characteristic of the period immediately following accession, i.e. after 2004. The enthusiasm prevailing in the country precluded any serious discussion in this regard and eliminated political foresight, even if only based on speculation. The European Union was looked upon as a project allowing gradual but limited integration of the state into international structures. Under no circumstances was the slightest risk of annihilation of statehood within the federal formula to be reckoned with. This view was not even weakened by the fact that, as late as 2003, another treaty strengthening Community structures was adopted – the Treaty of Nice – and in 2004 work began on a treaty incorporating in its name the concept of a European constitution (the Treaty establishing a Constitution for Europe, obviously pushed through without success). Thus, the obvious signals of the direction of the political and constitutional development of the community were ignored. As one might think, the reason for this thinking was the widespread conviction that the process of European integration was limited by impassable, constitutionally defined barriers. These barriers were intended to protect Poland against too far-reaching interference of the European Union institutions in its internal system and thus guarantee subjective participation in European structures. Specifically, these were: the principle of supremacy of the Constitution expressed by Article 8 of the Constitution (this provision states specifically that the Constitution is the supreme law of the Republic of Poland), and the clause in Article 90(1) of this act assuming a limited scope of transfer of competences by the Republic of Poland to the European Union (according to this clause, the Republic of Poland may, on the basis of an international agreement, transfer to an international organisation or international body the competences of organs of state authority in certain matters).

The indicated regulations played a key role in the first ruling of the Polish Constitutional Tribunal of May 11, 2005, which demonstrated clear support for the idea of European integration, but at the same time very clearly defined its permissible legal framework. They were issued as part of the control of compliance with the Constitution of the Republic of Poland of the Accession Treaty of April 16, 2003 (including the act specifying the conditions of accession to the EU and its final act). His main thesis states that

the Polish legislator, realizing the importance of international agreements on the transfer of competences belonging to public authorities “in certain matters” to an international organization or international institution (...), introduces important guarantees against too easy or insufficient justified transfer of competences outside the system of state authorities of the Republic of Poland. These safeguards apply to all cases of transfer of competences to the bodies of the Communities and the European Union.¹⁰

An assessment of the content of the ruling in question leaves no doubt that the judges ruling were fully aware of the dynamic significance of the concept of “ever closer union” and the related further evolution of relations between the European Union and the Member States. At the same time, it shows that these judges had set as their objective the protection of the domestic Constitution and the legal order shaped on its basis. It is, after all, difficult to understand otherwise the concept formulated within this statement of the permissible scope of transfer of national competences to the Union and the indication of the limits of interference of the treaties in the constitutional system of the state. While appreciating such a line of thought, it is difficult to believe that it is the result of an in-depth analysis of the dangers associated with a pro-federalist interpretation of the “ever closer union”. Rather, it should be combined with an instinctive following of similar, indeed anti-federalist, rulings made in the past by the Union Constitutional Court of the Federal Republic of Germany.

The initial enthusiasm was quite quickly disrupted by fears, articulated for the first time in the public space, about too far-reaching interference of the EU institutions in the matters of the political system of the Third Republic. Their emergence was related to the preparation of the Lisbon Treaty in 2007, whose provisions reformed the system of EU institutions and at the same time gave legal force to the Charter of Fundamental Rights. Part of the Polish political class saw in the new solutions a threat to the constitutional identity of the Polish state. For this reason, it led to Poland’s accession to the so-called British Protocol, which – taking the form of declarations included in the annexes to the treaty – was to preserve national legislation as the basis for the protection of the individual and thus limit the direct effectiveness of certain rights contained in the Charter (especially social rights – Title IV of the Charter). By its very nature, the adopted document created a safeguard against undue interference by Union bodies in the sphere of fundamental rights regulated under national legislation. As subsequent experience, in particular the 2017 case of the Polish dispute with the Union over justice reform, has shown. (Osiatyński Archive, 2018), the Protocol failed to fulfil its assigned role as a shield protecting the Polish constitutional order from the temptations of external factors. Neither in the jurisprudence of the Court of Justice of the European Union¹¹ nor in the practice of law application by other EU bodies has its legally binding force been recognised.

¹⁰ Case K 18/04.

¹¹ Case 411/10 and case 493/10; *Obserwator konstytucyjny*, 2012.

4. “Ever closer union” during the Lisbon Treaty period

The scepticism of part of the Polish political class towards an even more far-reaching strengthening of the European Union under the provisions of the Lisbon Treaty was expressed already at the stage of the drafting of this act. For this reason, almost immediately after its ratification by the President, which was carried out not without objections on the part of the ratifying party, a request was submitted to the Constitutional Tribunal for a review of the treaty’s constitutionality. According to the petitioners, the new solutions in several areas led to an excessively strong disruption of the constitutional mechanism of power, thus raising objections from the point of view of the Basic Law. Although the Court in its judgement issued on November 24 in 2010 (Case K 32/09) did not share this position, at the same time it decided to defend and develop the theses already formulated in 2005. His statement included several important elements. First and foremost, he stood firm on the defence of Polish sovereignty, emphasising that

(...) the sovereignty of the Republic and its independence, understood as the distinctiveness of Poland’s state existence within its present borders, under the conditions of membership in the European Union on the principles laid down in the Constitution, imply confirmation of the primacy of the Polish Nation to determine its own fate. The normative expression of this principle is the Constitution, and in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1), in the light of which the sovereignty of the Republic is expressed in the non-transferable competences of the organs of state power, which constitute the constitutional identity of the state. The principle of sovereignty is reflected in the Constitution not only in the provisions of the Preamble. The expression of this principle is the very existence of the Basic Law, as well as the existence of the Republic as a democratic state under the rule of law (...).

Furthermore, he presented for the first time a way of understanding the concept of the constitutional identity of the Republic, saying that it is constituted by the powers covered by the prohibition of transfer, those which reflect the values on which the Constitution is based. In his view,

(...) Constitutional identity is (...) a notion that determines the scope of the exclusion from the competence to delegate of matters belonging (...) to the “hard core”, cardinal to the foundations of the system of a given state (...)

the delegation of which would not be possible on the basis of Article 90 of the Constitution. Regardless of the difficulties associated with establishing a detailed catalog of non-transferable competences, the matters covered by the total ban on transfer include the provisions defining the fundamental principles of the Constitution and the provisions on individual rights defining the identity of the state, including in particular

the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition of transferring constitutional power and competences to create competences (...). In this context, he finally referred to the meaning of Art. 90 of the Constitution. He stated:

(...) the Article 90 of the Constitution cannot be understood in such a way that it exhausts its meaning after a single application upon accession to the European Union. The Constitutional Court has declared as inadmissible to consider that the initial transfer of competences to the European Union as it took place in 2004, has given an open way for further transfers, no longer obeying procedural requirements set out in the Article 90. As Constitutional Court emphasized in its statement, (...) those requirements still apply to future changes in the Treaty on EU, if those changes result in the subsequent transfer of competencies to the European Union. It means in particular, that an international treaty aiming at delegating additional competences to the European Union or to some of its institutions, must not be ratified by means of procedure set for in Article 89 of the Constitution for all international treaties interfering with the matters reserved for statutory regulation, but not involving transfer of states sovereign competences.

The Tribunal's statement protecting the Polish constitutional order coincided with new actions of the European Union, which constituted another element in the process of strengthening its institutions and weakening the institutions of the Member States. It was clear from this that the conservative approach of the Polish authorities would face growing external pressure and the related further attempts to deepen integration in the extreme version of the “ever closer union”. This portended misunderstandings and tensions between Brussels and Warsaw in the future.

The financial and banking crisis of 2009 provided an opportunity to introduce solutions that would expand the limits of the European Union's authority. It was under its influence that the European Union, striving to create mechanisms that would preventively prevent similar situations *pro futuro*, decided to expand the package of instruments for economic supervision of states. Member States. In this way, it was established, among others, European Semester procedure¹² making national financial and economic policy even more dependent on Brussels. This, of course, applied to Poland as a member state, although only to a limited extent. It should be noted that the new regulations provided for the deepest interference of EU institutions in relations with countries belonging to the euro zone.

As a side note, let us note that the newly baked financial mechanisms have become another reason for the Constitutional Tribunal to take a position. In 2013,

12 Dawson, 2015, p. 23.

the Tribunal examined the constitutionality of the Act of 11 May 2012 on the ratification of the decision of the European Council of 25 March 2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to the stabilization mechanism for Member States whose currency is the euro. In his judgment of June 26, 2013.¹³ previous theses regarding the issue of sovereignty and constitutional identity were repeated. They state:

The basis for the Polish state to transfer the powers of Polish state bodies to international organizations are the principle of statehood and the principle of sovereignty. A modern reading of the principle of sovereignty and statehood leads to the conclusion that the implementation of the state's constitutional tasks, in particular tasks related to the protection of human rights, requires opening the Polish legal order to international law. Without such opening, the Polish state would not be able to carry out these tasks.

And further:

The essence of Art. 90 of the Constitution guarantees the meaning of the restrictions contained therein from the point of view of the sovereignty of the Nation and the State. They consist in the fact that the transfer of competences of state authorities is permissible: (1) only to an international organization or international body, (2) only in certain matters and (3) only with the consent of the Parliament or the sovereign acting in the form of a national referendum. The triad of constitutional restrictions mentioned here must be maintained to ensure the compliance of the transfer with the Constitution (...).

And last but not least:

The effect of the transfer of competences is usually a complex system of dependencies between the state, its bodies and the international organization. Therefore, the transfer of competences should always be assessed from the point of view of the principles shaping constitutional identity. The guarantee of maintaining the constitutional identity of the Republic of Poland remains Art. 90 of the Constitution and the limits of the transfer of competences specified therein.

The growing expansion of the EU empire and the tough defense of Poland's constitutional identity finally led to an open conflict between the authorities of the European Union and the authorities of the Republic of Poland in the second half of the last decade. Specifically, the issue of the justice reforms carried out in Poland, which EU decision-makers accused of lack of compliance with the applicable treaties, became the axis of disagreement.¹⁴ In this dispute, the issue of whether the institutions of the European Union are entitled to interfere in the constitutional system

¹³ Case K 33/12.

¹⁴ Kryszkiewicz, 2021, no page.

of the Republic of Poland without explicit support in the provisions of the treaties (the treaties do not allow them to express their opinion on this matter *expressis verbis*) has become crucial in this dispute, relying only on the provisions included in the treaties. axiological norms. At the same time, controversies surrounding the understanding of the concept of the rule of law in the context of legislative solutions established in Poland and the requirements formulated in this respect at the level of EU legislation came to the fore. Considering the actions of the Polish authorities to be in violation of the treaties, the European Union decided to demonstrate force and take a number of different actions to present its position. These included: the treaty procedure on violations of the rule of law, which has been launched several times since 2017, numerous resolutions of the European Parliament, and, finally, rulings of the Court of Justice of the European Union regarding the issue of the independence of the Polish judiciary. The latter, in several cases proclaiming not only the lack of compliance of the reforms undertaken with the treaties, but also the primacy of EU law over the national constitution.¹⁵

In the judgment issued on 14 July 2021 the Constitutional Court has decided upon the admissibility of applying preventive measures by the Court of Justice of the European Union (Case P 7/20). Specifically, he explained whether Article 4(3) provided in the TUE, second sentence, read in conjunction with Article 279 of the TFEU, to the extent that it results – considering regulations of the Polish Constitution – in the obligation of an EU Member State to implement interim measures affecting the operation of the national judicial system. Referring to this issue, he stated unequivocally that

Art. 4 section 3, second sentence of the Treaty on European Union (...) in connection with Art. 279 of the Treaty on the Functioning of the European Union (...) to the extent that the Court of Justice of the European Union imposes *ultra vires* obligations on the Republic of Poland as a Member State of the European Union by issuing interim measures relating to the structure and jurisdiction of Polish courts and the procedure before Polish courts, is inconsistent with Art. 2, art. 7, art. 8 section 1 and art. 90 section 1 in connection with Art. 4 section 1 of the Constitution of the Republic of Poland and in this respect is not covered by the principles of priority and direct application specified in Art. 91 section 1-3 of the Constitution.

In turn, in the judgment of 7 October 2021, the Constitutional Court has challenged the way that the provisions of the Treaty on EU (to be exact: Article 1(1) and (2) in conjunction with Article 4(3) TEU as interpreted by the CJEU, as well as Article 19 in conjunction with Article 2 of the TEU) were interpreted by the Court of Justice of the European Union. Of particular importance was the thesis in which the Tribunal openly referred to the normative meaning of the “ever closer union”

15 Case 619/18; joined Cases: 585/18, 624/18 and 625/18; Case 824/14; Case 791/19, Case 487/19.

clause from the point of view of the functioning of the Polish constitutional order. Its formulation made it possible to answer the question whether

(...) the constantly strengthening relationship which is a field of loyal (sincere) mutual cooperation within the EU may lead to a waiver from the application of the Constitution or to the application of legal provisions contrary to the Constitution.

Here, the Tribunal presented a line already known from previous judgments and took a clear position emphasizing the primacy of the Polish constitution over EU law. He stated that

(...) the norm derived from Art. 1, first and second paragraphs of the TEU in connection with joke. 4 section 3 TEU, which authorizes or obliges the body applying the law to depart from the application of the Constitution of the Republic of Poland or orders the application of legal provisions in a manner inconsistent with the Constitution of the Republic of Poland, raises far-reaching and justified constitutional doubts, and is not confirmed in the text of the treaties subject to review by the Constitutional Tribunal.

As a supplement, it is worth noting that not all institutions of the Polish judiciary have adopted the perspective outlined by the Constitutional Tribunal. Some of them – sharing the point of view of the EU institutions – considered that the decisions of the Court of Justice of the European Union were an expression of the correct understanding of the treaty norms. The differences that emerged here were evidence of a far-reaching crack in the assessment made by Polish legal elites of the previously mentioned justice reforms. An important decision here is the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labor Law and Social Security Chamber adopted on January 23, 2020.¹⁶ In this resolution, some judges of the Supreme Court, citing the existing case law of the Court of Justice of the European Union, took the position that the mechanisms for nominating judges of the Republic of Poland adopted in 2017 were incompatible with EU law. A fragment of the statement was eloquent:

If, however, the Constitution of Poland, in particular Article 179 which provides that judges shall be appointed by the President of the Republic of Poland on application of the National Council for the Judiciary, are found to prevent review of the independence and impartiality of a court adjudicating in a given case, then the Polish Constitution would be in fundamental conflict with Article 47 of the Charter. In the territory of the European Union, independence and impartiality of courts must be real; and their independence and impartiality cannot be uncontestedly decreed

16 Case BSA I-4110-1/20.

by the mere fact of being appointed to the office of a judge by the President of the Republic of Poland.

The dispute presented above clearly revealed differences of opinion in the perception of the relationship between the “ever closer union” clauses and the constitutional identity of the Polish state. At the same time, he clearly criticized the direction of the political changes taking place in the EU and the attempts of the EU institutions that determined it. Against this background, the European Union’s desire to take over the competences of the Republic of Poland that are not directly granted in the treaties and thus disrupt the formula of relations between Warsaw and Brussels in the current state of treaty regulation has become all too visible. The concept of federalization of the European Union, which European elites have been talking about and consistently implementing for a long time, is gaining new dynamics. On the eve of the discussion about subsequent treaty changes that is just beginning, no one can have any doubts about this.

5. Conclusions

The considerations presented above lead to several key conclusions. Firstly, it is quite clear from them that the progressing process of European integration, based on a dynamic interpretation of the “ever closer union” clause, is intended to involve an increasingly broader transfer of national competences to the EU decision-making center and, correlated with this process, increasingly bold restrictions on the power of the Member States, including RP. Secondly, Poland has so far adopted a very assertive position, emphasizing throughout its membership in the European Union a strong attachment to its constitutional identity and thus showing its readiness to defend its domestic constitutional order against external interference. Thirdly, it is currently difficult to predict how far the process of political transformation will go, and where – if at all – the final border separating the sphere of empire of the European Union and the Republic of Poland will be drawn. One can only hope that the observed pressure from EU decision-makers will not turn out to be exaggerated and will not result in any negative consequences. Faced with the dilemma of ‘how much unity Europe needs and how much diversity it can endure’ and at the same time ‘how much diversity Europe must retain to achieve unity’¹⁷, these decision-makers should realize that when implementing pro-federal agenda – regardless of its substantive assessment as a systemic concept for the future of Europe – there is a high risk of “crossing the Rubicon” and, as a result, triggering disintegrating tendencies. If this happened, the Europeans’ dream of implementing an “ever closer union” could

17 Kissinger, 2017, p. 93.

be replaced by the dark vision of a “forever closed union”. And this is certainly not something anyone living in Europe should wish for.

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PART II

THE FUTURE OF
THE ECONOMIC AND
MONETARY UNION

CHAPTER 4

THE FUTURE OF THE EUROPEAN SINGLE MARKET FOR FINANCIAL SERVICES FROM A POLISH PERSPECTIVE*



NATALIA KOHTAMÄKI

Abstract

The single financial market is still *in statu nascendi*, i.e. in the process of being established. Like a litmus test, it reacts to the crises regularly faced by the European Union. There are two main types of turbulence; those taking place within global financial markets (e.g. the 2008–2010 credit crunch), and those generating systemic risks from outside of the financial structures (e.g. the refugee migration crisis of 2015, which was connected to Russia's aggression against Ukraine of 2022, or the pandemic crisis of 2020). Both directly affect the financial sector which is deeply integrated in the EU Member States after 50 years of harmonisation efforts (first banking directive 1977). Although financial integration is generally regarded positively as the main driver of economic development in Member States, it should be borne in mind that the agenda for change is far from complete and that the single financial market will be increasingly challenged by technological revolutions in the sector, in particular the emergence of FinTechs. Member States can find they are a part of the structures of the European executive order (institutional and normative mechanisms) in the financial sector in different ways. This article attempts to provide a brief overview of the single financial market from the perspective of Poland, a Member State which, having joined the European Union in 2004, entered the already relatively well developed institutional structures of the EU financial sector, and had to learn to function effectively from within them.

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1. Introduction

In 2023, The European Union celebrated the 30th anniversary of the entry into force of the Maastricht Treaty and the formation of the single internal market. The single market marked a revolution in the European Union's integration process. It became its fundamental engine and, to this day, within the framework of sectoral integration, is the core of most regulatory processes. By guaranteeing the so-called four freedoms of movement, namely goods, persons, services and capital, the internal market stimulates the economic development of the Member States, promotes intensive trade and, through its accessibility, guarantees the competitiveness of goods and services, including financial services. The importance of the single market in proliferating the integration of Member States has been recognised in the context of the crises of recent years. In the face of the Covid-19 pandemic, the European Commission adopted the Single Market Programme in 2021, which represents a fund of EUR 4.2 billion for the period 2021–2027. This funding is intended, amongst other things, to increase the efficiency of the internal market, backing for consumers and businesses, as well as support for the development of common standards and governance mechanisms within individual market sectors (including the financial services sector).¹

From almost the beginning of economic integration, it was perceived that its intrinsic element should be the assimilation of financial services. The Treaty of Rome establishing the European Economic Community (EEC) in 1957 already contained a provision stating the need for the free movement of capital between the Member States. This need was subsequently confirmed in the Maastricht Treaty in 1992. The single financial market was to become a permanent part of the single internal market. It was understood as a market with free movement of capital and freedom to provide financial services within the Member States. It was assumed that two basic conditions had to be met to bring about such a market. Firstly, that consumers should have free access to products offered by all financial institutions operating within the EU. Secondly, that financial institutions should be free to operate in any EU Member State of their choice on the same basis as national players, i.e. they would not be obliged to have any additional authorisation.²

- 1 See the information of the European Commission, available at: https://commission.europa.eu/funding-tenders/find-funding/eu-funding-programmes/single-market-programme/overview_en (Accessed: 25 January 2024).
- 2 Mikita, 2010, p. 31.

With the successive stages of economic and monetary union, the pursuit of a harmonised economic policy, the introduction of the common euro, and the implementation of a common monetary policy by the European System of Central Banks, it has become clear that the single financial market is an indispensable link in the construction of the Community system both at institutional and legal level. However, this initially provoked strong resistance from the majority of Member States, arising from their conviction that the financial sector is closely linked to the preservation of national sovereignty, which is one of the key elements required to maintain a nation's stability and security. Indeed, economic security is often equated with financial market security, i.e. the stability of the financial market. Financial stability is defined positively as a situation in which the financial system performs its functions properly, or negatively as a situation in which there are no crises and no threats in the form of systemic risk to a particular financial market.³

A typical mechanism for ensuring financial stability is the creation of a so-called financial safety net.⁴ Its main objective is to protect the financial system from destabilisation. It is a structure comprised of institutional elements (a finance ministry, a central bank, a deposit guarantee scheme, financial supervisors) and regulatory elements (legislation, secondary regulations) intended to prevent financial crises (*ex ante* actions) and, when they do occur, actions to overcome the crisis (*ex post* actions). Each country has developed such mechanisms individually.⁵ In the 1980s and 1990s, it was difficult to imagine that economic integration would implicitly force greater financial assimilation to such an extent that structures similar to national financial safety nets would become necessary within the single financial market.⁶

The end of the Cold War and the intensification of integration processes in Europe in the 1990s were part of the broader phenomenon of the transformation of the contemporary international system observed in studies of international law and international relations. This system is multipolar in nature, while retaining certain characteristics from the period of the bi-polar division.⁷ Such features include the tripartism of the system, observed as early as the 1950s by the French demographer Alfred Sauvy. In the trammels of this tripartism, there would be a “First” World of the rich West, a “Second” World of the Eastern Bloc and a so-called “Third” World of the poorest, developing countries.⁸

The dissolution of the Eastern Bloc following the collapse of the USSR did not fully erase the differences between the countries of Western Europe and those of Central and Eastern Europe. Although both are part of the so-called rich “Global

3 Cf. Jurkowska-Zeidler, 2008, p. 166.

4 ‘Safety nets area central pillar of modern financial architectures. By granting liquidity support to a collection of institutions, a safety net can relieve the strains of eligible members in financial distress.’ See Bengui, Bianchi and Coulibaly, 2019, pp. 105–132.

5 Polish example: Stępień, 2017, p. 47.

6 Jurkowska-Zeidler, 2008, p. 217; Rhee, Sumulong and Vallée, 2013, p. 2.

7 Cooper, 2004, p. 20.

8 Sauvy, 1986, pp. 81–83. Also Palieraki, 2023.

North”,⁹ which “absorbed” the communist states of Central and Eastern Europe, old habits, the burden of the still ongoing systemic transformation, as well as separate traditions and experiences are often clearly visible in the processes of European integration. In recent years, various factors have become the subject of numerous tensions and often open disputes, including differences in the understanding of integration processes, differences in the shaping of mechanisms characteristic of a democratic state governed by the rule of law, or finally, the shaping of a state’s position on the international arena within the dynamically evolving complex interdependencies between participants in international relations. Poland and Hungary have often illustrated the example of such a split between the “old” and “new” Member States of the European Union.¹⁰

Despite having a different view of the integration process with respect to financial market integration than that of the so-called “old” Union countries, in the first years after accession, Poland proceeded with great diligence and commitment to the processes of implementing EU directives. This is reflected in its willingness to observe so-called soft law, i.e. various types of recommendations, opinions and guidelines enabling the common and consistent application of the law governing the single financial market. The Polish Financial Supervision Authority (*Komisja Nadzoru Finansowego*, KNF), rarely expresses dissenting opinions, instead adopting soft law instruments that were formulated within the framework of the European System of Financial Supervision.¹¹

Anniversaries, such as the 30th anniversary of the single market, or the soon-to-be 15th anniversary of the creation of the European System of Financial Supervision,¹² encourage us to reflect on the state of financial integration and the place of the “new” Member States, Poland being an example, in the complex processes of institutionalising cooperation in the financial market sector. There is no doubt that the future of the European Union will be closely linked to the phenomenon of strengthening cooperation between the Member States in specific segments of the internal market, and the financial services market, due to its key role in the development processes of national economies.¹³

Such strengthening of cooperation in selected areas, e.g. in the financial sector, means an increasing transfer of powers to the common level, including powers that go beyond the area of coordination or exchange of information, and involve the

9 Cf. Trefzer et al., 2014, pp. 1–15.

10 Mulder, 2021; Ágh, 2016, p. 34.

11 See the information of the KNF, available at: https://www.knf.gov.pl/o_nas/wspolpraca_miedzynarodowa/unia/ESNF/wytyczne_europejskich_urzedow_nadzoru (Accessed: 25 January 2024).

12 See the information of the European Parliament, available at: <https://www.europarl.europa.eu/factsheets/en/sheet/84/european-system-of-financial-supervision-esfs-> (Accessed: 25 January 2024).

13 Weismann, 2016, p. 199; Cf. The information of the CEPS, available at: <https://www.ceps.eu/ceps-task-forces/eu-financial-markets-in-2030/> (Accessed: 25 January 2024).

establishment of institutions at the level of the EU administration with the capacity of intervention, regulation, mediation or control over national administrations. Today's EU administration no longer resembles the one envisaged in the Maastricht Treaty. The initial Treaty model, which assumed that the administration was to have a non-executive character, has changed.¹⁴

With the increase in tasks and expectations of greater efficiency, effectiveness and thus administrative capacity of the institutions active at EU level, it has become apparent that the European integrated administration, anchored after the changes introduced by the Lisbon Treaty explicitly in Article 298 TFEU, has a multi-faceted, complex character.¹⁵ Thus, it can also perform executive functions. This is particularly evident in the financial sector, where the European financial supervisory authorities (ESAs) are actively involved not only in coordinating the development of European law for the three financial market sectors (banking, capital and insurance), but are also an important link in supervising the consistent implementation of that law.

2. Evolution of the European financial market

2.1. The single financial market as a type of international regime in the making

Recalling Robert Cooper's vision, it can be said that mutual openness in integrated structures, the possibility of common institutions applying intervention powers (for example, interference in a crisis situation by European financial supervisory authorities), or the creation of complex information systems are the only ways out for states he describes as post-modern. He sees the multipolar world as one of growing threats, chaos and cyclical crises, which can be averted not by individual states, but by so-called zones of order. By this he means the major powers, which include the United States and China, as well as the European Union. The author recalls Thomas Hobbes's axiom on the consequences of the non-existence of a Leviathan, i.e. an omnipotent, controlling state. Post-modern states lose their full sovereignty, which creates imbalances in the international system and leads to rivalry between various players including non-state players operating across borders (such as large financial institutions, for example). As a consequence, such processes can lead to the emergence of systemic shocks, which individual states, weakened by liberalisation and deregulation processes, are unable to counter on their own.¹⁶

The importance of international norms and institutions has also been pointed out by another American international relations theorist, Stephen Krasner. According to

14 Kowalczyk, 2018, p. 8.

15 Michel, 2015, p. 55.

16 Cooper, 2000, pp. 24–33.

Krasner, a trend characteristic of the Western world is the construction of international regimes, i.e. systems of principles, norms, rules and decision-making procedures around which the expectations of the participants in cooperation are focused. Regimes are thus built by states on a functional basis. They arise from the specific interests of the players involved, and the goals and values they share.¹⁷

International regimes most often operate on the basis of normative legitimacy.¹⁸ That is, their action is legitimised by collectively constructed norms. Such legitimacy, based primarily on legally binding normative acts, can be called hard legitimacy. It is complemented by soft legitimacy, which also involves other non-state players in international relations (so-called stakeholders, such as financial institutions) on a broadly cooperative basis. Their participation justifies the existence of these structures both at the level of axiological legitimacy (shared values) and at the level of technocratic legitimacy, arising from the expertise of representatives of NGOs and non-state entities. This second type of legitimacy is called soft legitimacy, which can be identified with out-put legitimacy.¹⁹ This concept was introduced into academic discussion by the German theorist of international governance and administration systems, Fritz Scharpf. He correctly assumed that within integrated structures it is impossible to seek legitimacy for decision-making processes in a traditional way, i.e. on the basis of democratic elections.²⁰ The rationale for such structures must be their effectiveness expressed in concrete results, for example in providing security in the single financial market.²¹

The single financial market is still in the process of being created (*in statu nascendi*). It is one of the most unique achievements of the integration process initiated by the Franco-German idea of strategically linking European economies in the 1950s. Financial integration in Europe has a special dimension, primarily because of the complexity of cooperation in both regulatory and institutional spheres. A complex institutional architecture has emerged in the last decade or so, following the 2008–2011 financial crisis, coordinating the activities of national financial supervisory institutions and monitoring the activities of financial institutions that are active in all three financial market segments: banking, capital and insurance.²² The institutional architecture has been accompanied by an intensification of regulatory activity by the European Commission, which is making efforts to harmonise financial law in an increasingly substantive manner.

Harmonisation in the case of ongoing efforts since the 1980s is referred to in the literature as synchronisation *sensu largo*. This is a process that includes not only regulatory harmonisation (in the first stage, mainly directives for an increasingly longer time, as well as regulations), which refers to the formation of uniform rules for the

17 Krasner, 1982, p. 187.

18 Faude and Große-Kreul, 2020, pp. 431–439.

19 Parzymies and Symonides, 2012, pp. 69–72.

20 Scharpf, 1997, p. 20.

21 More at Kohtamäki, 2019, p. 152.

22 More at Kohtamäki, 2012, pp. 115–153; Weismann, 2016, pp. 106.

creation of credit institutions and prudential regulations, but also institutional harmonisation, concerning the unification of the institutional form of supervision, analytical harmonisation, related to the unification of the methods of assessing banks, and information harmonisation, regarding the creation of a uniform system of information on the situation of individual financial institutions and selected market segments in the Member States.²³

However, the complexity of the EU financial market is not only expressed by the normative/institutional framework, but also the subjective dimension (the multiplicity and diversity of participants in the single financial market) and the objective dimension (highly developed financial products).²⁴

Economic sciences indicate the high level of volatility of the financial market, which is subject to internationalisation processes more intensively than other sectors of the economy in neo-liberal economies. In practice, this grants the rapid transformation of financial products and services, which is a derivative of trans-sectoral integration and dynamic cross-border integration. Hence, for many years, it has been considered that, especially in the case of the harmonisation of regulations in the integrated structures of the European Union, the law-making bodies regulating the financial market have not kept up with its rapid transformation.²⁵ The breakthrough was the introduction at EU level of a fast-track law-making procedure for financial sector regulation under the so-called Lamfalussy process. It was applied to securities legislation in 2002 and two years later to the banking legislation.²⁶

This is a four-stage law-making process, which assumes that at the initial level, the legislative process for framework directives and regulations follows the procedures set out in the Treaties (the traditional co-decision procedure, triggered by the European Commission's initiative). At the secondary level, directives and regulations of a technical nature (so-called regulatory and implementing technical standards) are drafted. Special expert committees and, since 2011, decentralised agencies (ESAs) that coordinate the supervision of individual segments of the single financial market, are involved in the preparation of such draft legislation. The tertiary level allows the involvement of the supervisory authorities of the Member States within the framework of intergovernmental cooperation (administrative network within the European System of Financial Supervision, at the level of the three supervisory authorities – ESAs). The ESAs, together with the European Commission, jointly coordinate the consistent implementation of financial law and the development of uniform supervisory practices to avoid regulatory and supervisory arbitrage.

23 Nieborak, 2010, p. 53.

24 Cf. Amtenbrink, 2014.

25 Kruszká, 2012, p. 49. The author points out that, especially in the eurozone countries, there has been a growing trend of cross-border integration in the area of interbank operations for many years.

26 Alford, 2006, p. 390.

The quaternary level involves the European Commission's supervision of the correct enforcement of EU law.²⁷

It is worth noting that the financial market is one of the most important sectors of national economies. Turbulence in financial markets has a direct impact on economic stability and therefore on state stability.²⁸ Therefore, it is considered that financial stability is a public good that should be especially protected. As mentioned above, the mechanisms of the so-called financial safety net serve this purpose. Financial markets play a so-called systemic role with regard to the possible transmission of disturbances.²⁹ Their increased integration, especially in such a special case as the European single market, necessitates the creation of a number of normative and institutional supervisory safeguards. Financial markets, including the integrated European market, exhibit some specific features, such as the administrative and legal framework regulating access to that market. In the case of the single financial market, access to the single market is linked to access to the internal market, which is of particular importance to third countries, which thus gain access to the markets of all EU Member States.³⁰

Integrated financial markets bring a number of specific benefits to Member States and third countries which are active in those markets. In this context economists mention, among other things, risk diversification, smooth cross-border capital flows, foreign participation in domestic financial markets, and information flows. Financial integration is linked to deregulation, i.e. the removal of administrative and legal barriers. All participants in an integrated market should have the same rights, i.e. be subject to the same rules.³¹

2.2. Regulatory dimension of financial integration in the EU

The role of integrated financial markets can be seen from the point of view of the so-called “financialisation” of social life, i.e. the penetration of the economic sphere into the real sphere. In neo-liberal economies today, the activities of individuals are focused on getting rich and managing their resources. Thus, the role of the financial sector, which adapts to social changes and technological challenges, is growing.³² Access to financial services is currently expected to be easy, remote and secure. The needs of customers, who primarily expect convenience in accessing financial

27 See Okoń, 2022, pp. 78–80. More also at the European Commission's website, available at: https://finance.ec.europa.eu/regulation-and-supervision/regulatory-process-financial-services_en (Accessed: 25 January 2024).

28 On the role of financial market for economic growth and economic stability see the information of the ECB, available at: <https://www.ecb.europa.eu/press/key/date/2001/html/sp010531.en.html> (Accessed: 25 January 2024).

29 Cf. Remsperger, 2008, pp. 1–7.

30 Cf. Danisman and Tarazi, 2020, p. 1842.

31 Barata et al., 2023, p. 6.

32 Cf. Nieborak, 2017, p. 161.

services, are forcing certain actions on the part of existing financial institutions, but are also changing the financial market in terms of players, as financial services are starting to be offered by entities that did not previously conduct such activity.³³ The European Union has been trying to respond to these challenges for more than thirty years by consistently reshaping its integrated financial market (the second banking directive of 1989³⁴ is conventionally taken as the starting point).³⁵

The turning point was the Financial Services Action Plan, a sort of programme for making the single financial market a reality, announced by the European Commission in 1999.³⁶ It was a policy strategy document that assumed the implementation of individual goals that were to become the next stages of financial market integration. The general objective included four tasks and envisaged the creation of better conditions for the smooth functioning of the single financial market. The three strategic objectives, which included 42 legislative tasks, were (1) the creation of a single wholesale financial market, (2) the creation of an open and secure retail financial services market and (3) the preparation of supervisory regulations and a supervisory system for an integrated European Union financial market. The implementation of the FSAP involved the implementing of a series of directives to homogenise the financial market. This was a crucial stage in the harmonisation of the single financial market, which was completed in the legislative phase in 2004.³⁷

Today's financial markets face various complex challenges, which are associated with the emergence of new financial products and the evolution of entities that are active on the financial market (FinTech). Therefore, while defining the rights and obligations of these entities, the legislator is also setting the framework for its interference. In the case of financial markets, the normative framework is largely harmonised. Micro prudential directives are increasingly detailed in nature and, with minor modifications, are implemented directly into the legal orders of the Member States.³⁸

Until just over twenty years ago, when implementing its provisions on the conduct of business by credit institutions, Directive 2000/12/EC³⁹ allowed Member States to introduce stricter regulations than those that had been directly provided for in the directive itself. In the case of the transposition of this directive into its national legal

33 See EU Digital Finance Platform, available at: <https://digital-finance-platform.ec.europa.eu/eu-fintech-map> (Accessed: 25 January 2024).

34 Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC, OJ 1989 L 386/1.

35 Gruson and Nikowitz, 1988, p. 209.

36 European Commission Communication of 11 May 1999 entitled 'Implementing the framework for financial markets: action plan', COM(1999) 232 final.

37 Pilecka, 2005, p. 25.

38 See the EBA information 'The Basel Framework', available at: <https://www.eba.europa.eu/activities/basel-framework-global-regulatory-standards-banks> (Accessed: 25 January 2024).

39 Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions, OJ 2000 L 126/1.

order, Poland followed the then popular practice of so-called gold plating. This means that, during the transposition phase, a Member State “gold-plates” the directive, i.e. introduces “harsher” solutions than provided for by the directive, for example, by imposing additional burdens on the addressees of the standards. Initially, within the framework of minimum harmonisation, it was assumed that such a phenomenon was an expression of the freedom of the Member States in the processes of creating a single financial market. It had been intended to ensure the preservation of the peculiarities of individual markets, arising from their separate traditions and their diverse development, derived from the dissimilar potentials of these markets.⁴⁰

Over time, the dangers of gold-plated regulation began to be recognised. The 2006 CRD directives (2006/48/EC and 2006/49/EC)⁴¹ already provided for the principle of maximum harmonisation for the single financial market. It implies the need to implement the provisions strictly, namely, without adding more stringent regulations, but also without skirting over the directive’s objectives. In the case of the CRD, however, it was possible to retain the so-called national options, which gave the financial supervisory authorities the ability to choose one of the solutions provided for in the directive and allowed them to tighten national regulations.⁴² Consequently, this led to supervisory and regulatory arbitrage. The CRD Directive was replaced in 2014 by the CRD IV/CRR (Directive 2013/36/EU and Regulation EU 575/2013)⁴³ regulatory package. The package significantly reduced freedom of implementation within the context of prudential regulation. The very choice of the regulation format (CRR) showed a trend towards eliminating national differences in this regard.⁴⁴

The experience of the global financial crisis of 2008–2011 resulted in the formation of a legal and institutional framework related to the establishment of an EU financial market supervisory architecture (ESFS), the adoption of crisis management mechanisms in the financial sector, the inclusion of strengthened supervision of credit rating agencies, the development of specific solutions for investment services and supervision of trading in financial instruments, the introduction of modifications regarding capital adequacy, the application of special solutions for the operation of

40 Kaczor, 2022, p. 83.

41 Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions, OJ 2006 L 177/1; Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions, OJ 2006 L 177/201.

42 See the information of the Polish supervisory authority KNF, available at: https://www.knf.gov.pl/dla_rynku/pakiet_crd4/maksymalna_harmonizacja (Accessed: 25 January 2024).

43 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ 2013 L 176/338; Regulation (EU) 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176/1.

44 Deslandes, Dias and Magnus, 2019, p. 2.

collective investment institutions, the development of new mechanisms regarding payment services (in particular, in the area of so-called “open banking”), as well as the introduction of a new order for information obligations and market abuse.⁴⁵

2.3. Institutional dimension of financial integration in the EU

An in-depth historical analysis of the complex process of financial integration cannot be presented in this brief article. The following sub-section only presents selected milestones in the creation of an integrated financial market, which will allow reference to be made in the third section to Poland’s position in the process of forming this market. The so-called new Member States (from the 2004 accession) should be seen through the perspective of their inclusion in processes that have already been in progress for several decades.⁴⁶ That is, the so-called late-comers had to insert themselves into the existing structures and fit into procedures which, in the context of the financial market, are not always nominal, and can often be informal. At issue in this context is the construction of a so-called system of deliberative institutionalism, which is particularly strong within the European System of Financial Supervision (ESFS) and is based on informal consultations between representatives of national supervisors, representatives of the three European financial supervisory authorities (ESAs), representatives of the European Commission and in many cases, representatives of the private sector.⁴⁷

The ESFS, which became operational in 2011, is complex and can be seen as a type of administrative network. At the macroprudential level, there is the European Systemic Risk Board (ESRB).⁴⁸ Although an independent body, it is organisationally integrated with the European Central Bank (ECB). This body is responsible for identifying systemic risks and addressing the risks associated with them. This is expressed in the development of macroprudential policy guidelines together with the Member States. The ESRB is responsible for the strategic framework for macroprudential policy, implemented, among other things, through warnings and recommendations designed on the basis of observations of systemic risks in the single financial market. The members of the Board’s executive bodies perform their duties impartially and in the interests of the Union as a whole. In principle, therefore, in accordance with EU rules, they do not represent individual Member States, but work for the stability of the entire system.

Three decentralised supervisory agencies coordinate microprudential supervision activities at EU level: the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities

45 Barata et al., 2023, p. 15; Okoń, 2022, p. 77.

46 Wallas, 2023, p. 150.

47 Weismann, 2016, p. 106.

48 Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board, OJ 2010 L 331/1.

and Markets Authority (ESMA).⁴⁹ All three cooperate closely within the aforementioned intergovernmental cooperation with the financial supervisors of the Member States. The cooperation includes both the drafting of European legislation of a binding nature (mainly in the technical area related to the operation of individual market segments), but also the preparation of guidelines, recommendations and opinions, i.e. acts of soft law. The ESAs also develop common supervisory standards and uniform practices together with the national supervisors.⁵⁰

The so-called new Member States, including Poland, show less independence in this regard than Western European countries.⁵¹ This is due to concerns regarding the possible undermining of financial stability if recommendations are not followed. Among other arguments, the literature points to the need to gain more experience in the deliberative structures of the European Union, which, as mentioned earlier, is a unique international regime. The ability to adjust to negotiating mechanisms is crucial in pushing one's agenda in structures of an intergovernmental nature.⁵²

The next step to create structures resembling national networks is to build a so-called banking union. The European Commission intended the banking union to give the banking sector “a more solid foundation” and restore confidence in the single currency.⁵³ The European Central Bank (ECB) formally assumed supervisory responsibilities in November 2014 under the so-called Single Supervisory Mechanism (SSM) for the largest, “significant” financial institutions (the so-called first pillar of the banking union). This group includes 116 banks, the assets of which account for more than 80% of the eurozone banking sector's assets. With respect to these institutions, the ECB has exclusive powers to grant and revoke banking licences, conduct supervisory reviews and on-site inspections, assess the purchase and sale of significant shareholdings in banks, and ensure compliance with EU regulations regarding prudential supervision.⁵⁴

The second pillar of the banking union is the Single Resolution Mechanism (SRM), with the Single Resolution Board (SRB) as its main resolution authority. The mechanism was launched in 2015 to conduct resolution processes with respect to banks facing insolvency (i.e. non-viable credit institutions) so as to preserve financial stability within the EU banking market.⁵⁵

49 See the regulations: for the EBA: No. 1093/2010, OJ 2010 L 331/12; for the EIOPA: No. 1094/2010, OJ 2010 L 331/48; for the ESMA: No. 1095/2010, OJ 2010 L 331/84.

50 Wörner, 2017, p. 138.

51 Busuioc, 2013, p. 87.

52 Saurer, 2011, p. 51.

53 Kohtamäki, 2016, p. 99.

54 Dobrzańska, 2019.

55 See the information of the Council, available at: <https://www.consilium.europa.eu/en/policies/banking-union/> (Accessed: 25 January 2024).

3. The Polish Perspective

Putting the final remarks on the banking sector, which plays a key role in financial integration, into focus, it should be noted that two areas are important with respect to the Polish perspective. Firstly, EU directives must be effectively implemented into national legal order. The future of financial integration should be seen through the lens of further harmonisation of the law. As referred to above, it is currently of an intensified nature, while the proper (namely, also in accordance with the timing requirements) implementation of European law into the national order is crucial for active participation in the single financial market. Secondly, the main focus of financial integration processes will come from cooperation in institutionalised structures, including ESFS primarily. A permanent element of the financial architecture will also be the banking union, which should undergo further modifications in the coming years, including the development of the European deposit insurance scheme (EDIS) (the so-called third pillar).

Polish experts refer to two basic trends in the development of the financial market, focusing on the banking sector. The first is the move to create legal safeguards to ensure support from home countries for subsidiary banks in host countries during a crisis situation. This would allow the host countries to agree to exempt local subsidiary banks from maintaining full capital and liquidity requirements. The second is to complete the banking union precisely in terms of the establishment of the EDIS. Perhaps Poland will become a member of the banking union, becoming subject to its mechanisms in the future.⁵⁶

There have been some delays in Poland's implementation of the financial market directives. Currently the most urgent directive is the one amending the EU rules on administrative cooperation regarding taxation, referred to as Directive DAC7.⁵⁷ The deadline for its implementation passed at the end of 2022. As a result of the delay, there have even been fears that the European Commission will file a complaint with the CJEU over Poland's failure to implement this directive. Additionally, credit, insurance and equalisation tax regulations have not been implemented on time. According to the Polish Ministry of Finance, most of the delays, primarily arising from negligence, should be fixed in 2024.⁵⁸

The status of the Polish banking sector in 2023 and 2024 has been positively assessed by economists, mainly because of the increase in profits compared to 2022. Based on capital adequacy and liquidity ratios, its high stability is noticeable despite the difficult international situation. The banking sector's aggregate net profit at the end of 2023 was PLN 24.3 billion, an increase of PLN 14.4 billion over 2022.

⁵⁶ Bednarski and Polk, 2019, p. 39.

⁵⁷ Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation, OJ 2021 L 104/1.

⁵⁸ See PAP information, available at: <https://biznes.pap.pl/pl/news/pap/info/3564638,polska-jest-opozniona-we-wdrazaniu-6-dyrektyw-finansowych-i-podatkowych--jaka-pierwsza-mf-bierze-dac-7> (Accessed: 22 March 2024).

Additionally, the level of its own funds increased from PLN 214 billion in 2022 to PLN 245 billion in 2023. It was also noted that the level of excess capital in the banking sector over the required supervisory standards increased in 2023. At the same time it should be remembered that the Polish banking sector is one of the smallest in Europe in terms of the ratio of assets to GDP, and therefore holds one of the latter places in the European Union in these indicators.⁵⁹

As for the earlier reflections, it should be said that Poland needs to cooperate more actively within the framework of decentralised agencies coordinating European financial supervision initiatives. This requires good substantive preparation, but also the ability to develop a clear agenda in the implementation of long-term goals. The experience of countries with smaller financial markets shows that they often implement an agenda built *ad hoc*, depending on the changing situation, succumbing to the interests of countries with the largest financial markets.

The process of building a single financial market will continue in the coming years. Financial integration will play a key role in shaping the internal market, especially if Member States face further crises. Therefore, it can be anticipated that further regulatory measures will be taken to increase the efficiency of the single market, including the removal of restrictions on the use of the Treaty freedoms – mainly in the flow of capital and services. The European Union's efforts to increase its competitiveness on global financial markets, which have been operating for many years, only have a chance of being realised if all Member States participate in these processes with equal commitment, regardless of the potential of the individual financial markets.

59 Lusztyń, 2024.

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EUROISATION AND MONETARY POLICY IN BOSNIA AND HERZEGOVINA – SITUATION AND PERSPECTIVES



KANITA IMAMOVIC-CIZMIC

Abstract

The Central Bank of Bosnia and Herzegovina is an independent monetary institution established by the Constitution of Bosnia and Herzegovina as the sole authority for conducting monetary policy at the state level. Its powers and organisational structure are regulated by the Constitution of Bosnia and Herzegovina (Annex 4 of the Dayton Peace Agreement) and the Law on the Central Bank of Bosnia and Herzegovina. In accordance with these acts, the Central Bank functions as a currency board, where the convertible mark is officially tied to the euro (EUR). This paper provides an overview of the regulatory framework for the operation of the Central Bank of Bosnia and Herzegovina, presents the management of foreign reserves and mandatory reserves, and discusses the suitability of the currency board in Bosnia and Herzegovina, which has led to a semi-official euroisation, facilitating the path to EU membership.

Keywords: currency board, euroisation, Central Bank of Bosnia and Herzegovina

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1. Introduction

A currency board is a form of fixed exchange rate that involves complete and automatic linkage of the domestic currency to a foreign currency. The foreign currency serves as an “anchor” for the value of the domestic currency and is often one of the “leading” world currencies with high stability and convertibility. The basic principle of a currency board dictates that the central bank must maintain foreign reserves in a precise proportion to the amount of domestic currency in circulation. This means that the quantity of domestic currency in the economy automatically adjusts to changes in foreign reserves. The introduction of a currency board has several advantages, such as exchange rate stability, reduced inflation, lower foreign exchange risk, increased investor confidence, etc. Economic history shows that countries that have implemented a currency board typically lack experience in conducting independent monetary policy, have underdeveloped financial systems and markets, or have experienced severe economic crisis with the collapse of the monetary system.

Euroisation is a process in which a country officially adopts the euro (EUR) as its legal tender, replacing its own domestic currency. This means that citizens, businesses, and other institutions in the country use the euro for their financial transactions instead of the domestic currency. The decision to euroise can be motivated by a desire for stability, ease of business, or political alignment with the European Union. Euroisation poses certain challenges, and countries intending to pursue euroisation, regardless of the form it takes, must carefully assess all aspects before deciding to adopt the euro. Euroisation usually occurs when a country becomes a member of the eurozone or simply decides to unilaterally adopt the euro as its currency, often for various reasons (e.g., Montenegro, Andorra, Kosovo). Bosnia and Herzegovina (BiH) experiences a partial official euroisation that began indirectly through the introduction of the currency board and the efforts of the monetary authorities to maintain it until BiH achieves EU membership status.

The currency board, based on whose principles monetary policy in BiH is conducted, is established by the provisions of Articles 31 and 32 of the Law on the Central Bank of Bosnia and Herzegovina. These articles specify the official exchange rate for the currency of BiH (convertible mark at 0.511292 euros). In practice, this means that the purchase of convertible marks is conducted at a fixed exchange rate of 1.95583 convertible marks to one euro. For the currency board to function, foreign currency reserves must be sufficient to enable anyone holding convertible marks, including funds in reserve accounts of banks with the Central Bank of Bosnia and Herzegovina and deposits of depositors with the Central Bank, to convert them into the foreign currency. In simpler terms, each issued convertible mark has coverage in foreign currency. In the Bosnian-Herzegovinian scientific and political milieu, there is a debate about the justification of the existence of the currency board. Do the reasons that justified the introduction of the currency board in BiH still hold? Would abandoning the currency board contribute to the economic growth of BiH? The currency board in BiH is sometimes the target of criticism from some economists

who believe that the currency board represents an obstacle to the economic growth of BiH because it has negative implications for the export of the Bosnian-Herzegovinian products. However, the problems of BiH are not of a monetary nature but real, and if the exchange regime in BiH were to change, Bosnian-Herzegovinian exports might not necessarily increase because the Bosnian-Herzegovinian economy is less competitive than countries that produce the same or similar products. Simply put, production costs, for various reasons, are too high, and the use of monetary policy instruments would not have a significant effect. At the same time, questions arise about the advantages of tying the convertible mark to the euro and acquiring EU membership status, i.e., entering the European Monetary Union. In this integration path, the Central Bank of Bosnia and Herzegovina has its role. The Central Bank participates in the work of coordination structures established on the basis of the Decision of the Council of Ministers of Bosnia and Herzegovina on the EU coordination system to monitor the implementation of the contractual obligations stemming from the Stabilisation and Association Agreement (SAA). To answer these questions, this paper presents the legal basis, goals, and tasks of the central bank, an analysis of the quality of management of foreign reserves and mandatory reserves as the only instrument of the monetary policy of the central bank, and presents the views and findings of the European Commission and the International Monetary Fund in the context of the work of the Central Bank of Bosnia and Herzegovina.

2. Central Bank of Bosnia and Herzegovina – legal basis, goals, significance and organisational structure

BiH is a country in transition and development, which has recently acquired the status of candidate for EU membership, with a GDP in 2021 of 39,107 million KM¹, whose index of volume of consumption per inhabitant is significantly lower compared to the countries in the region. GDP per capita in 2021 was 33% of the EU 27 average, while real individual consumption per inhabitant in SKM (purchasing power standard) was 41% of the EU 27 average.² In addition to a small, open economy, BiH is characterised by an extremely complex state structure that has implications for its economic system and market, which is still not unique in a large number of segments.

According to Annex 4 of the Dayton Peace Agreement, which represents the Constitution of Bosnia and Herzegovina, and the decision of the International Court of Arbitration, in the administrative-territorial sense, BiH is composed of two Entities (the Federation of Bosnia and Herzegovina and the Republika Srpska) and the Brčko

1 Agency for Statistics of Bosnia and Herzegovina, 2023.

2 Agency for Statistics of Bosnia and Herzegovina, 2022.

District. The Entity Federation of Bosnia and Herzegovina is divided into 10 cantons, while the Entity Republika Srpska is unitary. This complex state arrangement results in economic federalism, i.e. the distribution of responsibilities between the State of Bosnia and Herzegovina, the two Entities and the Brčko District. Within the Federation of Bosnia and Herzegovina, jurisdiction is divided between the Federation and 10 cantons. Annex 10 of the Dayton Peace Agreement stipulates that the institution of the Office of the High Representative (OHR) in BiH supervises the civilian implementation of the agreement, representing the countries involved in the Dayton Peace Agreement through the Peace Implementation Council (PIC). In 1997, the PIC gave additional significant powers to the OHR, in order to avoid delays and obstructions in the implementation of the Dayton Peace Agreement. Under the so-called Bonn powers, the OHR can make binding decisions in cases of violations of the Dayton Peace Agreement and legal obligations in general.³

The Constitution of Bosnia and Herzegovina in Art. 1 prescribes freedom of movement throughout BiH in the sense that BiH and the Entities will not hinder the full freedom of movement of persons, goods, services and capital throughout BiH. No Entity shall exercise any control at the border between Entities. This guarantees the single market of BiH.

In Art. 3 of the Constitution of Bosnia and Herzegovina, the competences of the institutions of BiH and its Entities are determined in such a way that the following issues are within the competence of the institutions of BiH: foreign policy, foreign trade policy, customs policy, monetary policy, financing of institutions and international obligations of BiH, policy and regulation of regarding immigration, refugees and asylum, enforcement of international and inter-entity criminal law regulations, including relations with Interpol, establishment and functioning of joint and international means of communication, regulation of inter-entity transport and air traffic control.

Art. 7 of the Constitution stipulates that the Central Bank of Bosnia and Herzegovina is the only authorised institution for printing money and monetary policy in the entire territory of BiH. Its competence is determined by the Parliamentary Assembly of Bosnia and Herzegovina. Also, the Constitution stipulates that, within a period of six years from the entry into force of this Constitution, the Central Bank will not be able to grant loans by printing money, nor function as a currency commission; after that period, the Parliamentary Assembly can give this authority to the Central Bank.

The aforementioned constitutional solution ensured that BiH has its own central monetary institution, which became a constitutional category, and represents the outcome of the activities undertaken until then by Narodna banka B&H, the Institute for Payment Transactions and commercial banks in preserving the monetary sovereignty of BiH.

3 Marković Bajalović and Imamović Čizmić, no date, ip.

In addition to the Constitution, as the highest legal act, the most significant source of monetary law is the Law on the Central Bank of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, no. 1/97, 29/02, 8/03⁴, 13/03, 14/03, 9/05, 76/06, 32/07), which has undergone seven amendments to date. This Law regulates the following issues: establishment, goals and tasks of the Central Bank, organisation and administration of the Central Bank, financial provisions, monetary functions and operations of the Central Bank, monetary unit, banknotes and coins, foreign exchange policy, foreign exchange reserves and foreign exchange control, relations of the Central Bank with banks, accounts, financial statements, audits and reports of the Central Bank, various provisions regulating the special rights and obligations of the Central Bank.

The Central Bank is an independent institution with legal personality whose goals and tasks are prescribed in Art. 2 of this Law. According to the mentioned article, the goal of the Central Bank is to achieve and maintain stability of the domestic currency (convertible mark) by issuing domestic currency under an arrangement known as currency board. The basic assignments of the Central Bank are: (a) to define, adopt and control the monetary policy of BiH through the issuance of domestic currency (convertible mark) at the exchange rate determined by this Law with full coverage in freely convertible foreign currency assets, (b) to keep and manage the official foreign exchange reserves of the Central Bank in a safe and profitable manner; (c) to support or establish and maintain appropriate payment and accounting systems; (d) to issue regulations for the implementation of the activities determined by the provisions of this law; (e) to coordinate the activities of the agencies responsible for issuing banking licences and supervising banks in the Entities in a manner determined by the Central Bank's Governing Council, including monthly meetings of the heads of these agencies with representatives of the Central Bank and the submission of monthly reports by these agencies to the Central Bank on their activities and movements in financial institutions under their jurisdiction; (f) to implement monetary policy; (g) to receive deposits from BiH and commercial banks in order to fulfil the requirements for mandatory reserves. The Central Bank can also hold deposits of the Entities and other public institutions, as well as other reserves of commercial banks, if they so wish; (h) to review the information forwarded to the Central Bank by the Entities' Banking Agencies on the basis of the Law on the Banking Agency of the Federation of Bosnia and Herzegovina and the Law on the Banking Agency of the Republika Srpska; (i) to put into and withdraw from circulation domestic currency (convertible mark), including banknotes and coins of legal tender, strictly adhering to the rules of the currency board; (j) to implement actions to help combat money laundering, support anti-terrorist measures and measures against obstruction of the implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina, which relate to banks.

4 This amendment is imposed by Office of the High representative, 2003.

Duties, tasks and obligations of the Central Bank are carried out through its headquarters, main units and other branches. The basic tasks of the Central Bank should be performed under the authority of its Governing Council, which has exclusive jurisdiction over tasks related to defining and controlling monetary policy of BiH, issuing currency, managing foreign exchange reserves, establishing and maintaining payment and accounting systems, and coordinating the activities of the Banking Agencies. The remaining tasks should be performed by the headquarters, main units and other branches of the Central Bank.

According to Article 5 of the Law on the Central Bank of Bosnia and Herzegovina, the organisation and administration of the Central Bank is based on the Governing Council, the management board consisting of the Governor, three Vice-Governors and the staff.

Article 8 regulates the constitution of the Governing Council. This article stipulates that during the first six years of operation of the Central Bank, the Governing Council consists of the Governor appointed by the International Monetary Fund with prior consultations with the Presidency of Bosnia and Herzegovina and three members appointed by the Presidency of Bosnia and Herzegovina. The Governor appointed by the International Monetary Fund is not a citizen of BiH or any other neighbouring country. The three members appointed by the Presidency of Bosnia and Herzegovina are one Bosniak and one Croat from the Federation of Bosnia and Herzegovina and one Serb from the Republika Srpska.

After the first six years of operation of the Central Bank, the Governing Council of the Central Bank consists of five members appointed by the Presidency of Bosnia and Herzegovina. After the appointment of the aforementioned members of the Governing Council, the Governing Council elects the Governor from among its members for a period of six years.

According to Article 17 of the Law on the Central Bank of Bosnia and Herzegovina, the management board of the Central Bank consists of the Governor and Vice-Governors, who, with the approval of the Governing Council, are appointed by the Governor. Members of the Governing Council can be appointed as Vice-Governors only with the unanimous decision of the Governing Council. The Governor may, with the approval of the Governing Council, assign temporary tasks to other members of the Governing Council. He can also give long-term assignments to the members of the Governing Council, if such assignments are unanimously approved by the Governing Council.

Art. 18 of the Law on the Central Bank of Bosnia and Herzegovina confers on the Governor the powers of the administration of the Central Bank, making him/her chief executive officer of the Central Bank in charge of the day-to-day operations of the Central Bank. If the Governor is absent, or is unable to perform his duties, the Vice-Governor, chosen by him with the approval of the Governing Council, acts as the chief executive officer of the Central Bank. The Governor is responsible to the Governing Council for the execution of their decisions, as well as for the management and control of the administration and activities of the Central Bank.

Based on Art. 2 of the Law on the Central Bank of Bosnia and Herzegovina, the Central Bank has adopted a large number of acts in the form of regulations, decisions and instructions. Most of these acts refer to the issuance of banknotes, while the following can be distinguished from other acts: (1) Regulation on the conditions, procedure, and documentation for registration in the Register of banks, subsidiaries, branches, and representative Offices in the Brčko District of Bosnia and Herzegovina. Rulebook on the conditions, procedure and documentation for registration in the Survey of banks, subsidiaries, branches and representative offices in the Brčko District of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 16/03)⁵; (2) Decision on the method and deadlines for submitting reports on total open foreign exchange positions of banks (Official Gazette of Bosnia and Herzegovina, 16/99); (3) Decision on the establishment of the Branch of the Central Bank of Bosnia and Herzegovina in Brčko (Official Gazette of Bosnia and Herzegovina, 10/00); (4) Decision repealing the Decision on determining compensation to commercial banks for withdrawing convertible mark banknotes from circulation (Official Gazette of Bosnia and Herzegovina, 16/05); (5) Decision on organising the clearing method for calculating international payments (Official Gazette of Bosnia and Herzegovina, 42/07); (6) Decision on repealing the decisions of the Central Bank of Bosnia and Herzegovina regulating electronic signature (Official Gazette of Bosnia and Herzegovina, 88/07); (7) Decision on taking over and converting monetary gold (Official Gazette of Bosnia and Herzegovina, 28/09); (8) Decision on establishing operational rules for gross settlement in real time (Official Gazette of Bosnia and Herzegovina, 31/16 and 37/19); (9) Decision on the establishment of the Branch of the Central Bank of Bosnia and Herzegovina in Banja Luka (Official Gazette of Bosnia and Herzegovina, 24/98 and 3/99); (10) Instructions on the structure and use of the international bank account number (IBAN) (Official Gazette of Bosnia and Herzegovina, 43/09); (11) Instructions on the procedure, activities and measures of the Central Bank of Bosnia and Herzegovina when a commercial bank fails to fulfil its obligation regarding the establishment and maintenance of mandatory reserves and in case of status changes of a commercial bank (Official Gazette of Bosnia and Herzegovina, 31/14);

- 5 The Brčko District functions within Bosnia and Herzegovina's unified monetary system, which is overseen by the Central Bank. The Central Bank ensures the stability of the currency board, issues the convertible mark (BAM), and regulates the country's monetary policy. There are no bank headquarters located within the Brčko District; instead, all banking institutions operate through branches or representative offices that are registered either in the Federation of BiH or Republika Srpska. All banks and their affiliated organizational units must be registered in the official Register of Banks, Subsidiaries, Branches, and Representative Offices in the Brčko District, with oversight provided by the local authorities in accordance with established regulations. The Regulation on the Conditions, procedure, and documentation for registration in the Register of banks, subsidiaries, Branches, and Representative Offices in the Brčko District of Bosnia and Herzegovina is a normative act that governs the conditions, procedure, and documentation required for the registration of banks, their branches, representative offices, and other legal entities in the official register of the Brčko District, maintained by the Branch of the Central Bank. Registration in the register is mandatory and a necessary condition for the commencement of banking operations in the Brčko District.

(12) Decision on the establishment of the main units of the Central Bank of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 7/98, 3/99 and 8/01); (13) Decision on the guaranteed convertibility of the convertible mark (Official Gazette of Bosnia and Herzegovina, 27/98); (14) Guidelines on rounding the amount for payment in cash payment transactions (Official Gazette of Bosnia and Herzegovina, 94/07); (15) Decision on the purchase and sale of effective foreign currency for foreign currency funds to commercial banks (Official Gazette of Bosnia and Herzegovina, 64/18 and 22/21); (16) Decision on the purchase and sale of convertible stamps to commercial banks (Official Gazette of Bosnia and Herzegovina, 64/18 and 22/21); (17) Decision on operational rules for the giro clearing system (Official Gazette Bosnia and Herzegovina, 37/19); (18) Decision on the Central Register of Credits of Business Entities and Individuals in Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 44/19 and 77/21); (19) Instruction for operating the Reserve account of commercial Banks (Official Gazette of BiH, 2/15) Instructions for working on the reserve account of commercial banks (Official Gazette of Bosnia and Herzegovina, 2/15)⁶; (20) Decision on determining the tariff of fees for services provided by the Central Bank of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 10/21, 53/22 and 81/22); (21) Decision on monitoring the functioning of payment systems (Official Gazette of Bosnia and Herzegovina, 76/22); (22) Decision on the Unified Register of Accounts of Business Entities in Bosnia and Herzegovina (amended text) (Official Gazette of Bosnia and Herzegovina, 26/23)

In addition to the above, the Central Bank of Bosnia and Herzegovina has adopted a number of other acts and regulations with the aim of improving the functioning of the organisational system of the Central Bank of Bosnia and Herzegovina, relying on the good practices of central banks in developed countries. Moreover, the Central Bank of Bosnia and Herzegovina has continuous communication with the European Central Bank (ECB), the central banks of the Eurozone, and other central banks of different countries, including the most important monetary institutions in the world, such as the WB and the IMF, in order to improve its functioning. The Central Bank of Bosnia and Herzegovina participates in the work of various forums and bodies in which the governors and finance ministers of the most developed countries of the world and the region take part.

6 This Instruction the procedure for opening, maintaining, and closing reserve accounts of banks with headquarters in Bosnia and Herzegovina at the Central Bank of Bosnia and Herzegovina on which the bank holds funds for the purpose of fulfilling the mandatory reserve. It also outlines the procedures, activities, and measures to be taken in cases where the bank fails to meet the mandatory reserve requirements, as well as in the event of the revocation of the operating license or changes in the bank's status. Additionally, it covers other rights, obligations, conditions, and the manner of operation between the Central Bank and the bank.

3. Currency board and euroisation in Bosnia and Herzegovina

The Central Bank of Bosnia and Herzegovina operates according to the principle of currency board, and apart from defining the reserve requirement rate, it does not have other functions typical of central monetary institutions of market economies that represent instruments of monetary policy.

A currency board is a monetary regime based on an explicit legal obligation to replace the domestic currency with a specified foreign currency at a fixed exchange rate. This means that the domestic currency is only issued if it is fully covered by the foreign currency.⁷ The currency board is an arrangement with a fixed exchange rate that is tied to the “sirdo” currency, gold or even a basket of currencies where all money can be freely converted into the reserve “anchor” currency and where the basic functions of the central monetary institution – the bank – are limited and strictly prescribed by law. Foreign currency is most often one of the world’s currencies, with high stability and convertibility, which guarantees the security of the domestic currency with its credibility.

Economic history indicates that currency boards were most often introduced:⁸ (a) after gaining colonial independence (British colonies), (b) after a period of marked macroeconomic instability, (c) after the first transitional reforms and the opening of economies.

Considering the macroeconomic determinants, i.e. the environment at the time of the introduction of the currency board, the countries can be divided into two groups. The first group consists of countries where the need to introduce a currency board arose as a result of monetary and currency instability, and the second group includes countries with a small open economy that do not have enough experience in conducting monetary policy. The common determinant for both groups of countries is that they are countries in transition with a relatively low level of economic development.

The application of the currency board model, bearing in mind the experience of the countries that introduced it, has its advantages and disadvantages. In the literature, the following are mentioned as advantages:⁹ (a) Financial discipline is ensured and monetary balance is established automatically and constantly, without exceptions or reasons of a “special nature”; (b) Full convertibility and a fixed exchange rate are provided, which means that conversion costs and currency risk are effectively zero, and transaction costs are reduced to a minimum; (c) The regime of free movement of capital is ensured; there can be no restrictions regarding the raising of

7 Jakovčević, Lovrinović and Radošević, 2011, p. 461.

8 Kozarić and Fabris, 2012, p. 210.

9 Savin, 2003, pp. 123–141.

reserve currency funds on any basis. The currency board is obliged to exchange any amount of convertible money into domestic money and vice versa.

In addition to the loss of the monetary sovereignty of the central government and the possibility of conducting a discretionary monetary policy, two main disadvantages can be mentioned: (a) ban on granting loans (institute of last resort) to commercial banks and other institutions, (b) inadequate protection against speculative shocks.

There are at least three justified reasons for the introduction of a currency board in BiH, which existed and which are still valid today. Namely, in the 1990s, BiH began the process of transition to a market economy with private ownership as the dominant form of ownership over the capital of business companies, which was interrupted by the aggression against BiH. A successful transition process meant the creation of macroeconomic stability, the backbone of which is stable domestic money, which rests on a real basis and provides a solid basis for realistic calculations of private investments in the economy. Another reason for the introduction of the currency board is related to general social conditions, i.e. the need for general social stability in BiH after the aggression (1992-1995) which resulted in war destruction and post-war trauma, administrative complexity and asymmetry, national divisions, lack of mutual trust within ethnic groups, and different types of discrimination in the domestic and international context.

In such social conditions, it was not acceptable to establish a central monetary institution with absolute authority in conducting “discretionary” monetary policy. At the same time, there were additional economic reasons for introducing a currency board. To understand the economic reasons for introducing a currency board in BiH, several facts need to be mentioned. After the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the Bosnian-Herzegovinian dinar (BHD) was introduced in BiH in 1992 as the means of payment in the payment system of BiH. The conversion of the Yugoslav dinar (YUD) to BHD was carried out at a rate of 1 BHD to 10 YUD. Deposit money was replaced through conversion at the given rate through the Social Accounting Service. During that period, due to the prevailing political situation, three currencies were in circulation in the territory of BiH (BHD, YUD, and the Croatian kuna). Since there were difficulties in securing BHD and its pegging to neighbouring currencies, from the second half of 1994, the former German mark (DEM) began to be used as means of payment. According to the exchange rate, BHD was pegged to DEM, where 1 DEM was equivalent to 350 BHD. In conditions of economic collapse and hyperinflation, there was a need for additional cash, which could not be printed to such an extent, so DEM was increasingly used as a payment currency.¹⁰ The macroeconomic situation was characterised by high inflation, a decline in economic activity, and problems in the functioning of the fiscal system, leading the government to borrow from the Central Bank of Bosnia and Herzegovina to finance public expenditure. In order to address such a situation, in mid-1994,

10 Marjanac, 2013, p. 113.

the monetary authorities of BiH took certain measures (BHD confirmed as the definitive means of payment, denomination of BHD by removing four zeros, introduction of a dual currency payment system BHD/DEM, fixed official exchange rate of 1 DEM – 100 BHD, reduced borrowing of the government and commercial banks from the Central/National Bank of Bosnia and Herzegovina).¹¹

The currency board, which was introduced in 1997, establishes KM as the only valid and legal means of payment in the entire territory of BiH, while all other monetary units that circulated in legal and economic traffic until then are abolished and prohibited as such.

Its influence and results differ depending on the aspect being observed. Two aspects are most often mentioned in the literature. The first aspect is the management of monetary policy, where the currency board proved to be a good solution, because it fulfilled the main goals, primarily the establishment of a healthy and stable monetary system and the prevention of political influence on the autonomy of the Central Bank when issuing money. Taking into account the experiences of the Federal Republic of Yugoslavia (FRY) and Croatia, and their monetary authorities, which stimulated hyperinflation during the greatest crisis by issuing money without cover, it can be said that this purpose of introduction has been fully fulfilled. Namely, by analysing the effects of the application of this regime during the past years of implementation, in order to ensure monetary stability, the currency board successfully achieved other objectives of the monetary policy to a greater extent:¹² (a) strengthening financial stability and discipline, (b) low inflation rate, (c) attracting foreign investments, (d) continuous growth of foreign exchange reserves, (e) development of the financial market, (f) servicing of the external state debt, (g) political independence.

Another aspect of observing the effects of the currency board is the achievement of economic policy goals, the achievement of economic development and the stimulation of economic growth through boosting domestic exports by devaluation of the domestic currency. Some analyses show the absence of a positive effect, which is expected due to the tight peg of the convertible mark to the euro. At this point, it is necessary to explain the reasons for the absence of those effects that are not related to the currency basket. Namely, taking into account the theoretical assumptions, the effect of devaluation on the stimulation of exports, which is of a short-term nature, also depends on the productivity, quality and competitiveness of domestic production on the foreign market. If the above considerations are put into the context of the economy of BiH, which is still characterised by an insufficiently high level of technical and technological development, accompanied by an insufficient level of competitiveness of domestic production, it can be concluded that the existence of a currency board, which prevents the use of monetary policy instruments, is not the only obstacle to economic growth. The reasons are much deeper and are found in the real sector, which affects all three dimensions of international competitiveness

11 Kozarić and Fabris, 2012, p. 223.

12 Marjanac, 2013, p. 114.

(price, structural and living standards). The analysis of international competitiveness in all these dimensions indicates that there is considerable room for action in order to improve the position of the economy of BiH on the international level. For example, the competitiveness of the industry represents a key challenge in order to increase the aggregate supply and achieve economic growth, which would ultimately lead to raising the standard of living of the citizens of BiH to a level that could rival the EU27 countries. In relation to the neighbouring countries, after the dissolution of Yugoslavia and the acquisition of independence, BiH had a much worse starting position due to the damage caused by war events during the aggression, which is reflected in the loss of human capital through expulsions and genocide, the destruction of production capacities and infrastructure, and the loss of export markets also due to the inherited modest, undifferentiated, labour- and resource-intensive industry with low productivity. In addition to these factors, a significant handicap for the economy of BiH was the inefficient and still unfinished process of privatisation in BiH as well as the slowness in the implementation of economic reforms in general. This results in high costs of the products from BiH. Before the crisis in 2008, BiH recorded growth of up to 10% on an annual basis, but this was not enough to significantly improve the overall industrial base and raise capacity utilisation to a higher level.¹³

Therefore, if the currency board regime were to be abandoned, Bosnian exports would not necessarily increase, because domestic products are less competitive in terms of price and structure than the products of countries that offer the same or similar products on the international market. Production costs, for the above and other reasons, are too high and no amount of monetary intervention can help much. It should be borne in mind that the weakening of the KM exchange rate would certainly have negative effects on debtors with loans indexed or issued in foreign currencies. The value of the debt would increase in case of devaluation. If the policy of targeted inflation were to be used, it is acceptable in stable circumstances in the world food and energy markets and in countries that have a significant influence on the world prices of these goods. This is because BiH is a significant importer of food, oil, and gas, which affects price shocks in the country. Therefore, for the transition from the regime of the currency board to the discretionary monetary policy in BiH, which implies the use of instruments for achieving economic growth, there should be favourable economic conditions, the completion of economic and structural reforms, which has not yet been done.¹⁴ The currency board, if a favourable regulatory environment for business would be created, puts the domestic economy and businesses in the right position related to the level of competitiveness without any artificial intervention of a monetary financial type, which in the long term creates conditions for sustainable economic development on a realistic basis. What does a favourable regulatory environment for business mean? In the simplest terms, a favourable regulatory environment is one that ensures the ease of doing

13 BiH Directorate for Economic Planning, 2021.

14 Central Bank of B&H, 2021.

business in a country. Namely, it is of crucial importance how easy it is for a local entrepreneur to open a small or medium-sized enterprise and do business according to the current legislation of the country. It does not include all issues that are important to the enterprise, but it covers important areas that are under the control of policy makers. According to the Association of Employers of Bosnia and Herzegovina, in order to create conditions for better business, it is necessary to change the laws at the level of BiH as well as at the level of the Federation of Bosnia and Herzegovina. Laws refer to taxes, contributions, working conditions and other additional things.¹⁵

There is considerable room for action in creating a favourable environment for business and it is transferred to the tax policy with the aim of reducing taxes and other levies that burden economic operators and affect the level of product prices and the accumulation of investments. Therefore, the priority of the fiscal policy would be the implementation of the tax reform in BiH, which should be revenue neutral. However, if taxes were to be reduced, the problem of filling the budget and creating a budget deficit would arise. Generally speaking, the budgets in BiH have the financing of a complex administrative apparatus conditioned by state regulation, which ultimately leads to the issue of constitutional reforms in BiH.

The foundations of the currency board in BiH, in addition to the Constitution of Bosnia and Herzegovina, are prescribed in Chapter IV titled 'Monetary functions and operations of the Central Bank' of the Law on the Central Bank. According to Art. 31 of this Law, which provides for the rule of issuing domestic currency or currency board, the Central Bank is obliged to ensure that the total amount of its monetary liabilities never exceeds the equivalent amount (expressed in the currency of BiH) of its net foreign exchange reserves. This Law establishes the rules according to which: (1) the total amount of monetary liabilities of the Central Bank is always the sum of: (a) all banknotes and coins put into circulation by the headquarters, main units and other branches of the Central Bank and (b) credit balances of all accounts kept in the books of the Central Bank and its organisational units by resident account holders; (2) the net foreign exchange reserves of the Central Bank represent at all times the difference between the fair market value of the assets and liabilities of the Central Bank listed below.

Article 32 stipulates that the official exchange rate for the currency of BiH is one convertible mark for 0.511292 euros, that is, one euro equals to 1.955830 convertible marks. The binding of the convertible mark to the euro leads to restrictions, the most important of which is the conditionality of the primary emission based on the euro reserves as an "anchor currency", i.e. the indirect influence of the monetary policy of the ECB on the monetary system of BiH. In practice, this means that it is a monetary regime based on the rule that the domestic currency is 100% covered by a certain foreign currency. In order for the arrangement of the currency board to function, the foreign exchange reserves must be high enough to ensure that all owners of KM, including deposits of resident banks with the Central Bank of Bosnia and Herzegovina

15 Udruženje poslodavaca Federacije BiH, 2022.

as well as the funds of the government, government institutions and agencies that hold KM deposits with the Central Bank of Bosnia and Herzegovina, are enabled to convert to foreign means of payment whenever they so wish. All issued KM, both cash and giro, are covered by foreign currency, i.e. the complete issued monetary liabilities of the Central Bank of Bosnia and Herzegovina are covered by held foreign exchange reserves.¹⁶ Bearing in mind these indications and the reports of the Central Bank, it can be concluded that the Governor and the Governing Council of the Central Bank of Bosnia and Herzegovina lead the policy of the currency board very responsibly, and based on the reports it can be seen that the coverage of monetary liabilities is 3-6% higher than the prescribed 100% which additionally strengthens the trust of both citizens and business operators, as well as foreign investors and international institutions in the domestic currency KM in BiH.

The arrangement of the currency board for certain countries is a stage in the introduction of full “euroization” and when it is implemented, the country still retains the central bank and the national currency. The currency board is then seen as a transitional form towards further EU integration in the form of eurozone membership.¹⁷ Eurisation is a term that appears as a counterpart to the term dollarisation¹⁸ and in the broadest definition it means a situation in which one country uses the euro as means of internal payment. A more concrete definition would imply ‘several different monetary systems that are very different from each other, but have the common characteristic that in formal or informal transactions foreign currency is widely distributed, as a means of payment.’¹⁹ Eurisation is most often associated with ‘small currency areas, it is open and sensitive to international capital flows.’²⁰ In the literature, the following factors are cited as factors that lead to euroisation:²¹ (a) in the long term, macroeconomic imbalance, manifested as ‘high and volatile inflation, stronger depreciation of the domestic currency and unsustainable economic growth’; (b) “underdeveloped capital market” in the country; (c) disruption of the macroeconomic balance, that is, “market imperfection”; (d) incomplete institutional structure, i.e. “currency blind regulatory framework.”

The aforementioned factors can be linked to the reasons for the introduction of the currency board in BiH and the aspiration to establish and maintain a stable monetary system in BiH, an underdeveloped institutional structure and an underdeveloped capital market.

There is no universal form of eurisation, so different types have appeared in practice that affect independence in the conduct of monetary policy in different

16 Hodžić and Gregović, 2017, p. 109.

17 Hodžić and Gregović, 2017, p. 111.

18 The term “dollarization” emerged as a result of the frequent substitution of unstable national currencies with the dollar. It most commonly occurs in less developed countries where there has been a loss of confidence in the domestic currency, which has been unstable for an extended period.

19 Fabris, 2006, p. 9.

20 Tomić, 2009, p. 3.

21 Ivković, 2011, p. 82.

ways:²² (a) Full official euroisation – implies a situation in which the foreign currency (euro) is the only legal tender and the domestic currency does not exist. (b) Partial official euroisation – implies a situation in which both foreign currency (euro) and domestic currency are used as legal tender. (c) Unofficial euroisation – refers to the situation when, due to the lack of trust in the domestic currency, a foreign currency (euro) is used as means of payment, means of calculation or – means of preserving value, and at the same time the foreign currency is not recognised as legal tender in the country. It is not possible to precisely determine in which countries unofficial euroisation is present, given that statistics of this type are almost impossible, but this form of euroisation is much more widespread than official euroisation. (d) The European Monetary Union refers to the situation when several countries use the euro as a common currency, resulting in the absolute transfer of monetary sovereignty to the central monetary institution of the EU. There is a partial official euroisation in BiH, which started indirectly through the introduction of a currency board and the efforts of the monetary authorities to maintain it until the acquisition of EU membership status of BiH. By signing the Stabilisation and Association Agreement in 2008, BiH fulfilled the institutional prerequisite for joining the European Union, including the assumption that in the long-term process of meeting the convergence conditions for admission, official euroisation will occur. The introduction of the euro into the monetary system of BiH, as a variant of euroisation, as was said earlier, was achieved by establishing the currency board regime of the Central Bank of Bosnia and Herzegovina.²³

In Art. 87 entitled 'Economic and trade policy' of the Stabilisation and Association Agreement it is foreseen that the Community and BiH will cooperate and thus facilitate the process of economic reform in order to improve understanding of the fundamentals of their respective economies as well as the formulation and implementation of economic policy in market economies. Furthermore, it was established that at the request of the authorities of BiH, the Community can provide assistance that supports the efforts of BiH to establish a functional market economy and to gradually harmonise its policies with the policies of the European Economic and Monetary Union, aimed at stability.

The aforementioned cooperation will also aim at strengthening the rule of law in the business area through a stable and non-discriminatory trade-related legal framework. Cooperation in this area shall include informal exchange of information concerning the principles and functioning of the European Economic and Monetary Union. The activities of the Central Bank of Bosnia and Herzegovina in this integration process of BiH are realised through participation in the work of coordination structures, established on the basis of the Decision of the Council of Ministers of Bosnia and Herzegovina on the EU coordination system, for the purpose of monitoring the implementation of contractual obligations stemming from the

22 Fabris et al., 2004, pp. 10–12.

23 Hodžić, 2020, p. 34.

Stabilisation and Association Agreement. Bearing in mind the last paragraph of Art. 87 SAA, the Central Bank of Bosnia and Herzegovina prepares attachments and information within its jurisdiction, including regular reports on the progress of BiH and the Economic Reform Program (ERP) of BiH. In the context of convergence towards EU standards, the Central Bank of Bosnia and Herzegovina applies a proactive approach, introducing the necessary functional changes in accordance with the challenges and requirements of the EU accession process. In the aforementioned activities, the Central Bank has great support from the ECB and the European System of Central Banks, which have been helping the Central Bank of Bosnia and Herzegovina through technical cooperation since 2007 in preparations for harmonisation with the EU and international standards.²⁴

4. From the perspective of joining the European Union

In June 1999, activities were initiated within the framework of the Stability Pact for South-Eastern Europe, the strategic goal of which is stabilisation in South Eastern Europe by bringing the countries of the region closer to Euro-Atlantic integration, and strengthening regional cooperation. This opened up the possibility of integration of BiH, as well as other countries of the Western Balkan region, into the EU. In the chronology of events and the development of relations between BiH and the EU, in the last phase before giving the opinion or conclusions of the Council on the Opinion of the European Commission on the request of BiH for EU membership, answers to the questions from questionnaire predisposed by the European Commission were prepared and submitted. Chapter 17 related to economic and monetary policy issues, where there were 23 issues from the domain of monetary policy that related to ensuring the independence of the Central Bank, the implementation of the currency board, the banking sector and its supervision, legislative reform and harmonisation with the *acquis* and other areas.

The progress or degree of preparation of BiH for EU membership is monitored through Commission Reports. When it comes to chapter 17 and the monetary policy segment, what the EU insists on is the independence of central banks and the ban on financing the public sector.

In the Report on Bosnia and Herzegovina of the European Commission for 2020,²⁵ it is stated that BiH is in the early stage of preparation in the field of economic and monetary policy. There was no progress in improving cooperation and coordination of macroeconomic and fiscal policies. The recommendations from 2019 were not implemented and remain in force. Monetary policy supports economic stability, but

²⁴ Central Bank of B&H, 2023a.

²⁵ European Commission, 2020.

the full independence of the Central Bank of Bosnia and Herzegovina remains to be ensured. The recommendations for 2020 mainly related to the elements of economic policy and the implementation of the Economic Reform Program and the political responsibility for it, which should be visible and coherent. In the monetary policy segment, it was stated that the objective of the Central Bank, defined as ensuring the stability of the domestic currency, is in contrast to maintaining stability as the basic objective of the EU's monetary policy. It was also pointed out that the Law on the Central Bank does not ensure the unconditional functional independence of the Central Bank of Bosnia and Herzegovina. Namely, according to the Law on the Central Bank of Bosnia and Herzegovina, the Central Bank of Bosnia and Herzegovina is obliged to submit reports on audited annual financial statements to the Parliamentary Assembly of Bosnia and Herzegovina and a preliminary financial report to the Presidency of Bosnia and Herzegovina. The European Commission believes that the submission of the preliminary report to the Presidency can especially affect its independence.

In the Report, it is stated that the fragmented competences of banking supervision, which implies that the supervision of the banking system is carried out by the Entities' agencies over banking, affect the effectiveness of its implementation.

In the Report on Bosnia and Herzegovina of the European Commission for 2021,²⁶ it is again stated that BiH is in the early stage of preparation in the area of economic and monetary policy. There was no progress in improving cooperation and coordination of macroeconomic and fiscal policies. The recommendations from 2020 have not been implemented and remain in force. Monetary policy supports economic stability, but the full independence of the Central Bank remains to be ensured. Recommendations for the year 2022 were given. Some of the recommendations coincide with the recommendations for 2021 in the segment of implementation, political responsibility, visibility and coherence of the Economic Reform Program. As a special recommendation, the preservation of the independence of the Central Bank of Bosnia and Herzegovina and the integrity of the currency board, as well as the appointment of members of the Governing Council of the Central Bank without further delay are stated. In the domain of monetary policy, the Report states that the existing regime of the currency board ensures monetary stability within the complex institutional environment of the country. It is stated again that the goal of the Central Bank, defined as ensuring the stability of the domestic currency, is in contradiction with the maintenance of stability as the basic goal of the EU's monetary policy, as well as the fact that the Law on the Central Bank does not ensure the unconditional functional independence of the Central Bank of Bosnia and Herzegovina. In this Report, the compliance of the appointment of the members of the Governing Council with the *acquis* is stated. However, the problem that arose due to the fact that after the mandate of the members of the Governing Council, expired in August 2021, new members were not appointed because the Presidency of

26 European Commission, 2020.

Bosnia and Herzegovina did not adopt a decision on the appointment. In order to enable the work and functioning of the Central Bank of Bosnia and Herzegovina, one day before the end of the mandate in August 2021, the members of the Governing Council, adopted a decision on the principle of continuity, which created the assumption that they will carry out activities until the appointment of a new member of the Governing Council. The Report stated that the Serbian member of the Council proposed on several occasions the use of Central Bank reserves for fiscal purposes, which would undermine the arrangement of the currency board. This confirmed the importance of maintaining the currency board model and the independence of the Central Bank. It was also reiterated that the fragmentation of the banking supervision system affects its efficiency.

The Report on Bosnia and Herzegovina of the European Commission for the year 2022²⁷ does not differ in many respects compared to the previous two presented. What is particularly emphasised and what is worrisome is that there has been a setback in this area because the new Governing Council of the Central Bank has not been appointed, and the insufficiency of coordination and cooperation of the bodies of different authorities, which was reflected in the preparation and implementation of the Economic Reform Program. It was stated that the recommendations were followed, but to a limited extent, and that they are still valid. As a recommendation for 2023, the need to maintain the independence of the Central Bank was emphasised. It is stated again that the objective of the Central Bank, defined as ensuring the stability of the domestic currency, is in contradiction with the maintenance of stability as the basic objective of the EU's monetary policy, but also that the Law on the Central Bank of Bosnia and Herzegovina is not fully harmonised with regard to the prohibition of monetary financing and that it does not ensure a functional independence of the Central Bank. The problem of appointing members of the Governing Council due to the blocking of decision-making at the state level by representatives coming from the Entity Republika Srpska was described again. In the context of supervision of the banking system, the position of the Commission remained unchanged.

When looking at the findings from the above-mentioned European Commission Reports, it can be concluded: (a) The economic and political situation in BiH confirms the necessity of maintaining the currency board regime, that is, it has not acquired the prerequisites for the application of discretionary monetary policy, (b) that political and ethno-national determinism enables blocking and influencing the efficiency of the work of the Central Bank of Bosnia and Herzegovina, i.e. ultimately its functional independence, (c) that the existing mechanism of supervision over the banking sector is not efficient enough.

27 European Commission, 2022.

5. Management of foreign exchange / currency reserves in the Central Bank of Bosnia and Herzegovina

Foreign exchange reserves represent claims of the central monetary institution abroad on the basis of effective foreign money, deposits with foreign banks and securities denominated in foreign currency. The reasons for holding foreign exchange reserves of individual countries are different.²⁸ Central monetary institutions manage foreign exchange reserves. Quality management of foreign exchange reserves is essential because it can increase the elasticity and resistance of the economy to shocks. For the management of foreign exchange reserves to be of high quality, it is necessary to adopt modern management policies and practices that can follow, for example, the Guidelines of the International Monetary Fund on the management of foreign exchange reserves, in which the basic principles of good management of foreign exchange reserves are given.²⁹

Chapter VI of the Law on the Central Bank of Bosnia and Herzegovina regulates the exchange rate policy, foreign exchange reserves and foreign exchange control. According to Art. 50 of the Law, the Central Bank of Bosnia and Herzegovina creates and maintains a certain foreign exchange reserve, which consists of all or part of the assets of the said Central Bank. The Central Bank of Bosnia and Herzegovina uses foreign exchange reserves to support the domestic currency, which results from the provisions of the currency board arrangement as the chosen model of monetary policy, in accordance with the Law on the Central Bank. The law stipulates the principles of good management of foreign exchange reserves in such a way that it is determined that the Central Bank of Bosnia and Herzegovina invests foreign assets in accordance with the principles and practice of sound investment and only in liquid securities issued by the Government or the central bank of the country in whose currency the securities are denominated.

Considering the importance of foreign exchange reserve policy, it is crucial to establish a chain of responsibility, authority and delegation of authority. In the Central Bank of Bosnia and Herzegovina, this was done in the following way. The Governing Council approves broader guidelines that determine the type and level of risk that the Central Bank of Bosnia and Herzegovina can assume. The Investment Committee acts within the framework of these guidelines and adopts operational rules for the

28 Some of the reasons include: supporting and maintaining confidence in monetary policy and exchange rate policy, including the capacity for intervention to support the domestic currency; limiting external vulnerabilities by maintaining liquidity in foreign assets to absorb shocks during periods of crisis or when the economy has limited access to borrowing; ensuring a certain level of market confidence that the economy can meet current and future external obligations; supporting the domestic currency through foreign assets and assisting government policies in meeting financial needs and debt obligations; foreign exchange reserves can be used in the case of natural disasters or urgent interventions. International Monetary Fund, 2014, p. 4.

29 International Monetary Fund, 2014.

Banking Department, which, respecting the guidelines and operational rules, based on the analysis of information on the financial markets, taking into account the types of risks given in the guidelines, and on the basis of the stress tests that have been developed within the framework of the Financial Sector Assessment Program for BiH (Financial Sector Assessment Program - FSAP), makes decisions on the investment portfolio.³⁰

Bearing in mind Art. 50 of Law on the Central Bank of Bosnia and Herzegovina foreign exchange reserves shall be invested only in liquid securities with the highest credit rating, issued by the Government or the central bank of the country in whose currency the securities are denominated. Given that KM is tied to the euro as a reserve currency, foreign exchange reserves shall be invested in government bonds and bank deposits of Eurozone member countries. The foreign exchange reserves of the Central Bank are therefore mostly held in EUR currency. The composite credit rating, which is taken as a criterion for investing foreign exchange reserves, represents the average level of existing credit ratings assigned to a certain issuer by at least two of the three renowned credit rating agencies Standard & Poor, Fitch Ratings or Moody. Investment of foreign currency reserves in instruments that imply exposure of the Central Bank of Bosnia and Herzegovina to a high level of credit risk is not allowed. In the above sense, the Central Bank of Bosnia and Herzegovina, in accordance with international investment standards and practices, treats a composite credit rating of AA- or higher as exposure to medium-level credit risk, a composite credit rating between BBB- and A+ as exposure to medium-level credit risk, and a rating lower than BBB as exposure to high level credit risk. The Central Bank of Bosnia and Herzegovina manages this type of risk by limiting the scope of financial instruments, by limiting contractual parties and issuers to those with an acceptable credit rating, by defining limits regarding investment concentration with each individual contractual party, by limiting the maximum amount that can be invested in individual types of financial instruments, by limiting the size of the issuance of individual securities and by limiting the maturity of the investment.³¹

According to the currency board regime and the provisions of Article 34 of the Law on Central Bank of Bosnia and Herzegovina, the Central Bank cannot invest more than 50,0% of the total unreduced capital and reserves in currencies other than the anchor. Based on this provision, the Central Bank invests more than 95,0% of its foreign exchange reserves in financial instruments denominated in EUR. In accordance with the aforementioned, the Central Bank has a very strict investment policy regulated by various internal acts with the involvement of highly sophisticated and professional internal bodies that monitor and evaluate it daily, and based on the above, continuously work on optimising the investment portfolio according to clearly defined criteria. All of the above is done with the aim at minimising the exposure of

30 Most commonly, there are four types of risks: foreign exchange risk, credit risk, liquidity risk, and interest rate risk.

31 Central Bank of B&H, 2022, p. 37.

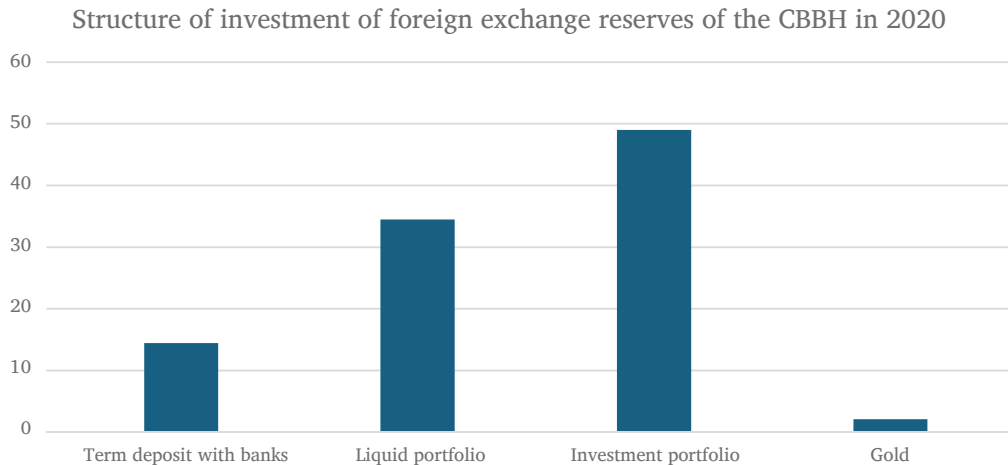
the Central Bank of Bosnia and Herzegovina to credit risks of an unacceptable level, i.e. with the aim at optimising the relationship between risk and return on invested funds in order to protect and stabilise the currency board and maintain the bank's key financial indicators at an optimal level, which results in the stability of the overall monetary system of BiH. In this sense, the Governing Council of the Central Bank of Bosnia and Herzegovina, together with other organisational parts involved in this process, ultimately take care that the net foreign assets of the Central Bank of Bosnia and Herzegovina, which are calculated by deducting monetary liabilities from the net foreign exchange reserves, is at an acceptable level because it represents the main financial indicator achieving and maintaining the stability of the domestic currency (KM), as part of the official foreign exchange reserves, i.e. net foreign exchange reserves in BiH, represent the basic measure of the success of the Central Bank of Bosnia and Herzegovina operations, so that the net foreign exchange reserves should always be at least a few percent above the monetary liabilities, which shows that the monetary liabilities, that is, the total amount of money in domestic currency, covered by more than 100% net foreign exchange reserves, which is actually the legal minimum.³²

According to the Annual Report of the Central Bank, the structure of foreign exchange reserves at the end of 2020 consisted of: time deposits with banks (excluding overnight deposits), with a share of 14.42%; liquid portfolio, with a share of 34.47%; investment portfolio (securities with more than one year left to maturity), with a share of 49.01%, and; gold, with a share of 2.1%.³³

32 Central Bank of B&H, 2022, p. 31.

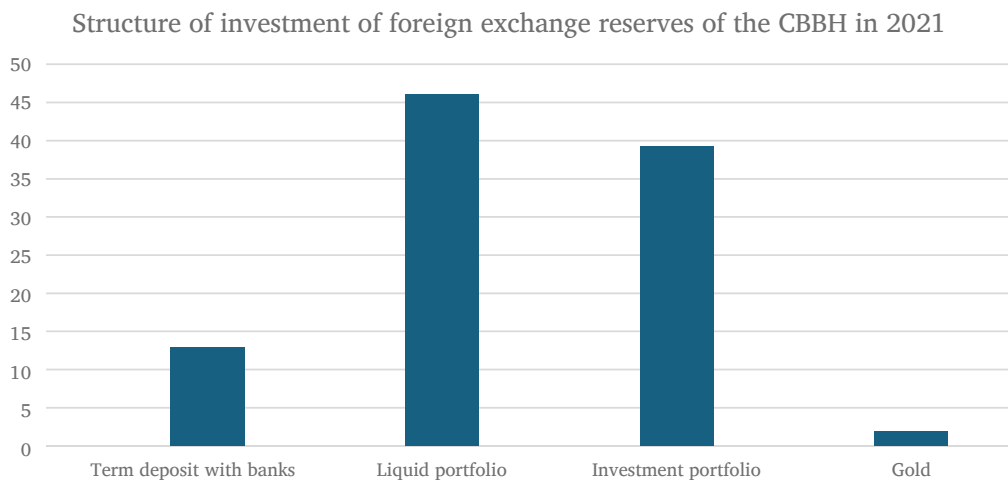
33 Central Bank of B&H, 2020.

Graph 1. Structure of investment of foreign exchange reserves of the Central Bank of Bosnia and Herzegovina in 2020



According to the Annual Report of the Central Bank, the structure of foreign exchange reserves at the end of 2021 consisted of: time deposits with banks (without overnight deposits), with a share of 12.87%; liquid portfolio, with a share of 46.01%; investment portfolio (securities with more than one year left to maturity), with a share of 39.27%; and gold, with a share of 1.85%.

Graph 2. Structure of investment of foreign exchange reserves of the Central Bank of Bosnia and Herzegovina in 2021



According to the Annual Report, the structure of foreign exchange reserves at the end of 2022 consisted of: time deposits with banks (without overnight deposits) with a share of 37.98%; liquid portfolio with participation of 39.71%; investment portfolio (securities with a maturity of more than one year remaining) with a participation of 14.02%; securities (Business model 1) with a participation of 7.30% and; gold with a participation of 1.00%.

Graph 3. Structure of investment of foreign exchange reserves of the Central Bank of Bosnia and Herzegovina in 2022

Structure of investment of foreign exchange reserves of the CBBH in 2022

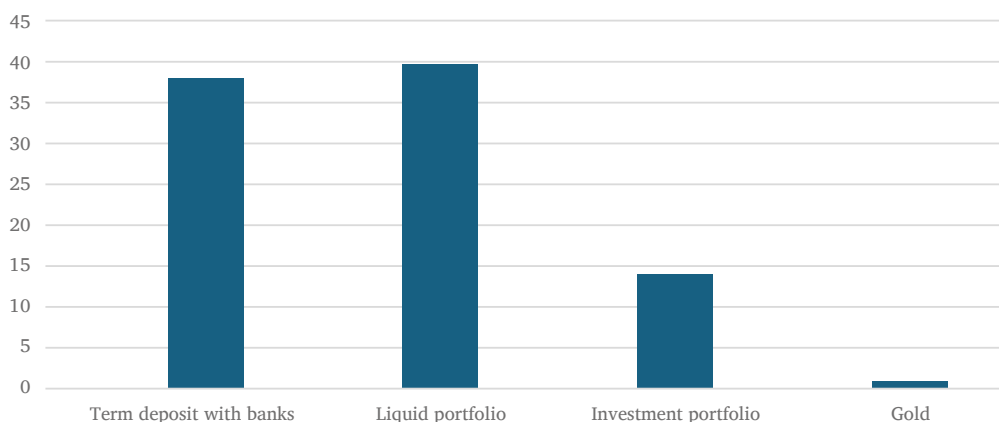


Table 1. Structure of investment of foreign exchange reserves of the Central Bank of Bosnia and Herzegovina in 2020, 2021 and 2022

Year	Term deposits with banks	Liquid portfolio	Investment portfolio	Gold
2020	14.42%	34.47%	49.01%	2.10%
2021	12.87%	46.01%	39.27%	1.85%
2022	37.98%	39.71%	14.02%	1.00%

Taking into account the interest rate, credit and foreign exchange risk, the Central Bank restructures investments of foreign exchange reserves in order to achieve the maximum net effect of the investment of foreign currency funds on the income statement.

Table 2. Presentation of the net effect of investing foreign exchange reserves of the Central Bank of Bosnia and Herzegovina in 2020-2022

Year	Total net effect	Effective rate of return ³⁴
2020	7.3 million KM	0.06%
2021	7.12 million KM	-0.05%
2022	11.15 million KM	0.07%

In 2021, a negative yield was expressed for the first time. The reasons are the current events on the EU financial market and the policy of negative interest rates led by the ECB. Namely, as a result of such ECB policy, there was a drop in yield rates on investments in convertible foreign currency, which is a consequence of negative interest rates on short-term deposits in euros and investments in securities with negative yield rates when purchasing in the last few years. Due to the ECB's quantitative easing, negative interest rates were applied in the eurozone countries from 2014 until 2021, which discouraged savings and stimulated consumption and investment. In order to get rid of excess liquidity reserves in their accounts with the ECB, on which they pay negative interest, many commercial banks in the Eurozone have introduced a negative interest rate on large deposits of their clients. The period of negative interest rates on the Eurobond market also lasted for a number of years, and the result was lower returns on investments of foreign exchange reserves of the Central Bank of Bosnia and Herzegovina in government bonds of the Eurozone countries.

Taking into account the legal assumptions for the management of foreign exchange reserves and the data from the Annual Reports of the Central Bank, it can be concluded that the management of the Central Bank, taking into account all risks, ensured the profitability of investments and did not call into question the marginal value of the coverage coefficient, i.e. that the marginal value of coverage was always above 100% which is the lower limit. The coverage rate of the currency board at the end of 2022 is lower than at the end of the previous year and was 102.89%.

34 'The effective yield is calculated by dividing the net effect of investing foreign reserve funds by the average level of foreign reserves observed during the period. When calculating the overall net effects of investing foreign reserve funds, all net interest income on securities and deposits in foreign currency are taken into account, as well as realized net capital gains/losses from the sale of securities from the portfolio of foreign reserves of the Central Bank of Bosnia and Herzegovina (CBBiH)' – Central Bank of Bosnia and Herzegovina, 2020, p. 35.

6. Management of mandatory reserves of the Central Bank of Bosnia and Herzegovina

The basic instrument of the monetary policy of the Central Bank of Bosnia and Herzegovina, which affects the overall stability of the banking system and its liquidity, is the mandatory reserve.

The required reserve is a percentage of the bank's asset base that is calculated and kept in specially opened accounts with the Central Bank. The reserve requirement is, along with open market operations and the discount rate, one of the three standard instruments of discretionary monetary policy.³⁵ The popularity of using this instrument of monetary policy depends on the level of development of countries, so for example, developed countries use open market policy more, because they have developed financial markets or a discount rate in relation to the reserve requirement rate, which in the case of open market operations is used as an alternative or supplement. By determining the mandatory liquidity reserve, the Central Bank influences credit conditions and the interest rate, controls the amount of money in circulation and controls the amount of bank reserves. The required reserve rate determines the amount of funds that a commercial bank should set aside from its deposit potential in favour of required reserves at the Central Bank.³⁶ It means that a part of demand deposits is placed outside the credit potential and cannot be used for loans.³⁷ With the reserve requirement, the Central Bank limits and directs the growth of deposit money.

Mandatory reserve in BiH is calculated on deposits and borrowed funds of the bank. Regardless of the currency in which they are expressed, deposits and borrowed funds together form the basis for calculating the required reserve. The Central Bank of Bosnia and Herzegovina, together with the Decision determining the mandatory reserve, also delivers a methodological scheme to commercial banks, of what is included in the deposit basis. The balance of these items is determined at the end of each working day in the period of ten days preceding the reversal of mandatory reserves. Banks are obliged to regularly submit reports on the balance of their deposits. Article 36 of the Law on the Central Bank of Bosnia and Herzegovina regulates the issues of mandatory reserves in terms of the competence to determine the level of the rate of mandatory reserves, the amount of compensation that the Central Bank pays to banks for the amount of reserves, the responsibilities and actions of monetary institutions in the event that the bank does not fulfil its obligation in terms of mandatory reserves.

Since the beginning of its operation in 1997, the Central Bank of Bosnia and Herzegovina has constantly adjusted the basis for calculation and the amount of

³⁵ Marić, 2021.

³⁶ Mišlov, 2016.

³⁷ Kešetović, 2007, p. 157.

compensation for holding excess reserves on accounts with the Central Bank, depending on the trend in the liquidity of commercial banks and their credit policy. Since the beginning of its operation, the Central Bank of Bosnia and Herzegovina has determined a percentage of 10% of deposits of commercial banks as a basis for calculating the required reserve. The fee rate on the mandatory reserve is 0.0%.

Table 3. Movement of the mandatory reserve rate

Year	Mandatory reserve rate-MRR
2012	Differentiated MRR rate: 10% on a short-term basis and 7% on a long-term basis
2013	Differentiated MRR rate: 10% on a short-term basis and 7% on a long-term basis
2014	Differentiated MRR rate: 10% on a short-term basis and 7% on a long-term basis
2015	Differentiated MRR rate: 10% on a short-term basis and 7% on a long-term basis
2016	Until July 1, 2016, differentiated: 10% on a short-term and 7% on a long-term basis, from July 1, 2016, a single 10%
2017	10%
2018	10%
2019	10%
2020	10%
2021	10%
2022	10%
2022	10%

Banks have the possibility to keep excess cuts above the mandatory ones, which they manage themselves, ensuring their own liquidity, for which a special fee can be calculated by the Central Bank of Bosnia and Herzegovina. Banking agencies, in order to maintain the liquidity and safety of the banking system, by their regulations order commercial banks to keep part of the reserves above the required reserve level.

The remuneration policy of the Central Bank of Bosnia and Herzegovina implies a policy towards monetary assets (obligatory reserves and excess over mandatory reserves), i.e., remuneration that is calculated at a certain rate on the mentioned reserves and the level of the remuneration rate on monetary assets itself affects the asset structure of the balance sheet of commercial banks. Although excess reserves are included in the available credit potential of commercial banks, banks keep their liquidity reserves in a reserve account they have opened with the Central Bank of Bosnia and Herzegovina and for which they receive a certain fee. This compensation is equal to the weighted average of the interest rates that, during the period of maintenance of the mandatory reserve, the Central Bank of Bosnia and Herzegovina

achieves on the market on deposits invested for up to one month. The approximately symmetrical level of that rate, on these placements, essentially represents risk-free placements for banks and is an incentive to keep funds in the reserve account with the Central Bank of Bosnia and Herzegovina.³⁸

Table 4. Movement of mandatory reserves and surplus above mandatory reserves of commercial banks in BiH (average of 36 decades within a year)

Year	Total Base	Average MR	Surplus above MR
2012	14,755,574,233.67	1,257,850,162.62	1,453,163,038.68
2013	15,162,241,323.62	1,290,757,911.83	1,813,107,490.09
2014	15,999,278,159.62	1,370,136,562.86	2,207,687,503.20
2015	16,664,524,694.40	1,432,593,008.05	2,337,906,719.91
2016	18,494,243,296.51	1,734,081,448.93	2,323,531,837.46
2017	21,224,852,629.71	2,122,485,262.99	2,180,855,031.97
2018	23,537,084,216.16	2,353,708,421.63	2,851,699,301.13
2019	25,752,967,935.80	2,575,296,793.60	3,013,723,746.89
2020	26,964,789,467.59	2,696,478,946.77	2,713,271,703.25
2021	28,677,192,430.04	2,867,719,243.02	3,434,762,484.06
2022	30,175,606,190.72	3,017,560,619.08	3,676,739,061.35

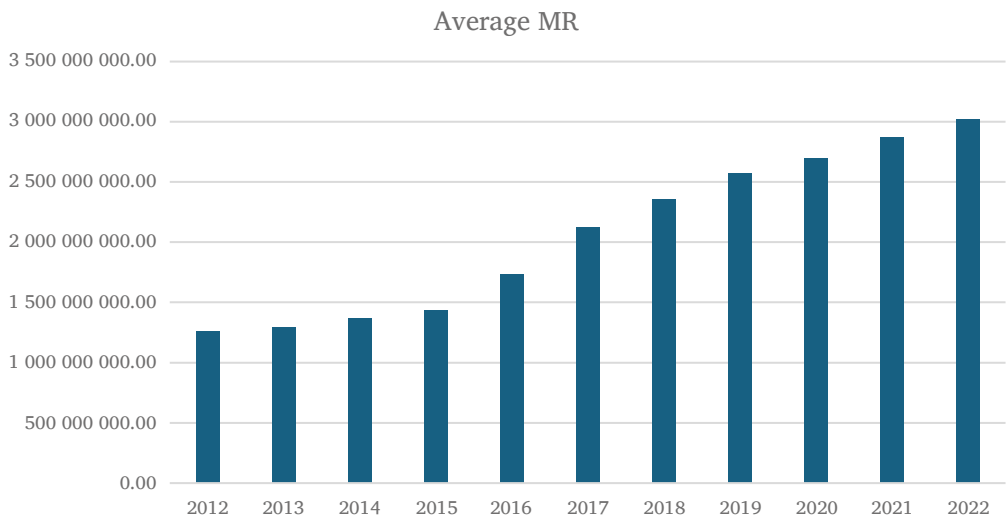
Regarding the currency structure of the base for the calculation of the required reserve, it can be stated that in the observed period the highest percentage of the base is in the domestic currency, ranging from 50 to 52%. So in 2020, it amounted to 52,6%. A certain level of liabilities of banks in foreign currencies, as well as assets in foreign currencies, is natural in BiH due to the arrangement of the currency board, the structure of banks' sources of financing and regulatory requirements related to banks' foreign exchange risk management. Slight changes in the wave structure in the observed period are the result of the impact of the COVID 19 pandemic and the war in Ukraine. What international institutions insist on, specifically the International Monetary Fund, is greater deeurisation. However, deeurisation in existing conditions, when the population and business entities still remember the financial collapse and the loss of their deposits and savings in Yugoslav dinars that occurred after the breakup of Yugoslavia, is not popular. The population believes in the currency system and the euro, and it is difficult to persuade them to keep deposits exclusively in KM.

38 Zupur and Tomić, 2014, p. 88.

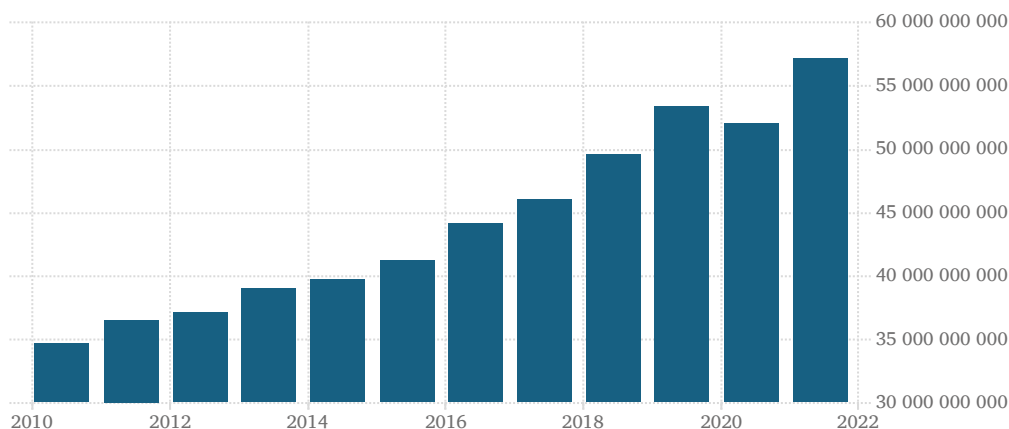
Data on the movement of mandatory reserves indicate that commercial banks in BiH are extremely liquid, which makes the banking system of BiH safe. The growing trend of mandatory reserves is a reflection of economic trends in BiH.

When observing the average size of required reserves, which is obtained as an average of the new 36 decades, that is, ten-day measurements, during the year one can clearly see the same growing trend during the last ten years, as can be seen in graph 4.

Graph 4. Average MR trend in period of 2012 to 2022



It is clear that more intense growth has been observed since 2016, when the rate on the long-term basis of 7% stabilised at the level of 10%, but the growth can also be explained on the basis of the economic growth in the mentioned period, which can be expressed through the PPP size of GDP with the fact that in both cases certain stagnation can be seen in 2020 during the pandemic (graph 5).

Graph 5. PPP-adjusted GDP of BiH (current international \$)

When observing the average annual level of excess over the required reserves, a similar trend can be observed, with the fact that in this case, during 2020, a decrease in the same level can be observed because the banks resorted to the same in order to maintain liquidity during the pandemic period with the aim at avoiding panic among the population which produced good effects and preserved the monetary stability of BiH (chart 6).

Graph 6. Surplus above MR trend in period of 2012 to 2022

Based on the aforementioned trends, it can be said that the Central Bank of Bosnia and Herzegovina fulfils its mission and monitors the national economy in the context of the needs of its development and growth, regardless of the fact that it does not have the competences and instruments to implement a full discretionary monetary policy. The aforementioned trends show that the Central Bank of Bosnia and Herzegovina in its current capacity and powers represents a real support for the economic development of BiH based on competitiveness as a criterion and does not represent any limiting factor, but on the contrary a factor that strengthens the integrity of the domestic economy and its monetary system on a permanent basis.

7. The operation of the Central Bank of Bosnia and Herzegovina from the point of view of the International Monetary Fund

After the dissolution of the SFRY, upon gaining independence, BiH inherited membership in the Bretton Woods institutions, and the Central Bank of Bosnia and Herzegovina has the status of a depository. Since 2002, the Central Bank of Bosnia and Herzegovina has assumed the role of fiscal agent of BiH to the IMF from the Ministry of Finance and Treasury of Bosnia and Herzegovina.³⁹ In the context of the arrangement with the IMF, BiH had and still has a debt relationship according to the following models:⁴⁰

- 1) “Stand-by arrangement” – Financial assistance is provided from General Resources Account (GRA) up to a certain amount and in a certain period of time, provided that the member complies with the provisions of the agreement. A stand-by arrangement is usually realised in a period of one year and it is usually approved in four tranches. At the request of the member, it can be extended (up to three years) The arrangement is repaid with a grace period of two years and three months, after which repayment occurs in eight equal quarterly installments. The drawdowns of tranches are purchase transactions, while repayments are repurchase transactions in the domestic currency.⁴¹
- 2) “Extended fund facility” – an extended financial arrangement is being developed to remedy for the disturbance in the balance of payments based on the Memorandum on Economic and Financial Policies and the Letter of Intent.
- 3) “Rapid financing instrument” – it is an arrangement of rapid financial assistance needed to mitigate the consequences of the pandemic caused by COVID

³⁹ Central Bank of B&H, 2023c.

⁴⁰ Central Bank of B&H, 2023b.

⁴¹ Radaković, 2016, p. 147.

19, where the approved amount is allocated once upon approval by the IMF Executive Board.

In the context of the “stand-by” arrangements, which have existed until now, BiH has repaid 10,456,800 (SDR) debts and closed that engagement. When it comes to the “extended fund facility” arrangement (2016-2019), the planned and committed amount of funds is 126,825,000 (SDR) and 36,990,625 has been repaid, so the debt of BiH to the IMF based on this arrangement is 89,834,375 (SDR). Funds in the amount of 265,200,000 (SDR) were committed on the basis of the “rapid financing instrument” on April 22, 2020, but so far not a single instalment has been returned.⁴²

Every year, the IMF publishes its opinion on BiH and makes recommendations. The IMF Report for 2022 (IMF Country Report No. 22/167) comprehensively covers the latest developments, perspectives, risks, and discussions on policies – reforms to support recovery. Within the framework of the reforms, a special place is dedicated to the arrangement of the currency board. The Report states that during the pandemic, and more recently the war in Ukraine, the arrangement of currency agreements contributed to ensuring macroeconomic and financial stability by maintaining public confidence in the currency. The mission welcomed the reforms of the Central Bank of Bosnia and Herzegovina aimed at strengthening the mandatory reserve framework by applying a differentiated fee rate to the reserves of commercial banks. These reforms will help achieve greater profitability of the Central Bank of Bosnia and Herzegovina, and thus a higher coverage rate of the currency board. The members of the mission also welcomed the commitment of the Central Bank of Bosnia and Herzegovina to implement the remaining recommendations from the report of the technical assistance mission for 2019.⁴³

8. Concluding considerations

Today, twenty-five years after the establishment of the Central Bank, the conditions for abandoning this model have not yet been met. Political pressure, administrative and ethnic division of society and little progress in terms of economic recovery are still present. In addition, the globally present economic challenges caused by the Covid-19 pandemic, the war in Ukraine and inflationary pressure, as well as the introduction of digital currencies and the impact of digitalisation on economic flows justify the existence of the currency board in BiH. Namely, in such challenging circumstances, the Central Bank of Bosnia and Herzegovina managed to maintain

42 Central Bank of B&H, 2023b.

43 International Monetary Fund, 2023.

the monetary stability of the country as one of the key factors of macroeconomic stability.

The paper analyses the Annual Reports of the Central Bank of Bosnia and Herzegovina covering the period of 2020 to 2022 aimed at confirming the assumption that the existing model of the currency board, along with good management of foreign exchange and mandatory reserves by the monetary authorities in BiH, enabled the maintenance of monetary stability and strengthening of confidence in the domestic currency (KM). In other words, that in BiH, which has acquired candidate status, the currency board that ties the KM to the euro is paving the way to the fulfilment of the master conditions for entry into the European Monetary Union. Viewed from that angle, taking into account the existing economic and political situation in BiH, the introduction of discretionary monetary policy is not an acceptable solution. The reports of the European Commission and the International Fund support this. On the other hand, the population that faced financial trauma after the breakup of Yugoslavia and appreciates the stability of the currency, gives great support to the currency board that ties the KM to the euro. In addition, the strict rules of the uniform currency established by the Law on the Central Bank are the basis of a stable banking system, which is a prerequisite for the functioning of the real sector.

The currency board model is not an obstacle to stimulating economic growth in BiH, there is currently a lot of space in which to act in order to improve the business environment, which is a prerequisite for greater international competitiveness of the Bosnian economy. The Association of Employers of Bosnia and Herzegovina created a document on the necessary changes to the regulatory environment, which refers to changes in the laws that regulate: value-added tax, excise duties, customs policy, court fees, public procurement, issues in the field of labour relations, etc. The issue of tax reform remains open, as well as the potential impact of this reform on the budget. The creators of economic policy in BiH, assuming that there is a political will for it, face numerous challenges and open courses of action in order to stimulate economic growth in the country and, consequently, increase the well-being of citizens.

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CHAPTER 6

THE LIMITS OF THE POWERS OF THE CENTRAL BANK IN SLOVAKIA (LIABILITY FOR DAMAGE CAUSED BY A NATIONAL CENTRAL BANK IN THE EU)



ĽUBOMÍR ČUNDERLÍK

Abstract

This chapter is devoted to the legislative and jurisprudential influences on the status and powers of the national central bank in the EU, in general, and in Slovakia, in particular. First, the aim is to present the substantive Slovak legal limits on the central bank's powers and the European legal limits on the central bank's powers in the EU. Regarding EU law, the chapter focuses on the execution of some of the tasks entrusted to the European Central Bank in the supervision of credit institutions, namely, on assessing the practice of the electronic filing of applications by banks in the case of licensing procedures under the Single Supervisory Mechanism, in the context of the relevant Slovak legislative framework (Act on Banks). The last part of this chapter will provide an analysis and assessment of the appropriateness of the current legal status of the liability the central bank in the Slovak Republic has for the exercise of public authority. This will be done in the light of a recent decision of the Court of Justice of the European Union. Following that, the conclusion presents some doubts of the author about the compatibility of Slovak legislation with EU law concerning the liability for damage caused by a national central bank. Based on the above, the Slovak concept of liability is potentially contrary to the prohibition of monetary financing of the public sector and represents a threat to the financial independence of the central bank in Slovakia.

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Keywords: Central bank, independence of central banks, legal convergence, liability for damage, prohibition of monetary financing

1. Introduction

Central banks were established later than commercial banks when the two-tier banking system was set up. Generally, according to the manner of their creation, a central bank was established by commissioning an existing commercial bank or by setting up an entirely new institution. In theory,¹ the basic functions of a central bank today include the following:

- a) bank of issue (administrative monopoly on the issue of legal tender),
- b) the supreme monetary policy authority (manages monetary developments by regulating the quantity of money in circulation, determining the exchange rate of the domestic currency against foreign currencies with the objective of price stability),
- c) bank of banks (bank for the commercial banks: sets reserve requirements, lends as lender of last resort, acts as a clearing house),
- d) bank of the state (maintains treasury accounts, represents the state in negotiations with supranational banks, monetary institutions),
- e) banking regulation and supervision (authorisation to enter the financial market),
- f) currency reserve manager (management of gold and foreign currency claims),
- g) coordination and supervision of payment systems.

These functions are sometimes supplemented by other functions, or some of these functions are not performed by the central bank because they are not recognised by national law (banking supervision) or because, as a result of membership in the monetary union, the central bank's activities have been transferred to another entity (activities of the bank of issue and the conduct of monetary policy). The legal status and structure of the central bank depend on historical traditions, the territorial division of the state and the legislative expression of its position in the legal order.

Depending on the nature of the body that defines them, the legal limits of the central bank's status and competence in the EU (as well as in the Slovak Republic) could be summarised as:

- a) national limits, represented by national legislative acts (national constitution, national central bank law) and the decisions of national judicial authorities (supreme court, constitutional court),

1 Medved', 2013, pp. 57–58; Nagy, 2022, p. 28.

- b) supranational limits, such as European legislation (Treaty on the Functioning of the European Union, hereinafter referred to as “TFEU”; Protocol No 4 on the Statute of the European System of Central Banks and of the European Central Bank, hereinafter referred to as “Statute of the ESCB/ECB”, prior to the Treaty of Lisbon, Protocol No 18) or which are the result of the adjudicatory activity of European judicial authorities (the Court of Justice of the EU).

The above breakdown implies that the central bank’s actions are legally shaped not only by the legislature but also by the judiciary, i.e. we recognise legislative and jurisprudential influences.

In the second and third chapter, I present the substantive Slovak legal limits on the central bank’s powers and the European legal limits that curb central bank powers in the EU. In the fourth chapter, I will focus on the execution of some of the tasks entrusted to the European Central Bank (hereinafter referred to as the “ECB”) in the supervision of credit institutions, namely, I will assess the practice of electronic filing of applications by banks in the case of licensing procedures under the Single Supervisory Mechanism (hereinafter referred to as “SSM”) the so-called SSM-conduct, in the context of the relevant Slovak legislative framework. In the fifth chapter, in the light of a recent decision of the Court of Justice of the EU, I will examine and assess the appropriateness of the current legal status of the liability the central bank in the Slovak Republic has for the exercise of public authority.

2. Limits of the central bank’s powers: status de lege lata and national limits in the Slovak Republic

The National Bank of Slovakia (hereinafter referred to as the “NBS”) is regulated at the constitutional level in Art. 56 of the third title of the Constitution of the Slovak Republic “Economy of the Slovak Republic”, as follows:

1. The National Bank of Slovakia shall be an independent central bank of the Slovak Republic. The National Bank of Slovakia may, within its competence, issue generally binding legal regulations if it is empowered to do so by law.
2. The supreme governing body of the National Bank of Slovakia is the Banking Council of the National Bank of Slovakia.
3. Details under paras. 1 and 2 shall be established by law.

The NBS was established with effect from 1 January 1993 on the basis of Act No. 566/1992 Coll. on the National Bank of Slovakia, as amended (hereinafter referred to as the “NBS Act”), which was adopted on 18 November 1992.

The legal basis of the NBS gradually reflected the key events in Slovakia’s state law, constitutional law and European integration process.

The prerequisites for the establishment of an independent Slovak central bank were the following: (a) the amendment to the Constitutional Act on the Czechoslovak Federation, proposed by the Czechoslovak Federal Government and approved by the Federal Assembly of the Czechoslovak Federal Republic, which allowed Slovakia and the Czech Republic to found their own issuing banks at the end of the Czechoslovak Federation on proviso that the issuing banks of the two republics would be created by the division of the State Bank of Czechoslovakia,² (b) the monetary separation on 8 February 1993 on the basis of the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic on the termination of the Agreement between the Government of the Slovak Republic and the Government of the Czech Republic on Monetary Arrangement (concluded on 27 January 1993)³ and the actual issue of the Slovak currency (the Slovak Crown – slovenská koruna).

Although the NBS was formally established as the Bank of Issue in the Slovak Republic, it had all the above-mentioned usual functions, objectives, competences and tasks of a central bank since its establishment on 1 January 1993 (until 30 June 2001).

The original institutional anchorage of the NBS changed at constitutional and legal level on 1 July 2001 from an issuing bank to an independent central bank in the framework of the preparations for Slovakia's accession to the EU.⁴

The primary reasons for this change in 2001 were: (a) the EU's principled requirements, based on the Treaty establishing the European Community (renamed TFEU as of 1 December 2009) and the Statute of the ESCB/ECB, to guarantee the independence of national central banks (institutional, functional, financial and personal independence) at the relevant national legal level, (b) the national case-law of the Constitutional Court of the Slovak Republic⁵ had to be reflected, according to which "independence" can only be granted to constitutionally enshrined institutions by an explicit constitutional provision.⁶ At the same time, it is contrary to the Constitution to grant "independence" to constitutionally enshrined institutions only by ordinary law. It follows then from the case-law cited above that the right to issue generally binding legal acts can primarily be enshrined only in the Constitution⁷

2 Act No. 143/1968 Coll. on the Czechoslovak Federation, as amended by later constitutional acts. According to Art. 14, para. 4 'The Czech Republic and the Slovak Republic may create their own banks of issue. The issuing banks of the republics shall be formed by the division of the Czechoslovak State Bank. An Act of the Federal Assembly shall divide the assets, rights and obligations of the State Bank of Czechoslovakia and determine the date of their takeover by the issuing banks of the republics.'

3 Available at: http://www.mzv.cz/jnp/cz/encyklopedie_statu/evropa/slovensko/smlouvy/ (Accessed: 10 October 2023).

4 Adoption of Constitutional Act No. 90/2001 Coll. of 23 February 2001, amending and supplementing the Constitution of the Slovak Republic with effect from 1 July 2001.

5 Ruling of the Constitutional Court of the Slovak Republic sp. zn. PL. ÚS 17/96 of 24 February 1998, published under No. 78/1998 Coll.

6 Hrčka, 2001, p. 5.

7 Kanárik and Bujňáková, 2002, pp. 242–252.

and that the provisions of an ordinary (non-constitutional) law conferring the right to issue generally binding legal acts on institutions upon which the Constitution does not directly confer such a right are contrary to the Constitution.

For these reasons, the amended Art. 56, para. 1 of the Constitution of the Slovak Republic (and also § 1, paras. 1 and 3 of the NBS Act) stipulates (since 1 July 2001) that the NBS is an independent central bank that can issue generally binding legal regulations within its scope of competence if subsequently authorised to do so by law. With this amended constitutional anchoring of the NBS, the EU's principled requirements for a proper national legal guarantee of its independence as a national central bank were met.

In the past, there were opinions that the central bank as a body of public authority, with its incorporation into the Constitution of the Slovak Republic as an independent entity, represents a new, so-called banking power. I believe that this systematic placement of the central bank in the Constitution of the Slovak Republic is a formal expression of its institutional independence.

The integration of Slovakia into the EU (on 1 May 2004) brought about a significant change for the NBS, since the NBS became a participant in the European System of Central Banks (hereinafter referred to as "ESCB") as a national central bank of an EU member state with a temporary exemption from the adoption and introduction of the euro.

Another important milestone was the adoption of Act No. 659/2007 Coll. on the introduction of the euro currency in the Slovak Republic and on the amendment of certain acts, as amended on 28 November 2007, as this was a legal prerequisite for the introduction of the euro in Slovakia (on 1 January 2009), since the NBS became part of the Eurosystem (the central banking system of the eurozone within the ESCB). In the process of preparing for the introduction of the euro, the NBS carried out and was responsible for a whole range of activities in the field of legislation, such as responsibility for the preparation of the aforementioned law on the introduction of the euro in the Slovak Republic, which was also successfully negotiated with the ECB.⁸

The competence of the NBS as a central bank to issue euro banknotes and euro coins as per the legal regulations in force in the euro area governing the issuance of euro banknotes and euro coins is regulated at national level in § 2, para. 1, letter b of the NBS Act.

§ 17, para. 1 of the NBS Act established the competence of the NBS to manage cash circulation in the Slovak Republic according to special regulations applicable to euro banknotes and euro coins.

With regard to the authority to exercise supervision, after the establishment of the Slovak Republic, the exercise of banking supervision was transferred from the Czecho-Slovak State Bank to the NBS.⁹

8 See ECB opinion CON/2007/43 of 19 December 2007 on the draft law on the introduction of the euro currency in the Slovak Republic and on the amendment of certain acts.

9 See § 36 of the NBS Act.

Under Act No. 747/2004 Coll. on the supervision of the financial market and on the amendment of certain acts, as amended (hereinafter referred to as the “Supervision Act”) (with effect from 1 January 2006), the NBS was entrusted with the supervision of the entire financial market in Slovakia in the areas of banking, the capital market, insurance and pension savings. It served the integration and centralisation of supervision under one supervisory authority, the NBS.¹⁰

The path to the creation of integrated supervision over the financial market spanned a period of almost four years, treaded gradually through the approval of government resolutions (in March 2002 – approval of the concept of integrated supervision over the financial market, in August 2003 – approval of the integration procedure), and preparations up to the adoption of a specific legal regulation in the form of the Supervision Act (2 December 2004).

The reason the entire supervision of the financial market was entrusted to the NBS was that it had proved that it had the necessary qualification, experience and trustworthiness in banking supervision as well as the constitutional base of its independence.

Entrusting the supervision of the entire financial market to the NBS was the very first case when a national central bank became directly and fully responsible for the supervision of the financial market in an EU member state. This fact was received very positively by the ECB during the mandatory consultation (intra-community comment procedure) on the proposal for the Slovak Supervision Act.¹¹ In this regard, the ECB stated that

there are good arguments for the concentration of powers in the field of supervision in the hands of a single authority. The ECB welcomes the fact that the independence, trustworthiness and experience of the NBS were considered decisive reasons for the proposal of the Government of the Slovak Republic to entrust the NBS with this task’ (point 7 of the ECB opinion).

At the same time, it stated that ‘the proposed institutional framework for prudential business supervision is capable of dealing with the growing interconnection between individual sectors within the financial system’ (point 9 of the ECB opinion).

Procedural integration was related to organisational integration. Previously, two separate administrative procedures and supervision procedures (before the NBS, for commercial banks and before the Financial Market Office, for other supervised entities) were integrated into a single supervisory procedure and one administrative procedure before the NBS, regulated by a single act (Supervision Act).

Key components of the framework for supervision by the NBS have become: (a) on-site supervision, (b) remote supervision (off-site), (c) separate administrative

10 Mrkývka, 2012, p. 200.

11 See points 7 and 9 of ECB opinion CON/2004/31 of 22 September 2004 on the draft Supervision Act.

proceedings in matters of supervision, (d) secondary regulation of the entire financial market (so-called secondary legislation: generally binding legal regulations, which are measures – decrees).

The establishment of the NBS reached an important milestone after the European System of Financial Supervision [ESFS]¹² was set up (on 1 January 2011), as the NBS became a participant in this system as a national institution responsible for the entire supervision (prudential supervision) of the financial market at the micro and the macro level.

3. Limits of the central bank's powers: the independence of the national central bank and the limits of the national central bank's competence under EU law

The involvement of the NBS in the EU infrastructure means that the NBS fully participates in the activities of the ESCB, the Eurosystem and the ESFS institutions (EBA, ESMA, EIOPA). The Slovak Republic must, according to Art. 131 of the TFEU and point 14.1 of Art. 14 of the Statute of the ESCB/ECB, maintain full compatibility (so-called legal convergence) of Slovak legislation, especially the “statute” of the national central bank (NBS Act), with the legal framework of the founding agreements and the Statute of the ESCB/ECB. This legal framework lays down rules that relate in particular to:

- a) independence of the central bank,¹³
- b) compliance with the prohibition of monetary financing and the prohibition of preferential access,¹⁴
- c) compliance with the objectives and tasks of the ESCB,¹⁵
- d) management and implementation of monetary policy within the Eurosystem,¹⁶
- e) maintaining and managing foreign exchange reserves within the Eurosystem,¹⁷
- f) respecting the ECB's exclusive right to authorise the issuance of euro banknotes and to approve the volume of issued euro coins,¹⁸

12 Čunderlík et al., 2017, p. 180.

13 E.g. Art. 130 of the TFEU, Art. 7 of the Statute of the ESCB/ECB.

14 Art. 123 and 124 of the TFEU.

15 Art. 127(1) and (2) and Art. 282(2) of the TFEU, Art. 2 and 3 of the Statute of the ESCB/ECB.

16 Art. 282(1) of the TFEU, point 12.1 of Art. 12 and point 9.2 of Art. 9 of the Statute of the ESCB/ECB.

17 Point 12.1 of Art. 12 and point 9.2 of Art. 9 of the Statute of the ESCB/ECB.

18 Art. 128(1) and (2) of the TFEU, point 16.1 of Art. 16 of the Statute of the ESCB/ECB.

- g) obligations of national central banks to act in accordance with ECB guidelines and instructions,¹⁹
- h) and aspects related to the integration of national central banks into the Eurosystem.

The independence of the NBS is particularly important, which, due to the detailed analysis of the aspects of the independence of member states' central banks in the ECB documents²⁰, includes a relatively extensive concept of

- a) institutional,
- b) functional,
- c) financial and
- d) personal independence.

However, the elements of independence of the NBS as a central bank that is part of the ESCB are first and foremost determined by (primary) EU law, which has, in accordance with Art. 7, para. 2 of the Constitution of the Slovak Republic, priority over national legal acts.

The independence of a central bank in the EU is based on the perception of the independence of the ECB.²¹ Details of the status and functioning of the ECB can be found in: (a) the Statute of the ESCB/ECB (b) Art. 127–132 of the TFEU.

Based on these legal acts, we can define *institutional independence* as meaning that neither the ECB nor the national central bank nor any member of their decision-making bodies can request or receive instructions from the EU authorities, the government or any other body. EU authorities and national governments are committed to upholding this principle. It is anchored in Art. 130 of the TFEU and Art. 7 of the Statute of the ESCB/ECB.

Functional independence is defined using the mandate of the central bank – the main goal of the central bank, which is price stability, the provision of tools to ensure it and the determination of responsibility for this goal. It is enshrined in Art. 127 of the TFEU and Art. 2 of the Statute of the ESCB/ECB.

Financial independence refers to the independence of management, the prohibition of direct financing of budget expenditures, while national governments may not influence the budget of national central banks and may not use national central banks to finance their state expenditures. This is a ban on public sector financing (monetary financing), while terms such as “overdraft” or “credit facility” with the ECB and national central banks in favour of bodies governed by public law, central governments and regional authorities are defined in Council Regulation (EC) No 3603/93 of 13

19 Point 14.3 of Art. 14 of the Statute of the ESCB/ECB.

20 These are primarily convergence reports and advisory opinions of the ECB. Some aspects of independence are addressed, for example, in ECB opinion CON/2009/85 of 27 October 2009 on the independence of the National Bank of Slovakia.

21 Daudrikh and Szakács, 2022, pp. 111–112.

December 1993 specifying definitions for the application of the prohibitions referred to in Art. 123 and 125(1) of the TFEU. The direct purchase of their debt by national central banks or the ECB is also prohibited. This type of independence is enshrined in Art. 123 of the TFEU and Art. 21 of the Statute of the ESCB/ECB.

Personal independence (Art. 14 of the Statute of the ESCB/ECB) must be understood as a guarantee of decision-making autonomy and incompatibility of functions, members of top management must have at least a 5-year term of office, and representatives of national central banks cannot be dismissed by the government for political reasons.²² It should be noted that, in recent years, personal independence have also applied to rank-and-file employees of the central bank.

Some of these elements have already been referred for interpretation to the Court of Justice of the EU in the context of the threat of their limitation by other EU bodies (see proceedings in Case C-11/00 Commission of the European Communities v ECB, judgment of 10 July 2003).

In the fifth chapter, I will take a closer look at financial independence in the light of the recent decision of the Court of Justice of the EU (C-45/21, Banka Slovenije).

The Constitutional Court of the Slovak Republic as an independent, court-type constitutionality control body²³ has also touched upon aspects of the NBS's independence in connection with the non-appointment of a candidate for vice-governor by the president due to failure to meet professional requirements (Resolution No. PL. ÚS 14/06 adopted in closed session on 23 September 2009).²⁴ It stated that the NBS is a body independent of the government, while this independence follows directly from Art. 56 of the Constitution of the SR. From the point of view of the formal division of power, as envisaged by the Constitution of the Slovak Republic in terms of its structure, the competence of the NBS falls under the executive power. However, it follows from its constitutional independence that it cannot be subject to the basic hierarchy of the bodies of executive power, i.e. it is not subordinated to the government.

When creating new competences for national central banks in the EU, the obligation to consult with the ECB on draft legislative provisions regulating the powers of the national central bank must be met. According to Art. 127(4) and Art. 282(5) of the TFEU, drafts of national legislation that relate to the competence of the ECB and national central banks must be submitted to the ECB's intra-community comment procedure. The areas that are mandatorily subject to consultation are defined in

22 On the other hand, neither the ECB nor the EU imposes any requirements on the process of selecting members of the decision-making bodies of the central bank. The appeal of the governor of a central bank is subject to review by the Court of Justice of the EU, while other members of the decision-making body (in the case of the NBS, members of the Banking Council) have the opportunity to turn to a national court for review of their appeal.

23 Ľalík and Ľalík, 2019, p. 26.

24 Similarly, there was a second case of non-appointment of a candidate for the office of vice-governor in 2019. The decision of the Constitutional Court of the Slovak Republic in this case (judgment III. ÚS 394/2020) is subject to theoretical criticism. Ľalík, 2022, pp. 670–685.

Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions (98/415/EC).

In the following section, I will focus on the European legal limits applicable to national central banks in carrying out two main activities, namely, the conduct of monetary policy (including the issue of money) and the supervision of credit institutions (the first pillar of the Banking Union – Single Supervisory Mechanism).

3.1. Implementation of monetary policy and the issue of money (general legal basis)

After the NBS's integration into the eurozone and, concurrently, into the Eurosystem since the introduction of the euro in Slovakia (on 1 January 2009), the NBS *lost its monetary sovereignty* in the implementation of an independent monetary policy. The ECB is responsible for deciding on a single monetary policy for the entire euro area, while the Governor of the NBS also participates in this ECB decision-making as a member of the ECB's Board of Governors.

According to Art. 3(1)(c) of the TFEU, the EU has exclusive jurisdiction in the area of monetary policy for the member states of the European Union whose currency is the euro. According to Art. 282(1) of the TFEU, the ECB together with the national central banks constitute the ESCB. The ECB, together with the national central banks of the member states whose currency is the euro and which form the Eurosystem, conducts the monetary policy of the EU. As per Art. 128(1) of the TFEU, the ECB has exclusive right to authorise the issue of euro banknotes.²⁵ Under Art. 16 of the Statute of the ESCB/ECB, the Governing Council has the exclusive right to authorise the issue of euro banknotes in the EU. These banknotes can be issued by the ECB and national central banks. Art. 128(2) of the TFEU provides that member states may issue euro coins in the volume approved by the ECB. Within the meaning of Art. 282(3) of the TFEU, only the ECB can authorise the issue of the euro. It follows from the above that, in matters of monetary policy, the ECB has the upper hand.

3.2. Financial market supervision

EU requirements regarding the legal status of a national central bank (point 14.4 of Art. 14 of the Statute of the ESCB/ECB) permit national central banks to perform functions other than those of the ESCB as long as this does not interfere with the objectives and tasks of the ESCB. However, such functions are performed by national central banks on their own responsibility and do not form part of the functions of the ESCB. Consequently, the NBS is currently entrusted with the full supervision of the financial market in Slovakia.

Similarly, according to Art. 127(6) of the TFEU, the ECB may be assigned special tasks related to the policy of the prudential supervision of credit institutions and

other financial institutions, with the exception of insurance companies. Accordingly, the first pillar of the Banking Union was created, which only concerns the supervision of banks. The legal basis of the SSM is represented by (a) Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (hereinafter referred to as the “Prudential Supervision Regulation”) and (b) Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) (ECB/ 2014/17) (hereinafter referred to as the “SSM Framework Regulation”).

In accordance with Art. 25(2) of the Prudential Supervision Regulation, the ECB carries out the tasks entrusted to the ECB by this regulation without prejudice to its tasks related to monetary policy (the so-called separation from the function of monetary policy).

4. The practice of cooperation between the NBS and the ECB within the SSM in the licensing procedure

In this chapter, I will focus on evaluating the effectiveness of the licensing process within the SSM in Slovakia, specifically on the practical usability of the ECB’s electronic application system for selected licensing procedures (SSM procedures).

The SSM is a system of financial supervision over credit institutions consisting of the ECB and the competent authorities of the eurozone member states and other EU member states that have decided to join the system voluntarily (the procedure for establishing close cooperation is regulated in Decision ECB/2014/5 of 31 January 2014 on the close cooperation with the national competent authorities of participating member states whose currency is not the euro). The participation of eurozone member states is mandatory. The ECB is responsible for the consistent functioning of the SSM. The SSM was launched on 4 November 2014.

In essence, the SSM consists in the cooperation of the ECB and the relevant national authorities in the supervision of credit institutions which, from the point of view of supervision, are classified into significant and less significant institutions.

The significance of credit institutions directly supervised by the ECB is based on a number of criteria (e.g. the value of the assets of the credit institution exceeding the threshold of 30 billion euros, whether the credit institution received financial support from the European Financial Stability Facility or the European Stability Mechanism or is one of the three most important credit institutions in a member state, regardless of other criteria, such as the volume of assets, etc.), or the ECB may, on the initiative of a national authority, consider a credit institution significant for

the economy of a member state, or the ECB may, on its own initiative, consider a credit institution significant if this institution has established bank subsidiaries in more than one member state.²⁶

Other, less significant credit institutions are subject to the supervision of the national authority (NBS). However, the ECB can also exercise certain powers in relation to these institutions. The ECB may, for example, decide to exercise direct supervision even over a less significant credit institution (e.g., if such an institution is close to fulfilling one of the significance criteria).

The aim of this concentration of supervisory power is to ensure that pan-European interests and not national interests are pursued when solving banking crises.

The special powers of the ECB in relation to all credit institutions (regardless of significance) include the possibility to conduct *various types of licensing procedures* (see Art. (4)(1)(a) and (c) of the Prudential Supervision Regulation) *or impose sanctions* (for the possibility of imposing administrative fines, see Art. (18), or for the withdrawal of licence, see Art. (14)(5) of the Prudential Supervision Regulation, or for pecuniary penalties, Art. 2(4c) of Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions).

The ECB will set up, as per Art. 24 of the Prudential Supervision Regulation, an administrative review committee for the purpose of reviewing the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation. After deciding on the admissibility of the review, the Administrative Review Committee issues an opinion and refers the matter to the Supervisory Board for it to draft a new decision. The Supervisory Board will take into account the opinion of the Administrative Review Committee and submit a new draft decision to the Board of Governors. The original decision will be cancelled or replaced by a new draft decision (Art. 24(7) of the Prudential Supervision Regulation).

Administrative procedures before the NBS are regulated in the third part of the Supervision Act, entitled “Procedures in matters of supervision” (§ 12 to § 34a), while any application of the general regulation on administrative procedures is excluded (§ 12, para. 1).

The national legal framework for cooperation between the NBS and the ECB within the SSM regarding licensing procedures consists of § 1, para. 3, letter d) and § 34a of the Supervision Act and § 94, paras. 5 and 6 of Act No. 483/2001 Coll. on banks and on the amendment of certain laws, as amended (hereinafter referred to as the “Act on Banks”).

According to § 34a of the Supervision Act, the provisions on procedures before the NBS in matters of supervision (i.e. special administrative procedures under the Supervision Act) also apply to the procedure of cooperation between the NBS (cooperation and preparing documents for procedures and decision-making) and

26 For the categories of criteria, see Art. 6(1) of the Prudential Supervision Regulation. For the determination of materiality, see the SSM Framework Regulation.

the ECB within the SSM under the Prudential Supervision Regulation and the SSM Framework Regulation.²⁷

In practice, the NBS assesses the application submitted in the licensing procedure and, for SSM licensing procedures, prepares a draft decision directly for the ECB, where the competent supervisory authority is the ECB as per the Prudential Supervision Regulation.

Pursuant to § 94, para. 5 of the Act on Banks, applicants may submit an application in licensing matters in electronic form. Under § 94, para. 6, the measure that may be taken by the NBS, which is published in the collection of laws, establishes what is understood by electronic form as per para. 5, the manner, form and procedure of submitting the application and its annexes in electronic form, the types of procedures, when the application can be submitted in electronic form, and other details of electronic submission.²⁸

According to the explanatory memorandum to these two paragraphs, they introduce the possibility to submit applications in licensing procedures in electronic form. Para. 6 contains an authorising provision, enabling the NBS as a participant of the SSM (within the meaning of the Prudential Supervision Regulation) to determine the conditions for the electronic submission of applications by means of a decree. The aim is to join the ECB's upcoming project for the electronic submission of applications within the framework of procedures for the licensing of credit institutions in the participating SSM member states.

Electronic submission should take place through the ECB's electronic communication system – the IMAS Portal. Para. 6 provides the legal basis for the issue of an act that would guide the applicant in the electronic submission of the application, especially in relation to:

- a) the information system through which the application will be submitted electronically,
- b) the types of licensing procedures, applications that can be submitted electronically,
- c) the procedure for submitting the application and its attachments in electronic form.²⁹

The problem is that so far, such an act has not been issued by the NBS, which could result in the provision on the possibility of submitting an electronic application not being enforceable.

Neither of the paragraphs indicate that only certain types of licensing procedures fall within the ECB's competence. However, it is clear from the above-mentioned explanation to para. 6 that it is limited to certain types of requests, i.e. not

27 This provision was adopted by Act No. 279/2017 Coll. with effect from 15 December 2017.

28 These paragraphs were introduced with effect from 29 December 2020 by Act No. 340/2020 Coll.

29 Prepared according to the explanatory memorandum to Act No 454/2021 Coll., which, with effect from 10 December 2021, clarified the empowering provision in para. 6.

all procedures referred to in the Slovak Act on Banks are covered. The link to the ECB's information system clearly indicates the decision-making activity of the ECB within the SSM, which is limited to certain types of licensing procedures (that is, procedures conducted under the authority of the ECB in cooperation with the NBS). The electronic submission of applications should cover banks (credit institutions) that fall under the ECB's decision-making authority within the SSM (significant banks and less significant banks).

The ECB – IMAS Portal is the ECB's electronic communication system which allows banks to submit applications related to SSM procedures, monitor the status of SSM procedures, and enables information exchange between the NBS and the ECB. The goal of this portal is to simplify, streamline and digitise SSM procedures and to increase transparency in relation to banks about the status of their ongoing SSM procedures, directly connecting banks.

In general, the following types of SSM procedures are available through the IMAS Portal: (1) for all banks (significant banks and less significant banks): (a) procedure for granting prior approval for the acquisition or further increase of qualified participation in a bank (§ 28, para. 1, letter a of the Act on Banks), (Art. 4(1)(c) of the Prudential Supervision Regulation),³⁰ (b) procedure for granting a banking licence (§ 7 of the Act on Banks), (Art. 4(1)(a) of the Prudential Supervision Regulation),³¹ (c) procedure for granting prior approval for the return of a banking licence (§ 28, para. 1, letter b of the Act on Banks). (2) only for significant banks:

- a) procedure for granting prior approval for the election or appointment of a member of the statutory body, a member of the supervisory board or for the appointment of a procurator, for the appointment of a senior employee or head of the internal control and audit department in the bank (§ 9, para. 4 of the Act on Banks), (Art. 93 of the SSM Framework Regulation),
- b) procedure for granting consent to the activity of a financial holding company and a mixed financial holding company (§ 20a of the Act on Banks).

On its website, the NBS refers to a link where banks as well as third parties can submit applications related to the aforementioned SSM procedures, while the NBS provides guidelines in this regard.

The IMAS Portal can, in practice, be used in the Slovak Republic: (a) voluntarily, (b) for submitting a proposal for staff appointments at a significant bank (according to § 9, para. 4 of the Act on Banks); it is not yet technically feasible for smaller banks. However, only one major bank actually uses this option.

30 The submission procedure is regulated in Art. 15 of the Prudential Supervision Regulation. In more detail, the procedure of cooperation between the NBS and the ECB is regulated in Art. 85 to 87 of the SSM Framework Regulation.

31 The procedure for applying for a licence and the procedure for withdrawing a licence are regulated in Art. 14 of the Prudential Supervision Regulation. In more detail, the procedures of cooperation between the ECB and the NBS are regulated in Art. 73 to 84 of the SSM Framework Regulation.

By contrast, the ECB already uses the electronic system for the other SSM procedures mentioned above (mainly, the acquisition of qualified participation in a bank and granting a banking licence). In the case of these other procedures, the NBS acts as an intermediary – it communicates with the ECB via the IMAS Portal and scans and sends the submitted application via the portal’s electronic system. In the future, use of the IMAS Portal in the Slovak Republic should be:

- (a) mandatory,
- (b) technically possible for all SSM licensing procedures,
- (c) in relation to all banks – significant and less significant banks.

At the European level, it would be appropriate to consider expanding the scope of SSM procedures to include other types of licensing procedures (e.g. granting prior approval for mergers, mergers or demergers of a bank, the dissolution of a bank, the sale of a bank’s business). For some types of licensing procedures, however, it is important to leave the evaluation of applications to the national supervisory authority, which knows best the situation of the bank (e.g. consent to changing the bank’s articles of association, some types of previous consents under § 28 of the Act on Banks, such as to the use of shares issued by the bank as the subject of securing the obligations of the owner of these shares). In this regard, a completely uniform licensing practice may not be possible, since some types of licensing decisions are based on an assessment of country-specific legal requirements.

5. Liability for damage caused by a national central bank in the EU

In the fifth chapter,³² I look at and analyse the suitability of the current legal status of central bank liability in the Slovak Republic in the exercise of public authority in the light of a recent decision of the CJEU.

5.1. Slovak law on liability in the exercise of public authority

Liability for damage caused in the exercise of public authority is regulated by Act No. 514/2003 on liability for damage caused in the exercise of public authority and on the amendment of certain acts (hereinafter referred to as the “Liability Act”), which entered into force on 1 July 2004.³³

32 This fifth part is also an output of the Project VEGA No. 1/0212/23: Financial innovations as a determinant of current and anticipated regulation of the financial market (challenges and risks).

33 Its predecessor was Act No. 58/1969 on liability for damage caused by the decision of a state authority or its maladministration.

The concept of liability in the exercise of public authority in (Czech)Slovak law is historically built on absolute strict liability, which means:

- a) that no examination of fault is required for liability to arise (i.e. it arises irrespective of whether the responsible authority acted intentionally or negligently, thus no exculpation is possible; otherwise, it would be liability for fault),
- b) liability for the damage caused cannot be cleared (liberation), i.e. there are no grounds for liberation, otherwise it would be relative liability.

The Liability Act (§ 1) distinguishes between the liability of the state for damage caused by public authorities in the conduct of public authority and the liability of local authorities for damage caused by them.

The exercise of public authority is considered to be official action and decision-making concerning the rights, legally protected interests and obligations of natural and legal persons. A public authority includes, *inter alia*, a legal person entrusted by law with the exercise of public authority.³⁴

As mentioned above, the central bank has broad public powers and duties conferred on it by legal acts a) at national level (NBS Act, Supervision Act) and b) at European level in the case of participation in the ESCB/Eurosystem (TFEU, Statute of the ESCB/ECB), SSM, ESFS (e.g. Prudential Supervision Regulation).

Its remit includes e.g. public tasks arising from membership in the ESCB, Eurosystem, the issue of euro coins, being a lender of last resort, the exercise of prudential supervision at the national level, consumer protection and cooperation with foreign supervisors (in the SSM, consolidated supervision).

There is therefore no doubt that a national central bank is clearly a public authority. The state is liable for damages, where the central bank is the public authority, arising from an unlawful decision or maladministration of the central bank.

The Liability Act (§ 4) establishes a list of central public bodies that act on behalf of the state in the matter of compensation for damage caused by a public body. At the same time, the scope of proceedings on behalf of the state includes, in relation to individual plaintiffs, payment of the incurred damage,³⁵ for which the state is responsible under the Liability Act. It is probably no coincidence that the law does not use the whole customary phrase “acts in the name of the state and on its account”. The NBS acts on behalf of the state if: (a) the damage occurred as a result of its unlawful decision or (b) was caused by its incorrect official procedure (§ 4, para. 1, letter h of the Liability Act).

Proceedings on behalf of the state relate to the competence of the competent public authority (e.g. the Ministry of Justice in relation to violations by the courts; in such a case, the competent authority has the right to claim compensation if it has paid the damage – so-called “recourse compensation” – § 21–22 Liability Act).

34 See § 2 of the Liability Act.

35 See, e.g., § 16 of the Liability Act.

Exculpation is only possible for public authorities at a lower level in relation to the central public authorities, when these central public authorities have already paid damages to individual plaintiffs. Exculpation (waiving recourse compensation) applies only if the damage was not caused by an arbitrary decision (which has no legal basis).

Exculpation does not apply in the case of the NBS because the central bank is considered to be the competent central authority that must act on behalf of the state (including paying the damage caused by its unlawful activity).

The Slovak Republic must (according to Art. 131 of the TFEU, Art. 14.1 of the Statute of the ESCB/ECB) maintain full compatibility (legal convergence) of Slovak legislation with the EU legal framework (especially the TFEU, Statute of the ESCB/ECB).

At the time of its adoption, the Liability Act was not subject to a consultation obligation under EU law, as Slovakia was not yet a member.³⁶

However, the Slovak legal concept of strict liability conflicts with European rules regarding: (a) independence of the central bank (financial independence), (b) compliance with the prohibition of monetary financing.

5.2. Supervision of the financial market as a conduct of public authority in the Slovak Republic

The power to supervise the financial market can be clearly defined as the exercise of public power.³⁷ The state entrusted the NBS with tasks (powers, duties) of supervision by a special law (Supervision Act). As mentioned above, the key activities of the NBS within the scope of supervision are (a) on-site supervision, (b) remote supervision (off-site), (c) licensing or sanctioning administrative procedures in matters of supervision.

The costs associated with on-site supervision and remote supervision are borne by the NBS (§ 2, para. 12 of the Supervision Act). In this context, it is necessary to state how the NBS finances the costs of supervision. The sources of financing are own resources, supervised entities' contributions³⁸ (annual contributions and special contributions, § 40–40a of the Supervision Act), procedural fines for procedural offences (§ 38 of the Supervision Act). However, the NBS income from the latter is not ordinary fines, which are transferred to the state budget under § 34 of the Supervision Act.

36 Currently, it would be subject to mandatory consultation with the ECB, because in accordance with the third point of Art. 2(1) of Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions refers to the position of the national central bank.

37 Kohajda, 2018, p. 101.

38 Supervised entities are legal and natural persons as referred to in § 1, para. 3, letter a of the Supervision Act who operate on the financial market on the basis of a relevant authorisation or other authorisation (e.g. registration).

As regards personnel costs (wages), the income from the contributions of supervised entities covers c. 40% of these costs.

The concept of strict liability under the Slovak Liability Act in the exercise of supervisory jurisdiction should be evaluated in the light of the recent judgment of the Court of Justice of the EU in Case C-45/21 *Banka Slovenije* [Judgment of the Court (Grand Chamber) of 13 September 2022, in Case C 45/21, request for a preliminary ruling from the *Ustavno sodišče* (Constitutional Court, Slovenia), made by decision of 14 January 2021, received at the Court on 28 January 2021, in the proceedings *Banka Slovenije*].

The reference for a preliminary ruling concerns the interpretation of Art. 123 and 130 of the TFEU, and Art. 7 and 21 of the Statute of the ESCB/ECB. The reference was made in the context of proceedings for a review of the constitutionality of national legislation defining the conditions for the liability of *Banka Slovenije* (the Slovenian central bank) for damage caused by the cancellation of certain financial instruments and access to certain information relating to that cancellation which that central bank has.

The Central Bank of Slovenia brought an action for review of the constitutionality of the Slovenian Banking Act and another Slovenian law (Act on the procedure applicable to the judicial and extra-judicial protection of former holders of eligible bank liabilities, hereinafter the “Protection Act”), claiming that the rules laid down in those provisions, as regards the incurrence of its liability, are incompatible with Union law.

The national court questions the compatibility of the liability regime under the Protection Act with Art. 123 of the TFEU and Art. 21 of the Statute of the ESCB/ECB – in so far as the responsibility assumed by the Central Bank of Slovenia in place of the Slovenian authorities could be equated with a form of financing of those authorities – and with the principle of the independence of central banks under Art. 130 of the TFEU and Art. 7 of the Statute of the ESCB/ECB.

Under the Protection Act, the liability of the Central Bank of Slovenia for damage caused by the cancellation of certain financial instruments may be incurred under two separate and alternative regimes. For the purposes of assessing the Slovak legislation, the first liability regime is of significance.

According to Art. 14.4 of the Statute of the ESCB/ECB, national central banks may perform functions other than those of the ESCB as long as this does not interfere with the objectives and tasks of the ESCB. However, such functions are performed by national central banks on their own responsibility and do not form part of the functions of the ESCB. Thus, for example, the NBS is entrusted with the exercise of financial market supervision.

Where the legislature of a member state assigns such a function to the central bank of that member state, that function must, under that provision, be performed under the responsibility and liability of that central bank (para. 54 of the Judgment of the Court).

As regards the specific rules governing the liability of a national central bank (including where it exercises a function conferred on it by national law), the Statute of the ESCB/ECB states in Art. 35.3 that it is to be liable according to those acts of national law (para. 55 of the Judgment of the Court).

It follows from the above that it is for the member state concerned to define the conditions under which the liability of its national central bank may arise.

It follows from Art. 123(1) of the TFEU (as well as Art. 21.1 of the Statute of the ESCB/ECB) that this provision prohibits the ECB and the national central banks from granting overdraft facilities or any other type of credit facilities to the Union's and member states' institutions, bodies, offices and agencies, as well as from directly purchasing their debt instruments.

5.3. Conclusions in the context of the judgment in Case C-45/21

Art. 1(1)(b) of Regulation No 3603/93 defines the term "other types of credit" for the purposes of Art. 123 of the TFEU as covering any financing of public sector obligations towards third parties. The obligation of a national central bank to pay for the damage for which it is liable may also be regarded as such a situation if the payment is made out of the central bank's own resources. This is the case, therefore, where the legal system of a member state entrusts a national central bank with a specific task (e.g. financial market supervision), but no financial resources are provided by the state to pay for the potential damage arising from its activities (or, alternatively, the revenues from the exercise of this function are differentiated between the state and the NBS, but the obligation to pay for the damage is assumed by the central bank).

Similarly, the CJEU has held that where the incurrence of liability (with an obligation to pay for the damage) results in the national central bank assuming obligations towards third parties (in the case of the NBS, the assumption of an obligation of the state) which could potentially be a public sector obligation, this may be regarded as financing a public sector obligation towards third parties within the meaning of Art. 1(1)(b)(II), (para. 67 of the Judgment of the Court).

However, the incurrence of such liability by reason of the exercise of a function conferred on it by national law does not always constitute financing of a public-sector obligation. An opposite interpretation would be contrary to the diversity of national practice. It would mean that the incurrence of liability by a national central bank by reason of the exercise of a function conferred by national law is in any event incompatible (with Art. 123(1) of the TFEU). However, Art. 14.4 and Art. 35.3 of the Statute of the ESCB/ECB could not explicitly allow national central banks to perform such functions on their own responsibility and at their own risk under the conditions laid down by national law.

In essence, the CJEU has stated that in order for a member state's legislation to be compatible with EU law, it is required that, in "complex and urgent matters", the exercise of a function entrusted to a national central bank must involve a breach of the rules governing the exercise of that function, which is serious (e.g. "infringement

of the duty to exercise due care of a serious nature”).³⁹ It is therefore important to preserve the possibility for the central bank to absolve itself of its liability by proving that the duty/rule:

1. was in no violation,
2. is of a serious nature,
3. relates to a complex and urgent matter.

Failure to do so would result in the central bank bearing a substantial part of the financial risks associated with this exercise. From a compatibility perspective, it is not important who bears the burden of proof regarding the demonstration of due diligence. At the same time, the state must ensure that the national central bank has the necessary financial resources to be able to pay compensation without compromising its independence.⁴⁰

5.4. Doubts about the compatibility of Slovak legislation with EU law (Art. 123 and 130 of the TFEU)

The Court (Grand Chamber) ruled (regarding the first preliminary question) that Art. 123(1) of the TFEU and Art. 21.1 of the Statute of the ESCB/ECB must be interpreted as not precluding national legislation which provides that a national central bank belonging to the ESCB is liable, from its own funds, for damage suffered by former holders of financial instruments cancelled by it pursuant to reorganisation measures, within the meaning of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, ordered by that central bank, where it appears, during subsequent court proceedings, that either that cancellation was not necessary in order to ensure the stability of the financial system, or that those former holders of financial instruments suffered greater losses as a result of that cancellation than they would have suffered in the event of the insolvency of the financial institution concerned, to the extent that the central bank in question is held liable only where it (or the persons whom it authorised to act on its behalf) acted in serious breach of their duty to exercise due care.

Based on the analysis of the judgment in Case C-45/21, we consider the Slovak concept of strict liability incompatible with the CJEU's interpretation of Art. 123 and 130 of the TFEU because of the following reasons.

1. The problem is that the Slovak Liability Act does not distinguish between the state and the central bank. If a national court finds that a decision of the NBS in the scope of its power and duty to supervise the financial market is unlawful, or an official action of the NBS was wrong/unlawful, the NBS will always be liable to compensate the damages incurred (no liberation is possible). The concept of strict liability does not allow the central bank to avoid

³⁹ See para. 75 of the Judgment of the Court.

⁴⁰ See para. 105 of the Judgment of the Court.

payment, since here, the central bank represents the state (state = central bank) and thus assumes its obligation towards third parties. In this context, it is therefore *de lege ferenda* necessary to consider changing the national legislation on the concept of strict liability to one of relative liability. Specifically, in the Liability Act, to limit liability by introducing liberalising grounds which, if met, would not give rise to NBS liability;⁴¹ for example: (a) it is not a serious breach of a duty (degree of seriousness⁴²) to act with due care, (b) there is a “complex and urgent agenda” (complex and urgent matters).

2. Another problem is that the NBS, in the event of liability for damage incurred in the course of financial market supervision, will have to pay for this damage from NBS resources. As mentioned above, the revenues from fines imposed on supervised entities (in the course of supervision for breaches of legislation) are not a source of the NBS but a revenue of the state budget. In this context, it is therefore *de lege ferenda* necessary to consider a change in the national legislation: (a) in financial market laws – to make the revenues from all fines be the revenues of the NBS (this solution may not be sufficient in the future if the damage incurred exceeds the volume of fines imposed); or (b) in the Liability Act – to introduce a mechanism whereby in the event of NBS liability, the state would pay for the damages incurred (in full or in some proportion), and at the same time introduce a distinction in the Liability Act between the liability of the state and the liability of the central bank as a public authority.

As a result of these problems, the Slovak concept of liability is contrary to the prohibition of monetary financing of the public sector (Art. 123 of the TFEU, Art. 21.1 of the Statute of the ESCB/ECB) and is a threat to the financial independence of the NBS (Art. 130 of the TFEU, Art. 7 of the Statute of the ESCB/ECB). It is questionable whether the NBS could, in practice, without the proposed legislative changes, challenge performance from its own resources on the grounds of the prohibition of monetary financing and of financial independence if enforcement (forced execution) of a court decision recognising the damage were to be initiated.

41 In this context, the Constitutional Court of the Slovak Republic has expressed the opinion that there is no right to accurate and correct legal banking supervision and, consequently, no right to compensation for damages in case of failure of supervision. Banking supervision is a conceptual, economic and political activity; it is not a traditional administrative activity as per its interpretation in the Liability Act (Resolution of the Constitutional Court of the Slovak Republic, sp. zn. II. ÚS 295/2017). In doing so, the Constitutional Court questioned the liability of the NBS for maladministration.

42 The liability of the Central Bank of Latvia has been regulated in a similar way. The original liability for negligence has been changed in favour of this central bank to liability for wilful misconduct or gross negligence; see ECB opinion CON/2021/9 of 26 February 2021 on the reform of Latvijas Banka. Both the judgment of the Court of Justice of the EU and ECB opinion CON/2021/9 demonstrate that the legal regime of liability for damages in the case of a central bank should be linked to the fulfilment of certain criteria which relativise liability while respecting the financial independence of the central bank. Liability should not arise automatically.

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CHAPTER 7

THE FUTURE OF THE ECONOMIC AND MONETARY UNION FROM THE PERSPECTIVE OF THE CZECH REPUBLIC



MICHAL PETR

Abstract

When the Czech Republic joined the European Union in 2004, it was widely believed that it would adopt the euro as soon as it met the Maastricht convergence criteria. More than 20 years later, the Czech Republic is still not a member of the eurozone, despite having met the Maastricht criteria in the past. At the same time, the Czech population has shown the strongest opposition to euro among the non-eurozone countries. Over the years, the position of the Czech National Bank has remained unchanged – the governance of the eurozone is an unfinished project. As the future obligations of its members are not clear, euro cannot reasonably be adopted. The position of the Government has shifted from mild support to outright opposition. In this argument, we will discuss and evaluate the reasons put forward against the adoption of the euro, concluding that whether the euro is adopted will ultimately be a political, not a legal or economic decision.

Keywords: Czech Republic, Economic and Monetary Union, Euro, Eurozone

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1. Introduction

Over the years since the Czech Republic joined the European Union in 2004, its position towards the adoption of the euro has significantly changed from mild support to the strongest opposition. Even though the statements issued by critical Czech institutions remain unchanged, the public opinion may be changing again.

As will be described in detail below, the Czech National Bank (hereinafter referred to as “CNB”) regularly prepares a report concerning the risks and benefits of the possible adoption of the euro. For almost 20 years, the risks have remained the same: the lack of full economic alignment with the eurozone and the as-yet-unknown obligations, connected with the future governance structure of the eurozone. Thus the future of the euro in the Czech Republic depends on the future of the Economic and Monetary Union (hereinafter referred to as “EMU”) itself.

In this paper, I will discuss the possible future of the EMU and the position of the Member States within it from the perspective of the Czech Republic. To this end, I will first discuss the approach of the Czech Republic to the adoption of the euro over the past 20 years (Chapter II). Thereafter, I will analyse the arguments put forward as a reason not to adopt the euro in the Czech Republic (Chapter III). As these reasons are, arguably, not persuasive from the economic and legal point of view, I will concentrate on the ultimate argument against the adoption of the euro, consisting in the unpredictable future of the EMU itself (Chapter IV). Furthermore, I will describe the two theoretical models of future EMU and, in particular, the actual measures adopted over the last ten years as a reaction to diverse economic crises hitting the eurozone. This assessment leads me to the conclusion that the EMU is, in the long term, heading towards a fiscal union, characterised by mutualisation of debt and extensive financial transfers.

This leads us back to the original proposition put forward in this paper: the question whether to adopt the euro is, ultimately, a political one, which depends on the willingness of candidate countries to participate in the fiscal union.

2. The Curious Case of the Czech Approach to the Euro

The Czech approach to the euro has been changing significantly over the last 20 years. With a little simplification, we can distinguish the following four phases.

2.1. We would like to, but we cannot

When the Czech Republic joined the European Union in 2004, its population was rather enthusiastic. In 2003, there was a referendum on the accession, in which 55% of voters took part, a relatively high number for the Czech Republic, and more than

77% voted yes. These numbers did not indicate exceptionally high support when compared to Slovenia or Slovakia, both close to 90%, but were much higher than the similar results in Malta (53%) or Estonia (66%).¹

Concerning specifically the adoption of the euro, opinions in the Czech Republic were fully comparable to other “new” Member States. In 2004, 40% of people supported the adoption of the euro, which corresponded with 39% support in non-Euro countries on average. Thus the Czech Republic was well in the mid-range of the most enthusiastic countries, Hungary and Slovenia (support over 55%), and the most reserved ones, Latvia or Poland (support close to 30%).²

The official Czech strategy towards the euro also reflected this “mild optimism”. In the months preceding the Czech Republic’s accession to the EU, the government’s position seemed to be very much in favour of adopting the euro. Together with the Czech National Bank, the government published, in 2003, a document entitled ‘The Czech Republic’s Euro-area Accession Strategy’ (hereinafter referred to as “Strategy 2003”), in which it recommended ‘that the Czech Republic join the euro area as soon as economic conditions allow for doing so’.³

Even in such an atmosphere, the euro could not have been adopted “immediately”. Without going into technical details, a country wishing to adopt the euro must first comply with the “Maastricht” convergence criteria, provided for in Article 140 of the Treaty on the Functioning of the European Union (hereinafter referred to as “TFEU”) and Protocol No. 13 thereto. The four criteria concern (a) price stability, i.e. the rate of inflation; (b) sustainability of the government financial position, i.e. avoiding excessive governmental deficits, as defined in Article 126 TFEU; (c) observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, i.e. participation in the Exchange Rate Mechanism (ERM II); and (d) convergence in the long-term interest-rate levels.

The participation in the ERM II has a specific position among these criteria, as it must last at least for two years.⁴ For the Czech Republic, the first date that was theoretically feasible for adopting the euro was thus in 2006, achievable if the Czech Republic entered the ERM II immediately. Such decision was adopted by several new Member States; for example, Estonia, Lithuania and Slovenia joined the ERM II in the same year they joined the EU, while Latvia and Slovakia joined ERM II a year later, in 2007.

The Czech Republic did not opt for this solution. Because of the contemporary budgetary difficulties, Strategy 2003 did not expect meeting the other Maastricht convergence criteria before 2007 – in fact it put the date “around 2009-2010”.⁵ As a consequence, Strategy 2003 suggested that the Czech Republic should enter the

1 Český statistický úřad, 2004.

2 European Commission, 2006.

3 Czech Government and Česká národní banka, 2003.

4 Protocol No. 13 to the TFEU, Art. 3.

5 Czech Government and Česká národní banka, 2003, p. 7.

ERM II only when the convergence criteria would have been met, putting forward that ‘staying in the ERM II for longer than the minimum required period of two years does not seem desirable’.⁶ Ever since, the Czech Republic had not considered joining the ERM II.

The government started to prepare its institutions for the adoption of the euro. As early as 2005, it appointed a National Coordinator for the Introduction of the euro in the Czech Republic and established a National Coordination Group for the Introduction of the euro in the Czech Republic. In 2007, the government adopted the National Euro Changeover Plan,⁷ a technical document providing for procedures and a “timetable” for adopting the euro after entering the ERM II system. Similar to Strategy 2003, the Changeover Plan was aimed at adopting the euro as soon as possible.

However, it should be noted that, from the very beginning, Strategy 2003 expressed realistic concerns about the economic impacts of the euro on the Czech economy. It stressed the importance of ‘cyclical and structural alignment of the Czech economy and its financial sector with the euro-area economies’ and observed that ‘the Czech economic cycle is less aligned with the cycle in the euro area than is that of the average euro-area Member State’.⁸ Because of that, the CNB undertook to prepare an annual assessment of the Czech economy’s current and expected fulfilment of the Maastricht convergence criteria and an assessment of the Czech economy’s alignment with the euro area.

2.2. We cannot (yet), but we should (at some point)

In the subsequent years, however, the Czech position about the euro began to change, growing more and more sceptical. Because of the economic situation, the Czech economy had not converged with the Maastricht criteria, and the situation even worsened following the economic crisis of 2008. The adoption of the euro was no longer foreseeable in the near future.

In 2007, the government published an updated accession strategy to the euro area (hereinafter referred to as “Strategy 2007”).⁹ Crucially, it no longer stated that the Czech Republic was legally bound to adopt the Euro. Instead, it stressed that the Czech Republic was not yet economically ready¹⁰ and that structural economic reforms were needed first. Any specific date to adopt the euro was thus impossible to set; however, the Czech Republic remained committed to adopt the euro in due time:

6 Ibid., p. 3.

7 Czech Government, 2007.

8 Czech Government and Česká národní banka, 2003, p. 4.

9 Czech Government and Česká národní banka, 2007.

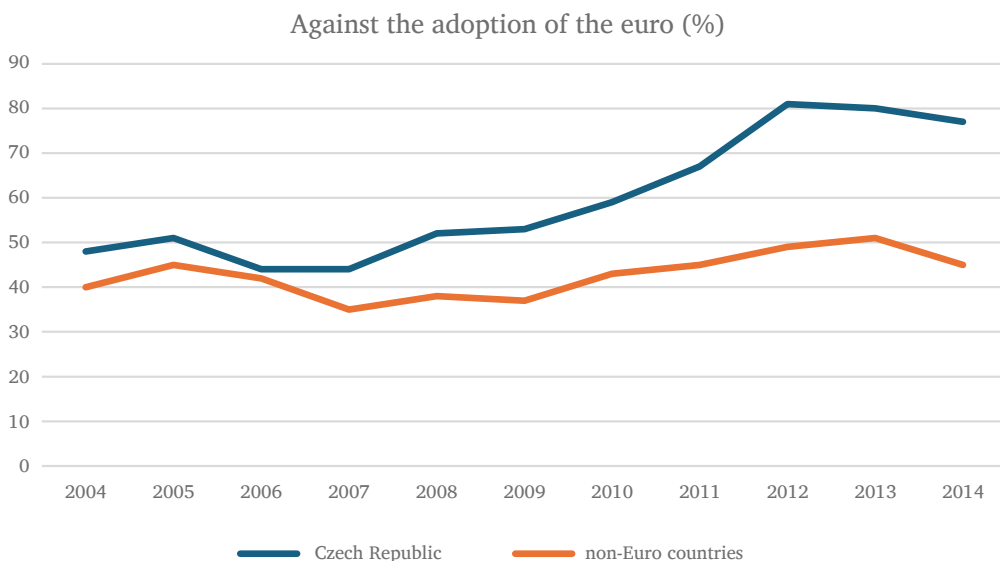
10 Ibid., p. 9: ‘The main obstacles to the fulfilment of the Maastricht criteria remains the unconsolidated state of public finances. This, coupled with the low flexibility of the economy, and especially the labour market, simultaneously presents a risk to the operation of the Czech economy in the euro area and prevents it from reaping the benefits associated with adopting the euro.’

The euro adoption date will depend on a fundamental reform of public finances and on enhancing the flexibility of the Czech economy. The Government therefore sets itself the task of making maximum reform efforts to remove these obstacles by the end of its term of office [i.e. 2009].¹¹

The subsequent governments took a similar stance, the last to proclaim its willingness to adopt the euro was the government in power between 2014 and 2017, who, in their policy statement from 2014, pledged to create the conditions for enabling the Czech Republic to enter the eurozone.¹²

This more reserved approach of the government to the euro corresponded with the shift in public opinion. From a moderately pro-euro country in 2004, the Czech Republic shifted to the strongest opposition to the euro in the EU. Public opposition to the euro grew from 48% in 2004 (the average of non-eurozone countries was 40% at that time) to 81% in 2012 (compared to the average of 49% in other non-eurozone countries). This trend is represented on Graph 1 below. Only 13% of the Czech population supported the euro in 2012, compared with 47% in other non-eurozone countries.¹³

Graph 1.



¹¹ Ibid.

¹² Czech Government, 2014.

¹³ These numbers, together with the values in Graph 1, were compiled from the Eurobarometer reports of the European Commission for years 2004 – 2014. European Commission, 2007; European Commission, 2008; European Commission, 2009; European Commission, 2010; European Commission, 2011; European Commission, 2012; European Commission, 2013; European Commission, 2014.

As we will discuss below, this was the period when the public opposition to the euro was the strongest. The government subsequently adopted an openly anti-euro position, despite the fact that support for the euro began to grow slowly.

2.3. We can, but we do not want to

The subsequent governments entirely stopped supporting the adoption of the euro. In particular, the government in power since 2018 openly proclaimed in its policy statement that it ‘currently sees no way of joining the euro area’.¹⁴ The government also listed three reasons why it refuses to adopt the euro: (a) loss of control over monetary policy; (b) incomplete process of convergence with the euro area; and (c) the extent of liabilities connected with the European Stability Mechanism.¹⁵ This hostile approach to the adoption of the euro resulted, among others, in the fact that the post of the National Coordinator of the Introduction of the euro in the Czech Republic has not been filled since 2017.¹⁶

Oddly, this happened in a period of time when, from the economic point of view, the Czech Republic was closest to fulfilling the convergence criteria, i.e. before the economic impact of the COVID-19 pandemic. In its 2018 convergence report, the European Central Bank reported that the Czech Republic fulfilled the convergence criteria (for the participation in ERM II).¹⁷ However, the report also noted that ‘Czech law does not comply with all the requirements for central bank independence, the monetary financing prohibition and legal integration into the Eurosystem’.¹⁸ Surprisingly, the 2018 annual CNB report on alignment with the eurozone failed to comment on this, and repeated, as in the previous reports, that the ‘still unfinished process of real economic convergence of the Czech Republic towards the euro area and persisting lower structural similarity of economies’ constituted a serious economic risk.¹⁹

14 Czech Government, 2018, p. 2.

15 Ibid., p. 7: ‘Our unwillingness to try to adopt the euro as a common currency in the coming period is mainly driven by the fact that we would lose control of our own monetary policy, and the process of nominal and actual convergence with the euro area remains incomplete, meaning that, when the exchange rate is fixed, this would engender costs – in the form of inflation – impairing the value of citizens’ savings. If the common currency were to be adopted in the near future, the Czech Republic would be required to contribute somewhere in the order of tens of billions of crowns to the European Stability Mechanism. The related contingent liabilities could then spiral to hundreds of billions of crowns.’

16 This information is available online on the website of the National Coordination Group for the Introduction of the euro in the Czech Republic. Available at: <https://www.zavedenieura.cz/cs/narodni-koordinacni-skupina/narodni-koordinator/narodni-koordinator> (Accessed on 1 December 2023).

17 European Central Bank, 2018, p. 7.

18 Ibid., p. 8.

19 Česká národní banka, 2018, p. 10.

2.4. ... or do we?

The current government, in power since 2022, is the first one not to address, in its policy statement, the question of adopting the euro at all.²⁰ The parties that form the governing coalition are split in this regard, some strongly in favour of the euro and some strongly against.

As concerns the convergence reports of the CNB, the message remains the same. In its latest recommendation on the adoption of the euro, issued jointly by the CNB and the Ministry of Finance, it was suggested that ‘the Czech government should not set a target date for euro area entry for the time being. This recommendation implies that the government should not aim for the Czech Republic to join the exchange rate mechanism either.’²¹ In its latest analyses of the Czech Republic’s alignment with the euro area from 2023, the CNB mentioned again, as a risk factor, ‘the unfinished process of economic convergence of the Czech Republic towards the euro area, especially as regards the convergence of the price and wage levels.’²²

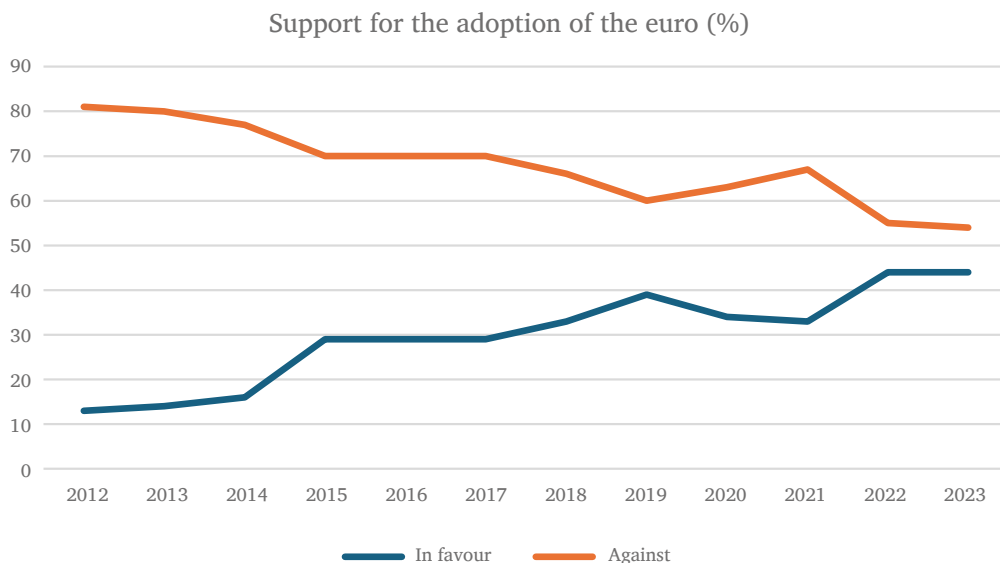
Nonetheless, this prevailing scepticism at the institution level seems to be at odds with the shift in public opinion. Indeed, the support for the euro grew from 13% in 2012 to 44% in 2023, while the percentage of opponents dropped from 81% (2012) to 54% (2023), as is evident from Graph 2 below.²³

20 Czech Government, 2022.

21 Česká národní banka and the Ministry of Finance, 2022.

22 Česká národní banka, 2023.

23 These numbers, as well as the values in Graph 2, are compiled from the Eurobarometer reports of the European Commission for years 2012–2023. European Commission, 2013; European Commission, 2014; European Commission, 2015; European Commission, 2016; European Commission, 2017; European Commission, 2018; European Commission, 2019; European Commission, 2020; European Commission, 2021; European Commission, 2022; European Commission; 2023.

Graph 2.

These numbers still do not express an actual support for the adoption of the euro and are well below the averages of other non-eurozone Member States. In 2023, the average support was 58% and the average opposition 40%. Nonetheless, these figures seem to indicate a strong trend. Interestingly, the growing support for the euro is not correlated with the perception whether the Czech Republic is actually ready to join the eurozone – these numbers remain low (21% in 2023), but comparable with the non-eurozone average (26% in 2023).²⁴

A stronger push for the adoption of the euro is also visible on the business level. In November 2023, the Confederation of Industry of the Czech Republic, the largest association of employers in the Czech Republic, issued a statement asking the government to make maximum efforts to adopt the euro in the shortest possible time-frame, while also requesting that the target date for the adoption of the euro be set and that the Czech Republic joined the ERM II.²⁵

Having in mind this growing support for the euro, we shall further analyse the arguments *against* its adoption.

²⁴ European Commission, 2023.

²⁵ Svaz dopravy a průmyslu České republiky, 2023.

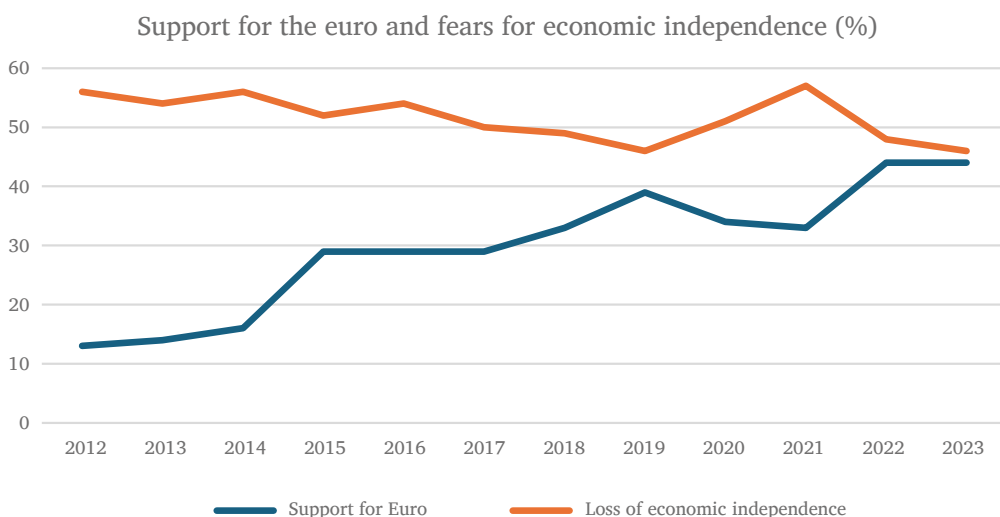
3. Why (Not) Adopt the Euro

There are four key topics to consider when discussing the reasons why the euro should not be adopted in the Czech Republic. In this chapter, we will discuss the first three topics, while the most general topic – the unfinished nature of the eurozone governance structure – will be analysed in detail in a separate chapter below.

3.1. Loss of control over monetary policy

The first principal argument against the adoption of the euro is the loss of control over the national monetary policy. It ought to be mentioned that this issue resonates in the public opinion. There is a prevalent perception that the adoption of the euro would limit the Czech control over its economy. Curiously, however, while this perception remains high, the support for the euro grows nonetheless, as is evident from Graph 3.²⁶ Thus it seems that, according to the public opinion, the loss of economic independence is an acceptable consequence of the adoption of the euro.

Graph 3.



From the economic and legal perspective, this is not a real dilemma. By definition, giving up a national currency means giving up national monetary policy. Therefore, the introduction of the euro, a supranational currency, necessarily entails the acceptance of a supranational monetary policy. The loss of national monetary

²⁶ These numbers, as well as the values in Graph 3, are compiled from the Eurobarometer reports of the European Commission for years 2012–2023, referred to in footnote 23.

policy is a direct consequence of joining the eurozone. Therefore, in my opinion, there is no need to further discuss this issue.

3.2. Costs and liabilities

Entering the eurozone entails significant direct costs and liabilities. These were summarised by the CNB and the Ministry of Finance in 2022, as follows.²⁷

The principal financial obligation is associated with the payment of the rest of the Czech Republic's share in the subscribed capital of the European Central Bank (hereinafter referred to as "ECB"), estimated to amount to EUR 200 million. Furthermore, the adoption of the euro comes with an obligation to transfer to the ECB a part of the CNB's international reserves and a contribution to the ECB's reserve funds, amounting to approximately EUR 800-900 million.

Additional costs are associated with the participation in the European Stability Mechanism (hereinafter referred to as the "ESM"), an international financial institution set up by the euro area Member States to help the euro area countries in severe financial distress. Even though the ESM was created based on an amendment of Article 136 of the TFEU, it was set up by an international treaty rather than the law of the European Union, and it forms an international organisation outside of the EU architecture – similar in design to the International Monetary Fund, but interlinked with other EU institutions.²⁸ Upon joining the ESM, the Czech Republic would have to pay up a capital deposit totalling around EUR 1.8 billion within four years. These funds would remain the property of the Czech Republic, which, in exchange, would receive ESM shares in the same total nominal value and acquire corresponding shareholder's rights and obligations in the ESM. In addition, a contingent liability of EUR 14.6 billion would be payable in the extreme case scenario where the ESM's lending capacity would be fully exhausted. Thus the capital deposit constitutes an upfront payment, whereas the liability is, to some extent, hypothetical.

Finally, there would be costs associated with participation in the Banking Union, specifically the Single Resolution Fund (hereinafter referred to as the "SRF"). On the basis of a regulation from 2014,²⁹ the ECB gained certain responsibilities for the prudential supervision of approximately 150 euro area credit institutions, representing around 80% of the banking assets in the euro area, national authorities retaining

27 Česká národní banka and the Ministry of Finance, 2022, Appendix B, p. 21.

28 As summarised by Beukers and De Witte, 2013, p. 814: 'The governance system of the ESM [...] forms a curious hybrid: all formal decision-making powers are entrusted to organs composed of representatives of the Members; but those representatives happen to be the same persons who represent their country in the EU's informal Eurogroup and the euro working group; and major tasks in preparing and implementing those decisions are entrusted to the supranational EU institutions, the Commission and the ECB.'

29 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

supervisory responsibility over the rest.³⁰ This is known as the Single Supervisory Mechanism, and is referred to as the first pillar of the Banking Union.³¹

This first pillar of the supervisory mechanism is accompanied by the second pillar, known as the Single Resolution Mechanism (hereinafter referred to as the “SRM”), which concerns the restructuring of failing banks.³² Similarly to the ESM, however, the actual financing of the restructuring is entrusted to the Single Resolution Fund, a fund outside of the EU architecture, created on a basis of an international treaty.³³ The Czech Republic would be obliged to transfer the contributions of banking institutions to the SRF rather than keep them on national level. Thus, the participation in the SRM does not actually incur new costs for the Czech Republic, only the transfer of contributions collected from banking institutions subject to the Single Supervisory Mechanism.

As summarised above, the costs associated with the adoption of the euro are significant, but not insurmountable. They serve, to large extent, as an “insurance”, a cost for the stability of the euro, the national finances and the banks. Therefore, in my opinion, these costs cannot be used as a serious argument against the adoption of the euro. Comparable amounts of money would be at stake for the support of the national currency as well.

3.3. Incomplete process of convergence

This leads us to the third argument against the adoption of the euro, repeatedly used by the CNB since 2004, which is the claim that the alignment of the Czech economy with the economy of the eurozone is not yet finished. Even though the convergence is not complete, the CNB itself reports a very high level of convergence.

In its last report from 2023, the CNB concedes that the ‘correlation of economic activity in the Czech Republic and the euro area has long been high’, that the ‘Czech currency reacts to changes in the environment outside the euro area similarly to the euro’ and therefore the correlation of the koruna-dollar exchange rate with the euro-dollar exchange rate remains high, and that the ‘Czech Republic’s strong trade and ownership links have long been one of the strongest arguments for it joining the euro area.’³⁴

As the argument against the adoption of the euro, the CNB underlines the differences in prices and wages that could lead to a sustained pressure on Czech inflation targets. At the same time, the CNB admits that the ‘convergence of the price

30 Ferran and Babis, 2015.

31 Kern, 2015.

32 Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010 of the European Parliament and of the Council.

33 Fabbrini, 2015.

34 Česká národní banka, 2023, pp. 6 and 7.

and wage levels accelerated.³⁵ Thus the principal argument remains the ‘persisting differences in the structure of the Czech economy compared with that of the euro area, [which] consist mainly in an above-average share of industry in Czech GDP.’³⁶ According to the CNB, the structural differences pose the risk of asymmetric effects from economic shocks.

Even though this may be the case,³⁷ it should be noted that no country was ever fully aligned with the eurozone economy before adopting the euro.³⁸ There are no exact metrics for determining the optimal level of convergence for the adoption of the euro.³⁹ In this regard, it is surprising that the CNB itself mentions in its analyses that the lack of complete alignment with the eurozone is not a material problem:

The analysis shows that alignment of economic activity does not represent a barrier to euro adoption for the Czech Republic. The Czech Republic’s economic activity is well synchronised with the euro area countries, especially Germany, France, Austria and Slovakia.⁴⁰

Overall, I take the position that the three arguments discussed above do not constitute a relevant reason against adopting the euro, since they are either inherent to the process (loss of control over monetary policy), intended as insurance (associated costs and liabilities) or economically manageable (state of convergence). Thus the only argument remaining is the fact that the governance of the eurozone is not yet finished, and therefore the prospective members cannot be certain about what are they applying for, as will be discussed in the following Chapter.

4. The Future of the Eurozone

It is surprising that, 30 years after the establishment of the Economic and Monetary Union by the Treaty of Maastricht, there is still no consensus about what its final form should look like or what target its members should set.⁴¹ The Conference on the Future of Europe did not bring any significant input in this regard and, as the

³⁵ Ibid.

³⁶ Ibid.

³⁷ Lacina et al., 2007, p. 136.

³⁸ Čihák and Holub, 2005; Gorčák, Šaroč and Bič, 2021; Žďárek and Šindel, 2007.

³⁹ Lacina et al., 2007, p. 248.

⁴⁰ Česká národní banka, 2019.

⁴¹ As summarised in Česká národní banka, 2019, p. 12: ‘On the one hand, mainly “southern” Member States are advocating faster integration with a stronger sharing of risks and financial resources, and on the other, the countries of the European “north” seek to emphasise countries’ individual fiscal responsibility, fiscal stability and risk reduction in the EU financial sector.’

term of the current European Parliament and the Commission is drawing to an end, no significant decisions can be expected in the near future.

At least since the financial crisis of 2008 and the subsequent sovereign debt crisis unfolding in several Member States, it was debated whether there are deficiencies in the architecture of the EMU. The European Commission issued a communication in 2012,⁴² identifying ‘weaknesses in the initial design of the EMU’ and claiming that the ‘EMU needs to be deepened further’. After five years, at the end of 2017, the Commission issued another communication, admitting that ‘the euro area architecture is more robust than ever before but this does not mean that it is complete.’⁴³ Admittedly, a lot of progress has been made since then, including the establishment of the ESM and the first two pillars of the Banking Union, as discussed above, or the ongoing reform of the Stability and Growth Pact.⁴⁴ The ultimate vision of the EMU has, however, not yet been formulated, and the opinions do not seem to be converging.⁴⁵

As has been described elsewhere,⁴⁶ with a level of simplification necessary for the purposes of this study, there are two general approaches to the understanding of the EMU: a *stability union* and a *fiscal union*. Rooted in broader economic theories, these approaches are also projected into the narrative of the financial crises the EMU has gone through. We will briefly outline these approaches below.

4.1. EMU as a stability union

The concept of a stability union (*Stabilitätsunion*) was framed in Germany, and is based on the economic school of ordoliberalism, a stream of neo-liberalism generally identified with the social market economy. Its ideas are based on the principle that the state (public authority) must create a proper legal environment for the economy, allowing competition to flourish, and must employ active measures in order to maintain it.⁴⁷

These ideas apply to the area of monetary policy as well. In this framework, the principal goal of a monetary union is to ensure fair and stable conditions for efficient free-market competition by maintaining a currency that is solid both internally (low inflation) and externally (stable exchange rates).⁴⁸ Conversely, interventionist fiscal

42 Communication from the Commission. *A Blueprint for a Deep and Genuine Economic and Monetary Union. Launching a European Debate*. COM(2012) 777 final/2 of 30 November 2012.

43 Communication from the Commission. *Further Steps Towards Completing Europe's Economic and Monetary Union. A Roadmap*. COM(2017) 821 final of 6 December 2017, p. 1.

44 European Parliament, 2023.

45 Brunnermeier, James and Landau, 2017, p. 7: ‘[C]ountries are following, on the whole, an approach of ‘business as usual’ – digging trenches around established intellectual and theoretical propositions. The rational business of negotiation strategies developed in the course of the European crisis intensified rather than resolved the clash of cultures. As the relentless logic of events went on, the French appeared ever more French and the Germans ever more German.’

46 Hacker and Koch, 2016.

47 Vattier, 2010.

48 Hacker and Koch, 2016, p. 11.

policy (financial stimuli), leading ultimately to inflation and devaluation, creates fundamental risks. Growth and economic dynamism is achieved through productivity-expanding competition in the markets, not through expansive fiscal or monetary policy.⁴⁹ Government deficit is the only area in which co-ordination is needed among members of a monetary union, because they may lead to a debt crisis and ultimately to a demand for bailout,⁵⁰ which is absolutely unacceptable under this approach.

In this narrative, a monetary union needs to be built on two pillars: an independent central bank and the fiscal discipline of its member states.⁵¹ In addition to that, it is important that liability and control must go hand in hand. In each relevant policy field, control over fiscal and economic policy action has to be accompanied by a liability for its consequences, any divergence between these two aspects is causing a moral hazard and may result in serious political tensions.⁵² This effectively prevents any mutualisation of debt.

4.2. EMU as a fiscal union

Conversely, the concept of a fiscal union is based on neo-Keynesian thinking, focused, in contrast to the ordoliberal approach, on the demand side of the economy, which needs to be stimulated by public authorities (and public finances) in order to prevent the cyclical crises. In case the monetary union is not an optimal currency area, as is clearly the case with eurozone, public stimuli are needed to contain regional asymmetric shocks.⁵³

Extensive spending capacity on the side of a monetary union is thus necessary for it to function.⁵⁴ In addition to that, economic policies of member states need to be closely coordinated. In direct opposition to the ordoliberal approach, it is claimed that a monetary union cannot work properly without being supported by some form of economic⁵⁵ and, in the long run, political union.

49 Ibid.

50 Dullien and Guérot, 2012, p. 3.

51 Wyplosz, 2017, p. 149.

52 Feld et al., 2016, p. 48.

53 In detail, see Mundell, 1961.

54 De Grauwe, 2006, p. 727: '[M]onetary union needs a central budgetary authority capable of offsetting the desire of consumers gripped by pessimism to increase their savings, by the dissaving of the central government. In addition, to the extent that there are asymmetric developments in demand at the national level, the existence of an automatic redistributive mechanism through a centralized budget can be a powerful stabilizing force. Finally, in this view the responsibility of a central bank extends beyond price stability (even if this remains its primary objective). There are movements in demand that cannot be stabilized by only caring about price stability.'

55 Pisani-Ferry, 2006, p. 841.

In this narrative, there is a “design failure” in the current architecture of the EMU,⁵⁶ and some form of debt mutualisation⁵⁷ and creation of a common budgetary authority – in short a “fiscal union” – is needed in the future, because ‘in the long run the monetary union will have to be embedded in a significant fiscal union. [...] Without significant steps towards a fiscal union there is no future for the euro.’⁵⁸

The proponents of this approach call for the introduction of specific stabilisation funds⁵⁹ and significantly increased fiscal capacity at the EU level.⁶⁰ This is, however, in direct contradiction to the ordoliberal requirement on the same level of control and liability, according to which, as showed above, any form of debt mutualisation and bailout is inconceivable without the full-fledged transfer of fiscal and economic powers to the EU.⁶¹

4.3. The trajectory of the EMU

Arguably, the long-term trajectory of the EMU seems to be the fiscal union.⁶² Strategic materials published by EU institutions point in that direction,⁶³ as well as several notable changes concerning the financing of the EU.

The establishment of the ESM, a mutually guaranteed fund devised to support failing Member States, is a case in point. The banking union, and especially the SRF, point in the same direction. Another decisive step toward the fiscal union was done as a reaction to the COVID-19 pandemic.⁶⁴ In 2020, the EU created the EU Recovery Instrument,⁶⁵ which provides access to funds up to EUR 750 billion, almost equalling the overall Multiannual Financial Framework (2013–2020) of EUR 961 billion.⁶⁶ Most of these resources is to be disbursed to Member States as grants and loans via the Recovery and Resilience Facility.⁶⁷ Arguably, this as yet one-off project constitutes the most decisive step towards mutualisation of debt and anti-cyclical financing, as called for by the proponents of the fiscal union. In summer 2023, a proposal for the Ukraine Facility, a fund based on similar principles, was published.⁶⁸

56 De Grauwe, 2013.

57 Ibid, p. 26.

58 Ibid, p. 29.

59 See eg. De Grauwe and Ji, 2016, p. 144.

60 See eg. Pisani-Ferry, Vahriala and Wolff, 2013, p. 3.

61 Feld et al., 2016, p. 50.

62 Dědek, 2014, p. 316.

63 Petr, 2018, p. 188.

64 Dermine, 2020, p. 345.

65 Council regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.

66 Porras-Gómez, 2022, p. 6.

67 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

68 Proposal for a regulation of the European Parliament and of the Council on Establishing the Ukraine Facility. COM (2023) 338 final of 20 June 2023.

At the same time, it should be noted that there is no consensus on the future of the EMU as a fiscal union. In my opinion, however, the activities of Member States seem to suggest that, in the long term, this is the trajectory of the EMU. Even though currently there is no evidence for the actual costs of staying outside of the EU, the deepening monetary integration may ultimately lead to more economic benefits associated with joining the monetary union.⁶⁹

5. Conclusions

The Czech approach to the euro has undergone several changes over the past 20 years. In 2004, the Czech Republic started as a moderately pro-euro country, only to turn into its strongest opponent in just 10 years. On institutional level, it has maintained this sceptical approach, with the government proclaiming openly that the adoption of the euro was not in the interest of the Czech Republic. The public opinion and the support of business has, however, lately shifted back to a moderate support of the euro.

Czech institutions have put forward four reasons against adopting the euro. As we have discussed in this paper, these reasons are, arguably, not decisive from the economic and legal perspective. The only relevant argument seems to be that the future of the EMU itself is yet unknown, and it is impossible to subscribe to a project with unclear trajectory.

I have argued in this paper that the long-term course of the EMU heads towards fiscal union. Ultimately, it will be a political choice whether the Czech Republic is willing to participate in such a project. Currently, there are no strong economic arguments against the adoption of the euro; however, the political arguments may be legitimate.

The current government will clearly not take any steps towards the adoption of the euro. The next government should make its position clear, explaining the political choice of why (not) vote for participation in the EMU as a fiscal union.

69 Dědek, 2014, p. 177.

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CURRENT ISSUES OF THE ‘HUNGARIAN EURO’ WITH SPECIAL REGARD TO THE SELF-SET ‘MAASTRICHT 2.0’ CRITERIA



GYÖRGY MARINKÁS

Abstract

The author strives to answer why Hungary stayed out of the Eurozone so far and if there is any chance of a nearby accession. In order to do so, in the first part the author introduces the opinions of high-ranking officials and the Hungarian convergence data from the last twenty years. In this regard, the author provides an insight how the political will and the economic possibilities did not collide: as a Hungarian peculiarity while there was a political will in the 2000s to access, the economic situation did not allow it. The situation has been the opposite in the last years: in the author's view, between 2014 and 2020 Hungary would have had the opportunity to access the eurozone with a little extra effort exerted, however, it was not on the top of the priority list. Last, but not least, the author introduces the consequences of the decision of the drafters of the Fundamental Law to grant constitutional rank to the forint as the legal tender of Hungary.

In the second part, the author provides a brief introduction of the ‘post-Eurozone debt crisis’ regulatory choices of the EU legislator – namely the creation of the Banking Union – and also the choices of the Hungarian legislator on the nexus between the Hungarian Central Bank and the institutions of the Banking Union. This way, the author can make conclusions on the maturity of the Banking Union's institution and their functioning and evaluate the earlier arguments in the studies issued under the aegis of the HCB, namely that the rules of the Banking Union are unclear and their functioning displays uncertainty. The author also provides a comparison of the chosen crisis management tools of the ECB and the HCB related to

György Marinkás (2025) ‘Current Issues of the ‘Hungarian Euro’ with Special Regard to the Self-set ‘Maastricht 2.0’ Criteria’. In: János Ede Szilágyi and György Marinkás (eds.) *Maastricht 30: A Central European Perspective*, pp. 277–300. Miskolc–Budapest, Central European Academic Publishing.

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three crises, namely: the Euro-zone debt crisis, the COVID-19-related crisis and the Russo-Ukrainian War related crises. The author concludes on the chosen crisis management tools of the ECB and the HCB, highlighting the similarities and differences.

Keywords: Hungarian Central Bank, monetary policy, convergence criteria, real convergence, Maastricht 2.0, Economic and Monetary Union, Eurozone, Banking Union, COVID-19, Russo–Ukrainian War

1. The question of the Hungarian Euro

1.1. *The opinions of the high-ranking officials on the Euro in the last twenty years*

‘There was a bright optimism.’ – *Ferenc Bartha*’s¹ thoughts on the professionals’ opinion around the Millennium on the possibility of introducing the Euro soon after Hungary’s EU accession.²

In 2001, the then *Orbán* government set 2007 as a target date, which according to *Zsigmond Jári*³ seemed a realistic objective. However, as a result of the undisciplined fiscal policy of the subsequent governments, the budget deficit and the public debt rapidly increased, which rendered the introduction of the Euro a more and more distant possibility, he added.⁴ The last known official target date was 2010, however this “deadline” passed without a result. The currently governing party emerged to power in the same year. Seemingly, the introduction of the euro has not been on the top of the priority list ever since. The then minister of finance, *György Matolcsy* said in 2011 that the country’s accession to the Eurozone was no longer a desirable goal as the Greek Sovereign Debt Crisis proved the weakness of the Eurozone. In 2015, Prime Minister *Viktor Orbán* stated that ‘the introduction of the euro in Hungary shall be abandoned.’⁵ In January 2020, the Prime Minister reaffirmed that in the government’s view the country is not prepared to access the Eurozone. Accession should happen only after the country’s real economic indicators approximate the

1 The last governor of the Hungarian Central Bank before the change of regime (1988-1990) and the member of the Medgyessy Government’s governmental working group mandated to prepare the introduction of the Euro.

2 Kenessey, 2022.

3 Governor of the HCB between 2001 and 2007.

4 Jegyzőkönyv az Országgyűlés Alkotmányügyi, igazságügyi és ügyrendi bizottsága 2002-2010 közötti lakossági devizaeladósodás okainak feltárását, valamint az esetleges kormányzati felelősséget vizsgáló albizottságának, 2011. november 3-án, csütörtökön 8 óra 3 perckor az Országház főemelet 58. számú tanácstermében megtartott üléséről, pp. 6-9. (AIB-DEV-4/2010-2014.). Available at: <https://www.parlament.hu/biz39/bizjvk39/AIB/A412/1111031.pdf> (accessed: 17 December 2023)

5 Menich-Jónás, 2021, p. 71.

same indicators of Austria.⁶ In July 2023, when asked whether the past year would have been easier if Hungary had adopted the euro as its currency, Hungarian finance minister *Mihály Varga* said that it probably would have been. However, he also emphasised that the euro is not a “panacea” and in itself it does not make an economy better or worse. What really matters is the quality and effectiveness of economic policy. The Czech economy is performing better than the Slovak economy, even though the Slovaks have the euro, and the Czechs have their own currency. We need to think about the opportunity, but the government should not rush into this,”⁷ he added.

The current Governor of the *Hungarian Central Bank* (HCB) – György Matolcsy⁸ stated in a 2023 interview that:

Perhaps around 2030 or a bit later we could reach [...] 90% of the EU’s average in terms of development, then it is worth entering the Eurozone as the Euro has many advantages [...] Until then, it is worth using the extraordinary room for manoeuvre that having a national currency allows the Hungarian Central Bank to boost the economy.⁹

The recent thoughts of Matolcsy on the introduction of the euro in Hungary made this topic actual again, however, it has to be noted that Matolcsy’s statement does not mean that there is an official date for Hungary’s accession to the Eurozone since the introduction of the euro – and the target date – would require government decision.

Last, but not least it is worth taking an insight to the opinion of the “man on the street” on the introduction of the Euro in Hungary. As for the Hungarian citizens, they are the most supportive (66%) among the citizens of the non-Eurozone V4 countries: in comparison, the Czechs are the most dismissive in this regard and the Polish citizens, too, are more reluctant towards the common currency compared to the Hungarian ones.¹⁰ Economic operators seem to support Hungary’s membership in the Eurozone as well: in their view Hungary is ready to the introduction of the common currency and it would be useful for the Hungarian economy.¹¹

6 Menich-Jónás, 2021, p. 71.

7 Rádai, 2023.

8 Governor of the Hungarian Central Bank (2013–).

9 Heinrich, 2023.

10 Eurobarometer 465 18 May 2018. Available at: <https://europa.eu/eurobarometer/surveys/detail/2187> (Accessed: 17 December 2023); Republikon, 2022.

11 Sipos, 2019.

1.2. Hungary and the Maastricht Convergence criteria

At the time of writing the current lines,¹² Hungary is a so called ‘Member State with a derogation’ under Article 139(1) of the Treaty on the Functioning of the European Union¹³ (TFEU), which means that provisions of the Treaties defined in Paragraph (2) of the said article shall not apply to her. Based on 140(1) of the TFEU:

at least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation.

Summarising the provisions of Paragraphs (2) and (3), the Council shall, on a proposal from the Commission, after consulting the European Parliament and after discussion in the European Council, decide if the Member State with a derogation fulfilled the criteria set in Paragraph (1) and abrogate the derogations of the Member State concerned. If it decides to abrogate the derogation, the Council shall, on a proposal from the Commission and after consulting the European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned. The Council shall take the other measures necessary for the introduction of the euro. In doing so, the Council shall proceed with the unanimity of the Member States whose currency is the euro and the Member State concerned.

Hungary has never met the criterion set in Article 140(1) so far, thus the mechanism according to Article 140(3) has never been triggered. Mihály Varga explained in 2017 that Hungary intentionally avoided fulfilling every criterion.¹⁴

Comparing the convergence reports of 2004¹⁵, 2010¹⁶, 2014¹⁷, 2020¹⁸, and 2022¹⁹ allows to draw well-founded findings regarding how realistic the country’s Euro accession was in the past and how realistic is it nowadays. As *Judit Menich-Jónás* concluded, if we compare the former target dates for the introduction of the euro with these data, the conclusion can be drawn, that in 2002 it was unrealistic to expect accession in 2007.²⁰ As *Péter Mihályi* wrote in a 2012 study, fulfilling the Maastricht Criteria has been relegated to a position of lesser importance on the list of priorities of successive governments.²¹ Instead – as *Neményi* and *Oblath* argue – short-term

12 November 2023.

13 Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, pp. 47–390)

14 MTI, 2017.

15 ECB, 2004.

16 ECB, 2010.

17 ECB, 2014.

18 ECB, 2020.

19 ECB, 2022.

20 Menich-Jónás, 2021, p. 70.

21 Mihályi, 2012, p. 918

political considerations have successively overridden medium-term stability-oriented macroeconomic policies. The instability and unpredictability of the economic policy caused Hungary to lag behind the region.²² As *Ákos Péter Bod*²³ summarised in 2007: 'The peculiarly Hungarian story is that we were closer to meet the Maastricht criteria in 2000 than in 2006, which is (if I may say so) a laughing stock.'²⁴

The author of the current article agrees with the above authors that it is clear from the convergence reports that while before 2014 the Eurozone accession was rather a wishful thinking due to the undisciplined fiscal policy of the former governments and the financial crisis started in 2007. In his view, somewhere between 2014 and 2020 Hungary would have had the opportunity to fulfil the Maastricht criteria and access the Eurozone with some extra effort exerted. However, this was not among the government's plans based on the above-mentioned 2017 statement of Mihály Varga, who explained that Hungary intentionally did not fulfil every criterion. Co-authors *Neszmélyi* and *Pócsik*²⁵ argued that even in 2021 – after the outbreak of the COVID-19 pandemic – we were not far from reaching compliance. Based on the 2022 Convergence Report, Hungary's indicators started to deteriorate as the COVID-19 pandemic and then in 2022 the Russo-Ukrainian War did their effect on the country's economic performance.

1.3. Pros and Cons of Joining the Eurozone

When examining the expected pros and cons of joining the Eurozone from a Hungarian perspective, it is worth examining the studies issued under the aegis of the HCB first. In their 2002 study co-authors *Csajbók* and *Csermely*²⁶ emphasised that it is important to raise the question whether an *Optimum Currency Area*²⁷ will come into existence between the member state country and the Eurozone. In their view, it is also important to answer whether the common monetary policy can be as efficient as the member state's monetary policy in countering the economic cycles. Their main finding was that the introduction of the euro may raise the growth rate of Hungarian GDP by 0.6 to 0.9 percentage points in a long-term²⁸ average. They identified and quantified three benefits and costs. The benefits are namely: reduced transaction costs, expansion of foreign trade, and a drop in real interest rates. The costs in their view are lower seigniorage revenues and the loss of independent monetary policy. They also identified certain dangers of the accession, namely: if non-resident investors are confident that Hungary will join the eurozone soon, it may trigger speculative capital inflows and start off a "convergence play" similar

22 Neményi and Oblath, pp. 587–588.

23 Governor of the HCB 1991–1994

24 Kenessey, 2023.

25 Neszmélyi and Pócsik, 2021, pp. 646–647.

26 Csajbók and Csermely, 2002, p. 208.

27 As first described by Mundell and Balassa. – See: Mundell, 1960, pp. 657–665; Balassa, 1961, p. 324.

28 Some 20 years.

to the ones that had involved other countries earlier in preparation of accessing the Eurozone. Finally, they warned that the rapid fulfilment of the Maastricht criteria on inflation and the fiscal deficit may cause economic discrepancies and may result in a sacrifice of growth. However, they summarised their cost-benefit analysis as follows: ‘The quantifiable benefits arising from joining the euro area considerably exceed the costs entailed, resulting in higher economic growth and faster real convergence towards Western Europe.’²⁹

Later studies seemed to be more cautious, when it came to the issue of accession. Co-authors *Kisgergely* and *Szombati* emphasised in their 2014 study³⁰ that the accession would mean the loss of the country’s monetary sovereignty. They also raised the question if the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) are more efficient than the domestic supervision mechanisms. In their conclusion, they are not.³¹ They argued that: competence between community and domestic authorities were not clear enough – that is to say, it was not clear who will have the last say – furthermore, the mechanism seemed to be bureaucratic and that no clear rules existed on the burden of crisis management. As for the advantages, they argued that accession would secure our place at the “core” and would also mean access to the crisis management fund – a sum of 55 billion euros in 2014 – which is greater than the funds Hungary could alone allocate. They also highlighted the professionalism of ECB’s staff that would contribute to enhance the national staff’s knowledge.

In their 2017 study, co-authors *Nagy* and *Virág*³² – and later *Virág*³³ and *Nagy* in 2020³⁴ – argued that while the accession to the Eurozone does not results in “automatic real convergence”, failure is inevitable if the country introduces the common currency before a given level of real convergence is reached. In order to avoid such a scenario, they elaborated on the so-called Maastricht 2.0 criteria. In their view, the following criteria should be met before the accession: GDP per capita and wage levels should reach at least 90% of the euro area; synchronised business and financial cycles as well as available, effective countercyclical political toolkit should be established; the economy should be close to full employment; advanced, stable and competitive financial sector – with some 90% convergence – should be established; and structural balance should be achieved dependent on government debt between 0 and –2% of GDP, with a debt target of 50%.

29 Csajbók and Csermely, 2002, p. 11. Translation by the author.

30 Kisgergely and Szombati, 2014, p. 30.

31 These findings on the Banking Union’s institutions were well-founded back in 2014: the chapter on the European monetary policy, which also elaborates on the shortcomings of the said institutions support these findings. However, based on the developments of the recent ten year, most of these shortcomings were addressed.

32 Nagy and Virág, 2017.

33 Virág, 2020, p. 309.

34 Nagy, 2020.

After introducing the HCB's point on the issue, one may introduce the opinion of the Hungarian scientific community. In the last 20-25 years, the fundamental premise agreed by the majority of academics – and practicing economists – was that in case of a premature, politically motivated accession without economic convergence serious economic harm is inevitable. The accession in itself does not bring real convergence as it was proved by co-authors *Neményi* and *Oblath* in their 2012 study.³⁵ The Greek Sovereign Debt Crisis proved “once and for ever” this thesis. As *Zsolt Darvas* argued in 2017, it was not the introduction of the common currency which in itself induced the serious problems in the Mediterranean countries. In his view the main problems were: insufficient demand, poor budget structure, and wage increases in excess of productivity.³⁶ Already in 2008, co-authors *Darvas* and *Szapáry* concluded³⁷ that – due to certain characteristics of the Eurozone³⁸ – common monetary policy induced the less developed member states to perform excessive borrowing.³⁹

However, the fulfilment of the Maastricht Criteria is necessary and at the same time insufficient to reach real convergence, as *Péter Mihályi*⁴⁰ argued. As *Darvas* added, the Maastricht criteria are not a proper tool to measure a country's readiness for the accession. Neither are the above-cited Maastricht 2.0 criteria. In his view, the level of economic development is not so important.⁴¹ On the other hand, the comparative study of co-authors *Kutasi* and *Nagy*⁴² proves that pursuing a disciplined economic policy and reaching a level of real convergence is important even if the country does not wish to access the Eurozone. In their study they scrutinised the economic indicators of the V4 countries, i.e., how the economic performance of Slovakia – the only V4 country that adopted the euro – compares to the economic performance of countries having their own national currencies, namely Hungary, Poland, and the Czech Republic. It is worth mentioning that both the Polish and Czech central bank chiefs seem to categorically refuse the accession to the Eurozone.⁴³

Based on the above-mentioned study of *Kutasi* and *Nagy*, the Slovakian labour force became the most expensive in the region due to the fact that Slovakia – in the lack of sovereign monetary policy – was no longer able to devalue its own currency in order to keep the Slovakian labour force cheap. Regarding price stability, they concluded that the Czech and the Hungarian national currencies' inflation rates seemed to better fit the Maastricht criteria, than the Slovakian ones. – Something that one would not expect. – In 2015–2016 Slovakia had deflation, just like Hungary

35 *Neményi* and *Oblath*, 2012, pp. 673–677.

36 *Czelleng*, 2018, p. 104.

37 *Darvas* and *Szapáry*, 2008, p. 873.

38 *Artner* and *Róna* 2012, pp. 83–102.

39 It is worth mentioning that the great availability of credits worldwide at the Millennium would have induced the Greek governments to obtain large amount of credit anyway, as *Imre Tarafás* argues. *Tarafás*, 2013, p. 362.

40 *Mihályi*, 2005, pp. 716–717.

41 *Czelleng*, 2018, p. 105.

42 *Kutasi* and *Nagy*, 2019, pp. 7–23.

43 *EJ/MD*, 2023; *King*, 2017.

and Poland in the same period. It was only the Czech Republic, which was not affected by the deflation trend. Kutasi and Nagy further argue that it was only the Slovakian debt to GDP rate that displayed growth during the examined period. When it comes to current account, they found that the common currency did not provide any advantage in this regard to Slovakia. Last, but not least they argue that the amount of Foreign Direct Investment data show almost the same trajectory in case of Hungary and Slovakia, while the Czech Republic and Poland performs better. Regarding the result of Kutasi and Nagy, the author of the current chapter would only mention that based on his own findings “government debt to GDP ratios” declined until 2019–2020 in all the V4 countries and started to grow in year 2020⁴⁴ – in a year that was out of the scope of the above co-authors’ study.

Co-authors Bod, Pócsik and Neszmélyi evaluated the results of the “Slovakian Euro” in a more positive way. Although they also mention the Slovak firms’ disadvantage in terms of the wage share cost compared to producers in floating currency countries, they argue that since the price of imported materials and parts fell more than that of exported goods, the improvement in the exchange rate mitigated the effects of the more expensive wages. While they acknowledge, too, that the actual benefits of euro adoption have been somewhat lower than initially expected, this may be attributed to external factors such as the global economic crisis and the prolonged crisis in the Euro area. In their view it can be even risked to state, that the *Economic and Monetary Union* (EMU) – and its strict fiscal rules – had protected the national economy from suffering grater losses from those fiscal shocks. However, membership in the Euro area is not in itself a guarantee of sustainable growth. Instead, it is the strong and longstanding commitment to the integration process and to obey its rules, which warrants the growth: disciplined economy policy minimises the risk of economic policy “slippage” and helps to avoid costly forced adjustments.⁴⁵

As an interim conclusion – articulated by Darvas⁴⁶ and Péter Gottfried⁴⁷ – one may state that a country may be successful with or without euro as well. Similarly, György Surányi stated in 2012 that no country is immune to bad, irresponsible economic policies, neither as a member of the EMU nor as an outsider.⁴⁸

Three further issues should be emphasised. First, Hungary’s import-export volume to the EU is already really high, it almost reached the potential maximum.⁴⁹ That is to say the accession to the Eurozone does not offer any room for improvement in this regard. Some also argue that the accession to the Eurozone does not offer any additional prestige value: as Gottfried wrote, we are already devoted to the EU and the NATO, thus accession to the Eurozone would not offer any such additional value. He adds, however, that Brexit eroded the possibilities of non-Eurozone members to

44 Based on the data available at the <https://tradingeconomics.com/> (Accessed: 17 December 2023).

45 Bod, Pócsik and Neszmélyi, 2020, pp. 339, 343, 345–346.

46 Czalleng, 2018, p. 105.

47 Gottfried, 2021, p. 110.

48 Hvg.hu, 2012.

49 Menich-Jónás, 2021, p. 72.; See also: Virág, 2020.

empower their interests. Also, the more countries decide to access to the Eurozone, the less power those decide to keep out will have on the long-run.⁵⁰ *András Vértés* argued in a very similar way: in his opinion, the main dilemma here is the fear from that 'missing out means to be left behind.'⁵¹ It is also worth mentioning that *Kisgergely* and *Szombati* in their 2014 study made under the HCB's aegis also emphasised that accessing to the Eurozone would mean belonging to the core. The Brexit and its effect on the outsiders' ability to enforce their interests was emphasised in *György Surányi's* opinion as well. He, on the other hand, unlike *Gottfried*, thinks that the accession does have a prestige value:

The financial and economic crisis, the crisis in the euro area, the influx of refugees, Brexit, the election of Donald Trump, all together and clearly push the European Union in the direction of deepening cooperation between member states. In this process, a country that is unable or unwilling to come into the inner circle could be marginalised or effectively left out of the European Union.⁵²

Second, the loss of monetary sovereignty is maybe the most often-cited argument against the introduction of the common currency, which is more often refuted by pointing on "the reality," namely that the Hungarian economy is a small and open one, therefore a fully independent monetary policy – in *György Surányi's* words – is only an "illusion." Therefore, in his view, losing it is not an unacceptable sacrifice. In the view of *István Pál Székely*, the tool of devaluation is overestimated. He argues that is only enough to buy time, but only in a limited extent, and only in order to facilitate other economic measure to solve the problem.⁵³

Last but not least, the issue of setting the target date has to be mentioned. *Gottfried* essentially asked in his 2021 writing whether we should rush to the safe haven or should wait to see how the Eurozone evolves, and our economy performs.⁵⁴ As co-authors *Bod*, *Pócsik*, and *Neszmélyi* argue there is not a single date, which is from an economic point of view absolutely perfect for the accession: all calculations are questionable. Furthermore, a serious role can be played by unpredictable circumstances, or simply put: good and bad luck. That is to say, it is an issue which has to be decided by politics. This decision should not be short-sighted, however: only a political consensus over several government cycles is eligible for the success of the currency exchange and to comply with the resulting financial conditions.⁵⁵ In *Mihályi's* opinion, the "original sin" was committed by the subsequent Hungarian governments, when they pushed the deadline again and again inducing unfounded expectations in the economic operators and the population. They should either

50 *Gottfried*, 2021, p. 113.

51 *Czelleng*, 2018, p. 103.

52 *Hvg.hu*, 2017.

53 *Czelleng* 2018, p. 105.

54 *Gottfried*, 2021, pp. 124–125.

55 *Bod*, *Pócsik* and *Neszmélyi*, 2020, pp. 321, 323–324.

manage the introduction of the euro or tell that we will not access the Eurozone in the near future.⁵⁶

1.4. A legal issue regarding the possible joining of the Eurozone

The legislative framework of the HCB's structure and functioning is set out in the Fundamental Law of Hungary⁵⁷ (FLH), which in its Article 41(6) states that the detailed provisions are to be settled in a so-called cardinal act.⁵⁸ As *István Simon* described⁵⁹ the current regulatory framework on the HCB, the FLH is a so-called core constitution, which directs the Parliament to pass cardinal laws on subjects specified in it. In line with this, the HCB is regulated by cardinal act 139 of 2013 on the Magyar Nemzeti Bank⁶⁰ (HCB Act). Furthermore the FLH – unlike the previous Constitution⁶¹ which did not contain regulations on the currency – Article K) of the FLH declares that the official currency of Hungary is the forint. As Simon argues, while the previous Constitution was neutral in terms of economic policy – as well as in other issues⁶² –, the Fundamental Law is not. In his view, the causes of the constitutional and policy changes are rooted in the crisis situation before 2010.⁶³ Simon argues that granting constitutional status to the forint has a symbolic meaning and practical importance, i.e., the forint fulfils the functions of money in Hungary, but what is even more important is that changing the legal tender of Hungary would require the amendment of the Fundamental Law, which requires at least a two-third majority vote, thus the existence of proper democratic legitimacy. Others, however, contest this decision of the drafters: they argue that this provision runs counter to the obligations arising from the founding treaties of the European Union, since upon accessing to the EU Hungary agreed to adopt the common currency.⁶⁴ A quick research done on the constitutional and statutory rules of the V4 countries and Germany by the author of the current chapter revealed that the constitutions of the Czech

56 Mihályi, 2012, p. 918,

57 The Fundamental Law of Hungary (25 April 2011). Available at: <https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178> (Accessed: 17 December 2023).

58 In other words: organic law.

59 Simon, 2018, pp. 113–114.

60 Act CXXXIX of 2013 on the Magyar Nemzeti Bank. Available at: <https://www.mnb.hu/letoltes/mnb-torveny-2019-04-05-en.pdf> (accessed: 17 December 2023).

61 Act XIX of 1949.

62 As József Szájer, who chaired the committee responsible for drafting the FLH, argues in his memoirs that it is a value-based constitution in other regards as well: Szájer, 2014, pp. 736–737, 774–775; see furthermore: Árva, 2022; Kiss, 2023, p. 424; Jakab, 2011, p. 379.

63 Simon 2018, p. 114.

64 Arato, Halmai and Kis, 2011.

Republic,⁶⁵ Poland,⁶⁶ Slovakia,⁶⁷ and Germany⁶⁸ do not nominate the legal tender, it is regulated in their statutes on their national banks instead. Article 13 of the Act on the Czech National Bank⁶⁹ states that the legal tender of the Czech Republic shall be the Czech koruna. Article 31 of the law on the Polish National Bank⁷⁰ states that the currency of the Republic of Poland shall be banknotes and coins denominated in złoty and grosz. Article 15(1) of the Act on the Slovakian National Bank⁷¹ states that the legal tender of Slovakia is the euro. In case of Germany, the legal tender is determined in Article 14(1) of the law on the German National Bank (Bundesbank),⁷² which reads as follows: banknotes denominated in euro shall be the sole unrestricted legal tender. Thus one may argue that the solution chosen by the drafters of the FLH is unusual – or “unorthodox” –, since even the Czechs, who are the most dismissive towards the common currency among the V4 countries,⁷³ dispensed with regulating the national currency in their constitution, which would make it impossible for a government without a qualified majority to introduce the euro, like the FLH does. The author of the current chapter is of the view that what Simon identifies as a wise regulatory choice by the drafters of the FLH is an undesirable one, instead, since once a situation may occur in which the country cannot access the Eurozone despite being mature enough in terms of real convergence and the political will of the government to do so.

As *Miroslav Štrkolec*⁷⁴ pointed out during his conference presentation in October 2023,⁷⁵ the currently enacted⁷⁶ Article 39a⁷⁷ of the Slovakian Constitution, which grants the issue of cash and the right to pay by cash, may also raise constitutional issues whenever the proposed digital Euro,⁷⁸ which is in a rather initial phase for the time being, will replace the “physical euro”.

65 Ústava České republiky č. 1/1993 Sb. (16. prosince 1992).

66 Konstytucja Rzeczypospolitej Polskiej (2. kwietnia 1997).

67 Ústava Slovenskej republiky (1. septembra 1992).

68 Grundgesetz für die Bundesrepublik Deutschland (23.05.1949).

69 Zákon č. 6/1993 Sb. o České národní bance.

70 Ustawa z dnia 29 sierpnia 1997 r. o Narodowym Banku Polskim.

71 Zákon 566/1992 (z 18. novembra 1992) o Národnej banke Slovenska.

72 Gesetz über die Deutsche Bundesbank in der Fassung der Bekanntmachung vom 22. Oktober 1992 (BGBl. I S. 1782), das zuletzt durch Artikel 14 Absatz 3 des Gesetzes vom 28. Juni 2021 (BGBl. I S. 2250) geändert worden ist.

73 Eurobarometer 465 18 May 2018; Republikon, 2022.

74 Professor JUDr. Miroslav Štrkolec, PhD (Univerzita Pavla Jozefa Šafárika).

75 The Interaction of National Economic Governance with The EU Integration and Contested Areas (Budapest, 26–27 October 2023).

76 Zákon 241/2023 (15. júna 2023) ktorým sa dopĺňa Ústava Slovenskej republiky č. 460/1992 Zb. v znení neskorších predpisov.

77 Article 39a: ‘(1) The issue of cash as legal tender shall be guaranteed. (2) Everyone shall have the right to make payment for the purchase of goods and the provision of services in cash as legal tender, and the acceptance of such payment may be refused only on reasonable or generally applicable grounds. The right to make a cash transaction at a bank or branch of a foreign bank shall be guaranteed. (3) The law shall lay down the conditions and limitations of the right under paragraph (2).’

78 Demertzis and Martins, 2023.

2. Similarities of the ECB's and the HCB's chosen path of handling the crises

2.1. Regulatory changes

The Eurozone in its original form featured a regulation deficit, which meant the almost complete lack of supervision authorities that could forecast potential risks and intervene in case of a crisis. There were no plans as to what to do in case of a crisis and there were no institutions vested with the power to apply fiscal rescue packages. It was a “half-built house”.⁷⁹ As pointed out earlier by the author,⁸⁰ this was the result of the founding fathers’ “original sin”: due to their political dissent, they gave up the creation of a real economic and monetary union and created an asymmetric monetary union with severe structural weaknesses instead.⁸¹ These weaknesses became evident in 2010 at the wake of the Greek Sovereign Debt Crisis. Back then many economist buried the euro.⁸²

As a response, the European legislator created the *European Banking Union* (EBU), which was proposed by several scholars years before and which became the warrantor of the EMU's stability. As *Luigi Chiarella* pointed out,⁸³ the new institutions were necessary, because the previous banking supervision and resolution framework, which was based on cooperation, failed during the crisis,⁸⁴ because domestic authorities were prone to turn a blind eye, when it came to their “national champions”. In accordance with the European Commission's proposal,⁸⁵ the EBU should have been based on multiple pillars, namely: (a) the *Single Rule Book*, (b) the *Single Supervisory*

79 A label used by *Fred Bergsten*. See Bergsten, 2012, p. 16.

80 Marinkás, 2020, p. 140; Marinkás, 2018, pp. 437–471.

81 See furthermore: Buda, 2017, p. 234; Buda, 2016, p. 22.

82 Stiglitz, 2010; Worstall, 2015.

83 Chiarella, 2016, pp. 41–46, 85.

84 This failure is well-portrayed by *advocate general Gerard Hogan's* opinion in the *Landeskreditbank Baden-Württemberg v. ECB* case: ‘[...] legislators and regulators have struggled to come to terms with the enormity of this banking crisis and to understand how, in the face of what had previously seemed to be a perfectly adequate system of regulation, that system ultimately failed when it was put to the test in those dark days of 2008 onwards.’ – C-450/17 P – *Landeskreditbank Baden-Württemberg v. ECB*, opinion of Advocate General Gerard Hogan, 5 December 2018, para. 2

85 European Commission (2012) ‘Communication from the Commission to the EP and the Council. A Roadmap towards a Banking Union’, Brussels, 12.9.2012, COM (2012) 510 final.

*Mechanism*⁸⁶ (SSM); (c) the *Single Resolution Mechanism*⁸⁷ (SRM); and the (d) *European Deposit Insurance Scheme* (EDIS).

While the last one still has not been completed, based on the reports of EU institutions and scientific literature⁸⁸ the author of the current article came to the conclusion in his 2020 study⁸⁹ that the first years of their functioning proved that the SSM and – more or less – the SRM are viable institutions despite the hardships experienced at their launch. More recent sources also support these findings: while the SSM is praised, the SRM still displays uncertainties in its functioning.⁹⁰

As for the Hungarian regulatory rules, Article 41(2) of the FLH doubles the HCB's mandate: it states the HCB shall perform the supervision of the financial intermediary system. Hungary did not establish a so-called close cooperation with the ECB, but the HCB is obliged to cooperate with the ECB and the entities of the Banking Union, since the HCB is a member of the European System of Central Banks and the European System of Financial Supervision. With a view to this membership, the HCB shall perform the tasks imposed on it by the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority, and the European Systemic Risk Board.⁹¹ The HCB shall cooperate in the supervision of financial intermediation with the European Commission and the entities of the Banking Union, including the Central Banks of other Member States as well.⁹² The HCB cooperates furthermore with the European Systemic Risk Board in performing its duties related to macro-prudential policy for

86 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, pp. 63–89) (*SSM Regulation*).

87 Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (OJ L 225, 30.7.2014, pp. 1–90) (*SRM Regulation*).

88 European Commission (2019) 'The Report from the Commission to the European Parliament and the Council on the application and review of Directive 2014/59/EU (Bank Recovery and Resolution Directive) and Regulation 806/2014 (Single Resolution Mechanism Regulation)', Brussels, 30.4.2019, COM (2019) 213 final p. 15; ECA (2016) 'Single Supervisory Mechanism – Good start but further improvements needed', Special Report No. 29, p. 136.; ECA (2017) 'Single Resolution Board: Work on a challenging Banking Union task started, but still a long way to go', Special report No. 23/2017, p. 68.; Karagianni and Scholten, 2018, pp. 185–194.

89 Marinkás, 2020, p. 140.

90 European Commission, Report from the Commission to the European Parliament and the Council on the Single Supervisory Mechanism Established Pursuant to Regulation (EU) No. 1024/2013. Strasbourg, 18.4.2023 COM (2023) 212 final; Avgeri, et al., (2020), p. 34., Culpepper and Tesche, 2020, pp. 134–150; Smoleńska, 2022, pp. 42–53; See furthermore the author's analysis on the T-510/17 *Antonio Del Valle Ruiz v. European Commission and Single Resolution Board* and T-481/17 *Fundación Tatiana Pérez [...] v. SRB* cases in the book 'Economic Governance – Fiscal and Monetary Policy of Central European Countries', Central European Academic Publishing 2024 (in publication).

91 Under Article 1(1) (3) of the HCB Act.

92 Under Article 140(1) regarding the duties set out in Article 4(9) of the HCB Act.

the stability of the entire system of financial intermediation,⁹³ and cooperates with the European Banking Authority in respect to its tasks as a resolution authority⁹⁴ as defined by a separate act.⁹⁵ The HCB shall meet notification, data and information supply requirements of the above authorities.⁹⁶

2.2. Crisis management tools

The change in the ECB's director seat in 2011 gave an impetus to the already ongoing policy shift: while *Jean-Claude Trichet* insisted that the restrictive dispositions of the TFEU – namely the “no bailout”⁹⁷ and “no default”⁹⁸ assumptions – shall be kept under all circumstances, the new president Mario Draghi held his famous “whatever it takes”⁹⁹ speech in 2012 giving the green light to the *Outright Monetary Transactions*¹⁰⁰ and the other purchase programs. As *Isabel Schnabel*¹⁰¹ concluded:

the reforms that followed the global financial crisis of 2008 have made our financial system safer and more resilient. Tighter regulation and higher capital ratios have been key factors enabling banks to act as shock absorbers rather than shock amplifiers during the coronavirus (COVID-19) pandemic.¹⁰²

It is interesting to compare the communication from the HCB, which hit a very similar tone: by the time serious negative economic effects of the COVID-19 crisis started to hit the Hungarian economy, the HCB's targeted measures have helped to put the Hungarian economy on a sustainable catching-up path, while also strengthening the economy's immune system, according to György Matolcsy.¹⁰³ In the words of co-authors *Csortos* and *Nagy-Kékesi* the HCB has sufficient “firepower” to deal with

93 As set out by Article 4(7) of the HCB Act.

94 Article 4(15) of the HCB Act: ‘In performing the function provided for in Paragraph (8), adequate arrangements shall be in place to ensure operational independence of the department responsible for enforcement of resolution functions from other departments of the MNB, including that these functions must be performed under the direct control and supervision of the governor or any of the deputy governors of the MNB’.

95 Act XXXVII of 2014 on the further development of the system of institutions strengthening the security of the individual players of the financial intermediary system (Resolution Act).

96 Article 140 (3)–(12) contain detailed provisions on the HCB's obligations to notify the above entities.

97 Consolidated version of the Treaty on the Functioning of the European Union, *OJ C* 326, 26.10.2012, pp. 47–390, Article 125.

98 *Ibid*, Article 9.

99 ‘Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.’ ECB (2012) Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012. Verbatim of the remarks made by Mario Draghi. Available at: <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (Accessed: 17 December 2023).

100 Cœuré, 2013.

101 Member of the Executive Board of the European Central Bank (Incumbent from 1 January 2020).

102 Schnabel, 2020.

103 Matolcsy, 2020, pp. 13–35.

the challenges posed by the COVID-19 epidemic.¹⁰⁴ As for the HCB's chosen method of handling the Eurozone crisis, *Csaba Lentner* provides a good oversight of the pre-crisis monetary policy of the HCB and how the HCB changed its perception on its role during the handling of the Eurozone crisis:¹⁰⁵ the HCB reduced the base rate from 7.0% to 0.9% and kept it at that level between 2012 and 2019;¹⁰⁶ launched the *Funding for Growth Scheme* (Növekedési Hitelprogram, hereafter: FGS);¹⁰⁷ the *Self Financing Programme* (Önfinanszírozási program, hereafter: SFP) in the middle of 2014 to reduce external vulnerability; phased out household loans denominated in foreign currencies, which also reached an unhealthy level, thus enhancing the vulnerability of the country's economy.¹⁰⁸ While Lentner argues that the HCB's crisis management was a great success for many reasons, *László Csaba* argues that the success is highly attributable to external, one-time factors, including low global energy prices, growth recovery in the EU, and sustaining zero bound interest rate on global capital markets. In his view, it is hard not to see how European trends are followed by Hungarian ones: when the EU entered into a recession in 2011–12, Hungary followed.¹⁰⁹ Similarly: in 2013–17 when Europe recovered, Hungary also recovered.¹¹⁰

Also, the chosen path of handling the negative effects of the COVID-19 pandemic and the Russo-Ukrainian War by the ECB and the HCB show similarities due to inevitable economic necessities:¹¹¹ contrary to the disinflation trends of the COVID-19 crisis, which required low or near zero interest rates and quantitative easing, the challenges of the new crisis characterised by high inflation rates required a return to the “good old” restrictive monetary policy with high interest rates and abandoning the refinancing role.

At the onset of the COVID-19 pandemic, *Christine Lagarde*, the President of the European Central Bank¹¹² stated that ‘Extraordinary times require extraordinary action. There are no limits to our commitment to the euro.’¹¹³ The Pandemic

104 Csontos and Nagy-Kékesi, 2020.

105 Lentner, 2021, pp. 103–116.

106 Data available at the ‘Policy rate and interest rate corridor’ page at the HCB's website: <https://www.mnb.hu/en/monetary-policy/monetary-policy-instruments/policy-rate-and-interest-rate-corridor> (Accessed: 17 December 2023).

107 Documents related to the programme are available at the HCB's website: <https://www.mnb.hu/en/monetary-policy/funding-for-growth-scheme-fgs> (Accessed: 17 December 2023).

108 Hoffmann, Kolozsi and Nagy, 2014.

109 Except for the banking sector, which in Hungary remained solid.

110 Csaba, 2022, pp. 5, 8, 10.

111 See: The Magyar Nemzeti Bank's self-financing programme April 2014 – March 2015. Available at: <https://www.mnb.hu/letoltes/the-magyar-nemzeti-bank-s-self-financing-programme-april-2014-march-2015.pdf> (Accessed: 17 December 2023).

112 Incumbent since 2019.

113 Navaratnam, 2020.

Emergency Purchase Programme (PEPP)¹¹⁴ was such an answer with an initial envelope amounting to 750 billion euros.¹¹⁵ The PEPP has been increased and extended twice in terms of amount and duration, reaching 1850 billion euros.¹¹⁶ On 16 December 2021, the Governing Council of the ECB decided to discontinue net asset purchases under the PEPP by the end of March 2022. In response to the COVID-19 pandemic, the HCB decided to modify its monetary policy instruments and defined three objectives: first to provide adequate liquidity to the banking system and financial markets in keeping up with the maintenance of price stability and financial stability. Second, to allow more flexibility in short-term yields in response to the negative money market developments induced by the coronavirus pandemic, and, last but not least, to ensure that the HCB is able to shape and influence long-term yields, which have gained increasing importance in recent years, directly and on as many relevant markets as possible.¹¹⁷ The HCB reduced the policy rate and provided long-term liquidity: it temporarily suspended penalization for breach of reserve requirements,¹¹⁸ enhanced the “good old” FGS and the relatively new *Bond Funding for Growth Scheme* (Növekedési Kötvényprogram, hereafter: BGS).¹¹⁹ The HCB also enhanced its asset purchase programs¹²⁰ (APPS): while before the pandemic, the HCB had purchased securities for about 1.2% of GDP, during the pandemic till end-2021 – when these programs expired – the HCB bought bonds for an additional 9.1% of GDP, most of them was government securities.¹²¹

As a result of the economic hardships caused by Russo-Ukrainian War, in July 2022 – the first time ever in the previous 6 years – the ECB increased its fixed interest

114 Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17), OJ L 91, 25.3.2020, p. 1–4; For the ECB's Summary please visit: The ECB's summary on the Decision (EU) 2020/440 and related issues. Available at: <https://www.ecb.europa.eu/mopo/implement/pepp/html/index.en.html> (Accessed: 17 December 2023).

115 While the first response to the pandemic on 12 March 2020 included the announcement of an additional envelope of 120 billion euros under our regular asset purchase programme (APP), it quickly became clear that the APP was not an adequate tool to deal with the sudden and severe dislocations in euro area bond markets when the crisis hit with full force. – Schnabel, 2021.

116 ECB Press Release (10 December 2020) Monetary policy decisions. Available at: <https://www.ecb.europa.eu/press/pr/date/2020/html/ecb.mp201210~8c2778b843.en.html> (accessed: 17 December 2023).

117 HCB, 50 Proposals of the Magyar Nemzeti Bank to Address the Impacts of the Coronavirus Pandemic on the Economy, 29 September 2020. Available at: <https://www.mnb.hu/letoltes/50-proposals-of-the-magyar-nemzeti-bank.pdf> (Accessed: 17 December 2023).

118 HCB, 2020, p. 20.

119 Supplementing its present set of unconventional monetary policy instruments, from mid-2019, the MNB will launch a corporate bond purchase programme with a facility amount of HUF 300 billion, within the scope of which it will buy the bonds of non-financial corporations of good credit rating. Furthermore, within the scope of the scheme, it will also be possible to purchase securities backed by corporate loans, through which the MNB wishes to contribute to the spread of securitisation in Hungary. – HCB, 2020, p. 22.

120 HCB, 2020, pp. 22–24.

121 Delgado and Gravelle, 2023, p. 36.

rate to 0.5 percent. In the next period the ECB increased the interest rates almost monthly. By June 2023 the rate reached 4 percent, the highest since the beginning of the global financial crisis in 2007.¹²² The ECB's other tool of tackling inflation was the phasing out of the net purchase programs.¹²³ Based on statistical data, these tools seems to work.¹²⁴ The HCB taking into account its primarily objective, i.e., price stability, restricted its purchase programs – leaving them as an exceptional tool – and decided to raise the base rate with 1% from 3,40% to 4,40% from February to March 2022. By September 2022, it reached 13% and remained at the peak until October 2023, when the Monetary Council decided to cut the base rate to 12,25% due to the improving economic situation.¹²⁵

3. Summary and conclusions

In the first part, the author examined four issues regarding the “Hungarian Euro”. First the author introduced the opinions of high-ranking officials on the euro in the last twenty years. In this regard one may conclude that – as a former governor of the Hungarian Central Bank articulated it –, there was an optimistic atmosphere before the accession to the EU and even in the first years of Hungary's EU membership. However, due to the undisciplined economic governance the original target date became unsustainable and after the change in the government in 2010 tackling the issues of the ongoing economic crisis became more important. The issue of joining the Eurozone was taken off from the agenda. In 2023, high-ranking officials started to talk about it, although this does not mean that Hungary has an official target date. Second, the author introduced convergence reports between 2004 and 2022 and concluded that while it was unrealistic to hope the accession before 2014, between 2014 and 2020 Hungary would have had the opportunity to fulfil Maastricht criteria and access the Eurozone with some extra effort exerted. However, this was not among the government's plans based on Mihály Varga' 2017 statement. Third, the author examined the “evolution” of the Hungarian scientific community's opinion throughout the decades. In this regard the author concludes that the initial mild optimism – before and around the time of the country's accession to the EU – started to erode as an increasing number of voices warned of the “risks and undesired effects” of the common currency. While the early opinions suggested that accession may facilitate economic growth and convergence, as soon as the lessons from the

122 Statista, 2023.

123 Panetta, 2022.

124 Trading Economics, 2023.

125 Minutes of the monetary council meeting 26 September 2023. Available at: <https://www.mnb.hu/letoltes/roviditett-jegyzokonyv-a-monetaris-tanacs-2023-szeptember-26-i-uleserol-en.pdf> (Accessed: 17 December 2023).

Greek sovereign debt crisis were concluded, namely the risks of premature accession, a more realistic approach, namely the “real convergence first” became dominant. In the author’s view, the Greek sovereign debt crisis was clearly the turning point in this regard. Also, later studies came to the conclusion that a country may achieve economic growth with or without the euro as well: while the introduction of euro may not protect the country from negative economic trends, a country with its own currency may outperform those with the common currency. That is to say, the introduction of the common currency in itself does not grant economic success. Gottfried essentially asked in his 2021 writing whether we should rush to the “safe haven” or wait to see how the Eurozone evolves, and our economy performs. He suggested the latter option. In the author’s view, we should have turned our ship towards the safe haven, when we had the opportunity, since it seems for the author that our ship was washed farther away from the safe haven by the currents and the author wonders when it will be in close sight again. Fourth, the author examined a legal issue regarding the possible joining to the Eurozone, namely the choice of the drafters of the Fundamental Law to grant constitutional rank to the forint as the legal tender of Hungary, i.e., the introduction of the euro would require the amendment of the Fundamental Law. Such an amendment requires at least a two-third majority vote, thus the existence of proper democratic legitimacy. The author of the current chapter is of the view that what others identify as a wise regulatory choice is an undesirable one instead, since once a situation may occur in which the country cannot access the Eurozone despite being mature enough in terms of real convergence and the political will of the government to do so.

In the second part, the author provided a brief introduction of the “post Eurozone crisis” regulatory choices of the EU and the Hungarian legislator and also a comparison of the chosen crisis management of the ECB and the HCB related to three crises, namely: the Euro-zone crisis, the COVID-19-related crisis and the Russo-Ukrainian War-related crisis. In this regard the author draws two conclusions. First, the Banking Union’s supervisory institutions matured rather well despite certain still existing shortcomings in the SRM’s functioning. Thus, the earlier arguments in the studies issued under the aegis of the HCB, that the rules and the functioning of the Banking Union are unclear and unpredictable are obsolete for the time being. Second, due to inevitable economic necessities, the chosen crisis management tools are rather similar in case of the ECB and the HCB: during the Euro crisis both applied low interest rates and quantitative easing. The disinflation trends of the COVID-19 crisis also required these policy choices from both institutions. The challenges of the crisis induced by the Russo-Ukrainian War, characterised by high inflation rates required a return to the “good old” restrictive monetary policy with high interest rates and abandoning the refinancing role. In this regard only the base rate differs: the HCB set a bit more than three times higher base rate compared to that set by the ECB. In this regard, one may conclude that, while the HCB successfully helped the economy to tackle the economic issues and the independent monetary policy may have facilitated a crisis management tailored to the country’s needs, it is hard

not to see the similarities of its monetary policy choices with those implemented by the ECB. In the author's view, this proves that such a small and opened economy as Hungary is cannot pursue an entirely independent monetary policy, as it was emphasised by a former governor of the HCB.

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PART III

THE DILEMMAS OF
GEOGRAPHICAL
ENLARGEMENT

BEYOND EUROPE: INTEGRATED MARKETS IN OTHER PARTS OF THE WORLD



HERBERT KÜPPER

Abstract

The internal market of the European Union is the highest level of economic integration in the world. However, it is not the only international instrument for market integration. Both in Europe and beyond, we find many international organisations that aim at, and sometimes achieve, some degree of economic cooperation and integration. These may be classified as free trade zones, customs unions, common markets, economic unions, and currency unions. The EU is partly an economic union and partly, for the states of the Eurozone, a currency union. A comparative analysis of other international organisations reveals that the special feature of the EU is its supranationality, a feature that even the currency unions in the Caribbean and Africa lack.

Keywords: European Union, internal market, supranationality, international economic organisations

1. Introduction

The European Union prides itself to have achieved a level of economic and political integration unique in the world. In particular, the single market tends to be qualified as unparalleled.

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Technically, this high level of integration is expressed in the supranational quality of the European Union. The European Union may take binding decisions, even against the will of individual member states.

It is interesting to see whether Europe's supranational integration which culminates in the single market qualifies as unique, or there are similar market integrations in other parts of the world. A comparative overview will help answer this question.

Formally, the European Union is neither the only nor the oldest supranational organisation in the world. Some supranational bodies such as the Danube Commission, founded in 1856 and refounded in 1948, are much older. Nevertheless, all other supranational organisations deal with a very narrow field of specialised tasks, such as the Danube Commission with navigation on a river. The European Union is the only supranational organisation with a wide field of competences. Member states have transferred sovereign rights in many different policies onto the EU, making the EU a supranational organisation of nearly "general competence". This, as the following comparative analysis will show, is unique in itself.

However, the EU does not have the power to define its own competences. The "Kompetenz-Kompetenz", as the German doctrine calls it, remains with the member states that may or may not, in the treaties, transfer a given competence totally or partly onto the EU. Therefore, the powers of the EU are derivative, such as that of any international organisations', and not original as the powers of a state are.

2. Parameters of comparison

The EU and its single market rely on a universal economic integration in the sense that it encompasses in principle all economic activities, all goods and services, labour, and capital.

In contrast, many international economic organisations such as the International Cocoa Organisation or the Kimberley Process, focus on a single product, or are open to only one half of the market, e.g., to exporters, such as the OPEC. In our comparative tour around the world, we will leave them aside because comparing a general economic organisation with a one-issue organisation would be like comparing apples to oranges. We will also leave aside the World Trade Organisation because its aim is not the economic integration of its member states but the coordination of their economic policies. So let us concentrate on economic integration mechanisms of a general scope.

When classifying such integration mechanisms, we can distinguish five distinct levels ranging from weak to intensive integration. The borders between these five

levels are not always clear in individual cases, but they suffice to create a useful typology.¹

The lowest level of integration is a *free trade zone*. In a free trade zone, member states reduce or even abolish customs among each other whereas each member state is free to apply their individual customs tariff vis-à-vis third countries.

The second level of integration is a *customs union*. A customs union is characterised by the abolition of all customs between member states and a unified external customs tariff vis-à-vis third states.

One level higher, we find the *common market* or *internal market*. If a common market is established within a customs union, this means that all products and goods may circulate freely and under equal conditions without being stopped or hampered by state frontiers. More developed common markets permit the free circulation of services and/or labour as well.

Level four is the *economic union* which is characterised by a harmonised economic policy of the member states of a common market. One field of economic policy harmonisation is the reduction and, ideally, the abolition of non-tariff and similar barriers to trade.

The peak of economic integration is the *currency union*, which is an economic union operating under a joint currency. The European Union qualifies as a currency union for the members of the Eurozone and as an economic union for the other member states.

We will use these five levels for our comparative analysis of the world's other economic integrations. In this paper, we only deal with integrated markets of more than two countries that achieve the first level of integration but do not consider international economic organisations short of a free trade zone such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) or the Southern African Development Community (SADC). In a historical perspective, we would also have to exclude the Roman Empire which did not possess an integrated market but many internal customs between provinces, round individual cities. etc., as, e.g., the New Testament illustrates quite vividly. When it comes to historical perspective, the Central European Free Trade Agreement (CEFTA) should be dealt with as well.

1 Krajewski, 2021, pp. 305–309.

3. Free Trade Zones

Since we do not have any free trade zones in Europe, let us start our world tour in Asia.

3.1. Association of Southeast Asian Nations (ASEAN) and ASEAN Free Trade Area (AFTA)

Founded in 1967, the Association of Southeast Asian Nations (ASEAN) is a primarily political international organisation with ten member countries in South-East Asia.² Its predecessor was formed in 1961.

In 1991, ASEAN members founded the ASEAN Free Trade Area (AFTA) as the ASEAN economic suborganisation. Within AFTA, most customs between member states have been reduced to zero, with the exception of the most important and at the same time most delicate field of the economy: agriculture. Decision-making is purely intergovernmental without any supranational elements.

AFTA shares its basic problem with ASEAN. The ten member states are heterogeneous and share nothing except the same geographical mesoregion.³ On the one hand, we have Singapore, one of the 21st century's metropolises, and the petro-microstate of Brunei. On the other hand, there is Myanmar with its eternal military dictatorship. Myanmar is often described as an "army with a state apparatus attached" but may be equally justifiably qualified as an "army with an economy attached" – or Cambodia which to this very day has not really recovered from the Khmer Rouge's genocide. In the field of economy, it is clear that these countries live under very different circumstances and that their interests are therefore very different. Furthermore, both political and economic integration are hampered by deep-rooted cultural prejudices and a long-standing lack of trust.

In light of the above, AFTA is demonstrating a poor performance. It is reasonable to assume that South-East Asia's economic integration will not extend beyond the boundaries of a free trade zone and that the development of supranational decision-making structures will not occur.

3.2. The United States–Mexico–Canada Agreement (USMCA)

The United States–Mexico–Canada Agreement (USMCA) was founded in 2020, replacing the North American Free Trade Agreement (NAFTA) which dates back to 1994.⁴ NAFTA and USMCA limit the economic integration to a free trade zone and do not aspire for more. NAFTA focused on the free flow of goods and later expanded

2 Herdegen, 2020, pp. 261–263.

3 Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam. Regular observers are Papua New Guinea and Timor Leste.

4 Herdegen, 2020, pp. 255–257; Siqueiros 1993, p. 383.

to include free trade in services. USMCA has expanded the scope of the agreement to include digital services. NAFTA and USMCA play an important role in dispute resolution. All decision-making is strictly intergovernmental.

One of the reasons, if not the only one for this reluctant integration lies in the heterogeneous nature of its members. Although it comprises no more than three states,⁵ it is not uniform: two well-developed economies face an emerging one. One country, the US, is the dominating partner due to its demographic and economic weight as well as its geographical position. Any strengthening of the USMCA would inevitably enhance the influence of the United States over the Canadian and Mexican economy and economic policy, given the natural preponderance of the US among the partners. A lack of equilibrium leads to a lack of will to integrate.

3.3. The Greater Arab Free Trade Area (GAFTA)

While Asia and the Americas have only one free trade zone each, the Middle East and Africa offer a richer source of comparison. The first free trade zone of that region is the Greater Arab Free Trade Area (GAFTA). It was founded in 2005 within the Arab League and consists of 17 members.⁶

The success of overall GAFTA integration has been limited because so far members have not reduced customs in a sizeable amount vis-à-vis each other, and both tariff and non-tariff barriers of trade continue to limit economic exchange among the members of the free trade zone. However, smaller groups of states within the GAFTA have liberalised trade among each other to a wider extent. This “integration of multiple speeds” (or multi-speed integration) is a phenomenon familiar to the EU as well.

Most experts do not expect further economic success from the GAFTA because of its heterogeneous membership and the fact that most members of this free trade area are not market economies but mixed market-state economies, many of which are underperforming. Weak member state economies translate into weak economic integration.

3.4. The Gulf Cooperation Council (GCC)

Formed in 1981, the Gulf Cooperation Council (GCC) has united six members.⁷ It is primarily a political organisation but it has economic goals as well. There are plans to create among the members of the GCC a customs union and a currency union, but neither union has progressed beyond the stage of rather vague plans.

5 Canada, Mexico, USA.

6 Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi-Arabia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen. Membership applications by Mauritania and Somalia are pending. For more detail see Herdegen, 2020, p. 264.

7 All states of the Arab Peninsula with the exception of Yemen.

At present, cautious customs liberalisation between members has moved the GCC towards a free trade area, but these attempts appear to be stalling.

There is little prospect that the GCC will ever achieve its economic goals because the shared priorities of its member states are predominantly centred on security rather than economic integration. Consequently, the focus of GCC cooperation remains on security concerns, and economic matters are not a priority.

3.5. Economic Community of West African States (ECOWAS)

On the African continent, the Economic Community of West African States (ECOWAS), founded in 1975, started as a cooperation platform of mostly former French colonies. Today, it comprises 15 members with English, French, and Portuguese official languages.⁸ Four members have been suspended in the last years because of military coups. Since the democratic performance of many other ECOWAS members is not exactly glorious, this measure is criticised as hypocritical by both African and Western governments.

ECOWAS aims at an economic integration and political co-operation. The economic goals include a common market and a common currency. Quite concrete plans exist but pertinent action has been postponed several times.

ECOWAS functions exclusively in intergovernmental structures. Its institutions are the Commission, the parliamentary assembly, i.e., the ECOWAS Parliament, and the Community Court of Justice.

Compared to other economic integrations described in this paper, political cooperation seems to work better. The ECOWAS military intervention in the Liberian civil war usually counts as a success story. When in July 2023 the military in Niger ousted the elected president, the political reaction of ECOWAS was prompt. The ECOWAS heads of government met several times and decided to suspend Niger's membership. More far-reaching plans of an economic embargo or a political or even military intervention, however, were brought up in these meetings but dropped in the end.

One factor hindering the progress of economic integration might be the natural dominance of Nigeria with its large population and superior economic power. Many of the smaller ECOWAS states find it difficult to maintain equal footing with the regional superpower and therefore hesitate to give up sovereignty for the benefit of an integration which may serve as a channel for enhancing Nigeria's dominance. This situation bears a certain similarity with the natural preponderance of the USA preventing the other USMCA members from deepening economic integration.

8 Benin, Burkina Faso*, Cape Verde, Gambia, Ghana, Guinea*, Guinea-Bissau, Ivory Coast, Liberia, Mali*, Niger*, Nigeria, Senegal, Sierra Leone, Togo (*: membership is suspended). Mauretania left ECOWAS in 2000. Morocco's membership application is kept pending because of fears of opening the gate for goods from Morocco's other free trade partners.

3.6. The East African Community (EAC)

The East African counterpart of ECOWAS is the East African Community (EAC). Although EAC was founded in 2000, however, close co-operation in East Africa is much older. Former British colonies, i.e., Kenya, Tanzania, and Uganda shared a common currency and maintained a customs union in the interwar period and maintained close ties after gaining their independence. In 1967, they were planning to create a common market, and they retained a common currency, the East African Shilling, until 1969. However, starting from the 1970s, the three East African states loosened their ties.

In 2000 they founded a new international organisation, the EAC, which aims at a general political co-operation and has economic goals: a customs union and a common currency, i.e., the re-establishment of the degree of the economic integration that had existed from the 1920s to the late 1960s. On the long run, political and economic integration are scheduled to result in a federal state. The EAC has well-established organs such as the East African Court of Justice and a joint parliamentary assembly.

This successful past, however, was soon diluted by the acceptance of more members. With Burundi, Rwanda, the Republic of Congo, and South Sudan, countries without the traditions of the close East African co-operation were admitted to the EAC. Somalia applied for membership, and other countries have shown their interest to join, too.

EAC's future is qualified as uncertain. What may have worked between the original three founding members is far from working with and among the other members who are quite unwilling to give up sovereign rights for the benefit of integration. Still, compared to many other initiatives such as GAFTA, GCC, or COMESA,⁹ ECA may be regarded as moderately successful. This is why it is attractive to so many countries in the region.

3.7. Common Market for Eastern and Southern Africa (COMESA)

The Common Market for Eastern and Southern Africa (COMESA) unites 21 member states "from Cairo to (nearly) Cape Town."¹⁰ Its predecessor, the Preferential Trade Area for Eastern and Southern Africa (PTA), was founded in 1981 and replaced by COMESA in 2000.

COMESA's principal goal is the creation of a common market. However, no steps have been undertaken so far to create the basis of a common market, and all

⁹ On COMESA, see point 3.7.

¹⁰ Burundi, Comoros, Congo (Democratic Republic), Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, Zimbabwe. Former members Angola, Lesotho, Mozambique, Namibia and Tanzania left COMESA at various points.

economic co-operations within the framework of COMESA have remained in the realm of good intentions. One reason may be the large number of very heterogeneous member states. It seems practically impossible to organise closer co-operation in purely intergovernmental structures among so many and so different states.

4. Customs unions

Customs unions can be found in Africa and South America. We will start with the African examples.

4.1. Union économique et monétaire ouest-africaine (West African Economic and Monetary Union, UEMOA)

Similar to the EAC, the Union économique et monétaire ouest-africaine (West African Economic and Monetary Union, UEMOA) is also based on a common currency from colonial times: the CFA Franc that was introduced in 1945. After gaining independence, former French colonies kept the common currency and the common central bank, the West African Central Bank. In 1994, seven of these countries institutionalised their co-operation under the common currency and founded the UEMOA which was joined by a former Portuguese colony.¹¹ In 2015, UEMOA members developed their organisation into a customs union with a joint external customs tariff. UEMOA also operates a joint court of law and a joint stock exchange. The West African Central Bank has certain features that go beyond mere intergovernmental structures but can take fundamental decisions only with a unanimous vote of all member states.

Despite the joint currency, UEMOA does not qualify as a currency union because it lacks the lower levels of integration.

Plans for the future include the establishment of a common market. Its realisation, however, faces grave problems. The economic structure of all UEMOA member states continues to be strongly colonial. Foreign trade is conducted with the former colonial metropolis but hardly with the neighbours in the region. 60 per cent of UEMOA's foreign trade target Europe whereas trade among members amounts to only 11 per cent of the foreign trade of their respective countries.

Insofar, UEMOA is a good example for the double-edged colonial heritage. On the one hand, one leftover of the French colonial rule is a common currency with functioning institutions such as a joint central bank for this currency. On the other hand, the structures of foreign trade still focus on Europe, reducing regional trade into

11 Benin, Burkina Faso, Ivory Coast, Mali, Niger, Senegal, Togo; Guinea-Bissau.

a marginal phenomenon. As a result, economic structures in the UEMOA member states serve European interests rather than the needs of the local populations.

4.2 The Communauté Économique et Monétaire de l'Afrique Centrale (Economic and Monetary Community of Central Africa, CEMAC)

The Communauté Économique et Monétaire de l'Afrique Centrale (Economic and Monetary Community of Central Africa, CEMAC) is the clone organisation of UEMOA. Five states from former French Equatorial Africa retained after independence the CFA Franc as a joint currency. They, plus one former Spanish colony¹², institutionalised their pertinent co-operation in 1994 in the CEMAC. CEMAC has its own central bank, the Bank of Central African States, and maintains a court for disputes among members as well as the Development Bank for Central African States. As in UEMOA, the joint central bank of CEMAC, too, may be the nucleus for supranational decision-making. So far, however, decision-making has strictly followed intergovernmental structures.

4.3. Mercado Común del Sur (Mercosur) / Mercado Comum do Sul (Mercosul)

The regional economic bloc in South America is the Mercado Común del Sur (Mercosur in Spanish) or Mercado Comum do Sul (Mercosul in Portuguese).¹³ Although close economic co-operation in South America started quite early, in 1960, in the Latin American Free Trade Association, the next step, the customs union, i.e., Mercosur, was founded as late as in 1991. The organisation's membership is special insofar as it has more associated than member states.¹⁴

The main purpose of Mercosur is to enhance economic co-operation, including securing South America's position in a globalising world and economy. The organisation is still struggling to achieve its primary goal, i.e., the creation of a customs union. Cooperation in technical and undisputed political fields works well, resulting in enhanced economic contacts and pertinent international treaties, but the highly divergent economic interests of the heterogeneous membership as well as the other members', especially Argentina's fight against the dominance of the largest member Brazil slow down progress in other, usually more important questions of market integration. Nevertheless, Mercosur is already formulating the next goal which is the common market.

The organisational structure of Mercosur is based on that of the EU. There is a body of the heads of states and governments, a Council which is to promote integration, a court, and other auxiliary bodies dealing with more specialised details.

12 Cameroon, Central African Republic, Chad, Congo (Republic), Gabon; Equatorial Guinea.

13 Herdegen, 2020, pp. 259–261; Mayr, 1993, p. 258; Moavro, Orietal and Parera, 1997.

14 Members: Argentina, Brazil, Paraguay, Uruguay, Venezuela (suspended since 2016); associated: Bolivia (in the process of accession), Chile, Colombia, Ecuador, Guyana, Peru, Suriname.

The one key difference, however, is that decision-making is not majoritarian (supranational) but unanimous (intergovernmental).

Compared to most other market integration organisations mentioned in this paper, Mercosur works well. A positive factor may be the common narrative (to secure South America's position in globalisation). A negative factor is the imbalance of power among the members with one very large member (Brazil) naturally dominating the entire organisation.

4.4 Comunidad Andina (Andean Community, CAN)

The Comunidad Andina (Andean Community, CAN), founded in 1969, is the second instrument of integration in South America. Unlike Mercosur, it does not concentrate on economy but aims at an all-encompassing political co-operation including economic issues. Its membership fluctuates. Right now, CAN has four members: Bolivia, Colombia, Ecuador, Peru. Two countries (Chile until 1976 and Venezuela until 2006) were members at some time but lost membership in the past. Furthermore, five states are associated members: Argentina, Brazil, Chile, Paraguay, Uruguay. At first sight, the core of the member states, being all Andean countries, appears to be comparatively homogeneous.

Besides common political goals, CAN aspires at economic integration as well. For this purpose, it established a customs union in 1994. Yet, only two member states (Colombia, Ecuador) apply the joint external customs tariff whereas the other two members (Bolivia, Peru) continue to use their own tariffs which makes the customs union incomplete. Since decision-making is strictly intergovernmental, CAN has no legal means to enforce the customs union on the two non-complying members.

Despite the *prima facie* homogeneity of the Andean states, the few CAN members were not able to set aside national egoisms and vanities as well as traditional prejudices and mutual mistrust. Therefore, their political as well as economic co-operation stagnates, unlike Mercosur which shows a much more dynamic development such as the trade agreement with the EU signed in December 2024.

5. Common markets

In a comparative perspective, common markets are less frequent than organisations on the lower levels of integration.

5.1. European Free Trade Association (EFTA)

The European Free Trade Association was founded in 1960 as a counter-project to the European Union. Whereas the EU embarked on a supranational path from the start, EFTA was consciously designed as an intergovernmental organisation. In those days, there were two economic blocs in Western Europe: EFTA and EU. Today,

EFTA only has residuary significance. Most of its former members joined the EU, leaving EFTA with only four members: Iceland, Liechtenstein, Norway, Switzerland.

EFTA's meaning is reduced further by the fact that three of its members are integrated into the EU's treaty system, the European Economic Area (EEA), and the fourth member, Switzerland, has achieved a similar association to the EU on a bilateral basis. Nevertheless, despite the strong integration into the EU treaty cosmos, EFTA retains some factual importance among its four member states.

The lesson that comparatists may learn from EFTA is that supranational integrations (EU) seems to be a better functioning organisation than intergovernmental integrations (EFTA), at least in the European political and economic context. When market integration reaches the level of a common market, unanimous decision-making is less and less appropriate to answer the legal and other questions the market asks. There were, of course, other factors that favoured the EU over the EFTA, e.g., that the core countries of Western Europe of those days (France, Italy, West Germany) united in the EU, or that the EU formed a contiguous territory in Europe's centre whereas EFTA members were dispersed in various parts of Europe's geographical periphery. Nevertheless, markets need to be regulated in order to function, and this is true for a common market as well. Market regulation runs more smoothly if no individual member state has unlimited veto power. Consequently, the EU thrives, whereas the EFTA withers away.

5.2. Caribbean Community and Common Market (CARICOM)

The Caribbean Community and Common Market (CARICOM),¹⁵ established in 1973, was based on the Carib Free Trade Area (CARIFTA) founded in 1968. CARIM's 15 members are – mostly small – Central American countries.¹⁶ The membership is therefore very heterogeneous, encompassing (former) British, Dutch, and French colonies, ranging from very poor (Haiti) to fairly well-off (Barbados) states. CARICOM itself groups its members into one of two categories: “less developed countries” and “more developed countries”. 8 members maintain a joint currency, the Eastern Caribbean Dollar,¹⁷ whereas the other members hold individual currencies. Many members still have a colonial-style economy oriented towards the former colonial power, but some countries managed to free their economic structures from such legacies. Given this picture, a *prima facie* impression suggests that chances for a true market integration are rather precarious.

Nevertheless, economic co-operation in CARICOM may be considered a success since it has a common external customs tariff, a common market and also to some

15 Herdegen, 2020, p. 261.

16 The 15 full members: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago; the 5 associates: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Turks and Caicos Islands (all British colonies).

17 For more detail see OECS at point 7.1.

extent common economic planning. Besides market integration, co-operation in other fields such as foreign policy, public health, education or a joint passport works well, too.

Although the transition from CARIFTA to CARICOM was conducted with explicit reference to the role model of the EU, CARICOM's decision-making remains strictly intergovernmental. The only supranational element is the Caribbean Court of Justice which decides disputes within CARICOM and acts as a supreme court for those member states that so decide. The latter function is attractive for former British colonies because it allows them to break away from the Privy Council without having to establish a supreme court of their own.¹⁸

Despite CARICOM's orientation towards the EU as a role model, its history is similar to Mercosur. A regional free trade organisation is replaced, as a next step, by a common market. This "organic" development through the different levels of market integration seems to favour success, as it did both with Mercosur and CARICOM.

5.3. Mercado Común Centroamericano (Central American Common Market, MCCA)

In the same region, since 1960, the Mercado Común Centroamericano (Central American Common Market, MCCA) has been the instrument for market integration of the five Central American republics: El Salvador, Guatemala, Honduras, and Nicaragua. In its first decades, MCCA was hardly operational, due to hostilities among the member states. In 1993, the members reactivated MCCA which was then joined by Costa Rica. Today the organisation has a common external customs tariff, allows for the free circulation of goods and has developed first initiatives to enable the free flow of services and labour. Initiatives to liberalise trade in services dates back to 2007, but due to mutual distrust, results have been limited so far.

MCCA decision-making institutions are the Central American Economic Council, the Executive Council, and the Secretariat which work on an intergovernmental basis. Apart from them, MCCA has a court and maintains the Central American Bank for Economic Integration.

In some respects, MCCA is the exact opposite of CARICOM. In CARICOM, a larger number of quite heterogeneous states manages to co-operate quite successfully whereas in MCCA, a small number of quite homogeneous countries – only Costa Rica has a different demographic, social and economic structure – struggles very hard to achieve at least some level of market integration. One reason of faltering cooperation is mutual distrust, fuelled by frequent civil wars, revolutions, and extremely high levels of intra-country (violence).

18 Barbados, Belize, Dominica, Guyana and St. Lucia have opted for this function.

6. Economic unions

Apart from the EU which functions as an economic union for the non-members of the Eurozone, there is only one example for an economic union worldwide.

6.1. Eurasian Economic Union (EEU)

The Eurasian Economic Union (EEU) is a product of Russia's aspirations to keep together the post-Soviet world after 1991. The principal international organisation for that purpose was the Commonwealth of Independent States (CIS), founded in 1991, reuniting, at times, all Soviet successor states with the exception of the Baltic republics. The CIS was the general forum for co-operation in many fields, including economy. However, the need was felt for a separate international organisation for those CIS members wishing a higher degree of market integration than CIS with its fluctuating membership allowed for. These countries gradually formed the Eurasian Economic Union during the 1990s.¹⁹

In its first decade, the EEU was successful and established a customs union, a free trade zone, and later a single market and introduced further instruments for market integration. From the beginning, the legal basis of the EEU was laid down not in one treaty but in a larger number of agreements, and each agreement had a different circle of signatories. This caused considerable problems in the development of an economic union in the post-Soviet region. Another problem was that some participants, e.g., Russia and Belarus, agreed on a considerably higher degree of integration on a bilateral level. As a consequence, different treaty provisions are applicable depending on which EEC member states and which area of the economy is concerned. This legal fragmentation does not favour the development of closer economic ties.

The practical importance of the EEU and other multilateral treaties on market integration of the post-Soviet space has dropped considerably since around 2010. The EEU's fate is similar to CIS. CIS functioned fairly well in many policy fields in the 1990s, inviting the active co-operation of the member states, but ceased to be functional after 2000. The EEU as well started successfully and was reduced to a phantom after 2010. The reasons are similar. First, more and more former Russian/Soviet colonies no longer deem a high degree of co-operation with Russia necessary because they more and more render themselves independent from the former colonial centre. The Russian aggression against Ukraine has accelerated this process, making many post-Soviet states seek greater distance from Russia which again reduces the significance of the EEU. Second, Russia herself erodes the multilateral treaty system, and the international organisations designed to keep together the post-Soviet space. Under Yeltsin, Russia followed an integrationist policy, trusting in multilateralism and international organisations. Putin changed this policy and returned to the classical Tsarist and Soviet attitude of *divide et impera* which relies on

19 Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia. Observers: Cuba, Moldova, Uzbekistan.

bilateral relations in which Russia can exert its influence on the other country much more directly than it could do in multilateral relations and international organisations. Russia did not abolish the CIS and the EEU, but Moscow concentrates relevant decision-making about market integration in bilateral treaty relations, leaving the EEU as little more than an empty shell.

6.2. A look into history: the Commonwealth of Nations

CIS and EEU are the instruments of the former colonial centre to reorganise its empire after the independence of the colonies. It is interesting to see what other former colonial powers did in this respect. Some of them limited their multilateral treaty relations to political, military, and cultural aspects,²⁰ but, between 1931 and 1949, Great Britain established an international organisation for a wide range of co-operation, including economic cooperation: the Commonwealth of Nations.

In the first decades, the Commonwealth was a forum for considerable economic integration, too. When Great Britain joined the EU, the EU gradually took over Britain's special economic relations with the former colonies, as it did with France's and Portugal's special economic relations with their respective former overseas possessions. These special post-colonial economic relations have been institutionalised in the Lomé Convention and the Cotonou Agreement with the EU on the one hand and the so-called African, Caribbean and Pacific Group of States (ACP countries) on the other. After Brexit, Great Britain has endeavoured to re-establish its old close links to its former possessions, though with limited success so far because quite a few former colonies declined the conclusion of trade treaties with the UK.

7. Currency unions

Currency unions are the highest level of institutionalised market integration. As seen before, the Eurozone within the EU is such a currency union.

7.1. Organisation of Eastern Caribbean States (OECS)

The Organisation of Eastern Caribbean States is the currency union of the states that share the Eastern Caribbean Dollar as a common currency. Therefore, it has close links with CARICOM.²¹

The Eastern Caribbean Dollar (EC\$) was introduced in 1965 when the pertinent territories were still colonies of various European states. After gaining their

20 Communauté Française, Comunidade dos Países de Língua Portuguesa.

21 Supra point 5.2.

independence, these states decided to retain the EC\$ and to establish an international organisation for this purpose, which they did in 1981. Today, OECS has seven members – six Caribbean insular micro-states, i.e., Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, one British overseas territory, Montserrat – and four associated members: two British and two French territories, namely Anguilla, British Virgin Islands; Guadeloupe, and Martinique. The dynamics of OECS are exactly the opposite of the EU. European integration started as a supranational common market and gradually developed into a currency union, whereas OECS started with a common currency, the heritage of colonial times, and supported it with the necessary market integration. This market integration gained momentum in 2001. Since 2012, OECS has had a common external customs tariff and a free flow of goods, services, labour and capital, thus attaining in principle, though not always in detail, a level of market integration similar to the EU.

Like the EU, economic cooperation and market integration are only one goal of OECS. This organisation encompasses a joint foreign policy, joint foreign representations, a joint university, and many other joint institutions, e.g., in health care. The reason for this wide scope of joint activities is the small size of the member states, as neither of them would be able to maintain a diplomatic service, a university, specialised hospitals, etc. By pooling their limited capacities, they create a critical mass that enables them to have all these components of modern statehood. Ultimately, this is true for the common currency as well. Only the joint economic potential of all member states suffices to maintain a currency.

As a currency union, OECS is as incomplete as the EU because not all members and associates have the EC\$.²² OECS has a joint central bank for all members of the EC\$ zone: the Eastern Caribbean Central Bank, founded in 1983.

The Eastern Caribbean Central Bank and the Eastern Caribbean Supreme Court are the only supranational elements in the OECS structure. The court is not only the forum to solve disputes within the OECS but also provides supreme-court-level jurisdiction in some member states. The other OECS institutions, the Council of Ministers, the Assembly of Parliamentarians, and the Secretary, decide strictly in inter-governmental structures.

7.2. Joint currencies without a currency union

We saw that some groups of states in Africa share a joint currency: UEMOA, CEMAC and, historically, EAC.²³ These are not currency unions in the sense of the Eurozone or OECS because the joint currency lacks the fundament of an economic union. They remain mere customs unions that happen to have a joint currency.

22 British Virgin Islands: US\$; Guadeloupe and Martinique: €.

23 Supra points 4.1., 4.2., 3.6.

8. Conclusions

On a regional level, we find numerous attempts at market integration. Especially Central America and Africa provide a rich scope of initiatives whereas integration is especially rare in Asia.

Looking at the examples described above, we can identify some factors that favour an integrated market. Homogeneity is the first of such factors. Similar structures and parallel interests help reduce national egoisms for the benefit of joint endeavours. Cultural closeness seems to be less important because attempts at close integration between culturally homogeneous groups of states were not more successful than others: CGG, GAFTA in the Arab-Muslim world, MCCA on the Central American continent, and CAN in the Andes. On the other hand, cultural differences are one main obstacle for a closer ASEAN integration.

External or objective force may be another such factor. OECS seems to be successful, i.e. achieves the goals it set to itself, because the small size of member states forces them into close cooperation. This is highlighted by a look at similar organisations in Africa: CEMAC, EAC, and UEMOA. All four organisations started with a joint currency inherited from colonial times. In the Caribbean, this led to a currency union with highly integrated markets whereas in Africa, where member states are larger and therefore may consider themselves more easily in possession of a full-fledged sovereignty, integration seems less pressing. For the Caribbean micro-states, sovereignty is an illusory concept from the outset. This may make it easier for them to pool parts of their sovereignty. It is worth noting, however, that even OECS did not make the step from intergovernmental to supranational decision-making.

A third positive factor is a common vision and a common narrative. Even in a purely economic union, a narrative about shared goals and, eventually, values seem to be helpful. In the EU, the common narrative used to be peace in Europe, later complemented by welfare for everybody. In Mercosur, the common narrative of securing South American identity and significance in a globalising world favours integration.

On the other hand, a negative factor seems to be one dominating state. If one state stands out by size, demography, economic potential, etc., other members tend to be careful to give too many competences to their international organisation for fear that this will enhance the dominating partner's influence. We find this mechanism in USMCA, Mercosur, and EEA, and to somewhat lesser extent in ECOWAS. OECS is very conscious of the importance of a sound power balance because they hesitate to accept members larger than a micro-state. They not only rejected Venezuela's membership application, but refrained even from accepting the island state of Trinidad and Tobago, fearing that that would upset the fine balance within the union. A look at the EU confirms this. Since its beginnings, European integration has always been careful in maintaining a balance between small, middle-sized, and large member states. This sometimes results in complicated voting rules but prevented any state or state group from dominating or feeling dominated.

Looking at the other integrated markets in the world, we find some highly developed organisations with well-integrated economies. Nowhere, however, do we find supranationalism beyond “supranational organs by nature” such as a joint court or central bank. Supranational decision-making is a European speciality. Probably a very lucky constellation of positive factors, as well as the absence of negative factors, made transferring parts of their sovereignty onto a supranational organisation acceptable to EU members.

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THE LEGAL IMPLICATIONS OF EUROPEAN UNION ENLARGEMENT: A UKRAINIAN PERSPECTIVE



BULETSA SIBILLA

Abstract

The acquisition of candidate status is highly valued by Ukrainian civil society, as it serves as a mechanism to build renewed momentum for reform. Over the past few months, the government and civil society have made a concentrated and successful effort to attain candidate status inside the European Union. From Kyiv's perspective, it can be argued that the Eastern Partnership has effectively accomplished its initial goals. Ukraine's willingness to embrace realignment or adopt new forms is contingent upon the attainment of demonstrable security benefits.

Ukraine's membership in the European Union (EU) offers several key advantages, including better trade prospects, ongoing implementation of reforms, and the opportunity for accelerated economic and social development. Ukraine's membership in the European Union would allow the country to achieve a degree of development similar to that of prominent European nations and to solidify its position within a union of economically advanced and politically independent states. Empirical data from numerous countries demonstrates that joining the European Union (EU) will bring several benefits to both the general population and businesses.

Keywords: enlargement, European union, Ukraine, agreement, reforms.

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1. Introduction

Being a European country, Ukraine's status provides it with new prospects for collaboration with the developed nations of the continent, thereby improving its worldwide standing within the context of international relations. Currently, the European Union consists of a total of 27 member states. Upon attaining the official status of an independent state in December 1991, Ukraine established diplomatic ties with the European Union. The determination of Ukraine's policy towards the European Union is established by the legislative framework outlined in the Law of Ukraine of 1 July 2010, titled 'On the Fundamentals of Internal and Foreign Policy'.¹

The results of European integration for Ukraine include the modernisation of the economy, bridging the technological divide, attracting foreign investment and advanced technologies, generating new employment opportunities, enhancing the competitiveness and productivity of domestic manufacturers, and gaining access to the global market, particularly the EU market. Ukraine, being a significant component of Europe, adheres to the prevailing paradigm of socio-economic progress employed by prominent European nations.²

Ukraine is required to adhere to the comprehensive body of EU legal norms referred to as the *acquis communautaire*. This criterion encompasses various aspects, including the quantitative aspect of the cohesion policy, adherence to democratic principles, and the fulfilment of specific requirements. Its primary objective is to facilitate the unhindered movement of goods and capital, enable the provision of banking, insurance, and investment services, and ensure the free movement of labour and the recognition of professional qualifications within the single market. This criterion serves to align the labour and social security laws within the system while governing competition and industrial policy, corporate law, the protection of industrial and intellectual property rights, as well as transport and telecommunications. The organisation establishes criteria for agricultural commodities, fisheries, and the control of environmental quality. Additionally, it safeguards the welfare of customers and promotes the coordination and advancement of education, science and research. The subject matter encompasses the Customs Union, the Schengen region, the Economic and Monetary Union, and exerts a substantial influence on the institutional advancement of the recently admitted member states of the European Union.³

Ukraine has had the status of a candidate for European Union membership since 23 June 2022. It is important to acknowledge that a nationwide poll was taken by the Sociological Group Rating on 14–16 January 2023. According to a recent survey, a significant majority of 87% of Ukrainians expressed their support for Ukraine's potential membership in the European Union, should a referendum be held. Conversely,

1 Law № 2411-VI of 1 July 2010 on the principles of domestic and foreign policy.

2 Могиль [Mohil], 2023, pp. 78–82.

3 Матюшенко [Matjusenko], 2015, p. 225.

a mere 3% of respondents opposed this idea, while 8% indicated that they would abstain from voting. The level of endorsement for NATO membership has had a notable resurgence, reaching its peak in recorded history. According to recent observations, a significant majority of 86% would express their support for this endeavour in a hypothetical referendum. Conversely, 3% would voice opposition, while 8% would abstain from voting. There is widespread consensus among representatives from various macro-regions, age cohorts, and income brackets in favour of accession to both the European Union (EU) and the North Atlantic Treaty Organisation (NATO). The results of the poll indicate that a significant majority, specifically, 85% of the respondents, express their support for the establishment of a military-political alliance comprising Ukraine, Poland and the United Kingdom. A total of 3% of individuals express opposition towards the aforementioned project, while 7% are indifferent. The concept of establishing a military-political alliance comprising Ukraine, Poland and Lithuania garners a favourable response from 80% of the individuals surveyed. A total of 6% oppose the establishment of such an organisation, while 9% exhibit a state of indifference. There is widespread support for the concept of military-political alliances with the aforementioned European nations across different regions, age and socio-economic groups.⁴ Ukraine stands as the sole nation to have attained EU candidate status while being embroiled in a state of armed conflict, with the expectation that the conflict will reach its resolution in the near future.

Before the incursion initiated by Russia on February 24th, Ukraine's EU strategy was characterised by the presence of two persistent themes. The ratification of the Association Agreement in 2014 brought about a notable change in the European Union's language, transitioning from a predominantly symbolic and normative focus on topics pertaining to prospective membership to a more pragmatic approach. The post-revolutionary political elites, who primarily support European integration, combined with a more capable civil society, directed their endeavours towards attaining a more extensive sectoral integration with the European Union. Concurrently, research presented empirical evidence of the widespread acknowledgment among Ukrainians of the highly improbable nature of achieving membership. An additional significant event was the escalating displeasure articulated by the Ukrainian leadership in relation to the European Union. Despite the notable advancements achieved by Ukraine in the implementation of reforms since 2014, the government exhibited a degree of hesitancy in earnestly evaluating proposals aimed at bolstering the Eastern

4 Підтримка вступу України до ЄС та НАТО практично одностайна серед українців [Support for Ukraine's accession to the EU and NATO is almost unanimous among Ukrainians] [Online]. Available at: <https://eu-ua.kmu.gov.ua/novyny/pidtrymka-vstupu-ukrayiny-do-yes-ta-nato-praktychno-odnostayna-sered-ukrayinciv-0> (Accessed: 29 June 2023).

Partnership framework. The plan known as the “Associated Trio”⁵ encountered reluctance among stakeholders in Brussels. The invasion led to a lasting change in the prevailing circumstances. The country of Ukraine has acquired a heightened level of importance as a strategic stronghold in the defensive endeavours of democratic Europe against the aggressive expansionist actions of Russia. The event outlined above presented Ukraine with a moral and strategic opportunity. The primary basis for Kyiv’s swift integration into the Union, similar to the time prior to 2014, was mainly rooted in normative principles. President Zelensky asserts that the granting of candidate status is considered fair, as Ukrainians are actively endangering their own existence in their pursuit of European ideas and rights.⁶ Ukrainian government officials saw enquiries pertaining to the advancement of judicial reforms or endeavours to address corruption as inappropriate “micro-arguments”. Concurrently, there is an evident rise in Kyiv’s level of confidence towards the European Union. The representatives of Ukraine believe that their nation is comparable to the larger member nations of the European Union. They present themselves as prominent figures within the region and assertively work as catalysts for implementing the Association Agreement.⁷

2. The historical stages of the signing of the Association Agreement between Ukraine and the European Union

The Maastricht Treaty⁸, also known as the Treaty on European Union, was signed on 7 February 1992 in Maastricht, the Netherlands. It subsequently became effective on 1 November 1993. The core elements of this concept encompass: a) transitioning from a singular internal market to achieving comprehensive economic and monetary integration; b) incorporating a social dimension into economic integration through the implementation of broad social policies; c) pursuing collective foreign and domestic policy initiatives. The European Council convened in Brussels on

5 The Foreign Ministers of Ukraine, Georgia and Moldova have established the Association Trio, a tripartite platform for enhanced cooperation on European integration, by signing a Memorandum. The document emphasises the European aspirations of the three EU associate partners and their ambitions to become members of the European Union. The Associated Trio reflects the clear position of our three European countries: Ukraine, Georgia and Moldova are an integral part of a united Europe and seek to join the European Union, the Minister of Foreign Affairs of Ukraine stressed. Kuleba, 2021.

6 Грузії, Республіки Молдова та України за підсумками 6-го Саміту Східного партнерства’ [Joint statement of the Heads of State/Government of the “Associated Trio” – Georgia, the Republic of Moldova and Ukraine following the results of the 6th Eastern Partnership Summit] [Online]. Available at: <https://www.president.gov.ua/news/spilna-zayava-glav-derzhavuryadiv-asocijovanogo-trio-gruziyi-72097> (Accessed: 29 June 2023).

7 Härtel, 2022.

8 The Treaty on European Union, 7 February 1992.

24–25 October 2002, during which the European Union's expansion timeline and application deadlines were ultimately established. In May 2004, the European Union welcomed ten new member countries, namely, Estonia, Cyprus, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Hungary, and the Czech Republic. On 1 January 2007, Bulgaria and Romania became members of the European Union.⁹

Negotiations commenced in March 2007 between Ukraine and the European Union with the aim of reaching a new enhanced agreement to replace the existing Partnership and Cooperation Agreement. This initiative was undertaken in accordance with the Ukraine-EU Action Plan. During the Ukraine-EU summit held in Paris in September 2008, it was mutually decided by the parties that the forthcoming deal would be referred to as the Association Agreement, reflecting the anticipated enhancements and modifications. During the period from 2007 to 2012, a total of 21 negotiation sessions were held in connection with the Association Agreement, while the Deep and Comprehensive Free Trade Area chapter of the Agreement underwent 18 rounds of negotiations. The conclusion of discussions on the Association Agreement between Ukraine and the European Union was declared at the Ukraine-EU Summit on 19 December 2011. The scope of the European Union's agreements with the countries of Central and Eastern Europe extends beyond mere bilateral arrangements. On 15 May 2013, the College of the European Commission made the decision to recommend to the EU Council the signing of the Agreement and its provisional application, pending the completion of ratification procedures by EU member states. The drafted Agreement was made available to the public on 9 August 2013 by publication on the Government Portal. An association agreement was concluded between Ukraine and the European Union in two stages. The signing of the political component of the Agreement and the last act of the summit took place on 21 March 2014 during an extraordinary meeting held between Ukraine and the European Union. At the Council of the European Union meeting held on 27 June 2014, the economic component of the Agreement¹⁰ was signed by President P. Poroshenko of Ukraine, the leadership of the European Union, and the heads of state and government from the 28 member states of the EU. The contents of this document encompass many parts pertaining to Justice, Freedom and Security, Trade and Trade-Related Matters, Economic and Sectoral Cooperation, and Financial Cooperation and Anti-Fraud Provisions. On 16 September 2014, the Verkhovna Rada of Ukraine and the European Parliament ratified the Association Agreement between Ukraine and the European Union simultaneously.¹¹

The Association Agreement signifies the most extensive international agreement ever established by the European Union with a non-member state,

9 Артьомов [Artyomov], 2007, p. 29.

10 Association Agreement, 27 June 2014.

11 Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand. The agreement was ratified by promulgation of the respective law.

including a diverse array of domains and containing significant substance. This proposal presents a novel framework for the bilateral relationship between Ukraine and the European Union, which is based on the concepts of political association and economic integration. Moreover, it functions as a strategic framework for the execution of significant socio-economic reforms in Ukraine. The Agreement aims to establish a complete and expansive free trade zone, and will create a legal framework to promote the unrestricted flow of products, services, capital, and to some extent, labour between Ukraine and the European Union. It additionally includes provisions for the adoption of regulatory measures with the objective of progressively aligning the Ukrainian economy with the common market of the European Union. As per the provisions outlined in Article 486 of the Agreement,¹² the interim application of the Agreement has been in effect since 1 November 2014 and will remain in force until its official implementation. The Association Agreement between Ukraine and the European Union was fully implemented on 1 September 2017, following an extensive ratification procedure.

3. Reforms required for Ukraine's integration into the European Union

Simultaneously, Ukraine and the European Union have entered into five agreements that serve to further our nation's progress towards accession into the European Union. These agreements also play a significant role in bolstering the stability of our state amidst the ongoing conflict with the Russian aggressor. An accord about Ukraine's involvement in the European Union's initiative, "Digital Europe" (2021–2027) has been reached.¹³ This falls within the framework of the European Union's digital visa exemption policy. The "Digital Europe" programme has been allocated a budget of 7.5 billion euros to facilitate the advancement of initiatives in five key areas: (1) supercomputing, artificial intelligence, cyber security, digital skills, and the widespread adoption of digital technology in the economy and society; (2) Agreement on the participation of Ukraine in the EU programme for cooperation within the customs domain.¹⁴ Commencing on 1 October, the European Union will implement a policy allowing customs clearance procedures to be conducted without the requirement of a visa. Following the formalisation of the Agreement,

12 Article 486 of the Association Agreement of 27 June 2014.

13 Agreement between Ukraine and the European Union on Ukraine's participation in the European Union programme "Digital Europe" (2021–2027). The agreement was ratified by Law No. 2926-IX of 23 February 2023.

14 Agreement between Ukraine and the European Union on Ukraine's participation in "Customs", the Union programme for cooperation in the customs sphere, Ukraine, Rules of 9 May 2022, ratified on 29 June 2023.

Ukraine will become a participant in the Customs programme with a substantial budget of about 1 billion euros. This initiative will facilitate the enhancement of the skill sets of our customs officers, enabling their active involvement in the advancement and use of European electronic systems; (3) Agreement on Ukraine's participation in the EU programme for cooperation in the tax sphere – *Fiscalis*.¹⁵ The State Tax Service of Ukraine will now have the capability to engage in information exchanges with counterparts from the European Union. The utilisation of contemporary European information technology systems presents a potential avenue for application within the realm of taxation; (4) the European Union has reached an agreement to allocate financial assistance in the amount of EUR 500 million to Ukraine. The allocated funds will be used to ensure accommodation for individuals who have been internally displaced, in addition to providing assistance to small-scale farmers in order to sustain and enhance their entrepreneurial endeavours; (5) an agreement has been reached wherein the European Commission will augment the budget allocated for grants to Ukraine by a sum of 122 million euros. This measure will facilitate the provision of financial support for Ukraine's priority projects and expedite its acquisition by enabling direct grant allocation to state authorities, local governments and public organisations. The inclusion of all five agreements in the two-year integration plan with the European Union represents a significant aspect, highlighting the exceptional support Europe lends to Ukraine amidst the ongoing conflict.¹⁶

In July 2022, an agreement was signed between the European Commission and the Ministry of Health concerning Ukraine's accession to the EU4Health programme.¹⁷ Ukraine has submitted applications for participation in seven grants intended for public institutions, namely, Joint Action grants. These projects collectively amount to a budget of over 205 million euros, allocated to the consortium of participating countries. The programmes commence in and the acquisition of funding from the European Union for their execution is scheduled for October–November 2023. These initiatives will be carried out by several entities within Ukraine, including the Ministry of Health, the Centre for Public Health, the State Expert Centre, the Ukrainian Centre for Transplant Coordination, and the State Enterprise “Electronic Health”. These initiatives will encompass the following domains: actions aimed at combating antimicrobial resistance, the prevention of cancer and other non-infectious diseases, the prevention of cardiovascular diseases and diabetes, as well as support for the integration of European Reference Networks (ERN) into the national health care systems. The present study focuses on the advancement of the EU regulatory network's capabilities in the domain of pharmaceutical products. This study aims to

15 Agreement between Ukraine and the European Union on the participation of Ukraine in the European Union programme for cooperation in the field of taxation “*Fiscalis*”, Ukraine, Rules of 5 September 2022, ratified on 29 June 2023.

16 To be in the European Union: when will negotiations on Ukraine's accession to the EU begin.

17 Agreement between Ukraine and the European Union on the participation of Ukraine in the “EU-4Health” programme. The Agreement was ratified by law.

test a novel methodology for assessing and approving revised protocols pertaining to the processing of donor blood, tissues and cells. Additionally, it seeks to enhance the utilisation of data within the electronic healthcare system and to execute interventions in the realm of global healthcare.

The agreement reached between Ukraine and the European Union pertains to Ukraine's involvement in the "EU4Health" programme.¹⁸ As of June 2023, the level of agreement implementation in the domain of health care has reached a rate of 71%. During the current year, two significant laws were enacted within the context of the Association Agreement with the European Union. These laws include the one on the Public Health System¹⁹ and a revised version of the law on Medicinal Products.²⁰

Noteworthy developments have occurred in the realm of blood donation, as evidenced by the government's implementation of a resolution that facilitates the automation of blood system procedures.²¹ This resolution specifically enables the expeditious acquisition of accurate data pertaining to blood requirements, thereby contributing to the efficient management and monitoring of national and regional blood reserves. These objectives are accomplished through the utilisation of electronic systems, namely eKrov (electronic blood) and Electronic health care system (EHCS). Furthermore, the Cabinet of Ministers has formulated and subsequently presented to the Parliament a draft piece of legislation aimed at enhancing accountability within the realm of blood donation and its constituent elements.²²

In August 2023, the Ukrainian Parliament passed a draft piece of legislation that pertains to the country's security and aims to incorporate EU standards into radiation protection, specifically addressing the impact of ionising radiation.²³

The Ministry of Health is making advancements in the internal review of laws to ensure conformity with European Union regulations. Now a significant proportion of EU directives, acts, agreements, and other actions pertaining to health care in the context of self-screening have been successfully reviewed, amounting to over 98% completion.²⁴

Agreement between Ukraine, on the one hand, and the European Union, on the other hand, on the participation of Ukraine in the European Union programme

18 Law № 2853-IX of 12 January 2023 on the ratification of the Agreement between Ukraine and the European Union on the participation of Ukraine in the "EU4Health" programme.

19 Law № 2573-IX of 6 September 2022 on the public health system.

20 Law № 2469-IX of 28 July 2022 on medicinal products.

21 CMU Resolution № 143 of 17 February 2023 on the creation of an information and communication complex of the blood system.

22 Draft Law № 9257 of 1 May 2023 on amendments to certain legislative acts of Ukraine on strengthening the liability for the violation of legislation in the field of donor blood and blood components.

23 Law № 3344-IX of 23 August 2023 on amendments to some laws of Ukraine regarding the protection of humans from the effects of ionizing radiation.

24 Ministry of Health: development of the approach to accession to the European Union, 2023.

“Single Market” (2021–2027):²⁵ the objectives of the “Single Market” programme are to improve the functioning of the internal market, and especially to protect and empower citizens, consumers and businesses, in particular micro, small and medium-sized enterprises (SMEs), by ensuring compliance with European Union legislation, promoting access to markets, setting standards and promoting human, animal and plant health and animal welfare by respecting and maintaining the principles of sustainable development and ensuring a high level of consumer protection, as well as to develop, produce and disseminate high-quality, comparable, timely and reliable European statistics, which underpin the development, monitoring and evaluation of all European Union policies and help citizens, politicians, authorities, enterprises, scientific circles and mass media to make informed decisions and take an active part in the democratic process.

It is important to acknowledge that the European Union plays a significant role in ensuring energy security. Under current circumstances, it is not feasible for any European nation to independently guarantee its own energy security. As our nation progresses along the path of EU membership, it is actively seeking the endorsement and safeguarding of its energy interests from prominent European nations. Upon its accession to the European community, Ukraine will no longer be solely regarded as a mere “transit territory” for the installation of pipelines to Europe.²⁶

Ukraine endeavours to attain the policy objectives outlined in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. It encounters challenges and upholds the fundamental principles of democracy, the rule of law, respect for human rights, including equality among individuals, delicate equilibrium, and the freedom of expression and artistic autonomy. The agreement between Ukraine and the European Union regarding Ukraine’s involvement in the “Creative Europe” programme for the period 2021–2027.²⁷

4. The benefits of Ukraine’s membership in the European Union

- a) Political benefits: stability of the political system and adaptation of the national legislation to EU legislation, reform of the inefficient national judiciary, participation in European collective security and guaranteeing, with its help, the territorial integrity of Ukraine.

25 Agreement between Ukraine, on the one hand, and the European Union, on the other, regarding Ukraine’s participation in the European Union programme “Single Market” (2021–2027). The Agreement was ratified by Law № 3175-IX of 29 June 2023.

26 Павлюк [Pavlyuk], 2018.

27 The agreement was ratified by Law № 1963-IX of 15 December 2021.

- b) Economic benefits: macroeconomic stability, new sales markets for Ukrainian goods and additional investments in the Ukrainian economy, ensuring the development of medium and small businesses, implementing EU standards in production, increasing the competitiveness of domestic enterprises, subsidies to the degrading agricultural sector, reducing customs tariffs and achieving a positive trade balance.
- c) Social benefits: formation of the middle class, reform of education, social protection, effective protection of human rights in EU institutions, opening the borders for the free movement of people, more opportunities for education, work and recreation, and ensuring a high standard of living for the population.
- d) Cultural (ideological) benefits: the spread of Ukrainian culture in the EU countries, wide access to the information potential of the EU, etc. One of the prerequisites for the integration of new members into the European Union is a significant degree of development of the democratic institutions in the country seeking admission. In light of the decision to embark on the route of European integration, it is imperative for our state to make substantial efforts to ensure that Ukrainian citizens experience the advantages associated with European-style democracy.

In order to attain full membership in the European Union, Ukraine was required to undertake a series of duties, which include the reinforcement of anti-corruption measures, such as: (1) appointment of the heads of the Specialised Anti-Corruption Prosecutor's Office (SAP) and the National Anti-Corruption Bureau (NABU); (2) reform of the Constitutional Court of Ukraine; (3) the ongoing process of judicial reform in Ukraine encompasses several measures, such as the assessment of the integrity of individuals serving on the High Council of Justice (HCJ) and the careful selection of candidates for the High Qualification Commission of Judges (HCJC); (4) legislation aimed at countering oligarchy; (5) execution of measures to combat money laundering and to reform law enforcement; (6) enactment of a "Media Law" aligned with European audiovisual regulations; (7) the modification of legislation pertaining to national minorities.²⁸

President Volodymyr Zelensky expressed his commitment to ensuring the full implementation of all recommendations, emphasising the need for the European Commission to promptly commence the evaluation of Ukraine's progress in integration.²⁹ In the upcoming year, it is imperative to address the primary concern, which pertains to the commencement of membership discussions. The ability to meet the seven political criteria is what is needed to start negotiations with member states of the European Union. According to Prime Minister Denys Shmyhal, Ukraine aspires to be

28 Бурда [Burda], 2023.

29 Zelensky, 2022.

adequately prepared for engaging in negotiations over EU membership by the end of 2023, with the ultimate goal of attaining full EU membership by the end of 2024.³⁰

The European Union's implementation strategy entails the incorporation of necessary modifications into Ukraine's legislative framework and the development of procedures to effectively enforce this legislation. Let us now contemplate the alterations that have already been implemented, as well as the forthcoming transformations that lie ahead for Ukraine in its pursuit of accession to the European Union.

4.1. Strengthening the fight against corruption

A great deal of effort has gone into this step. Today, Ukraine has a fairly large anti-corruption infrastructure. A number of anti-corruption bodies have been created, namely:

- a) the Higher Anti-Corruption Court of Ukraine;
- b) State Bureau of Investigation;
- c) National Anti-Corruption Bureau of Ukraine;
- d) National Agency for the Prevention of Corruption;
- e) National Agency of Ukraine for the identification, search and management of assets obtained from corruption and other crimes;
- f) Specialised Anti-Corruption Prosecutor's Office.

The announcement of Ukraine's progress in combating corruption was made by the President of the European Commission herself. Nevertheless, occasional grievances arise over the efficacy of these establishments, which are entrusted with the task of combating corruption. It is noteworthy that the implementation of a comprehensive set of measures aimed at combating corruption is deemed to be highly important. Primarily, it is imperative to enact modifications to the existing legislation. The Criminal Code of Ukraine and the Law on the Prevention of Corruption in Ukraine are inconsistent in several regards, resulting in an inefficient prosecution process for individuals involved in corruption offences. Furthermore, the adoption of electronic service delivery by governmental entities has the potential to dampen the prevalent issue of corruption in certain areas. This measure prevents the proliferation of corruption, as it effectively reduces the level of engagement between government officials and the general populace. Ukraine has made significant progress in this particular endeavour. Nevertheless, the process of addressing corruption is a complex undertaking that necessitates a comprehensive evaluation of the behaviours exhibited by both public officials and individuals. Additionally, it requires a fundamental reconsideration of the detrimental impact that corruption inflicts upon the functioning of the state.

30 Радіо Свобода [Shmyhal], 2023.

4.2. Implementation of the Constitutional Court reform in Ukraine

Reforming the Constitutional Court of Ukraine is also a crucial measure, both for Ukraine's EU membership and for the country as a whole. In 2016, constitutional reform was implemented in Ukraine. The Law on the Constitutional Court of Ukraine was enacted already in 2017.³¹ Each appointing authority, including the President of Ukraine, the Verkhovna Rada of Ukraine, and the Congress of Judges, is required by this law to hold a separate competition for the appointment of judges. However, information about the changes and circumstances did not produce the desired outcome. In a ruling in October 2020, the Constitutional Court of Ukraine abolished criminal liability for failing to submit or falsifying electronic declarations. This decision nearly resulted in the loss of Ukraine's visa-free status. It led to citizen discontent and the so-called "crisis of the Ukrainian Constitutional Court".³² In order to prevent errors in the operation of the Constitutional Court of Ukraine, a thorough screening and the competitive selection of judges are necessary.

In a notable development, the European Commission proposed to uphold Ukraine's standing as a potential candidate for EU membership through the introduction of a rigorous selection process for judges of the Constitutional Court of Ukraine. Law No. 3277-IX³³ of Ukraine, which pertains to the competitive selection process for candidates seeking the position of judge in the Constitutional Court of Ukraine (CCU), came into effect on 20 August 2023. Consequently, Ukraine has successfully implemented one of the primary suggestions put forth by the European Commission for maintaining its status as a candidate for European Union membership, securing its position as the foremost candidate among the seven candidate nations. The significance of this event lies in its impact on the European integration process of Ukraine. The enactment of this law signifies the adoption of a novel mechanism for the selection of justices to the Constitutional Court, aligning with the proposals put forward by the Venice Commission. Indeed, the competition is scheduled to take place with the assistance of an Advisory Group of Experts specifically set up for this purpose. Assessing the moral attributes and professional aptitude of candidates for the position of justice of the Constitutional Court is their responsibility. During the period of transition, the DGE will comprise six individuals who possess expertise in the relevant field. Specifically, one representative will be selected by the President, the Verkhovna Rada, and the Council of the Judiciary (in lieu of the Congress of Judges), while the Cabinet of Ministers will appoint a member based on the recommendation of the Venice Commission. Additionally, two further members will be designated by international organisations that have been advising Ukraine on this

31 About the Constitutional Court of Ukraine: Law № 2136-VIII of 13 July 2017.

32 Шембель [Shembel], 2022.

33 Law № 3277-IX of 27 July 2023 on amendments to some legislative acts of Ukraine regarding clarification of the provisions on the competitive selection of candidates for the position of judge of the Constitutional Court of Ukraine.

matter. Competitions for available positions within the Constitutional Court are expected to be launched in the near future, in accordance with the revised protocol. Indeed, the process of the DGE (Directorate-General for Education) typically exceeds a duration of one month, as stipulated by the legislation. Furthermore, it is expected that within a one-month timeframe, the Verkhovna Rada and the Council of Judges will officially declare the commencement of the process for individuals interested in applying for the position of judge in the Central Administrative Court. Upon the transmission of candidate information to the DGE, a period of about five months will be allocated for the evaluation of candidates' fulfilment of the criteria of high moral characteristics and a recognised degree of competence. It is important to acknowledge that the KSU comprises a total of 18 judges. Six judges are appointed by the President, the Verkhovna Rada, and the Congress of Judges. It is important to acknowledge that there are now five unoccupied seats within the KSU. Specifically, three of these seats are allocated according to the Verkhovna Rada quota, while the remaining two seats are designated for the Congress of Judges. Consequently, the newly enacted legislation will enable the process of filling empty seats in accordance with the revised procedure.

4.3. Judicial reform

For Ukraine to attain full membership in the European Union, it is imperative that the country persists in the process of reforming its judiciary legislation. The process of judicial reform was initiated in Ukraine in 2016.³⁴ The current reform of the judicial power in Ukraine represents the most significant undertaking in the nation's history since gaining independence. The proposed reform encompassed modifications to the Constitution of Ukraine and the establishment of many additional entities. The Strategy for the Development of the Justice System and Constitutional Judiciary for the period of 2021–2023 has been endorsed by a Decree of the President of Ukraine.³⁵ This strategy outlines the fundamental principles and objectives for the continued and sustainable operation and advancement of the justice system, with due consideration given to the most exemplary international standards and practices. The objective of the strategy for the enhancement of the justice system is to identify the primary orientations and priorities for the ongoing improvement of Ukraine's legislation pertaining to the judicial system, the status of judges, and the judiciary's relationship and interaction with other justice institutions. This aims to effectively establish the principle of the rule of law, ensure efficient and equitable justice, and reinforce the functional framework for organising judicial authorities in accordance with the human rights safeguards and values enshrined in the Constitution of Ukraine and Ukraine's international legal commitments.

³⁴ Law № 1402- of 2 June 2016 on the judicial system and the status of judges.

³⁵ Decree of the President of Ukraine №231/2021 on the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021–2023.

The selection process for candidates to fill posts within the High Council of Justice (HCoJ) was finalised by the competition commission in March 2023.³⁶ The HCoJ, at present, comprises a total of 17 individuals, all of whom adhere to the established criteria of professional ethics and integrity. Between 9 November 2021 and 31 March 2023, the Ethics Council held a total of 101 interviews. These interviews involved 111 candidates who were being considered for membership in the HCoJ, as well as 4 current members of the HCoJ. It is noteworthy that on 13 July 2021, the Verkhovna Rada passed legislation concerning the reinstatement of the Higher Qualification Commission of Judges of Ukraine (HQCJU) operations.³⁷ The HQCJU tournament commenced in September 2021, experienced a six-month hiatus in 2022 due to the Russian invasion, and concluded on 15 March 2023. The competition commission, comprising a significant proportion of internationally recognised specialists, conducted a rigorous selection process to identify 32 individuals from a pool of 301 participants. In June 2022, the European Commission stipulated the establishment of a new Voluntary Cooperation and Convergence Unit (VCCU) as a prerequisite for Ukraine to commence negotiations regarding its potential accession to the European Union subsequent to obtaining candidate status. On 1 June 2023, a total of 16 individuals were appointed as members of the Supreme Judicial Council by the Supreme Council of Justice, chosen from a pool of 32 pre-selected applicants.³⁸

The initiative to enhance the efficiency of the court network was launched in the year 2021. Despite the significant alteration in plans resulting from the extensive invasion, completion of the operation had been originally slated for 1 January 2023. The growth in the number of courts unable to dispense justice was primarily attributable to the occupation of a portion of Ukraine's land. Consequently, the temporary modification of territorial jurisdiction resulted in a higher workload for other courts.

The Unified Judicial Information and Telecommunication System was inaugurated in January 2019. The implementation of automation in court systems can lead to the gradual streamlining of many operations. These include the gathering and processing of statistical data, the centralised storage of materials, automation of case distribution, utilisation of video conferencing, and the facilitation of document circulation among case participants. Among the 18 modules comprising the system, a total of 8 were initially intended for deployment. However, due to undisclosed factors, only three subsystems, including the "Electronic Cabinet", the "Electronic Court", and the "Video Conferencing Module" have been successfully implemented as of the year 2021.

36 'The Supreme Council of Justice' [Online]. Available at: <https://hcj.gov.ua/page/misiya> (Accessed: 29 June 2023).

37 Regulations of the Higher Qualification Commission of Judges of Ukraine. Decision № 81/3п-16 of the Higher Qualification Commission of Judges of Ukraine of 13 October 2016 was approved.

38 The list of members of the Higher Qualification Commission of Judges of Ukraine as at 1 June 2023.

During the implementation of judicial reform, it is imperative to underscore additional issues of equal significance that require resolution in the immediate future. The establishment of the Service of Disciplinary Inspectors inside the HCoJ is deemed necessary.

One of the primary responsibilities mandated by legislation for the Government Regulatory Panel is to ensure judicial accountability through the assessment of its findings. Furthermore, this pertains to the 2016 judicial reform plan aimed at establishing the High Court on Intellectual Property. The process of competitively selecting judges for the Court, which commenced in 2017, remains ongoing and has not yet come to an end.³⁹

4.4. Anti-Oligarchy Law

The steps necessary for Ukraine to attain full membership status in the European Union were partially completed in 2021. Law No. 1780-IX⁴⁰ was endorsed by the Verkhovna Rada of Ukraine, and subsequently ratified by the President, with the aim of mitigating risks to national security arising from the undue dominance of influential persons with substantial economic and political clout within the public sphere, sometimes referred to as oligarchs. This legislation establishes regulations aimed at diminishing the impact of the oligarchy on both the economic and political domains of the nation. This measure seeks to safeguard large corporations against the influence of politicians who exploit their economic leverage for the purpose of advocating for their own interests. This legislation encompasses a multitude of definitions, including the precise delineation of the term “oligarch” as well as the set of criteria employed to ascertain the classification of certain individuals. The criteria cover the following aspects: active engagement in political affairs, substantial impact on mass media, being the ultimate beneficial owner of a company, and possessing proven assets valued at more than one million times the subsistence minimum for able-bodied individuals. An individual may be classified as an oligarch if they satisfy a minimum of three conditions. Nevertheless, this legislation has numerous deficiencies and contradictions, rendering it ineffectual. An illustrative example is the identification of the parameters based on which an individual is classified as an oligarch. These factors are often perceived as a potential danger by many individuals, especially international investors. In June 2022, the President of

39 'Наступні кроки судової реформи: які вони?' [The next steps of judicial reform: what are they?] [Online]. Available at: https://lb.ua/blog/pravo_justice/552223_nastupni_kroki_sudovoi_reformi_yaki.html (Accessed: 29 June 2023).

40 Law № 1780-IX of 23 September 2021 on the prevention of threats to national security associated with the excessive influence of persons who have significant economic and political weight in public life (oligarchs).

Ukraine issued a decree authorising the establishment of the Register of Oligarchs.⁴¹ The establishment and maintenance of the Register of Oligarchs was mandated by the Council of National Security and Defence of Ukraine. The register will contain data pertaining to individuals who satisfy the conditions stipulated by the relevant legislation of Ukraine. Hence, in order to facilitate the advancement of Ukraine within the European Union, it is imperative to enhance the anti-oligarchy legislation, address existing discrepancies therein, and refine the mechanisms for identifying individuals classified as oligarchs.

4.5. Endeavours to combat money laundering

In order to progress towards European Union membership, Ukraine must prioritise the enhancement of its anti-money laundering legislation to comply with the established benchmarks set forth by the Financial Action Task Force (FATF).⁴² Implementation of this necessitates modifications to the existing legislative framework of Ukraine. The detection of dark money in politics poses a complex challenge, without a straightforward answer. However, Ukraine should consider enhancing transparency in political party financing and media ownership, while also adopting a proactive approach to combating money laundering. According to Carpenter, hacking, disinformation, and dark money are the primary mechanisms employed by foreign entities to meddle in political processes.⁴³

A.V. Bazylyuk defines “laundering” as the act of transforming funds acquired through fraudulent methods, such as price manipulation, infringement upon the genuine proportions of barter exchange, use of bills, securities, property relations, and many forms of illicit transactions. The observation reveals that in this particular scenario, engaging in illegal activities is regarded only as one of several methods of acquiring illicit earnings.⁴⁴ This perspective contributes to an excessively expansive interpretation of the legal parameters encompassed within this definition of criminal law.⁴⁵ V.M. Popovych makes a notable distinction between the processes of shadow capital cleanup and legalisation. The former pertains to the coverage of any actions or omissions committed by owners of “real funds of illegal origin” or “fictitious funds” acquired through the issuance of fictitious financial instruments. It also covers actions or omissions by employees of credit institutions, other financial

41 Decree of the President of Ukraine №459/2022 of 29 June 2022 on the decision of the National Security and Defence Council of Ukraine concerning the approval of the regulation on the register of persons who have significant economic and political weight in public life (oligarchs), the order of its creation and management.

42 FATF recommendations, international standards for combating money laundering, terrorist financing, and the proliferation of weapons of mass destruction, methodology for assessing compliance with FATF recommendations and the effectiveness of anti-money laundering and countering terrorist financing systems, rules and procedures of the 5th round of mutual evaluations by the moneyval.

43 Бедратенко [Bedratenko], 2018.

44 Базилюк [Baziljuk], 2002, pp. 11–13.

45 Baire [Waite], 2015, pp. 30–31.

and economic institutions, notary bodies, registration organisations, and other entities that attempt to conceal the origins of capital or act as initiators and accomplices in such endeavours. The researcher deems this to be a crucial component of the process of legitimising underground capital, specifically its integration into the formal economy.⁴⁶ Ukraine has undertaken the requisite actions in this regard, having included some European legislative acts related to the prevention of money laundering and the funding of terrorism in its domestic legal framework.⁴⁷

Ukraine can rely on the experience of European countries in this matter. In most European countries, the verification of suspicious transactions is the responsibility of individual authorities or, for example, customs or other financial institutions. Most EU member states have financial intelligence agencies that receive, analyse and investigate information about businesses to identify signs of money laundering. These organisations then pass on the information to law enforcement agencies for investigation in case of criminal acts or intentions. Improving the legislation on the State Financial Monitoring Service, expanding its powers and giving it more rights would be a good step in the fight against money laundering. This organisation is the financial intelligence agency in Ukraine. However, Ukraine has already taken a number of steps to fulfil this requirement. In April 2020, the Law on the prevention of and countermeasures against the legalisation (laundering) of the proceeds of crime, terrorism financing and financing the proliferation of weapons of mass destruction⁴⁸ came into force, which aims to adapt Ukraine's legislation in this area to European standards.

Ukraine has faced serious obstacles in the past and will do so in the future. Challenges the world must address: building a comprehensive mechanism for verifying information about the ultimate beneficial owners is a global problem; there is no country that has a fully functioning mechanism; hidden beneficiaries that can be used for terrorist financing and money laundering; and a lack of leadership and attention to ultimate beneficial ownership issues worldwide.

Ukraine encounters challenges arising from the lack of a governmental entity tasked with the establishment and execution of state policy concerning beneficial ownership, as well as the development of a mechanism for verifying ultimate beneficial owners. The successful implementation of such a mechanism necessitates collaboration among all parts of government, encompassing the legislative, executive, judicial, and banking institutions. It is important to introduce modifications to normative legal actions. The Electronic Data Repository (EDR) contains data that lacks organisation and reliability, leading to the absence of key processes outlined in legislation. The absence of validation and accountability for inaccurate information

46 Попович [Popovych], 2001, pp. 108–109.

47 Law № 361-IX of 6 December 2019 on the prevention of and countermeasures against the legalisation (laundering) of the proceeds from crime, terrorism financing and financing the proliferation of weapons of mass destruction.

48 Law № 361-IX of 6 December 2019.

pertaining to ultimate beneficial owners, the absence of a cohesive approach to the organisation and oversight of the accurate identification of ultimate beneficial owners, and the absence of systematic training, communication, and awareness campaigns regarding the imperative to identify and verify ultimate beneficial owners.⁴⁹

Finally, the courts should pay attention to the fact that the location of money or other property obtained as a result of the predicate offense is irrelevant, as these things can be legalised both in Ukraine and abroad. Thus, the provisions of Articles 6 to 8 of the CC refer to the spatial application of the criminal law in assessing both the predicate offense and the legalisation of the proceeds.⁵⁰ Public authorities should combat money laundering in the framework of international cooperation. For example, state registries should be improved to contain verifiable information on the true ownership of all legal entities, and all banks should know the true owner of any account with financial institutions. In addition, public authorities should adopt and fully implement all FATF recommendations;⁵¹ multinational companies should publicly disclose their revenues, profits, losses, sales, taxes paid, subsidiaries and staff levels in each country; customs agencies should properly review trade transactions; financial institutions should have adequate controls and procedures in place, applying strict customer due diligence, and ensure a high degree of transparency in operations, which is crucial for combating money laundering.⁵²

In conclusion, it is important to highlight that money laundering has the most detrimental impact on the state's economy. The sectors covering macroeconomics, finance, investment, international economics, and production are among the numerous constituents of the "unclean" property that experience some detriment during the process of its purification. Although Article 209 of the Criminal Code of Ukraine, pertaining to money laundering, is situated within Chapter VII of the Special Part of the Criminal Code of Ukraine titled 'Crimes in the Field of Economic Activity', it is important to acknowledge that the ramifications of this offence extend beyond the realm of the economy. The most apparent ramifications of money laundering are the financial losses resulting from predicate crimes and the subsequent rise in revenue for individuals engaged in criminal activities. However, it is important to consider additional threats that may arise, including the proliferation of corruption, the escalation of criminal activities, particularly those associated with organised crime, and the subsequent amplification of their economic and political sway. The confluence of these causes precipitates the dismantling of the political frameworks within the state.

49 Fighting money laundering and reforming the law enforcement sector, 2023.

50 On the practice of courts applying the legislation on criminal liability for legalization (laundering) of proceeds obtained through crime: Plenum of the Supreme Court of Ukraine Resolution. 15.04.2005.

51 Сорок рекомендацій групи з розробки фінансових заходів боротьби з відмиванням грошей [Forty recommendations of the group on the development of financial measures to combat money laundering] [Online]. Available at: <https://www.kmu.gov.ua/npas/2854776> (Accessed: 29 June 2023).

52 Венгерська and Удодова [Udodova and Kutsenko], 2018, p. 46.

4.6. “Media Law”

For the most part, the legislative framework governing the media in Ukraine originated in the early 1990s. During this period, the media landscape consisted mostly of newspapers, television channels, both state-owned and a limited number of privately-owned entities. The private media sector encompassed print media and cable television, which often faced challenges in terms of inconsistent programming and the presence of unauthorised content. The development of the Ukrainian media field is faced with significant challenges stemming from various factors, including the enduring influence of the Soviet era, the erosion of fair business practices, the prolonged period of Soviet rule spanning 70 years, the impact of hyperinflation, and the ongoing fight in the economic sphere. These factors collectively contribute to the difficulty of envisioning alternative pathways for the advancement of the Ukrainian media landscape. The countries that had been colonised for several centuries were denied their freedom due to the significant influence exerted by Russia. The combination of these causes led to the phenomenon of “oligarchisation” of the media market. The emergence and consolidation of major television channels have occurred as a result of their integration into the media holdings of a limited number of oligarchs at the local level. These media outlets are additionally subject to control by local business elites or politicians, with instances of overlapping ownership in certain cases. Simultaneously, these aforementioned circumstances led to a multitude of setbacks in the establishment of autonomous public service media. The establishment of Ukrainian public service media UA: PBC occurred subsequently to the third revolution, commonly referred to as the Revolution of Dignity, rather than in the year 2014. Specifically, UA: PBC was established in 2017. Throughout the period of Soviet rule, Ukraine lacked an autonomous media sector. Due to the imperative of the Soviet leadership to establish robust propaganda mechanisms, the fundamental liberties of speech, assembly, and private property were rendered unattainable during that era. The emergence of private print media occurred only during the final years of the Soviet Union’s disintegration, a period commonly referred to as “Perestroika” or “rebuilding”. The initial legislation on print media in Ukraine was introduced in 1992, while the legislation concerning television and radio broadcasting was enacted in 1993, with subsequent amendments made in 2006. In 1997, a set of four media laws was enacted, including a law pertaining to public service broadcasting. However, the aforementioned law quickly became ineffective within six months of its promulgation, rendering it essentially obsolete. The laws pertaining to the coverage of state bodies and local authorities have been widely regarded as the most undemocratic statute within the realm of media legislation. Their revocation, however, is not expected to take place before the year 2023. The law “brings national legislation closer to Directive 2010/13/EU on audiovisual media services” and the ratification of the law is one of the European Commission’s primary requirements for Ukraine’s EU membership application.⁵³

53 Moiceєв [Moiseev], 2023.

From time to time, some huge scandals concerning attempts to put pressure on the media emerged. In some cases, media were destroyed by false defamation cases, as was the case with the popular newspaper “Silski Visti” in the late 1990s. In other cases, judgments of the European Court of Human Rights help to address issues that require final resolution. For example, in the case *Ukrainian Press-Group v Ukraine* in 2004, the Court made a devastating decision saying that value judgment is not subject to proof. Another case – *Editorial office “Pravoye Delo” & Shtekel v Ukraine* in 2015, shows a considerable gap in the regulation of news websites or online media under the future law.⁵⁴ There exist three primary justifications for the immediate necessity of new media legislation in Ukraine. The initial observation highlights that the Ukrainian media legislation was ill-prepared to address the challenges posed by Russian assault. Both regulatory bodies and legal regulations lack sufficient mechanisms to counteract the dissemination of disinformation, propaganda and deceitful narratives by Russian media outlets, including both official and opposition sources. These media sources audaciously referred to the occupying forces as “our lads”. This issue is inherently inherent – Ukraine has never had intentions to initiate a conflict, in contrast to Russia. Furthermore, the existing Ukrainian legislation, which is based on a framework of “old” technologies, fails to adequately address the contemporary issues posed by convergent media and social networks. Naturally, the domain of media law does not provide a comprehensive response to the challenges posed by the messaging platform Telegram, which is known for its problematic security rules and widespread usage in Ukraine. Nonetheless, the incorporation of measures addressing this issue represents a progressive advancement in the evolution of Ukrainian laws. The third perspective concerns the European dimension, signifying that the regulations implemented in Ukraine ought to bear a resemblance, to a certain extent, to the regulations outlined in the European directive.

On 13 December 2022, the Ukrainian parliament finally adopted a law on the media.⁵⁵ The Law on Media was developed and adopted to fulfil the requirements of the European Union imposed on Ukraine, in particular to overcome excessive private interests in the media market of Ukraine, and to transpose into Ukrainian law the provisions of Directive 2010/13/EU of the European Parliament⁵⁶ and of the Council on audiovisual media services as amended by Directive (EU) 2018/1808 of 14 November 2018.⁵⁷ The legislation establishes provisions regarding the process

54 Розкладай [Rozkladai], 2023a.

55 About media: Law of № 2849-IX of 13 December 2022.

56 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

57 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

of licencing and registering entities operating in the media sector, including the specific procedures for registering foreign linear media. It also outlines the legal responsibilities of media entities in relation to compliance with legal requirements. Additionally, it addresses the unique aspects of legal regulation in situations of armed aggression. The law further defines the role and status of the national regulatory body, as well as the implementation of co-regulation mechanisms and collaborative development with the joint regulatory body.⁵⁸

The legislation augmented the jurisdiction of the National Council to impose sanctions on media organisations for a range of transgressions; however, it did not confer upon the Council the authority to unilaterally cease their operations, i.e. to suspend or impede their activities, without recourse to a judicial process. Media outlets may face various sanctions for non-compliance with regulatory requirements or licence terms. These sanctions, which are contingent upon the type of media, may include warnings and fines, revocation of licences, cancellation of registration, and prohibition on publication and distribution. The fulfilment of these provisions constitutes a prerequisite for granting Ukraine candidacy for accession to the European Union.⁵⁹

Furthermore, according to paragraph 5 of Resolution No. 314 of the Cabinet of Ministers of Ukraine of 18 March 2022 titled “Certain Issues of Ensuring Economic Activities during the State of War”,⁶⁰ the validity period of existing term licences and permit documents shall be automatically extended for the duration of the state of war and an additional three months following its cessation or revocation. Additionally, the payment deadlines for these licences and documents shall be deferred until the end of the state of war in Ukraine.

The proposed legislation seeks the comprehensive and significant transformation of the Ukrainian media landscape, commonly referred to as media reform. This reform was initiated in a period when the global community confronted the emergence of Russian fascism and neoimperialism, posing a significant danger to the established international order and democratic principles, and exacerbating a food shortage. However, the process of reforming the media does not solely entail altering the regulations governing its operations, bureaucratic procedures, or implementing sanctions. The topic at hand pertains to democracy itself. The existence of democracy is contingent upon the presence of freedom of speech which, in turn, relies on the presence of responsive journalism, independent media, and an impartial regulatory body. The recently enacted Media Law aims to achieve a highly ambitious objective, which is to effectively transform the prevailing culture within the media market and

58 Баконіна [Bakonina], 2023.

59 Національна рада надає роз’яснення щодо впровадження Закону “Про медіа” [The National Council provides clarification on the implementation of the Law “On Media”] [Online]. Available at: <https://www.nrada.gov.ua/natsionalna-rada-nadaye-roz-yasnennya-shhodo-vprovadzhennya-zakonu-pro-media/> (Accessed: 29 June 2023).

60 Resolution № 314 of the Cabinet of Ministers of Ukraine of 18 March 2022 on some issues of ensuring economic activities during the state of war.

establish a solid basis for fostering trust.⁶¹ Total review of all regulatory acts of the National Council, cancellation or review of some acts of the Cabinet of Ministers, Ministry of Culture and Informational Policy, and the Ministry of Justice should be ensured. Also, these actions should start the process of the proper budget funding for 2024. The creation of co-regulatory bodies is a good test for the media market so that it could become an active part of the policy process and be responsible for the fulfilment of commitments.⁶² In accordance with the Law, news agencies are required to determine their legal classification and through the process of re-registration as media enterprises within a certain timeframe, namely, by 31 March 2024. The process of re-registration is carried out upon submission of a certificate of state registration of a news agency as an entity engaged in information-related activities and does not incur any fees. Subsequent to the aforementioned date, the validity of certificates of state registration of a news agency as an entity engaged in information-related endeavours shall be rendered null and void.⁶³

The author believes it is imperative for journalists to thoroughly understand the societal ramifications and repercussions stemming from their professional endeavours. In accordance with European legislation, it is incumbent upon the state to ensure the fundamental entitlements of freedom of expression and information. However, this assertion is not applicable to the present situation. The use of tactics that involve inducing artificial panic among residents or disseminating false or exaggerated information can be deemed as justifiable and essential strategies for safeguarding the state and its populace.

4.7. Law on National Minorities

The final challenge facing Ukraine is to bring its national minority legislation in line with the standards set by European legislation. The legislation establishes the basic principles of state policy for enforcing the rights and freedoms of persons belonging to a national community in Ukraine. It also defines the main powers of the central executive body that ensures the formulation and implementation of state policy in the field of rights and freedoms of national communities, among other provisions.⁶⁴

Ensuring the rights of national minorities is an important step towards Ukraine's membership in the European Union, and a significant contribution to the preservation of human rights in the democratic global community. The adoption of the

61 Розкладай [Rozkladai], 2023a.

62 Розкладай [Rozkladai], 2023b.

63 Національна рада надає роз'яснення щодо впровадження Закону "Про медіа" [The National Council provides clarification on the implementation of the Law "On Media"] [Online]. Available at: <https://www.nrada.gov.ua/natsionalna-rada-nadaye-roz-yasnennya-shhodo-vprovadzhennya-zakonu-pro-media/> (Accessed: 29 June 2023).

64 Передерій [Perederii], 2022, p. 22.

Law⁶⁵ provided President Zelensky with a legitimate basis for communication with the leaders of the EU member states on 15 December 2022. In his address, he called on them to accelerate the assessment of Ukraine's implementation of the European Commission's (EC) recommendations, thereby facilitating progress towards the start of negotiations on Ukraine's potential accession to the EU.⁶⁶ In the summer of 2023, the Venice Commission offered comprehensive feedback on the Law on National Minorities in Ukraine. Considering Russia's hostile actions towards Ukraine, it is crucial to thoroughly analyse the matter of supporting a state engaged in terrorism (an aggressor state). The focus should be restricted to criminal law, excluding minority law, as this is the primary concern. The Venice Commission proposes the inclusion of this provision in a more suitable legislation, such as the statute pertaining to the situation of emergency. The initial clause of Article 6(1) regarding self-identification is consistent with the provisions outlined in Article 3 of the Framework Convention for the Protection of National Minorities. This article curtails individual rights, in violation of the Convention for the Protection of National Minorities (FCNM). As per Article 6(1), individuals are not obliged to reveal their affiliation with a national minority. Notwithstanding this rule, the rights of national minorities cannot be effectively enforced. Crucially, according to Article 6(2) of the existing legislation, it is forbidden to compel Ukrainian nationals to acknowledge or give up their identity as a national minority or group. Furthermore, the correlation between Article 6(3) concerning names, surnames, and patronymics and Article 11(1) of the Framework Convention for National Minorities is significant. Nevertheless, this rule can elucidate the process for the endorsement of names in minority languages. Article 15 of the Framework Convention for the Protection of National Minorities (FCNM) surpasses the provisions of Article 9 by mandating governments to create favourable circumstances for the involvement of national minorities in cultural, social, economic and public matters. The Venice Commission advises the enactment of laws to ensure the necessary circumstances.⁶⁷

In September 2023, a group consisting of representatives from the Ministry of Education, the State Service for Ethnic Policy, legislators, and the Ministry of Foreign Affairs visited Budapest. During the visit, Hungary was provided with a roadmap that outlined specific technical and organisational measures agreed upon by the Hungarian party. These measures pertained to textbooks, the educational process, its organisation, decisions made by the Ministry of Education, and any additional legislative changes.⁶⁸

65 Про національні меншини (спільноти) України: Закон України від 13.12.2022 №2827-IX. [On national minorities (communities) of Ukraine] (Ukraine), 13.12.2022, No 2827-IX. Retrieved June 15, 2023 [Online]. Available at: <https://zakon.rada.gov.ua/laws/show/2827-20#Text> (Accessed: 29 June 2023).

66 European Integration in the Conditions of War: Challenges and Prospects Analytical Report, December 2022.

67 Opinion On The Law On National Minorities (Communities) in Ukraine, Strasbourg, 12 June 2023.

68 Стефанішина [Sztefanisina], 2023.

The Verkhovna Rada approved the draft law on amendments to the Law on National Minorities (Communities) in Ukraine concerning certain issues of ensuring the rights and freedoms of national minorities in the first reading on 21 September 2023, taking into consideration the observations made by the Venice Commission. On 8 December 2013, the President of Ukraine signed a new law concerning national minorities. This legislation primarily centres around the definition of national minority, stating that a national minority (community) in Ukraine refers to a group of Ukrainian citizens who are not of Ukrainian ethnicity. These individuals reside within Ukraine's internationally recognised borders and are bound together by shared ethnic, cultural, historical, linguistic and/or religious characteristics. They are aware of their affiliation to this group and express a desire to maintain and advance their linguistic, cultural and religious identity. National minorities, also known as communities, are an integral element of Ukrainian society, encompassed by and assimilated within it. The Law also delineates the criteria for classifying settlements as inhabited by national minorities. A settlement that has been traditionally occupied by members of a national minority community is defined as a village, town, or city where these members have resided continuously for the past century, as indicated by official statistical data provided by the state. Furthermore, these members must constitute at least 10% of the total population at the time when this information is obtained. Deportees, individuals who have suffered ethnic genocide or temporary occupation, are exempt from the obligation of maintaining continuous residence in the settlement. A settlement where a national minority community makes up a substantial portion of the population is defined as a village, town, or city where, based on official statistical data, the national minority community constitutes more than 15 per cent of the total population at the time of receiving this information.

The legislation provides national minorities with the entitlement to receive education in their native language in secondary school, as long as it is one of the official languages of the European Union. (Once again, this clarification is crucial in order to alleviate the "tension" around the Russian language.) Private universities are required to instruct students in the language of national minorities, as long as it is a language spoken in an EU member state, under the condition that Ukrainian is taught as a distinct subject. Furthermore, educational institutions have the authority to potentially increase the proportion of instruction in the Ukrainian language. The state language should be used to instruct students in the Ukrainian language, Ukrainian literature, the history of Ukraine, and the defence of Ukraine.⁶⁹

Individuals who are members of a national minority are entitled to self-identification, use of their minority language, unhindered participation in public organisations, the safeguarding of cultural identity, and the opportunity to receive education in their native language, among various other rights. The core principle of the Law is that national minorities, or communities, are essential and fully integrated components of Ukrainian society. Ukrainian citizens cannot be compelled in any manner

69 Власенко [Vlasenko], 2023, p. 7.

to acknowledge, abandon, or alter their association with a national minority (community). In Ukraine, individuals are entitled to their own given name, patronymic and family name, in consideration of the cultural practices of the national minority or community with which they are affiliated. Ukraine has implemented various strategies to accomplish this objective. For example, Article 12⁷⁰ of the Law provides for the right to protect the cultural identity of a national minority. In particular, persons belonging to a national minority have the following rights (1) the right to preserve and develop their cultural, linguistic and religious identity as well as their traditions and customs; they also have the right to enjoy the achievements of their culture, preserve and disseminate their cultural heritage; (2) the right to celebrate and commemorate events related to their history and culture.

The government actively promotes and supports the identification and preservation of sites that hold historical importance to national minorities or groups. Furthermore, it guarantees the safeguarding of places of cultural heritage linked to national minorities or communities. The historical, cultural and religious monuments of national minorities residing in Ukraine are an inseparable component of Ukrainian culture. Furthermore, examination of the historical and cultural facets of these ethnic groups is of key significance. It is also crucial to organise cultural and artistic activities that are tailored to the needs and interests of these unique national minorities. The state has the duty to guarantee that individuals who are part of a national minority (community) are provided with education regarding the history and culture of Ukraine.

Important changes to the Law are that TV channels and radio stations wishing to broadcast in a language of the EU or certain national minorities of Ukraine will be able to reduce the mandatory share of the Ukrainian language on air to 30%; however, this will not apply to the Russian language. Another new element is the right to set up specialised bookstores to ensure the rights of national minorities (communities) are applied.

Also, national minorities have the right to audiovisual advertising in their native language on the condition that it is duplicated in the state language. Advertising in the Russian language is no longer possible.

Nevertheless, the matter of establishing and building transparent and efficient structures designed to safeguard the rights of ethnic minorities remains unresolved. The state administrations, in response to the initiative of public associations representing national minorities, will establish a Centre for National Minorities in the respective administrative areas. This centre will provide the necessary resources and infrastructure to meet the cultural needs of individuals belonging to a national minority, ensuring equal and inclusive access. The establishment of an autonomous regulatory entity to ensure adherence to the legislation in this domain is a vital step towards the successful execution of changes in this field.⁷¹

⁷⁰ Law № 2827-IX of 13 December 2022 on National Minorities (Communities) in Ukraine.

⁷¹ Шембель [Shembel], 2022.

The safeguarding of national minorities is fundamentally rooted in political deliberations and is closely related to the establishment and maintenance of trust among the different segments of the population. The European Court of Human Rights (ECHR) examined an interview conducted with representatives of the Greenjackets youth group, which was a rare instance of investigation in the realm of broadcasting. During the interview, derogatory comments were made about immigrants and other ethnic groups living in Denmark. Specifically, the phrases “Denmark is for Danes” and “niggers are animals” were used. Furthermore, a comparison was made between individuals of African descent and gorillas. Moreover, individuals labelled as “perker” – a derogatory term employed to characterise migrants – were collectively indicted for their alleged participation in drug trafficking. Members affiliated with the organisation faced legal repercussions for the aforementioned remarks. In addition, the applicant was convicted as a co-conspirator. The support offered encompassed the participation of journalists who expressed their views. The ECHR’s assessment of this intervention was confined to its necessity within a democratic society. The TV presenter underscored the paramount need of addressing racial prejudice, highlighting that the democratic framework of society rests upon the principle of freedom of speech. Furthermore, he recognised the expedited and substantial influence of audiovisual media in comparison with conventional media. Hence, the presenter contended that journalists must strictly adhere to the norms of objectivity and impartiality in their reporting. The European Court of Human Rights (ECHR) examined both the substance and circumstances of the aforementioned interview. The item was introduced as a component of a broadcast with a sombre tone, targeting an audience that was adequately knowledgeable about the topic being discussed. Furthermore, it is important to mention that the documentary commenced with a disclaimer noting the contentious nature of the subject matter, and the interviewer himself had negative connotations about it. Considering these factors, along with the fact that the representatives of the “Greenjackets” did not have the right to normal protection, the European Court of Human Rights (ECtHR) determined that this interference was not required in a democratic society and constituted a breach of Article 10 of the Convention. Upon examination of this instance, it is evident that journalists may permit the use of unpleasant language and hate speech in the comments made by their guests. Nevertheless, it is imperative for them to unequivocally distance themselves from these perspectives and uphold objectivity to prevent these talks from exceeding the scope of public concern.⁷²

The legislation of Ukraine establishes the definition of “national minorities (communities)”: (a) rights, freedoms and duties of persons belonging to a national minority (community); specifics of the state policy concerning the enforcement of the rights and freedoms of persons belonging to a national minority (community), in particular, the specifics of financial support for the implementation of such policy, powers of the central executive body implementing the state policy in the field of the

72 Дущик and Дворовий [Dutsyk and Dvorovy], 2019, p. 24.

protection of rights and freedoms of persons belonging to a national minority (community); (b) possibility to set up advisory bodies at state executive bodies of different levels to advise in the above matters.⁷³

After examining the rulings of European courts, Yevhen Tkachenko determined that the majority of cases initiated by minority groups and their advocates pertain to infringements of fundamental rights that apply universally. These rights encompass the right to education (as stated in Article 2 of Protocol No. 1), freedom of thought, conscience and religion (as stated in Article 9), freedom of expression (as stated in Article 10), freedom of assembly and association (as stated in Article 11), and the right to free elections (as stated in Article 3 of Protocol No. 1). Guaranteeing free elections is essential, as without it, all other steps to protect minority rights will be ineffectual, if not purely symbolic. These rights are safeguarded by the implementation of Article 14 of the Convention for the Prohibition of Discrimination Based on Belonging to a National Minority together with other articles in Section I (“Rights and Freedoms”) of the aforementioned agreement and its protocols.⁷⁴

To sum it up, it may be contended that Ukraine has successfully adopted a substantial portion of the legal amendments required for possible membership in the European Union. At this point, the task is the efficient methods and protocols for executing the new legislation and the meticulous choice of capable personnel for public positions. Ukraine must make substantial efforts to enhance its legal structure and align it with European standards in order to further its goal of EU membership.

5. Other important changes

The Verkhovna Rada of Ukraine is now deliberating a proposed law on amendments to the Law on the Security Service of Ukraine with the aim of enhancing the organisational and legal framework governing the operations of the Security Service of Ukraine (registration number 3196-d).⁷⁵ The primary objective of the proposed law is to enhance the institutional capabilities of the Security Service of Ukraine in safeguarding the state’s security. This entails aligning the existing Ukrainian legislation governing the activities of the Security Service with contemporary challenges and threats that pose risks to the state’s security, which the Security Service of Ukraine is responsible for countering.

⁷³ Стешенко [Steshenko], 2023.

⁷⁴ Ткаченко [Tkachenko], 2018, pp. 165–166.

⁷⁵ Draft law № 3196-d of 26 October 2020 on amendments to the Law on the Security Service of Ukraine regarding the improvement of the organisational and legal foundations of the Security Service of Ukraine.

The Verkhovna Rada of Ukraine officially recorded a fresh iteration of the Law on the Protection of Personal Data (registration number 8153)⁷⁶ on 25 October 2022. The purpose of the draft law is to align Ukrainian legislation with European standards in the area of personal data protection and to ensure compliance with the updated Convention by implementing Regulation (EU) 2016/679 of the European Parliament and Council,⁷⁷ commonly known as GDPR. Additionally, the draft law aims to incorporate the provisions of EU Directives 2016/680⁷⁸ and 2002/58⁷⁹, which pertain to the protection of personal data by competent authorities and the processing of personal data and the protection of privacy, respectively.

The Verkhovna Rada of Ukraine has officially registered a draft law on the National Commission for the Protection of Personal Data and Access to Public Information.⁸⁰ The proposed legislation entails the establishment of a new regulatory entity for safeguarding personal data – the National Commission for the Protection of Personal Data and Access to Public Information. Additionally, it outlines the official standing, authorities, organisational principles and procedural framework of this institution.

Efforts are currently made to advance the drafting of the revised law on State Control of International Transfers of Strategic Goods.⁸¹ This revision is being undertaken with due consideration of the provisions in Regulation (EU) 2021/821⁸² of 20 May 2021, which establishes a comprehensive framework within the Union for the regulation of exports, intermediary activities, technical assistance, transit, and transfers of dual-purpose goods. The forthcoming version of the law will incorporate these provisions.

In December 2022, the European Commission endorsed the application put forth by the international consortium potential, which includes Ukraine, to spearhead the development of a digital wallet for Europe (European Digital Identity Wallet).⁸³

76 Draft law № 8153 of 25 October 2022 on Personal Data Protection.

77 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

78 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

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

80 Draft law № 6177 of 18 October 2021 on the National Commission for the Protection of Personal Data and Access to Public Information.

81 Draft law № 8415 of 3 February 2023 on State Control of International Transfers of Strategic Goods.

82 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast).

83 The Potential consortium was set up to pilot the new European Digital Identity Wallet (EUDIW).

The implementation of the pilot project is planned for the period 2023 to 2025. Its goals are to: (a) collaboratively develop interoperable national digital wallets accessible across Europe in a fully secure manner; (b) streamline online procedures such as opening a bank account, renting a car or signing documents electronically; (c) forge stronger ties across Europe and help people, businesses and governments to work together more efficiently.

Based on the evaluation carried out by the European Union in 2020 regarding compliance with obligations in the telecommunications services sector under the Association Agreement, it has been determined that the majority of the provisions outlined in Directive 2000/31/EC⁸⁴ of the European Parliament and of the Council, commonly referred to as the “Directive on electronic commerce”, have been incorporated into Ukrainian legislation.

According to a report from the Ministry of Social Policy of Ukraine, individuals now have the opportunity to officially register as candidates for child adoption using the Diya portal, an online platform. A total of 780 applications have been submitted thus far.⁸⁵

The state strategy for the promotion of gender equality and equal rights and opportunities for both women and men until 2030 was officially endorsed by the government on 12 August 2022. Additionally, the operational plan for the execution of this strategy during the years 2022–2024 was also authorised⁸⁶. The strategy is designed with the objective of attaining the Sustainable Development Goals of Ukraine by the year 2030.

6. Procedure for acquiring EU member status

Once candidate status is granted, the European Commission will proceed to identify the principal elements and suggestions for discussions, which will necessitate unanimous endorsement from the European Council. The negotiations are founded around a framework consisting of 35 chapters, which are categorised into six primary clusters: fundamental principles, internal market, competitiveness, green agenda, resources, agriculture, and foreign relations. The negotiation process often adheres to a rigid linear structure, wherein each chapter is initiated only upon the definitive

84 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

85 Report on the implementation of the association agreement between Ukraine and the European Union for 2022.

86 Order of the Cabinet of Ministers of Ukraine № 752-p of 12 August 2022 on the approval of the state strategy for ensuring equal rights and opportunities for women and men for the period up to 2030 and the approval of the operational plan for its implementation for 2022–2024.

closure of the preceding one. The initial chapter of the European Union is dedicated to the fundamental principles upon which it was established. These principles encompass a range of topics including justice, human rights and the functioning of public institutions. Significantly, this chapter is positioned at the beginning and end of the EU's framework, highlighting the paramount importance the EU attaches to upholding its core democratic values. It is highly probable that Ukraine will be requested to initiate changes prior to the commencement of negotiations.

The primary objective of the arduous discussions is to align the candidate country as closely as feasible with the laws, legislation and political structures of the European Union. Following the comprehensive consideration of all 35 chapters, a preliminary accession agreement is produced. The text requires unanimous ratification by both the Council and the national parliaments of each member state within the European Union in addition to securing a majority vote in the European Parliament.

Typically, effective discussions span a duration of approximately four to five years. As an example, Poland officially made its application for membership in 1994 and subsequently acceded in 2004. Austria, Finland and Sweden successfully accomplished the assignment over a span of two years, whereas Croatia, the most recent member to join the European Union, required nearly eight years to complete the same task. The time required is contingent upon both the cadence of the candidate's reform initiatives and the level of political engagement from the European Union.⁸⁷

The process of accession to the European Union is evidently characterised by its extensive and arduous nature, demanding significant efforts from both the applicant country and the EU as a collective entity. The European Union has adopted a cautious approach towards accepting new members in recent times. This hesitancy may be attributed to various factors, including the economic and migrant crises, the Brexit phenomenon, the ongoing pandemic, and instances of rule-breaking by certain member states, notably Hungary. Simultaneously, the requirement for unanimous agreement among all EU member states means a persistent impediment to the process of enlargement. Bulgaria is presently hindering the initiation of accession negotiations with North Macedonia, which indirectly affects Albania as well. This obstruction is primarily rooted in enduring disagreements concerning historical and linguistic matters.

Furthermore, the remaining three recognised aspirants, namely Montenegro, Serbia and Turkey, are presently facing obstacles in advancing their accession negotiations. Notably, negotiations with Turkey have been ongoing since 1987 without significant progress in advancing the process. Considering the aforementioned factors, it is pertinent to acknowledge that the expeditiousness of Ukraine's integration into the European Union may be further affected by the stances of long-standing candidate

87 Терещук [Tereshchuk], 2022.

nations awaiting accession, as well as the positions of other aspiring member states such as Moldova and Georgia, which also anticipate joining the EU.

Simultaneously, the ongoing war in Ukraine has prompted and expedited Ukraine's progress towards joining the European Union. However, additional factors relating to Ukraine, such as its substantial demographic size (approximately 40 million inhabitants) and geographical location, may influence the attainment of consensus among EU member states. These factors bear significance because of shared characteristics with Russia and Belarus as well as relative poverty and a GDP per capita that ranks among the lowest in Europe.

The perspective of EU membership has been and continues to be regarded as a very efficacious instrument of EU foreign policy. The anticipation of joining the European Union motivated Bulgaria and Romania to intensify their efforts in combating corruption, and lead to an increased rate of apprehensions of war criminals in Croatia, Serbia and Montenegro.⁸⁸

The questioning stance adopted by Kyiv is both comprehensible and justified. It serves to prompt Europeans to take swift action and make judgements in the face of the current exceptional circumstances rather than relying on customary technical and bureaucratic procedures. Simultaneously, it is evident that Ukraine's prospective membership in the European Union in the near future is unattainable, even in a theoretical sense. This discussion encompasses not just political factors inside the European Union but also procedural aspects and other relevant issues.

Following Ukraine's submission of its application for the establishment of a distinct entry procedure for our nation, Slovakia immediately expressed its support. However, what this procedure will exactly look like and whether some intermediary phases can be omitted or reduced remains uncertain. The forthcoming European Union summit may include deliberations on the matter of "special procedures".

It is unsurprising that the Baltic states and Poland, our proximate European allies, express support for Ukraine's membership but without advocating for an urgent and expedited accession process. The expeditious granting of candidate status for EU membership to Ukraine was strongly encouraged by Slovenia and the Czech Republic, followed promptly by the initiation of negotiations on membership. Subsequently, Hungary also joined this endeavour.⁸⁹

⁸⁸ Терещук [Tereshschuk], 2022.

⁸⁹ Коли Україна вступить до ЄС: питання та відповіді [When will Ukraine join the EU: questions and answers] [2022]. [Online]. Available at: <https://www.rbc.ua/ukr/news/ukraina-vstupit-es-voprosy-otvety-1647117135.html> (Accessed: 29 June 2023).

7. Conclusions

The relationship between the European Union and Ukraine has deepened significantly since Ukraine's attainment of independence in 1991. The rationale behind this was the mutual recognition by both parties that fostering collaboration between Ukraine and the European Union had the potential to substantially enhance economic well-being, political stability and regional security. Ukraine and the European Union both wish to improve their bilateral relations in the forthcoming years. Over time, this relationship has progressed from political statements to the provision of technical and financial aid, growing into a collaborative partnership that embodies a diverse array of issues across multiple sectors, involving numerous governmental, business and civil society entities. The Partnership and Cooperation Agreement inked in 1998 marked a considerable advancement in the relations between the European Union and Ukraine. The Partnership and Cooperation Agreement (PCA) and the ten-year EU-Ukraine Action Plan established the necessary legal and practical framework for the furthering of EU-Ukraine ties. The events of 2004 played a significant role in fostering closer relations between Ukraine and the European Union. The Orange Revolution exemplified Ukraine's dedication to implementing internal democratic reforms. Nevertheless, the enlargement of the European Union on 1 May 2004 created a contiguous border between Ukraine and the European Union. Negotiations were initiated in March 2007 with the aim of reaching a new agreement to supplant the existing Partnership and Cooperation Agreement. The agreement, which was ratified subsequent to Ukraine's membership in the World Trade Organisation in May 2008, sought to establish a comprehensive and extensive free trade zone between Ukraine and the European Union.

The annual summit between the European Union and Ukraine took place on 9 September 2008, providing a platform for evaluating the progress of their evolving partnership and contemplating future prospects.⁹⁰

During the Ukraine-EU meeting held on 3 February 2023, Ursula von der Leyen, the President of the European Commission, stated that while no specific timeline was outlined, there are certain objectives that the aspiring member must accomplish. Ukraine has a commendable level of proficiency in this domain. It has a reputable track record of adhering to the pronouncements made by the European Union's High Representative and Council resolutions. Ukraine regularly collaborates with the European Union in efforts aimed at combating cyber threats and disinformation. The normative framework, which includes legal regulations, often aligns with the accumulated body of European Union legislation, known as the *acquis communautaire*. The unresolved matter pertains to the ratification of the Rome Statute of the International Criminal Court and its associated treaties. Further efforts are required to

90 Саміт Україна [Ukraine-EU summit], 2008.

effectively address and mitigate the unlawful trafficking of firearms, munitions and explosive materials.⁹¹

Ukraine has successfully accomplished 72% of the obligations outlined in the Association Agreement, a significant component of which is Ukraine's endeavour to integrate into the internal market of the European Union. Companies can benefit from various advantages within the European Union (EU). These include better access to EU funds and support programmes specifically designed for small and medium-sized enterprises (SMEs). Additionally, companies can access lending programmes and receive assistance tailored to the agricultural sector. The EU also offers transparent taxation and accounting rules, which can facilitate business operations. Furthermore, the absence of customs or quantitative restrictions within the EU fosters seamless trade. Companies can also benefit from simplified administrative procedures when trading with other EU member states. Lastly, the EU provides access to a vast market comprising approximately 450 million consumers, offering significant potential for business growth and expansion.

Non-tariff barriers can be reduced by many measures, such as the mutual certification of goods, establishment of a standard certification process, and the rigorous enforcement of competition policy and intellectual property rights.⁹²

The conditions that new members must meet in order to join the European Union are commonly referred to as the "Copenhagen criteria". A state meeting certain criteria, such as being free and democratic, upholding the rule of law, safeguarding human rights, maintaining stable state institutions, and fostering a competitive market economy, is considered to have fulfilled these conditions. It should be noted that the CMU (Cabinet of Ministers of Ukraine) has officially endorsed a resolution which requires that a report, along with recommendations, be presented to the Cabinet of Ministers of Ukraine by 30 August 2023.⁹³ This report will contain the evaluation results and suggestions for aligning Ukraine's industry legislation with the legal framework of the European Union (EU *acquis*). The CMU is also expected to submit a separate report to the Cabinet of Ministers of Ukraine by the same deadline, providing an assessment of the results and proposals for harmonising Ukraine's industry legislation with the regulations of the European Union (EU *acquis*).

Therefore, should Ukraine persist on its current trajectory, there is considerable likelihood of meeting the criteria established by the European Union for accession.

91 Commission Staff Working Document – Analytical report to the Communication of the Commission to the European Parliament, the European Council and the Board of Conclusions of the European Commission regarding Ukraine's application for membership in the European Union. Brussels, 1 February 2023.

92 Терешук [Tereshchuk], 2022.

93 Resolution of the Cabinet of Ministers of Ukraine № 189 of 28 February 2023 on the approval of the procedure for conducting an initial assessment of the state of implementation of the acts of the European Union (EU *acquis*).

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THE DILEMMA OF GEOGRAPHICAL ENLARGEMENT FROM THE PERSPECTIVE OF A CENTRAL EASTERN EUROPEAN COUNTRY: CROATIA



SNJEŽANA VASILJEVIĆ

Abstract

The link between diverse European national cultures and the bridge between old and new Member States can be seen in the concept of European integration. However, what are considered fundamental values in the European Union (EU), in the rest of Europe that is outside the EU, they are not perceived in the same way. Furthermore, candidate countries have chosen to resist these values precisely by emphasising traditions, legal culture and fundamental constitutional values which differ significantly from those of the EU because of their long wait in the European Union's lobby. The EU's conditionality policy initially crafted for Central and Eastern European countries (CEE) interested in joining the EU expanded to include the Western Balkan region. The lack of a monitoring mechanism after accession has led to very slow and limited progress in fundamental rights' protection and the adoption of the fundamental values set out in the Maastricht Treaty, although the implementation of international and European standards rights in Croatian legislation was the result of the pre-accession conditionality proposed by the Copenhagen Summit.

Keywords: geographical enlargement, conditionality policy, fundamental values, fundamental rights, rule of law

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1. Introduction

After the breakup of former Yugoslavia, the whole picture of the Western Balkans changed.¹ The consequences of the war and the very difficult economic and social situation led to the erosion of fundamental values and fundamental rights.² During the accession period, Croatia put a huge effort into fulfilling all the necessary conditions set by the European Council (EC) at the Copenhagen Summit in 1993 (the Copenhagen criteria)³ to join the European Union (EU), including the protection of human rights and the rule of law.⁴ Moreover, Article 2 of the Treaty on European Union (TEU), which entered into force in 1993, stipulates:

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

The TEU emphasised the importance of upholding human rights in all EU Member States as a crucial aspect of establishing the rule of law within the EU. While the Copenhagen summit's pre-accession requirements led to the adoption of international and European standards for human rights in Croatian legislation, the absence of a monitoring mechanism following accession resulted in limited progress in safeguarding fundamental rights and values.⁵

The EU's conditionality policy was initially crafted for CEE countries interested in joining the EU. As time passed, the policy expanded to include the Western Balkan region.⁶ In addition to the original criteria for CEE nations, the Western Balkans must satisfy additional second-generation conditionality criteria. These new criteria include ensuring the sustained return of refugees, pursuing transitional justice, and promoting inter-ethnic reconciliation in a post-conflict setting. Despite expectations that Croatia would make progress in these crucial areas soon after joining the EU, these issues remain unresolved. Some of the most significant challenges involve national minorities, such as Serbs and Roma, as well as the return of Serb refugees and the resolution of their status. The Roma national minority faces social, educational⁷ and integration challenges, while the restitution of lost property is a concern for

1 Vasiljević, 2022, pp. 223–252.

2 Čepo, 2020.

3 The key criteria for accession were, 'that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and the respect for and protection of minorities.' European Council in Copenhagen, 1993, p. 12.

4 Screening report for Croatia, 2007.

5 Consolidated Version of the Treaty on the European Union, Official Journal C 326/13.

6 Schimmelfennig and Scholtz, 2010, pp. 443–460.

7 ECtHR, *Oršus v. Croatia*, Application no. 15766/03, Judgment 16.3.2010 [GC]

Serbs and Jews. When it comes to the issue of the rule of law, the situation becomes more complicated. The central hypothesis is that much more is needed to *ensure* that the *policy objective of conditionality in the field of fundamental values and fundamental rights* is reached.

This paper attempts to answer the following research questions: why did the negotiation process with the EU take so long for Croatia and what progress did Croatia make in the field of fundamental rights and fundamental values after 10 years of membership?

2. Geographical enlargement as a way to preserve European values

Thirty years after the Balkan wars and three years of war in Ukraine have shown that Europe needs peace and stability more than ever. The situation in the Western Balkans is still complicated because of the situation in Kosovo and the Republic of Srpska. The growing disappointment of people in the Western Balkan region, who have been waiting in the EU lobby for a long time, should encourage the EU to accelerate the enlargement process.

The EU forged unique ties with the CEE nations between 1989 and 1992. With the implementation of the Maastricht Treaty in 1993, this connection evolved into an enlargement commitment. The decision to start accession negotiations with all candidates simultaneously was taken by the Luxembourg Council, even though certain countries did not match the requirements outlined by the European Commission (EC) in its July 1997 Agenda 2000 report. When the CEECs first applied for membership, the EC acknowledged that it had a unique obligation towards them and responded with several association agreements that primarily focused on trade liberalisation, economic support, and political collaboration. According to the Copenhagen Criteria, Member States were required to adopt the EU fundamental values (democracy, human rights, and the rule of law) before their accession, at least since 1993. Candidate nations, like Croatia, were very active in harmonising laws and policies before admission (positive normativism); nevertheless, following entry, changes slowed down, the process stagnated, and the situation became worse. The integrity of the *acquis* principle was adhered to during the talks between the EU and the newly admitted Member States. This meant that the *acquis* would need to be properly applied by the new members. The EU, however, had more negotiating strength than the new members, therefore the negotiations were unbalanced. There was no realistic ability for the new members to threaten to leave to obtain a better deal. Thus, the talks were not real negotiations.

The process of transformation of society in the negotiation process of candidate countries about joining the European Union is called “Europeanisation”.⁸ Europeanisation involves giving up traditions for “common values” formulated by the EU political class. The Balkans’ ultimate goal is to become a part of Europe through formal EU membership. Europe is seen as a higher goal, a model for transforming neighbouring societies. Entry into the EU was considered, and it is still considered the only possible way, a way without an alternative. And as soon as there is no alternative, there is no freedom either, because freedom is a possible choice between at least two options.

As Jović precisely points out,

to achieve true subjectivity, candidate countries must accept the conditions set by the EU through a process of one-way influence. The negotiations on joining the Union are not a discussion between two equal parties, but rather the formulation of conditions by the EU – the party with power – and the satisfaction of those criteria by the candidate country – the party without power. The term “conditionality” plays a vital role in the Europeanisation process. The main aim of this process is to reduce the level of sovereignty of European countries in order to establish peace and security in post-Yugoslav countries. European politicians did not consider that many Europeans do not, in fact, share these values, as well as the fact that many outside Europe share them. Also, they concluded too optimistically that freedom and pluralism, individualism and peace are universal values, shared by all, or at least the vast majority, of people. Many of them prefer security, tradition, authoritarianism and nationalism, thus contrasting the idea that there are common values.⁹

While, according to some authors, ‘EU conditionality is most often identified with limited, discrete instances of influence’, others observe that, in some countries of the Western Balkans, ‘EU conditionality has effectively contributed to the consolidation of [...] detrimental governance patterns’. However, it certainly remains one of the most important mechanisms to achieve the (at least formal) alignment of candidate countries with the standards required for membership. One of the most important vectors of this alignment is approximation of legislation, aiming to ‘eliminate inconsistencies between national laws.’¹⁰

Since the conditions for membership are quite different from those that the nations that joined the Union during the last major round of enlargement in 2004 had to meet, they are not realistically established for all candidate states and are extremely high-level requirements. With the introduction of some recently developed criteria

8 Beširević, 2012, pp. 21–44.

9 Jović, 2018, pp. 359–394.

10 Čemalović, 2020, 179–196.

known as “Copenhagen plus”, the EU has long exceeded the Copenhagen requirements for candidate countries, and has placed ever-present obstacles in their way. This was made clear at the time when Croatia’s membership process was on hold because of its lack of cooperation with the ICTY. The simplest way to understand why this process is so strongly tied to concerns about the post-Yugoslav wars is to look at the introduction of full-scope cooperation with the ICTY and the encouragement of regional cooperation as well as new and specific criteria for entering the EU.

Despite the proactive external relations and conditionality policy, in the struggle to enhance the process of stabilisation in the Western Balkans, the lack of precise and consistent conditionality standards resulted in the systematic backsliding of the rule of law and fundamental rights after the accession of CEE countries to the EU.¹¹ The cases of Poland, Croatia and Hungary demonstrate how a lack of monitoring procedures may subsequently weaken or even jeopardise the rule of law’s status as an essential EU value. The candidate countries focused all their efforts on fulfilling the formal legal requirements for EU membership, thus limiting the practical applicability and effectiveness of these solutions. Undoubtedly, one of the causes is the public’s mistrust of institutions, particularly the court, as well as the absence of prompt and significant reforms. One of the reasons for the delay in the process of accession is distrust in the EU institutions as well as in the process of enlargement. All candidate countries have waited too long in the lobby and there is growing Euro-scepticism because they do not see the light at the end of the tunnel. The only way out is to accelerate the negotiation process with candidate countries and to speed up the closure of the negotiation chapters. Otherwise, the possible outcome of these super conditionality requirements is that this country will probably decide to opt out and form a new community of states for economic purposes. Something similar already exists in the form of a free trade zone. According to Jović, ‘the consequences of such Brussels politics will be twofold, one Europe is the EU, and the other Europe is outside the EU (“in and out” model)’. The political situation in the EU towards the enlargement process is influencing the implementation of European standards and values in national law not only in the candidate states who are in the process of adopting a key communicator but also in the new Member States which are struggling with the implementation of EU law because there is a significant resistance in adopting legal standards and legal methods of interpretation which rely more on legal formalism rather than legal realism and therefore in some of the cases the adopted legislation remains as black letter law. In other words, the process of implementation usually ends once the legislation is adopted but the application of the adopted legislation remains partial, incomplete or inconsistent. Instead of focusing on practical solutions, these countries often prioritise meeting the formal legal requirements for EU membership. As a result, the policies put in place may not be as effective as they could be in practice.

11 Pech and Kochenov, 2019, pp. 1–17.

3. The long and winding road to the EU

Why did the negotiation process with the EU take so long for Croatia? Obligations to protect human rights, especially the rights of minorities, Croatia took over by signing the Stabilisation and Association Agreement (SAA) with the EU and its Member States on 29 October 2001. With this agreement, Croatia received the status of a potential candidate (Rodin, 2001).¹² Croatia's obligation also stems from the resolution of the Council of Ministers of the Council of Europe from February 2002 on the application of the Framework Convention on the Protection of National Minorities,¹³ the Report of the EC on Stabilisation and Association from April 2002 and the Status Report of the Mission from June 2002.¹⁴ In the report of the EC on the process of stabilisation and accession in Croatia, it is possible to see the importance of meeting the political criteria, on the fulfilment of which depends the evaluation of the implementation of the entire process. Three main political conditions relate to the strengthening of democracy, rule of law, respect for human rights and protection of minorities, and regional cooperation. With the adoption of the new Constitutional Law, Croatia has made satisfactory progress regarding the rights of national minorities.¹⁵

When a country applies to join the EU, it must go through four consecutive stages: application, becoming a candidate, negotiation, and finally accession to the EU. Before a country can proceed to the next stage, it must gain unanimous approval from the European Commission, the European Council and EU leaders. In 1995, Austria, Finland, and Sweden became the fastest countries to join the EU, taking only 1 year and 11 months from the start of negotiations to accession. Portugal and Croatia waited the longest to join – 7 years and 2 months, and 7 years and 8 months, respectively. The negotiation process between Croatia and the EU was prolonged due to the specific war situation and the long transition process. The conditionality policy and a set of additional criteria also added to the delay in joining the EU. However, the EC was responsible for the assessment of the capacity to adopt and implement the EU *acquis communautaire*, which contains 23 chapters of EU legislation, covering all aspects of political, economic and social life. That was a long and winding process.

Article 36 of the Treaty of Accession of Croatia (2012) provided a special monitoring mechanism in the area of judiciary and fundamental rights (Annex VII), including the continued development of track records on judicial reform and efficiency, impartial handling of war crimes cases, and the fight against corruption.

12 Rodin, 2001, pp. 87–105.

13 Croatia ratified the Framework Convention on the Protection of National Minorities in October 1997 and submitted its first report in 1999. In April 2001, the Advisory Committee published a position that became the basis for the resolution of the Council of Ministers from 2002.

14 Adoption of the amended Constitutional Law on National Minorities was also a precondition for Croatia's accession to NATO.

15 Vasiljević, 2004, p. 243.

However, there have been no infringement cases against Croatia so far in this area.¹⁶ EU Member States have taken steps to protect judges and prosecutors, and their self-governing bodies, from external and internal influences. Despite this, some states continue to pose serious threats to judicial independence,¹⁷ and public mistrust of judges remains high.¹⁸ To prevent this situation from escalating, EU institutions have taken specific steps and measures.¹⁹ In 2016, the European Parliament adopted a Resolution on the EU Mechanism on Democracy, Rule of Law and Fundamental Rights,²⁰ which calls on the Commission to establish comprehensive monitoring of all EU Member States and institutions and an annual cycle of reporting and recommendations. This call was repeated in 2018.²¹ In addition, the European Parliament adopted resolutions on the rule of law in several Member States.²² For current Member States, it may be beneficial to create an evaluation system to track progress in these areas. Although the EC already produces annual reports on the rule of law, the fundamental rights agency also provides a supplemental report. However, it may be more effective to entrust this responsibility solely to the fundamental rights agency.

Despite negotiations started in 2005, it took Croatia around four years to negotiate the issues of collaboration with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Slovenian border situation. On 30 June 2011, the final day of the Hungarian presidency, Croatia concluded the negotiations.²³ Twenty years later, only Croatia successfully concluded all chapters in the accession process and became a member of the EU in July 2013 twelve years after signing the SAA, which entered into force in 2004.²⁴

16 Carević, 2021, pp. 279–305.

17 CJEU, C-286/12 Commission v. Hungary; C-411/17 Commission v. Poland.

18 Report of the Secretary General of the Council of Europe, 2023.

19 For example, the EC established the Cooperation and Verification Mechanism in the cases of Bulgaria and Romania, to assess and promote their progress in areas such as judicial reform, fight against corruption and organised crime. For the first time in the history of the EU, the new Member States were placed under a supervisory mechanism after accession.

20 European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, 2015/2254 – INL, 2015.

21 European Parliament resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, 2018/2886 – RSP, 2018.

22 'Establishing an EU mechanism on democracy, rule of law and fundamental rights'. Available at: <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-eu-mechanism-on-democracy-the-rule-of-law-and-fundamental-rights> (Accessed: 30 September 2020).

23 EU Monitor, 2011.

24 Čemalović, 2020, 179–196.

4. A look back at Croatia's 10th anniversary in the EU

Although Croatia has been a full member of the European Union since 1 July 2013, the road towards EU membership was not completely concluded, but that was 'further proof of the transformative power of the EU's enlargement policy.'²⁵ First it took several years until all restrictions on the free movement of labour were lifted for Croatian citizens, and only at the beginning of 2023 did Croatia introduce the European common currency and became a member of the Schengen zone.

Full harmonisation with the EU *acquis communautaire* is the most advantageous result of the EU accession. Numerous anti-discrimination laws have been adopted as a result of Croatian legislation and policy on human rights being harmonised with EU norms. However, the establishment of a comprehensive legislative framework for the advancement of national minorities' rights and effective legal human rights protection took a long time in Croatia. The Enlargement Strategy and Main Challenges 2010-2011 was the primary strategic statement concerning the application of minority rights norms. In this paper, the Commission made reference to minorities in both social and security contexts:

the economic crisis has had a negative impact on social welfare in the enlargement countries. Vulnerable groups, including minorities, disadvantaged communities and people with disabilities, have been particularly affected.²⁶

The conditionality policy, in instances of ethnic minority protection, revealed different criteria applied in countries that declared independence after the break-up of former Yugoslavia.²⁷ Some authors believe that Slovenia's approach to ethnic minority protection was evaluated positively,²⁸

whereas Croatia had trouble meeting the minority rights demands due to its "preoccupation with nation" and its contested process of building a sovereign nation-state until the late 1990s.²⁹

When the two countries are compared it seems that conditionality policy was applied in Croatia in a stricter way than in Slovenia.³⁰

25 Lazowski, 2012, pp. 1–39.

26 Communication from the Commission to the European Parliament and the Council, 2010, p.7.

27 Bojinovic Fenko and Urlic, 2015, pp. 107–137.

28 Bučar, 1999, pp. 339–353.

29 Boduszyński, 2013, pp. 39–53.

30 The European Council, 2011, based on a proposal by the Commission, refers to monitoring up to accession as a 'necessary assurance to Croatia and the current Member States' and concludes the paragraph with a warning that it may otherwise, 'acting by qualified majority on a proposal from the Commission, take any appropriate measures', i.e. it may put a hold on the accession process. The same provision is included in the Croatian Accession Treaty to the EU (Title IV, Art. 36, point 1, Para 1 and point 2).

Croatia is the first to experience this new accession reality where rapprochement is based on much stricter conditionality and benchmarking, particularly (but not only) in the area of judiciary and fundamental rights.

Before joining the EU, Croatia made good progress in respect of judiciary and fundamental rights, but it was necessary to accelerate judicial reform, the protection and enforcement of fundamental rights, particularly those of minorities and refugees, war crime impunity, and the fight against corruption.³¹ The EC declared in its Interim Report on Chapter 23 ‘Judiciary and fundamental rights,’ three months before the closure of negotiations that ‘further work remains to be done, in particular to establish convincing track records in the field of the judiciary and the fight against corruption, to address impunity for war crimes and to settle the outstanding refugee return issues’ and thus it ‘will continue to monitor Croatia’s progress closely and to further support Croatia /.../ to enable it to meet the benchmarks in this chapter’.³² Since the closing of Chapter 23, until now, enormous efforts have been made to reform the judicial system. Despite this, according to recent public opinion surveys, Croatia ranks first in the EU in terms of the number of judges, and lowest in terms of the perception of judicial independence, and this negative perception is continuously increasing.³³ The reasons for the negative perception of the judiciary in the public are to a large extent found in the large number of pending cases and lengthy trials, some of which last for decades, the individual decisions of some judges that deviate significantly from well-established judicial practice, the way certain judges are selected and a large number of cases of violation of the right to fair trial.³⁴ A lack of resources and administrative support continues to serve as an excuse for limited progress in judicial reform in the Member States that have one of the most massive judicial systems in the EU.

From the time of accession until the present, there has been a regression regarding the rule of law, which is evident in the following ways: difficulties in appointing judges; inconsistent case law from national courts; lack of transparency in the publication of court decisions; public mistrust of the judiciary; lengthy court trials and violations of Article 6 ECHR; an increase in lawsuits against journalists (SLAPP); difficulties in implementing the recommendations of independent equality bodies; and deficiencies in the free legal aid system. At the professional level, it is indisputable that even at the beginning of the third millennium, the degree of harmonisation of procedural rules and judicial action in comparison to current EU

31 Croatia 2010 Progress Report accompanying the Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2010-2011, COM (2010) 660, Brussels 9 November 2010.

32 European Commission, 2011.

33 European Commission, 2023.

34 Ibid.

members was relatively low.³⁵ As Uzelac emphasised, ‘justice reform was faced with too many obstacles, especially in the CEE countries, where half a century of communist rule reduced courts, and even law itself, to mere instruments of political power.’ The European Commission’s Annual Rule of Law Reports continue to prioritise human rights protection (especially focusing on the rise in hate speech, and ongoing discrimination against Roma and Serbian national minorities).³⁶ However, the issue of the protection of human rights, especially of ethnic minorities, remained relevant to the extent that the new government with the current Prime Minister decided in 2017 to form a coalition with the largest party from the ranks of the Serbian national minority, which brought the Deputy Prime Minister for Human Rights and Social Activities. However, after the recent Croatian parliamentary elections held in May 2024, the new Government consists of the right-centred coalition, without representatives of the Serbian national minority. During the three weeks of negotiations on the composition of the new government, we witnessed an increase in radicalisation and intolerance towards the legitimately elected representatives of the Serbian national minority in Croatia.

According to the Human Rights House Report from 2022, the procedure for electing judges and the work of the State Judicial Council are still non-transparent. Apart from the ranking list of candidates, other evaluation data and explanations of decisions are not publicly available.

Such a method of selecting judges may cast a doubt on their impartiality, which falls within the scope of the violation of the right to a fair trial pursuant to Article 6 of the European Convention on Human Rights (ECHR).³⁷ The reasons for the limited publication of first-instance and second-instance verdicts are still unclear, especially since the decisions of county courts are only rarely published, while the judgments of municipal courts are not published on the Internet at all. Furthermore, if we focus on the right to a fair trial, violations of the right to a fair trial make up the largest number of judgments against Croatia for violation of the ECHR, including the right to a trial within a reasonable time (as much as 52%).³⁸ In 2022, the number of applications to the European Court of Human Rights (ECtHR) increased by 27%,³⁹ and the non-execution of these judgments remains a problem for years to come.

In addition, citizens largely express their dissatisfaction due to delays in the resolution of criminal charges, almost until the statute of limitations for initiating criminal proceedings has expired, and due to non-prosecution of criminal charges.⁴⁰

35 Uzelac, 2004, pp. 99–123.

36 European Commission, 2023.

37 ECtHR, *Parlov-Tkalčić v. Croatia*, Application No. 24810/06

38 Available at: <https://uredzastupnika.gov.hr/sudska-praksa/clanak-6-pravo-na-posteno-sudjenje/159?trazi=1&=&page=24> (Accessed: 10 October 2023).

39 ECtHR, *Camasso v. Croatia*, Application No. 15733/02 (2005); *Jeans v. Croatia*, Application No. 45190/07 (2011); *Starčević v. Croatia*, Application No. 80909/12 (2014); *Bilbija & Blažević v. Croatia*, Application No. 62870/13.

40 Ompudsperson for Human Rights, 2023.

The effectiveness of criminal proceedings should comply with the standards set out in a series of judgments of the ECtHR issued against the Republic of Croatia from 2005 to date. These standards include the conduct of effective investigations, while providing legal remedies against protracted proceedings and other irregularities in the work of state attorneys and investigating judges, and the court's obligation to conduct proceedings within a reasonable time. The problem of the inadequate prosecution of war crimes persists, which resulted in proceedings against Croatia before the ECtHR for violations of Article 2 and the ineffectiveness of war crimes investigations.⁴¹

The uneven judicial practice in similar court cases also contributes to the negative perception of justice, which calls into question legal certainty, which, among others, is also a guarantee of the right to a fair trial. Although EU law is part of the internal legal order, there is still a lack of awareness, especially among lower courts, of the need to harmonise court practice with the jurisprudence of the ECtHR and the Court of Justice of the EU (CJEU).⁴² Although the EC plays a significant role in the enlargement process, in recent years the CJEU has acted as the driving force of integration by shaping judicial standards that should ensure mutual trust and mutual recognition in the judicial cooperation among EU Member States.⁴³

According to the latest report of the EC for 2022, it is estimated that the Republic of Croatia

made significant progress in implementing the recommendation to reconsider the newly introduced periodic security checks of all judges and state attorneys conducted by the national security agency and instead ensure their integrity based on other existing mechanisms, taking into account the European standards of judicial independence and autonomy of state attorneys and the opinion of the Venice Commission.

Although the effective investigation of corruption at a high level continued, and the total number of indictments and verdicts increased, the length of the investigation, prosecution and judgment of corruption crimes remains an obstacle to the effectiveness of the anti-corruption system. According to the European Commission Rule of Law Report 2022,

41 ECtHR, *Jularić v. Croatia*, Application No. 20106/06; *Skendžić v. Croatia*, Application No. 16212/08; *Jelić v. Croatia*, Application No. 57856/1.

42 Vasiljević, 2020, pp. 89–124.

43 CJEU, C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018] ECLI:EU:C:2018:117; Joined cases C-585/18, C-624/18 and C-625/18 *A.K. and Others v. Krajowa Rada Sadownictwa* [2019] ECLI:EU:C:2019:982; C-453/16 *PPU Openbaar Ministerie v. Halil Ibrahim Özçelik* [2016] ECLI:EU:C:2016:860; Joined Cases C-508/18 and C-82/19 *PPU Case Minister for Justice and Equality v OG and PI* [2019] ECLI:EU:C:2019:456; Joined cases C-566/19 *PPU* and C-626/19 *PPU JR and YC* [2019] ECLI:EU:C:2019:1077; C-509/18 *Minister for Justice and Equality v. PF* [2019] ECLI:EU:C:2019:457.

in order to increase the effectiveness of investigations and prosecution of perpetrators in corruption cases, it is necessary to continue structural work on the issue of elections and salaries of judges,⁴⁴ state attorneys⁴⁵ and court staff, taking into account European standards on resources and remuneration for the judicial system.⁴⁶

Public communication about the work of the judiciary could be improved, which was also recommended by the Ombudsperson for Human Rights.⁴⁷ Reforming the justice system and improving an individual's capacity to access justice go together with enforcing the rule of law. However, stagnation is observed, which is partly connected with the inefficiency of the judiciary and the continued distrust of citizens in the work of courts and institutions. By reforming the judicial system and restoring trust in institutions, Croatia could make progress in protecting fundamental rights and fundamental values and serve as a positive example for other Western Balkans countries waiting to join the EU.

44 'Croatia is facing a growing lack of public trust in the judiciary and was at the bottom on the last two European Commission reviews of rule of law in Member States. The two first attempts to elect the Supreme Court president failed because of a disagreement between Prime Minister Andrej Plenković and President Zoran Milanović, who has the role of confirming the election.' The new president of the Croatian Supreme Court was finally elected on 18 October 2021. Trkanjec, 2021.

45 On 8 February 2024, the Croatian Parliament elected Ivan Turudić as the new Attorney General on Wednesday, further deepening the divisions in the already deeply polarised Croatian political scene. Milovan, 2024.

46 European Commission, 2022.

47 Ombudsperson for Human Rights, 2023.

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THE DILEMMAS OF GEOGRAPHICAL ENLARGEMENT FROM THE PERSPECTIVE OF AN EU CANDIDATE COUNTRY – THE REPUBLIC OF SERBIA*



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Abstract

Starting from the autumn of 2000, Serbia's central foreign policy objective has been membership in the European Union. For a long time, the enthusiasm of politicians (especially those in power) was shared by the majority of citizens. Nevertheless, the constant addition of new conditions (which was not the case with other countries seeking entry), some of which are unacceptable for both the political elite and the citizens of Serbia, and then the open announcements by some of the leading European politicians about the halt of EU enlargement for the foreseeable future, have led to significant decrease in the interest of Serbian citizens in EU membership. EU membership is still the number one foreign policy objective of the Serbian state, but in the absence of a clear, fast and certain European perspective, Serbia is increasingly thinking about finding alternatives. In practice, alternative solutions are being resorted to, even if temporarily. Even though the geographical position of Serbia and the depth of its economic and other relations with the EU and its member states so far make it necessary that each of these alternative solutions imply close relations between Serbia and the EU, but the absence of an unequivocal European perspective

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imposes the need to turn to other global partners, such as China, the USA, Russia or other countries. This positioning is in accordance with the historical experience of Serbia, which is traditionally involved cooperation with both East and West, and a balancing act between the two. In addition, it is possible and probable that this orientation towards other global actors and partners is fully in line with the changes currently taking place in the world and, above all, with the process of globalisation, by which the European Union itself is influenced and to which it will have to adapt.

Keywords: accession, perspective, enthusiasm, disappointment, alternative, balancing, globalization.

1. The uncertainty of the European integration perspective for Serbia

On 1 March 2012, the Republic of Serbia acquired, based on the decision of the European Council, the status of a candidate for membership in the European Union. Despite the progress made in the required reforms and in the negotiation process, which began on 21 January 2014, at this moment, more than eleven years after acquiring candidate status, it is completely uncertain when, if at all, the Republic of Serbia (as well as other countries of the so-called Western Balkans) would become a member of the EU, if at all.

In spite of the fact that official representatives of the EU and its member states, such as Germany, Hungary, etc., have often claimed that there was a need for offering full membership in the EU to the countries of the Western Balkans, including Serbia, as soon as possible (contingent upon fulfilling the required conditions), there is a clearly expressed position, most significantly represented by the President of France, Emmanuel Macron, that the EU should not expand the circle of members, and, moreover, that it does not even have the capacity to do so until the necessary reforms are implemented. A short time after Macron assumed the presidency of France on 14 May 2017, he announced, in a series of programme speeches, his personal engagement and the commitment of France to further strengthen the European Union. Even though the competent European institutions had indicated 2025 as the latest time for Serbia and Montenegro to join the EU, Macron made it clear that there would be no enlargement before the EU reforms were implemented.¹ In his speech at the European Parliament on 17 April 2018, he said: ‘I will only support enlargement

1 Macron is advocating for deep and essential reforms, which might require the amendment of the Basic Treaties of the European Union. See: Macron, 2017; Chastand, 2018; Ouest France, AFP, 2018.

if Europe first experiences deepening and reform’,² explaining that ‘Europe which functions with difficulty with 27 members will not function easier with 30 or 32.’³ Up to this moment, when one of Macron’s presidential mandates has already expired and the second mandate is well underway, the announced EU reforms have not been rolled out, and the French president’s position on stalling the expansion of EU membership until the EU’s restructuring has remained unchanged.⁴

It is also not entirely clear what conditions the Republic of Serbia should fulfil in order to become a member of the EU.

This primarily concerns the issue of recognising the “independence” of Kosovo, one of the two autonomous provinces within the Republic of Serbia, which is currently under temporary international administration based on UNSC Resolution 1244 of 1999, after a declaration of independence by Albanian secessionists on 17 February 2008. In accordance with the system of distribution of competencies between the EU and its member states, it was left to the states to decide whether to recognise the secession of Kosovo or not.⁵ Currently, 22 member states recognise the independence of the southern Serbian province, while 5 do not.⁶ In the last chapter of the accession negotiations between Serbia and the EU – chapter 35, which refers to “other issues” –, paragraph 1 is entitled ‘Normalisation of relations between Serbia and Kosovo’. Even though in the official documents and during the talks Serbia has not been explicitly asked to recognise Kosovo’s independence, it is difficult to imagine, bearing in mind that the vast majority of EU members, including the most influential ones, support Kosovo’s independence, what kind of “normalisation” would be acceptable to the EU other than one that includes at least the indirect recognition of Kosovo as an independent state by Serbia. The fact that, by normalisation, the EU almost explicitly means the recognition of Kosovo as an independent state is confirmed by the ‘EU Proposal – Agreement on the path to normalisation between Kosovo and Serbia’, published on 27 February 2023 (originally a French-German proposal), since every article of the 11-article proposal suggests that, according to the EU’s understanding, the “normalisation” of relations means the establishment of good neighbourly relations between two sovereign states (Article 4, paragraph 2, foresees, for example, that ‘Serbia will not object to Kosovo’s membership in any international organisation’).⁷

The second request of the EU towards Serbia, i.e. its condition for Serbia’s admission to membership also represents a major, practically insurmountable obstacle. It is the EU’s request that Serbia harmonises its foreign policy with the EU’s Common Foreign and Security Policy (referred to in chapter 31 of the accession negotiations)

2 Website of the French Embassy in Sofia. *Available at:* <https://bg.ambafrance.org/Mercredi-18-avril-7477> (Accessed: 30 October 2023).

3 Schoen and François, 2018.

4 Rakić, 2020, pp. 553–582.

5 Council of the European Union, 2008.

6 These are Spain, Romania, Greece, Slovakia and Cyprus.

7 European External Action Service, 2023.

by introducing sanctions against the Russian Federation, which the EU gradually introduced after the annexation of Crimea by Russia in 2014 and intensified after the beginning of the armed intervention of the Russian Federation in Ukraine on 24 February 2022. The European Union considers this alignment of Serbia's foreign policy with the Common Foreign and Security Policy as an urgent priority matter, even though chapter 31 has not yet been opened, and, according to the regular course of things, the full alignment of the candidate country's foreign policy with the CFSP should be realised by the very moment of accession to the EU.⁸ Even though it voted for Resolution A/RES/ES-11/1 of the UN General Assembly of 2 March 2022, which characterised the Russian intervention, which the Russian Federation calls a "special military operation", as "aggression", as well as for the suspension of the Russian membership in the UN Human Rights Council, the Republic of Serbia refuses to join the sanctions, for a number of reasons. Firstly, Serbia wishes to preserve its economic interests, primarily the procurement of energy from Russia under contracted conditions that are significantly more favourable than market conditions.⁹ Secondly, the refusal to join the sanctions is based on the fundamentally negative attitude of the Republic of Serbia, which in the 1990s was itself exposed to economic sanctions, towards any kind of economic sanctions against states, which cause the most damage to the innocent population. Thirdly, the people of Serbia and the people of Russia traditionally maintain close relations. Finally, and probably most importantly, the Russian Federation, as a powerful state and a permanent member of the UNSC, supports the preservation of the territorial integrity of the Republic of Serbia, opposing the independence of Kosovo and its membership in international organisations.

2. The evolution of public opinion in Serbia towards the perspective of EU membership

The prospect of joining the European Union was not considered by the Republic of Serbia, either as a part of the Yugoslav state or as an independent country, until 5 October 2000, the day when the ruling regime was overthrown by a coalition of political parties, who viewed the European path as a priority element of the political programme. Before that, the Republic of Serbia and the FR Yugoslavia had been under EU sanctions,¹⁰ brought independently or as an integral part of the UNSC

⁸ European Commission, 2022.

⁹ A similar logic was followed by the Government of Hungary, a member of the EU, which opposed some packages of sanctions against Russia when it came to energy sources and requested (and received) certain exceptions for itself, arguing 'that as a landlocked country very much dependent on energy carrier imports, especially Russian imports, Hungary does not have the alternatives that other EU Member States have.' Csernus, 2023, p. 8.

¹⁰ See: Rakić, 2015.

sanctions, and, in 1999, the vast majority of the then 15 EU member states, more precisely those that are also members of NATO, participated in the military intervention of the Atlantic Alliance against the FRY (a number of other countries, which would later become EU members, also participated in the intervention in different ways).

However, the awareness of the need to harmonise the legal system of Serbia and FR Yugoslavia with the Law of the European Union was also present during the last decade of the 20th century, and measures were taken in this regard during the period of the most unfavourable relations between Serbia/Yugoslavia on the one hand and the EU and its member states on the other.¹¹

Announcing the rapid entry, first of the Federal Republic of Yugoslavia (which, on 4 February 2003, was transformed into the “state union of Serbia and Montenegro”), and then of the Republic of Serbia (after its constitution as a separate state on 5 June 2006) into the European Union was, on the one hand, part of the political marketing of the new authorities, with the aim of gaining the support of the population tired of long-term isolation and exclusion from normal international communication and cooperation, but, on the other hand, also an expression of the sincere conviction of the authorities that they were highly respected in the West. This belief in a swift EU membership went so far that, for example, on 20 July 2003, a group of high-ranking politicians, led by then Deputy Prime Minister of the Republic of Serbia, Čedomir Jovanović, encouraged by the declaration adopted at the EU-Western Balkans Summit held in Thessaloniki on 21 June 2003,¹² organised a performance that consisted of sailing a boat along the Sava and the Danube into Belgrade, to symbolically announce the joining of the country to the EU, with full membership, in 2007 (when the numbers 20 and 07 from the date of this performance are combined, the number 2007 is obtained).¹³

For the more than a decade and a half since then, the bid by high-ranking Serbian state officials to enter the EU with that date has been characterised by a completely unrealistic optimism:

It is theoretically possible for Serbia to join the EU in 2007, Zoran Živković (Prime Minister, B.M.R.), 2003.

Serbia will enter the European Union by 2010, Boris Tadić (President of the Republic, B.M.R.), 2007.

Serbia will win candidacy next year, and become a full member of the EU in 2014, Božidar Đelić (Deputy Prime Minister, B.M.R.), 2008.

11 FRY Federal Government, 1996. See also: Rakić, 1997.

12 EU-Western Balkans Summit, 2003.

13 Television News 2 of the “Serbian Radio and Television” Broadcasting Agency, July 20, 2003.

I believe in Serbia joining the EU by 2014, Boris Tadić (President of the Republic, B.M.R.), 2010.

The earliest deadline for our country's entry into the EU would be 2016, Boris Tadić (President of the Republic, B.M.R.), 2010.

There is a chance to enter the EU by 2020, Aleksandar Vučić (Prime Minister, B.M.R.), 2015.

We hope that Serbia will become a full member of the European Union in 2022, and I am sure that it will be before 2025', Aleksandar Vučić (Prime Minister, B.M.R.), 2016.¹⁴

The infatuation and obsession of politicians, above all those in power, with Euro-enthusiasm found an echo in the media, which, in Serbia, could hardly be seen as particularly free. European integration, specifically Serbia's future membership in the EU, considered certain and imminent, became a ubiquitous topic, which dominated the discourse in all appropriate and inappropriate forums. Almost every event, whether or not it had anything to do with European integration, was used as an occasion to talk about the EU and Serbia's membership in it, and all public figures, regardless of their occupation, were expected to express their opinion, unavoidably positive, about Serbia's European perspective. For example, on 28 January 2010, when the newly elected Patriarch of the Serbian Orthodox Church, Mr. Irinej, held his first press conference, the journalists were mainly interested, in a completely inappropriate manner – taking into account the primarily spiritual role of the head of the Church and a number of significant spiritual topics and current church issues that the newly elected Patriarch had to deal with –, in the Patriarch's position on the European Union and Serbia's European integration, and the Patriarch's answers to the journalists' questions were given priority treatment by practically the entire media.¹⁵

Conviction about swift EU accession, as well as about the desirable and useful nature of said membership was soon instilled in the vast majority of Serbian citizens. Public opinion surveys carried out by competent state authorities, primarily the Government Office for EU Accession and the Ministry of European Integration, speak eloquently about this, as well as about the subsequent evolution of the attitudes of Serbian citizens.¹⁶ Thus, according to a public opinion survey conducted in September 2006 by the Office for EU Accession, to the question 'If a referendum were called tomorrow with the question: Do you support the membership of our country

14 Ekspres, 2017.

15 Politika online, 2010.

16 The results of the public opinion survey by year are available on the website of the Ministry for European Integration. See: Government of the Republic of Serbia, Ministry for European Integration, 2006–2022.

in the European Union, how would you vote?', a huge majority, 69.90% of citizens said they would vote "for", 17.80% said they would not vote, and only 12.30% were "against". In December 2003, the pro-European attitude was even stronger: 73% of citizens said they would vote "for", 12% said they would not vote, and only 8% said they would vote "against".

Over time, as expectations that Serbia would soon join the EU waned and as the entire accession process was called into question, citizen enthusiasm decreased and the percentages changed drastically. According to the research of the Ministry of European Integration from December 2022, 43% of citizens would vote "for", 32% would vote "against", 13% would not vote, while 12% did not have an answer to the question.

The fact that the EU's attitude towards us is the key reason for this change of public opinion in Serbia towards the EU is quite eloquently indicated by the fact that, in December 2022, 28% of the respondents believed that the factor that slowed down and hindered Serbia's entry into the EU to the greatest extent was the 'policy of constant conditioning and blackmail applied by the European Union towards our country.'¹⁷ It should be noted that, before voicing the aforementioned "expectation" of the most influential circles in the EU towards us regarding the recognition of Kosovo's independence and the request to join the sanctions against Russia, there was another request from Brussels that was unacceptable for a significant number of Serbian citizens, and which Serbian authorities fulfilled, namely "cooperation" with the International Criminal Tribunal for the former Yugoslavia. Primarily, the cooperation required the extradition of accused members of the political and military leadership of the Republic of Serbia, the Federal Republic of Yugoslavia, the Republic of Srpska and the Republic of Serbian Krajina, as well as other accused parties who were believed to be accessible to the Serbian authorities. The relevance of that request ended with the extradition of General Ratko Mladić on 31 May 2011. The negative public attitude in Serbia towards "cooperation" with the Hague Tribunal was particularly influenced by the fact that the vast majority of persons accused and convicted before this court were Serbs and that almost no one was finally convicted for the many crimes committed against Serbs. The emergence of new, humiliating demands led to the general feeling about "constant conditioning and blackmail".

It is quite interesting to see the structure of the answers to the question

In your opinion, should the reforms that are necessary for joining the EU be implemented, first of all, because it represents the fulfillment of the conditions set by the

17 12% of respondents said that the culprit was 'the mentality of our people and unwillingness to change'; 11% indicated "the current situation within the European Union itself"; 10% indicated 'the failure to fulfil assumed international obligations'; 9% indicated 'objective obstacles (extensive reforms in all areas that need to be carried out)'; 9% indicated 'the inability of the domestic leadership'; 5% indicated that "our country's entry into the EU has not been slowed down and/or difficult"; 1% indicated 'the situation regarding Pristina'; and 15% said that they did not know, meaning that they had no opinion.

EU, or should they be implemented even if the EU did not set them as a condition, for the sake of creating a better Serbia and for our own sake?

In a survey from December 2022, as many as 65% of respondents answered that ‘those reforms should be implemented even if they are not a condition for joining the EU, for the sake of creating a better Serbia and for our own sake’, 14% answered that ‘such reforms, in general, should not be implemented’, 11% answered that ‘reforms that are necessary for entry into the EU should be implemented primarily because this is the fulfilment of the conditions for entry into the EU’, while 10% said that they did not have an answer. These percentages have not significantly decreased compared to 2009, when these figures were 72%, 5%, 14% and 9%, respectively. In light of these results, and especially when taking into account the fact that, during the 1990s, when the perspective of EU membership could not even be considered, a decision was officially made to harmonise the legal system in the FRY with the European system, we can conclude that there is a stable desire among the Serbian population to live in a society organised according to European models and standards, but that the former enthusiasm has dropped significantly when it comes to EU membership itself.

These changes in mood among the population are not in proper correlation with the attitude of the authorities of the Republic of Serbia regarding the perspective of our membership in the EU. “European integration” and, above all, the acquisition of the status of a full member of the EU, has been the foreign policy priority of the Serbian government since the regime change of 5 October 2000. Ana Brnabić, Prime Minister of the government of the Republic of Serbia, who was also holding the mandate for assigning the new Government, said in her speech held on 25 October 2022 before the National Assembly of the Republic of Serbia, in which she presented the proposal of the government programme the next mandate:

Serbia will continue its European path, because Serbia belongs to the family of European nations and countries. (...) Our whole region can be long-term stable, better connected and prosperous, only as part of the wider European family. The European Union can certainly be criticized a lot, but it is the most successful peace project of all mankind and, strategically, our final destination is in the Union.¹⁸

However, the Prime Minister also noticed the following:

How successful our negotiations with the EU will be in the coming period certainly depends on a whole series of factors, but, unfortunately, it seems to depend least on the speed and quality of our reforms. (...) In any case, it is in the interest of our country and our people that we continue with reforms on the European path, first of all because these reforms are good for us, because they strengthen our economy, because they make our public administration more efficient and transparent, and

18 National Assembly of the Republic of Serbia, 2022.

because the rule of law is important to us. We are building a European Serbia, and membership itself certainly does not depend only on us.¹⁹

It has been demonstrated that Serbian authorities show continuity and perseverance in their European determination, but also realism in the sense that the prospect of membership is neither imminent nor certain. Such realism is a novelty compared to the rather naive conviction of the authorities in the first decade of the 21st century regarding swift integration.. As for the citizens, the absence of a clear perspective of Serbia's EU membership led to a significant decrease in support for said membership.

3. “Europe has no alternative”?

In the period of European integration ecstasy that ruled Serbia during the first fifteen years of the 21st century, one of the claims widely repeated by the media and the different ranks of politicians, up to the level of the President of the Republic,²⁰ practically a political mantra, was that ‘Europe does not have an alternative’.²¹ A look at the geographical map of Europe will justify this idea, since Serbia and the countries of the so-called Western Balkans – Bosnia and Herzegovina, Montenegro, North Macedonia and Albania – represent a small, still unintegrated island in the middle of the vast space of the European Union.



¹⁹ Ibid.

²⁰ See, for example: Danas Online, 2008; RTS online, 2011.

²¹ One movement, made up mostly of young people, that was ubiquitous on the public scene was called ‘Europe has no alternative’.

In addition to the EU's economic power, it is exactly due to Serbia's geographical position that the country Serbia has far closer economic cooperation with the EU and its members than with any other partner, as pointed out by Ana Brnabić in her government programme proposal, quoted above:

Over 65% of foreign investments in the Republic of Serbia are investments from EU member states. If you look only at German companies operating in the Republic of Serbia, they currently employ around 78,000 people. Over 70% of our exports go to EU member countries. With the support of the EU, we build many infrastructure projects and implement public investments in schools, hospitals, gerontological centers and the like. Our citizens also benefit from favorable loans from European financial institutions, such as the EBRD, EIB and CEB, with which we finance the construction of a whole range of projects - from science and technology parks to sanitary landfills.²²

However, the awareness that there is no readiness in the European Union to admit Serbia in the foreseeable future, i.e. that there is no readiness to ever admit the country without setting unacceptable conditions for Serbia, the likes of which have never been applied to any other country that has joined the EC/EU,²³ led to a decrease in Euro-enthusiasm among citizens (as shown by the results of public opinion polls cited above) and made them look for alternatives. This phenomenon is not exclusive to Serbia. A similar loss of illusions about EU membership occurred, for instance, among a significant part of the citizens and state leadership of Turkey, especially after the failed coup attempt in July 2016.²⁴ Turkey has been a candidate for EU membership since 12 December 1999, after concluding the initial association agreement in 1963 and beginning the pre-accession negotiations on 3 October 2005.

When determining whether it makes sense at all to look for alternatives to Serbia's membership in the EU – and the EU's position makes us believe that it does –, and what those alternatives are, it is of particular importance to consider, on the one hand, Serbia's historical experience in positioning on the international economic and political scene and, on the other hand, the dynamics and perspectives of the further development of the European integration process and its positioning on the international scene in the context of globalisation.

In any case, it is certain that resorting to any alternative solution instead of full membership in the EU is not possible without the simultaneous close cooperation of Serbia with the European Union and its member states, both economically and in other areas, primarily due to the aforementioned geographical position of Serbia,

22 National Assembly of the Republic of Serbia, 2022.

23 Jovanović, 2015, pp. 38–39.

24 Müftüler-Baç, 2018, pp. 119–128.

and also because of the already existing close cooperation in the economic field, among others, as pointed out by Ana Brnabić in the quote above.

Therefore, an alternative to EU membership that makes sense to think about is a position of the Republic of Serbia that implies good relations and cooperation both with the European Union and its member states, as well as with the West in general, on the one hand, and, on the other hand, with other countries in the world, primarily those that increasingly present themselves as leading economic and political actors on the international scene, such as China, Russia, India, etc.

The historical experience of Serbia and the Serbian people in balancing between influences from the West and from the East, as well as the current determination for the military neutrality of Serbia, make our country, according to many, destined to continue building its future international position by cooperating in the most balanced way possible with countries and organisations from different parts of the world. Likewise, modern developments on the international scene, the re-establishment of the multipolar structure of the international community and the process of globalisation make it clear that the natural and correct choice is the commitment to balanced cooperation with countries and organisations from different parts of the world. In fact, this is not even a choice in the true sense of the word, since the absence of a sincere willingness from the part of the EU to admit Serbia into its ranks in due time, as well as under possible and acceptable conditions, leaves us no other options.

4. The historical experience of Serbia as “The East to (in) the West and the West to (in) the East”

The exit of the United Kingdom from the European Union after the referendum held in 2016 reminded many of the fact that the traditional geopolitical self-experiences of certain peoples during earlier centuries can have an impact on their perception of their own geopolitical position today and play, to a non-negligible extent, a defining role in major political decisions and in determining the political course of a nation. When considering the attitude of British political decision-makers and the general public towards European integration, not only at the moment of Brexit, but also before the British entry into the EC and later during the period of this country's membership in the EC/EU, there were numerous reminders and references, above all in the United Kingdom itself, to the traditional, centuries-old British idea of “exceptionalism”, or “splendid isolation”, as coined in Victorian times, which led to the distancing of Britain from continental Europe.²⁵ When Brexit became effective, the President of the European Commission, Ursula van der Leyen alluded to the similarity between the

25 Maccaferri, 2019, pp. 70–77 and 95–102.

centuries-old British approach to Europe and Britain's departure from the EU, stating: 'Our experience has taught us that strength does not lie in splendid isolation, but in our unique union.'²⁶

This example indicates that it is legitimate and sensible to look for the influence of political approaches to past alliances on the possible commitment of citizens and political circles from today's Serbia when looking for a possible alternative for EU membership in a situation where it seems that there is not enough readiness in the EU to accept Serbia as a member.

The statement that Serbia is 'the East to (in) the West and the West to (in) the East', as a description of both the geographical position and the civilizational affiliation and collective sense of identity of the Serbian people, was often quoted in public and attributed to the founder and first archbishop of the Serbian Orthodox Church from the 12th century, Rastko Nemanjić, also known as Saint Sava. Even though the attribution of these words to Saint Sava is incorrect and historically unfounded,²⁷ its wide acceptance and frequent use, while ignoring what East and West meant in the 12th century, speaks of how the citizens of Serbia perceive their position at the meeting point of great civilizational units. That Serbia is located on the border between civilizations, namely Western and Orthodox civilizations, is also stated by Samuel Huntington in his book *The Clash of Civilizations and the Remaking of World Order*. While Huntington classifies Serbia as part of the Orthodox civilization, the boundary between the Orthodox and Western civilizations runs along the western border of the Republic of Serbia with Bosnia and Herzegovina, where a large percentage of the population is Serbian, and Croatia.²⁸ In fact, if we start from the fact that religion is an important factor in determining civilizational affiliation, then it could be said that Serbia is at the place of a more complex civilizational encounter. On its territory, both in historical and current terms, three religions meet: Orthodox Christianity, Catholicism and Islam (in addition to other religious communities with a significantly smaller number of believers). Therefore, it can be said that Serbia is the meeting place of these three civilizational units, which is by no means without significance when it comes to understanding where the citizens stand on EU membership. The majority Orthodox Serbs are influenced by the EU's relationship with Russia, which is the largest Orthodox and the largest Slavic country, while the attitude of the Muslim population towards the EU is significantly influenced by the relationship between the EU and Turkey, which they perceive as their civilizational motherland.

26 Stone, 2020.

27 As the historian Radivoj Radić points out, in reference to the research of his senior colleague Sima Ćirković, a member of the Serbian Academy of Sciences and Arts, these words attributed to Rastko Nemanjić appeared for the first time in the short story "Sād" ("The Plant") from the short story collection "Brojanice Svetog Save" ("The rosaries of Saint Sava") by Milan D. Miletić, published in 1980, as a quote from a letter sent by Rastko Nemanjić to Bishop Irinej (unknown to historical science, i.e. non-existent at the time in question). It is, therefore, a matter of fiction. Radić, 2011.

28 Huntington, 1996, p. 27.

The influence of Orthodoxy on the self-awareness and identity of the Serbs was particularly amplified (even if the population may not be sufficiently aware of this circumstance) by the fact that during most of the centuries-long Turkish occupation, lasting from the end of the Serbian Despotate in 1459 until the establishment of the Principality of Serbia in 1815, there was no Serbian state, meaning that the Serbian people as a nation survived primarily thanks to the Orthodox Church, the only organisational form in which it was united and which, by the nature of things, had a decisive influence on the preservation of the national consciousness of the Serbs. Nevertheless, during the process of liberation and re-establishment of the Serbian state, during the 19th and early 20th centuries, the Serbian rulers, trying to free their emerging state from the Turkish civilizational influence as much as possible, built state institutions, a legal and political system, and other elements of social life according to Western models, primarily under Germanic (both Austrian and German) and French influence.

As a small nation that was in the process of freeing itself from the centuries-old occupation by the powerful Turkish Empire, which was mighty even in its weakened state, and re-establishing its statehood against the backdrop of various interests and influences, above all the interests of the great powers of the time, the Serbs had to seek alliance and support from some of the larger countries. Thus, during the entire 19th century, Serbia maneuvered and balanced between the influence of Russia on the one hand and Austria on the other. At the beginning of the 20th century, Russia's influence prevailed, and relations with the Austro-German bloc reached their lowest point during the First World War. After the October Revolution, there were practically no relations between Russia (within the USSR) and Serbia (within the Yugoslav state). The Kingdom of Serbs, Croats and Slovenes, or later the Kingdom of Yugoslavia, had close relations with other allied countries from the First World War, primarily France, but the highly educated Russian emigrants who fled from the revolutionary turmoil played a major role in the spiritual uplifting of the Serbian nation, which was decimated by the war. Only after the beginning of World War II, faced with the danger of a German attack (which occurred in the spring and early summer of 1941), did Yugoslavia and the USSR establish official relations in 1940 and early 1941.²⁹ After the Second World War and the short-lived Soviet domination, lasting until 1948, the socialist Yugoslav state pursued, for several decades, a policy of not joining any of the two established blocs in the bipolar world, playing a key role in the establishment and functioning of the Non-Aligned Movement³⁰ (which did not represent an obstacle to cooperation with the European Communities, with which the SFRY concluded trade agreements in 1970 and 1973, and a Cooperation Agreement in 1980, which entered into force in 1983 and resembled, in many ways,

29 See: Životić, 2020.

30 For detailed information on the Non-Aligned Movement and the position of Yugoslavia, see: Dimitrijević and Čavoški, 2021.

association agreements, even though it was not called that³¹). This policy of equidistance, both towards the East and the West, lasted until the dissolution of the SFRY during the last decade of the 20th century. This period was followed by the decade of wars and sanctions, when the majority of Serbian citizens felt resentment towards the West on the one hand, perceived as the instigator of wars and the culprit for the disintegration of the SFRY – and later, in 1999, as a direct and open enemy –, while also feeling disappointed due to the lack of Russian support.

All in all, it can be said that Serbia and the Serbian people have a long history of positioning in such a way that it is not completely tied to either the East or the West, but balancing between the influence of the two.

There are two additional points to make here. First, Serbia is the only country in the Region located in an area whose parts have been under two different civilizational influences for several centuries. The greater part of present-day Serbia, south of the Sava and the Danube, was under Turkish occupation for several centuries and suffered oriental influence, while Vojvodina, a territory north of the Sava and the Danube, was part of Austria, i.e. Austria-Hungary, during those same centuries, and was, therefore, under the civilising influence of the West, primarily Hungary. Also, of all the countries in the Region, only Serbia and Montenegro were ruled by national dynasties after liberation from Turkish occupation – all the other countries in the Region were ruled by one of the German dynasties.³²

Second, even though its current foreign policy priority is to approach the European Union with the aim of acquiring full membership, the Republic of Serbia has proclaimed and maintains a policy of military neutrality. The National Assembly of the Republic of Serbia, at the session held on 26 December 2007, adopted the „Resolution of the National Assembly on the Protection of the Sovereignty, Territorial Integrity and Constitutional Order of the Republic of Serbia”, which contains, in section 6, the following proclamation:

Due to the overall role of NATO, from the illegal bombing of Serbia in 1999 without a Security Council decision to Annex 11 of the rejected Ahtisaari plan, in which it is determined that NATO is the “final organ” of government in “independent Kosovo”, the National Assembly of the Republic of Serbia makes a decision on declaring military neutrality of the Republic of Serbia in relation to the existing military alliances until the eventual calling of a referendum at which the final decision on the issue would be made.³³

31 See: Lopandić, 1985; Lopandić and Milikić, 2021, pp. 207–224.

32 Members of the German dynasties ruled most of the countries around us in the period after gaining independence from Turkey, namely the Wittelsbach and later Glücksburg dynasty in Greece, Battenberg and then Sachsen-Coburg and Gotha in Bulgaria, Hohenzollern-Sigmaringen in Romania and Wied-Neuwied in Albania. Rakić, 2020, pp. 553–582.

33 Official Gazette of the Republic of Serbia, No. 125/2007.

Although there were complaints about the insufficient clarity of the term “military neutrality”, the said proclamation provides sufficient grounds for drawing conclusions about the meaning content the term and the key motivation behind the proclamation. Since it takes the form of a parliamentary resolution, it is obviously a political statement, given weight by the fact that it was adopted by the National Assembly, which is the highest representative body. The proclamation clearly states that the Republic of Serbia is politically determined not to enter into (existing) military alliances, which does not exclude cooperation, or even cooperation regulated by appropriate agreements – even though the neutral status would imply holding, to the greatest extent possible, balance in terms of the degree of cooperation with existing military alliances –; however, membership is excluded. Therefore, neutrality in this sense is not the same as “permanent neutrality” under international law, but simply a political determination, proclaimed unilaterally by a state. Military neutrality does not constrain Serbia in terms of defence and does not exclude the possibility of participation in wars. The quoted section of the Resolution foresees the way in which military neutrality can be ended – through a decision of the citizens by referendum. Finally, the proclamation explicitly indicates that the motive behind its adoption was the rejection of membership in NATO. The reason for this refusal is the aversion that exists in Serbia and among a large majority of the Serbian people towards NATO due to its overall hostile attitude towards the country during the Yugoslav crisis of the nineties, which culminated in NATO’s military intervention against the FR Yugoslavia in 1999, as well as open and active support and sponsorship provided by the most important NATO member states – and, indeed, the vast majority of members – to the self-proclaimed “independence” of Kosovo.

Wrapped in the cloak of total military neutrality in relation to all military alliances, Serbia’s rejection of NATO membership is not, in itself, an obstacle to EU membership. Out of the 27 current EU member states, only 22 are also members of NATO. Nevertheless, accession to NATO would certainly bring Serbia closer to the European Union, even if it is not a condition for EU membership. As we have seen, Serbia is committed to becoming a member of the EU in spite of regularly reaffirming the country’s military neutrality in a number of official documents and statements made by politicians. In fact, EU membership is one of the foreign (and internal) policy priorities of Serbia, as evidence by the statements of officials, a number of official documents and a series of practical actions. At the same time, the fact that Serbia has chosen not to be tied neither to the West (NATO being a Western organisation) nor to the East militarily contributes to the conviction of the citizens and political circles of Serbia, disappointed by the apparent unwillingness of the EU to admit Serbia into its membership at in the foreseeable future and without setting unacceptable conditions, that the position “somewhere in between”, balancing between the EU on the one hand and countries and organisations from other parts of the world on the other, is a realistic, achievable and valid alternative to the currently unattainable membership in the EU.

Naturally, the question arises as to how willing the European Union, as well as the USA and other Western countries, are going to accept the balancing position and policy of the Republic of Serbia in domains within the scope of EU competencies (excluding the military domain), and how much they will insist on the exclusive attachment to and cooperation with the West by Serbia, even without being a member of the EU. Publicly expressed dissatisfaction of EU officials and certain member states, as well as the USA, with Serbia's existing cooperation with China (not to mention Russia, especially since the EU started imposing sanctions on the Russian Federation, with the expectation that Serbia will join them by harmonising its external policy with the CFSP of the EU), indicate the absence or low level of such readiness. Nevertheless, the question arises as to how much the EU itself will be forced, owing to globalization, the creation of a multipolar world order, as well as other international processes and movements, to develop cooperation with countries from other parts of the world and to treat them as partners instead of competitors in the race for world supremacy, as has often been the case until now.

5. The European Union was created as an expression of the need for a common market and, as such, is it too narrow now?

We pointed out that the geographical position of Serbia (and the Western Balkans), as an island surrounded by the wide space of the European Union, naturally predisposes Serbia to develop good relations and close cooperation with it and its member states. The rationale of this belief becomes abundantly clear when one looks at the map of Europe (shown above).

However, if we look at the European Union, and even the whole of Europe, from a wider, global perspective, it also becomes clear that Europe is but a small cape of the larger Eurasian area, as Paul Valéry said,³⁴ not to mention the entire world. This is shown eloquently by the following map:

34 'L'Europe deviendra-t-elle ce qu'elle est en réalité, c'est-à-dire: un petit cap du continent asiatique?' Valéry, 2000, pp. 9–10.



The question arises as to where the EU stands in global perspective and what its future is when one takes into account the increasing interdependence and intertwining of ties and interests that comes with the intensifying process of globalization. In order to understand that, one must consider both the dynamics of the European integration process and the dynamics of globalisation, as well as the relationship between the two. Finally, Serbia and its European perspective, or the absence of that perspective, must also be interpreted in that context.

The Free Trade Agreement between China and Serbia, signed on 17 October 2023, was met with criticism and protests by pro-European circles in Serbia.³⁵ As Europe's enthusiasts in Serbia claim, our future is in the European Union, and therefore any close economic cooperation with China is unnecessary and undesirable. Moreover, they regard it as harmful, because it only serves China's interests, and not ours (interestingly, they fail to apply the same reasoning to a similar cooperation with the EU, which, they say, is in our interest too). This argument does not take into consideration the nature and dynamics of the European integration process and its relationship with wider phenomena, primarily in the context of globalisation. It is exactly this dynamic and relationship that shows us the necessity and inevitability of building strong and close economic relations with partners both in the West and in the East, especially with those with enormous and, therefore, unavoidable economic power.

In 2012, the European Union received the Nobel Peace Prize because, as announced by the Nobel Committee, '(t)he Union and its forerunners have for over

35 Both the European Union and the USA criticised the strengthening of economic cooperation between China and Serbia. Reporting on the newly concluded Free Trade Agreement, Radio Free Europe said: 'Due to the strengthening of cooperation with China, (Serbia, B.M.R.) has been repeatedly criticized by Brussels and Washington. Reacting to the signing of the Free Trade Agreement with China on October 17, the European Union announced that Serbia, as a candidate for EU membership, committed itself to withdraw 'from all bilateral free trade agreements' on the day of accession to the Union.' Radio Free Europe, 2023.

six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe.³⁶ It is almost universally accepted that the European Communities (EC), which later grew into the EU, were created during the 1950s as a peace project, as a reaction to the sufferings of the Second World War and an attempt to prevent future divisions similar to those that had led to wartime devastation. The founders envisioned that the way to prevent those divisions would be to connect, join and integrate France and Germany first, and then other Western European countries. Indeed, the document that initiated that integration process, the Schumann Declaration of 9 May 1950, clearly indicated that achieving peace had been the key goal of the proposed project since the very beginning.³⁷

Nevertheless, the question arises as to how it is possible that, despite the fact that Europe has gone through many bloody wars over the centuries, it did not occur earlier that the integration of states and peoples represents a possible preventive measure against future divisions and conflicts. Part of the answer to that question is given by Shuman himself in the next sentence of the Declaration, where he invokes, through allusion, the French initiative for creation of a “European Federal Union” within the League of Nations,³⁸ and the author of that initiative, the Prime minister and Minister of foreign affairs of France, Aristide Briand, who presented his idea at the Assembly of the League of Nations on 5 September 1929, said that he embraced a centuries-old idea.³⁹ Indeed, there have been dozens of proponents of the idea of European integration among politicians, philosophers, artists, scientists, etc. since the Middle Ages. In Briand’s time, there was already a European integrationist movement, who adopted the title of a book by Gaston Riou, “Unite or die” (*S’unir ou mourir*).⁴⁰ The number of European integrationist projects always increased significantly after major war cataclysms, with clearly expressed pacifist tendencies.⁴¹

In light of all this, the question arises why the European integration project managed to take off only after the Second World War, and not before.

36 The Norwegian Nobel Committee, 2012.

37 ‘World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it. The contribution which an organised and living Europe can bring to civilisation is indispensable to the maintenance of peaceful relations.’ Ministry of Foreign Affairs of the French Republic, 1950.

38 ‘In taking upon herself for more than 20 years the role of champion of a united Europe, France has always had as her essential aim the service of peace. A united Europe was not achieved and we had war.’ Ministry of Foreign Affairs of the French Republic, 1950.

39 ‘I have associated myself during these last years with an active propaganda in favor of an idea which one wanted to qualify as generous, perhaps to dispense with qualifying it as imprudent. This idea, which was born many years ago, which has haunted the imagination of philosophers and poets, which has earned them what can be called successes in esteem, this idea has progressed in people’s minds by its own value. It ended up appearing as responding to a necessity. Propagandists have come together to spread it, to bring it further into the minds of nations, and I confess that I found myself among these propagandists.’ – Briand, 1929.

40 Riou, 1929.

41 See, for example: Rougemont, 1990; Vuyenne, 1964; Rakić, 2003.

The answer to this question lies within the content of that project. In particular, the European Communities were created as a Common Market of six Western European countries, the number of which increased over time, followed by a certain number of so-called common policies, primarily in the economic and social domain (common agricultural policy, common transport policy, common competition policy, common social policy, common/foreign/trade policy, etc.). Without denying the significant influence of the pacifist motivation, it can actually be concluded that the European Communities were created primarily as an expression of the needs of six highly developed Western European states, which had recovered from the war's destruction and had strengthened economically, thanks, to a large extent, to American aid through the Marshall Plan, for a market that was significantly wider than the individual national markets. As a consequence of the subsequent development of science, technique and technology, as well as the development of the economy, the markets of those countries became too narrow for the economic process at the time, which required a wider base for raw materials and wider opportunities for the placement of products. This also applies to the large countries of the initial European six (France, FR Germany and Italy), not to mention the Benelux countries. The opportunities offered by those countries and markets became too narrow for the economic needs of the time, especially compared to rivals on the world stage, such as the USA or the USSR.⁴²

The fact that the main reason for the creation of the European Communities was the need of the founding countries for a wider market, because the national markets were too narrow to meet the requirements of modern economy, is confirmed by the words of their creator, Jean Monnet, during the Second World War, in a speech held before the National Liberation Committee in Algiers on 5 August 1943:

The countries of Europe are too small to provide their peoples with the prosperity and social development they need. This presupposes that the States of Europe form a federation or a European entity that makes a common economic unit out of them.⁴³

Therefore, the European Communities were created as an economic integration organisation (for a long time, the term Common Market was used as a synonym for EC), which the European Union still is today, despite the expansion of competencies to non-economic domains. Efforts to expand the political dimension led to several major crises during the development of the European integration process, such as the failure to create the European Defence Community in the first half of the fifties, the failure to create the European Constitution in 2005, or Brexit, whose

42 At the conference at Cannes in January 1922 Briand privately told his colleagues: 'We will one day find ourselves sandwiched between two giants, Russia and the United States. This is why we must create a United States of Europe, at least in the economic field.' Laroche, 1957, p. 101; Boyce, 2012, pp. 71–93.

43 Monnet, 1943.

main advocates, like Nigel Farage, clearly and loudly claimed that the UK entered the Common Market by entering the EC and that it left the EU precisely because numerous political elements were grafted onto that market in an often undemocratic manner, which the British initially did not count on and which they did not want.⁴⁴

Looking a few centuries into the past, we see that the development of the economy, a consequence of progress in science and technology, i.e. the expansion of the economic process, led to the expansion of the scope of basic socio-political structures. Thus, the fiefs, which had been the dominant structures in the Middle Ages and, in a part, of the Modern Period, where almost all aspects of the citizens' life and the economic process took place, with relatively limited interactions, were replaced – thanks to the development of science and technology, the ensuing expansion of communication capabilities, and, in particular, the expansion of the scope in space of the economic process (primarily through the emergence of proto-industrialisation and then industrialisation – by the nation states that still dominate the geopolitical landscape. Due to the expansion of certain social functions, as a result of the development of science and technology across the borders of nation states, international organisations appeared in the 19th century. For a long time, until the League of Nations was founded in 1919, these existed only in domains where cross-border organisation was required by the development of science and technology and by the ensuing development of communications and economy, such as telegraphy, postal services, the protection of intellectual property, trade in certain products, etc.⁴⁵ Finally, the first and, so far, the most developed integration organisation, the EC/EU was created, mainly as a result of the development of science and technology and the consequential need and possibility to create a wider common market for a group of European states.⁴⁶

Looking at the present, it is obvious that the expansion of economic and social processes has continued, due to the development of science and technology. Nowadays, these historical trends and processes are accelerating considerably. We are witnessing and experiencing globalisation, when an ever-increasing number of social processes are raised to the global level. It is a social tendency that is independent of any individual or collective will; the next step in the process that led to the creation of nation states, international organisations and supranational organisations,

44 At the session of the European Parliament of 26 June 2016, immediately after the Brexit referendum, Nigel Farage addressed the European parliamentarians with the following words: '(...) the main reason the United Kingdom voted the way that it did is that you have by stealth, by deception, without ever telling the truth to the British or the rest of the peoples of Europe, you have imposed upon them a political union.' Farage, 2016, 1:18–1:41. At the session of the European Parliament of 2 February 2020, at the time of Britain's final exit from the EU, Farage said: 'Madam President, so this is it, the final chapter, the end of the road: a 47-year political experiment that the British, frankly, have never been very happy with. My mother and father signed up to a common market, not to a political union, not to flags, anthems, presidents – and now you even want your own army.' Farage, 2020, 0:00–0:22.

45 Dimitrijević and Račić, 2011, pp. 15–25.

46 Rakić and Vučić, 2014, pp. 66–146.

i.e. integrational organisations at the regional level, and this process is unstoppable.⁴⁷ The preservation of cultural diversity through opposing the abuses inherent to globalisation, such as economic exploitation and the imposition of cultural patterns of the stronger and more developed actors on the weaker and less developed societies is a necessity and a noble goal, pursued by the progressive part of humanity. However, opposing globalisation itself as a social phenomenon would be just as pointless as opposing the laws of nature.⁴⁸

In the conditions of globalisation, the EU market, despite its considerable expansion compared to the time when the EC was created, is becoming too narrow. Similar to the times when fiefdoms became too narrow for the economic processes, leading to the formation of nation states, national markets too became obsolete, leading to the creation of a Common Market. This process is going to continue. The European Union, which was created several decades ago and functioned for a long time in accordance with the aforementioned tendency to expand the scope of economic and other social processes, will have to adapt to the process of further expansion, as a result of which its space will become too narrow. Jean Monnet himself wrote about this in his Memoirs, drawing a parallel between the narrowness of sovereign states and the historical limitations of the EC itself:

47 Al-Rodhan and Stoudmann, 2006, pp. 1–21.

48 Mihailo Marković, a member of the Serbian Academy of Sciences and Arts, points to the need to separate the concept of globalisation from the concept of globalism: ‘The term “globalisation” today covers two very different meanings. One thing is scientific: as we have seen, objective social processes are increasingly acquiring, on the one hand, a comprehensive, global character. In this sense, globalisation refers to the development of modern technology, communication, scientific research, the unification of economic and political institutions and models in various parts of the world, the connection of different national and regional cultures and civilizations, the general degradation of the natural environment, etc.’

‘The second meaning is ideological and it prevails today. In this sense, the term is used to denote the increasing control over the world economy, politics and culture by the governments and multinational corporations of today’s sole superpower and its allies (the G-7 Group). They use the term “new world order” to justify and rationalize the dictatorial structure of relations between individual countries and regions. Such different meanings should not be attached to the same term, as this would cause very unwanted, in fact, deliberate confusion. We are talking about two different concepts that should be expressed using two different terms: “globalization”, which refers to the objective scientific, progressive concept of world integration, and ‘globalism’, which expresses the ideological and very regressive concept of the struggle for world domination. Any text that does not make this distinction remains at best confusing and contradictory, and at worst a deliberate rationalization of the greatest evil of today’s civilization.’ Marković, 2004, p. 32.

The sovereign nations of the past can no longer solve the problems of the present. And the [European] Community itself is only a stage on the way to the organised world of the future.⁴⁹

Therefore, the European Union will have to adapt to globalisation as an inevitable social phenomenon, and open up for closer and more intensive cooperation with other important (and less important) actors on the world stage, above all with China, the USA, Russia, India, Brazil and other countries worldwide. Any closure or attempt to unnaturally suppress the competition of other important actors, which today is expressed, above all, through the phobia of the Chinese economic boom, can only lead to the deepening of existing crises and the creation of new ones within the EU. Any attempt to turn the EU into some kind of exclusive club would be as unnatural as it was in the fifties of the last century, when it would have been unnatural to close France, Germany and other founders of the EC into their national frameworks.

It may appear so that some of the recent and current crises in the EU are the result of external factors. However, the fact is that practically all major crises that have shaken the European Union in recent times resulted from its collision with global phenomena. The economic crisis in the EU and, especially, the eurozone crisis was caused by the global economic crisis that erupted in 2008. The migrant crisis is of a transcontinental nature, being a global phenomenon in its roots, manifestations and consequences. The Covid crisis is a pandemic, and therefore a global phenomenon. The current energy crisis is also an integral part of a wider, global problem. The European Union obviously does not cope well with global phenomena and global crises. It should also be added that, despite all the expansions, the European Union has become, and is increasingly becoming, too narrow a framework for a number of economic functions, while it has not yet come close to establishing a unifying identity.⁵⁰

The question arises as to how Serbia should position itself in these conditions. It seems that, despite the fact that membership in the EU is the country's key declared commitment, Serbia has already taken up the position that the future will require her to hold. Despite opposition and pressure from the West, Serbia has significant economic cooperation with China, Russia, Turkey and other countries outside the EU, and the cooperation is becoming more and more intense. The obvious and increasing uncertainty of the European integration perspective for Serbia (or, even better, the increasingly clear absence of such a perspective) pushes us to cooperate with other economic forces. More and more citizens of Serbia believe that we should

49 Monnet, 1976, p. 617. The President of the European Commission, José Manuel Barroso, in his speech at the ceremony where of the Nobel Peace Prize was awarded to the European Union in 2012, after quoting Monnet's above words, spoke of the existence of awareness among European leaders in recent times about the need to include the EU in the process of globalisation based on the principles of responsibility and solidarity. Baroso, 2012.

50 Rakić and Vlajković, 2022, pp. 231–285.

be grateful to the European Union for making us act this way, since, by cooperating with actors from different parts of the world, in accordance with evident economic and other interests, we may be unconsciously positioning ourselves in a position that the future will require us to hold. Obeying this rule will increasingly prove necessary for the EU and its member states as well.

6. Concluding remarks

In summary, we can conclude that, when it comes to the European integration perspective of the Republic of Serbia, two things are certain, and everything else is tainted with uncertainty.

The following things are certain: (a) Serbia, as a European country that is completely surrounded by EU member states or states that aspire for membership, must imagine its future, by the nature of things, either as a member of the European Union or, if the European Union fails to express a will to admit Serbia (or if that will is tied to conditions that Serbia as a sovereign country cannot accept), in a very close relationship with the EU and its member states. For not only in terms of geography, but also in terms of cultural patterns and values, and in line with the current (and traditional) development of economic relations, Serbia belongs to Europe and is part of the European family of nations. (b) The modern world is characterised by the accelerated elevation of social functions to a global scope, and this process, known as globalisation, is unstoppable and is taking place ever faster. Regardless of the future direction of relations between the EU and Serbia, both of them, separately and together (to the extent that there is a commonality between them), will have to adapt to globalisation and seek the most favourable place in its system.

As shown, the certainties regarding the future of relations between the EU and Serbia are objective conditions and processes that are not directly dependent on the will and decisions of individuals.

Everything else, which depends on the will of individuals, seems pretty uncertain at this point. The position of EU decision-makers on whether, when and under what conditions they want Serbia to become a member of the EU is uncertain. It must not be forgotten that the admission of a new member state requires the consent of all existing member states. Even if it may seem that, for a moment, the will to accept Serbia as a member is dominant, the opposition of a single country, or their imposition of unacceptable conditions, will derail the entire project. What's more, the future of the EU itself is uncertain, especially when one takes into account the stated need for deep reform. Although the Serbian political elite is significantly dominated by a pro-European attitude and EU membership is declared to be the number one foreign policy goal, it is debatable who in the leading political circles in Serbia is ready to accept which of the proclaimed or implied conditions for Serbia's admission.

As for the mood of the population in Serbia, there is a clear trend of declining enthusiasm for the EU, and it is uncertain whether, when and how this unfavourable trend can change. Finally, the general geopolitical context, to the extent that it depends on the will of individuals, i.e. in those segments where human will can shape the ways the general trend is manifested, is itself full of uncertainty.

Given the presented state of affairs, it is difficult to draw clear and certain conclusions about the perspectives of Serbia's European path. Nevertheless, from the Serbian perspective, the fundamentally important issue is that we should work intensively and persistently to build our society in accordance with European models. On the one hand, we are part of Europe, and, on the other hand, these models and values will most certainly gain more and more supporters, as humanity is increasingly becoming one big family.

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GROUNDS FOR RESTRICTING THE FREE MOVEMENT OF WORKERS – RECOGNITION OF PREVIOUS PROFESSIONAL EXPERIENCE AND LOYALTY TO THE EMPLOYER



VERENA VINZENZ

Abstract

This article analyzes and critiques two European Court of Justice (ECJ) judgments concerning the freedom of movement for workers and the justifications for restrictions on this right. The Krah judgment is critically examined for its combination of two distinct provisions to constitute a restriction, while the reasoning in the Land Niedersachsen case, involving a single provision under a Collective Agreement, is supported. The article further explores the ECJ's evolving approach to company loyalty as a justification, noting a significant development in the Land Niedersachsen judgment. The Court's decision to consider functionally independent units within a single employer context as invalidating company loyalty justification represents a progression from the SALK ruling. Lastly, the article assesses the ECJ's treatment of recognizing previous professional experience, particularly in the Krah ruling, where limited recognition was deemed unjustifiable due to the continual accumulation of expertise by academic staff. The case of Land Niedersachsen introduces a nuanced perspective, emphasizing the inconsistency in the employer's recognition of equivalent experience. Together, these cases provide a deeper understanding of the permissible boundaries of justifications in EU law.

Keywords: Freedom of Movement of Workers, Art 45 TFEU, Restriction, Justification, Company Loyalty, Professional Experience

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1. Introduction

The free movement of workers, as laid down in Art 45 TFEU, is considered one of the EU's central cornerstones.¹ The provision aims to ensure free movement for workers within the European Union and entails the abolition of any discrimination based on nationality. However, Art 45 TFEU does not permit Member States to lay down restrictions on freedom of movement within their own territory.

The goal of this article is to explore the boundaries surrounding the notion of a restriction to the free movement of workers. To do so, Chapter 2 will delve into the broader scope of Art 45 TFEU, examining both direct and indirect discrimination concepts before concentrating on the concept of a restriction to the free movement of workers. Furthermore, it will discuss possible justifications for a restriction of free movement. Chapters 3 and 4 will present and analyse two recent judgments of the European Court of Justice to illustrate how these rulings shape our understanding of the above-mentioned concepts. Finally, the findings will be consolidated in a final, concluding Chapter.

2. The scope of Article 45 TFEU

The principle of free movement for workers is laid down in Art 45 TFEU, which has a direct effect. This means that individuals may directly invoke Art 45 TFEU when they wish to challenge State measures.² While Art 45 Para 1 generally states that the freedom of movement for workers shall be secured within the Union, Art 45 Para 2 provides that any discrimination based on nationality is prohibited. According to the European Court of Justice,³ the free movement of workers encompasses import as well as export restrictions, which means that it is equally applied, regardless of whether a worker is prohibited from leaving his or her home state to take up employment in another Member State or vice versa, i.e. when he or she is prohibited from entering a host state.⁴

In terms of material scope, Art 45 Para 2 expressly addresses the abolition of discrimination based on nationality. Para 3 adds that this shall entail the right to accept job offers, to move freely and to stay within the territory of a Member State for that purpose. In addition to Art 45 TFEU, the Workers Regulation Directive⁵ offers a negative expression of the equal treatment principle and is therefore often

1 Blanpain, 2014, p. 324.

2 Schütze, 2018, p. 593; Blanpain, 2014, p. 325.

3 See European Court of Justice, 26.1.1999, C-15/95, *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland*, ECLI:EU:C:1999:22.

4 Schütze, 2018, p. 614.

5 Regulation 492/2011.

referred to in case law as well. According to the European Court of Justice,⁶ Art 7 Para 1 of the Regulation, much like Art 45 TFEU, encompasses direct as well as indirect discrimination.

The term “direct discrimination” is commonly defined as a different and usually less-favourable treatment on the grounds of nationality,⁷ or in other words: the national of a Member State and the non-national are treated differently in law. If a Member State allows only for nationals to become lawyers, as Belgium has done in the case of *Reyners*,⁸ this constitutes direct discrimination as citizens from other Member States are treated less favourably than Belgian nationals. This national measure has thus been qualified as an infringement of Article 45 TFEU by the European Court of Justice.

Additionally, “indirect discrimination” is also prohibited by Art 45 Para 2 TFEU and Art 7 Para 1 of the Regulation. National measures may be qualified as indirectly discriminatory when they are apparently nationality-neutral on their face, meaning that they apply indistinctly to all workers, but have a greater impact on nationals of other Member States.⁹ Typical examples include requirements concerning residence¹⁰ and language¹¹. While nationals of a certain Member State almost always satisfy these conditions, migrants usually do not.¹² In contrast to direct discrimination, there is a possibility to salvage a measure that has been qualified as indirectly discriminatory and that is by way of justification. Therefore, if a national measure has been found indirectly discriminatory but pursues an aim compatible with Union law, and the measures adopted to achieve that goal are found to be necessary as well as proportionate,¹³ the measure has to be qualified as being in accordance with Art 45 TFEU.

What has just been described is the system expressly set out by Art 45 TFEU. Around the mid-1990s, several cases were brought before the European Court of Justice that concerned national measures which, applying only Art 45 Para 2, were found to be non-discriminatory. However, these measures were also found to effectively hinder market access of the workers concerned,¹⁴ thus impeding the freedom of movement of workers.¹⁵ Jurisdiction therefore decided to broaden the scope of Article 45 TFEU and equally apply it to these kinds of measures – this is what we now describe as the so-called restrictions of or obstacles to the free movement of workers.¹⁶

6 European Court of Justice, 12.2.1974, case 152/73, *Sotgiu v Deutsche Bundespost*, ECLI:EU:C:1974:13.

7 Barnard, 2016, p. 218.

8 European Court of Justice, 21.6.1974, case 2/74, *Reyners v. Belgian State*, ECLI:EU:C:1974:68.

9 Barnard, 2016, p. 219.

10 Cf. European Court of Justice, 16.1.2003, C-388/01, *Commission v. Italy*, ECLI:EU:C:2003:30.

11 Cf. European Court of Justice, 6.6.2000, C-281/98, *Angonese v. Cassa di Risparmio di Bolzano SpA*, ECLI:EU:C:1999:583.

12 Barnard, 2016, p. 219.

13 Barnard, 2016, p. 220.

14 Barnard, 2016, p. 222; Riesenhuber, 2012, p. 103.

15 Schütze, 2018, p. 604.

16 Schlachter, 2021, p. 471.

To explore this institution further and also to outline its possible outer limits, I would like to highlight two cases brought before the European Court of Justice, starting with the well-known judgment of the court in the famous *Bosman* ruling.¹⁷

Jean-Marc Bosman is a Belgian national who was employed by the Belgian first-division football club FC Liège. When his contract expired, he wanted to switch teams and play for a French second-division football club. However, the receiving French club was confronted with transfer fees imposed by the national and international football associations. These transfer fees also applied to players already out of contract. Now, the transfer fee system applied equally to all players moving from one club to another and a player's nationality was entirely irrelevant regarding the application of the transfer fees. The system was therefore found to be neither directly nor indirectly discriminatory. However, Mr. *Bosman* was nonetheless effectively prevented from securing employment with the French football club, as they refused to pay the applicable transfer fee. The European Court of Justice ruled that while the transfer fee system did not constitute direct or indirect discrimination as set out in Article 45 Para 2 TFEU, it nonetheless directly affected players' access to the employment market in other Member States and was thus capable of impeding the freedom of movement for workers.

The European Court of Justice has also already defined when a non-discriminating national measure is not liable to restrict the freedom of movement of workers. The Court ruled in the *Graf*¹⁸ judgement, that an event may be too uncertain and indirect, a possibility for legislation to be capable of being regarded as liable to impede market access. In the case on hand, Mr *Graf* terminated his contract of employment with an Austrian employer to move to Germany and take up new employment there. In Austria, a compensation on termination of employment is paid if the employment relationship has continued for at least three years and the contract of employment is terminated by the employer. However, no compensation is being paid if employees terminate the employment contract themselves. The European Court of Justice found that the entitlement to compensation was not dependent on the worker choosing whether to stay with their current employer. It was rather dependent on a future and hypothetical event, namely the subsequent termination of the contract without this being at the worker's initiative. The event was therefore found to be "too uncertain and indirect"¹⁹ to be regarded as a breach of Article 45. This reasoning is still being employed today to determine whether a certain non-discriminatory national measure constitutes an obstacle to the free movement of workers.²⁰

It is worth noting that a restriction of the free movement of workers, if identified, may be justified using the same possible grounds as with indirect discrimination.²¹

17 European Court of Justice, C-415/93, *Bosman/Royal Club Liégeois SA*, ECLI:EU:C:1995:463.

18 European Court of Justice, 27.1.2000, *Graf/Filzmoser Maschinenbau GmbH*, ECLI:EU:C:2000:49.

19 European Court of Justice, 27.1.2000, *Graf/Filzmoser Maschinenbau GmbH*, ECLI:EU:C:2000:49.

20 Riesenhuber, 2012, p. 104.

21 Schlachter, 2018, p. 471.

Consequently, a restriction to the free movement of workers can be deemed lawful when it pursues one of the legitimate objectives listed in the Treaty or if it is justified by overriding reasons in the public interest and when the measure is necessary to achieve that aim as well as proportionate.

Two possible justifications for restricting the free movement of workers, frequently cited in the case law of the European Court of Justice, shall be highlighted:

(1) We talk about “company loyalty” whenever a national measure applies certain legal consequences to the loyalty of an employee to a certain employer.²² A longer period of employment with the same employer is considered desirable for the worker, but also holds concrete (including economic) benefits for the employer. Employees who have been with the company for a longer time are familiar with the internal processes, have experience in their specific field, and do not require time-consuming training and induction. The stability factor that employees provide with increasing seniority should also be taken into account. This is particularly important for customers who regularly value continuity in consulting.²³ The European Court of Justice itself has already stated in several judgments that company loyalty may potentially justify a measure that has been qualified as an obstacle to the free movement of workers. However, up until now, there is not a single case in which this justification has been effectively applied.

One of the judgments that explicitly addressed company loyalty is the so-called SALK ruling.²⁴ SALK is an abbreviation for a holding company for the clinics and hospitals of the Federal State of Salzburg (Land Salzburg), in Austria. In this case, a national measure provided that to determine the reference date for the advancement of an employee of Land Salzburg to the next pay step in his/her respective pay grade, account is to be taken of all uninterrupted periods of service completed with Land Salzburg. Experience with employers outside of the Land was only recognised with a period equal to 60%. Therefore, if an employee had spent ten years working at a hospital in Munich, Germany, and then sought to take up employment at a clinic in Salzburg, only 6 out of these 10 years would be taken into account in determining the reference date.

The European Court of Justice concluded that the justification of company loyalty did not apply because of the high number of potential employers (as each clinic and hospital is a legally distinct entity) coming under the authority of Land Salzburg. Instead, this pay scheme is intended to allow mobility within a group of distinct employers and not to reward the loyalty of an employee to one particular employer. Therefore, we can conclude that as far as a group of legally distinct employers is concerned, the justification of company loyalty is not accepted by the European Court of Justice.

22 Brameshuber, 2018, p. 16; Schlachter, 2018, p. 471.

23 Brameshuber, 2018, p. 16.

24 European Court of Justice, 5.12.2013, Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH/Land Salzburg, ECLI:EU:C:2013:799.

(2) Secondly, the “recognition of previous professional experience” may also constitute a justification for a restriction of the free movement of workers. It is usually argued that previous experience enables an employee to perform his/her duties better.²⁵ The European Court of Justice has already found that rewarding experience acquired in a particular field may constitute a legitimate objective of pay policy, if the measure is also necessary and proportionate.

In summary, the principle of equal treatment alone was deemed inadequate to effectively reinforce the principle of free movement of workers within the European Union. There’s a notable emphasis on ensuring that individuals encounter no barriers upon accessing a specific Member State’s labour market and do not suffer impediments upon engaging in that market.²⁶ Having introduced the concept of restrictions to free movement of workers and their possible justifications, the focus transitions toward two recent judgments of the European Court of Justice. Commencing with the case *Adelheid Krah v the University of Vienna* these judgements will be examined in further detail.²⁷

3. Case C-703/17 –Krah v University of Vienna²⁸

Dr. Adelheid Krah holds a doctorate in history and is a senior lecturer/postdoc at the University of Vienna. Due to an internal regulation of the University, previous professional experience of three years was credited to her within the scope of a retroactive classification into the pay grade of the Collective Agreement for university employees. However, all other previous professional experience, including another 4 1/2 years at the University of Vienna as well as 5 years at the University of Munich, were not taken into account.

Dr. Krah therefore filed an action with the Labour and Social Court of Vienna for all previous professional experience to be credited in order to be placed in a higher pay step of the Collective Agreement. The Labour and Social Court turned down her request, and Dr. Krah then appealed to the Higher Regional Court, Vienna. The court stayed the proceedings and referred two questions to the European Court of Justice for a preliminary ruling.

25 Schlachter, 2018, p. 471.

26 Barnard, 2016, pp. 287–288.

27 Please note that the judgment contains more legal aspects than the one featured in the article at hand. However, this particular aspect has not yet been widely discussed and was therefore specifically chosen. For more information regarding the topic of discrimination against (domestic) nationals in the Krah judgment, please refer to Burger-Ehrnhofer, 2019, p. 442; Friedrich, 2021, p. 31; Posch, 2021, pp. 149; and Potz, 2020, p. 99.

28 European Court of Justice, 10.10.2019, *Krah/Universität Wien*, ECLI:EU:C:2019:850.

- 1) Must EU law, in particular Article 45 TFEU be interpreted as precluding a provision under which previous periods of relevant professional service of a member of the teaching staff of the University of Vienna can be recognised only up to a total period of three years, irrespective of whether these are periods of service with the University of Vienna or with other national or international universities or similar institutions?
- 2) Is a system of pay that does not provide for full recognition of previous professionally-relevant periods of service, but at the same time links a higher rate of pay to the duration of employment with the same employer, at variance with the freedom of movement for workers in accordance with Article 45 (2)?

When delving into the legal framework, it becomes evident that this case revolves around the regulations governing the remuneration of university staff. These regulations are established at two levels: firstly, at the national level through the applicable Collective Agreement, and secondly, by the University of Vienna itself through its internal guidelines and regulations.

In Austria, Collective Agreements are a result of a negotiation between the social partners. They set the minimum rules that must be applied by Austrian universities.²⁹ However, they do not prevent those universities from internally adopting more favourable rules.

The applicable Collective Agreement contains rules regarding the evolution of the remuneration of academic staff. Those rules take seniority into account. Once in office, remuneration increases at regular intervals, with the time spent within the same university. Academic staff is divided into several subcategories corresponding to specific pay grades. Each pay grade is itself subdivided into pay steps, to which a certain salary corresponds. The university employees move from one pay step to the next within the specific pay grade.

The internal regulations of the University of Vienna provide for a period of up to four years of previous professional experience to be taken into account to decide the initial pay step upon recruitment. This amounts to a more favourable treatment offered by the University of Vienna in comparison to the national provisions and to other universities that merely apply the rules laid down by the Collective Agreements. The internal rules therefore act as an incentive for scientific staff to take up occupation at the University of Vienna. Dr. *Krah* was allocated to the third of five possible pay steps. However, she argued that a full recognition of her previous professional experience would have led to an even higher classification.

The European Court of Justice found that the internal regulation of the University of Vienna did not constitute a direct discrimination as the measure applies to all employees of the university regardless of their nationality.³⁰

²⁹ Risak, 2010, p. 41.

³⁰ European Court of Justice, 10.10.2019, *Krah/Universität Wien*, ECLI:EU:C:2019:850, m.n. 28.

The European Court of Justice ruled that the regulation could not be classified as indirect discrimination either.³¹ The Court highlighted that the practice of recognising previous relevant professional experience – limited to a specific number of years – could potentially detriment certain employees. Specifically, individuals with over four years of previous professional experience at universities other than the University of Vienna might face a setback compared to senior lecturers with an equal duration of service exclusively at the University of Vienna. However, this disparity impacts both Austrian employees and those from other Member States equally. According to the European Court of Justice, this provision did not inherently impact employees from other Member States more than it affected domestic employees, thus negating its classification as indirect discrimination.

The final consideration for the European Court of Justice was to determine if the provisions created a restriction to the free movement of workers. The Court observed that granting complete credit for previous professional experience would result in a new employee being placed in the same pay step as senior lecturers who have worked for an equivalent duration, albeit exclusively at the University of Vienna. In contrast, only recognising a set number of professional experience would result in senior lecturers who spent all their professional experience at the University of Vienna being placed in a higher pay step than new employees that accumulated the same amount of professional experience at another institution. Consequently, the European Court of Justice concluded that this measure indeed constitutes a restriction of the free movement for workers.³²

The European Court of Justice did not find the restriction justifiable. The University of Vienna submitted, by way of justification, that the limited acknowledgment of previous professional experience served the purpose of only recognising experience that is associated with enhanced work quality. Conversely, the University of Vienna argued that acknowledging experience beyond four years would not necessarily enhance performance. However, the European Court of Justice promptly dismissed this argument. Among other reasons, it highlighted that senior lecturers are often tasked not only with teaching but also with conducting research activities and handling administrative duties, negating the notion that experience beyond the specified duration would cease to contribute to their performance.

The interpretation of the European Court of Justice largely aligns with the evaluations made in the previous Chapter. The limited recognition of previous professional experience, while not qualifying as direct or indirect discrimination, indeed restricts the free movement of workers. The only concrete indication that we can employ to decide whether a national measure constitutes an obstacle to the free movement is the formula developed in the judgment *Graf*,³³ namely that the event must neither be too uncertain nor indirect to affect a worker's decision to take up occupation in

31 European Court of Justice, 10.10.2019, Krah/Universität Wien, ECLI:EU:C:2019:850, m.n. 38.

32 European Court of Justice, 10.10.2019, Krah/Universität Wien, ECLI:EU:C:2019:850, m.n. 49.

33 European Court of Justice, 27.1.2000, Graf/Filzmoser Maschinenbau GmbH, ECLI:EU:C:2000:49.

another Member State. Limiting the recognition of previous professional experience has a direct effect on the employees' right at the beginning of the employment relationship with the University of Vienna as the amount of time credited directly affects the remuneration received. This immediate consequence, without reliance on hypothetical future events, is likely to significantly impact employees' decisions regarding employment at the University of Vienna.³⁴

The fact that the European Court of Justice rejected the submissions of the University of Vienna is fundamentally plausible. As the Court has pointed out, the submissions only take into account one of a number of tasks owed by the potential employee. Furthermore, I cannot understand why only the first four years of professional experience should be relevant. Rather, the learning curve that a senior lecturer goes through is a progressively rising one. The gain in experience might be highest in the first years of one's activity, but it also increases after those first four years. For this reason alone, the submissions of the University of Vienna cannot be followed.

I also believe that the internal regulation is a measure that is expressly intended to act as an incentive for potential employees to take up employment at the University of Vienna. The Collective Agreement does not provide any possibility of crediting previous professional experience. The internal regulation therefore puts all employees with professional experience in a better position than the existing system at national level and should therefore primarily serve to increase the competitiveness of the University of Vienna. It is not clear why such an "incentive" cannot be suitable to justify a restriction.

Furthermore, the judgment is inaccurate in one other central point of its reasoning: The European Court of Justice concludes in paragraph 49 of the judgement that a full recognition of previous professional experience would cause employees who are nationals of other Member States and who have performed for more than four years the duties of a senior lecturer at a University in their home country to receive the same conditions of remuneration as employees who have worked as senior lecturers at the University of Vienna for the same amount of time.

Upon examining the legal framework, it becomes apparent that there are two different measures that are being applied to scientific staff: (a) The first rule, the one contained in the internal regulations of the University, is that up to four years of previous relevant professional experience are taken into account by the University of Vienna upon hiring senior lecturers, to determine their initial pay step within a specific pay grade. This has been accurately named "the past experience rule" by Advocate General *Bobek*.³⁵ (b) The second rule is that, once in office, during the contract concluded with the University of Vienna, seniority accrued within that job

34 Vinzenz and Burger, 2020, p. 528; Posch, 2021, pp. 148, 152. Also note Friedrich, 2021, p. 30, and Potz, 2020, p. 99, who argue that the present regulation does not even constitute a restriction to the free movement of workers, as mobile and immobile workers are treated the same.

35 Opinion of Advocate General Bobek, 23.5.2019, ECLI:EU:C:2019:450.

determines subsequent moves from one pay step to another. This is the provision laid down by the Collective Agreement and has been referred to as the “the seniority rule” by the Advocate General.

Both provisions can of course be subject to an examination about their compatibility with the freedom of movement of workers, but such an assessment should be made separately.

On the one hand, while it has previously been noted that the “past experience” rule included in the internal regulations of the University of Vienna may likely constitute a restriction to the free movement of workers,³⁶ it seems plausible, at least in assessment, that it may very well be justified.

On the other hand, the examination must also consider the “seniority rule”. As per the Collective Agreement, an employee is categorised into a particular pay grade and progresses through pay steps as the employment duration increases. If a worker who has accrued the same periods with a different employer begins a new employment relationship, they will be classified into the first of a certain number of pay steps within the same pay grade. This measure constitutes a restriction, as it might be seen as a potential deterrent for workers considering opportunities in the Austrian employment market. However, such a provision could conceivably be justified by the above-mentioned company loyalty aspect, as the Collective Agreement exclusively values durations spent with the same employer. Should an employee of the University of Vienna decide to take up employment as a senior lecturer elsewhere in Austria, he/she would similarly begin at the initial pay step within the specific pay grade.

Should the Court integrate these two criteria, as indicated by the wording of Paragraph 49, it would seemingly necessitate the automatic recognition of all previous professional experience upon placement into the remuneration structure. Consequently, the justification based on company loyalty would be rendered absurd since recognising only durations with the same employer would be impossible without also acknowledging past experiences with other employers. I hold the belief that the European Court of Justice did not intend its judgment to lead to problems of this sort.³⁷

Interestingly, the European Court of Justice was approached in a strikingly similar case shortly afterward. Consequently, the judgment *WN v Land Niedersachsen* shall now be examined and contrasted with the *Krah* judgment.

36 Compare also Posch, 2021, pp. 148, 152. Different views expressed by Friedrich, 2021, p. 30, and Potz, 2020, p. 99, who argue that the present regulation does not even constitute a restriction to the free movement of workers, as mobile and immobile workers are treated the same.

37 Vinzenz and Burger, 2020, p. 531.

4. *WN v Land of Land Niedersachsen*³⁸

The facts of the judgment are surprisingly similar to those in the judgment of *Krah. W.N.*, a German national, carried out teaching activities in France. In 2014, she was recruited as a teacher by the Land of Lower Saxony. Her employment contract is governed by the Collective Agreement for the public sector of the *Länder*, which determines her pay step allocation in the remuneration table.

The Land of Lower Saxony recognised *W.N.*'s professional experience acquired in France as equivalent to determine her classification in that table. The previous professional experience completed in France was taken into account only in part, as only 3 out of 17 years of *WN*'s professional activity in France were taken into consideration. Once again, it was up to the European Court of Justice to decide whether the partial recognition of previous professional experience poses an obstacle to the free movement of workers.

Paragraph 16(2) of the Collective Agreement provides that the relevant professional experience acquired with employers other than the local authority is taken into account only in part. Previous professional experience with the Land of Lower Saxony on the other hand, is recognised in full. The European Court of Justice stated that such a provision is likely to render the freedom of movement for workers less attractive, in breach of Article 45(1) TFEU, and, accordingly, constitutes an obstacle to that freedom.³⁹

In a next step, the European Court of Justice turned to examine the possible justifications submitted by the Land of Lower Saxony and the German Government.

The first argument submitted is that experience acquired with the same employer enables the workers concerned to perform their duties better. That advantage may be rewarded with a higher remuneration. The Court dismissed this argument by stating that the Land of Lower Saxony had already recognised *WN*'s previous professional experience as equivalent to that which she is to perform in the context of her work relationship with the Land of Lower Saxony. Therefore, it is not possible to argue that an experience that has already been considered as equivalent by the employer itself is then deemed as insufficient for the sake of granting a certain rate of remuneration.

The Land of Lower Saxony and the German Government also argued that the measure is justified by the objective of rewarding employees for their loyalty to their employer. According to their argument, the conditions of work, such as the teaching content, are similar in all state schools within the Land of Lower Saxony.

The European Court of Justice found that while state school teachers are employees of one single employer, they are assigned to different schools within that Land. The measure at issue does nothing to promote the loyalty of a teacher to a single school as the remuneration is payable even if that person changes schools

³⁸ European Court of Justice, 23.4.2020, *WN/Land Niedersachsen*, ECLI:EU:C:2020:299.

³⁹ European Court of Justice, 23.4.2020, *WN/Land Niedersachsen*, ECLI:EU:C:2020:299, m.n. 33.

within that Land. The measure therefore leads to a partitioning of the employment market for school teachers – on the one hand those teachers within the Land of Lower Saxony and on the other hand all teachers outside the territory of the Land and it therefore runs counter to the principle of freedom of movement of workers.

The European Court of Justice decided that the obstacle to the free movement of workers could not be justified and that the national legislation in question is therefore not compatible with Article 45 TFEU.⁴⁰

5. Conclusion

I would like to conclude with a swift comparison of the two rulings. As has been shown above, I believe that the European Court of Justice made a mistake in the Krah judgment when they combined the effect of two different provisions to constitute a restriction to the freedom of movement for workers. In the case of Land Niedersachsen, the limited recognition of previous professional experience and the advancement in remuneration based on seniority are contained in the same provision, namely the applicable Collective Agreement. It is therefore impossible to separate them in effect and therefore, I do agree with the European Court of Justice's reasoning in that particular case.

Secondly, I would also like to assess the considerations of the European Court of Justice regarding the justifications submitted. In both judgments, company loyalty and recognition of previous professional experience were referred to explicitly. I believe that both cases may be further employed to develop our understanding of these two justifications and their possible outer limits.

If we first turn toward company loyalty, I would like to bring to mind once again the judgment of the European Court of Justice in the SALK judgment.⁴¹ The Court stated that company loyalty cannot be employed if there are several legally distinct employers present and a certain provision simply allows mobility within this group of employers. In the case Land Niedersachsen, the European Court of Justice went one step further. While all state school teachers are the employees of one single employer, namely the Land of Lower Saxony, they are assigned to different schools within the *Land*. The European Court of Justice concluded that the deciding unit is the single state school, even if they are not legally independent entities. I believe that this step can be considered a development of the SALK ruling. If there is only one employer, but workers are assigned to functionally independent entities, even if they result to be legally dependent from that one employer, the justification of company

40 European Court of Justice, 23.4.2020, WN/Land Niedersachsen, ECLI:EU:C:2020:299, m.n. 55.

41 European Court of Justice, 5.12.2013, Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken Betriebs GmbH/Land Salzburg, ECLI:EU:C:2013:799.

loyalty cannot be employed. In the case *Land of Lower Saxony*, the Court found that the single schools had identical teaching content and terms of remuneration. However, they differ in other aspects, for example school reputation or teaching priorities and they compete against each other in the employment market. That is enough to consider them functionally independent from one another.

Finally, I would like to assess the statements of the European Court of Justice regarding the recognition of previous professional experience. In the *Krah* ruling, the Court explained that a limited recognition of previous professional experience as a senior lecturer could not be justified as senior lecturers are assigned more tasks than simply teaching, as they participate in administration and carry out research activities. I believe this is a smart move as the European Court of Justice did not have to go into more detail as to why the justification could not be employed. I believe that the deciding factor is that a member of the academic staff does not stop to accumulate experience, put in other words, there can be no cap to the knowledge acquired.⁴² To me, this is a reasoning that might be employed in the future if arguments of that sort are being submitted. Lastly, I would like to conclude by saying that the case *Land of Lower Saxony* contains one more interesting aspect that should be suitable for developing our understanding of the justification. Apart from the plain fact that a different weighting of previous professional experience will always be difficult to justify if the employer itself has already recognised the previous experience of a single employer as equivalent at one stage, so it will not be able to deem that experience as insufficient for another purpose such as the allocation into a remuneration table.

42 Also compare Friedrich, 2022, p. 31; Potz, 2020, p. 100.

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MOVING TOWARDS SECURE FLEXIBILITY – DEVELOPMENT OF THE SOCIAL DIMENSION OF THE EUROPEAN UNION



NÓRA JAKAB

Abstract

Access to decent working conditions and social protection is crucial for the economic and social security of the workforce and for well-functioning labour markets that create jobs and sustainable growth. At the same time, there is a growing number of people who do not have sufficient access to labour and social protection due to the type of employment or self-employment. In the development of the social dimension of the European Union, I consider the pursuit of employment security for workers in the labour market to be a major achievement. What does employment security mean? Who are the workers who need protection? These are the two fundamental questions of this study, which, since the adoption of the Maastricht Treaty, have lent a new dimension to our views on security and flexibility. I am convinced that we are no longer talking *about flexicurity* but *about secure flexibility*. At least, this is what the European Commission's efforts, the case law of the European Court of Justice and individual (Member) State decisions on employment status are leading us to believe.

Keywords: fair working conditions, information directive, minimum rights, labour and social law protection, social dimension, secure flexibility

1. Changes in the labour market

Over the last 25 years, since Maastricht, we have seen an increase in labour market flexibility. In 2016, a quarter of all new contracts were for “non-traditional” forms of employment, and over half of all new jobs in the last ten years were of “non-traditional” forms.¹ Digitalisation has facilitated the emergence of new forms of employment and demographic changes have led to a more diverse active population. The flexibility provided by new forms of employment has contributed significantly to job creation and labour market growth. More than five million jobs have been created since 2014, of which almost 20% correspond to new forms of employment. Their ability to adapt to economic change has allowed new business models to emerge, also in the social economy, and has enabled previously excluded people to enter the labour market.² The EU currently has 236 million women and men in employment, which means that the EU has the highest employment rate ever. Self-employment and atypical forms of employment together account for a significant share of the labour market. In 2016, 14% of workers in the EU were self-employed, 8% were temporary full-time employees, 4% were temporary part-time employees, 13% were permanent part-time employees and 60% had a full-time contract of indefinite duration.³

In recent years, the labour market has undergone fundamental changes, influenced by the rise of subcontracting and outsourcing of business and personal services activities, as well as the digitalisation of production processes and the spread of the online platform economy. The share of self-employment in the EU is relatively high and has increased significantly in recent years, especially in the online platform economy. While these developments have increased the flexibility and accessibility of the labour market, in some cases they have also led to difficult working conditions in the online platform economy and beyond. Some self-employed workers, even if not fully integrated into their employer’s business as employees are, may not be entirely independent of their employer or have sufficient bargaining power to shape their working conditions. In addition, the COVID-19 crisis has made many self-employed

- 1 Non-traditional forms include permanent part-time and temporary full-time and part-time employment. COM (2017) 797: Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Brussels, 21.12.2017.
- 2 Here I note, among other things, the entry of the recipients of equal opportunities policy, which strongly discourages labour law from applying flexible rules.
- 3 Council Recommendation on access to social protection for employed and self-employed workers, COM(2018) 132 final, p. 1.

workers even more vulnerable, as their loss of income has been exacerbated by weak or non-existent national social security systems and targeted support measures.⁴

The self-employed are also a heterogeneous group. Most people voluntarily choose to become self-employed with or without employees, taking the risk of becoming self-employed, while around 20% become self-employed because they cannot find a job as an employee. Some enjoy good quality jobs and autonomy; others, less than 10% of self-employed workers, experience economic dependence and financial vulnerability. Among the new businesses set up each year in the EU, the share of self-employment is between 15% and 100% in Member States where data allowed analysis.⁵ For newly launched businesses established by self-employed people, the survival rate is typically between 30% and 60% after the first five years.⁶

In the labour market, *interdependence (on the part of both parties)* is implicit in the relationship when working for someone else, whether independently or not. The *pacta sunt servanda*, the assumption of rights and responsibilities, obliges both contracting parties to comply with the contract. At the same time, when the *partnership moves away from a state of interdependence*, there is need for *transparency, predictability, security: protection*. Since Maastricht, this protection has increasingly involved the definition of fair working conditions, the organisation of collective bargaining to improve working conditions and the extension of social protection to workers in the labour market.

2. Employee or worker?

I use the term *worker*: the extension of the concept of worker can be observed in the case law of the European Court of Justice. Regarding the definition of worker, it is interesting to note the relationship between Community and national law, which needs to be seen through the lens of the free movement of workers. In an early ruling, the European Court of Justice stated that the concept of worker is a Community concept, since if it were left to the Member States to define it, they could

4 See: Report of the European Parliament of 13 October 2021 on the situation of artists and cultural regeneration in the EU (2020/2261(INI)) Committee on Culture and Education [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0283_EN.html (Accessed: 16 October).

Commission Communication – Guidance on the application of EU competition law to collective agreements on working conditions for self-employed individuals [Online]. Available at: file:///G:/DOCUMENTS/Competition%20vs%20collective%C3%ADv%20t%C3%A1rgyal%C3%A1s/C_2021_8838_1_HU_annexe_acte_autonome_part1_v1.pdf (Accessed: 16 October).

5 Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Greece, Hungary, Ireland, Lithuania, Luxembourg, Malta, Poland, the United Kingdom and Cyprus.

6 Council Recommendation on access to social protection for employed and self-employed workers, COM, 2018, pp. 3–4.

discriminate against workers, contrary to the principle of free movement of persons. At the same time, it was noted that the Court of Justice gave a broad interpretation of the concept.⁷ Moreover, the criteria for the status of worker had to be defined. In the *Levin* case⁸, the Court ruled that the concept of worker must be interpreted by reference to generally accepted principles and based on the generally accepted meaning of the term, taking account of the context and the objectives of the basic Treaty. The *Levin* case was followed by the *Lawrie-Blum* case⁹, according to which the status of worker must be defined according to objective criteria which distinguish the employment relationship from other activities by reference to the rights and obligations of the persons concerned. On this basis, an employment relationship is one in which a person performs work of economic value for another person, under the latter's instructions, for which he/she receives remuneration in return for the work. It should be seen that this formulation covers a wider range of employment relationships. Thus, the *Lawrie-Blum* definition essentially promotes the free movement of workers, not just employees. The EU legal concept of "worker" must be defined according to objective criteria which characterise the employment relationship in the context of the rights and obligations of the persons concerned. In this regard, it is settled case-law that the essential characteristic of an employment relationship is the fact that a person provides services for a specified period of time for the benefit

- 7 Judgment of the Court of 19 March 1964 – Mrs M.K.H. Hoekstra (née Unger) v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten (Administration of the Industrial Board for Retail Trades and Businesses) - Reference for a preliminary ruling: Centrale Raad van Beroep - Netherlands - Case 75/63. *'Articles 48 to 51 of the treaty, by the very fact of establishing freedom of movement for "workers", have given community scope to this term. If the definition of this term were a matter within the competence of national law, it would therefore be possible for each member state to modify the meaning of the concept of "migrant worker" and to eliminate at will the protection afforded by the treaty to certain categories of person.'* See also Gyulavári, 2014, pp. 62–64.
- 8 Judgment of the Court of 23 March 1982 – D.M. Levin v Staatssecretaris van Justitie – Reference for a preliminary ruling: Raad van State – Netherlands – Right of residence – Case 53/81. *'The answer to be given to the first and second questions must therefore be that the provisions of community law relating to freedom of movement for workers also cover a national of a member state who pursues, within the territory of another member state, an activity as an employed person which yields an income lower than that which, in the latter state, is considered as the minimum required for subsistence, whether that person supplements the income from his activity as an employed person with other income so as to arrive at that minimum or is satisfied with means of support lower than the said minimum, provided that he pursues an activity as an employed person which is effective and genuine...'* See also Gyulavári, 2014, pp. 38–41, 61–66.
- 9 Judgment of the Court of 3 July 1986 – Deborah Lawrie-Blum v Land Baden-Württemberg. Reference for a preliminary ruling: Bundesverwaltungsgericht – Germany – Worker – Trainee teacher – Case 66/85: *'The term "worker" in Article 48 has a community meaning. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship is that a person performs services of some economic value for and under the direction of another person in return for which he receives remuneration. The sphere in which they are provided and the nature of the legal relationship between employee and employer are immaterial as regards the application of article 48.'*

and under the direction of another person in return for remuneration.¹⁰ In this light, the Court of Justice has already ruled that being a “self-employed person providing services” under national law does not preclude a person from being an “employed person” within the meaning of EU law if his/her self-employment is only apparent and thus in reality disguises an employment relationship.¹¹

The ILO framework offers the best definition of the self-employed: the value of the self-employed worker’s labour depends directly on the benefits of the goods or services he/she produces. He/she is solely responsible for the operation of the business, working for one or a small number of clients. The self-employed worker differs from the employee in that the latter has a stable employment relationship, with possible interruptions in its continuity.¹² Some self-employed workers, even if not fully integrated into their employer’s business as employees are, may not be fully independent of their employer or have sufficient bargaining power to influence their working conditions. In addition, the COVID-19 crisis has made many self-employed workers even more vulnerable, as their loss of income has been exacerbated by weak or non-existent national social security systems and targeted support measures.¹³

The Court ruled that a collective agreement for self-employed service providers could be considered to be the result of a dialogue between the social partners if the service providers were in a similar situation to that of employees¹⁴, and confirmed that ‘in today’s economy, it is not always possible to determine simply the status of self-employed service providers’. The Court also stated that

a service provider may lose the status of an independent economic operator and thus its status as an undertaking¹⁵ if it does not determine its market conduct autonomously but is wholly dependent on its principal, since it does not bear any of the

10 Judgment in Case C46/12, EU:C:2013:97, paragraph 40 and the case law cited; Judgment in Case C270/13, EU:C:2014:2185, paragraph 28.

11 See, to that effect, Allonby judgment – C256/01 – EU:C:2004:18, paragraph 71.

12 Resolution concerning the International Classification of Status in Employment (ICSE), adopted by the Fifteenth International Conference of Labour Statisticians (January 1993).

13 Report of the European Parliament of 13 October 2021 on the situation of artists and cultural regeneration in the EU (2020/2261(INI)) Committee on Culture and Education [Online]. Available at: https://www.europarl.europa.eu/doceo/document/A-9-2021-0283_EN.html (Accessed: 16 October). The possibility of self-employed people accessing job-search schemes is also of interest. While in Germany, statistics show that self-employed people made little use of job-search subsidies during COVID-19, in Hungary, this was not even statistically measurable. In order to receive a job-search allowance, a self-employed person has to cease self-employment.

14 Judgment of the Court of 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411, paragraph 31.

15 Judgment of the Court of 4 December 2014, FNV Kunsten Informatie en Media v Staat der Nederlanden, C-413/13, ECLI:EU:C:2014:2411, paragraph 32.

financial and commercial risks arising from the principal's activities and acts as an auxiliary body integrated into the principal's undertaking.¹⁶

Within the group of the vulnerable self-employed, however, we need to make further distinctions. This is because vulnerability is not necessarily the same as being in a situation comparable to that of employees. For example, self-employed individuals may be in a *weak bargaining position vis-à-vis their partners* and therefore may *not be able to significantly influence their working conditions*, but this does not mean that they are in a similar position to that of employees. In some cases, however, they may be considered as apparently self-employed and may be reclassified as workers by national authorities/courts. This may be the case for self-employed individuals who provide their services exclusively or predominantly to a business partner, possibly in a situation of economic dependence on that business partner. Such self-employed individuals are generally not independent in determining their behaviour in the market and are highly dependent on their business partner and are an integral part of the business partner's enterprise. They are also more likely to receive instructions on how to carry out their work.¹⁷ Alternatively, they may be self-employed individuals working "alongside" employees, who are "alongside" employees of the same business partner, performing the same or similar tasks to those of the business partner, are in a similar position to that of employees in that they provide their services under the direction of their business partner, do not bear the commercial risks associated with the business partner's activities and do not have any independence in the conduct of the economic activity concerned.¹⁸ They may also be self-employed individuals working through digital labour platforms. The emergence of the online platform economy and digital platform work has created a new reality for some self-employed individuals who are in a similar position to employees vis-à-vis the digital work platforms through which or for which they perform their work. Self-employed individuals can become dependent on digital platforms, especially for access to clients, and are often forced into a situation of being offered work with little or no room for negotiating their terms of employment, including their remuneration. Digital job platforms can usually impose the terms of their contractual relationship unilaterally, without prior information of or consultation with individual self-employed workers.

16 Judgment of the Court of 4 December 2014, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, C-413/13, ECLI:EU:C:2014:2411, para 33; Judgment of the Court of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio v Compañía Española de Petróleos SA*, C217/05, ECLI:EU:C:2006:784, paras 43–44.

17 Communication from the Commission: Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, point 243 [Online]. Available at: file:///G:/DOCUMENTS/Competition%20vs%20collective%C3%ADv%20t%C3%A1rgyal%C3%A1s/C_2021_8838_1_HU_annexe_acte_autonome_part1_v1.pdf (Accessed: 16 October).

18 *Ibid.*, point 26.

Recent case law and legislative developments at national level provide further guidance on the comparability of such self-employed and employees. In the context of reclassification cases, national courts are increasingly recognising the dependence of service providers on certain types of platforms or even the existence of an employment relationship. Based on Christina Hiessl's collection¹⁹, the following statistics on the employment status of platform workers are presented.

Country	Number of cases	Employee (UK: worker)
AT	10	8
BE	9	3
CH	12	10
DE	5	1
DK	3	1
ES	66	53
FI	6	5
FR	87	37
IE	3	1
IT	20	8
LU	2	0
NL	12	6
NO	2	2
SE	9	2
UK	21	17

From the above data, it can be concluded that in most cases, the dependency/vulnerability has led to the extension of labour law and thus social protection to platform workers. This certainly represents a move towards more secure flexible employment in the European labour market.

¹⁹ Christina Hiessl, 2022.

3. In search of fundamental values

The question arises as to what protection is afforded to workers on the new platform and vulnerable workers in general.²⁰ *Bellice* himself argues that the answer for labour law may be to return to its core values.

In the time since Maastricht, it can therefore be said that the *fundamental value of labour law is that it provides economic security* and thus *predictability*: both internally, by means of rules that protect the worker, and externally, by the state, by providing a social safety net in case the worker is unable to work in a situation of disruption. Another very important value is a healthy and safe working environment.

In 1998, the ILO set out the fundamental rights that all states must respect:

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced and compulsory labour;
- c) the effective abolition of child labour;
- d) the elimination of discrimination in respect of employment and occupation.²¹

20 Mangan refers to a Uber ruling in North Carolina, which found that Uber is not a technology company. According to the ruling, just because someone uses a technology, does not mean they are a technology company. Mangan warns that this argument ignores the changes that have taken place. For more on this, see O'Connor et al. v Uber Technologies, Inc., C.A. No. 13-03826-EMC (N.D. Cal.), and Mangan, 2018, p. 70. See also Prassl and Risak, 2016, pp. 619–651; Davidov, 2017.

21 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised on 15 June 2010).

‘... The International Labour Conference ... (2.) Declares that all Member States, even if they have not ratified the Conventions in question, are bound by their membership of the Organization, in good faith and in conformity with the Constitution, to respect, promote and fulfil the fundamental rights to which these Conventions refer. These principles are: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the abolition of forced and compulsory labour in all its forms; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation. ...’

These rights should be fundamental rules of the game, regardless of the playing field.²² Security is therefore the preservation of core values within labour law.²³ However, core values have been further concretised with the development of the social dimension. In what way?

In the second half of the 20th century in Europe, changes occurred essentially at two levels: on the one hand, employers modified the terms of the agreement in ways that the efficient functioning of the business required. On the other hand, the modified agreements transformed the workforce, and new legal categories emerged: casual worker, part-time worker, temporary agency worker, bogus self-employed worker, person with a status similar to that of an employee, etc.²⁴ Two distinct strategies for managing changes in the employment relationship have appeared at national and supranational level. One of the re-regulatory strategies aims to extend the scope of labour law. This strategy is based on the theory that there is a grey area between subordination and self-employment, where subordination and autonomy are more nuanced. The redefinition has sought to extend labour law to as many new forms of agreement as possible.²⁵

The second re-regulatory strategy aspired to regulate and protect new atypical forms of employment through ad hoc legislation. This approach assumed that legal relationships which had some elements of contingent work (e.g. continuity, full-time work) deserved some level of protection. This view does not focus on the subject matter of employment relationships, but rather on taxonomy and classification.²⁶

But in the 21st century, *the idea of a predominantly secure labour market* is gaining ground in Europe. In this, the European Pillar of Social Rights is of fundamental importance. Since I believe that the interpretation of flexibility and security at European level must be implemented within the social dimension of the

22 Mangan also refers to what Bellice pointed out in the case of algorithms. Namely, that algorithms can lead to inequalities, i.e. discrimination. Mangan, 2018, p. 72.

23 I do not analyse Freedland and Countouris' theory of personal work relations in this research, as I do not consider the concept feasible. However, there are several elements in the concept that deserve to be highlighted. One of these is about values in work. It is pointed out that, rightly, the normative basis of labour law is the balancing of the positions of parties in unequal situations. Human dignity is a first-generation right with which we are all familiar and which is enshrined in many international documents. Freedland and Countouris complement this thinking on dignity with the concept of autonomy and equality. Autonomy means that a person makes decisions about his or her own life (work life) autonomously, without any constraints. This is complemented by equality, which, like human dignity, is also one of the oldest first-generation human rights. However, equality is thought of in terms of Amaryta Sen's concept of equality, which is equality based on ability, which is considered the most appropriate for labour and social law. Dignity is closely linked to the person of the worker, based on personal work. Freedland and Countouris, 2011, pp. 372–376.

24 On self-employment, see Szekeres, 2018, pp. 472–484; Countouris, 2007, p. 4.

25 Similarly, Act I of 2012 on the Labour Code sought to extend labour law to as many atypical jobs as possible.

26 Countouris, 2007, p. 5. Mark Freedland and Nicola Countouris therefore propose a new taxonomy by introducing the concept of personal employment relationships. See in detail Freedland and Countouris, 2011, pp. 190–208; Deakin and Morris, 2012, pp. 200–202, pp. 219–224.

European Union, I will now examine this and also analyse the relationship between the social dimension of the Union and European labour law, in particular decent working conditions.

On 26 April 2017, the Commission published its proposal²⁷ on the European Pillar of Social Rights. The Pillar was finally launched at the Social Summit on Fair Jobs and Growth in Gothenburg on 17 November 2017, further strengthening the social dimension of the Union in cooperation with the European Parliament and the Council. The Pillar sets out what the European Union considers to *be the minimum level of social protection* to maintain and enhance competitiveness, as Member States can promote social rights in a more ambitious way than the rights set out in the Pillar. The Pillar states that economic and social development can be pursued together with the following principles: *equal opportunities and the right to work, decent working conditions, social protection and social inclusion*. These can be seen as the pillars underpinning the employment relationship in the development of the employment model. *The section on decent working conditions describes the basic rules of the game of labour law and, in my opinion, defines a minimum level of security*, in which the following principles and rights are the pillars: safe and flexible employment, wage protection, information on the terms and conditions of employment, protection against dismissal, social dialogue and employee participation, work-life balance, a healthy, safe and properly designed working environment and data protection.

27 The Pillar was born out of the combination of several documents. Communication from the Commission to the European Parliament, The Council, The European Economic And Social Committee and the Committee of the Regions: Establishing a European Pillar of Social Rights, Brussels, 26.4.2017 COM(2017) 250 final;

Commission Recommendation of 26 April 2017 on the European Pillar of Social Rights, Brussels, 26.4.2017 C(2017) 2600 final; Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights, Brussels, 26.4.2017, COM(2017) 251 final;

Commission Staff Working Document accompanying the document Communication from the Commission to the European Parliament, The Council, The European And Social Committee and the Committee of the Regions: Establishing a European Pillar of Social Rights, Brussels, 26.4.2017 SWD(2017) 201 final;

Commission Staff Working Document: Report of the public consultation 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: Establishing a European Pillar of Social Rights, Brussels, 26.4.2017, SWD(2017) 206 final.

The first preliminary draft of the Pillar covered three main areas:

‘Equal opportunities and access to the labour market, including skills development, lifelong learning and active support for employment to increase employment opportunities, facilitate employment transitions and improve the employability of individuals;

Fair working conditions that ensure an appropriate and reliable balance between the rights and obligations of employers and workers, and between flexibility and security of employment, in order to promote job creation, employment and subsequent career changes, and to encourage social dialogue;

Adequate and sustainable social protection and access to high-quality basic services, including childcare, health and long-term care, to ensure decent living conditions and protection against risks, and to enable individuals to participate fully in employment and society in general.’

4. Recent results relating to the social dimension

György Kiss writes that the dogmatics and historical development of labour law proves that labour law can only be represented in a unified view of individual and collective relations. These two parts of labour law are not loosely connected but are correlatively related.²⁸ This is indeed the case. The protection of the working person in Europe means the protection of the EU worker against vulnerability. The future of the social dimension in relation to decent working conditions could be shaped by rethinking the working conditions directives through the lens of the protection of the EU worker and the new employment relationship. I believe that this has been achieved in the revision of the Information Directive. And the latest Commission guidelines confirm that an essential element of protection in the case of work done for others in the labour market is the possibility of collective bargaining with a view to improving working conditions. In other words, the correlative relationship between individual and collective labour law is also strongly manifested in the case of new types of work. If we look at the case law²⁹ in the European (Member) States, we see that new types of workers claim certain protections, one of the most important of which is the right to organise and to improve working conditions through collective bargaining.

5. Transparent and predictable working conditions

The aim of this section is to examine how the Information Directive has changed since 1991. The question is whether the legislator has managed to respond to changes in employment.

The Pillar provides guidance for *a renewed upward convergence of* social standards in the face of the changing realities of the world of work, and for a hypothetical balance between flexible and secure employment. One major manifestation of this is the Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, which contributes in particular to Pillar principles 5 (Secure and adaptable employment) and 7 (Information about employment conditions and protection in case of dismissals).

28 Kiss, 2005, p. 313.

29 See in particular: *Uber BV and others (Appellants) v Aslam and others (Respondents)*, Case ID: UKSC 2019/0029. [Online]. Available at: <https://www.supremecourt.uk/cases/uksc-2019-0029.html> (Accessed: 27 December 2023).

Judgement of The Revenue Commissioners v Karshan Midlands t/a Domino's Pizza. [Online]. Available at: https://www.courts.ie/acc/alfresco/e4ee7c3d-0e02-4a33-82b7-26458d895138/2023_IESC_24.pdf/pdf#view=fitH (Accessed: 27 December 2023), *Cour du travail de Bruxelles - 2022/AB/12 - 2022/AB/43 - 2022/AB/118*.

Principle 5 states that irrespective of the nature and duration of the employment relationship, workers have the right to fair and equal treatment in terms of working conditions, social protection and access to training, and that the shift to permanent forms of employment should be promoted; that employers should be given the flexibility to adapt quickly to changes in the economic environment, in accordance with the law and collective agreements; the need to promote innovative forms of work that ensure quality working conditions, to encourage entrepreneurship and self-employment and to facilitate occupational mobility; it also states that employment relationships that lead to precarious working conditions should be prevented, *inter alia* by prohibiting abuse through atypical contracts, and that any probationary period should be of a reasonable duration. Principle 7 states that workers have the right to be informed in writing of their rights and obligations arising from their employment relationship, including during the probationary period, at the beginning of the employment relationship, and that they have the right to be informed of the reasons for dismissal and to a reasonable period of notice before dismissal, as well as access to effective and impartial dispute resolution and to remedy, including appropriate compensation, in the event of unfair dismissal. I assume that the Pillar has and will have a considerable impact on the change in European labour law rules. Indeed, the Directive, in connection with the Pillar, expands the scope of information, thereby strengthening the protection of the worker. The Directive also contributes to the implementation of the following principles set out in the European Pillar of Social Rights: *education, training and lifelong learning, gender equality, secure and flexible employment, gender equality, information on employment conditions and protection in the event of dismissal, social dialogue and worker participation*.³⁰

The Directive replaces the Directive on the obligation to provide written information with a new instrument to ensure transparency of working conditions for *all*

30 Article 31 of the Charter of Fundamental Rights of the European Union provides that every worker has the right to working conditions which respect his or her health, safety and dignity, to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid holidays. In its Resolution on working conditions and precarious employment of July 2017, the European Parliament called on the Commission to review the Directive on the obligation to provide written information to take account of new forms of employment. In their opinions on the Pillar, the European Economic and Social Committee and the Committee of the Regions highlighted the shortcomings in the area of worker protection and stressed the need for action at EU level to define a framework for decent working conditions and to strike a balance between flexibility and security. The general objective of the proposed directive was to promote more secure and predictable employment while ensuring the adaptability of the labour market and improving living and working conditions. The specific objectives that enabled the general objective to be achieved were: *improving workers' access* to information on their working conditions; *improving working conditions* for all workers, in particular for new and non-traditional forms of employment while leaving room for adaptation and labour market innovation; improving compliance with working conditions standards through *better enforcement*; and improving transparency in the labour market *without imposing excessive burdens on businesses of all sizes*. See on this Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preambles (4) and (6).

workers, as well as new substantive rights to improve the predictability and security of working conditions, *especially for people in precarious employment*.³¹ This is to be achieved through the provision in Chapter II requiring updated basic information on the employment relationship for all EU workers, including the estimated 2–3 million people who are currently not covered by the Written Information Directive, which leaves the definition of “worker” and “employment relationship” to national legislation. In order to clarify the scope of the Directive, the definition of “worker” is based on the settled case law of the Court of Justice of the European Union (CJEU) concerning the determination of the status of workers³² and limits the possibility for Member States to exclude workers with short-term or casual contracts to extend the scope of the Directive. This is a very important provision. It is about determining the level of protection for new types of employment.

In view of the increasing number of workers excluded from the scope of Directive 91/533/EEC on the basis of exclusions made by Member States under Article 1 of that directive, it is necessary to replace those exclusions with a possibility for Member States not to apply the provisions of this Directive to an employment relationship with predetermined and actual working hours that amount to an average of three hours per week or less in a reference period of four consecutive weeks. The calculation of those hours should include all time actually worked for an employer, such as overtime or work supplementary to that guaranteed or anticipated in the employment contract or employment relationship. From the moment when a worker crosses that threshold, the provisions of this Directive apply to him or her, regardless of the number of working hours that the worker works subsequently or the number of works hours provided for in the employment contract. Workers who have no guaranteed working time, including those on zero-hour and some on-demand contracts,

31 Article 2 – Definitions This Article lays down the criteria to be used to determine the status of worker for the purposes of this Directive. These criteria are based on the case-law of the CJEU, as developed since Case C-66/85 Lawrie-Blum, and most recently referred to in Case C-216/15 *Ruhrlandklinik*. The definition of these criteria is necessary because the REFIT evaluation has shown that the scope of the Written Information Directive differs between Member States, based on their understanding of “worker”, “employment relationship” and “employment contract”, with the risk that an increasing number of non-traditional workers such as domestic workers, on-call workers, seasonal workers, voucher workers and platform workers are excluded from the scope of the Directive. The proposed Directive would also cover these workers, provided they meet the criteria set out above.

Proposal for a Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union. SWD(2017)205 final, pp. 21 and 25 and footnote 50. See also ‘A European Agenda for the Community Economy’, Commission Communication (COM(2016) 356 final) 2.4. SWD(2017)205 final, p. 24.

32 Judgment of 3 July 1986, Deborah Lawrie-Blum, Case 66/85; 14 October 2010, Union Syndicale Solidaires Isère, Case C-428/09; 9 July 2015, Balkaya, Case C-229/14; 4 December 2014, FNV Kunsten, Case C-413/13; and 17 November 2016, *Ruhrlandklinik*, Case C-216/15.

are in a particularly vulnerable situation. Therefore, the provisions of this Directive should apply to them regardless of the number of hours they actually work.³³

Directive 91/533/EEC contains a list of essential aspects of the employment contract or employment relationship on which workers must be informed in writing. To take account of changes on the labour market, in particular the spread of atypical forms of employment, it was necessary to recast this list, which could be extended by the Member States.

If the nature of the work, *for example in the case of a call-in contract*, does not allow for fixing a specific working time, the employer must inform workers of the way in which their working time will be determined, including the periods when they may be called in and the minimum notice period before the work is ordered to start.³⁴

Among the complementary measures regarding on-call work contracts, where Member States allow the use of on-call or similar contracts, they should take one or more of the following measures to prevent abusive practices: (a) restrictions on the use and duration of on-call or similar employment contracts; (b) a rebuttable presumption of the existence of an employment contract which determines the minimum number of hours paid on the basis of the average number of hours worked in a given period; (c) other equivalent measures to ensure effective prevention of abusive practices.³⁵

The information on social security schemes should include details of the social security institutions receiving social security contributions, where applicable, in respect of sickness, maternity, paternity and parental benefits, occupational accident and occupational disease benefits, old-age, invalidity, survivors' and unemployment benefits, early retirement benefits and family benefits. Employers are not obliged to provide this information if the employee chooses the social security institution. Information on the social protection provided by the employer should include, where applicable, the fact of coverage by a supplementary pension scheme within the meaning of Directive 2014/50/EU of the European Parliament and of the Council or Council Directive 98/49/EC.³⁶

Given the increasing use of digital means of communication, the *written information* required by this Directive *may also be provided by electronic means*. In order to assist employers in providing timely information, Member States should be able

33 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preambles (11) and (12) and Article 1 (3).

34 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (21), Article 4.

35 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Article 11.

36 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (22), Article 4.

to provide templates at national level which provide relevant and sufficient information on the relevant legal framework. National authorities and social partners may further develop these templates at sectoral or local level. The Commission will support Member States in developing templates and models and will make them widely available where appropriate.³⁷

Workers employed on a mostly or totally unpredictable schedule should be guaranteed a minimum degree of predictability, where the employer determines the working hours in the first instance, either directly, for example by ordering work, or indirectly, for example by asking the worker to respond to requests from clients.³⁸

The reference hours and days, i.e. the periods during which the employer can ask the employee to work, must be set out in writing at the beginning of the employment relationship. A reasonable minimum notice period, i.e. the time between the employee's notification of the new assignment and the start date of the assignment, is another necessary element of job predictability in employment relationships where the work schedule is not or mostly not predictable. The length of the prior notification period may vary depending on the needs of the sector concerned, but it should provide adequate protection for the worker. The application of the minimum notice period is without prejudice to Directive 2002/15/EC of the European Parliament and of the Council.³⁹ Workers should be given the possibility to refuse to carry out an assigned activity if it falls outside the reference hours and days or if they have not been informed of it within the minimum period of notice, without adverse consequences for them. In addition, workers should be able to accept the working time ordered if they so wish.⁴⁰ In the case of a worker whose work schedule is not at all or mostly not predictable, where the worker has agreed with his or her employer on a specific pattern of working time, the worker should be able to plan accordingly. The worker should be protected against loss of earnings resulting from late cancellation of agreed mandated work by providing adequate compensation.⁴¹

On-call or similar contracts, including zero-hours contracts, where the employer asks the worker to do the work flexibly and when it is needed, are particularly unpredictable for workers. Member States which allow such contracts should ensure that effective measures are in place to prevent abuse of such contracts. Such measures may limit the use and duration of such contracts, apply a rebuttable presumption of the existence of an employment contract or employment relationship guaranteeing

37 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (24).

38 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (30).

39 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (31).

40 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Articles 33 and 10.

41 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preamble (34).

the number of hours paid based on the number of hours worked in the previous reference period, or may be other equivalent measures to ensure effective prevention of abuse. The implementation of this Directive should not constitute grounds for restricting existing rights in this area under existing Union law or national law, nor should it constitute a legal basis for reducing the general level of protection afforded to workers in the field covered by this Directive. In particular, it should not justify the use of zero-hour contracts and similar employment contracts.⁴²

The new forms of employment are covered by this Directive. In addition to the efforts made by workers and employers to facilitate employment, a minimum level of security must be ensured in labour law. The minimum rights for EU workers are therefore as follows:

- a) information on the employment relationship,
- b) the maximum duration of the probationary period,
- c) the possibility of parallel employment,
- d) minimum predictability of work, even if a worker's work schedule is totally or mostly unpredictable,
- e) prevention of abusive practices in the case of on-call or similar employment contracts by taking measures,
- f) applying for a more predictable form of employment with more secure working conditions,
- g) guarantees for compulsory training,
- h) the possibility to derogate from minimum rights in collective agreements in favour of the worker.

I believe all this is very important because it sets the framework for decent work in the European Union. The persons covered by the Directive may therefore include workers on zero-hour contracts, such as fast-food workers, logistics centre workers, supermarket shelf-stockers, domestic or voucher workers⁴³, and platform workers, such as on-call drivers or couriers, provided that the above criteria for the definition of worker are met.⁴⁴

In my view, this means that European labour law is clearly moving towards safer employment. Provided that workers meet the definition of an EU worker, domestic workers, on-call workers, seasonal workers, voucher workers, platform workers, trainees and apprentices are all covered by this Directive.

42 Directive of the European Parliament and of the Council on transparent and predictable working conditions in the European Union, Preambles (35), (47).

43 The employer receives a voucher from a third party (usually a government authority) used as payment to a worker providing the service instead of cash. [Online]. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/transparent-and-predictable-working-conditions-in-the-eu.html> (Accessed: 19 December 2023).

44 [Online]. Available at: <https://eur-lex.europa.eu/EN/legal-content/summary/transparent-and-predictable-working-conditions-in-the-eu.html> (Accessed: 19 December 2023).

6. Concluding thoughts

Some of the new forms of employment that have emerged since Maastricht can differ significantly from traditional employment relationships in terms of predictability, creating uncertainty for the workers concerned about their rights and social protection. Consequently, in this changing world of work, there is an increasing need for workers to be fully informed of basic working conditions, in a timely manner and in a written form that is easily accessible to them. Therefore, this study analysed the revised Information Directive in terms of its responsiveness to changes in the labour market and the economy since the adoption of the Maastricht Treaty.

To provide an appropriate response to the emergence of new forms of employment, I have attempted to define *new minimum rights* for EU workers, aimed at increasing the security and predictability of employment relationships.

It is therefore of great importance in the development of the social dimension of the European Union that the desire for employment security for labour market workers is becoming more and more evident in the light of the documents of the European Commission, the case law of the Court of Justice of the European Union and the examination of (Member) State decisions on the issue of employment status. For the purpose of this study, it was important to clarify what is meant by employment security, what the values that constitute the minimum level of protection under labour law are, and how this is complemented by social protection. In this trajectory since Maastricht, the definition of the vulnerable worker who needs protection is very important. All this has lent a new dimension to our views on security and flexibility since the adoption of the Maastricht Treaty. I am convinced that we are no longer talking about *flexicurity*, but about *secure flexibility*. The worker who is vulnerable in this new type of employment therefore has a legitimate claim to protection under labour and social law. Of course, each case is different, but the discourse on protection and the classification of employment status remain key factors in the advancement of the social dimension.

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PART IV

INSTITUTIONAL REFORMS
IN THE CONTEXT OF
THE FUTURE OF EUROPE
CONFERENCE

ULTRA VIRES WITHOUT END? THE GERMAN PERSPECTIVE ON THE FUTURE OF EUROPE CONFERENCE



JAN PHILIPP SCHAEFER

Abstract

The paper deals with the German perspective on the FoEC reform process within the framework of the European Union. In this context, an overview is given of the relevant case law of the German Federal Constitutional Court, which is the actual key player in integration policy in the Federal Republic of Germany. The jurisprudence of the Federal Constitutional Court reflects the doctrines developed by German European legal scholarship since the 1950s, which focus on the compatibility of post-national sovereignty with the constraints of integration policy. This article introduces the history of German European legal scholarship. Only from this perspective can the German positions on European budgetary sovereignty, the democratic development of the Union and questions of deeper cooperation in climate protection or pandemic management be illuminated.

Keywords: democracy, depolitization, functional integrative association, Walter Hallstein, Hans Peter Ipsen, Lisbon decision (FCC), Maastricht decision (FCC), neutralization, the political, Solange I decision (FCC), Solange II decision (FCC), special purpose association

I have been asked to present the German perspective on the Future of Europe Conference (FoEC). I can comply with this request only with the one important caveat that there is no specific “German” angle on this issue. The gist of the European integration process is to eliminate the national as the core criteria of political differentiations. Although it is possible to indicate which stakeholders benefit from a measure

Jan Philipp Schaefer (2025) ‘Ultra Vires without End? The German perspective on the Future of Europe Conference’. In: János Ede Szilágyi and György Marinkás (eds.) *Maastricht 30: A Central European Perspective*, pp. 445–513. Miskolc–Budapest, Central European Academic Publishing.

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taken in the European context (and which do not), the advantages and disadvantages of European unification must be viewed within a cross-border framework. However, there is a highly developed body of European law scholarship in German-speaking countries, whose various schools have influenced the case law of both the German Federal Constitutional Court (FCC, Bundesverfassungsgericht), based in Karlsruhe, and the Luxembourg-based European Court of Justice (ECJ). Without a look at the extensive German debate on European law, it is impossible to understand the sometimes idiosyncratic positions of German constitutional bodies and government authorities on the current state of integration.¹ This applies not least to the German federal government's reticence regarding the FoEC. In non-German-speaking countries, there are sometimes hair-raising misunderstandings about German European policy, especially about the FCC's position on European law issues. I hope to clarify some of this with my comments. Therefore, the reader may take my contribution as an attempt at damage limitation.

We will see that German legal scholarship does not speak with one voice. A rough distinction can be made between a "Hamburg School" around Hans Peter Ipsen (1907-89) and a "Frankfurt School" around Walter Hallstein (1901-82) and their respective academic successors. These schools are not citation cartels or closed associations. They certainly exhibit a certain internal plurality. What binds the two schools together, however, is the common position of their members on the finality of European unification. The "Frankfurt School" is pro-federalist, its Hamburg antipode anti-federalist, although not nationalist, but rather "sovereignist". It can be said that the "German" perspective on the FoEC, and on the European integration process in general, is most purely expressed in German European law scholarship and in the jurisprudence of the FCC. With this caveat concerning the focus of my analysis, I will first present the results and the historical context of the FoEC (1.). I will then move on to a more detailed analysis of the most important desiderata following the Conference (2.): (2.1.) further democratisation of the Union; and (2.2.) further steps towards a European fiscal union and a robust Union competence in the field of health policy. We will see that the last two points are closely linked. Finally, I turn to the situation in Germany. The key German player in European policy issues is the FCC. It is therefore appropriate to outline the premises of its case law on European integration, but above all to place them in a political context, outside of which they are not really comprehensible (3.). At the end of my contribution, I shall give a brief conclusion (4.).

1 For this reason, I will largely limit myself below to reproducing and commenting on German-language literature on European law and politics. It goes without saying that I had to make a narrow selection, which is intended to provide further guidance, especially for readers who are not familiar with the German-language literature but who speak or can at least read and understand German. The quotations from German literature and adjudication were translated into English by myself.

1. The Future of Europe Conference: Intention, Results and Political-historical Context

The European Union has been in need of reform for as long as it has existed. The FoEC is one of many contributions to reform that have remained more or less ineffective on their own, but which, taken together, have had a lasting impact on the finality discourse. Nevertheless, former Greek Foreign Minister Evangelos Venizelos posed the provocative question as to why a “simulated conference without a legal basis” was being held.² In fact, the conference lacks any legally binding force.

2.1. Why a “Simulated conference without a legal basis”?

The history of the FoEC begins with the European Commission’s 2017 White Paper on the “Future of Europe”.³ This describes five future scenarios for the European integration process. One of these scenarios focuses on deepening integration in all policy areas.⁴ In his State of the Union address on 13 September 2017, the Commission President responsible for this White Paper, Jean-Claude Juncker, emphasised the need to turn the European Union into a “constitutional state” that protects and strengthens freedom, equality and the single market.⁵ In this context, Juncker brought up the creation of the office of a European Minister of Finance and Economy. The European Parliament should be given further powers; the democratic legitimacy of the Parliament should be strengthened by electing some of the Members of Parliament via transnational lists. These ideas were taken up by French President Emmanuel Macron in his Sorbonne speech on 26 September 2017. This speech marked the end of a long period of French reticence on fundamental European policy issues. Macron’s statements should also be seen as an attempt to respond to a decade of European financial crisis. As it turned out, the French President’s considerations have become even more topical since the start of the Russian-Ukrainian war in February 2022 in light of the European polycrisis⁶. Macron called for a top-to-bottom reform of the European institutions.⁷ His European policy ideas focused on a federalisation of the European Union, which he called a “refoundation of Europe”:

2 Verfassungsblog, 2024.

3 European Commission, 2017. In addition: Calliess, 2019a, 9 et seq.; Calliess, 2018, 1 et seq.; Calliess, 2019b, 25 et seq.; Hoffmann, 2019, 69 et seq.; Schorkpopf, 2017, 16 et seq.

4 The Member States should share more powers and resources in all policy areas, take decisions jointly (by majority vote) as a matter of principle, leave the floor to the Union – in particular the European Parliament – at international level, and leave the exclusive powers to conclude international trade agreements to the Union.

5 European Commission, 2024.

6 The term “polycrisis” refers to the combination of migration crises, global climate crisis, European security crisis and pandemic. On this from the German literature: Calliess, 2018, 1 et seq.; Ludwigs and Schmahl, 2020.

7 Ouest France, 2017.

a “sovereign, united and democratic Europe”.⁸ The concepts of peace, prosperity and freedom, which had been at the heart of the previous integration project, had to be more than just technocratic functional modalities of a single European market. The demand for a common strategic defence culture, a common European immigration authority and democratic conventions as an “integral part of the refoundation of Europe” is derived from this. Macron makes it clear that his European policy ideas do not contradict the current level of integration, particularly the level of economic integration. The “common market” still represents the “true spirit” of Europe. Beyond this, however, the values of democracy and the rule of law as well as the single market should be at the heart of the new foundation of Europe. In contrast, the Visegrad states (Hungary, Poland, the Czech Republic and Slovakia) took a sceptical stance.⁹ In their joint declaration on the future of the EU of 29 January 2018, they spoke out in favour of securing the level of integration already achieved. The focus of the Visegrad Group was on strengthening European competitiveness and the level of industrialisation, deepening the economic and monetary union, protecting fundamental European freedoms, and securing the common external borders. In these two positions – Macron/Juncker on the one hand, the Visegrad Group on the other – we notice a European policy frontline that also pervades the German European policy debate: the controversy between European federalists on the one hand and pragmatists on the other. On closer inspection, however, it will be seen that the fronts are not as clear-cut as they first appear.

Developments in European policy seemed to prove the Macron-Juncker line right. In another keynote speech on European policy on March 4, 2019, Macron proposed a ‘Conference on the Future of Europe’.¹⁰ Macron’s impulse was taken up by the future EU Commission President Ursula von der Leyen, whose candidacy and election as Commission President was largely driven by Macron. In her candidate speech to the European Parliament on 26 July 2019, Leyen committed to an “active role” for the Union citizens in shaping the future of Europe.¹¹ Following on from this and flanked by a Franco-German non-paper¹², the European Council took up at its meeting on 12/13 December 2019 the impulse of a new European reform convention in the form of a broad-based, online citizens’ dialogue. Above all, the idea was to identify integration deficits and to jointly develop solutions broadly sustained by the European public. The European Council issued the conference mandate in January 2020, and the Presidents of the European Commission, the Council and the European Parliament expressed their support for the reform project in a joint Declaration on the Future of Europe on 3 March 2021.¹³ The conference opened on Europe Day, 9 May 2021, and the final report was presented to the European public exactly one

8 Speech by President Macron at the Sorbonne. Élysée, 2017.

9 Visegrad Group, 2018.

10 Macron, 2019.

11 European Commission, 2019.

12 Politico, 2019.

13 Council of the European Union, 2021.

year later. The report makes a total of 325 individual proposals in nine thematic areas and 49 subcategories.¹⁴ These proposals culminate in the call for a European constitutional convention. Accordingly, the Commission, the Parliament and the Council signed a joint declaration of intent, responding to the integration desiderata identified during the conference.¹⁵ The most important issues identified are: (a) the Union's financial and budgetary system, which should be federalised, particularly through joint borrowing by the EU Member States and the abolition of the unanimity principle in budgetary policy; (b) the establishment of a robust and general EU competence in health policy, particularly to combat epidemics: a consequence of the very heterogeneous political reactions of the EU Member States to the Covid crisis since 2020; (c) the creation of a supranational democracy: as the first reform steps towards this, transnational electoral lists and party mandates are being considered, as well as the further expansion of the European citizenship already introduced by Article 10 of the Treaty on European Union (TEU); (d) the implementation of new instruments of citizen participation in pan-European affairs as well as a new framework for the competences of the Union and the Member States; the latter can, of course, only take place on the basis of a formal treaty revision in accordance with Article 48 TEU.

Minister Venizelos is not so wrong if you look at the immediate results of the conference. This impression may be reinforced with regard to Germany by the lack of interest that German politicians have shown in the results of the conference. The German position is rich in fine-sounding words, but (at least for the time being) makes hardly any substantial concessions in terms of content. This can be seen by comparing the programs of the parties that form the current (March 2024) federal government under Chancellor Olaf Scholz (SPD) with political reality: (a) As the leading governing party, the Social Democrats (SPD) have refrained from making a declaration on the FoEC in their election manifesto for the 2021 Bundestag elections. However, in the coalition agreement for which they are jointly responsible, the working basis of the federal government, there is a demand that the FoEC should lead to a constituent convention with the aim of forming a European federal state. This European federal state should be organized according to the principles of subsidiarity and proportionality and be based on the European Charter of Fundamental Rights.¹⁶ (b) The Green Party (Bündnis 90/Die Grünen) is committed to the further development of the European Union towards a federal European republic with a European constitution.¹⁷ (c) In their program for the 2021 federal elections, the German

14 Kahl and Hüther, 2023.

15 Council of the EU, 2022.

16 Sozialdemokratische Partei Deutschlands/Bündnis 90-Die Grünen/Freie Demokratische Partei, 2021. The coalition agreement of the previous government of Christian Democrats (CDU/CSU) and Social Democrats (SPD) under Chancellor Angela Merkel (CDU) had – despite its titular pro-European commitment – refrained from such a clear commitment (see Christlich-Demokratische Union Deutschlands/Christlich-Soziale Union Deutschlands/Sozialdemokratische Partei Deutschlands, 2018).

17 Bündnis 90-Die Grünen, 2021.

Liberals (FDP) called for the convening of a European constitutional convention after the conclusion of the FoEC.¹⁸

The post-communist left, which is not part of the Scholz cabinet, also wants a “new constitution for Europe”, albeit within the framework of a ‘Europe of solidarity’.¹⁹

The conservative opposition is divided: The Christian Democrats (CDU), currently the largest opposition party, do not want a European federal state, but “more Europe”.²⁰ The CDU’s Bavarian sister party CSU did not include a declaration of principles on European policy in its 2021 Bundestag election manifesto. The national-conservative Alternative für Deutschland (AfD) is committed to a ‘Europe of fatherlands as a community of sovereign states (...) cooperating in all those areas that can be better shaped together’, in reference to Charles de Gaulle.²¹

What Chancellor Scholz said in response to President Macron’s keynote speeches on European policy at Charles University in Prague on 29 August 2022 can be regarded as the current German government line.²² Scholz outlined the vision of a “European sovereignty” that should develop as a result of greater independence of the Union, initially in defence and security policy. He also called for respect for the fundamental European values of human dignity, freedom, democracy, equality, the rule of law and human rights, which to a certain extent outline the core tasks of the Union. Scholz’s emphasis on the common European security policy already reflects the new geopolitical situation since Russia’s invasion of Ukraine and places a significantly different emphasis on German European policy compared to the final declaration of the FoEC. Climate protection, the fight against the pandemic and a common European budget policy remain important, but the rebuilding of military capacities and the security of transnational supply chains, which are vital for German industry, are moving into the focus of Berlin’s future scenarios. However, these observations do not mean that the conference was without effect. Minister Venzelos overlooks the fact that changes in the Union rarely happen through formal treaty amendments and legal acts. The Union’s institutions are at least as effective in providing ideas and paving the way for pro-European opinion-forming processes in the Member States. The “united Europe” is a narrative that must be constantly spun if it is to remain credible. This is precisely what the declarations of intent of the EU institutions are all about. First, the public’s willingness to accept them is tested, then more concrete projects are proposed, finally these are discussed in more solid forms (e.g. in the context of a citizens’ dialogue or a reform convention) and only then, if necessary,

18 Freie Demokratische Partei, 2021.

19 Die Linke, 2021.

20 Christlich-Demokratische Union Deutschlands, 2021.

21 Alternative für Deutschland, 2021. The AfD sees the current Union as a “planned economy super-state” and is therefore considering the withdrawal of the Federal Republic from the Union. It hopes that this will provide the impetus to found a “new European economic community and community of interests”.

22 Bundesregierung, 2024.

do they enter into procedures of political understanding between the Union and the member states. Legal acts are only adopted at the very end of this process, but are also often omitted if a consensus can be reached without legalization. The EU institutions have always seen themselves as trustees of the common European interest as well as promoters of societal change and integration. The fact that the FoEC set new standards in this regard can be seen in the Commission President's speech on the state of the Union on 14 September 2022 and the reactions to it.²³

After all, it is wrong to measure the impact of the FoEC only by its legal consequences, as Mr Venizelos suggests. In truth, the conference marks a similar caesura for European politics – it could be called a “turning point in European politics” – as the polycrisis of 2015 and after did for national and international politics – as it provides a powerful impetus for federalisation and constitutionalisation. This movement can lead to a reshaping of prevailing European political narratives and thus to a shift in political discourse, especially in Germany. The FoEC will have achieved its goal if the politicians acting in its spirit succeed in sensitising the European public to the issues raised and motivating them in line with the conference results. Democratic majorities for the reform agenda will then emerge of their own accord. To what extent this is the case will only be possible to judge conclusively in a few years' time. At present, it seems that the war between Russia and Ukraine, which threatens the whole of Europe, has changed the priorities of the European peoples in a way that was unforeseeable for the initiators of the conference.²⁴ If a similar colloquium were to be held in 2024, the desire to strengthen collective European security, understood as military security and security of supply, would presumably rank at the top of the list of priorities, whereas this policy area played a very subordinate role in the 2021/22 consultation period. But in this respect, too, hasty diagnoses should be avoided. It is not yet known whether Russian aggression will really unhinge Europe or whether a long conflict on the eastern periphery of the Union that freezes over time will at some point lead back to the old Brussels normality. After all, more than seventy years after embarking on the path of European integration, it is impossible to predict whether this path will be supported by the majority of member states in the long term. The scepticism against a pan-European unification based on economic premises existed from the very beginning, long before the term “Eurosceptic” was coined. It has not diminished. It almost seems that the European peoples understand the unification they initiated less today than they did immediately after the Second

23 European Commission, 2022.

24 The conference was to address the following ten topics: (1) climate change and the environment, (2) health, (3) a stronger economy, social justice and employment, (4) the EU in the world, (5) values and rights, rule of law, security, (6) digital transformation, (7) democracy in Europe, (8) migration, (9) education, culture, youth and sport, (10) other ideas, Archive-It, 2023. The order of the topics certainly indicates a political prioritisation, according to which – following the zeitgeist of the early 2020s – climate protection ranks at the top. No one explicitly considered European military cooperation and the strategic security of the Union, for example the protection of European supply chains.

World War. This observation leads to the major political and historical lines in which the FoEC is to be located.

1.2. Historical lines of the Conference

For all the foresight of its founding fathers, the work of European integration suffers from a fundamental dilemma. It legitimises itself as a peace project, but it does not succeed in neutralising the political. “The political” should not be mixed up with “policy” or “politics”. It is understood as the source of unity among individuals and nations, implying the danger of frictions, hostility and war.²⁵ The political is part of human nature, a basic anthropological constant. People are not inherently unequal. Inequality between people only arises through the definition of their own identity. The identity formation process takes place in every individual as a separation of the self from the you, of the person from their fellow human beings and their environment. In the same way, nations (political communities) define themselves by first formulating criteria for unification (today this is generally done in the context of constitutionalisation), but also by separating themselves from other communities and excluding them. Just as good cannot be conceived without evil, association implies dissociation and the friend implies the foe. The political is opposed to an undifferentiated cosmopolitanism, i.e. the elimination of all differences between citizens and states. What is called the “political” is a process of community-oriented concept formation notwithstanding exclusionary effects. Because of the latter, the political is dangerous.

The European Union is a peace project without war-prevention mechanisms. The peace dividend it promises is a calculation at the expense of third parties. Europe is dependent on the cooperation and goodwill of non-European actors: the USA, Russia and China. Russia has emerged as an aggressor, China is a relentless competitor and the USA is less and less willing to stand up for Europe’s security and prosperity. This alone would justify another FoEC. It is all the more remarkable that not a word has been said about the European Union’s geostrategic position in 2021, given that the particular sensitivity of European states to disruptions to global trade and the political balance of the major non-European powers is a fundamental constancy that was already evident before the Russia-Ukraine war. So, should the FoEC be dismissed as a “fair weather event”? Is it merely an attempt to avert storms from Europe by ignoring them? Like previous reform plans, the FoEC is primarily aimed at internal coherence. The European Union cannot and will not guarantee the conditions on whose existence it depends.²⁶ The integration consensus of the member states and

25 Schmitt, 1932. See also: Mehring and Schmitt, 2003.

26 Modification of a famous sentence of Ernst-Wolfgang Böckenförde, related to the constitution: ‘The liberal, secularized state lives from preconditions that it cannot guarantee itself’ (Böckenförde, 1991, 92 et seq.). What Böckenförde said about the national state’s constitution is all the more true for the European Union.

the balance of power within the Union are notoriously fragile. This is not collateral damage of the unification process, but precisely calculated. The FoEC is the latest attempt to answer the question of how the return of the political – meaning: the occurrence of a situation that provokes or even requires decisions based on national interests²⁷ – can be managed despite all attempts at depoliticisation at European level. On this level, the struggle with the political has a history that goes back to the Maastricht Treaty, whose thirtieth anniversary was celebrated in 2023. With the Maastricht Treaty, the member states of the European Community opted for a deepening and broadening of what had until then been mainly economic integration. The “ever closer union of the peoples of Europe”, which had already inspired the Treaties of Rome of 25 March 1957, was supplemented by intergovernmental cooperation in foreign and security policy as well as in domestic and justice policy. Following the demise of the Soviet Union as an organising factor on the European continent, which was also expected to dampen American involvement in the European-Atlantic area, the European states in the West and East became aware of the existential necessity of a European community of values and solidarity. After a European Political Community had failed in the 1950s, mainly due to the conflicting interests of Germany and France, a united Europe was now to be created in the medium term, whose economic and geostrategic weight could be set against the USA, Russia and China. Criticism that the Maastricht Treaty was a resurrection of the idea of a “Greater Europe” under international law, which had emerged particularly in the United Kingdom with an anti-German subtext and had never fallen silent again until Brexit, overlooks

27 The Euro crisis of 2010 onwards is one such example. European policy failed here because it did not know how to prevent a relapse into nationalist stereotypes. The biggest possible disaster for the European Union project would have occurred if the eurozone had actually collapsed. A forced Greek exit from the eurozone would have been the first step in this direction. Portugal, Ireland, Spain and perhaps even Italy and Belgium would have followed them. As a result, a supranational community that was founded for the sake of a common economy would have collapsed due to economic considerations. It is hard to imagine a more cruel irony of history. Any attempt at renewed European unification would probably have been disavowed for decades to come. The debate about whether Greece should remain in the Euro zone has shown that the European Union has long since outgrown the point at which economic indicators are nothing more than that. The fact that it was possible to avert the collapse of the eurozone at the last moment is a baptism of fire for European integration. For the moment, the political has once again been tamed. But the discussion about reforming the European institutions gains its plausibility from the justified concern that thinking in national terms – in the categories of nationalistic demarcations – could gain the upper hand at the next European endurance test.

the fact that Maastricht Europe is a depoliticisation project in the spirit of economic liberalism.²⁸

- 28 The famous constitutional and international law expert Carl Schmitt (1888-1985), one of the key players in the legal establishment in the German Reich during the Nazi era, was the keyword and source of ideas for the Greater Area Theory (*Großraumtheorie*). Schmitt attempted to give the National Socialist expansionist policy a foundation in international law. He based this on the American Monroe Doctrine. Schmitt did not see the “Greater German Reich” envisioned by the National Socialists as a nation state in the classical sense of constitutional law, but rather as a European area dominated by Germany, consisting of states and territories, some of which were to be sovereign internally and some of which were to be more or less strongly influenced by Germany as protectorates or dependent territories. Schmitt’s concept was not limited to the economic control of these territories by Germany, but the core of his considerations was – hence the reference to the Monroe Doctrine – a “prohibition of intervention by powers foreign to the area” (Schmitt, 1941; see also: Dreier, 2001). From the perspective of 1941, the year in which the treatise was first published, Schmitt described the state order that was emerging as a result of the Second World War as a polycentric system of various geostrategically autonomous large areas that were demarcated from one another. The end of the Second World War did not render Schmitt’s analysis obsolete, but the subsequent Cold War with its “balance of terror” sharpened it into a theory of global bipolarity. After 1945, it was not possible to achieve the One World under the principles of democracy and the rule of law that the United States was striving for. However, the world order structured according to the West-East pattern only lasted a few decades. After 1989/90, the world returned to a multi-polar order. The extent to which European integration, which began at the height of the Cold War, can be seen as an attempt to create an autonomous greater space between the USA and the Soviet Union is controversial. This question cannot be explored in depth in this article. Suffice it to say that the pros and cons of a strategic autonomy of “Greater Europe” was one of the main points of contention between France and (West) Germany and remains so to this day. The unwavering adherence of the Bonn Republic to the Euro-Atlantic security structures against the French will for strategic independence has strained Franco-German relations for thirty years. Hans Peter Ipsen, who will be discussed in detail in this article as the doyen of German European law, took up Schmitt’s Greater Germany theory in 1942 and described the internal relations of the German Reich to the territories dependent on it within the “Greater German” area as *Reichsaußenverwaltungsrecht* (Ipsen, 1942, 64 et seq.). This provided an analytical framework for describing the legal relations within the greater area dominated by Germany, which were neither constitutional nor international law. Some German scholars of European law emphasise the parallels between Ipsen’s later, very powerful conception of the European Communities and his earlier theory of the Reich’s foreign administrative law, although the source situation does not permit clear derivations (see: Kahl and Hüther, 2023, 58 et seq. with further references).

2. Analysis of the Conference results

2.1. Strengthening European democracy

2.1.1. From the lack of a European demos ...

It seems inevitable that reform considerations of the European Union will address “democracy” in some form. No concept in political science is more complex than this one. To simplify, a distinction can be made between “democracy” as a principle of state rule²⁹ and “democracy” as the guiding principle of republicanism. The former, legitimation-theoretical definition variant is (albeit misleadingly) regarded as a “formal” or even “formalist” theory of democracy, while the latter is mirrored as a “material” or “substantial” theory of democracy. The republicanist interpretation of the principle of democracy is the more common one today. According to this interpretation, “democracy” refers to a certain form of liberal association underlying the republic; “republic” is the official state committed to the moral idea of human dignity³⁰. In this sense, for example, the German Basic Law (*Grundgesetz*) of 23 May 1949 (GG) speaks of the “free democratic basic order” (Article 21 paragraphs 2 and 3 GG) as the kind of constitutional order in which the freedom of the individual is derived from human dignity. From this, the consequence of a democratic state structure is inferred. In the context of republican – especially communitarian – theories³¹, “democracy” is transformed from a form of government to a form of society. The democratic idea is transferred to institutional contexts outside the state.³² In the constitutional sense, however, the principle of democracy is understood as the state’s legitimising imperative. In all Western state constitutions, reference is made to this power-establishing and power-limiting aspect of democracy, e.g. in Article 20 paragraph 1, and paragraph 2 sentence 1 GG, Article B sections 3 and 4 of the Hungarian Constitution of 25 April 2011. The subject of legitimation of the state is the people; in political science, the term “demos” is often used. “Demos” or “people”

29 See for the classical understanding of democracy: Platon, 555 et seq., 557 et seq., 562 et seq.; Platon, 302 et seq.; Aristoteles, 1279a et seq., 1291b et seq., 1292bet seq., 1294b et seq.; Raymundi and Spiazzi, 1964; Kunzmann, 1958, 75 et seq.; Weinstock, 1971, 74 et seq.; Vorländer, 1964, 128 et seq. The relation between democracy and republicanism was classically conceptualised by: Behler, 1966, 16 et seq. Democracy as a social principle: Forsthoff, 1972, 100 et seq. Important secondary sources: Beyme, 2014; Chevenal, 2015; Fetscher, 1970; Frankel, 1973; Friedrich, 1971, 127 e seq.; Meier, 1970, 7 et seq.; Narr and Naschold, 1971; Palmer, 1953, 203 et seq.; Scharpf, 1970; Talmon, 1961.

30 Arendt, 1958; Isensee and Lirchhof, 1987, 863 et seq.; Isensee and Kirchhof, 2004, 369 et seq. The core of the republic principle, as it is found, for example, in art. 20 para. 1 sentence 1 GG, is the transformation of rule into service through the office. Cf. also: Böckenförde, 1978.

31 Resse-Schäfer, 2019, 365 et seq.

32 Reference texts of the democratization approach: Eschenburg, 1971, 112 et seq.; Hennis, 1973, 26 et seq.

is not understood here as an actual quantity (the “population”), but as a juridical quality – as a subject of attribution under constitutional law. Although constitutional lawyers and political scientists are generally familiar with these different uses of the concept of democracy, they all too often talk past each other. Unfortunately, this also happens in European political discourse. The most prominent example of this mutual misunderstanding is the endless and fruitless debate about the basic democratic structure of the Union. The assertion of a democratic deficit in the Union has become a stereotype thanks to its permanent repetition. An analysis of the wording of the relevant treaty law alone can help. Although the preamble to the TEU and Article 2 TEU determine that the Member States of the Union are committed to “democracy” as a fundamental value of the Union, Article 10 paragraph 1 TEU specifies that ‘the functioning of the Union shall be founded on representative democracy’. It does not say: ‘The Union is a representative democracy’. It is not, because it lacks a *demos*. This does not disprove the binding nature of a democratic way of working, particularly the organisation of decision-making at Union level according to the majority principle. What is meant here, however, is precisely not that the sovereign power of the Union emanates from the *people* (cf. Article 20 paragraph 1, and paragraph 2 sentence 1 GG), but rather that it is derived exclusively from the states (Article 5 paragraph 1 TEU), whose sovereignty the Union must respect and uphold (Article 4 paragraph 2 TEU). Article 10 paragraph 1 TEU does not address democracy as a legitimising principle of state rule, but transfers this principle to the functioning of a non-state organisation, i.e. to a non-state context. “Democracy” is understood here in the sense of republicanism. Compared with legitimisation provisions under constitutional law, the content of Article 10 paragraph 1 TEU is, therefore, much more extensive than the wording of this provision suggests at first glance. The wording: ‘The functioning of the Union shall be in accordance with representative democracy’ not only states that the Union shall in principle take its decisions according to the majority principle and in parliamentary procedures³³, but also that the Union is based on the same *social order* that supports parliamentarism and is presupposed by it. This interpretation of Article 10 paragraph 1 TEU is supported by Article 9 TEU, according to which the Union ‘shall, in its common action, respect the principle of equality of its citizens’, ‘who shall receive equal *attention* from the institutions, bodies, offices and agencies of the Union’. The key concepts of these fundamental organisational norms of Union law are: citizens instead of people, attention instead of legitimacy, functioning instead of decision-making. The vocabulary of Article 9 et seq. TEU does not originate from democratic theory, but from republicanism. The representation terminology of Article 10 paragraph 2 TEU does not change this. Rather, it emphasises that it is not a European *demos* but the *citizens of the Union*.

33 The European Union’s legislative procedures are only structured on a semi-parliamentary basis. Even the ordinary legislative procedure provides for equal participation of Parliament and Council, whereas Parliament lacks any legislative initiative. In special legislative procedures, Parliament only has an advisory role in some cases.

that are represented at Union level by the European Parliament. In terms of representation theory, the citizens of the Union are thus on a par with the Member States, which are represented by their governments in the Council in accordance with the same provision. The republican form of the Union is thus a form of equal rights for citizens and states within a larger unit, the purpose of which is precisely – as underlined by Article 10 paragraph 2 TEU – the dissolution of the relationship of subordination that characterizes the relationship of citizens to their state power according to the classical view of state theory. This clearly shows the depoliticization approach on which Union law is based. The “democratic functioning” within the meaning of Article 10 paragraph 1 TEU includes the principles of freedom and the rule of law and, in turn, particularly the protection of fundamental and human rights. Article 10 TEU is thus the consequence of Article 2 TEU, which declares democracy, the rule of law and human rights to be fundamental values of the Union. However, this does not make the Union a democracy in the state-analogous sense. Even in the preamble to the TEU, as in all previous texts, the reference is not to *the European people* but to *the peoples of Europe*, which contradicts any nationalisation approach.³⁴ It goes without saying that states that are all democratic in themselves can only come together to form a union that is itself based on democratic principles, even if it is not itself a democracy or a state. The democratic policy considerations of the FoEC take this into account. They avoid the demos concept and instead refer to “society”, i.e. to a sociological term. The existence of trans-European associations and party structures does not refute this, because political parties and associations are not state institutions. They are self-regulating instruments of the “society”, with the help of which democratic decision-making is organised, but not determined.³⁵ Even if their influence is so great in some states that the impression of a “party state” can arise³⁶, it is still the individual with the right to vote on whose decision the parliamentary majority is based and it is the people of the state (as the subject of democratic legitimacy) that ultimately creates all government offices. Transnational party structures and a trans-European public emerging in our times may strengthen a common European public sphere transcending the Member States, but they alone do not establish a “European” democracy analogous to the national democracies.

34 Schaefer, 2014, 325 et seq. Monographic treatise on the problem of democracy at European level: Kaufmann, 1997.

35 Paradigmatically, art. 21 para. 1 sentence 1 GG states: ‘The parties shall *participate* in the formation of the political will of the people’. They are republican institutions insofar as they enable a pre-selection of persons to be considered for state elective offices. They are, moreover, aids to democratic decision-making, but presuppose a self-organization effort on the part of the citizens that precedes democracy.

36 Leibholz, 1958, 78 et seq.

2.1.2. ... to the neutralization of the political

This is not a deficit.³⁷ The debate on democracy conducted with reference to the Union suffers from a transfer of state-theoretical figures to a supranational association. This is inconclusive and obscures the actual finality of the Union, which sees itself as a depoliticization project based on the market and human rights.³⁸ This is precisely the conflict surrounding the “democratisation” of the Union, which cannot do without a sideways glance at the finality of the Union. This is not about the theoretical question of whether democracy is conceivable without or beyond the state or whether non-state actors can produce a political system analogous to the state. Rather, what is at issue is the acceptance of the depoliticisation approach. Irrespective of the variety of definitions offered to explain the political, the political is defined – empirically speaking – as a factual and substantive contrast between people, which can gain such intensity that the parties can become friends or foes, and thus orient themselves towards a friend-foe scheme.³⁹ There is no need to be a Schmittian or a follower of Clausewitz to find this formula immediately plausible. The German sociologist Hans Freyer (1887-1969) described the depoliticising effects of capitalism with unsurpassed clarity.⁴⁰ Freyer defined capitalism as a system that does not make courses of action dependent on pre-established orders, but is based on a few purposeful – arbitrary, but practically useful – preconditions. This system does not derive its rationality from a particular world view, nor does it involve the person as a whole, but only with regard to those driving forces that are indispensable for the system to function. Thus, a capitalist system can function both in the environment of a liberal democracy and within the framework of an authoritarian political system; the USA on the one hand and China on the other are the most striking examples worldwide. The systemic premises of capitalism are: (1) general freedom of acquisition and contract for individuals and associations; (2) guarantee of individual property, including freedom of disposal over the objects of property; (3) release of the individual interest in acquisition and the forces of production from religious, social or state restrictions. Under these conditions, a “market” emerges as an instrument of basically unlimited economic growth.

37 However, the misunderstanding of a European “democratic deficit” even exists in the German FCC. This is evidenced in particular by recent statements by the former Federal Constitutional Court judge Dieter Grimm (Grimm, 1995, 581 et seq.; Grimm, 2014; Grimm, 2015, 325 et seq. Grimm agrees that the early leading decisions of the ECJ, van Gend and Costa, have begun a “constitutionalisation” of the European Treaties, which is associated with a dwindling democratic power of the Member States.

38 Hayek, 1960.

39 Schmitt, 1932. See also: Böckenförde, 1986, 283 et seq. Schmitt’s “Concept of the Political” has electrified German constitutional and political science since its first appearance in essay form in 1927. The German-speaking literature has produced an immense amount of treatises on the political, of which the following give a representative analysis: Maier and Vogel, 1988, 440 et seq.; Brunner, Conze and Koselleck, 1978, 789 et seq.; Sternberger, 1978; Ritter, Gründer and Gabriel, 1989, 72 et seq.

40 Freyer, 1956, 76 et seq. On this: Böckenförde, 2011, 64 et seq.

The all-round political compatibility of capitalism arises because the market is not oriented towards specific goals. Increases in prosperity, productivity or the sparking of the spirit of invention are by-products of economic competition, but not its actual goal. A community of states that integrates itself via a common market can therefore initially leave the question of finality open. Nor does economic supranationality require the abandonment of the state. On the contrary, its regulatory potential is needed to guarantee the individual rights that are essential for the functioning of capitalism and to absorb the social costs and external effects of competition. A state that is compatible with capitalism thus sees itself as a catch-all order for the socially indifferent market. The occasional assertion that the expansion of the market economy is automatically accompanied by the death of the state is simply wrong. However, capitalism tends to extend beyond the economic sphere, and also subjects, for example, the formation of public opinion or the distribution of information to the logic of competition. Furthermore, the market reaches beyond national borders. Karl Marx demonstrated this in the *Communist Manifesto*.⁴¹ The economist Friedrich August von Hayek (1899-1992), one of the pioneers of the ordoliberal Freiburg School after the Second World War, was also close to the vision of essentially apolitical co-operation between Europe's sovereign nation states. The basic idea behind this vision is that collective peacekeeping in Europe cannot be based solely on armed force and mutual deterrence. Wars cost money; military resources cannot be built up without financial resources. In a market economy, state revenues are dependent on national economic performance. This relationship draws the economy into politics. Hayek's idea was to subject national economies to joint administration by a supranational authority, at least in those areas essential to the welfare of the people. This would neutralise the destructive politicising elements of cross-border economic competition – the “economic war” as a precursor form of state war – i.e. remove them from the sphere of influence of the states. This approach can be described as “sectoral and functional integration”: “sectoral” because it is limited to a specific, clearly defined policy area; “functional” because it is linked to the objective of joint task fulfilment and the resulting synergy effects. Hayek presented his concept, which he christened “interstate federalism”, in exile in Britain as early as 1939.⁴² As a first step towards economic “federalisation”, Hayek recommended the dismantling of customs barriers and, along with this, the liberalisation of the cross-border movement of people and

41 Marx and Engels, 1848: ‘The ancient national industries (...) are being supplanted by new industries, the introduction of which is becoming a matter of life and death for all civilised nations, by industries which no longer process indigenous raw materials, but raw materials belonging to the remotest zones, and whose manufactures are consumed not only in the country itself, but in all parts of the world at the same time. (...) The old local and national self-sufficiency is being replaced by an all-round traffic, an all-round dependence of nations on each other. And as in material production, so also in spiritual production (...)’. This development ‘(...) pulls all nations into civilisation through the infinitely facilitated communications (...). (...) It forces all nations to adopt the bourgeoisie’s mode of production [the liberal market economy, author’s note] if they do not want to perish’.

42 Hayek, 1939, 131 et seq. German version: Hayek, 1952, 324 et seq.

capital, i.e. precisely what a few years later constituted the core area of European integration as the “fundamental freedoms” of the European Economic Community (today: Article 28 et seq., Article 39 et seq., Article 45 et seq., Article 49 et seq., Article 56 et seq. TFEU). As a result of the merger, the states would no longer be able to exert any influence on the communitised economic sectors. The supranational community would step into the resulting sovereignty gap. On the one hand, this would protect economic life from state intervention, because at the supranational level, changes to the jointly agreed market organisation would hardly be possible according to the principle of unanimity. But even more important than this is the fact that the executive authority of the Community (in the EU framework this is the European Commission), as the custodian of the Community interest detached from the Member States, no longer controls the economy according to national criteria, but according to the common objectives agreed by all Member States. National egoisms could no longer have an impact on the economic order. The effect of this integration system is depoliticising because cross-border economic conflicts, which can be seen as the main causes of European state wars, are no longer in dispute. To this end, the common authority, as trustee of the Community interest, would have to be granted a monopoly on decisions regarding inter-state trade conflicts. Hayek hoped that his interstate federalism would lead to lasting, resilient peace in Europe. Looking back from the perspective of 2024, the prophetic power of Hayek’s design can only be praised. It is ultimately based on Hayek’s unarticulated but well-considered insight that the flip side of the political and a possibility that can never be ruled out is war. This justifies the seriousness of the examination of the political, as conducted by the sciences of politics and public law.

2.1.3. The legal shape of the European Union: insights from the Future of Europe Conference

The legal form of the European Union will not be directly changed by the FoEC (see above). However, the call for a European Convention following the conference documents aims at finally overcoming the nation state, understood as the primary civic space, in Europe. Europe’s as yet unfinished farewell to the political is to be brought about in the coming years. The collective threat to which all states of the Union are exposed by Russia’s aggressive imperialism could create a momentum for the implementation of federalisation ideas that has not been seen in this form since the end of the Second World War. In order to understand what the call for a European convention refers to, it is necessary to return to the problem of the political and, in particular, its relationship to the nation state. Just as at the possible end of the development of the European state, so too at its beginning was the will and the necessity to overcome the political. Medieval European society was pervaded by feuding, i.e. by the logic of feuds and enmities. Since there was no stable, centralised and bureaucratized system of offices with a monopoly on the use of force and jurisdiction – in other words, what is today called the “state” – in Europe at that time, and

since it therefore depended on chance whether well-meaning rulers sought a balance between rule and justice (which often failed), contemporaries were faced with the existential question: How can we effectively prevent people from killing each other in the long term? This is the question of taming the political. The nation state of modern Europe is one such attempt. Its roots go back to the 13th century, when the European peoples began to define themselves no longer as a “church”, i.e. as a united Christianity vis-à-vis other religions, especially Islam.⁴³ With the decline of the Roman church into nepotism, simony and extravagance, Europe discovered the ethnically perceived nation as the new paradigm of political identity. Thus, alongside the church, the modern, centralised nation state emerged, based on a standing army, ongoing taxes and specialised bureaucracy.⁴⁴ Not all European states define themselves according to ethnic criteria, but the dominant model of political order of the modern era is the nation united in the state. The “state” can be defined as a unit of will and action of a people that has achieved political consciousness, initially under monarchical and later democratic sovereignty.⁴⁵

The history of the nation state is well known. This form of political order has not only failed to pacify Europe, even in its democratised version, but has led to even more cruel and extensive wars than was ever conceivable under the dynastic feuds over thrones and regalia of the Middle Ages. After 1945, Europe embarked on a radically new path. What was now needed was a model of order that could replace the state. The precedents of church, state and empire could not be relied upon. They had all outlived their usefulness, not to mention the ancient Greek polis and the Roman republic. But what was to take the place of the state? The initiators of the European integration process after the Second World War took advice from leading economists of the interwar period. In addition to the aforementioned Friedrich August von Hayek, these were: Ludwig von Mises (1881–1973)⁴⁶, Joseph Schumpeter (1883–1950)⁴⁷, and Karl Polanyi (1886–1964)⁴⁸, to mention just the most important persons. They all came from the area subject to the Habsburg monarchy until 1918. They were all cosmopolitans and European patriots. They proposed a system of co-operation entirely market-oriented. Thus, they placed the individual, rather than the nation, at the centre of the framework of government institutions. In this system, the state is a function of satisfying individual needs. The sovereign regulatory power must ensure that the market mechanisms do not become dysfunctional. As has been seen above (...), Hayek’s draft of an “interstate federation” reads like a blueprint for European cooperation after the Second World War. Ordoliberal market liberalism is

43 Roth, 2011. Ever since the Middle Ages, “Europe” has always been the object and ideological horizon of constitutionalisation efforts. See the treatise on constitutional history by: Thieme, 1997.

44 This development was masterfully traced and sociologically explained by Max Weber (Weber, 2002) From the more recent literature on constitutional history: Reinhard, 1999.

45 Isensee, 1989, 133 et seq.

46 Mises, 2016.

47 Schumpeter, 2020.

48 Polanyi, 1944.

combined with the secular theology of human rights developed in the revolutionary age. In this way, the individual – not the people – becomes the starting point of any higher order, and European nations lose their relevance. However, as Robert Schuman aptly pointed out, these ideas could not be realised in one fell swoop.⁴⁹ Initially, the national armaments industries were communitised within the framework of the European Coal and Steel Community in order to pave the way for a European Defence Community and thus force cooperation between Germany and France, who had just been fighting each other as “hereditary enemies”. After the EDC failed in August 1954 due to the refusal of the French National Assembly, the Treaties of Rome of 1957 formed within six European states⁵⁰ European communities to complement the Coal and Steel Community for the civilian use of atomic energy and the establishment of a single European market: the European Atomic Energy Community (EAEC) and the European Economic Community (EEC). The European Free Trade Association (EFTA) developed alongside the European Communities⁵¹. Among the Soviet-dominated states of the European “Eastern Bloc”, the Council for Mutual Economic Assistance (COMECON) had already been created on 18 January 1949 in response to the American Marshall Fund (opened to non-European states in 1962, dissolved on 28 June 1991). As a result, there were three economic areas in Europe until 1991, although apart from one case – Finland, as an EFTA Member State, had signed a cooperation agreement with COMECON on 16 May 1973 – they did not cooperate with each other. At the level of organised free trade, the political division between the states allied with the Soviet Union or the USA and the “non-aligned” states that emerged after 1945 was reflected quite precisely in the Europe of the

49 European Union, 2024.

50 The founding members of the ECSC, EAC and EEC are: Belgium, (West) Germany, France, Italy, Luxembourg and the Netherlands. In 1973, Denmark, Ireland and the United Kingdom joined; Norway rejected accession after successfully completing accession negotiations. Greece followed in 1981, Spain and Portugal in 1985. In 1995, the European Union was expanded to include Austria, Finland and Sweden, followed in 2004 by Hungary, Poland, the Czech Republic, Slovakia, Slovenia, Malta, Estonia, Latvia, Lithuania and Cyprus. In 2007, Bulgaria and Romania were added to the Union, followed by Croatia's accession in 2013, the last enlargement for the time being. On 1 January 2021, the United Kingdom completed its withdrawal from the Union, which had already been decided in 2016. The Swiss population rejected EU membership in a referendum in 1992. In 2015, Iceland broke off its accession negotiations with the EU, which had started in 2010. Candidate countries (as of March 2024) are: Albania, Bosnia-Herzegovina, Georgia, Moldova, Montenegro, North Macedonia, Serbia and Turkey.

51 EFTA was founded on 4 January 1960 between Austria, Denmark, Norway, Sweden, Switzerland and Portugal. Finland became an associate member in 1961 and a full member in 1986. Iceland joined in 1970, Liechtenstein in 1991. The United Kingdom left EFTA in 1973, Portugal in 1986, Finland, Austria and Sweden in 1995 after their respective accession to the European Communities and the European Union, so that today (March 2024) only Switzerland, Liechtenstein, Norway and Iceland remain. The Agreement on the European Economic Area exists between the EU and the three EFTA states of Liechtenstein, Norway and Iceland, whereby the EFTA states mentioned are included in a deeper European free trade area. Switzerland is excluded.

Cold War.⁵² The “common market”, today deepened into the European single market, became the centrepiece of European integration and still is. A “common market” knows no nations, only individual players and cooperatively organised groups that act like an individual to the outside world. But it is also not in conflict with the state. The concept of the “market citizen” proposed by Hans Peter Ipsen⁵³, whose preferences are derived from his natural needs and who is therefore apolitical, is perfectly in line with the logic of European economic integration.⁵⁴ The market citizen – like the *homo oeconomicus* as known in political economy – purports individual likes and dislikes, which may well be altruistic in nature, but which exist alongside and to some extent independently of national affiliations and loyalties. Ipsen understood the concept of the market citizen purely pragmatically, but its extraordinary resonance in German European legal scholarship is due to the utopian associations reflected in it. If we could achieve a state in which the market citizen replaces and consumes the state citizen (the “bourgeois” replacing the “citoyen”⁵⁵), a world freed from national, ethnic and religious hatred would emerge: a world in which there is still affection or aversion, love and hate, good and evil between individuals, but on a purely personal level, not as a divide that separates nations from one another. It would be something like the “end of history”. This market system will be complemented by human rights, being in itself unpolitical.⁵⁶ They protect the individual as a legal entity isolated from others and self-referential. A government system based on the market and human rights cannot be a centralised law enforcement structure like the nation state of modern times. It is a multipolar negotiating forum in which the relationship between individual interests and the common good must be constantly renegotiated. In contemporary administrative law, this structure is described as a “governance system”.⁵⁷ It is no coincidence that cybernetic and governance theory approaches, supplemented by deliberative communication theories, have dominated legal and political science theory since the 1970s.⁵⁸ In close relation to anarchistic concepts, they describe the abolition of the foe, i.e. an anti-political approach. The Brussels utopia of a well-ordered government through market and human rights,

52 The fact that the original EFTA members Great Britain, Denmark and Norway – as well as Iceland – were not non-aligned, unlike Switzerland, Liechtenstein, Austria, Sweden and Finland, was probably a not insignificant motive for these states to enter into accession negotiations with the European Communities and, in the case of Great Britain and Denmark, to join. Norway and Iceland were left out, so that the economic integration structure during the Cold War was not congruent with the political alliance integration structure – a contradiction that did more harm to EFTA than to the EC.

53 Ipsen and Nicolaysen, 1964, 339 et seq. On the further reception of the term in German European law scholarship: Oppermann, 1988, 87 et seq.; Schönberger, 2005, 1 et seq.

54 Sharp critique: Albert, 2009.

55 Smend, 1968, 309 et seq.

56 The conceptual history of human rights in detail: Stourzh, 1989; Oestreich, 1978.

57 For an overview of the current “interdisciplinary” approaches in German legal administrative science see: Schaefer, 2016.

58 Mayntz and Scharpf, 1995.

“eternal peace” as already dreamed of by Immanuel Kant⁵⁹, fits in seamlessly with governance cybernetics. In this utopia, there are no insoluble conflicts. The state makes itself superfluous, but not by virtue of a Marxist-Leninist “dictatorship of the proletariat”, but by people’s understanding that prosperity, freedom and civic participation work better without the state than with it. The state would, certainly, continue to exist in its external form, probably for decades and centuries to come, just as a shadow of the medieval church survived the Middle Ages and is still visible today. But the state would gradually lose its function as the primary power of order and legitimisation. Sooner or later, it could no longer be seen as the primary republican space if the “citizens of the Union” perceived themselves as participants in a common European sphere of prosperity. Transcending states and peoples, the market citizen would develop new, supranational forms of participation. These forms are “democratic”, but in a pre-modern and non-state-related republican sense, according to the Roman motto: *quod omnes tangit, ab omnibus approbetur*. In other respects, however, the freedom of the market citizen in the European internal market is an individualistic freedom.⁶⁰ The Treaty of Lisbon has set the first milestones in this direction; the FoEC’s constitutionalising approach fits perfectly into this context.

2.1.4. *The European integration work as a functional integrative association*

The constitutional policy demands which followed the FoEC contradict a European law policy narrative that has taken hold in Germany since the 1960s and is associated with Hans Peter Ipsen.⁶¹ Ipsen, one of Germany’s earliest scholars of European law and for a long time its pioneer, coined the term *Zweckverband funktioneller Integration* (functional integrative association) in 1964 after many years

59 Vorländer, 1964, 195 et seq.

60 On this differentiation: Isensee and Kirchhof, 2005, 3 et seq.

61 Current European law scholarship has moved away from Ipsen’s conceptualisation, but the anti-federal aspect contained in the “association of functional integration” continues to drive the German debate. On the state of the discussion: Di Fabio, 2022, 1 et seq.; Fricke, 2021, 561 et seq.; Kube and Schorkopf, 2021, 1650 et seq.; Mayer, 2021, 16 et seq.; Nettesheim, 2020, 181 et seq.; Ruffert, 2020, 1777 et seq.; Schorkopf, 2020, 3085 et seq.; Steinbach, 2022, 1 et seq.

of preliminary considerations⁶², inspired by the international law expert Hartwig Bülck.⁶³ With this term, Ipsen referred both de Gaulle's "Europe des patries" and Coudenhove-Kalergi's "United States of Europe" to the realm of illusions. Ipsen argued that the European Communities (ECSC, EAEC and EEC) were associations for the pursuit of exclusively economic purposes. In Ipsen's opinion, the European Communities can neither be regarded as a federal state nor as an international organisation. A classic-style international organisation does not have the far-reaching legislative powers of the Communities and does not require legal harmonisation at national level. Nor should the Communities be described as state-like entities (federal states) using the terminology of classical state theory. This reservation extends particularly to the principle of democracy. The Communities derive their *raison d'être* exclusively from their constituent Member States, not from the demos. States require democratic legitimation because they can appropriate their competences themselves within the framework of their political mandate as defined by constitutional law, i.e. they possess the *Kompetenz-Kompetenz* (the competence of being competent). In contrast, the scope of powers of the Communities is precisely defined by the founding treaties (primary law), so that there is no political discretion and decision-making leeway for Community power. The principle of conferral (Article 5 paragraph 1 TEU) therefore replaces the principle of democracy as a prerequisite and condition of all Community action established by the constitutions of the Member States. According to Ipsen, a Community act outside the basis of powers laid down in the treaties must be regarded as an *ultra vires* act. Community action outside the competences established by the treaties also runs counter to the principle of democracy at the constitutional level, and therefore constitutes a violation of national constitutional law. Ipsen attests that the Communities are apolitical in nature due to their purely economic purpose. However, it cannot be ruled out that, as a result of the deepening economic cooperation between the Member States, a spillover to a political community will

62 Ipsen himself referred to the structure of the European Communities in a contribution to a discussion at the annual conference of German constitutional law teachers in 1959 (Ipsen, 1959, 86 et seq.). Further statements on the subject: Kaiser, 1959, 88 et seq.; Köttgen, 1961; Bülck, 1963.

63 In 1972, Ipsen presented the first monumental presentation of the European Community law in force at the time in German: Ipsen, 1972. The entire work underpins Ipsen's special-purpose association thesis. The genesis of the term was already well advanced at this time. Ipsen had first commented on European integration at the German constitutional law conference in 1959. At that time, the question had been discussed (Erler and Thieme, 1959, 7 et seq., 50 et seq.; cf: Ipsen, 1959, 86 et seq.). Ipsen spoke out vehemently against the transfer of the democratic and constitutional standards valid in the constitutional framework to the European Communities. This did not mean that these principles should not apply to the Communities, but that they should be adapted to the specific characteristics of the Treaty Community. Ipsen first explained what this meant in principle in 1964. Ipsen's conception of the European Communities as "special-purpose associations of functional integration" also dates from this year: Ipsen 1964, 1 et seq.; Ipsen, 1965, 1 et seq.; von Caemmerer, Schlochauer and Steindorff, 1966, 248 et seq.; Ipsen, 1967, 358 et seq.; Ipsen, 1968, 441 et seq.; Ipsen, 1969.

take place at some point.⁶⁴ Of course, according to Ipsen's logic, legal recognition of this change in nature presupposes the re-establishment of the Community by means of consenting legal acts by all Member States.

In contrast, the pre-federal character of the ECSC had already been postulated in the Federal Republic of Germany immediately after its foundation in 1951. In addition, European integration in Germany was accompanied from the outset by a romanticising literature that indulged in fantasies of a restoration of the Carolingian-style Roman Catholic West and for this reason alone rejected a unification that remained economic.⁶⁵ The diplomat and university lecturer Carl Friedrich Ophüls (1895-1970) was particularly prominent in the federalisation debate. As head of department for general international law at the Federal Ministry of Justice and later as head of department at the Federal Foreign Office, Ophüls accompanied the formation of the Coal and Steel Community from the German side. Ophüls saw in the Community organs analogies to the German federal state organs: the Joint Assembly corresponded to the German Bundestag, the Council of Ministers to the Bundesrat (the representative body of the German states at federal level), the Treaty Court to a supreme constitutional and administrative court; all of this ultimately established a separation of powers similar to that existing in the national framework.⁶⁶ Ophüls' thesis is not meant to be descriptive, but prescriptive. It insinuates that a supranational community organised along the lines of a federal state must develop from an international organisation into a federal state, even if – like the ECSC – it does not yet have the corresponding powers at the time of its foundation. Reading between the lines of these statements, one reads that integration aimed at the formation of a federal state is in the interests of the founding states and that no further acts of legitimation derived from the states are therefore required in order to advance the development of the federal state through secondary Community acts or a dynamic jurisdiction of the Treaty Court. The consequence of Ophüls' approach is that the "levers of integration" (*Integrationshebel*, a term coined by Ipsen⁶⁷) necessary for federalisation are already assumed to exist in principle in the ECSC system.

64 Ipsen held on to his view until the end of his academic career in the 1990s. According to Ipsen, even the integration push triggered by the Maastricht Treaty did not create a spill-over effect, i.e. it did not turn the European integration project into a political community, let alone a state. Ipsen was quite critical of the Maastricht judgment of the BVerfG (Ipsen 1994, 1 et seq.), but in this decision the BVerfG went a long way towards Ipsen's conception of European law (BVerfGE 89, 155).

65 For example, the writer Reinhold Schneider, who was very popular in the 1950s: Schneider, 1977, 420 et seq.

66 Ophüls, 1951a, 289 et seq.; Ophüls, 1951b, 381 et seq.; Ophüls, 1951c, 693 et seq.; Ophüls, 1952, 161 et seq. Ophüls' contributions were the first academic statements on the legal character of the Coal and Steel Community in the Federal Republic of Germany and therefore shaped the initial German perspective on the treaty community. Ophüls had also been involved in the planning of a European army on the German side since 1952. Even after Ipsen's unity of purpose theory had gained ground in German European legal scholarship and had become the prevailing opinion, he adhered to his federalisation thesis (Kaiser, 1965, 229 et seq.).

67 Ipsen, 1964, 1 et seq.

It made sense to transfer the federalisation scheme developed by Ophüls for the Coal and Steel Community to the EEC and the EAEC. Walter Hallstein, the first President of the EEC Commission, advocated this with verve. Hallstein coined both the concept of the European Communities as an “unfinished federal state”⁶⁸ (*unvollendeter Bundesstaat*)⁶⁹ and the concept of a “community under the rule of law” (*Rechtsgemeinschaft*)⁶⁹. But Ipsen considered Ophüls’ and Hallstein’s doctrines to be indefensible. The will of the treaty states had not been directed towards the establishment of a pan-European federal state. Rather, the intention was to transfer certain sovereign tasks in the area of economic law to a supranational organisation for independent execution. The Community was an economic association, not a state.⁷⁰ There is another point: the controversy between federalists and sovereigntists is not an academic gimmick. At its core, the debate revolves around the political shape of the European integration project: its finality. It is very serious. A federal state can only exist on the condition that its Member States are politically homogeneous.⁷¹ States that unite to form a higher political entity must therefore be founded on the same constitutional principles. Otherwise, the federation will fail. The terrible wars surrounding the disintegration of the former Yugoslavia have recently shown us where this can lead, but the military and economic frictions in the post-Soviet space also bear witness to the consequences of a failed federalisation project. Of course, the debates of the 1950s and 1960s were not yet able to refer to this, but they were aware of the American War of Secession and the Swiss Sonderbund War as examples of 19th century wars of federation. The academic protagonists of the Hamburg and Frankfurt schools of European law were well aware of what is equally obvious to us today: the prerequisites for a federal union – political, economic and cultural homogeneity of the Member States – cannot be enforced, but only come about, if at all, in an open process that sometimes takes many decades. Accession procedures by which states with less connectivity join the integration grouping tend to delay the emergence of a sufficient

68 Hallstein, 1969; Hallstein 1979, 341 et seq.

69 Hallstein, 1969. On this: Bogdandy, 2018, 675 et seq.; Calliess, 2014, 63 et seq.; Schorkopf, 2011, 323 et seq.; Voßkuhle, 2022, 33 et seq.; Zuleeg, 1994, 545 et seq.

70 Ipsen, 1969. A border crosser between the two schools of European law was the Frankfurt international law expert Hans-Jürgen Schlochauer (1906-90), who initially defined the ECSC as a “special-purpose association of federal character” (Schlochauer, 1952), but also wrote of a “federal order” (Schlochauer 1951).

71 Heller, 1928, 421 et seq.; Schmitt, 1928, 231 et seq. In the post-war German legal reasoning, homogeneity is substituted by a set of constitutional core values to be accepted by each citizen: Isensee, 1979, 131 et seq. Critical overlook: Grawert, 2012, 189 et seq. The German Basic Law contains an explicit federal homogeneity clause in art. 28 para. 1: ‘The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law. In each Land, county and municipality the people shall be represented by a body chosen in general, direct, free, equal and secret elections. In county and municipal elections, persons who possess the citizenship of any Member State of the European Community are also eligible to vote and to be elected in accordance with European Community law. In municipalities a local assembly may take the place of an elected body.’ Art. 2, 3 TEU in conjunction with the TEU preamble read as homogeneity provisions under Union law. The procedure under Art. 7 TEU refers to this.

level of homogeneity throughout the Community and postpone federalisation. For this reason, the simultaneous enlargement and deepening of an association of states is impossible. If a forced federation fails, it can end in a humanitarian catastrophe; exceptions, such as the peaceful separation of the Czech Republic and Slovakia, confirm the rule. Hallstein, Ophüls and their fellow campaigners wanted to force a rapid federalisation, according to the accusation of the opposing party, although even among the six founding states of the ECSC at the beginning of the 1950s the essential homogeneity did not exist (and still does not exist today). This could only lead to the failure of the integration project. Actual developments proved this: as early as 1954, the European Political Community and the European Defence Community failed because the French National Assembly said no, which incidentally paved the way for the military integration of the Federal Republic into NATO. Forty years later, the Maastricht Treaty met with fierce resistance in France, Denmark and other EC Member States. The European Constitutional Treaty was also rejected by the French and Dutch in 2005; a referendum in Luxembourg, which was no longer held, would probably also have had a negative outcome. Ipsen's special-purpose association approach, on the other hand, allows for integration alliances of varying density and finality, sometimes referred to as "variable geometry" or "multi-speed Europe".⁷² In this respect, different demands are placed on the level of homogeneity of the states. The formation of a common market is already possible between states that are linked by close trade relations, whereas an economic and monetary union requires significantly more intensive economic equality between the participating states. Finally, a political union is based on preconditions that the FCC specified in more detail in its Lisbon decision (see 3. below). With the Copenhagen accession criteria and the Maastricht criteria for economic and monetary union, the Union has formulated homogeneity conditions for accession candidates, which at the same time document a certain level of integration of the Union of Europe. The political shape of contemporary Europe takes very different forms. Not all EU states are members of the Euro zone and the Schengen area; the European Economic Area (EEA), on the other hand, extends beyond the EU and includes economically significant non-EU states such as Norway and Iceland. EU accession candidates and states associated with the EU or the EEA have the opportunity to prove themselves with regard to the homogeneity criteria demanded by the EU and also form strategically important bridges to areas outside the Union.

According to Ipsen's ideas, the concept of "functional integration" fulfilled several functions: Firstly, it was intended to fend off Ophüls' and Hallstein's federal state theory approaches, which aimed at a gradual replacement of the original sovereignty of the Member States by the European Communities. Secondly, the finality of the European integration process was to be kept open, an automatism from a special-purpose association to a federal state was to be denied. Thus, Ipsen's concept

72 In his groundbreaking 1972 textbook on European Community law, Ipsen speaks of communitisation as an "open system" (Ipsen, 1972).

is also prescriptive, not descriptive. The problem, however, was that the descriptive component of the unity-of-purpose theory could not fully capture the reality of European integration as early as the mid-1960s. In the decades that followed, the gap between the legal principles derived from the unity of purpose theory and the actual state of integration grew ever wider. Nevertheless, Ipsen recognised what is still not clear to many of today's constitutional and European law scholars: the Union is a work of depoliticization, which is why the categories of state theory cannot be applied to this phenomenon. In Germany, the terms "neutralisation" and "depoliticization" are primarily associated with Carl Schmitt and his students (above all Ernst Forsthoff), but Ipsen was not a student of Schmitt⁷³. The political science basis of Ipsen's theory of unity of purpose is functionalism, as outlined by the Romanian-British political scientist David Mitrany (1888–1975) in his influential work *A Working Peace System* from 1943.⁷⁴ Mitrany's account reads in parts almost like a sketch of European unification *avant la lettre*. Supranational communities, as envisaged by Mitrany, are based on the authorization of Member States to exercise sectorally defined sovereign powers, and their performance of tasks is dependent on and limited by the sovereign powers delegated to them, in line with the principle of conferral. The level of legitimacy required by a supranational community flows exclusively from its Member States; the Member States are and remain the primary democratic area. According to Mitrany's concept, autonomous or secondary legitimation, e.g. through a parliamentary assembly or similar attached to the Communities, is not only unnecessary but even harmful because it can blur responsibility structures. Furthermore, in the case of parliamentarisation or democratisation of the supranational community, a contradiction may arise between the democratically mediated interests of the Member States and an independent interest of the community. This could disrupt the integration process. Of course, a ramification process could not be ruled out, as a result of which an originally technocratic community would grow into a political and federal community. But such a finality is not implied *ex tunc* in the supranational cooperation that Mitrany has in mind.⁷⁵ Applied to the European Communities, this would mean that the Communities are initially

73 Ipsen's academic mentor was the Austrian international law expert Rudolf Laun (1882–1975), who taught at Hamburg University.

74 Mitrany, 1943. At the height of the Second World War, Mitrany wanted to point the way to a practically functioning international post-war order. His writing is directed in particular against utopian federalization approaches in the style of Coudenhove-Kalergi. In the context of international law on the concept of a special-purpose association: Bilfinger, 1951; Schlochauer, 1951; Schlochauer, 1955a, 213 et seq.; Schlochauer, 1955b, 40 et seq.

75 Of course, Mitrany's concept did not remain undisputed. His successors, particularly Ernst B. Haas (1924–2003), applied it to the European Communities and, as early as the mid-1960s, spoke of the possibility of a spill-over effect, whereby an originally strictly functional community could become a federal state (Haas, 1968; Haas, 1964.) The difference between the neo-functionalists and Mitrany lies in the assumption that functional communities contain an impulse towards federalisation, which is why a change in the shape of the community could occur without a new foundation. According to Mitrany and Ipsen, this is not possible.

economic-technocratic, not political or democratic in character. Ipsen did not want to rule out a further development of the European Communities into a federal state, but his special-purpose association theory implies that this can only happen on a completely different treaty and constitutional basis. Ipsen's concept is neither nationalistic nor anti-democratic. It does, however, protect the sovereignty of the Member States against the formation of a federal state against their will, an autonomisation of the supranational sovereignty created by them. In addition, the unity of purpose theory emphasises the apolitical nature of the integration process. In any case, it should be emphasised once again, the democratic standard adopted by the nation-state constitutions should not be applied to it.

Unsurprisingly, Ipsen's theory has had no resonance at Community level. On the contrary, the ECJ has made extensive use of the doctrine of implied powers and in this way substantially deepened its powers beyond the wording of the Treaties (see 3. below).⁷⁶ However, the fact that part of the German European law doctrine and, as we shall see, above all the German FCC have followed Ipsen's approach has created a tension between the Luxembourg Court's case law and Karlsruhe's constitutional assessment of it. Ipsen did not allow himself to be deterred by the headwind that blew in his face from Luxembourg, but also from the ranks of German European law scholars. Ipsen's convictions (and those of his students) have not been challenged by the fact that the integration process has progressed step by step beyond the functional integration principle as the ECJ's dynamic jurisprudence aimed at consolidating and deepening integration has progressed. Functionalism is, as shown, originally a political science concept and as such descriptive. It can only provide a satisfactory analytical scheme for the political conditions of European integration as long as no integration density has yet emerged that has fundamentally changed the character and form of the functional integrative association. But Ipsen uses the concept prescriptively. He derives legal conclusions from functionalism. The methodological contestability of this approach need not be discussed in the present context. Ipsen and his students are concerned with showing that the European Communities were originally conceived as functional integrative associations, and that a transition (spillover) from a functional association to a political community, i.e. to a federal state, is therefore not permissible without an additional injection of legitimacy by the Member States through a new foundation of the Community under international law, which must also satisfy the constitutional requirements of the Member States. Ipsen simply turns the tables on his critics: for him, the fact that the European Communities and later the European Union have moved further and further away from the original association of purpose without there ever having been a democratically legitimised redefinition of the finality and organisational structure of the Communities by the Member States is a continuing breach of the law.

76 The application of the implied powers doctrine by the ECJ was commented on early on by Gert Nicolaysen, a student of Ipsen: Nicolaysen, 1966, 129 et seq.

Because the debate on supposed democratic deficits at European level does not sufficiently differentiate between legal, political science and economic perspectives and because the claim to depoliticisation behind the economic integration method (“Community method”) is generally misjudged, debates on the democratic capacity of the European Union or on the question of where the focus of this Union should lie – with the states, with regions and countries or with a supranational entity *sui generis* – are so peculiarly confused and unfruitful. A debate on European democracy and finality that follows the templates of the state and state theory simply misses the point. It must be made clear: the Union does not contradict the continued existence of the nation states that support it and yet are not absorbed into it. Nor is it incompatible with democracy and the rule of law. Of course, the Union and all Member States guarantee procedural principles based on the rule of law as well as fundamental and human rights, but in an order based on economic principles, the primacy of the economy over the law applies. The scope of democracy in the process of European integration is illuminated by Angela Merkel’s famous words about “market-conforming democracy” and the “lack of alternatives” to European crisis and rescue policy at the limits of the law. They reveal precisely the logic of the European Union. Merkel has recognised this logic much more astutely than her critics, and the FoEC continues the democratic political narrative of the crisis decade of 2012-22.

2.2. Steps towards a European fiscal union and a single European health protection system

2.2.1. Fiscal union

The level of economic unification in the European Union is determined by the Maastricht criteria for economic and monetary union. These are not economic criteria, but *political* criteria formulated and set by the Member States. There has been much debate about their economic meaningfulness, but this discussion completely ignores the fact that it is not economic performance that is of interest, but the level of homogeneity of those Member States that wish to join a new level of integration by joining the Economic and Monetary Union. Because the Maastricht criteria are of a political nature, there is no contradiction in the admission of states that did not fulfil these criteria at the time of accession – e.g. Greece – nor in the temporary dispensation of individual criteria for individual Member States, e.g. for France and Germany in 2003 by the ECOFIN Council. However, the example of Greece, whose economic situation almost caused the Euro zone to collapse, illustrates the political risk of an “incomplete” federation, i.e. a union of states whose individual members do not all meet the necessary homogeneity criteria. This discussion forms the background to the FoEC proposals for the fiscal federalisation of Europe. If this were to take place, it would represent a further step towards federalisation that goes beyond economic and monetary union. Its risks must be weighed very carefully against the presumed benefits. Because even if politicians like to claim that certain integration

steps are irreversible, this is untrue. Nothing is politically irreversible, but the financial, social and humanitarian collateral damage of the reversal can, as we have seen, be devastating.

European fiscal union is desired and promoted by some Member States. It would bring about a common debt of the European Member States promoting a communitisation of budgetary policy. This is another central focus of the FoEC. This aspect is particularly sensitive for Germany. The fiscal policy debate at European level is as skewed as the debate about the Union's supposed democratic deficit. It is based on the respective interests of the Member States and on Union concerns partly opposed to those. It cannot be denied that states have interests, but they refer to the nation. The European Union as an institution of denationalisation does not recognise national concerns (see 2.1. above). Yet, in the market there are only individual and group interests. An analysis of the advantages and disadvantages of certain European policies must therefore start with the market citizens, not with the states. If it is conducted as an etatist debate, the essentials will be obscured. The point of European integration is precisely that it makes no sense to talk about German, Hungarian, Polish etc. interests. Instead, there needs to be a focus on the social groups that benefit or are burdened by Union measures. Economic networks have long since formed below the level of states and across national borders. They have few in common with national interests but affect the welfare of the European people. Thus, the denationalisation of the budgetary system is part of the logic of economic diffusion. The financial resources of a political system reflect exactly the power relations supporting it. The EU budget is currently based on a multitude of direct revenues, of which traditional own resources make up only a small part. The main financial burden is borne by GNI and VAT-based funds. Article 311 paragraph 2 TFEU stipulates that the EU budget should be financed entirely from own resources. Consequently, there is a prohibition on external financing of the Union enshrined in primary law, but no prohibition on borrowing. However, the Union may only borrow in accordance with the principle of conferral (Article 5 paragraphs 1 and 2 TEU), meaning that the Union does not have its own budgetary powers. It is impossible to understand the excitement in Germany and other net contributor states about 'more debt for Europe' without understanding the political preconditions of economic and monetary union, the further development of which is to be driven by a common EU budget. In Germany, it was above all the former President of the German Bundesbank, Hans Tietmeyer (1931-2016), who dominated the German debate on economic and monetary union in the early 1990s due to his influence on political decision-makers.⁷⁷ As early as 1992, Tietmeyer pointed out the pitfalls of a European Monetary Union from the perspective of the German Bundesbank. The Deutsche Bundesbank emerged from the Bank deutscher Länder as the German central bank on 1 August 1957. Its main task is to protect monetary stability. To this end, it is organised as a ministry-free authority (similar to an Independent Regulatory Agency), i.e. it operates independently of the government's

⁷⁷ On the following: Tietmeyer, 1993, 45 et seq.

or parliament's instructions within the scope of its responsibilities; its internal organisation and procedure resembles a court. The core idea behind the Bundesbank's independence is to prevent political influence on monetary policy. In Germany, this design, which was unusual for its time of origin, met with great approval, as the Germans had experienced two hyperinflations in 1922/23 and 1947/48 with catastrophic social consequences; the middle classes were impoverished as a result. For the Federal Republic of Germany, the independence of the European Central Bank, modelled on the German Bundesbank, has been a *conditio sine qua non* of monetary union. However, the European Monetary Union suffers from the asymmetry of monetary, wage and fiscal policy. At the beginning of European economic integration, it was sufficient to protect the mutual convertibility of European currencies. This is why Article 107 of the EEC Treaty referred to exchange rate policy (i.e. the European payments union) merely as a "matter of common interest". With increasing economic interdependence, a monetary union of the states participating in a common market can result in efficiency gains and positive synergy effects. To date, however, neither fiscal nor wage policy has been communitised. In an exchange rate union, the participating states can combat economic imbalances by revaluing or devaluing their currencies within the common monetary system. In a monetary union, this option is no longer available, as none of the participating countries can pursue an independent monetary policy. If the economic homogeneity between the participating countries is too low, the monetary union can be jeopardised by external economic shocks, i.e. disruptions to the overall economic equilibrium, which affect the countries in the monetary union to varying degrees. We can currently see this in the example of the energy crisis, which is caused by the differing dependence of EU Member States on Russian energy supplies and the differing trade policies of these states towards Russia. The European financial crisis of 2010 et seq. was triggered by the differing degrees to which the Euro countries were affected by the US mortgage crisis. Further economic imbalances can arise from differing wage and price levels in the countries of the monetary union. Wage restraint in one country can clash with extensive wage and social policies in another. If there is also a quasi-federal fiscal equalization (a transfer union), as is the case between the German Länder, the costs of the welfare state can be externalised to the partners of the monetary union. The Federal Republic, with its high level of welfare, has always endeavoured to prevent this. Finally, asymmetries of monetary and fiscal policy remain. As the states of the monetary union can no longer pursue an autonomous monetary policy and also have de facto only limited autonomy in the field of wage and social policy, the demand for fiscal policy measures at national level is increasing, particularly for an increase in national debt. Here it is important to prevent the negative interest and exchange rate consequences of a national debt policy from having to be borne by the partner countries as external effects. As Germany, as well as other central and northern European Euro states, are committed to a culture of budgetary discipline, while the southern European states tend to pursue a spending policy, the rules on European fiscal policy in Article 122 et seq. and Article 311 TFEU are of central importance for Germany.

However, even during the conception phase of the monetary union in the 1990s, Germany realised that the Euro Zone states would possibly have to enter into a fiscal union sooner or later. Because this realization has also reached the German federal government and even, as we will see, the FCC, Germany (with the current parliamentary majority) is submitting to a creeping communitisation of fiscal policy.

2.2.2. The Union's responsibility to protect?

With the Council's Next Generation Own Resources Decision of 14 December 2020, the first steps have been taken towards a change in budgetary sovereignty in the Union. This action was prompted by the Covid crisis, which has massively shaken the economies of the European states since 2020. Subsequently, the Union is now being provided with considerable credit-financed budget funds. This explains the close link between the fiscal policy debate and health management, the communitisation of which is also a central demand of the FoEC. To date, the Union has only had marginal powers in the area of health protection. According to Article 168 TFEU, the Union complements, promotes and coordinates the health policies of the Member States. In addition, the Union cooperates with third countries and international organisations in matters of health protection, but there is no original competence of the Union to formulate a binding Union-wide framework agenda for health policy. During the Covid crisis, this led to very different national disease control strategies, which contradicted, and in some cases undermined, each other. Ultimately, however, it is not just about the aspect of effective disease control, but the example of health protection shows that an authority's responsibility for the health of the citizens entrusted to it can lead to a more comprehensive responsibility to protect.⁷⁸ This, again, can extend to other areas of public life, e.g. internal and external security. Ultimately, the responsibility to protect – or more precisely: the synallagmatic relationship between protection and obedience – is a key attribute of the state. This view has been common property of European state philosophy since Thomas Hobbes.⁷⁹ The recognition of the government's responsibility to protect leads to a reinterpretation of fundamental rights. Above all, the fundamental right to life and physical integrity (Article 2 paragraph 1, Article 3, Article 6 CFR) might be converted into a duty to protect, on the basis of which corresponding powers of

78 The term "responsibility to protect" originates from international humanitarian law (see: Jessup, 1954, 98 et seq.) and can be applied to the fundamental rights of the Union.

79 Hobbes, 1651.

intervention by the Union can be created.⁸⁰ This is demonstrated by the development of fundamental rights in Germany. Starting with the abortion legislation in the 1970s, the FCC has interpreted more and more duties to protect into the fundamental rights of the German Basic Law. It has reinterpreted the fundamental rights meant as pre-state rights of freedom of the citizen against the state – rights that the state does not create, but merely recognises, as they are rooted in the dignity of the human being and are therefore unavailable to the state (Article 1, Article 19 paragraph 2, Article 79 paragraph 3 GG) – into state powers, turning individual rights into an objective set of values behind the constitution and supporting it.⁸¹ With this case law,

- 80 The development of Union competences from “rights to protect” does not need to be subject to a formal amendment of European primary law. The ECJ might follow the example of the German FCC, which reinterpreted the right to life and physical integrity, as guaranteed by Art. 2 para. 2 GG in form of a fundamental right (which means: a subjective right of the individual towards the state prohibiting legal infringement without due legal basis), as a government power, which is the opposite of a fundamental right. As a consequence, a constitutional provision meant as a right can now legitimise infringements of this very right (BVerfGE 39, 1). This adjudication line has been expanded to further fundamental rights provisions of the German constitution. The latest creation of the FCC is an “ecological subsistence level”, derived from the constitutional sustainability guarantee (Art. 20a GG), reading: ‘Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.’ Art. 20a GG is a merely objective constitutional provision, but the FCC finds an individual right in it. Consequently, the judges conclude a government responsibility to protect this individual right, so that the German legislator has to follow detailed requirements for climate action which are alleged “constitutional” without being suggested by the text of the constitution (BVerfGE 157, 30). This example shows how a court can partly supersede parliamentary legislation by interpretation of fundamental rights, an example of highest interest for an ECJ which understands itself as promotor of integration.
- 81 BVerfGE 339 1.

the FCC has made itself the true guardian of the political⁸², and also the guardian of the legislature. A similar development can occur in the relationship between the Union and its Member States if the Union is assigned a comprehensive responsibility to protect the life and limb of the Union's citizens and if it is then logically concluded that the Union must also be given the necessary budgetary powers and leeway to be able to fulfil its responsibility to protect. The FoEC has set a milestone here, no more and no less, but the topic is now on the European agenda. It has been framed by the Union in a way that emphasises the communitarisation tendency and will be taken up at the next opportunity in order to achieve further steps towards strengthening the Union at the expense of the states. All this still does not turn the Union itself into a state or a sovereign political entity, but it does drive the depoliticisation process further. To date, budget law has been the prerogative of national parliaments; these are the heart chambers of democracy. Nothing is as controversial as the national budget. The parliamentary budget debate is the general debate of the parliamentary session, in which the political becomes most visible in the form of party-political alliances. There is no such political exchange of blows at Union level. The European Parliament, with its transnational, extremely fragile alliances of MEPs, is no substitute for national parliaments, because it is not and cannot be a forum for the exchange of ideas between government and opposition.⁸³ It should be remembered that even Mitrany's classical functionalism, taken up by Ipsen's Hamburg school of European law, described the role of a supranational consultative assembly (which is what the

82 Collings 2015. The FCC is a "political court". State and constitutional law, the standard of review of the Constitutional Court, is "political law" in the sense that it formulates the conditions, procedures and powers of the state as a political entity – "homogeneity space" – and within this framework also establishes limits to state influence (Böckenförde, 1986). Constitutional jurisdiction itself acts "politically", i.e. with reference to the unity of the state, by interpreting state and constitutional law and thus implementing the homogeneity requirements on which the state is based, the state powers and the democratic decision-making process. Böckenförde puts this in a nutshell: 'Constitutional jurisdiction can therefore not be an area separated from political dissociations and the dangers associated with them in the same way as the judiciary, which is bound to the limits set by political discourse, is'. However, a constitutional court cannot be a "guardian of the constitution"; this term also comes from Carl Schmitt's constitutional theory (Schmitt, 1931). The "guardian of the constitution" must be an actively acting state organ. Its task is to strengthen the resilience of the constitution. A court – even a constitutional court – cannot fulfil this role for the simple reason that its decision-making powers, like those of any court, are strictly tied to the application and the subject matter of the dispute and are subject to more or less strict procedural requirements. Within the scope of its jurisdiction, a constitutional court may provide the political forces with advice and suggestions, but it can never intervene in the political process on its own initiative. The "guardian of the constitution" must be able to do so, because it is the 'guardian of political unity itself' (Böckenförde, 1986). The concept of the "guardian of the constitution" is closely linked to Benjamin Constant's theory of the *pouvoir neutre* as the fourth, moderating power in the three-power state. On this: Doebring, 1964, 201 et seq.

83 The struggle between government and opposition is identified as the core of the political by: Luhmann, 2000.

European Parliament still is) exactly as it is today.⁸⁴ There is neither a government of the European Union nor is there an opposition.⁸⁵ This is true even in the light of recent developments, which have led to a strengthening of “populist” right or left wing parties opposing the Union or their countries’ membership of the Union, being represented in the European Parliament by their own MEPs. “Eurosceptic” attacks are directed towards the relevant national stage on which their promoters seek to make their concerns plausible. In their view, the Strasbourg Parliament is an extended catwalk for a national beauty contest, not a place of politics. But here, they meet a point. The apolitical character of the European Parliament is not a democratic deficit, but (as shown in 2.1. above) a consequence of the depoliticisation approach inscribed in the Union. The Strasbourg Parliament has more the character

- 84 The controversy surrounding the so-called Spitzenkandidaten system in the run-up to the last European parliamentary elections in 2019 shows that the leading politicians responsible in the Member States are fully aware of this. At that time, the European Parliament attempted to impose top candidates selected according to ideological principles (“conservative” vs “progressive”) on the national heads of government meeting in the European Council in order to create a junction between the outcome of the parliamentary elections and the election of the Commission President. This demand was not accepted by the heads of government, in particular Emmanuel Macron. Macron ignored the leadership claim of the lead candidate put forward by the relatively strongest parliamentary group, the EPP, and insisted on the election of a person with government or political leadership experience, which (in Macron’s opinion) was not available in the person of this lead candidate. In the end, Ursula von der Leyen, then German Minister of Defence, was nominated for the post of President of the Commission. This impressively demonstrated that, even after almost seventy years of European integration, the place of politics is not to be found at Union level, and certainly not in the European Parliament, but still with the assembled heads of government of the Member States.
- 85 Older German European legal scholarship has occasionally compared the organizational structure of the European Community/Union with that of the German Confederation of Princes and Cities, which was constituted as the “German Reich” on 24 April 1871 in the Palace of Versailles. For the German Empire of 1871 also consisted of internally sovereign political units whose political leaders had equal rights. The Prussian King, as German Emperor, had by law only a protocolary precedence over the monarchical heads of state and republican heads of city assembled in the Federal Council (similar to the European Council), although Prussia de facto dominated the Reich from the very beginning (on the organisation of the German Reich on the basis of the Reich Constitution of 24 April 1871). Moreover, the comparison of the German Empire with the European Union is wrong in several respects. Although the Reich was not a state either, but a qualified confederation of states, the aim of the Reich was the national integration of the German people, not depoliticisation. Moreover, the German Reich lived from the strength of the dominant great power Prussia; de facto, it was a Prussia enlarged by the southern German states and Alsace-Lorraine to the exclusion of Austria-Hungary. The European Union, on the other hand, is dependent on a genuine balance of power between larger and smaller European states. There must be no permanently dominant power, otherwise the entire integration project will fail. After all, at the time of the formation of the Prussian-German Empire, the economic and legal integration of Germany was already largely complete or – with regard to the standardisation of criminal, procedural and civil law – could be implemented quickly without major resistance. The unification of Germany, which was only completed with the entry into force of the Weimar Constitution on 11 August 1919 and the creation of a German federal state based on it, was based on the already existing national, economic and legal unity of Germany. There can be no question of this in the European context. Here, even after more than seventy years, the economic and legal conditions for unification have only been imperfectly created; there is no national unity in Europe at all and it will probably never come about.

of a consultative assembly and was originally intended as such, a body oriented towards the substance of the matter – and not towards political conflict – which is intended to provide the Union with additional legitimacy not derived from the Member States (Article 10 paragraphs 2 and 3 TEU). It is to be expected that budget sovereignty transferred from the national parliaments to the European Parliament would perfect depoliticisation. Budgetary issues would then no longer be negotiated in terms of political controversy between the government and the opposition, but would be discussed by the Parliament's vast majority in terms of their benefits for the European integration. Some may well see this as progress and relief, as a desirable objectification of public discourse. In any case, however, this step would definitively depotentiate the European states. This development has been described from the outset by German European law scholars in particular, and some would say it has been written about.

2.3. Market versus values – a struggle of perspectives on European integration

2.3.1. The European integration: an application of ordoliberal theory

It is no coincidence that the concepts of German European law have long dominated the perspective on European integration beyond the Federal Republic. While France and Italy were still completely attached to the nation state, the German nation state was divided into East and West after 1945. As a result of the despair of the own nation, intensive reflection on the “post-national constellation” (Jürgen Habermas) began in West Germany immediately after the Second World War. The emerging Bonn Republic became a testing ground for neoliberal political change, which focused on “prosperity for all”. The prosperity formula described the German *Wirtschaftswunder*, and it served for the Bonn Republic as the primary means of

integration instead of national symbolism.⁸⁶ The Christian-Democratic Union (CDU) of Konrad Adenauer and Ludwig Erhard, victorious in the first Bundestag election in August 1949, ran on this campaign slogan and laid the foundations for a sustained increase in prosperity. As the CDU/CSU have been the parties of *Wirtschaftswunder* (a development which hardly anybody would have thought possible so shortly after the war), they became the dominant political forces in West Germany and have maintained this position even after the German reunification. One important incentive of the gentle revolution in East Germany in November 1989 was the will of the East German people to take their share of the West German consumer paradise. The prescriptions which the economic spin doctors of liberal post-war Europe enacted over West Germany were the same on the European communities level. Therefore, the CDU/CSU parties became the driving force of both *Wirtschaftswunder* and European integration. It surely helped that the European founding fathers next to Konrad Adenauer – Alcide de Gasperi and Robert Schuman – were also Christian Democrats, sharing their political convictions with the German chancellor. With the exception of the Belgian socialist Paul-Henri Spaak, all the founding fathers of the European integration project were Christian Democrats; the Christian Democratic parties in the Netherlands, Luxembourg and France, but above all the Italian Democrazia Cristiana, supported the integration project. However, while the Christian Democratic parties in Italy, France and the Benelux countries are Catholic-oriented, the German CDU/CSU sees itself as non-denominational. In southern Germany and the Rhineland, the Christian Democrats tend to be Catholic, while in the north and east of the country they tend to be Protestant. This is why the CDU and CSU were able to moderate the various northern and eastern enlargements of the European Communities and the European Union, which took away their specifically Catholic character, and remain

86 Like much of what was implemented in West Germany after 1945, the ordoliberal school originated in the final years of the Weimar Republic, when a fundamental reform of the state was being considered, the implementation of which was abruptly interrupted when Hitler came to power on 30 January 1933. The pioneers of the ordoliberal Freiburg School were the economists Walter Eucken and Wilhelm Röpke as well as the civil law expert Franz Böhm. The Freiburg ideas gained enormous political influence through the CDU politician Ludwig Erhard (1897–1977), father of the currency reform (1948) and the economic miracle, Federal Minister of Economics (1949–63) and Federal Chancellor (1963–66). The spiritus rector of German economic policy was Erhard's state secretary, the Cologne professor of economics Alfred Müller-Armack. Under Erhard's chancellorship, the work of European unification temporarily lost momentum. Unlike his predecessor Adenauer, Erhard was a Protestant and an Atlanticist. He took a skeptical view of the Federal Republic's privileged partnership with France and was more politically inclined towards Lyndon B. Johnson than Charles de Gaulle. He regarded the European Communities as economically sensible, but they should not stand in the way of West Germany's close ties with the United States. For Erhard's successors as Chancellor, the Christian Democrat Kurt Georg Kiesinger (1966–69) and the Social Democrat Willy Brandt (1969–74), European unification was not a top priority either, for different reasons. It only picked up speed again when the Social Democrat Helmut Schmidt and the Liberal-Conservative Valéry Giscard d'Estaing became German Chancellor and French President respectively at almost the same time in 1974. The close Franco-German alliance then continued under François Mitterrand and Helmut Kohl from 1982/83. It also led to a revival of European policy impulses.

the German European party. By the mid-1950s, West Germany was the economic engine of the western half of Europe. It has formed the economic centre of gravity of the European Communities from the very beginning. Ordoliberalism, the German version of economic neoliberalism, had triumphed across the board.⁸⁷ Their own nation became secondary for the Germans, as did all other European nations. This change of mentality was supported by a decidedly anti-nationalistic policy of the CDU/CSU. A supranational European community based on the market and human rights seemed to the Germans to be a continuation and welcome addition to their own post-national community.⁸⁸ They could count on the support of the smaller states of Western Europe, which were in a similar situation to the Bonn Republic. From a global perspective, post-war Germany is probably the most important, if not perhaps the only example worldwide of a successful neoliberal reestablishment of a political system. This was not what the Germans initially wanted. The historical situation forced them to break new ground. The high level of discipline of the German population and their willingness to forego the siphoning off of prosperity gains without regard for further sustainable economic development led the ordoliberal project to success. Elsewhere in the world, similar attempts have failed spectacularly: in the 1970s in Chile, Argentina and the UK (under Margaret Thatcher), in the 1980s in the USA (“Reaganomics”) and, perhaps most spectacularly, in the 1990s in Yeltsin-era Russia.⁸⁹ Although conservatives criticised the German development as the “end of the state” (Carl Schmitt)⁹⁰, as the victory of industrial society over the state (Ernst Forsthoff)⁹¹ or as the mechanisation of the living environment (Helmut Schelsky)⁹², all with a resigned undertone, the development was generally welcomed, especially with regard to its extension to the level of the European communities. Michel Foucault’s analysis from 1978/79, which discusses the ordoliberal German state model under the heading of “biopolitics”, is particularly apt.⁹³ Ipsen’s term *Zweckverband funktioneller Integration* has already been quoted (see 2.1. above); the first President of the European Commission, Walter Hallstein (who came from Adenauer’s circle), spoke sybillically of the European treaty community as an *unvollendeter Bundesstaat* (unfinished federal state) and *Rechtsgemeinschaft* (community of law)⁹⁴. Finally, in the 1990s, Giandomenico Majone reduced the approach described here to the denominator of the “regulatory state”⁹⁵; Paul Kirchhof developed the concept of the

87 Overview of ordoliberal theories and schools: Biebricher and Ptak, 2020.

88 Habermas, 1998.

89 Klein, 2007.

90 Schmitt, 1932.

91 Forsthoff, 1971.

92 Schelsky, 1965.

93 Foucault, 1978/79.

94 Hallstein, 1969, 485 et seq.

95 Majone, 1998.

Staatenverbund (association of states)⁹⁶, which still characterises the integration constitutional case law of the FCC today (see 3.).

Hallstein should be discussed in more detail at this point, as his theses show that the ordoliberal approach to European integration did not remain uncontested. As a “professional European” (Ipsen’s derogatory title⁹⁷), Hallstein took an affirmative stance towards the formation of a federal state at European level. Based on Ophüls’ thesis, according to which a supranational integrative association already had the character of a federal state *in statu nascendi*, i.e. in its (pre-)form as an economic association of convenience, Hallstein (like Ophüls) emphasised the analogies between the European Communities and the classical federal state. According to Hallstein, the current state of the Communities in the 1960s was to be seen as a stage, not the final form of European supranationality. The Member States of the Communities would ultimately have to be amalgamated into a federal state, only then would the stable final state of European unification be achieved. Moreover, the economic cooperation of the Western European states only made sense in the finality of the Union project outlined by Hallstein. One may add: in Hallstein’s view, persisting with a common European market would eventually cause the impetus for integration to disappear, because the European peoples do not long for a consumer paradise, but for an occidental community of values.⁹⁸ Hallstein’s statements found considerable resonance in German European law scholarship. Above all, they were able to tie in with the equally popular thesis of the structural homogeneity of the European to the nation-state principle of democracy.⁹⁹ The supranational community that democratic states enter into with each other is a reflection of these states themselves. Thus, the democratic as well as the constitutional and power-sharing requirements derived from the national constitutions for state authority would have to apply equally to the Communities and their institutions. In terms of legal policy, this was diametrically opposed to Ipsen’s repudiation of a European catalogue of fundamental rights and a parliamentarisation of the Community. Nevertheless, even Hallstein’s “Frankfurt School” did not deny that the time had not yet come for the formation of a federal state at European level and that, for the time being, one had to resign oneself, for better or worse, to an “association of functional integration”, but only *faute de mieux*. Thus, around 1970, two more or less irreconcilable German schools of European law faced each other: on the one hand, Hallstein’s “Frankfurt School”, whose legal policy demands suggested activism on the part of both the legislative and the judiciary to achieve rapid progress towards unification at European level, and on the other, Ipsen’s “Hamburg School”, which on the contrary insisted on the democratic (re-) legitimisation of all further integration steps, which in the long term entailed the necessity of constitutional amendments as a precondition for Germany’s participation

96 Kirchhof, 2009, 1009 et seq.

97 Ipsen, 1970.

98 Hallstein, 1969, 93 et seq.; Hallstein, 1979, 103 et seq.

99 In chronological order: Klein, 1952; Kruse, 1954, 112 et seq.; Friauf, 1960, 81.

in substantial deepening of European integration. It is worth noting that this controversy should not be misunderstood as a political dispute. If we look at the state of opinion at the time from a party-political perspective, we see a great deal of unanimity among all of Germany's leading parties with regard to the fundamental desirability of deepening and expanding the European Communities. Politicians were not interested in the how of this deepening, but only in the whether. Furthermore, all the theories associated with the buzzwords mentioned above have one thing in common: they see the European supranational institutions not as a state, but as a particular form of an association of states beyond the political. The "association of states" secures European peace by overcoming national differences. It overcomes national differences by containing and neutralising the political. The market and human rights are the determinants of the idea of freedom on which Union-Europe is founded.

2.3.2. *The European Union as a Commonwealth of values ("community of values")*

The European Union has been searching for its identity for some time. The preamble to the TEU and Article 2 TEU contain catalogues of values that represent a cross-section of European constitutional culture. The European treaty legislator weaves garlands of words, unsystematically juxtaposing the value provisions within the aforementioned catalogues without any recognisable priorities or patterns of order. The preamble to the TEU mentions the "cultural" alongside the "religious" and "humanist" heritage of Europe, without making it clear how the "religious" and "humanist" heritage are to be reconciled and how the relationship between the two and the "cultural" heritage, of which they are actually an integral part, is to be imagined. The preamble to the European Charter of Fundamental Rights contains the term "spiritual and religious heritage" in the German version, whereas the English version only refers to "spiritual and moral" heritage. This, too, does not make the definition of the common European foundation of values any more meaningful. The European discourse on values often ends in chatter. A certain clarity would have been achieved by including a reference to God in the preamble to a European constitutional treaty. However, all attempts to establish a religious foundation for the European value system have so far failed due to resistance from France, which insists on its secularism.¹⁰⁰ However, this fails to recognise that a constitutional reference to God does not turn rule into a theocracy. Rather, it is understood as a rejection of the omnipotence fantasies of an unleashed *pouvoir constituant* that is accountable to no one. By referring to God, the constitutional legislator acknowledges the transcendental nature – and thus the limitation – of the constitutional law, a gesture of humility. Values can also be founded on secular grounds. In this respect, it makes sense to interpret the fundamental rights of the treaties and the European Charter of Fundamental Rights as elements of an objective system of values. The FCC has taken this approach in order to derive state protection obligations and powers from

100 Isensee, 2015, 6 et seq.; Durand, 2007, 5 et seq.

the subjective rights of the Basic Law (see above). However, it is doubtful whether the path to a community of values does not hinder rather than promote the European integration project. Although top German politicians also like to profess their commitment to common European values, they often mean something completely different: “value” in the economic sense, i.e. goods, capital, labour, the European single market as a whole.

The ordoliberal theory still characterises the German and, as far as as can be seen, the Western European perspective on the European integration process in general. This is probably the root of the rift between some Central Eastern European states (especially Hungary and Poland) and the Western European EU members with Germany at the forefront. The Central and Eastern European states liberated from Soviet rule joined a European Union that they see as an occidental *Wertegemeinschaft* (community of values) and thus as the greatest possible contrast to the Marxist-Leninist “real socialist” empire of the Soviet type. Their euphoria about integration clashes with the cool rationalism of German ordoliberalism, which sees the values of the European Union, as promised in the preamble to the TEU and in Article 2 TEU, as an accessory, not as the essence of European integration. From a legal point of view, there is a dispute as to which provision in the TEU forms the normative foundation of the Union: Article 2 TEU or Article 3 TEU? For Germany and the Western Europeans, the European Union is a single market based on individualistic values; conversely, some Eastern European states probably see it as a community of values with anti-socialist (and only to this extent market-liberal) characteristics. This conflict of interpretation takes on political characteristics, as it has the potential to permanently and sustainably divide Western and Eastern Europeans, but the apolitical character of the Union’s institutions is not affected by this. Some critics of the Future of Europe process have criticised the fact that there was no mention of strengthening the concept of subsidiarity (Article 5 paragraph 3 TEU). Furthermore, respect for the sovereignty of the Member States (Article 4 paragraph 2 TEU) was neglected. From the above explanations, it is easy to see that this was not and could not have been the intention of the initiators of the process. Rather, from a “pro-European” perspective, the aim is to achieve a new deepening of the internal market and a centralisation of the protection of fundamental and human rights at Union level.

3. The “German Perspective” on the Future of Europe Conference in Light of the Federal Constitutional Court’s Adjudication Lines

3.1. *The FCC as a key player in German European policy*

As explained at the outset, there is no single German perspective on European integration issues. The point of the integration process is precisely the displacement of national thinking from European policy (see 2.2. above). How the FoEC is judged in Germany depends on the actors being asked about it. From a legal perspective, the key player on the German side can be clearly identified: the Federal Constitutional Court. Since 1967, it has supported the European integration process in part, but has often been very critical and obstructive. The following section provides an overview of the basic principles of Karlsruhe case law on constitutional integration law. First, however, this case law requires a fundamental classification. Since the FCC’s notorious Maastricht judgment of 12 October 1993¹⁰¹, a view has emerged in Germany that sees the FCC as an opponent of the ECJ. Another opinion highlights the FCC as the guardian of German national sovereignty. Both approaches cannot convince. Neither a nationalist nor an anti-integrationist theory can be justified on grounds of the adjudication lines drawn in Karlsruhe, if only because behind the few barriers that the FCC has placed on Germany’s participation in the European Union, it has always emphasised and strengthened the Federal Republic’s broad powers of participation in integration affairs. Reservations against an unconditioned principle of integration (sometimes falsely referred to as “open constitutional state”, *offener Verfassungsstaat*¹⁰²) made from a constitutional point of view may sometimes give the impression that the FCC is in a kind of dispute with the ECJ. This impression is also wrong and it is quite intriguing that law experts in particular have spread it. There can be no competition between Karlsruhe and Luxembourg, if only because the case law of the two courts is subject to different standards of review. The FCC examines only *national law* according to the German Basic Law¹⁰³, while the ECJ’s jurisdiction is limited to *Union law*, more precisely: to the control of acts of secondary and tertiary law against the standard of primary law. The only link between the national and the ECJ’s standards of review is the preliminary ruling procedure according to Art. 267 TFEU.¹⁰⁴ Although EU law takes precedence over national law, the former does not override the latter. Conversely, no unilateral reservations can be derived

101 BVerfGE 89, 155.

102 Di Fabio, 2001.

103 More recently, the FCC has in some cases integrated the European Charter of Fundamental Rights into the standard of review of the Basic Law BVerfGE 152, 152; 152, 216.

104 On January 14, 2014, the FCC issued its first order for reference pursuant to Article 267 TFEU (BVerfGE 142, 123). Only with this order did the FCC make it unmistakably clear that it is willing to accept a certain priority of the ECJ in the multi-level system of European legal protection.

from national law in relation to Union law. All of this is basically undisputed and has never been taken into question by the FCC. However, with its case law on the preconditions of European integration derived from constitutional law, the FCC has long assumed the role of an opposition on European issues that has not formed in the German Bundestag, the place of the political in the Federal Republic. European integration has never been seriously controversial in Germany for the reasons mentioned above (see 2.2. and 2.3.). To this day, all the mainstream parties support it. The FCC has thus adopted a political position without exceeding its competences. Karlsruhe limits itself to deriving constitutional standards for the European integration of Germany from the Basic Law, but this type of constitutional jurisprudence has an eminently political subtext.¹⁰⁵ On several occasions, the Karlsruhe court has abandoned the German integration consensus that otherwise prevails and reminded us of the relevance of the state and the nation. With its rulings, it binds the federal government and the federal legislature, which (sometimes only reluctantly) implement the guiding principles from Karlsruhe. The most important consequence of this at present is that the FCC determined in its Lisbon ruling of 30 June 2009 that the level of integration achieved with the Lisbon Reform Treaty is the maximum of supranational subordination that is still compatible with the current Basic Law.¹⁰⁶ The participation of the Federal Republic in further substantial reform steps would require a new constitution. A simple constitutional amendment would no longer be enough. German constitutional law has a provision known as the “eternity clause” in Article 79 paragraph 3 GG, according to which constitutional amendments are materially bound to the principles of human dignity and the major principles of state (i.e. federalism, democracy, rule of law). In the opinion of the FCC, the Federal Republic would forfeit its statehood in the event of further substantial deepening of European integration and become subject to a European federal state, even if this federal state might continue to be called the “European Union”. However, the Basic Law does not permit this. A new constitution would therefore have to be enacted that would authorise the Federal Republic to give up its sovereign statehood in favour of joining a European federal state. Article 146 GG puts such a constitutional replacement within the realm of legal possibility, but politically it is unthinkable. Nobody in Germany is currently thinking of replacing the current Basic Law, which has proven itself for almost eight decades now and was not even structurally changed by the

105 Cum grano salis the FCC’s case law on matters of constitutional law relating to European integration can be summed up as follows: *the political meets the non-political*. For decades, the FCC’s constitutional jurisprudence on European integration has provided a forum for arguments sceptical of integration that were not heard in the parliamentary decision-making bodies due to a lack of support from the parties represented there. It has thus acted as the de facto mouthpiece of an opposition that was not present in Parliament on fundamental questions of European policy. It has often overshoot the mark by failing to sufficiently appreciate the non-political nature of the common European market and its framework institutions. But it is precisely this deliberate disregard of the non-political aspects of European integration that constitutes the political subtext of the FCC’s case law.

106 BVerfGE 123, 267.

accession of the East German Länder on 3 October 1990. A political process aimed at recreating the constitution would have unforeseeable consequences and would perhaps paralyse the country for decades.¹⁰⁷ In practice, however, this means that the German government cannot support any substantial reform steps at European level, let alone treaty amendments. The FoEC with its indirect approach, which is not aimed at hard legal consequences or even reforms of primary law, is therefore also a consequence of the restrictions formulated in Karlsruhe on Germany's ability to act on fundamental European policy issues. Germany can currently only talk, not act, in European policy. However, it is not entirely out of the question that Karlsruhe will at some point come to a reassessment of Germany's constitutional leeway. The case law of the FCC to be outlined below, which probably best defines a genuinely German perspective on the integration process, is rich in surprising twists and turns.

3.2. Basic lines of the Karlsruhe integration case law

3.2.1. The general problem: balancing the prevalence of European law with constitutional requirements to protect fundamental rights and state principles

In retrospect, it is surprising that the FCC ignored for years the fundamental change in integration policy that has taken place at the level of the European Communities since 1963/64, forced by the ECJ, and then apparently had difficulties in correctly classifying its constitutional significance. The six signatory states of the Treaty of Rome wanted to create regional international economic law with a joint commission and a treaty court, the ECJ based in Luxembourg. Politically, Walter Hallstein's "unfinished federal state" was perhaps already being considered in the mid-1950s, but this did not emerge in the European treaties of March 1957. It is therefore all the more astonishing that the ECJ created this unfinished federal state virtually overnight with two leading decisions from the early 1960s: *van Gend en Loos* and *Costa/ENEL*. The *Van Gend* and *Costa* judgments are to the European legal community what the *Marbury v Madison* case is to the USA: the birth of a self-contained federal legal system. In the *Van Gend* case, the ECJ rejected the international character of Community law.¹⁰⁸ The European Economic Community constituted a *sui generis* legal order. From this, the Court deduced the direct effectiveness of Community law in the legal area of the Member States, the possibility of establishing individual rights of market citizens through European law, the possibility of implicitly anchoring subjective rights in European primary law and the obligation of national courts to directly apply Community law. All of this was now also linked to the right of market citizens to bring an action before national courts – dependent upon subjective rights being affected – for the violation of Community

¹⁰⁷ As a cautionary tale serves the amendment procedure of the Swiss Federal Constitution which lasted over two decades until 1999.

¹⁰⁸ ECLI:EU:C:1963:1 – *van Gend*.

law by national authorities. In the *Costa* case, the guiding principles from *van Gend* were supplemented by the statement that the primacy of Community law over national law implies a prohibition of confusion directed at the Member States, which is why European Community law itself must prevail over national constitutional law (or national law at the highest level).¹⁰⁹ In the early ECJ's adjudication on the status of Community law, there are echoes of both Ipsen's association theory and federalist concepts, in particular the concept of the *Rechtsgemeinschaft*, which was later prominently advocated by Hallstein. Both approaches can be interpreted in the concept of the "sui generis legal order", the key formula of the *van Gend* decision, depending on the perspective. On the one hand, the anti-federalists and functionalists could see themselves confirmed in the fact that the character of the Communities as functionally independent, autonomous supranational administrative authorities was approved. On the other hand, the federalists could also be satisfied, as the Luxembourg judges' insistence on the sui generis character of the Communities provided the decisive lever for integration that was needed for the further federal development of Europe. The same can be said of the *Costa* judgment's postulation of the comprehensive primacy of Community law over national law. Perhaps this also explains why both decisions have met with surprisingly little resonance in German constitutional and international law doctrine. Since all factions felt vindicated in their views, the more recent Luxembourg developments may not have been considered worth mentioning. However, the early ECJ case law did not yet recognise any fundamental rights on the community level, as these were not explicitly provided for in the treaties. In its early case law, the Luxembourg Court of Justice still shows an astonishing restraint in retrospect. Although there is no evidence that the Luxembourg judges were aware of the contemporary European law debate in the Federal Republic of Germany, the ECJ's original position on Community fundamental rights is entirely in line with Mitrany and Ipsen. Ipsen had admitted that the fundamental economic rights of the Basic Law could be affected by sovereign Community measures (see above), but he found that the principles of equal treatment and the prohibition of arbitrariness (Article 36 sentence 2, article 119 paragraph 1 EEC Treaty), which were guaranteed and justiciable at Community level, offered sufficient protection against interference with fundamental rights.¹¹⁰ In addition, the Communities were strictly bound by the principle of conferral of powers; infringements of powers could also be challenged under Community law on the basis of Article 173 EEC Treaty. However, not all contemporaries saw it that way. From a German perspective, the absence of fundamental rights in Community law subsequently proved to be problematic, as the EEC operated economic administration in a manner relevant to fundamental rights and Community law claimed unconditional priority of application. Thus, it had the greatest possible direct effect within the national legal framework. On the other hand, protection of fundamental rights against Community measures (in particular

109 ECLI:EU:C:1964:66 – *Costa*.

110 Ipsen, 1964, 1 et seq.

those of the EEC Commission) or against their implementation was initially only possible within the national framework, but could not be guaranteed without interruption due to the primacy of application of Community law and the EEC's independent legal personality ("legal order *sui generis*"). Article 1 paragraph 3, Article 19 paragraph 4, Article 20 paragraph 3, and Article 94 paragraph 1 no. 4a GG – the most important constitutional provisions for the protection of fundamental rights in German constitutional law – link the jurisdiction of the FCC to measures of German state authority, but according to van Gend and Costa, the European Communities could no longer be regarded as a derived form of German state authority ("sui generis legal order"). According to the German interpretation, this led to a preeminent constitutional relevance of European Community law. Accordingly, there is no legal protection against European primary law, neither before the ECJ nor before national courts. Legal protection against European secondary law (Article 288 TFEU) as well as against acts of execution or implementation by German courts and administrative authorities is conceivable in principle, but according to ECJ case law, it is not compatible with the meaning and purpose of the integration objectives (*effet utile*, Article 4 paragraph 3 TEU). This gives rise to the constitutional problem of balancing the integration objective recognised in German constitutional law (initially Article 24 paragraph 1 GG, today: Article 23 paragraph 1 GG) with the constitutionally required protection of fundamental rights within the scope of application of the Basic Law against sovereign acts attributable to the Federal Republic. Whether and to what extent measures of the European legal community are attributable to the Federal Republic of Germany and therefore trigger a responsibility to protect is the subject of a controversy that has been ongoing since the 1960s to the present day and which has only been clarified by the Karlsruhe case law step by step and not in one fell swoop by a single leading decision.

3.2.2. *The early adjudication of the FCC*

The FCC took the first step in this direction with its decision of 18 October 1967, concerning EEC regulations.¹¹¹ This first supreme court clarification of the complex legal situation was paved by a referral from the Rhineland-Palatinate Fiscal Court to the FCC in accordance with Article 100 paragraph 1 GG.¹¹² With this legal remedy, known as *Richtervorlage*, lower courts can request a preliminary ruling from the FCC in the event of doubts about the constitutionality of the simple statutory provisions to be applied by them. Ipsen and his fellow campaigners were already contesting the admissibility of the referral, as it addressed the compatibility of the EEC Treaty with the provisions of the Basic Law.¹¹³ The FCC found that the derivation of the exercise of sovereign rights by the EEC with effect for Germany from German

¹¹¹ BVerfGE 22, 134.

¹¹² Finanzgericht Rheinland-Pfalz, 376 (only guidelines).

¹¹³ Contemporary criticism in: Badura, 1966; Fuß, 1964, 577 et seq.; Ipsen, 1965.

constitutional law (then: Article 24 paragraph 1 GG, today: Article 23 paragraph 1 GG) did not justify the attribution of Community acts to German state authority. The FCC thus implicitly recognised the ECJ's *sui generis* formula. The fact that protection of fundamental rights against Community measures could not be guaranteed in the Federal Republic of Germany at the time also did not establish the FCC's competence to review European acts on German fundamental rights. Although the FCC did not follow Ipsen's opinion regarding the admissibility of the judicial review, the grounds for the decision adhered entirely to Ipsen's special-purpose scheme, which, in terms of legal doctrine, amounts to a strict differentiation of the judicial standards of review: the national courts, above all the FCC, review exclusively national law against the standard of national laws, while the Community courts review Community measures against their own law. Insofar as the Member States apply Community law within the national legal framework, a review against national legal standards is also ruled out.

This decision led the ECJ to adopt a genuine fundamental rights jurisprudence under Community law. In the *Stauder* case, not coincidentally a case from Germany, the Court held on 12 November 1969 that the fundamental rights of the person are part of the constitutional traditions common to the Member States, which is why they are guaranteed in unwritten form as general principles of Community law.¹¹⁴ In the *International Trading Company* case, the ECJ stated in its judgment of 17 December 1970: Since the Communities observe and safeguard fundamental rights as general principles of Community law, there is no room for reservations of fundamental rights and identity on the part of the Member States.¹¹⁵ In the *Nold* case, the Court of Justice finally ruled in its judgment of 14 May 1974 that the EEC (and, therefore, also the ECJ) had no power to recognise fundamental rights beyond the constitutional traditions common to the Member States.¹¹⁶ This was a response to national fears that the ECJ itself could become the guarantor of fundamental rights in competition with the national constitutional courts. Nevertheless, the Court recognised the European Convention on Human Rights as a source of legal knowledge of the common constitutional traditions relevant to Community law. The German debate on European law is likely to have had a particular influence on the *International Trading Company* case. In 1970, the constitutional law expert and university lecturer Hans Heinrich Rupp argued that the European Communities were, according to the prevailing theory of a special-purpose association, 'rule without a master, the exercise of sovereign rights without a democratic sovereign.'¹¹⁷ Ipsen, on the other hand, had argued that Community law measures could only be relevant to fundamental rights to a very limited extent, namely only with regard to freedom of

114 ECLI:EU:C:1969:57 – *Stauder*.

115 ECLI:EU:C:1970:114 – *International trading company*.

116 ECLI:EU:C:1975:114 – *Nold*.

117 Rupp, 1970. Rupp thus also set the tone in the debate on the supposed European democracy deficit, a debate which, as we have seen, was misguided. For contemporary criticism of Rupp, see: Martens, 1970, 209 et seq.; Spanner, 1970, 341 et seq.

occupation and freedom to conduct a business (Article 12 GG) and property (Article 14 GG). The FCC was now alarmed. With the famous *Solange I* decision of 29 May 1974, the court clarified its findings of 1967. *Solange I* was again based on a concrete review of norms in accordance with Article 100 paragraph 1 GG. In the light of the 1967 decision, it was surprising that the FCC considered the referral to be admissible. This was because the subject of the proceedings was again an EEC regulation. Now, however, the FCC considered itself competent under certain conditions, which are summarised in the following formula:

As long as the Community's integration process has not progressed to such an extent that Community law also contains a formulated (*not implicit*) catalogue of fundamental rights adopted by Parliament and in force that is adequate (*not congruent*) with the Basic Law's catalogue of fundamental rights, after obtaining the consent required in Article 177 TEC (*today: Article 267 TFEU*), the referral of a court of the Federal Republic of Germany to the Federal Constitutional Court in proceedings for the review of legal norms is permissible and required (*obligation to refer*) if the court considers the provision of Community law relevant to its decision to be inapplicable in the interpretation given by the ECJ because and to the extent that it conflicts with one of the fundamental rights of the Basic Law.¹¹⁸

In this decision, the FCC was not only guided by the unease of contemporary legal scholars about an independent supranational authority, but also by the conservative criticism of a technicist understanding of the state expressed by the Heidelberg professor of constitutional and administrative law Ernst Forsthoff (1902-74) in his widely received – rather prophetic than analytical – essay “Der Staat der Industriegesellschaft” (“The State of Industrial Society”) in 1971.¹¹⁹ Forsthoff warned against an exclusively technicist approach to the state, which would degrade the state to the function of socially dominant interest groups. Although Forsthoff does not explicitly

118 BVerfGE 37, 271; additives in italics by the author. With regard to the passages of the *Solange I* formula printed in italics, the following should be noted: (1) Starting with the *Stauder* case, the ECJ derived a protection of fundamental rights implicit in primary Community law from the constitutional convictions common to the Member States of the Communities. With France's accession to the European Convention on Human Rights (ECHR) in 1974, all EEC Member States at that time were also parties to the ECHR, so that it could serve the ECJ as a source of legal knowledge of the ‘common constitutional convictions’. The dogmatics developed by the ECJ at that time is today the basis of Art. 6 sect. 1, 3 TEU, Art. 52 sect. 4, Art. 53 CFR. However, the FCC was not satisfied with Community fundamental rights developed by the courts. (2) The adequacy criterion is based on the level of intergovernmental homogeneity necessary for the participation of the Federal Republic of Germany in the European integration process. No Community fundamental rights corresponding to the Basic Law are required, but they must be comparable to the German standard of protection of fundamental rights.

119 Forsthoff 1971, which is the sum of several relevant preliminary works by the same author on the subject of denationalisation and neutralisation of the political: Forsthoff, 1960, 807 et seq.; Forsthoff, 1968, 401 et seq.; Forsthoff, 1970, 145 et seq. Contemporary criticism in: von Simson, 1972, 51 et seq.

refer to the European Community, its economic integration approach is seen by conservatives as a blueprint for depotentiating the unifying factors inherent in the state. If the state lacks the power to moderate social frictions, this does not mean a taming of the political, but rather the release of the centrifugal forces inherent in society, whereby society becomes an agglomeration of more or less assertive particular associations that are in a state of latent civil war. Forsthoff's thoughts were seconded by the sociologist Helmut Schelsky (1912-84), who coined the term "technical state" in 1961 and understood it to mean an "expertocracy" a rule of experts.¹²⁰ Where the experts rule, the demos no longer has anything to decide and courts just certify decisions without technical alternatives, but they can no longer exert any formative influence on them.¹²¹ Although Schelsky's analysis is based on economic science, it can also be understood as a prophecy and the conclusion can be drawn that precautions must be taken at a national, constitutional level against the mechanisation of the state and the "takeover" of an expertocracy. Such ideas and fears are still in the background of the current German debate on the protection of national constitutional autonomy against a migration of fiscal and health policy powers of the state (i.e. from the sovereignty of the democratically legitimised national parliament) to the level of the Union and thus to an executive sphere. In view of these premises, Solange I meets the need for ultimate state control and defence of the state policy monopoly against supranationalisation tendencies.

3.2.3. *The rise of constitutional sovereignty*

Twelve years later, this case law was corrected in light of the direct elections to the European Parliament that had been introduced in the meantime (first held on 7-10 June 1979) and the progress made in the development of supranational protection of fundamental rights. The basis of these proceedings (and almost all further integration constitutional disputes) was a constitutional complaint (Article 94 paragraph 1 no. 4a GG). With this legal remedy, a holder of a fundamental right can either have the unconstitutionality of judgments of lower courts reviewed before the FCC (after having gone through the relevant legal process in full) or (under strict conditions) directly challenge the unconstitutionality of a statutory provision that burdens him. In both variants, the constitutional complaint does not primarily serve to remedy individual encroachments on fundamental rights; rather, the constitutional complaint is, by its very nature, a procedure for the review of legal norms. With the decision

120 Schelsky, 1965, 449 et seq. Hans Peter Ipsen has made this view of things his own, as can be seen from the following quote: "Where decisions are not made, but recognised, the competence of expertise prevails, not the majority. Community acts of this kind of recognition of what is right are legitimized by reasons, not by majority consensus" (Ipsen, 1969).

121 Much later, the British political scientist Colin Crouch presented similar ideas under the title "Post-democracy". They are a little reflected copy of the German discussion that had already taken place forty years earlier and of which Crouch took no notice. See: Crouch, 2008. On the postdemocracy discussion in the German legal science: Schaefer, 2016, 437 et seq.

of 22 October 1986 (Solange II), the FCC made a leading decision that is still valid today. The subject matter of the dispute was administrative court decisions relating to EEC law. Once again, the question of the jurisdiction of the FCC in cases relating to European law was raised. It had to be clarified whether the FCC grants protection of fundamental rights against acts of the EEC or their German implementation and enforcement acts. On this occasion, Karlsruhe coined the Solange II formula:

As long as the European Communities, in particular the case law of the Court of Justice of the Communities, guarantee effective protection of fundamental rights against the sovereign power of the Communities in general (*not necessarily in each individual case*), which is essentially equivalent to the protection of fundamental rights required by the Basic Law as indispensable (*identity control by the standard of proof*), especially since the essence of fundamental rights is generally guaranteed (*not with regard to each individual fundamental right, since there is no complete Community fundamental rights system*), the FCC will no longer exercise its jurisdiction over the applicability of derived Community law (*secondary, not primary law*), which is claimed as a legal basis for the conduct of German courts and authorities within the jurisdiction of the Federal Republic of Germany, and will therefore no longer review this law against the standard of the fundamental rights of the Basic Law.¹²²

With the Solange II formula, the FCC comes closer to the idea of a European “community of law” propagated by Walter Hallstein, which still enjoys a certain popularity in German constitutional law today.¹²³ The reservations expressed in the 1970s against expertocratic reinterpretations of democracy and the transformation of the state into a regime of technical constraints are receding into the background

122 BVerfGE 73, 339; additives in italics by the author. The Solange II formula sets a significantly different emphasis than the Solange I decision: (1) It is no longer required that the European level of protection of fundamental rights must be equivalent to the German level of protection in its entirety, but that there may be greater deviations in individual cases. This is the consequence of the ECJ case law, also recognised in principle by the FCC, according to which European Community law is not derived from national law, but rather the Community forms a legal order *sui generis*. (2) A constitutional court review of measures of the Communities based on secondary law against the standard of the Basic Law only takes place in the event of a violation of fundamental German constitutional principles that form the basis of identity. The FCC therefore concedes a certain margin of error to the ECJ and Community sovereignty. (3) Although the fundamental rights of the Basic Law are understood to be integral components of the German constitutional identity, they do not enjoy the full breadth of protection guaranteed by the FCC. This reservation was necessary in 1986 simply because of the incompleteness of the protection of fundamental rights at Community level. (4) To clarify, it should be emphasised that the Solange formulas refer only to secondary, not primary, Community law. Primary law is to a certain extent the constitutional law of the European Communities, the interpretation of which is the sole responsibility of the ECJ. Until 2019, the FCC did not dispute the ECJ’s monopoly of jurisdiction over primary law (see below).

123 However, subject of discussion is not an unspecific ‘legal community’, but various interconnected models. See the contributions in: Calliess, 2006; Pernice, 2020. The Freiburg professor Andreas Voßkuhle, President of the FCC 2008-20, has made a particularly valuable contribution to sharpening this concept: Voßkuhle, 2010, 1 et seq.

for the time being. This may have been due not least to a changed perception of the prerogative of West German statehood. On the thirtieth anniversary of the Basic Law, the publicist Dolf Sternberger (1907-89) developed his theory of the transformation of a patriotism related to the nation state into a “constitutional patriotism” (*Verfassungspatriotismus*). The object of patriotic veneration should therefore be the constitution itself and the symbols of German constitutional culture, not the German nation state (which at the time was divided and, in the opinion of many, politically non-existent).¹²⁴ Sternberger’s doctrine, which quickly became the talk of the town and was taken up by historians and sociologists alike¹²⁵, took the edge off the debates about the role of the nation state in the process of European integration. However, this relaxation did not last. The very German discussion of constitutional patriotism (because it arose from the specifics of the political situation in a divided Germany) died down with German reunification and the re-emergence of a unified German nation state on 3 October 1990. Opinions now gained ground again which saw national sovereignty and European integration as polar forces that threatened to tear the nation state apart, regardless of the efforts of Chancellor Helmut Kohl to define German reunification as the supporting pillar of a new European house.

Into this changed debate fell the next landmark decision of the FCC, the Maastricht decision. It occurred on 12 October 1993, when it was disputed whether the Federal Republic of Germany could ratify the Maastricht Reform Treaty in conformity with the constitution. This treaty was associated with substantial reform steps towards a European Political Community, which had failed in the 1950s. The European Community was supplemented by a common foreign and security policy as well as police and judicial cooperation, and European citizenship was introduced. The associated content of the Union was to be supplemented by a Charter of Fundamental Rights. Several constitutional complaints were lodged with the FCC against the ratification of the Maastricht Treaty by the German federal legislature. This in itself was problematic because the admissibility of a constitutional complaint presupposes the possibility of a violation of fundamental rights in the person of the complainant. However, there is no fundamental right to refrain from ratifying an international treaty. Nevertheless, the FCC has used a trick to construct the right to lodge a constitutional complaint from the right to vote (Article 38 paragraph 1 GG) in conjunction with the principle of democracy (Article 20 paragraph 1 and paragraph 2 sentence 1 GG). The right to vote actually only protects the process of democratic legitimization of the state organs by the demos, but the FCC also saw the right to vote as guaranteeing the protection of the democratic substance of the state. Consequently, the right to vote in conjunction with the principle of democracy ensures the substantial decision-making power of parliament, particularly in all political matters, but especially in the area of constitutional law on integration. The citizen could sue for this safeguarding of democratic decision-making substance – as an agent of the

124 Sternberger, 1990.

125 Habermas, 1991; Müller, 2010.

common good, so to speak – before the Constitutional Court. With this case law, the FCC was evidently pursuing the goal of obtaining any decision-making power at all with regard to substantial steps towards European integration. According to the prevailing view at the time, the ratification of an international treaty could only be halted or prevented by a preventive abstract review of norms directed against the parliamentary approval law before the FCC (according to Article 94 paragraph 1 no. 2 GG). However, the abstract review of norms is an instrument to which only state bodies are entitled, not subjects of fundamental rights. In particular, it is an instrument of parliamentary minority protection, as individual parliamentary groups can also use the review of norms against legislative decisions of the majority groups. However, where European policy measures are politically uncontroversial, it is not to be expected that the parliamentary opposition will take constitutional court action. This was precisely the situation in the German Bundestag, as the ratification of the Maastricht Treaty was not disputed between the government and opposition parties. If the FCC had now rejected the constitutional complaints directed against the ratification of the Treaty, there would have been no possibility at all in this specific situation for the courts to deal with fundamental questions of European law. On this basis, the FCC considered the Federal Republic's participation in the European Union created by the Maastricht Treaty to still be constitutional, but insisted on the guarantee of an indispensable constitutional minimum standard for the transfer of sovereign rights, which is now guaranteed by Article 23 paragraph 1 sentence 3 in conjunction with Article 79 paragraph 3 GG. The FCC reserved a residual competence to review European legal acts against the fundamental rights of the Basic Law insofar as the Union acts *ultra vires*, i.e. outside the competences granted to it by the constitution. Since then, this *ultra vires* reservation has shaped the constitutional debate in Germany on further deepening the European integration process. The regular inadmissibility of constitutional appeals and referrals for judicial review against supranational legal acts before the FCC was confirmed. National transposition provisions based on EU directives are an exception, insofar as EU law has granted the Member States leeway for transposition. This is to be measured against the Basic Law, in particular against fundamental rights. In its decision of 6 July 2010, the FCC specified the *ultra vires* standard.¹²⁶ According to this, the EU institutions have a broad scope for shaping EU law. An *ultra vires* review is therefore only admissible if a breach of competence by the European institutions is “sufficiently qualified”, i.e. a ‘structurally significant shift to the detriment of the Member States’ can be established. Consequently, structural and permanent shifts in competences to the detriment of the Member States must be demonstrated without sufficient authorization of competences. The procedural prerequisite for establishing an *ultra vires* act is the prior implementation of a referral procedure pursuant to Article 267 TFEU. With this line of case law, the FCC returns to the “relationship of cooperation” with the ECJ promised in the Maastricht ruling. Accordingly, there can be no departure of

126 BVerfGE 126, 286.

German constitutional case law from EU law without prior consultation with the Luxembourg judges. However, the FCC reserves the right to have the final say on the constitutional conformity of any integration steps. In this context, the FCC also comments on the alleged democratic deficit at Union level. In an almost literal adoption of Mitrany's and Ipsen's theories, it states that, even after Maastricht, the place of democratic decision-making is still at the level of the nation states. This means that the national parliaments are the central legitimising bodies, not the European Parliament, whose upgrading by the Maastricht Treaty is now primarily seen as an accessory to deeper integration. In reality, with regard to the democratic principle of the Basic Law, it would even require particular justification if the European Parliament were to acquire substantially broader powers. In the opinion of the judges in Karlsruhe, the Union is and remains an event of the executive, and this precisely in consideration of the principle of democracy. This position of the FCC was barely understood in the contemporary commentary literature and has often been misunderstood to this day. However, it is absolutely conclusive if one looks at the Union from the perspective of Mitrany's and Ipsen's functionalism theory. Another line of case law established by the Maastricht ruling may be even more significant in the long term: the theory of the European Union as an "association of sovereign states" (*Staatenverbund*), founded by the constitutional judge and Heidelberg law professor Paul Kirchhof (born 1943). This characterization of the Union was intended to indicate that it was supported by its Member States, so that the Union had to respect their Member States' national identities.¹²⁷ The Maastricht judgment bears Kirchhof's signature through and through. Just as the concept of an association of sovereign states was intended to keep the finality of the European Union suspended somewhere between a classic-style international organisation (like the United Nations) and a federal state, the FCC's main considerations in the Maastricht case also oscillate between insisting on the protection of German constitutional autonomy and seeking to keep the German constitution open to participation in European integration. It may be noted that the judgment attempts to square the circle: to construct an open constitutional state from a closed system of constitutional principles defined by the nation state. The concept of an association of sovereign states is also regarded by some German constitutional scholars as one of the great mistakes of the FCC. This is because it ultimately fails to capture the logic of the European integration process, which – as this article has shown – is not about denationalisation or the dismantling of constitutional law, but about depoliticisation. The state is still needed, at least for the time being and until further notice, as a guarantor of various depoliticisation and neutralisation processes. It is therefore not surprising that German constitutional law does not really know how to deal with the concept of the association of sovereign states and that the FCC has not developed it any further. The theory of the regulatory state can be seen as a competing interpretation of the association of sovereign states

¹²⁷ Kirchhof, 1992, 63 et seq. Further conceptual elaboration of Kirchhof's concept of state and union: Kirchhof, 1993, 855 et seq.; Kirchhof, 2012, 299 et seq.

theory, which is closer to the finality of the European Union. It was developed by the Italian political scientist Giandomenico Majone (born 1932).¹²⁸ Majone sees the European Union as structurally analogous to the US Independent Regulatory Commissions. In the Federal Republic of Germany, there are non-ministerial authorities which, like their US counterparts, carry out specialised administrative tasks largely outside the direct control of the supreme organs of the state, but within the legal and democratic constraints imposed by constitutional law. A recourse to Majone's regulatory theory would have spared the FCC many highly precarious and controversial determinations on the legal nature of the European Union and the constitutional premises of the European integration process. If the Union and its institutions are seen as Independent Regulatory Agencies, their link to the Member States and their constitutions is self-evident, without the need for a time-consuming and conflict-prone recourse to national constitutional reservations. In addition, definitions of the proximity or distance of the integration project to the state – and thus the tiresome federalisation debate – would be obsolete, as the non-state character of the Union would be clearly recognisable. Finally, the misunderstandings about a supposed democratic deficit of the Union would be dispelled, because it follows from the nature of a regulatory agency that it is a function of the democratically constituted state authority, not independent of it and certainly not an independent democratic subject.

3.2.4. The FCC in search of a constitutional doctrine of integration

A further clarification of the constitutional framework of European integration had already become clear in the Lisbon ruling of the FCC on 30 June 2009.¹²⁹ The subject of the proceedings here was the Lisbon Reform Treaty. It adopted the European Charter of Fundamental Rights as part of Union law with the status of primary law. The TEU and the TFEU were fundamentally amended, the European Parliament was again strengthened and the admissibility of majority decisions in the Council was extended. In addition, European citizenship was significantly enhanced and supplemented by instruments for citizen participation in EU affairs. Numerous constitutional complainants also raised fundamental concerns about this, which the FCC rejected in the end, but not without formulating a reservation of national constitutional identity and urging the German legislator to review European policy legislation more closely. Karlsruhe reaffirmed its view that supranational legal acts that are no longer covered by the Act of Consent (*ultra vires* acts) violate the principle of democracy and the rule of law of the Basic Law as well as the constitutional authorisation for integration under Article 23 paragraph 1 sentence 1 GG. Consequently, the FCC is authorised to carry out an "identity check" pursuant to Article 23 paragraph 3 sentence 3 in conjunction with Article 79 paragraph 3 GG. Even if the interplay of

¹²⁸ Majone, 1989, 159 et seq.; Majone, 1994, 78 et seq.; Majone, 2011, 31 et seq.

¹²⁹ BVerfGE 123, 267.

ultra vires and identity review has remained open in detail, this nevertheless means that the FCC has further residual jurisdiction to review substantial reform steps at EU level against the foundations of the guarantee of human dignity in Article 1 paragraph 1 GG and the fundamental principles of the state laid down in Article 20 GG. The Lisbon decision is not a mere continuation of the Maastricht rulings on deepening integration. Rather, the focus of the Lisbon ruling is on the position of the German Bundestag in the integration process. The European Union is characterised by a strong preponderance of the executive (as confirmed in the FCC's Maastricht decision). Not only is the initiating body at Union level, the European Commission, an executive body, but the national governments, which have a decisive influence on European legislation in the Council, are also organs of executive power. From a national perspective, this means that the parliaments of the Member States are in danger of being minoritised by the executive. The more legislative powers are transferred to the EU level, the stronger the position of the Member State governments in relation to their national parliaments and the less able they are to set the priorities of the European policy agenda. In the Lisbon ruling, the FCC criticised what the court saw as the German Bundestag's overly passive stance on integration policy issues. As the German Federal Government determines the European policy guidelines of the Federal Republic and the Federal Government is in turn supported by the parliamentary majority, there is little inclination on the part of Parliament to control the government in this respect. This, however, is the actual task of the Bundestag. For this reason, the FCC derived a specific integration responsibility of the German Bundestag from Article 23 GG. If the Bundestag does not fulfil its integration responsibility, its consent to further European treaties or to their amendment or supplementation may be unconstitutional for this reason alone. The FCC therefore requires the Bundestag not only to accept European policy initiatives of the Federal Government, but to consider them thoroughly and to demonstrate genuine parliamentary decision-making. In the recent past, the FCC has drawn practical consequences from the reservation of identity for extradition requests under the European arrest warrant procedure and for returns under the Dublin Regulation developed in the Lisbon judgment.¹³⁰

The ECJ ruling in the *Akerberg Fransson* case on 26 February 2013¹³¹ led to major distortions in the German constitutional debate. This case concerned the relationship between the fundamental rights of the European Charter of Fundamental Rights (CFR) and the fundamental rights of the Member States. Article 51 paragraph 1 sentence 1 CFR makes the binding nature of the Charter's fundamental rights for the Member States dependent on implementation. The ECJ has interpreted this provision as broadly as possible and is of the opinion that "implementation" in this sense is any legally relevant action by the Member States within the scope of application of Union law, even if this scope is only marginally affected, as in the reference case.

130 BVerfGE 140, 317; 147, 364; 156, 182.

131 ECLI:EU:C:2013:280.

Due to the sovereignty effects that can result from the supersession of national fundamental rights by European fundamental rights (see 2.2. above)¹³², this ECJ case law met with the firm resistance of the FCC. Karlsruhe made it clear that it would not bow to this line of case law and that the ECJ's Akerberg-Fransson ruling would be regarded as an individual case decision (not apt for *stare decisis*), otherwise it would have to be regarded as an *ultra vires* act within the meaning of the Maasticht case law.¹³³ This prompted the ECJ to take a more conciliatory line¹³⁴, but the jurisdictional conflict has not been resolved. The FCC's latest *volte-face* in this matter, the two decisions on the "right to be forgotten" from 6 November 2019, also provide little clarity.¹³⁵ In these decisions, the FCC abandoned the separation theory it had previously advocated. According to this theory developed in relation to Article 51 paragraph 1 sentence 1 CFR in conjunction with Article 4 paragraph 3, Article 6 paragraphs 1 and 3 TEU and Article 1 paragraph 3 GG, either the fundamental rights provisions of the Basic Law or the fundamental rights of Union primary law

132 From a state perspective, fundamental rights, understood as claims for injunctive relief, performance and participation by holders of fundamental rights against the state, compete with the state's legislative and administrative powers. As far as the scope of application of a fundamental right extends, the holder of the fundamental right can therefore mobilise state power in his or her own interests. From the state's perspective, fundamental rights are therefore negative competence provisions. This is the reason for their relevance to sovereignty. Even at the domestic level, fundamental rights upset the separation of powers between the legislature and the executive because they can directly force the executive to refrain from certain measures or to provide state services against the will of the parliamentary legislature in accordance with the constitution. This power of fundamental rights to break through the parliamentary legislature is the consequence of their constitutionally direct guarantee, which trumps the simple parliamentary law. But the relationship between the legislature and the executive can also be changed by fundamental rights. Insofar as fundamental rights also bind the legislative power of the state, as in Germany through Art. 1 para. 3 GG, they can be mobilised against the legislature, so that its responsibility to protect can also force it to encroach on the administrative order of competences. A recent example is the "fundamental right to self-determined dying" recognised by the FCC (BVerfGE 153, 182), the recognition of which is now forcing the German legislature to realign the law on euthanasia with far-reaching consequences for the executive. The sovereignty effect of fundamental rights is magnified when it is no longer the nation state, within the framework of its constitution, but a supranational organization that positions fundamental rights against the nation states. This can lead to national legislation being put under pressure and restricted in its sovereign legislative scope not only by the executive-oriented structure of the European political process, but also by the ECJ as a supranational fundamental rights court. This context explains why, in addition to the United Kingdom, Poland and the Czech Republic also expressed unilateral reservations against the unconditional validity of the European Charter of Fundamental Rights during the Lisbon ratification process. Last but not least, the ECJ's excessive power to interpret fundamental rights depotentiates the national constitutional courts. A similar process can be observed in Germany with regard to the relationship between the Federal Constitutional Court and the constitutional courts of the federal states. Although these continue to exist, they must largely defer to the case law of the FCC. The FCC's sharp reaction to the ECJ's Akerberg Fransson decision can also be explained by fears that Karlsruhe could find itself in a similarly subordinate position to Luxembourg as the German state constitutional courts are in relation to the FCC.

133 BVerfGE 133, 277.

134 ECLI:EU:C:2014:126; ECLI:EU:C:2014:2055.

135 BVerfGE 152, 152; 152, 216.

are the exclusive judicial standard of review. According to this theory, only the Basic Law is applicable when implementing Union law in conjunction with national discretionary or regulatory leeway, and only the CFR is applicable when implementation is fully determined by Union law. According to new case law, the FCC differentiates the question of precedence according to whether Union law is fully or partially harmonised with national law. If there is full harmonisation, the Union's fundamental rights are "as a rule" exclusively applicable. The exception arises from the constitutional residual reservations that the court developed in the Maastricht and Lisbon proceedings. What is new is that the FCC itself now applies the CFR as a standard of review and control. This had previously been rejected, as the Basic Law itself (Article 1 paragraph 3, Article 94 paragraph 1, Article 100 paragraph 1) exclusively defines national constitutional law as the FCC's standard of review and scrutiny. Insofar as only partial harmonization is required under EU law, the FCC upholds the primacy of the fundamental rights of the Basic Law, but the CFR fundamental rights form the constitutionally binding minimum fundamental rights standard. The latter guiding principle has been referred to as the "reverse" Solange formula. Consequently, constitutional complaints and referrals to the FCC by judges are now admissible even in the area of law that is fully harmonised under EU law; the referral procedure pursuant to Article 267 TFEU is included in the constitutional complaint procedure. What was initially celebrated with a certain euphoria as the burial of the hatchet between Karlsruhe and Luxembourg in the initial surprise at this turnaround in case law, which hardly any expert saw coming, turns out on closer inspection to be a line of case law with great potential for conflict. In the medium term, the interpretation of the CFR may diverge between the ECJ and the FCC. The question then arises anew as to whose interpretation takes precedence. So far, the FCC has not answered this question. In the meantime, the ECJ has indicated on another occasion that it is serious about its role as the constitutional court of the European constitutional courts, a role it has adapted since *Akerberg Fransson*.

With the judgment in the *Associação Sindical dos Juízes Portugueses* case of 27 February 2018¹³⁶, the Luxembourg judges have taken the path towards full harmonisation of the rule of law standards in the Union. Maybe this decision defines the ECJ's *Marbury* moment, notwithstanding it has been hardly perceived as such. Pursuant to the second sentence of the first subparagraph of Article 19 paragraph 1 TEU, the Court of Justice shall ensure that the law is observed in the interpretation and application of the Treaties. The second subparagraph of Article 19 paragraph 1 TEU (in conjunction with Article 47 CFR) also stipulates that the Member States shall provide the legal remedies necessary to ensure effective judicial protection in the areas covered by Union law. The ECJ states that the second sentence of the first subparagraph of Article 19 paragraph 1 TEU extends to the entire scope of Union law. Due to Article 2 TEU, this includes the rule of law. According to the second subparagraph of Article 19 paragraph 1 TEU, the national courts, in cooperation with

the ECJ (here Luxembourg has adopted the Karlsruhe formula), fulfil the task of upholding the rule of law in the EU. Furthermore, Article 4 paragraph 3 TEU obliges the Member States to provide effective legal protection and to establish appropriate legal remedies. In conjunction with the second sentence of the first subparagraph of Article 19 paragraph 1 TEU, this principle is a central component of the system of legal protection required under EU law. The guarantee of judicial independence at Member State level is indispensable for this. It is therefore the task of the ECJ to review and guarantee this. With this judgment, the ECJ can therefore both criticise what it considers to be inadequate national procedural law (and thus, at least indirectly, examine national law against the standard of Article 19 TEU) and also decide whether judicial independence is sufficiently guaranteed at national level. This can go as far as the ECJ ordering a Member State to maintain a national constitutional court or to refrain from reforming the constitutional jurisdiction, which in the opinion of the ECJ could impair judicial independence. The fact that this decision was not really about Portugal, but actually about Poland, needs no further explanation. Ultimately, however, any Member State whose state organs – in particular the national parliaments and constitutional courts – in the opinion of the ECJ fail to recognise the common European value standards can be targeted by the procedure under Article 7 TEU. The FCC's decisions from 6 November 2019 can also be read as a reaction to this new initiative from Luxembourg. This time, however, Karlsruhe does not remain in fruitless protest, but accepts the challenge and elevates itself to 'guardian of the Charter of Fundamental Rights'.

The last word has by no means been spoken on this matter. In its ruling of 5 May 2020, the FCC made in its PSPP ruling an *ultra vires* finding for the first time in its history.¹³⁷ At the time, it concerned the policy of the European Central Bank. ECB President Mario Draghi had promised unlimited crisis response funds at the height of the Euro financial crisis. As a result, the ECB bought up government bonds of distressed euro states on the secondary markets on a large scale. The FCC saw this as a circumvention of the prohibition of mutual assumption of liability between the euro states (Article 311 TFEU in conjunction with Articles 122 and 125 TFEU). However, the ECJ, to which the FCC had appealed, had no objections to this policy under EU law.¹³⁸ Thus, the FCC found that both certain ECB measures and the ECJ case law confirming them were no longer covered by the constitutional authorisation for integration and were therefore *ultra vires*. The Federal Republic of Germany was no longer allowed to participate in this. The details are not of interest in the context of this article. Apart from the fact that this ruling by the FCC caused great perplexity in both German politics and bureaucracy because its implementation remained completely unclear, the European Commission reacted by initiating infringement proceedings against the Federal Republic in accordance with Article 258 TFEU. This could have led to a veritable escalation of the crisis between Germany and the European Union,

137 BVerfGE 154, 17. On this: Mayer, 2020, 733 et seq.

138 ECLI:EU:C:2018:1000

as the ECJ was now called upon to act as judge in its own cause. Its (expected) criticism of the FCC's decision would have been contested from the outset. Neither the Commission nor the Federal Government wanted to let it get that far. A settlement was reached to end the infringement proceedings in return for the Federal Government's promise that the FCC would no longer issue ultra vires decisions in future.¹³⁹ This is remarkable in many respects and raises questions about the judicial independence recently emphasised by the ECJ. In any case, according to the latest case law, the FCC appears to be adhering to this agreement. After all, the breakthrough on joint borrowing by the EU Member States as part of a Union reconstruction program gave rise to further-reaching constitutional concerns. In a remarkably inconsistent final decision, the FCC has meandered around the discussion of an ultra vires act.¹⁴⁰ The subject of the proceedings was the Ratification Act passed by the German Bundestag, which was intended to bring the EU's own resources decision of 14 December 2020 into force for the Federal Republic. The FCC stated that joint borrowing by the EU Member States was not fundamentally excluded by Article 311 paragraph 2 TFEU, according to which the Union's budget 'shall be financed wholly from its own resources, without prejudice to other revenue'. However, the principle of conferral (Article 5 paragraph 1 sentence 1, section 2 TEU) must also be upheld in this respect. The principle of conferral is complied with if the authorisation to borrow is provided for in the own resources decision itself, the funds are used exclusively for the purpose of a specific authorisation granted to the Union, the borrowing is limited in time and amount and the sum of these other funds does not exceed the amount of own resources. The reasons for the ruling reveal serious concerns in this regard. On the one hand, it is questionable whether the requirements of Article 122 TFEU are met, and on the other hand, there are doubts as to whether the "other resources" created by joint borrowing do not exceed the Union's own resources, which is prohibited by Article 311 paragraph 2 TFEU. Here, Karlsruhe is satisfied with the existence of "different valuation possibilities". Finally, the bail-out prohibition pursuant to Article 125 paragraph 1 TFEU was again critically considered, but here too the court gave the all-clear. As the court explains, joint borrowing serves to relieve economically distressed Member States from the "market logic". Although the Federal Republic could be obliged to make substantial additional payments to the Union, which were not foreseeable at the time of ratification, in order to compensate for shortfalls in the EU budget, this obligation to assume liability was only of a provisional nature and could thus be regarded as constitutional. After all this, no violation of the German constitutional identity could be identified. This decision by the Senate majority can be seen as an effort to square the circle: a face-saving retreat from jurisdictional positions emphasizing sovereignty and identity, which had previously been built up for decades and even accelerated in 2020. The special opinion published on this decision reads as a kind of attempt to save the court's honour. Judge Müller explained

139 European Commission, 2024.

140 ECLI:DE:BVerfG:2022:rs20221206.2bvr054721.

that the Senate majority's decision leaves almost all relevant questions of EU law unanswered, refuses to enter into a dialogue with the European constitutional courts, accepts a violation of the responsibility to integrate and hints at a withdrawal from substantive *ultra vires* review. In a rhetorical mantra that is very unusual for German case law, Müller sums up his criticism: 'Closing the curtain and leaving all questions open does not seem to me to be a suitable maxim for the effective protection of the (...) right to democracy (...).'¹⁴¹

My brief outline of the FCC's case law history on integration constitutional issues has shown that the FCC is finding it increasingly difficult to develop a clear and uniform line on the core constitutional issues of European integration. This could be left to one side if, as explained at the beginning, the FCC were not the key German player in European policy issues. Thus, the confusion in Karlsruhe is affecting the entire Berlin Republic. The German government knows perhaps less today than it did thirty years ago whether its fundamental European policy initiatives will meet with rejection or applause from Karlsruhe. The only thing it can be sure of is that the FCC will deal with each of these initiatives in one way or another, thanks to the expanded power of constitutional appeal since the Maastricht ruling. The parliamentary legislator's hands are also tied because the red lines of integration that a parliamentary design of the "open constitutional state" must not cross are diffuse; thus, they are ultimately not "lines", but overlapping zones somewhere in the fog of vagueness. Contemporary German constitutional and European law scholarship is of little help here, as it too is divided. Of course, this cannot be blamed on academia; in a way, it is its job to be divided. Time has passed over both Ipsen's concept of a special-purpose association and the naive federalisation theory of the early years. Today, however, there are still two schools of thought in German European law, which, following Wolfgang Kahl, can be described as the "union of values" and the "theory of political cooperation".¹⁴² The former theory sees the finality of the European integration project as being founded from the outset on common European values¹⁴³; this was already true at the time when European integration was still translated as the "common market". The entry into force of the CFR and the defensive (i.e. reinforced by Article 7 TEU) value regime (Articles. 2, 7 and 49 TEU) were central to the development of the European Union into a union of values. The fundamental rights are understood as 'crystallisation points of a European value system'¹⁴⁴; the Member States form a European "value network". The weakness of this theory is, of course, that nobody understands what this is supposed to be. The only thing that seems clear is that the European "union of values" is not a federal state in the sense of the previously called-for United States of Europe, but an association of sovereign states,

141 ECLI:DE:BVerfG:2022:rs20221206.2bvr054721

142 Kahl and Hüther, 2022, 113 et seq.

143 Blumenwitz, Gornig and Murswiek, 2005; Joas and Mandry, 2005, 541 et seq.; Volkmann, 2017, 57 et seq.; Voßkuhle, 2021, 108 et seq.

144 Calliess, 2004.

between which, however, there is a higher degree of homogeneity than is usual in international organisations. This qualified homogeneity is founded on common “values”. To put it bluntly, the theory of a European union of values aims to create a union without a state. However, the ECJ draws, if not legal arguments, then certainly political legitimisation from the various value theories to act as the guardian of this European community of values. The above-mentioned decision on the Portuguese financial judges shows this very clearly. The opposing position also criticises the vagueness of the concept of values with regard to the European Union. Not least the political upheavals within the Union – on the occasion of the Euro crisis, the debate about the rule of law in Poland and Hungary or, more recently, the attitude towards Russia or the Middle East conflict – show that there is no common, politically resilient foundation of values for the Union. Some scholars criticise the unrealistic nature of unifying European value postulates.¹⁴⁵ Instead, Union Europe should resemble a network of different associations, which communitise certain policy areas with different objectives and at different speeds, whereby the balance between supranational and national tasks can be shaped differently depending on the relevant policy area. In this context, the unfortunate metaphor of Europe’s “variable geometry” is sometimes used. The concrete design of the integration mode should be based on the (presumed) acceptance of the Union’s citizens.¹⁴⁶ Article 7 TEU is now increasingly becoming the focus of the German debate on European law. According to the constitutional law expert Martin Nettesheim, this provision should not be understood as a legal basis for preventive measures against unruly member states, but rather as a safeguard clause. Only ‘those conditions (...) which the Member States have jointly formulated as a prerequisite and condition for membership of the EU’ are to be safeguarded.¹⁴⁷ In general, there are warnings against an “overstretching” of European integration.¹⁴⁸

The German position on further reform steps, as announced by the FoEC, has become even more unclear as a result of the latest volte-face in Karlsruhe, and the scope for German European policy has become even more uncertain. For it is doubtful whether the FCC will uphold the ultra vires review. Rhetorically, the ultra vires proviso may continue to be important, but its practical significance is likely to tend towards zero if the line of case law established here is continued. A similar development has been seen with regard to the Solange reservation from 1974, which

145 Kielmansegg, 2015.

146 Huber, 2019, 215 et seq.

147 Nettesheim, 2019, 91 et seq. Nettesheim adds that a community of values cannot be understood statically. Values are under discussion everywhere. Values can only be generalised at the cost of understanding values, and this requires a contentious process between the Member States. From this, one can further conclude that a definition of the European Union as a community of values – perhaps contrary to the intentions of its proponents – institutionalises the dispute within the Union instead of having a pacifying effect. In any case, according to Nettesheim, the intrinsic laws of a pan-European discourse on values could not be captured by a decision under Article 7 TEU.

148 Klein, 2014, 165 et seq.; Winkler, 2006, 36 et seq.

was de facto buried in 1986 (see above). The ruling on the EU Reconstruction Fund could stand in a similar relationship to the Solange I and Solange II rulings to the Maastricht ruling, although (in contrast to the Solange II ruling) no explicit distancing was made.

4. Conclusion

From all this, a very brief summary of the German position on the Future of Europe process can be drawn. From the perspective of March 2024, it is clear that the judges in Karlsruhe are endeavoring to give German European policy more leeway. This applies particularly to steps towards the mutualisation of European sovereign debt, which is increasingly turning out to be a question of the weal and woe of the European Union. On the one hand, Germany should maintain its sovereignty in this process, but on the other hand it should not be condemned to the role of the eternal brakeman. The fear in Berlin and Karlsruhe is that if Germany were to take on this role, it would leave France, Italy and Spain with the leading role in the Union. At the same time, this would reinforce the Union's focus on economic and financial issues. The fact that negotiations on strengthening democracy in the European Union were also held as part of the FoEC seems almost like a diversionary tactic. One is tempted to hurl the Bill Clinton quote from the 1992 US presidential election campaign at the supporters of a more democratic faction: 'It's the economy, stupid!' This could deepen the contrast between the Western European and Eastern European Member States. The Eastern Europeans, especially Poland and Hungary, have gone to sleep with the Christian-Western community of values in mind and woken up in a single European market. This is perhaps the reason for the disillusionment with the European integration project that can be heard in Budapest, Warsaw, Bratislava and among the candidate countries of the Western Balkans. The Future of Europe Conference has moved beyond this.

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INSTITUTIONAL DYNAMICS OF THE EU AFTER MAASTRICHT (1993–2023): SEPARATION OF POWERS AS AN OLD PRINCIPLE OF CONSTITUTIONALISM IN NEW CIRCUMSTANCES



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Abstract

In this paper, the author investigates the issue of the separation of powers in the institutional network of the European Union, bearing in mind that it represents an inseparable part of the *materiae constitutionis* of democratic constitutionalism. Since Montesquieu, the goal of this principle has been nothing but to realise, preserve and strengthen the lawful government (*government of law*) instead of maintaining and defending a *gubernaculum* as the mere will and caprice of the holder of power (*car tel est notre plaisir*). Therefore, it is a legitimate assumption that the doctrine of the separation of powers, which plays a key role in the creation of any political government, especially in the functioning of and respect for a just, lawful and independent judicial authority within the nation-state, *mutatis mutandis* would seek its place across state borders as well. This possibility is also indicated by the construction of the *Maastricht Treaty* (1992) which, by constitutionalising the EU's institutional structure, certainly opened not only a new stage in the adaptation of its organisational principles, but it once again shed new light on the question of the existence, state, adjustment, design, new content and understanding of the separation of powers as an old principle of constitutionalism under new circumstances.

Keywords: Maastricht Treaty, institutions, separation of powers, institutional balance

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1. Introductory note

In Jonathan Swift's famous book *Gulliver's Travels* (1726) there's an inspiring and ironic part of the text, offering a series of solutions to many burning questions of *Lilliputania*.¹ Reading those particular 'modest proposals' one can see how much the imagination of classical literature can serve us as a reminder of how new political and legal entities, with their attitude towards classical institutions and traditional vocabulary of constitutional engineering, almost regularly create, change and dissolve *taboo topics* from the seemingly consolidated glossary of the already known political and legal world as well as of the emerging one.² Has not something similar happened with the emergence and development of political and legal institutions in Europe after World War II? Especially as it concerns those institutions that fall within the framework of Europe's ambitious and far-reaching constitutional project of building peace, economic prosperity and the rule of law? The thirtieth anniversary of the *Maastricht Treaty*, signed in 1992, provides a favourable opportunity to recapitulate that event which, on the one hand, impressed with a series of innovations, but on the other hand, it also gave rise to doubts, disbelief and unknowns in the process of its implementation which the European public faced after its entry into force in 1993.

Suffice it to say that over the thirty years since the signing and entry into force of the *Maastricht Treaty*, the Union created by it has grown in size, scope and capacities. Today's *European Union* (EU) is a quite respectable actor on the global stage, supporting peace, the rule of law, social and political progress around the world. The EU is also the world's largest trading bloc and issues the second strongest currency in the world. At the same time, it guarantees rights for almost 450 million EU citizens. A key step towards this extraordinary development was made in 1991 when representatives of the 12 member states gathered in Maastricht to finalise a new alliance treaty. Maastricht, according to Jim Cloos, was a 'key moment' in European integration because it represented the 'crown of economic integration with the creation of a single currency' and the overall movement towards a true European Union.³ However, examining the processes on a broad scale and within longer time cycles, one can see how the changes that have shaped the EU over the last 30 years also stimulated major shifts at the constitutional, institutional level.

The European Union cannot be understood without being knowledgeable of its institutions. However, researchers of the EU differ on the question of what exactly EU institutions are, how they function and why they are important. The simplest definition of an EU institution refers to it as a *decision-making body*.⁴ Such a determination is also connected with the concept of EU institutional politics as a sphere of informal and formal rules, norms, procedures and practices that shape such

1 Swift, 1726; Jacek, 1998, pp. 100–115; Phiddian, 2013, pp. 256–258; Bačić, 2020, pp. 17–42.

2 Ziller, 2008, pp. 133–179.

3 Cloos, 2014.

4 Hodson et al., 2021, p. 4.

decision-making. In this context, institutions can be studied by applying different theoretical approaches – the tradition of international relations, integration theory, insights into new institutionalism, through the separation of power, approaches to governance, public policy and public administration, as well as by understanding EU institutions using critical perspectives. Drawing on these traditions, Dermot Hodson encourages a view of EU institutions in five dimensions: there are intergovernmental versus supranational institutions, international versus transnational, power-sharing (separated) versus power-confusion (fused) institutions, leader versus follower institutions, and legitimate versus contested institutions. Following the movements of those Union bodies that make decisions both within and between the previously mentioned dimensions, certainly opens up the possibility of a more thorough and deeper understanding of the importance of EU institutions.⁵

In order to clarify the issue of *Institutional Reforms in the context of the Future of Europe (FoE) conference*, this paper will try to touch on the question of the separation of powers in the EU and its possible developmental characteristics in one of Hodson's dimensional packages. This segment is interesting for at least two reasons. First of all, because the issue and significance of the separation of powers *nolens volens* has been an inseparable part of the theory and practice of democratic constitutionalism since the 18th century. This means that even Maastricht, which enabled the upgrading of the new *constitutional architecture of the Community*, could not simply ignore the principles of the responsible exercise of the political will and powers of the accepted EU institutions because their main goal, ever since Montesquieu, is nothing but the realisation, preservation and strengthening of the lawful government i.e. the *government of law*, and not the maintenance and defence of the mere *gubernaculum* as the will and caprice of the power-holder (*car tel est notre plaisir*).⁶ Therefore, it is a legitimate assumption that the doctrine of the separation of powers, which plays a key role in the creation of any political government, and especially in the functioning of and respect for a just, lawful and independent judicial authority within the nation-state, *mutatis mutandis* would seek its place across national borders as well.⁷ This is a possibility indicated exactly by the originality of the “founding” *Maastricht Treaty*. By constitutionalising the institutional structure of the EU, the Maastricht Treaty certainly shed new light on the question of the existence, state, adaptation, design, as well as the new content and understanding of the separation of powers as an old principle of constitutionalism under new circumstances.⁸ In this sense, the following is a reasonable conclusion:

The separation of powers analysis is ‘first, descriptively accurate, to a large extent, for much of the working of the EU apart from the law-making role of the ECJ; and,

5 Ibid., p. 7.

6 Plessy, 2022.

7 Vile, 1998, pp. 1–58.

8 Moellers, 2013, pp. 230–231; Walker, 2001, pp. 31–57.

secondly, normatively attractive as a means of practically safeguarding the principles of democracy and the rule of law. This view is supported by an analysis of the substitute for a separation of powers in the case law of the ECJ, namely the principle of institutional balance, which it is argued is too vague and indeterminate to be a satisfactory alternative.⁹

After a brief outline of *the Maastricht Treaty*, I will try to point out the difference between the “classical” division of powers and the substitution advocated by the Court of Justice (CJEU) in the established structure and dynamics of the EU institutions that developed after Maastricht, as well as its organic connection with the rule of law, which remains an essential commitment and characteristic of the European Union.

2. The Maastricht Treaty and affirmation of the new EU institutions

The treaty that created the European Union, signed in the Dutch city of Maastricht on 7 February 1992, entered into force on 1 November 1993 after it was ratified by the then 12 member states of the European Communities. The Intergovernmental Conferences (IGC) on Political Union (PU) and Economic and Monetary Union (EMU), where member states negotiated amendments to the founding treaties, took place against the turbulent geopolitical background of the fall of the Berlin Wall (1989), German unification and the final end of the Cold War. This new agreement amended *the Treaty establishing the European Economic Community* (EEC) and established the European Community (EC) as the first pillar of the Union. It also amended *the Treaty establishing the European Coal and Steel Community* (ECSC) and *the Treaty establishing the European Atomic Energy Community* (EAEC). Furthermore, two pillars of intergovernmental cooperation were added, namely common foreign and security policy (CFSP) in the second pillar and cooperation in the field of justice and home affairs (JHA) in the third pillar.

The structure of the text of the Treaty was outlined and explained using the model of a Greek temple that rests on three pillars. The text was divided into seven titles, followed by protocols and declarations. The main pillar of the temple represents the three Communities (titles II, III and IV, which set out the provisions

9 Conway, 2011, p. 304.

amending the pre-existing founding Community Treaties). The other two pillars represent the areas of intergovernmental cooperation (title V on CFSP and title VI on JHA).¹⁰

In a historical sense, the *Maastricht Treaty* represented one of the most important evolutionary additions to the European integration treaties. It contained provisions for the creation of an economic and monetary union (EMU), including a single European currency. It tried to increase the democratic legitimacy and efficiency of the decision-making process by strengthening the European Parliament (EP) and by expanding qualified majority voting (QMV). Along with introducing the principle of subsidiarity and the concept of European citizenship, it further developed existing policies such as social policy and added new ones, including education, culture, public health, consumer protection, trans-European networks, industry, research, technological development, environment and development cooperation.¹¹ The idea implied by all these measures testified in fact to the creation of a far-reaching economic and political union that could one day become the United States of Europe.¹²

Although the concept of the *EU Treaty* (Maastricht Treaty) emerged on a ‘wave of great optimism about the EC’, one must not forget the context of real political circumstances that still existed in a divided Europe. Namely, the European continent was still ‘divided into rival political and legal systems’. It is no wonder then that the Treaty was not a ‘completely coherent or symmetrical agreement’. It was obvious that of all the amending agreements, exactly the TEU ‘was created in the most difficult way’.¹³ That is why it has often been rightly pointed out that the TEU was ‘the last treaty of the Cold War’.¹⁴

10 The Maastricht Treaty (TEU) has seven titles. The first Title – Common Provisions, Articles A to F, among other, regulate the establishment of the European Union (Article A), determine its objectives (Article B), conditions under which the European Parliament, the Council, the Commission and the Court of Justice exercise their powers (Article E), etc. In Title II – Provisions amending the Treaty establishing the European Economic Community with a view to establishing the European Community, Article G amends the Treaty establishing the European Economic Community with the aim of establishing a European Community. Titles III and IV contain provisions amending the treaties establishing the European Coal and Steel Community and the European Atomic Energy Community (Articles H and I). Under Title V of the Maastricht Treaty – Provisions on a Common Foreign and Security Policy (Articles J to J.11) and Title VI – Provisions on cooperation in the fields of justice and home affairs (Articles K to K.9), under which the member states are obliged to ‘inform and consult one another within the Council’. Title VII contains the Final Provisions (Articles L to S).

11 Laursen and Vanhoonacker-Kormoss, 2019.

12 Goldstein, 1992, p. 117.

13 Hartley, 2004, p. 7.

14 Pryce, 1994, p. 3; Burgess, 2000, pp. 189–193.

2.1. *The importance of institutions*

For any attempt to understand the phenomenon of European integration and the EU itself, it is vital to know thoroughly the institutions in their respective context. According to the French administrative law classic M. Hauriou, an institution is

a social structure established for the performance of a specific function; in which power is subordinated to that end, and in which such subordination justifies the structure's autonomy and, possibly, its legal personality.¹⁵

According to a more modern and endorsed understanding, institutions consist of

a set of formal rules (including constitutions), informal norms, or shared understandings that constrain and prescribe political actors' interactions with another. Institutions are generated and enforced by both state and nonstate actors, such as professional and accreditation bodies. Within institutional frameworks, political actors may have more or less freedom to pursue and develop their individual preferences and tastes.¹⁶

Institutions are important for several reasons. First of all, institutions enable the "architecture" of every political system, including the European Union. The obligation and responsibility of achieving an efficient, democratic and transparent political system rests on its institutions. What distinguishes one environment from another, state from state, wider alliances from simpler ones, is precisely the ability of existing institutions to adapt to the changing economic, political and cultural context. According to P. Dann, analysis of the EU institutions actually represents research of a 'moving object'. Central parts of what today is the very core of the institutional system did not even exist at the very beginning of the European integration process. Dann cites the European Council and the European Parliament as examples, which today are the 'main actors in the institutional setting', noting that the Council was not even mentioned in the *Treaty of Rome* (1950) while the Parliament underwent a dramatic change regarding its role. Of course, considering the profound changes in the institutional structure, it can easily be concluded that 'the system has not yet matured', it is still in motion, and it is therefore 'difficult to interpret it in a coherent way'.¹⁷

Institutions can be political and legal. Political institutions are mainly concerned with the 'exercise and distribution of power and have a monopoly on the legitimate

15 Hauriou, 1943, pp. 25–27, cited in Mendes, 2020, p. 2.

16 Gilad, Institution. Available at: <https://www.britannica.com/topic/institution> (Accessed: 5 November 2023).

17 Dann, 2009, p. 237.

use of force’.¹⁸ For neo-institutionalists, according to J.E. Lane and S. Ersson, institutions are answers to interactional and transactional problems in human behaviour. Starting from the assumption, like James Madison in *the Federalist Papers* (1787–1788), that people organise themselves to protect their pertained and vested interests, they interpret political institutions as

devices for constraining opportunistic behaviour among political elites. Political groups pursue their broadly defined self-interests within the framework of interaction set by political institutions... Institutions restrain individual behaviour – this is the basic idea.¹⁹

Legal institutions are defined by Dick W.P. Ruiter as ‘... a regime of legal norms purporting to effectuate a legal practice that can be interpreted as resulting from a common belief that the regime is an existent unity’.²⁰ Here the element of legal “unity” refers to its institutional and substantive aspects. Institutional aspects refer to the fact that a legal institution is a system of rules and competences that in terms of validity ultimately originate exclusively from one legal source. Such an institution, therefore, is a legally valid, more or less autonomous element within the overall legal system. Furthermore, the unity of the legal institution implies that its legal system must be “coherent”, meaning that different parts of the institution’s legal regime are linked by common, basic legal concepts.²¹

In the context of the existence of international institutions – and the EU is an international, supranational organisation *par excellence* – it is emphasised that ‘institutions are persistent and connected set of rules (formal and informal) that prescribe behavioural roles, constrain activity and shape expectations’.²² The European Union is undoubtedly one of the most complex international communities in the institutional sense. If there were any lessons that could be learned from the Maastricht experience, one of them was surely that the construction of Europe meant and required forging (new) institutions.²³ The TEU launched the process of building a new political Europe – for some, this Treaty enabled a shift from functionalism to constitutionalism and the strengthening of central institutions, according to others it meant ‘crossing the Rubicon to a federal Europe’.²⁴ For J.H.H. Weiler, the ‘almost sunk’ Maastricht was the most important ‘constitutional “moment” in the history of the European construct’.²⁵ For A. Moravcsik, the very events between 1992 (*Maas-*

18 Political Institutions. [Online]. Available at: <https://www.yourarticlelibrary.com/essay/political-institutions-useful-notes-on-political-institutions/31366> (Accessed: 7 November 2023.).

19 Lane and Ersson, 2000, p. 56; Jupille and Caporaso, 1999, pp. 429–444.

20 Ruiter, 1993, p. 358, cited in: Curtin and Dekker, 2010, p. 6.

21 Ibid.

22 Keohane and Murphy, 1992, p. 871.

23 Curtin and Dekker, 2010, *ibid.*

24 See Polack, 2019.

25 Weiler, 1999, p. 4; see Walker, 2001, pp. 31–57.

tricht Treaty) and 2007 (*Lisbon Treaty*) determined the course of discussions about the evolution of Europe, and inspired answers regarding the fundamental theoretical challenges of that era.²⁶

In ‘blessed simplicity’ (*sancta simplicitas*), Phillip Dann removes Antje Wiener’s complex term *soft institutions* that includes social and cultural norms, rules and routine practices, and in the context of European constitutionalism, he simply accepts that the EU institutions are ‘bodies of the Union as set up by the founding Treaties and mentioned in Art. 7. EC and Art. 5. EU’.²⁷ Even after Maastricht, these are the institutions that constitute the most active part and source of constitutional and sub-constitutional European law.²⁸ They shape and encourage inter-institutional dynamics within the structure of executive federalism.²⁹

Finally, the EU Treaties followed the European tradition of defining the EU and its institutions as unique entities that have a special status. *The Treaty of Lisbon* explicitly states that the Union, as an organisation that enjoys a specific status, shall ‘have an institutional framework’ consisting of seven main institutions. In addition to the traditional five institutions of the former European Communities – the European Parliament, the Council, the European Commission, the Court of Justice and the Court of Auditors, the EU’s main institutions now also include the European Council and the European Central Bank. It is through these institutions – and, of course, through the extensive and complex structure of subsidiary bodies and agencies – that the Union has the ability to act in relation to the member states and its citizens.

26 Moravcsik, 2018, pp. 1648–1649.

27 Weiner, 2003, p. 121; Dann, 2009, p. 238.

28 Article 7: (1) The tasks entrusted to the Community shall be carried out by the following institutions: (a) a European Parliament, (b) a Council, (c) a Commission, (d) a Court of Justice, (e) a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by this Treaty. (2) The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity. Document 12002E/TXT, Treaty establishing the European Community (consolidated version, 2002).

Article 4 shall be replaced by the following: ‘Article 4 1. The tasks entrusted to the Community shall be carried out by the following institutions: (a) a European Parliament, (b) a Council, (c) a Commission, (d) a Court of Justice, (e) a Court of Auditors. Each institution shall act within the limits of the powers conferred upon it by this Treaty. Each institution shall act within the limits of the powers conferred upon it by this Treaty. 2. The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity. 7) The following Articles shall be inserted: Article 4a. A European System of Central Banks (hereinafter referred to as “ESCB”) and a European Central Bank (hereinafter referred to as “ECB”) shall be established in accordance with the procedures laid down in this Treaty; they shall act within the limits of the powers conferred upon them by this Treaty and by the Statute of the ESCB and of the ECB (hereinafter referred to as “Statute of the ESCB”) annexed thereto. Article 4b: A European Investment Bank is hereby established, which shall act within the limits of the powers conferred upon it by this Treaty and the Statute annexed thereto.’ *Treaty on European Union*, [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A11992M%2FTXT> (Accessed 6 November 2023).

29 Dann, 2009, p. 243.

3. Institutions of the European Union from Maastricht to Lisbon (1992–2022)

The *ratio* for adopting the Maastricht Treaty may lie in the move to connect the existing treaties with two new complex areas – *Common Foreign and Security Policy* (second pillar) and *Cooperation in the fields of Justice and Home Affairs* (third pillar) and in the creation of an economic and monetary union. At the same time, the EU as an international organisation developed into a legal system with a clear unique character that encompasses many, and sometimes very different, levels of cooperation and integration.

With the entry into force of the *Treaty on European Union* on 1 November 1993, the member states of the European Communities formally established the European Union. Despite the changes, the functions of the institutions mostly remained as they were defined by the *Treaty on the European Community*. According to Art. 3 of the Treaty, the Union had an ‘institutional framework which shall ensure the consistency and continuity of the activities carried out in order to attain its objectives while respecting and building upon *the acquis communautaire*’.³⁰ The same Treaty in Art. 7 provided that all tasks entrusted to the Community will be performed by the European Parliament, Council, Commission, Court of Justice and Court of Auditors. The institutions were required to act within the powers entrusted to them by the EC Treaty and any other related treaties or acts. The Council and the Commission were assisted by the Economic and Social Committee and the Committee of the Regions. The *European Council* was not specifically designated as a Community institution in Art. 7 because it functioned as a mechanism of intergovernmental cooperation. Set up as an informal forum for discussion already in 1974, it was given a legal basis in 1986 with the *Single European Act*, and finally it was included as an EU institution in the *Treaty of Lisbon*.

3.1. The question of the constitutionality of the Maastricht Treaty

Just before 1 November 1993, when the *Maastricht Treaty* entered into force, the German Federal Constitutional Court delivered its famous judgment on the Maastricht Treaty.³¹ The Constitutional Court’s decision of 12 October 1993 confirmed the constitutionality of the *Maastricht Treaty* and thereby opened the way for German participation in the future European integration process. However, the Court’s decision contains certain remarks (*obiter dicta*) that caused quite a stir in the European

³⁰ Lenaerts and Nuffel, 2005, p. 55.

³¹ Bundesverfassungsgericht – Judgment on the Maastricht Treaty of 12 October 1993; Cases 2 BvR 2134/92, 2 BvR 2159/92. The full text in German is cited in 89 Official Court Reports, 155 [BVerfGE 89, 155]; See the English translation at: <https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf>.

Union. The most important among them is the following: ‘The German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits’.³² In other words, the limits of the power of European law will be decided by national and not transnational courts – in this case, the German Federal Constitutional Court and not the European Court of Justice (CJEU). For German constitutional judges, legal acts of the Union that go beyond the competences specified in the Treaty will not be legally binding on Germany.

Of course, the main reasons for mentioning this important decision of the German Federal Constitutional Court are the reactions and conclusions regarding its possible impact on the future of the European Union and the integration process. All such predictions were necessarily speculative though, especially since the Federal Constitutional Court did not elaborate on the likely practical effects of the decision. The sound conclusions were that the Federal Constitutional Court, in spite of everything and although it apparently took bold steps, did not actually call the European Union into question. Instead, the Constitutional Court opened the door and provided guidance for continued European integration.³³

3.2. Successive reforms of institutions after Maastricht

The successive reforms agreed in Amsterdam (1997) and Nice (2001) did not, for the most part, change the “Maastricht organisational structure”, except the fact that the “third pillar” became a platform for police and judicial cooperation in criminal law matters. Also, as the Treaty establishing the European Coal and Steel Community signed in 1951 was concluded for a period of 50 years, it expired on 23 July 2002 and the ECSC ceased to exist. Two other communities – the EC and the Euratom remained in their original form as part of the EU.³⁴

In October 2004, the European Council signed the *Treaty establishing a Constitution for Europe*. Its aim was to create a constitution for Europe that would replace many existing treaties and restructure the EU’s legal foundations in a clearer manner. The goal was to make the EU more efficient in terms of decision-making, more transparent, more democratic and closer to citizens.³⁵ However, in May and June 2005, the *Constitutional Treaty* was rejected in popular referendums held in France and the Netherlands. Since the treaty – which was supposed to become a consolidated Constitution for the European Union – was not ratified, the existing EU treaties were amended and expanded. The institutional changes foreseen in

32 Ibid., p. 6.

33 Hilpold, 2021, pp. 159–192; Meessen, 1994, pp. 511–530.

34 Dehousse, 1994, pp. 181–239.

35 Ziller, 2004, pp. 29–69.

the original agreement were nevertheless transferred. This process resulted in the adoption of the *Treaty of Lisbon*, signed in 2007 and finally ratified in 2009.

The Lisbon Treaty retained the most important aspects of the ill-fated Constitutional Treaty. It reformed the EU's political system and abolished the existing three-pillar model. Internal coordination mechanisms were developed, the right of veto of individual member states was limited, and additional powers were conferred upon the Parliament. The EU also acquired legal personality so that it could act as an independent institution in pursuing common foreign and security policy. The Lisbon Treaty was largely about institutional changes. Existing EU institutions had their powers increased, while both the European Council and the European Central Bank were formally given the legal status of an EU institution. Existing powers were reorganised to some extent, mainly through the expansion of the scope of the co-decision procedure. Furthermore, the Council was given more opportunities to apply (the redefined) QMV, the decision-making process in budget adoption was reformed, the President of the European Council, elected for a maximum of five years, became a stable and full-time function, and the position of the High Representative of the Union for Foreign Affairs and Security Policy – who is appointed for five years and is also the President of the Foreign Affairs Council and a Vice-President of the Commission – was introduced, etc. In fact, one might rightfully conclude that the Lisbon Treaty primarily sought to accomplish institutional changes.³⁶

4. On the question of the separation of powers in the constitutional arrangement of the European Union

After a brief review of the EU's evolving institutional infrastructure, one could ask the following question: Is the new, post-Maastricht EU structure familiar with the old doctrine of the separation of powers? Some authors explicitly claim that the Union does not align with any rigid doctrine of the separation of powers. Joanne Coles points out that as regards the EU institutions,

there is little... which can be characterised within the traditional terms used in constitutional law, such as the executive, legislature, administration and judiciary. Instead, Community institutions operate a “separation of interests”, and each has powers overlapping with traditional governmental functions.³⁷

Although the evolution and successive changes of the EU's institutional framework directly indicated that the diffusion and fragmentation of regulatory authority

³⁶ Laursen, 2011, pp. 45–70; Piris, 2010, pp. 204–237; Ashiagbor et al. (eds.), 2012.

³⁷ Coles, 2001, p. 24.

clearly marked the 'breakdown of old conceptions of the separation of powers', Peter L. Lindseth concludes that traditional constitutional concepts retained a key role as separate mechanisms of legitimation in emergence of the system of administrative governance.

Donato Gianotti (1492–1573) was among the first authors to recognise that legal and political relations outside the borders of the "city-state" are based on special relations and regulations. In his political treatise *Della Reppublica Fiorentina* (1534), he emphasised the need for the recognition and application of the principle of the separation of powers based on the distinction of four state functions (electoral, legislative, executive and foreign and security policy).³⁸ However, it was in fact Immanuel Kant (1724–1804) who first explained why constitutionalisation on the "home ground" cannot be complete without the corresponding constitutionalisation of external policy powers through international legal rules and principles governing relations between states as well as *vis-a-vis* foreign citizens. Kant simply demanded the extension of the principle of the rule of law to interstate, i.e. intergovernmental relations as well as to transnational relations with foreign citizens.³⁹ The aim of the doctrine is to establish the rule of law (*jurisdictio*) and not the rule of people or their will (*gubernaculum*). The ultimate meaning of the classical doctrine, ever since Montesquieu, Madison and others, consisted in the division of state power in its totality. That is because when the power is divided between autonomous bodies, then each of them acts as a controller of the other, so freedom itself will survive precisely because of the existence of control. Finally, the value of the separation of powers lies in bolstering the checks and balances that are necessary to prevent abuse of the ever-growing powers of the executive.

Unlike the nation-state and its organisation of government in which the separation of powers is a central principle, at the levels of political and legal formations above the state, such as the various international or supranational organisations (UN, EU...), this principle has never been applied in a literal sense. G.A. Berman points out that 'the structure of the European Union has never been based so much on notions of the separation of powers (even in a modified form) as it has been on notions of institutional balance'.⁴⁰ Moreover, K. Lenaerts claims that it is 'impossible to characterize... Community institutions as holders of one or the other power since a close analysis of their prerogatives does not indicate a clear-cut line between the legislative and executive branches of power'.⁴¹

The attempt to define more closely the legislative and executive powers in the EU related to the failed *Constitutional Treaty*, in the context of determining the substance of "legislative" power and defining the procedure necessary for the adoption of a legislative act. It was then implied that everything else was of a "non-legislative"

38 Petersmann, 1997, p. 422.

39 Ibid.

40 Berman, 2005, p. 443.

41 Lenaerts, 1991, p. 13.

character and therefore belonged to the domain of executive power as opposed to legislative power. Continuous occurrence of the numerous so-called “new authorities” were mainly found to be actors that functioned as “satellites” of the executive rather than of the judicial or the legislative authorities. This is because it tends to be much easier to define and determine what “judicial” or “legislative” power is and what the related specific tasks of one or another power are than do the same for executive and limits of its power. While the legislature as well as the court can be defined and textually generalised on the basis of certain constitutions regardless of their various contextual and institutional particularities, things are completely different with the executive. According to N.W. Barber, the diversity of executive power in the various states and diversity of their institutional forms prove the impossibility of any abstract approach without considering specific limits of the respective constitutions.⁴²

Evidently, in Art. 6 of the *Treaty on European Union (Maastricht)*, which states the fundamental principles of the EU, the principle of the separation of powers is not mentioned *expressis verbis*. And yet, there is broad consensus that the principles of ‘liberty, democracy, respect for human rights and fundamental freedoms and the rule of law’ implicitly include the separation of powers.⁴³ In other words, the EU’s fundamental values follow the meaning of that classical principle of government organisation, aiming at the welfare of the political citizen, the realisation of limited government and the rule of law. There is a similarity here with the *Constitution of the United States* (1787), which was the first document to thoroughly elaborate a modern system of the separation of powers and the mechanism of mutual checks and balances between the institutions that hold power. Namely, the text of the Constitution does not expressly refer to the separation of powers doctrine.⁴⁴ It is self-evident that “people are not angels” and that their weakness for the siren call for the abuse of power and corruption is universal; and that power tends to corrupt and unlimited power does so to the maximum, is simply a well-known truth. The possibility of abusing any power is therefore obvious. That is why the fear of latent situations of abuse of power and of corruptive tendencies of ambition – first, at different levels of the national political system, and then at those of transnational political entities – resulted in the incorporation of certain, modified elements of the separation of powers. How?

4.1. Deviations from the classical concept of the separation of powers in European treaties

Instead of the classical principle formulated by Montesquieu several centuries ago, the EU adopts and promotes the concept of *institutional balancing*. Jean Paul

42 Barber, 2001, pp. 59–88; Henkel, 2002, pp. 359–386.

43 Rosas, 2007, p. 1034.

44 Katzenbach, 1987, pp. 243–250; Wills, 1987, pp. 289–297.

Jacque believes that institutional balance is a constitutional principle with two faces: legal and political. That principle must be respected by all EU institutions and member states. Violation of this principle is sanctioned by the highest court of the EU. From a *political* point of view, balance is conceived as a means of organisation of the relations between institutions. Thus, for example, the EU institutional triangle (Parliament, Council and Commission) has been in evolutionary momentum from the beginning. From a *legal* point of view, the principle of institutional balance means that institutions must act within the limits of the given competences. The principle of institutional balance indicates that the parties to the treaty have established a balanced distribution of powers, whereby the weight of each institution equals the weight of others. This simply means that the institutional structure of the Union is ‘based on the division of powers between various institutions established by the treaties’.⁴⁵

The Court articulated the principle of institutional balance for the first time in the *Meroni* case.⁴⁶ In its decision, the Court rejected the transfer of sovereign powers to subordinate authorities outside EU institutions and ruled that the subject of delegation could only be ‘clearly defined executive powers’. In addition, that process of delegation is fully under the supervision of the Commission as the delegator of powers. Although *Meroni* was created in the context of the *Coal and Steel Community Treaty*, its applicability to the EU Treaty was generally accepted, and later confirmed by the case law of the Court.⁴⁷ The principle got its clearest expression in the context of the so-called “comitology”, that is the method, i.e. set of procedures according to which committees consisting of member state representatives constitute the framework within which the Commission exercises its implementing, delegated executive powers.

The deficiency of this concept developed by the European Court of Justice is the lack of criteria that would determine its correct application. This difficulty is otherwise regularly associated with the issue of balancing. Namely, balancing implies the weighing of countless interests that are opposed to each other, so the entire activity entails the risk of subjectivity. This problem, however, does not exist in the tripartite separation of powers because it depends on a “conceptual definition of the function”; it is therefore about defining a specific type of power and not about assessing how the functionally undefined power of one institution affects the exercise of power by another. To specify functions is thus of primary importance. This is evidenced by the idea of *checks and balances* in the separation of powers theory, better understood as the “partial exercise” of the power of one branch of government by another branch.⁴⁸

45 Jacqué, 2004, pp. 383 et passim

46 Case 9/56 *Meroni* [1958] ECR 11; see the opinion of 17 December 1959 which refers to Art. 95 of the ECSC [1959], ECR 551.

47 Vos and Everson, 2014, pp. 1–17; Craig, 2021, pp. 46–89; Jacqué, 2004.

48 Jacqué, 2004, cited in Conway, 2011, pp. 319.

Altogether, as pointed out by S. Platon, there are several ways of interpreting the institutional balance in the European Union. First, institutional balance can be understood as a *fact* – namely, as the actual balance of power between the institutions noted when observing the way in which EU institutions mutually interact, together with their development over time and the identification of possible future trends. Second, institutional balance can be considered as a *normative principle* – that is, what the balance between institutions should be. Third, institutional balance can be seen as a *legal principle* applied and enforced by the Court of Justice.⁴⁹

The Court of Justice addressed the question of institutional balance again in the *Chernobyl case* (1990).⁵⁰ In this judgment, the Court found the following:

By setting up a system for distributing powers among the different Community institutions, assigning each institution to its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community, the Treaties have created an institutional balance.⁵¹

The Court has the task to maintain the institutional balance, ‘and in order to do so must be able to review observance of the prerogatives of various institutions’. Such special prerogatives are therefore ‘one of the elements of the institutional balance’ that are created by the Treaties. As regards the observance of the institutional balance, it ‘means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalise any breach of that rule which may occur’.⁵²

Respect for institutional balance means that ‘each of the institutions must exercise its powers while respecting the powers of other institutions’. This rule serves as a principle of mutual respect between institutions in terms of their competences and powers. The main question regarding institutional balance is whether institutional balance is a “general principle of EU law”. It should be pointed out that the explicit conclusion does not unambiguously follow from the jurisprudence of the Court. On the contrary, there were significant fluctuations in the Court’s jurisprudence to the extent that three different “ages” of institutional balancing could be identified. As such, there is not even a unanimous opinion whether or not institutional balance is a general principle.⁵³

Concluding that ‘Montesquieu has never visited Brussels’, professor of Constitutional Law and Vice President of the Convention on the Future of Europe G. Amato was among the first to express scepticism towards the incorporation of the

49 Platon, 2022, pp. 136–155.

50 Judgment of the Court of 22 May 1990. *European Parliament v. Council of the European Communities*. Case C-70/88; [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61988CJ0070> (Accessed: 5 November 2023).

51 *Ibid.*, p. 1

52 *Ibid.* pp. 21–22.

53 Platon, 2022.

separation of powers principle into the new treaty structure. The fact is, however, that the *Treaty of Lisbon* (2007) clarified the EU's institutional system and demonstrated that this classical principle, questioned by many in new arrangements, continued to be an enlightening idea and unavoidable criterion, 'inherent in all forms of political organizations inspired by the idea of constitutionalism itself'. This is despite the Court's pragmatic efforts to persistently seek or emphasise 'an inherent limit to the influence of constitutional law on inter-institutional disputes'. The idea behind such Court policy is obvious: the less time and energy institutions spend on conflicts over jurisdiction, the greater their contribution to increasing the overall efficiency of treaty arrangements will be.⁵⁴

5. Conclusion

The nature of the relationship between constitutionalism and international organisations persistently emphasizes the fact that the basic postulates of national constitutionalism are also upheld as part of the law of international organisations. According to Ernst-Ulrich Petersmann, these are the following principles: the rule of law, the separation of powers, fundamental rights, the necessity and proportionality of governmental restraints, democratic participation and social justice.⁵⁵

European institutions have been open to changes necessary for their better and more efficient functioning since the beginning. This was also true for the institutional changes introduced by the Maastricht Treaty. As in previous cases, the purpose of these changes and amendments was to create a more perfect institutional structure. Bearing in mind the level of complexity of the EU as an international organisation as well as the number of *intra*- and *inter*-relations of its institutions of several directions, this process is undoubtedly far from over.⁵⁶ Petersmann, a renowned researcher of contemporary international organisations, concludes that from a national perspective of constitutional democracies and their citizens, these organisations can be viewed as the "fourth branch of government". Just like national organisations, international organisations 'derive their legitimacy from promoting the equal liberties and "public interest" of domestic citizens'. Therefore, right from the beginning and continuously, it is 'important to ensure that international agreements do not undermine the basic constitutional principles of democracies'. That is why an effective rule-making process at the international level must be complemented by "democratic procedures" on the international and domestic policy-making levels.⁵⁷

54 Blanke and Mangiameli, 2013, pp. 1129–1133; Ballman, Epstein and O'Halloran, 2002, pp. 551–574.

55 Petersmann, 1997, pp. 431–434.

56 Rosas, 2007, p. 1033.

57 Petersmann, 1997, p. 440.

This is the framework in which constant search for the principle of the separation of powers in the European Union should be understood. Despite the dominant view that the EU, its institutional structure and the distribution of powers do not precisely reflect traditional *trias politica*, this classical principle still provides the most convincing answers to the problem of avoiding the concentration of power, which is also the purpose of the EU Treaties.⁵⁸ The results of new empirical analyses of the exercise of public powers, especially those of the Court of Justice in relation to other EU and member state actors, could help identify accountability and legitimacy gaps in the EU constitutional structure and form the empirically based foundations for strengthening and improving the separation of powers in the European Union.⁵⁹

58 Ramirez, 2013, pp. 421–426.

59 Wallerman Ghavanini et al., 2022, pp. 1–47; Eckes, Leino and Wallerman Ghavanini, 2021, pp. 1–24.

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INSTITUTIONAL REFORMS IN THE CONTEXT OF THE FUTURE OF EUROPE FROM THE POLISH POLITICAL SCIENCE PERSPECTIVE



PIOTR BAJDA

Abstract

The article examines the significance of the expansion of the European Union for post-communist countries in 2004 and afterwards. However, it also shows what added value the expansion to the East represented. The admission of culturally diverse countries with different traditions allowed the construction of Europe in line with the vision adopted in the Treaty of Lisbon. Thanks to Central Europe, it became a fact that the Old Continent was united in diversity, as its slogan says. In this context and from the perspective of the Central European countries, the paper presents an opinion on the latest proposals for changes in the Community treaties. Discussion is critical now when the Russian invasion of Ukraine complicated the geopolitical situation in Central Europe and within the European Union as a whole.

Furthermore, the heroic defence of Ukrainians opened the door to the European Union for Kyiv, putting the need to reform EU treaties on the agenda again. However, the proposals for new treaties may paradoxically weaken Europe's defence, which is even more dangerous for the countries located on the eastern border of the European Union and NATO.

Keywords: European Union, Treaty reform, Central Europe, Future of Europe

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1. Instead of an introduction – A short history of European integration until the Treaty of Maastricht and the Treaty of Nice from an institutional perspective

The history of European integration is full of twists and turns along with the evolution of the forms of cooperation. Yet one thing remains unchanged. European integration is the result of decisions made by the leaders of individual countries, who wanted to strengthen the position of their capitals in the international arena. It was therefore a conscious action in the interest of nation states. The first step was the signing of the Treaty of Paris and establishing the European Coal and Steel Community (ECSC) in April 1951. The purpose of this agreement was preventive, it was intended to create mechanisms that would guarantee peace on the European continent by deepening economic cooperation while agreeing to provide supra-state control over raw materials that could be used for armaments. The six countries signing the document (France, the Federal Republic of Germany, Italy, Belgium, the Netherlands and Luxembourg) were, most importantly, bound by the terms of the largest three states. The following two Treaties of Rome on the European Economic Community and on the European Atomic Energy Community (Euratom) signed by the same group of countries in March 1957 expanded and deepened the areas of economic cooperation.

This structure turned out to be appealing and attracted new candidates. A pivotal event was when one of the world's most powerful economies, Great Britain acceded to the European Communities which, together with Denmark and Ireland, became a member of the Union on 1 January 1973. A few years later, in 1981, Greece joined the European Communities, followed by Spain and Portugal in 1986. The enlargements from 1973 through 1981 doubled the size of the European Communities compared with the number of the founding countries. This process led to the first reform efforts which resulted in the signing of the Maastricht Treaty in February 1992 and the founding of the European Union at the beginning of 1993.

The change in the form of cooperation thereby defined is evidenced by the provision in Article G, which states that the term 'European Economic Community' shall be replaced by the term 'European Community'¹. Regarding declarations, it was recognised that the European Union thus established would be an association of states interested not only in economic but also political cooperation. In Maastricht, it was agreed not only to expand the scope of common economic policy but also to initiate the creation of a monetary union, and the areas of cooperation were supplemented with foreign policy, internal security and military policy. Moreover, the new treaty came into force just after the German unification, making Germany the most prominent European country with over 83 million citizens and having the most robust economy compared with others. As researchers of the subject aptly point out, one

1 Skolimowska, 2014, p. 64.

of the reasons for building the eurozone was to limit the role of the German central bank. 'France and Italy, among others, hoped that the introduction of the euro would eliminate the exclusive position of the Bundesbank in shaping monetary policy and allow for greater control by Community countries'.² Austria, Sweden and Finland joined the European Union in 1995 under such conditions. At the same time, the Norwegians and the Swiss rejected the idea of joining the Community in a referendum. In Norway, the public voted against the accession on two occasions, the first time in September 1972, and the second time in November 1994.³ The Swiss rejected the option of joining the European Union in a referendum held in December 1992, where 50.3% of Swiss people voted against integration with a 78.3% turnout.⁴

The failure of the accession referendum in Norway and Switzerland has shaken the European project. It showed that only some were ready for further integration and giving up their sovereignty. It was under these circumstances that Central European countries entered the international arena in Europe and, as a result of the Autumn of Nations, regained their sovereignty due to the collapse of the Eastern Bloc and the disintegration of the Soviet state. The ability to freely decide one's fate was quickly manifested in the first steps towards integration with the institutions of Western Europe. First, the Central European countries sought admission to the Council of Europe and the Organisation for Economic Co-operation and Development (OECD), but above all, the main goal was to gain membership in the European Union and the North Atlantic Alliance. Other activities in the regional arena were also subordinated to this goal. It is worth mentioning here that the declared goal of the Visegrad Group, established in February 1991, was the cooperation of the then three Central European countries (Czechoslovakia, Poland, and Hungary) for European integration.⁵ The subsidiary nature of this decision is evidenced by the fact that the V4 countries remain unformalised to this day, without any statute, institutional bodies such as a secretariat, or budget gained from the contributions of member states. It was the result of awe that establishing the Visegrad Group as a fully-fledged international organisation would be regarded in the West as an alternative integration project. As history has shown, this strategy turned out to be effective. The V4 became a kind of stabiliser in the region, reactivating and separating Central Europe from the entire Eastern Bloc which plunged into chaos in the early 1990s, becoming one of the most important partners for the European Union in its eastern neighbourhood.⁶ Evidently, for some members of the European Union, admitting Central European

2 Gwóźdź-Lasoń, Miklaszewski and Pujer, 2017, p. 10.

3 Boryczka-Cichy, 2012, pp. 242–243.

4 Tomczyk, 2013, p. 132.

5 The title of the document establishing the Visegrad Group made this perfectly clear: 'Declaration on Cooperation between the Czech and Slovak Federal Republic, the Republic of Poland and the Republic of Hungary in Striving for European Integration', see: Visegrad Group (1991) *The Visegrad Declaration* [Online]. Available at: www.visegradgroup.eu/documents/visegrad-declarations/deklapl (Accessed: 27 November 2023).

6 Bajda, 2015, pp. 190–192.

countries to the community meant more of a problem than an opportunity. The best example of this may be the foreign policy of French President François Mitterrand, who, instead of opening up the EU to post-communist countries, proposed building a loose European confederation accessible to even the Soviet Union (later the Russian Federation), and intended to limit deeper integration only to Western Europe.

Fortunately, the calendar of historical events, including the collapse of the Soviet state, the civil war in the Balkans, and the determination of Central European leaders resulted in the European Community taking action to prepare the EU for major enlargement.

Consequently, the Treaty of Nice was signed in February 2001, which entered into force two years later and was intended to improve the functioning of the larger union. One of the main provisions was the extension of the scope of issues subject to qualified majority voting. For this purpose, votes in the Council of the European Union were divided between individual member states and candidate states, ranging from 29 to 3 for the smallest countries. Theoretically, the number of votes allocated was to reflect the size of the population of each country. The Federal Republic of Germany had a population of over 82 million. They had 29 votes in the Council of the European Union, the same number the three other largest parties to the Treaty: Great Britain, France, and Italy held all together.⁷ The following number of votes was allocated to the countries preparing to join the European Union in 2004: Poland 27, the Czech Republic and Hungary 12 each, Slovakia and Lithuania 7 each, Latvia, Slovenia, Estonia, Cyprus and Malta 3 each. For candidates with whom further accession negotiations were conducted, 14 votes were reserved for Romania and 10 for Bulgaria. This meant that a total of 80 votes out of 321 were reserved for the group of 10 countries about to join the European Union. After the accession of Bulgaria and Romania, the new members held a total of 104 votes out of 345. According to the new provisions of the Treaty, a proposal submitted to a qualified majority voting required 74.8% of the votes from 51.9% of the member states if it was put forward by the European Commission, or needed the support of 66.6% of the countries if it was upon the initiative of one of the member states. Moreover, countries supporting the proposal had to represent a minimum of 62% of European Union citizens. Theoretically, after the first major enlargement, the new EU members could be out-voted by the rest because the countries with a longer history of membership had the required majority of 241 votes, and only the accession of Bulgaria and Romania in 2009 allowed for the more effective blocking of unfavourable solutions. However, when deciding on specific provisions of the Nice Treaty, the signatories possibly had limiting Germany's influence on their mind – since in their case, the principle of

7 According to Article 3 Provisions concerning the weighting of votes in the Council of the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts – Protocol annexed to the Treaty on European Union and the Treaties establishing the European Communities (Official Journal of the European Communities C80/1, 2001, p. 50).

proportionality in the number of votes assigned was clearly violated – rather than plans to impose their will on the new members of the European Community.

2. 2004 enlargement of the EU as a new hope for Europe

The accession of ten new countries to the European Union on 1 May 2004 changed the character of the community. From a club of relatively wealthy 15 members, suddenly emerged a union of 25 countries, including eight post-communist countries with a unique baggage of experience and, particularly, economic backwardness. It was a one-time increase of 66% in the number of member states. As one researcher of European integration aptly noted,

the admission of Poland and other Central European countries to the European Union was a thoroughly geopolitical project, the aim of which was to include this region of Europe in the transatlantic strategic system'.⁸

However, the major enlargement's additional purpose was to give the European Union new hope. Brussels could boast of success after losing the referenda in Norway and Switzerland. Additionally, the admission of ten new members highlighted the rich diversity of a united Europe. A few years later (2007), the first country using the Cyrillic alphabet (Bulgaria) was admitted to the European Union.

Contrary to the reluctance of France to admit new members as mentioned above, other countries, especially Germany, Great Britain and the United States harboured geopolitical calculations, and as a result, advocated the eastern enlargement of the European Union. Interestingly, each of these countries was guided by different political interests. With the accession of Central European countries, Washington wanted to expand the area of stability and anchor the new members of the community more firmly in the processes of economic and political cooperation with the West, which was an essential complementary factor after the admission of the first countries to NATO. First, in 1999, for Poland, the Czech Republic and Hungary, and subsequently, for as many as seven countries (Bulgaria, Estonia, Lithuania, Latvia, Romania, Slovakia and Slovenia) in 2004. For Berlin, it was important to move the EU's external border further east and use its economic advantage to conquer new markets. In turn, Great Britain saw the enlargement of the European Community to include eastern neighbours as an opportunity to strengthen the transatlantic option favoured by London and weaken centralist tendencies that deepened EU integration.⁹

⁸ Grosse, 2012, p. 90.

⁹ Ibid., pp. 90–91.

The aspirations of Central European countries to obtain membership in European and transatlantic organisations was a natural reflex and goal after the fall of communism, which in this region created a vast open grey zone susceptible to the competition of various ideas. In the 1990s, the European Union was undoubtedly the most significant regional power, especially after the collapse of the Soviet Union into sixteen independent states. Moreover, over the years, the emerging promise of membership in the European Community motivated candidates to adopt EU regulations, open their markets to goods and services, and resolve disputes peacefully.¹⁰ The candidate countries voluntarily submitted to the Europeanisation process, counting on future benefits and, one might add, breaking out of the grey security zone. However, as Zielonka mentioned above, the EU's intrusiveness was already felt at the time, which defined Brussels' policy.

The EU not only told the Eastern European candidates what to do – for example, in terms of legislative changes or administrative reforms – but also sent its representatives to individual ministries to check whether the changes were being implemented in accordance with the recommendations contained in the twinning programme.¹¹

At times Brussels ruthlessly penetrated areas reserved for the sovereign decision of states, such as demand for the liberalisation of the Latvian and Estonian citizenship law, opening the way to the naturalisation of many Russians living in either of the two former Soviet republics, which was against the national interests and the security of Riga and Tallinn.

It is also worth noting that Europeanisation was not the only proposal Central European states were offered. The Russian Federation, rebuilding its position in the international arena, tried to find a foothold in the region. The closest it got to implementing this plan was in the Slovak Republic during the government of Prime Minister Vadimír Mečiar in 1994–1998. His style of government, violation of democratic procedures, and attempts to monopolise the Slovak political scene resulted in Bratislava being excluded from the group of the first countries invited to accession talks with the European Union and the NATO. In these circumstances, Moscow proposed that the government in Slovakia establish closer political and economic relations with Russia. To this end, Russian Prime Minister Viktor Chornomyrdin visited Bratislava in February 1995, and Prime Minister Vadimír Mečiar returned the visit to Moscow six months later. It was then agreed upon, among other things, that a framework for military cooperation, conditions for Russian assistance in expanding the Slovak nuclear power plant in Mochovce, and a customs union project be considered. However, the most dangerous idea was embodied in the statements of Slovak leaders supporting the declaration of Bratislava's neutrality,

10 For more, see Zielonka, 2007, p. 71.

11 Ibid., p. 73.

which the Russian Federation would guarantee.¹² If realised, this scenario would have created a belt of neutral countries consisting of Switzerland, Austria and Slovakia, which would effectively break the cohesion of the North Atlantic Alliance. Fortunately, the parliamentary elections in Slovakia in September 1989 resulted in Václav Mečiar being removed from power. The new government of Prime Minister Mikuláš Dzurinda accelerated the integration process with the EU and NATO, which led to Slovakia's inclusion in the first group of countries joining the European Community in May 2004 and the North Atlantic Alliance as part of the second round of enlargement by seven Central European countries two months earlier.¹³

However, this longer description of a single case study of an EU candidate country exemplifies that the Europeanisation process was one of many propositions in the international arena, and that Moscow, reverting to its imperial policy, tried to challenge Brussels. Today, similar competition for influence can be observed not only in the post-Soviet but also in the post-Yugoslav area.

Nevertheless, the major enlargement of the European Union by ten new countries radically changed the face of the Community. On the one hand, there was the accession of countries that were definitely poorer (except for Malta and Cyprus), even when compared with the not-so-wealthy Portugal and Greece. On the other hand, it moved the entire Community to the East to a considerable degree, integrating a sizeable post-communist area. May 2004 had one additional effect on the European Union: by reason of the enlargement, the EU became a community predominantly consisting of small countries. It should be noted that with a population of almost 38 million citizens, Poland alone was more populous than the nine accession countries together (35.3 million) and only slightly smaller in area – 312,696 km² as opposed to the 425,698 km² of the remaining ones. Only Romania's accession in 2007 changed these proportions somewhat, but Bulgaria – which joined together with Bucharest – and, subsequently, Croatia could hardly be classified as medium-sized countries. Naturally, the goal of EU enlargement was not the creation of a club for small countries; nonetheless, it is worth looking at the consequences of these processes. The first apparent impact was the frequent need to build consensus between the 25 and then 27 countries. Another result noted by Zielonka is that due to Brussels's somewhat protectionist approach to the new members, there was visible temptation to further impose Europeanisation from above. The voting power assigned to individual countries under the qualified majority voting procedure made it relatively easy to build a blocking coalition. Therefore, by implementing the Treaty of Nice, preparations were made for a more profound reform of the European Union. The literature on the subject calls this debate the “Nice compromise”, which included focusing on the accession of new countries while opening a discussion on the reform of the Treaty. The directions of this debate were included in the “Declaration on the Future of the Union” adopted at the meeting of the European Council in December

¹² For more, see Bajda, 2010, pp. 108–115.

¹³ *Ibid.*, pp. 169–171.

2000. The document assumed that the aim of these efforts should be to simplify the Treaties, precisely divide the competencies between the Community and the member states, agree on the status of the Charter of Fundamental Rights adopted in Nice, and strengthen the democratic legitimacy of the EU by extending the competences of European national parliaments in EU matters.¹⁴

3. The Treaty of Lisbon as a step towards deeper integration

The path leading to the Treaty of Lisbon began with the cognizance of the need for a sweeping organisational and systemic reform of the European Union. The previous Treaties of 1951–1957 inaugurating post-war international cooperation on the Old Continent set up three international organisations: the European Coal and Steel Community, the European Economic Community, and the European Atomic Energy Community – Euratom. Each of them had its own statute and relevant executive bodies. Simultaneously, under the Treaty of Rome in 1957, the origins of the European Parliament and the Court of Justice were created. A multitude of these solutions contributed to making the first attempt at structural order, sought by the so-called “Merger Treaty” signed in Brussels in 1965, on the basis of which bodies of the previously mentioned three institutions were merged into the Commission of the European Communities and a single Council was established.¹⁵ However, it did not mean a formal merger of the ECSC, EEC and Euratom; it materialised only under the Treaty of Maastricht signed in December 1991 and with the establishment of the European Union. Nonetheless, the way to a comprehensive and integrated community was still long, and the institutional frameworks set up were based on three pillars of cooperation. The first one, which related to economic issues, was based on the final combination of three of the aforementioned international organisations. Thus the European Union, created within the first pillar, adopted its international and legal character from its predecessors, and became a typical, supranational, intergovernmental organisation. At the same time, the two remaining pillars, i.e. the Common Foreign and Security Policy (CFSP) and cooperation in the field of Justice and Home Affairs did not have such rigid institutional frameworks. Cooperation within these two pillars took place under the international regime. Understood as a solution

¹⁴ Barcz, 2008, p. 12.

¹⁵ *Traité instituant un Conseil Unique et une Commission Unique des Communauté Européennes* [Online]. Available at: <https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:11965F/TXT> (Accessed: 12 December 2023).

of a nature of non-formal models of states' behaviours, it aspired to fill in a loophole existing between a norm of international law binding subjects of international relations and their right to independence and freedom of action in the international environment.¹⁶

It touched on sensitive areas over which the states intended to maintain full sovereignty, and only later was migration and asylum policy slightly communitarised. The question of the sovereignty of member states in the European Union is beyond the scope of this article. However, it is worth noting that the leaders in countries have to calculate profits and losses, and decide in which areas and on what terms and conditions transferring other national competencies to the community level will be profitable.

The Treaty of Maastricht was of crucial importance for the countries of Central Europe. The Treaty was received as a signal of Western Europe's readiness to expand the European Union and as a positive response to the political changes after the collapse of the Eastern Bloc. It was a sound of hope for post-communist countries and triggered pro-European mobilisation.

Another two legal acts – the Treaty of Amsterdam of October 1997 and the aforementioned Treaty of Nice, were of an auxiliary nature, technically preparing the EU for a considerable expansion to the East. In this second case, additionally, further reformss were envisaged, seeking to simplify the Treaties by improving their clarity and comprehensibility, specifying the division of competencies between the EU and member states in compliance with the principles of subsidiarity, determining the formal-legal character of the Charter of Fundamental Rights (adopted in Nice) and explaining the role of national parliaments in the construction of the European Community.¹⁷

In consequence, the Constitutional Treaty was adopted in October 2004 which, apart from the simplification of the primary law, proposed the use of symbolic elements in the form of a hymn or a motto 'unity in diversity', and foreshadowed the introduction of Union acts or functions of Union ministers. It was supposed to prove the willingness to transform the European Union into a quasi-state structure, which provoked anxiety in the citizens of many countries, and prompted the French and the Dutch to reject the project in a referendum.¹⁸ The negative decision of two of the founders of the European Community released other states from the obligation of ratification: eventually, Denmark, Poland, Portugal, Ireland, Great Britain and the Czech Republic did not hold a referendum.

The draft of the Treaty of Lisbon was a partial step back. On the one hand, it derived from the provisions of the rejected Constitution for Europe. However,

16 Skolimowska, 2014, p. 63.

17 Myszona-Kostrzewa, 2005.

18 Kabat-Rudnicka, 2016, pp. 31–32.

it abandoned plans to replace the founding documents. Therefore, the hitherto tested means of amendment was used, as in the case of the Treaty of Amsterdam and the Treaty of Nice, by introducing changes to the founding documents.¹⁹

Yet with the entry into force of the Treaty of Lisbon, the nature of the European Union changed. Extending the scope of decisions requiring qualified majority voting enabled the most substantial countries to use arguments of force. It replaced the previous method of functioning on the basis of consensus. From then on, the European Court of Justice began to be used as a tool for disciplining those who resisted the new orders. This situation is particularly dangerous for small Central European countries. In practice, the new rules deprive them of the ability to block even the most alarming decisions. Institutionalisation of the European Union and, in theory, drafting treaties to the letter of the law weaken informal mechanisms in which the possibilities of small states are severely limited. Moreover, from the perspective of small states, the added value is the integrating function of international organisations (i.e. EU), harmonising rules and changing relations between states to a more conciliatory attitude, for breaking these rules exposes the perpetrator to the use of disciplinary or sanctioning measures. An integrated and solid organisation has sufficient capacity to take on administrative or operational roles, such as conducting humanitarian activities or peacekeeping operations.²⁰ Consequently, minor actors in international relations are in no need to perform independent activities which, due to limited human resources, allows those in state administration to be entrusted with other tasks. There is another reason to support deepening integration and institutionalisation. The European Union, due to the strength of its member states, has extensive knowledge in various areas, such as economics or social data, which are available to the members of the Community and is broader than national in nature, facilitating more rational decisions.²¹

4. The Conference on the Future of Europe – The start of a discussion on the new Treaty

The German–French idea of opening discussions on the future of European integration was put into action at the end of 2019. This means that discussions commenced before the outbreak of the SARS-CoV-2 pandemic and well before Russia's aggression against Ukraine. Work on changes accelerated in March 2021 when European Parliament President David Sassoli, the Prime Minister of Portugal António Costa, on behalf of the Council presidency, and Commission President Ursula von

19 Byrska, Gawkowski and Liszkowska, 2017, pp. 32–33.

20 Skolimowska, 2014, pp. 37–38.

21 Grøn and Wivel, 2011, p. 523.

der Leyen signed the joint declaration on the Conference on the Future of Europe. We could perceive the full effects of these discussions at the beginning of December 2023. On 7 December, a report summarising the results of the work undertaken by the Conference on the Future of Europe was presented in Brussels during the Council of the European Union meeting. The report is accompanied by a 303-page annex containing 49 proposals and 326 related specific measures. All proposals have been divided into nine chapters: ‘A stronger economy, social justice and jobs’; ‘Education, culture, youth and sports’; ‘Digital transformation’; ‘European democracy’; ‘Values and rights, rule of law, security’; ‘Climate change and the environment’; ‘Health’; ‘EU in the world’; and ‘Migration’.²² One of the most significant amendments proposed is the abolition of the veto right in Common Foreign and Security Policy, arguing that it is necessary to improve the EU’s capacity

to take speedy and effective decisions, speaking with one voice and acting as a truly global player, projecting a positive role in the world and making a difference in response to any crisis.²³

Nevertheless, this is only one of the proposed changes as the veto power may be abolished in 65 other cases. That power is proposed to be transferred from the member states to the European Commission on a massive scale.

A vote in the European Parliament preceded the presentation of the draft Treaty amendments. In November 2023, the accompanying resolution was adopted with 291 votes in favour, 274 against, and 44 abstentions. It was not a clear majority but enough to proceed with the proposed changes. The eventual entry into force of the new Treaties will, first of all, strengthen the European Commission and the position of the two largest countries, Germany and France. Under the new conditions, it will be practically impossible to pass any decisions without the consent of Berlin or Paris. It is very well demonstrated by the voting calculator on the official website of the European Union.²⁴ For example, suppose no veto power exists in defence and security issues. In that case, the countries on the eastern side of the European Union will not even be able to build a blocking minority. Furthermore, the war in Ukraine has shown that maintaining the right to make autonomous decisions in the area of security and foreign policy is a crucial prerogative for the countries located on the eastern borders of the European Union.

It is difficult to agree with the argument that only by amending the Treaties will further enlargement of the European Union be possible. After all, Croatia’s accession to the European Union took place under the regime of the current Lisbon Treaty.

The postulate of building European strategic autonomy is particularly dangerous. From the perspective of Central European countries, this means pushing out

²² For more, see Council of the European Union, 2023.

²³ *Ibid.*, p. 150.

²⁴ Voting calculator of the European Union, see: European Commission, 2023b.

the United States, which today is the most crucial security guarantor in Europe. It is said that NATO was created with the purpose of keeping the Americans in Europe, the Russians out, and the Germans down. In a pessimistic scenario, we risk that Americans will be “out”, Russia “in”, and Germany will “rise”. The potential reason why even a great Euroenthusiast – the new Polish Prime Minister Donald Tusk – is very cautious about new ideas.

5. Conclusions

The proposed amendments to the Treaty signal a dangerous trend of centralisation of the European Union. Instead of building a European community on consensual principles and the principle of subsidiarity, we may soon have a concert of powers. The new European Union will be far from a federal system, contrary to the public belief that the goal is to build a federal European community. To build a common state, we need European demos first. There is fear that building a deeply integrated European Union will end in its collapse. If weaker countries are forced to accept decisions that are adverse for them, a rise in nationalist sentiment can be expected. Moreover, this is the most likely scenario for the European Union to end up like the Soviet Union in the end.

However, the saddest of it all are the perceived trends in the narrative about the European Union. The first result of these processes will be new textbooks on European integration. It turns out that in place of the previous four founding fathers of the European Union (Konrad Adenauer, Alcide de Gasperi, Jean Monnet and Robert Schuman), the most important one is actually a former Italian communist, Altiero Spinelli and his Manifesto of Ventotene.²⁵

25 For more on Altiero Spinelli in EU narratives, see: European Commission, 2023b.

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INSTITUTIONAL REFORMS IN THE EUROPEAN UNION FROM THE PERSPECTIVE OF A CANDIDATE COUNTRY FOR MEMBERSHIP (SELECTED MACEDONIAN EXPERIENCES AND EFFECTS)



ALEKSANDAR SPASENOVSKI

Abstract

The paper ‘Institutional Reforms in the European Union from the Perspective of a Candidate Country: Selected Macedonian Experiences and Effects’ focuses on the foreign and defense policy of North Macedonia, analyzing its path to independence and integration into international institutions. Emphasis is placed on the role of the European Union and NATO in shaping Macedonian policy, as well as on public perceptions of achievements and challenges in these areas. The research utilizes data from public opinion surveys, revealing citizens’ perspectives on the progress and setbacks in foreign and defense policies, as well as their expectations for the future. The findings highlight the impact of prolonged delays in EU accession on rising Euroscepticism and propose measures to strengthen EU decision-making processes, prevent abuses by member states, and foster more efficient integration processes.

Keywords: North Macedonia, European integrations, Foreign affairs, Independence

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1. Introduction

The beginning of each new decade is marked by the anniversaries associated with the independence of today's North Macedonia.¹

If 1990 is the year when the processes of democratic transition and political pluralism began and intensified,² and 1991 is the year when the country's independence process began,³ then 1992 is the year when the process of creating and consolidating the key attributes of the already established sovereign and independent state – the Republic of Macedonia – started.

Bearing in mind the aforementioned, 30 years later, in 2022, we celebrated two important anniversaries related to one of the most important elements of Macedonian statehood:

- a) First: 30 years since the establishment of the country's foreign policy;
- b) Second: 30 years since the establishment of the country's defence policy.

With the adoption of the Declaration on International Recognition of the Republic of Macedonia⁴ at the beginning of 1992, the process of establishing our country's bilateral relations began – first with Bulgaria,⁵ then with Slovenia⁶ and with Croatia.⁷ However, it was with recognition by the Federal Republic of Germany⁸ that this process gained increased momentum.⁹

In 1992, when this international recognition process began, the foundations of defence were laid. Thus, after the adoption of the Constitution of our country¹⁰ according to which 'the defence of the Republic is regulated by a law adopted by a two-thirds majority vote of the total number of Representatives', the Parliament adopted the Law on Defence.¹¹

Taking into account the aforementioned, this paper has two purposes: (a) First: to shed additional light on the key issues related to the conduct of foreign policy and the defence of our country and (b) Second: to investigate how citizens have viewed the move towards independence in foreign relations and defence over the last 30 years, as well as their expectations for these fields in the decades to come.

Based on the data obtained, specific conclusions are then presented.

1 This paper contains selected findings that are part of the publication Spasenovski, 2022.

2 Spasenovski et al., 2021.

3 Ibid.

4 Assembly of the Republic of Macedonia, 1991.

5 Diplomatic relations with Bulgaria were established on January 15, 1992.

6 Diplomatic relations with Slovenia were established on March 17, 1992.

7 Diplomatic relations with Croatia were established on March 30, 1992.

8 Diplomatic relations with the Federal Republic of Germany were established on December 16, 1993.

9 More on the history of Macedonian-German relations in: Naumovski et al., 2018.

10 Official Gazette of the Republic of Macedonia, 1991, pp. 805–815.

11 Official Gazette of the Republic of Macedonia, 1992.

2. Analysis

The process of the Socialist Republic of Macedonia (SRM) gaining independence by separating from the then Socialist Federal Republic of Yugoslavia (SFRY) began in 1990.

Following the developments in the other republics of federal Yugoslavia, the political authorities of the time took appropriate steps responding to the steadily deteriorating situation. Thus, in the summer and autumn of 1990, the republic's institutions made a series of key decisions opening the way for Macedonian independence, by constructing a new constitutional-legal system based on principles diametrically opposed to the socialist-federal ones previously in place.

On September 20, 1990, the Assembly of SRM adopted 25 amendments to the Constitution thus implementing the first changes in the constitutional-legal system.¹² The monopoly of the ruling SKJ party was abolished (amendment LXXVII), the delegate system was replaced by a parliamentary system (amendment LXXIV), a government was set up instead of the executive council (amendment LXXVI), and the position of president of the Republic was established instead of the presidency of SRM (amendment LXXV).

Based on the aforementioned changes, on September 24, 1990, the president of the legislature announced the first democratic multi-party elections, held on November 11 of the same year, and the Assembly was constituted on January 8, 1991.

Furthermore, on January 27, 1991, the deputies elected the first democratic president of the Republic, Kiro Gligorov, and on March 20, 1991, the first democratic technocratic government headed by Nikola Klyusev was elected.

In this way, the foundations of the new democratic system of state government organization were laid.

In the meantime, on January 25, 1991, the representatives of the citizens in the Parliament passed the 'Declaration for Sovereignty of Macedonia',¹³ which, in Article 1, expresses sovereignty in accordance with the constitutional determinations for independence and territorial integrity of the Macedonian state, as well as the right of the Macedonian people to self-determination, including the right to secede.

Furthermore, on June 7, 1991, constitutional amendment LXXXII was adopted, which omitted the term "socialist" from the name of "SRM".¹⁴ In this respect, on May 7, 1991, the President of the State submitted to the deputies a proposal for the adoption of a new democratic constitution which was voted on November 17, 1991, preceded by the independence referendum of September 8, 1991 and the 'Declaration on the occasion of the plebiscite expressed will of the citizens for a sovereign and independent state of Macedonia', adopted at the session of the Assembly on September

12 Official Gazette of the Socialist Republic of Macedonia, 1990, pp. 506–511.

13 Assembly of the Socialist Republic of Macedonia, 1991.

14 Official Gazette of the Republic of Macedonia, 1991, p. 357.

17, 1991.¹⁵ Thus the new constitutional-legal system of today's North Macedonia as a democratic and independent state was created.

Finally, on December 19, 1991, with the adoption of the 'Declaration on International Recognition of the Republic of Macedonia', the process of international recognition of the recently created state began.

The declaration of international recognition consists of five points and was signed by the then president of the Assembly, Stojan Andov. In this declaration, MPs demand that 'the Republic of Macedonia, which is a sovereign and independent state, be recognised internationally', while stating that the state accepts the criteria in this sense of the Council of Ministers of the European Community from 17.12.1991, as well as the draft document of the Conference for Yugoslavia at the Hague, and at the same time that the country supported the efforts of the United Nations (UN) for a peaceful resolution of the Yugoslav crisis.

After the adoption of this document, the then Republic of Macedonia began to establish diplomatic relations and to establish relations of closer cooperation with states and with other entities of international relations. The first country that recognised the independence of our country was the Republic of Bulgaria on January 15, 1992, followed by the recognition of Slovenia on March 17, 1992 and Croatia on March 30, 1992. Today, the Republic of North Macedonia, as a member of NATO and a country negotiating for membership in the EU, has established diplomatic relations and is building dynamic foreign policy with more than 190 countries in the world.¹⁶

When the process of international recognition of the state began in 1992, the foundations of the defense were laid at the same time. Thus, after the adoption of the Constitution according to which 'the defense of the Republic is governed by a law adopted with a two-thirds majority of votes from the total number of deputies', the Parliament passed the Law on Defense.¹⁷

The Defense Law of 1992 consists of 135 articles divided into 11 chapters, according to which the defense of the Republic aims to ensure the independence and territorial integrity of the country, and it is carried out by citizens, state administration bodies and the Army of the Republic of Macedonia (ARM)¹⁸. Apart from the aforementioned, this law is characterised by Article 3 and Article 7, providing for military service of all adult male citizens for a period of 9 months.¹⁹

The foreign and defense policy of North Macedonia for the past 30 years has been characterised by stability and predictability.

15 Assembly of the Republic of Macedonia, 1991.

16 More about bilateral relations on the official website of the Ministry of Foreign Affairs of North Macedonia. Available at: www.mfa.gov.mk (Accessed: 12 December 2023).

17 Official Gazette of the Republic of Macedonia, 1992.

18 Ibid.

19 Ibid.

3. Public opinion research

For the purposes of this paper, a comprehensive public opinion survey was conducted at the end of August 2022. The sample size was chosen in accordance with the requirements of the research. In this case, 1111 respondents are included, keeping the general ratio in terms of basic demographic characteristics (gender, age over 18 years, ethnicity, profession and education), while respecting geographical balance.

The research aims to reveal citizens' views of the process of independence, the successes and failures of North Macedonia in the external and defense fields in the past three decades, and the expectations for these areas in the years to come.

3.1. General assessments of foreign policy and defense

The questions in the first part can be divided into two groups; in the first group, the respondents scored the conduct of foreign policy on a scale of 1 to 5, then did the same for the Army's performance over the past 30 years (see table 1 and table 2).

The analysis of the results shows that the respondents' average rating regarding the way the foreign policy of the country has been conducted over the past three decades is 2.52, while for the behavior of the Army, it is 3.37.

It is characteristic that there is no particular difference in the scores between the respondents, across ethnic origin, geographic origin or education.

The significantly higher evaluation of the respondents for the performance of the Army compared to the conduct of foreign policy can be attributed to the accession of North Macedonia to NATO, which represents the most significant goal which is strongly supported by the majority of political parties in the country. Of course, the traditional support of the citizens for the security system of the state has an influence on the results of both questions, which has been confirmed in almost all public opinion surveys up until the present time²⁰.

20 More information on this topic in the text: Slightly visible, but with the greatest trust (2022), Nova Makedonija.

Table 1.²¹

Foreign policy in the past 30 years

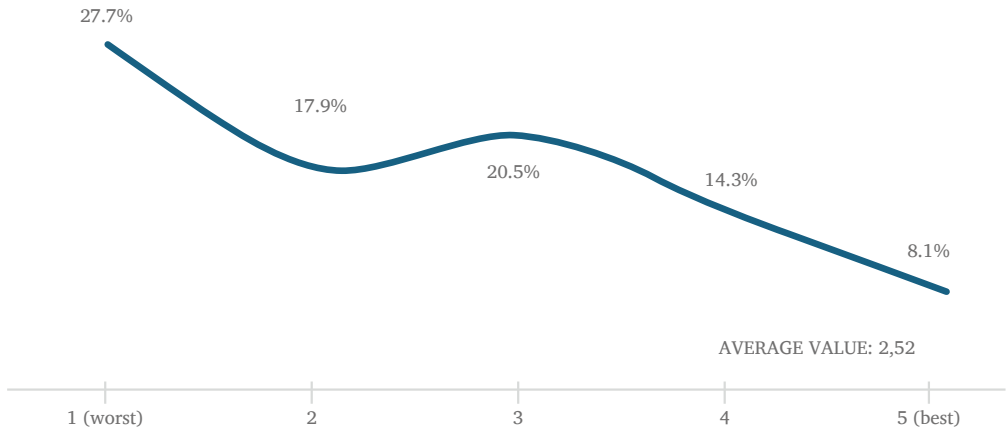
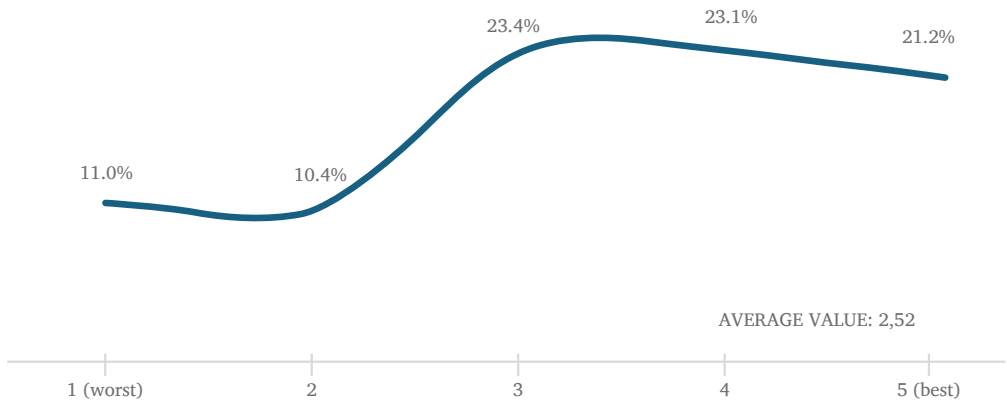


Table 2.

The role of the Army in the past 30 years



²¹ The ratings presented in this and in all other tables of this type in this text represent personal views of a specific group of respondents, compiled on the basis of established criteria for methodologically correct implementation of a public opinion survey.

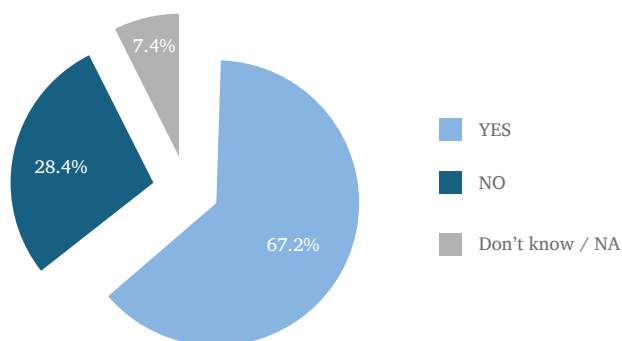
3.2. NATO and the European Union

The next segment of the research analyses respondents' views of the two most important foreign policy and defense goals.

Some 64.2% of the respondents support the membership of North Macedonia in NATO against 28.4% who are opposed (see table 3), which represents a ratio of 2:1 in favour of the advocates of the country's integration into the NATO alliance. In this respect, there are noticeable differences in the statements, mainly based on the ethnicity of the respondents. Thus, 90.1% of the members of the Albanian ethnic community support the membership of North Macedonia in NATO in contrast to the rest of the ethnic communities, where the support for this strategic goal of the state ranges between 55% and 65%, representing a difference of about 30%.²²

Table 3.

Do you support the membership of North Macedonia in NATO?

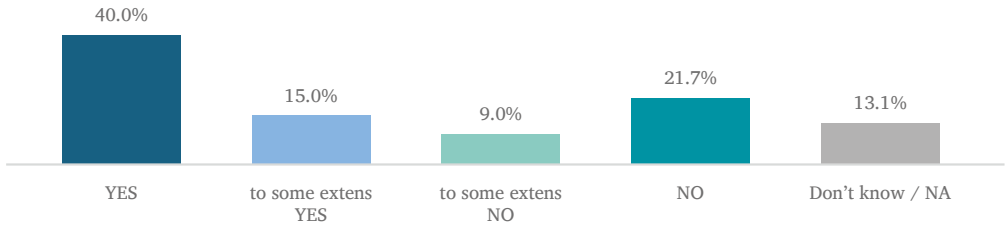


In addition to the previous question, cumulatively, 56.2% of respondents agree with the statement that North Macedonia is safer and more stable with NATO membership, compared to 30.7% who do not think so, representing a difference of 25.5%. As for the previous question, differences in the ratio of answers can be observed based on the ethnicity of the respondents.

²² Regarding the ethnic stratification of the respondents, the membership of North Macedonia in NATO is supported by 56.3% of the Macedonian respondents, 90.1% of the Albanian respondents and 63.6% of the respondents who belong to other ethnic communities in the country.

Table 4.

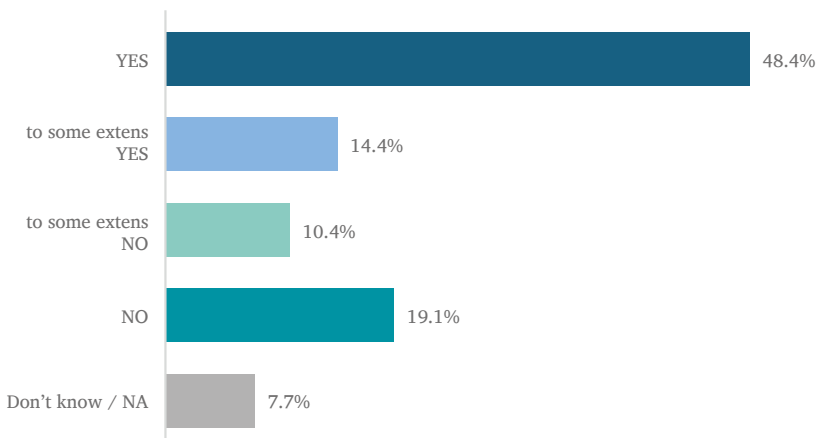
Do you agree or disagree with the claim that by joining NATO,
North Macedonia is a safer and more stable country



European integration and membership in NATO are foreign policy goals which enjoy consistently high levels of support from the Macedonian citizens. However, unlike the first decade of independence, the second and third decades are characterised by a steady decrease in citizens' support for North Macedonia's EU membership. Thus, 48.4% of respondents fully support the country integrating into the Union, while 14.4% support this only to some extent (see table 5). In total, 62.8% of all respondents are in favor of North Macedonia being part of the EU one day. Although this percentage is still very high, compared to the first two decades of independence, significant shifts in a negative direction can be observed.

Table 5.

Do you support the European integration process or not?



3.3. Relations with other countries

The next segment of the research analyses the bilateral relations of North Macedonia with other reference countries.

Respondents have the most positive impression of the quality of North Macedonia's mutual relations with Turkey, with 71.6% positive ratings; with Serbia, with 68.6% positive ratings and with Germany, with 64.3% positive ratings (see table 6). The research also notes that a significant 37.7% of respondents positively evaluate the quality of Macedonian-Greek bilateral relations. Also, 58.5% of the respondents have a positive opinion about the bilateral relations of North Macedonia with the USA and 57% have the same attitude about the bilateral relations between our country and Albania.

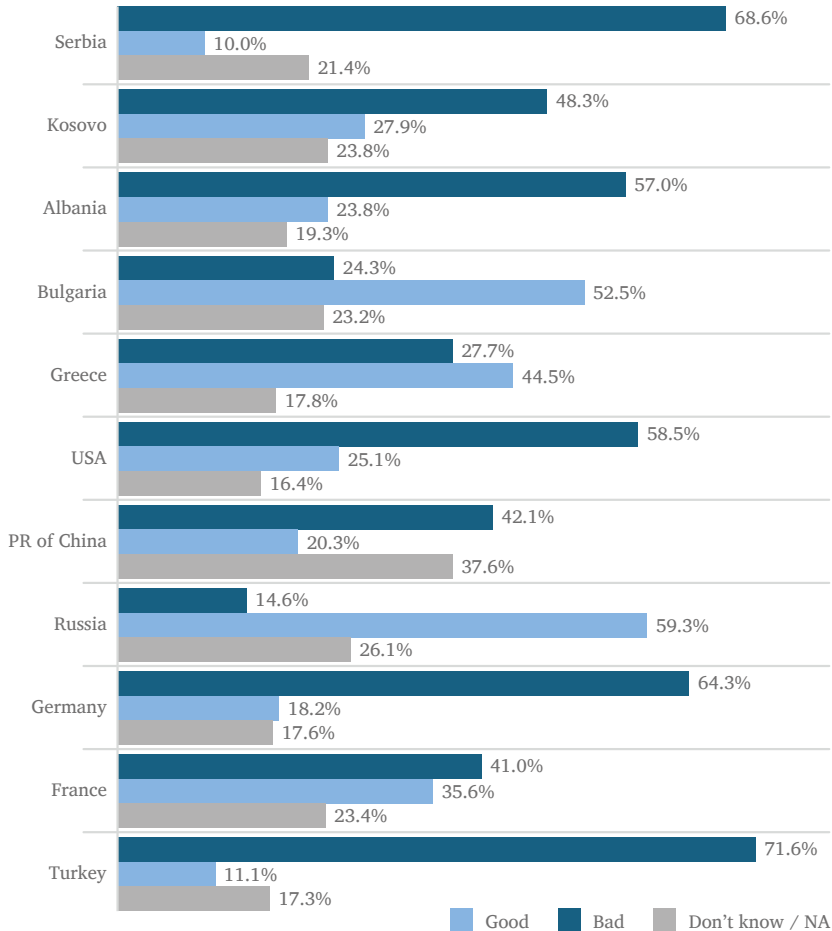
At the bottom of the scale are Russia and Bulgaria, for which 59.3% and 52.5% of respondents believe that they have poor bilateral relations with North Macedonia. The public opinion survey of 2021, which covered the three decades since the establishment of North Macedonia's independence, the citizens' opinion of the nature of our country's bilateral relations with Bulgaria and Russia was examined²³. At that time, 17.3% of respondents rated North Macedonia's bilateral relations with Russia as bad; the same figure for Bulgarian was 59.8%. This means that unlike in 2021, in 2022 the negative opinion of the citizens towards Bulgaria remains almost unchanged, and towards Russia it has visibly worsened. This situation in relation to respondents' opinions about Russia can be correlated with Russian aggression against Ukraine, a correlation which is also evident from the question in the penultimate segment of this analysis.

Analysis of the respondents' answers leads to the conclusion that the view of the quality of bilateral relations between our country and the aforementioned countries are relatively stable without major fluctuations, except in the case of Greece as a positive example and Bulgaria and Russia as negative ones.

23 See: Spasenovski et al., 2021.

Table 6.

How do you evaluate the country's bilateral relations with the following countries?



3.4. Current challenges

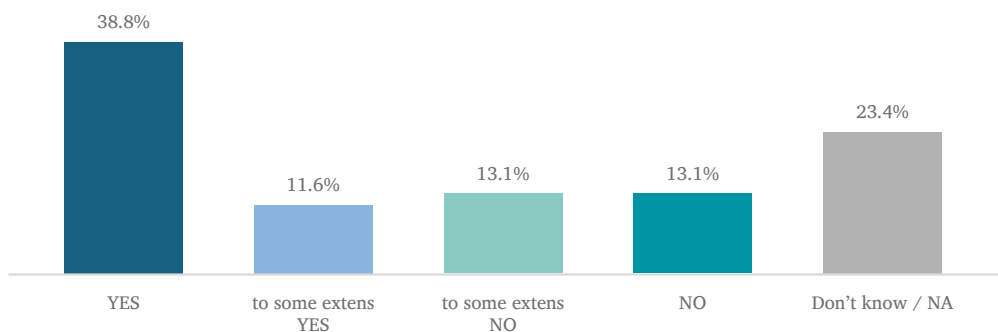
The next segment of the research covers two current issues in the field of foreign relations and defense.

The first question presents the respondents' impressions regarding the current situation in Ukraine (see table 7). Thus, 50.4% of the respondents consider that the Russian military aggression against Ukraine is unjustified and unacceptable, while 26.2% consider that it is justified and acceptable, which represents a ratio of 2:1. Analysis of the results leads to the conclusion that the respondents have

approximately the same attitude regarding this topic as the citizens of other EU and NATO member states.

Table 7.

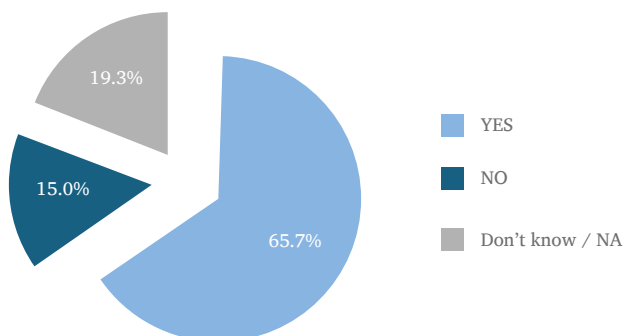
Russia military aggression against Ukraine is unjustified and unacceptable



The second question of this segment analyses respondents' position regarding the regional form of closer integration of North Macedonia, Albania and Serbia called "Open Balkan" (see table 17). Some 65.7% of respondents support the "Open Balkans" project, while 15% do not support it. The reasons for the high level of support for this form of regional integration can be attributed to the high level of approval for bilateral relations of North Macedonia with each of the two countries individually. Of course, considering the opportunities for cooperation which have been opened up by the implementation of this trilateral project, surely this is also a significant reason for such a positive impression on the part of the respondents.

Table 8.

Do you support the cooperation project between North Macedonia, Albania and Serbia called "Open Balkan"?



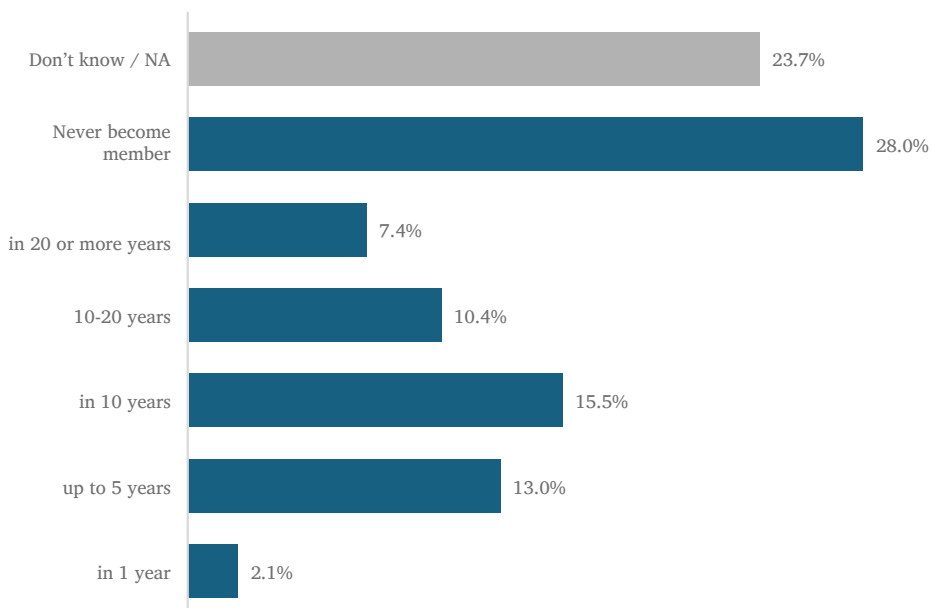
3.5. Expectations for the future

After the accession of North Macedonia to NATO, the remaining major foreign policy challenge for the country is EU integration, to which the last question is devoted (see table 9). Thus, when asked, 'When you think North Macedonia will join the Union?' 28% of respondents stated that it will not happen, which is the largest group, while 23.7% expressed their pessimism through the answer that they do not know when it will happen, i.e. they have no answer. Contrasting with these two groups are the more optimistic respondents: 7.4% stated that the country will become a member of the EU in 20 or more years; 10.4% stated in 10-20 years; 15.5% stated in 10 years; and 13% of respondents believe that North Macedonia will join the EU in 5 years.

From the responses, it appears that there is a pronounced pessimism about the membership of North Macedonia in the EU, as well as about how quickly this strategic goal will be achieved. The pessimism of the citizens regarding the integration of North Macedonia in the EU does not arise from the character of the Union or from the dissatisfaction with the way it functions, but is the result of the ongoing obstacles and delays that the country has experienced over the years, mainly as a result of bilateral problems. Thus, overcoming the bilateral obstacles and opening a clear perspective for the dynamic integration of North Macedonia without additional delays, would most certainly influence citizens' views in a positive sense in relation to the Union itself, as well as in relation to when such membership can be achieved.

Table 9.

When do you think North Macedonia will become a member of the European Union?



4. Conclusion

The history of the integration of the Republic of Macedonia into the European Union is the most vivid and unfortunate example of the open abuse by certain member states of decision-making procedures in the Union. The best argument for this position can be found by answering the question: how long did the last three countries which joined the European Union, i.e., Bulgaria, Romania, and Croatia, negotiate for membership in the European Union? In the case of Romania and Bulgaria, negotiations with the European Union lasted five years, and in the case of Croatia, negotiations lasted six years. In contrast to the aforementioned states, the Republic of Macedonia has been a candidate state for membership in the European Union since 2005, the decision to start membership negotiations was made only in 2022. This means that the Republic of Macedonia waited 17 long years from the recognition that it was a candidate state to the formal launch of negotiations for membership in the Union. If this fact is combined with the situation that formal diplomatic relations between the Republic of Macedonia and the European Union began five years after the declaration of independence of our country, i.e., in 1995, then

the picture becomes complete. For 23 out of 33 years of independence, the Republic of Macedonia has not progressed in its integration into the European Union due to various blocking moves and unprincipled actions. Among other things, these long-running and quite open practices have led to excessive growth of Euroscepticism in the country. This fact against the background of today's changed geopolitics after the beginning of Russian war of aggression in Ukraine, also represents a problem for the European Union itself.

The decision-making mechanism is one of the greatest problems facing the European Union today. The example of the Republic of Macedonia shows this mechanism being continuously abused, leading to long-term stagnation of integration processes in the EU. Given the changed geopolitics, such abuses reflect negatively on the European Union itself, which on its geographical borders – such as the Western Balkans – has societies and citizens where Euroscepticism is gaining alarming proportions. At the same time, the influence on citizens and societies from countries and cultures whose values are not the same as those of the Union is reaching very concerning levels. Hence, the final question is: 'how to prevent the abuse of the EU by some member states, which prevents other states from progressing in their integration into the Union?' There are many ways, but among these I have singled out the following five:

- 1) Strengthening EU Institutions: enhancing the effectiveness and independence of EU institutions, such as the European Commission, could help ensure a fair and impartial evaluation of aspiring member states. This includes maintaining a robust monitoring mechanism to assess progress, identify challenges, and provide reform recommendations.
- 2) Transparency and accountability: promoting transparency and accountability within the EU decision-making processes could help prevent abuses. Encouraging open debates, ensuring public access to information, and providing platforms for dialogue could expose any attempts to hinder integration, and it could increase accountability among member states.
- 3) Consensus-building and mediation: facilitating dialogue and mediation among member states could help resolve disputes and address concerns. The EU should play a proactive role in promoting dialogue, fostering understanding, and finding compromises between member states to overcome obstacles to integration.
- 4) Strengthening solidarity and cohesion: building stronger solidarity and cohesion among EU member states could help prevent the abuse of power by individual states. Promoting mutual support, sharing best practices, and encouraging cooperation can foster a sense of collective responsibility and minimise actions which hinder integration.
- 5) Timely enlargement: ensuring that the enlargement process is efficient, predictable, and based on clear criteria and timelines could minimise opportunities for abuses. Clearly defined milestones, transparent negotiations, and adherence to agreed-upon procedures could help prevent undue delays or manipulations in the accession process.

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INSTITUTIONAL REFORMS IN THE CONTEXT OF THE FUTURE OF EUROPE CONFERENCE FROM THE PERSPECTIVE OF A CENTRAL-EASTERN EUROPEAN COUNTRY: HUNGARY



LÉNÁRD SÁNDOR

Abstract

The history of the institutionalised cooperation in Europe now looks back to more than seven decades. The rapid development of the European integration has had its formidable successes including, particularly, the ability to contribute to preserving the peace in the old continent after the cataclysm of the Second World War or to create an internal market along with the fundamental freedoms Europeans enjoy today. On the other hand, the European cooperation has also had its shortcomings and failures especially in the past one and a half decades and has arrived at a crossroad from many aspects. The Treaty of Maastricht was a symbolic stage in this history, and the question of renewal is more urgent than ever. This paper therefore sheds light on the importance of the Maastricht Treaty in this historical development of the European integration. In light of this, it seeks to answer the question of why different regions have different viewpoints vis-à-vis the future of the European integration and it aims to explore the main Central-European or Hungarian perspective.

Keywords: History of the European integration, Maastricht Treaty, Treaty of Lisbon, European democracy, European Court, Transnational list, lead candidate system

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1. Introduction

The European cooperation that consists of the countries of the “Western block” has, for a long time, brought peace and prosperity in that area of Europe. This model served as a source of desire and aspiration for those countries that remained under Soviet occupation east of the Iron Curtain. However, even though the European integration was a success story, it has been going through one of the most challenging and treacherous eras of its more than 70-year old history. Its demographic, relative economic weight in the global economy and military spending have all been shrinking for decades.¹ The European cooperation was challenged by a crises period of the 2010s starting with the Great Recession² and European debt crises in the early 2010s and the protracted Russo-Ukraine conflicts that later on proved to be too acrimonious and difficult to be prevented by either the European Union or its defining Member States. On top of that, a migration crisis started in 2015 and the coronavirus pandemic that hit the European Union unprepared³ and the subsequent dividing debates on the need for economic recovery also put the European cooperation to the test. Consequently, Europe seems to have lost the unprecedented opportunity of self-determination and autonomy over the Old Continent that was regained after the end of the Cold War in the early 1990s. Beyond its devastating human costs and tragedy, the war along with its economic consequences most seriously impact the growth and competitiveness of the European continent. While the world has entered an era of absolute power rivalry and the sphere of influence has once again become a reality, the European integration is struggling to find and express Europe’s interests, narrate its story or provide a vision. Since the European integration is currently facing its most demanding and complex challenges, a healthy and fruitful discussion over its future, its revitalisation and reforms including its guiding principles, institutional arrangement and decision-making process is more urgently needed than ever.

For various reasons, the era of the Treaty of Maastricht represents an important and decisive milestone in the historical evolution of the European cooperation. With the fall of the Iron Curtain or the reunification of Germany, many new economic and strategic opportunities were made available for the European integration. Commemorating the 30th anniversary of this European milestone is therefore a good occasion to make an assessment of the past thirty years taking also into account the challenges of the future. Accordingly, the paper will first highlight the significance of the Treaty of Maastricht entered into force in 1993 as well as the path the European integration chose to pursue afterwards (II). One of the main objectives of the paper

1 See, for example: Europe Uncensored, 2020.

2 The longest economic downturn since the Second World War was the “Great Recession” between 2007 and 2009. The “Great Recession” has many economic and financial effects and rippled through the World. See: Federal Reserve History, 2013.

3 As a former counsel of the European Parliament, my personal recollection is that the European Parliament was occupied with environmental issues even in the early days of March 2020 when the devastating reports on COVID-19 cases came to light from the northern regions of Italy.

is to shed light on the institutional reform from a Hungarian perspective. To this end, the paper will first explore the different viewpoints the different regions have vis-à-vis the European cooperation, especially the difference between the “Old Europe” that includes countries before the eastward enlargement and the “New Europe” that consists of the countries of the eastward enlargement. Based on these different viewpoints, the main emphasis of the European integration will also be considered (III.). In this wider context, the paper explores the roots and background of the Conference on the Future of Europe and aims to unpack the question of institutional reforms as well as the principles that can drive and support the institutional arrangement (IV). The paper ends with a concluding section with a view to the future challenges (V.).

Based on the “Maastricht 30” international scientific conference organised within the framework of the collaboration between the Ferenc Mádl Institute of Comparative Law and the Ministry of Justice, the paper aims to enrich the ongoing academic and policy dialogue on the future of Europe with the contribution of the Central-European and Hungarian perspective.

2. The crossroad of history: the Maastricht Treaty

The birth of the institutionalised European cooperation was defined by two historical and geopolitical forces. On the one hand, the European integration was built on the ruins of a Europe that was devastated by an unprecedented war. The tragedy of the Second World War demanded a framework that provided for lasting peace. As Robert Schuman proposed, uniting and margining the steel and coal industry across Germany and France under a supranational authority would mean that ‘any war between France and Germany becomes not only unthinkable but materially impossible.’⁴ Therefore, as a generally accepted theory, the original idea and objective of a European integration was to prevent another war in the Old Continent primarily through economic means. On the other hand, the European integration was forged in the shadow of the unfolding Cold War and the Iron Curtain that divided Europe not only along ideological, but also military lines for many decades. From this perspective, the market-based European cooperation served to reinforce the Western country’s economies, social and political systems to contain the spread of communist ideology and military expansion.⁵ Instead of or in addition to the objective of preserving peace, the function of the European cooperation was also

4 Schuman Declaration May 1950 [Online]. Available at: https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en#:~:text=It%20proposes%20that%20Franco%2DGerman,the%20other%20countries%20of%20Europe. (Accessed: 08 August 2023).

5 The term containment refers to a geopolitical strategy adopted by U.S. President Harry S. Truman against the rise of the Soviet Union. See, Isaacson and Thomas, 2012, pp. 353–355.

to maintain the European heritage against a totalitarian ideology. In this sense, the Cold War gave impetus to the growth of the European cooperation in an era when Europe and European countries lost their strategic autonomy as a consequences of the power rivalry between the United States and the Soviet Union.

In the period leading up to the Treaty of Maastricht, the European cooperation focused on an economic and market integration along with the gradual expansion of the four freedoms including the free movement of goods, people and capital along with establishing and providing services. The rapid and spectacular growth of the European integration was accompanied by the solidification of an autonomous European legal system. The innovative and evolutive interpretation of the European Court soon emphasised its distinct, so-called “*sui generis*” nature in key judgements that detached European law from public international law. The 1963 van Gend & Loos decision declared the European law “directly applicable” so that individuals, whether they are corporations or natural persons, can rely directly on its rules and can enforce them in domestic courts.⁶ The 1964 Flaminio Costa⁷ and the 1970 Internationale Handelsgesellschaft⁸ judgments declared that European law enjoys priority over domestic law, including the constitutions of the Member States. Last but not least, the European Court is provided with the authority to become the ultimate arbiter of how provisions of the European law ought to be interpreted. The reference of preliminary procedure authorises and, in certain cases, requires domestic courts to make a reference on questions of interpretation and validity of EU measures to the European Court which in turn can ensure the autonomy and consistent interpretation of the European law. These decisions set the stage for recognising the European law as distinct and autonomous from international treaties and public international law and as binding to part of the domestic law of the Member States.⁹

The efficiency and the achievements of the market-focused integration along with the common vision against the Soviet-type system forged a strong consensus among Member States and provided the European institutions with robust legitimacy. By the 1980s, the outstanding economic success and the rising living standards in countries of the European integration made the cooperation and this model attractive in the eyes of the Central-European countries. The fall of the Iron Curtain and the change of regimes opened a window of opportunity for them not only to be able to express

- 6 Judgment of the Court of 5 February 1963. NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. Reference for a preliminary ruling: Tariefcommissie - Netherlands. Case 26-62. [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61962CJ0026> (Accessed: 10 August 2023).
- 7 Judgment of the Court of 15 July 1964. Flaminio Costa v E.N.E.L. Reference for a preliminary ruling: Giudice conciliatore di Milano - Italy. Case 6-64. [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61964CJ0006> (Accessed: 10 August 2023).
- 8 Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. Case 11-70. [Online]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0011> (Accessed: 10 August 2023).
- 9 See, for example, Middelaar, 2009, pp. 97–99.

their European identity and civilisational roots but also to become part of the integration process and their four decades long success story.

The Treaty of Maastricht symbolised this point of time in history. The general mood and prospect of this era was well described by the legendary song of the German rock band, the Scorpions: “the wind of change”.¹⁰ It was not only the symbolic end of a chapter in history, but also the beginning an era of general optimism and high ambitions with the rise of economic globalisation.¹¹ Accordingly, there was also a firm belief in the need for a continuous progress of the European integration as the then President of the European Commission, Jacques Delors compared it to a bicycle which always has to move forward.¹² The institutionalised European co-operation has become an integral and successful part of the European landscape and the newly liberated Central-European countries all longed to participate in this institutionalised cooperation. Hence the Maastricht Treaty represented a watershed moment in this unique historical period and the question was whether the European integration process can make use of the past achievements.

The Maastricht Treaty, however, did not offer any fast track for the eastward enlargement process. Instead, the scope and subject matter of the European cooperation were expanded to include political areas and objectives beyond the largely market oriented integration. By having established the European Union, it introduced two additional pillars of institutional cooperation: a common foreign and security policy, and cooperation between EU governments on justice and home affairs.¹³ The concept of Union citizenship was also introduced and has later been used as a precursor of creating a European demos.¹⁴ The Maastricht reforms started a deepening process in the European integration that was to be attained by the European Convention along with its main result, the text of the Constitutional Treaty.¹⁵ However, as opposed to earlier stages of the European integration, the Maastricht Treaty and the subsequent way this Treaty opened never enjoyed such a high degree of consensus

- 10 The song became the symbol of the change of regimes of 1989 and the Fall of the Berlin Wall. It was performed by the Scorpions at the Brandenburg Gate in 1999, during the 10th anniversary of the Fall of the Berlin Wall. Available at: <http://news.bbc.co.uk/2/hi/europe/513968.stm> (Accessed: 10 August 2023).
- 11 In his book in the early 1990s, Francis Fukuyama argued that the end of the Cold War and the victorious rise of the Western type of liberal democracy marked the most developed and last form of human government. See: Fukuyama, 2006.
- 12 See, for example: Kovács, 2023.
- 13 See, for example: The Maastricht and Amsterdam Treaties [Online]. Available at: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf (Accessed: 10 August 2023).
- 14 The Union citizenship is built upon the national citizenship, it does not replace it but instead provides further rights, see: EU citizenship and democracy [Online]. Available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/eu-citizenship_en (Accessed: 10 August 2023).
- 15 The Laeken Declaration in 2001 established the European Convention to elaborate on a Constitutional Treaty for the European integration. The Draft Treaty establishing a Constitution for Europe was adopted by the European Council on 18 June 2004 but was not accepted in the subsequent ratification process.

among the Member States.¹⁶ The political areas are much more difficult to integrate as different countries and regions have different interests or even values that they are willing to abandon. The idea of a strong political integration failed when the Constitutional Treaty was rejected in the French and Dutch referenda.¹⁷ Instead, the Lisbon Treaty was adopted in 2007 as a compromise that contained the necessary institutional and decision-making reforms in order to accommodate a larger eastward enlargement.¹⁸

However, the Treaty of Lisbon was not entirely able to remedy the cracks between some of the regions and some of the Member States. As a result, the past decades and crises period have revealed severe tensions within the European cooperation and shed light on the different perspectives, objectives and expectations Member States have regarding the integration. Moving beyond the successful economic and market-driven integration and establishing a closer political cooperation has not enjoyed such a strong support among such a wide array of Member States as before. One of the major questions is whether the institutional setting and the decision-making process can provide an adequate framework for a productive dialogue that enables the reconciliation of different viewpoints and the effective operation of the European integration. Before highlighting this aspect of the Conference on the Future of Europe, the paper aims to explore the cracks along with the different viewpoints within the European integration and their potential roots and backgrounds.

3. Different regions, different stories, different expectations?

Being a conference presentation, this paper is required to explore and introduce the Hungarian perspective on the institutional reforms in the Context of the Future of Europe Conference. This assumes that there are various regional and country perspectives regarding this question, and it is not possible to narrate it in one single way or along ideological lines.

- 16 The Danish referendum first rejected the ratification of the Maastricht Treaty in June 1992 and only after an exemption was provided under the monetary union a second referendum in 1993 endorsed the Treaty. See, for example: Worre, 1995. In France only a narrow margin (0.8%) supported the ratification of the Maastricht Treaty. See: Lewis-Beck and Morey, 2007, pp. 65–87.
- 17 The Constitutional Treaty was rejected by a wide margin in the French and Dutch referenda, see Draft treaty establishing a constitution for Europe (not ratified) [Online]. Available at: <https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/draft-treaty-establishing-a-constitution-for-europe> (Accessed: 10 August 2023).
- 18 The Lisbon Treaty is available at: <https://eur-lex.europa.eu/legal-content/ETXT/?uri=CELEX:12007L/TXT> (Accessed: 10 August 2023).

Indeed, the economic and geopolitical events, including the financial and the European debt crises, the large influx of immigration or the Brexit of the last decade revealed some of the different viewpoints the various European regions have about the European Union.¹⁹ For example, the so-called “*Frugal Four*” including Austria, Denmark, the Netherlands and Sweden, are fiscally conservative countries that have been opposing a considerable budgetary redistribution on the EU level or the collective EU debt as a response to the economic consequences of the coronavirus restrictions.²⁰ In contrast, the Southern Member States including Italy or Spain propagate stronger fiscal policy and EU budgetary intervention as a response to recessions. The other wide crack was the diverse approach of the United Kingdom and the Franco-German tandem to the European cooperation.²¹

One of the most visible – and also relevant from the perspective of this paper – division lies between the “old Europe” consisting of countries before the eastward enlargement and the “new” Europe containing countries of the eastward enlargement. The difference is not so much the economic output, the quality of the infrastructure or the living standard but rather the vision and the purpose of the future of the European integration. The East-Central-European countries see the European integration from different perspectives compared to the founding Member States, something that is rooted in the diverse historical experiences.

One of the experiences that defines the perspective of Western European countries and especially the Founding Member States of the European integration is the tragedy and horrors of the Second World War. As Keith Lowe tellingly pointed out, the story that underpins the European integration is akin to famous novel by William Golding, *The Lord of the Flies*. In the novel, a group of children are shipwrecked and stranded on a deserted island. They try to organise themselves so that they can survive on this island, but soon they start arguing with each other, and eventually start killing one another. The novel ends when a ship arrives, and a group of adults step onto the beach and stop them from tearing each other apart. The EU is similar to the arrival of the adults. It is an organisation of parents, keeping all the Member States as ‘children’ in check. After the Second World War the EU, like a parent organisation, has preserved peace.²² This is partly the reason why the “old Europe” insists on and accepted a “top-down approach” of European values and the concept of rule of law along with a corresponding institutional framework and decision-making mechanism in the centre of the discussion on the future of Europe and European integration.

19 On the cracks of the European integration see, for example: Horkay-Hörcher, 2020.

20 See, for example: Rankin, 2020.

21 As the 1963 Elysée Treaty and the 2019 Aachen Treaty both symbolise, the Franco-German tandem has always been at the heart of the European cooperation providing continuous impetus for further integration while the United Kingdom primarily saw the European integration as a trade and commercial association.

22 Lowe, 2019.

However, the Central-European experience is quite different from the Western one. People in Central and Eastern Europe lived under one totalitarian ideology coupled with military oppression in the second half of the 20th century. Consequently, what they had been fighting for through many long decades was to restore national sovereignty and self-determination. In this region, the insistence on the history, culture, tradition, religion and the concept of the nation states serve as the ultimate protectors of the people. In the mind of these countries, they owe their survival to this insistence and dedication to preserve this heritage. This historical and geopolitical experience is also decisive as to how they see the *raison d'être* and purpose of European cooperation. To them, the European cooperation is supposed to provide a strong architecture that can help better safeguard and also express their national identities, sovereignties and cultural heritage against, for example, ideological impositions.²³

So, the different European regions have different historical experiences and therefore different approaches to the European integration. These also led to different expectations and they also see and evaluate the results of the European integration differently through their own experiences and future visions.

Among the major dividing lines between the “Old Europe” and the “Europe of eastward enlargement” including, particularly, the approach of Hungary is the relationship between the Member States and the European Union and the role of sovereignty in the integration process. To what extent can the European integration replace or substitute the Member States’ competences and sovereignties or, alternatively, to what extent should the European Union justify its own competences towards the Member States as the “Master of the European Treaties”? In other words, should the European integration gravitate towards the concept of “*E pluribus unum*” (creating one out of many) or to its original objective “*In varietate concordia*” (unity in diversity). The institutional reform proposals such as the role of the European Parliament, the question of the transnational electoral list along with a more centralised European party system, the so-called “*Spitzenkandidaten* process” (lead candidate system), the horizontal and vertical distribution of competences, the introduction of a qualified majority voting rather than unanimity in the Council, the reform of the European Court as well as its relationship with the Member States’ constitutional and apex courts are all centred around and depend on this underlying vision.

Against this backdrop, the next section aims to explore the context and the main institutional reform issues of the Conference on the Future of Europe and the Hungarian position on these reforms.

23 This is the narrative what, for example, Milan Kundera highlights in his emblematic book, Kundera, 2023.

4. The Conference on the Future of Europe and the Question of Institutional Reforms

The idea of the Conference on the Future of Europe was first raised by the French President, Emmanuel Macron,²⁴ and aimed to initiate a common European deliberation as a response to the crises period of the 2010s.²⁵ As the European Commission and the European Parliament embraced the idea in 2019, the Conference was co-organised by them and the EU Council with the alleged objective to involve citizens, especially including young people and the civil society. Among others, a Multilingual Digital Platform launched in April 2021 served this purpose. The Conference concluded its work on the 9th May 2022 by putting forward a report on the final outcome that includes nearly fifty proposals for deliberations to the three EU institutions.²⁶

One of the sections of the report contains the recommendations on European democracy. Furthermore, among the most frequently discussed topics of the Conference became the question of the European Parliament elections and the redesign and restructuring of the European institutions.²⁷ On this issue, the mainstream suggestions of the Conference's outcome aim to redraw the Lisbon Treaty and draw the European integration into the direction of a "democratic European Federation."²⁸ To this end, the establishment of a common European identity and a common European public space have been tabled as proposals. Further symbolic proposals were also made to facilitate the achievement of this objective – and ignoring the cultural differences within Europe – such as the creation of European sports' teams, pan-European media outlets, network and a single public EU broadcaster or the introduction of the EU Passport.²⁹

As for the institutional redesign, the main proposals were made along the lines of the underlying idea of federalisation. They include, among others, the election of a President of the EU that would merge the competences of the President of the European Commission and that of the Council or strengthening the roles and competences of the main supranational institutions such as the European Parliament, the European Court or the European Central Bank. These suggestions, however, reflect a different vision

24 Macron, 2019.

25 This proposal has become part of the 2019 European Parliament election campaign of the Renew Europe Party.

26 The Final Report of the Conference on the Future of Europe is available at: https://www.eu-zukunftskonferenz.at/user/documents/kantar_report_march_2022_final_en22.pdf (Accessed: 10 August 2023), the Report on the Final Outcome is also available at: <https://wayback.archive-it.org/12090/20220915192132/https://futureu.europa.eu/pages/reporting> (Accessed 10 August 2023).

27 See, Final Report on the Conference, 2022, p. 83.

28 In the view of the Final Report, the federalisation of the European cooperation is necessary for the EU to be able to achieve its full potential.

29 Ibid., p. 88.

from the one that Hungary represented and proposed within the framework of Conference. The paper now explores the differences between the Conference's outcome and the Hungarian positions as well as their underlying reasons in regard to two main areas: on the one hand, the European democracy and on the other, the European judicial area. Even though the Conference's outcome has no legal force, it is the basis of political debate about the future of the European cooperation.

4.1. European Democracy

One of the keys and strategically crucial elements of the discussions within the Conference was the broader question of the strengthening of the European democracy – and decreasing the alleged democratic deficit of the European institutional decision-making – along with the reforms of the European Parliament and its election system and also the role of national parliaments in the decision-making and law-formation process of the European institutions. The ultimate question behind the dilemma of European democracy and the corresponding function of the European Parliament is the theoretical question of sovereignty and the existence of a European demos as the depositary of sovereignty. Who is the sovereign and who can exercise sovereign powers in an integrating Europe? The proposals that are aimed at strengthening both the legislative and oversight powers of the European Parliament are based on the belief that a European demos or people can develop over time as a result of the integration process.³⁰ The suggested reforms of the electoral system are designed to serve this ultimate purpose. Creating an EU-wide transnational electoral list along with a more centralised and “top-down” organised European party system would hold the entire territory of the European Union as one constituency. In the view of their proponents, this election method and reform would be able to address the “democratic deficit” of the European integration while at the same time support and contribute to the idea of federalisation.

In the view of Hungary, however, the European demos does not exist, and the Member States have not provided authorisation to the EU institutions to attempt its formation. The concept of the “ever closer union” is a legal term set forth in Article 1 paragraph 2 of the Founding Treaty.³¹ However, the Treaty uses “*peoples*” in plural that are the peoples of the Member States. Nowhere in the Treaty can the idea be found that there should be one single European people or a single European nation as a result of the integration. The European identity is part of the national identities of the Member States which cannot be substituted or replaced. This attempt would lead to the erosion of the control of Member States over the EU institutions.

30 The introduction of the Union citizenship with the Maastricht Treaty has been used as a vehicle to attempt to create the notion of European citizens.

31 Consolidated version of the Treaty on European Union [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (Accessed: 10 August 2023).

The increasing inability of the European Parliament to conduct meaningful political and public debates on questions that are relevant, timely and important to the Member States should be addressed in other ways.

Instead of the introduction of a transnational electoral list which would expose European politics to rather ideology-driven approaches, the ties and responsibility between the representative and the electorate should be strengthened. The democratic deficit can be addressed by reinforcing the role of national democracies in European legislation and oversight.³² The European democratic model is the democracy of national democracies. Consequently, Members of the European Parliament shall be either delegated by national parliaments as it was the case before 1979 or elected based on individual electoral constituencies. In the eyes of the Hungarian position, this election reform would provide stronger authorisation, closer political ties, and responsibilities as well as meaningful political debates that better consider and reflect on the needs of the Member States. For these reasons, the European citizens' initiative should be strengthened and the European Commission discretion to reject a successful initiative should be narrowed.

Beyond the election reform of the European Parliament, the role and competences of the national parliaments should also be strengthened to increase democratic legitimacy within the European integration. Since the European Union has been built upon European democracies, national parliaments are in the best position to fulfil an oversight role. This way the control of national parliaments shall cover the safeguarding of national and constitutional identities as well as of the principle of subsidiarity. To this end, the so-called already institutionalised “yellow-card-procedure” should be strengthened, leaving enough time to national parliaments to consider a legislative proposal of the European Commission. The introduction of a “red-card-procedure” would guarantee that a European legislation could not be adopted over the opposition of the majority of national parliaments. Last but not least, the establishment of a “green-card-procedure” would provide the national parliaments with the right to table legislative proposals on a European level.

With regards to the view of Hungary, strengthening the ties between the European representatives and the electorate as well as increasing the role of the national parliaments that have stronger relations with the electorate that makes inroads into the European political debates would better promote democratic legitimacy and better serve as guarantee for the principle of subsidiarity enhancing both cultural diversity and innovation.

4.2. The European Court and the European Judicial Area

Beside the concept of European democracy, the European values and the question of rule of law have become the other focal point of the discussion on the future of Europe. Hence, from this perspective, it seems essential to explore the

32 See, for example, Trócsányi, 2021.

reform proposal not only around the European Parliament but the European Court as well. As it was pointed out above, the European Court has been at the forefront of developing the European law and safeguarding its autonomy, precedence of application and primacy. Therefore, the European Court has an impressive legacy that profoundly contributed to the solidification of the “*acquis communautaire*” and the autonomous operation of the European Union.

However, the expanding subject matter of the European law to political and also to constitutionally sensitive areas had posed a challenge. Partly due to the growing political character of the European integration since the adoption of the Treaty of Maastricht, the values set forth in Article 2 of the Founding Treaty along with the concept of the rule of law have been increasingly dominating European political debates. However, the questions of values do not only have political dimensions, but they have been increasingly legalised, and the European Court is more and more involved in these debates. The mainstream proposal formulated within the framework of the Conference was to strengthen the powers of the European Court in order for it to become the final arbiter of debates on values or delimitation of competences.

However, in the Hungarian position, one of the fundamental tensions of the European integration stems from the conflict between the sovereignty of the Member States and the theory of the absolute primacy of European law. The starting point is that the European Union is an association of sovereign states that is based on a complex structure of different constitutional orders and courts. The European Court has not been able to relieve this tension and its jurisprudence ended up favouring the supranational institutions and centralisation.³³ As a response to this tendency, national constitutional and apex courts developed different types of reviews, including the review on whether EU institutions act in conformity with the Founding Treaties (“*ultra vires* review”), whether the European integration keeps the limits set by the national constitutional orders of the Member States (transfer review) and protect the core elements of national constitutional identities (“identity control”). To address the deficiency, the reform will enable the European Court to be a fair and reliable arbiter between the EU and Member States and to this end the Founding Treaties will need to offer adequate guarantees and procedures to defend the sovereignty as well as the constitutional and national identities of Member States.

The relationship between the European Court and national constitutional or apex courts is not a relationship of revision and cannot be addressed in terms of hierarchy. Embracing and old proposal and creating a separate court for the questions of competence would be a reform helping delimit the EU and Member States’ competences in a foreseeable way. Members of the competence court can consist, on a parity basis, of the judges of the European Court as well as of the national constitutional or apex courts.

Another way to safeguard the constitutional and national identities of the Member States in the face of the broadening competences of the European Union

33 See, for example, Blutman, 2020, pp. 33–48.

s to reinforce the judicial dialogue between the European Court and the national constitutional or apex courts. Questions that concern national or constitutional identities ought to be resolved with the involvement of national judiciary. A small but crucially important step forward would be if the national constitutional courts could intervene and present their positions before the European Court. To achieve this, the procedure of the European Court needs to be amended in a way that the relevant national court can participate in a meaningful way to ease the conflict.³⁴

The establishment of a “reverse preliminary ruling procedure” also embraced by the academia would represent a more radical reform avenue.³⁵ A reverse preliminary ruling procedure would require the European Court to submit cases to the competent national constitutional or apex courts regarding issues that concern national or constitutional identity and belong under the umbrella of Article 2 of the Treaty. It can create a true dialogue which is not a one-way street, but rather a two-way traffic among the European network of high courts (*Verfassungsgerichtsverbund*) that would allow them to reach conclusions jointly on questions of fundamental importance. The introduction of such an institutionalised dialogue would also contribute to the acceptance and therefore to the increase of legitimacy of the judgements of the European Court.

Last but not least, especially in light of the increasing legalisation of values set forth in Article 2 of the Founding Treaty, a procedure shall be in place that requires the European Court to apply the underused principle of subsidiarity.³⁶ This would also encourage the European Court to take into account the cultural diversity of the Member States and become the proper guardian of a common European legal culture and heritage.

5. Conclusion

The institutionalised European cooperation has no alternative today. Only such cooperation can provide the European States with the essential leverage, resilience and competitiveness in an age of globalisation, digitisation and intense power rivalry. Nevertheless, the institutional arrangement is never an end in itself. Reforming the institutional arrangements of the European integration poses a preliminary question: what the purpose of the purpose of the European integration is in the 21st century

34 Among others, the President of the Slovenian Constitutional Court, Rajko Knez, stated this position in an interview with Lénárd Sándor. Available at: <https://mandiner.hu/kulfold/2021/09/the-more-diverse-the-integration-becomes-the-softener-the-approach-should-be-conversation-with-rajko-knez> (Accessed: 10 August 2023).

35 Grabenwarter et al., 2021, pp. 43–62.

36 Trócsányi, op. cit.

and what European integration one wishes to have. The European institutional arrangement should be a reflection of the answer to this preliminary question.

Different European regions and different political groups have different opinions on this question. In the view of Hungary as well as other Member States, the more adequate question today is not whether there is a need for a more or less Europe, a more enhanced or a more loose European cooperation. Rather, the more adequate question today is how the European integration can justify itself in the eyes of the Member States since the European integration is not an end in itself nor is it self-evident anymore. The integration therefore shall be measured on a pragmatic basis: to what extent it can defend the interests and civilisational heritage of its Member States in a world that is defined by fierce power rivalry. To what extent it can serve the well-being and freedom of their citizens in an age of globalisation and digitisation. Consequently, any institutional reform shall be a function of this pragmatic analysis: it shall be a means to an end, instead of an end in itself.

For this reason, the institutional reforms shall aim to make the European political and public debates more relevant, focused and pragmatic. To this end, the ties between the representatives of the European Parliament and the electorate shall be strengthened by rethinking the election regulations. Furthermore, for the same purpose, the oversight and legislative competences of the national parliaments shall also be increased in the European decision-making process as the European public sphere is built on the multitude of national public spheres. In the same vein, the establishment of a European judicial area would strengthen the dialogue between European and national high courts and thus would offer a more harmonious cooperation among them. These reforms help protect the constitutional foundations as well as the acceptance and legitimacy of the European decisions and judgements of the European Court.

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PART V

THE EUROPEAN UNION'S ENERGY POLICY

THE EU ENERGY POLICY FROM THE PERSPECTIVE OF AN EU CANDIDATE COUNTRY: THE REPUBLIC OF SERBIA



MARIJA VLAJKOVIC

Abstract

The EU energy policy framework, apart from being one of the most complex policy and regulatory endeavours under the EU competences also has a wide outreach outside the territory of the Union. The reason behind this wide territorial scope of implementation is the Union external action, mostly that under the enlargement policy. By using a case-study approach, we focus on the external component of the energy policy framework from the perspective of the Republic of Serbia, a candidate country for Union membership and a member to the Energy Community, in order to demonstrate the implications these policy and regulatory measures have on the reform processes of states outside the territorial scope of their validity and implementation. Conversely, by applying longitudinal analysis together with a comparative method we strive to examine the effect the enlargement policy has on the development of the EU energy policy considering that its effectiveness, as a policy mechanism regulating network infrastructures, is highly dependent on partnerships with immediate neighbouring countries and with the countries where primary energy sources are located. Finally, we aim to provide an overview of the EU energy policy evolution and a multi-sectorial outline of the said policy's impact in the Republic of Serbia, putting an accent on the current harmonization challenges.

Keywords: EU energy policy, Energy Law, the Energy Community, Serbia

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1. Introduction

One of the main challenges the EU has been trying to address, especially in the last decade, is the fact that almost all Member States, although not in equal measure, are highly dependent on primary energy sources located outside the Union's territory.¹ Needless to say, some of the states with the highest reserves of primary energy sources have not always been on friendly terms with the Union, its Member States and external partners, which renders the entire contextual setup more complex. Hence, the primary focus of all EU policy mechanisms is mostly on the reduction of such dependence, through the promotion of energy efficiency and the use of energy generated from renewable sources. Without an intention to minimise the contribution achieved through the implementation of these two approaches to solving the issue of energy dependence, the external, geopolitical, component of the Union's energy sector is still a strong factor in shaping other policies and regulatory endeavours. The dominant approach in literature reducing the complexity of the geopolitical aspect to solely territorial and grid-bound energy systems can steer us away from understanding that energy is a factor in international relations,² beyond just oil and gas. Energy is shaping relationships between even territorially distant countries as a *sine qua non* of all international exchange of goods and services.

In the case of Serbia, a Union candidate country and party to the Energy Community Treaty,³ we can observe a myriad of aspects Union energy policy measures have on shaping development, inciting reform, and introducing new concepts in enlargement countries as well as the effects that are taken into account when developing the EU energy policy and regulatory framework. Serbia is also one of the countries that is highly dependent on imported energy, with an underdeveloped approach to the use of energy produced from renewables, and some significant negative effects of energy generation and consumption on the environment. Bordering the Union territory makes it a necessity for a country to take measures to become part of an integrated, systematic approach in order to ensure security of supply. We will demonstrate the effects the Union energy policy has had on a candidate state over the course of almost 20 years on its path to transiting from an absolute state ownership over energy sector toward market liberalization. Territorial aspect is a strong component of Serbia's specific position as an EU candidate country, taking into consideration that any difficulty in supply can only be effectively addressed through assistance from immediate neighbours.

This case study will allow us to observe the effects of the Union's energy policy on states and actors outside their territorial scope and the instruments that allow

- 1 According to Eurostat and Statista data, in the year 2019 the EU imported 60.46% of the energy it consumed, in 2020 this data was 57.5% and in 2021 the energy dependence rate amounted to 56%. See: Statista, 2024.
- 2 Sattich et al., 2021, pp. 1–2.
- 3 The Energy Community Treaty (EnCT), OJ L 198, 20 July 2006, pp. 18–37.

for the extension of such mechanisms. This will be achieved through an analysis of all energy sub-sectors, beginning with electricity, oil and gas, including renewable energy and energy efficiency. While observing the developments in the energy sub-sectors in Serbia, the main drawbacks that contributed to the nonlinear and moderate success in attaining the set goals and the outside factors that make the energy sector reform a genuine challenge, we will also present EU energy policy framework and instruments that form the contextual setup for the said actions.

2. EU Energy Policy

The energy policy has undergone a significant legislative transformation following the development of the Union as a political community and contributing to the growth of a complex body of EU law. EU energy policy was equally shaped by the economic and industry advancement, geopolitics, fast technology development in Member States and strong environmental concerns that followed.

2.1. Milestones: What led to the development of the EU Energy Policy?

The Treaty Establishing the European Coal and Steel Community (ECSC), signed in 1951, did not focus specifically on energy but it did, however, cover industry sectors that are related to the key energy issues that initially brought the founder states together. Subsequent European Communities arose from the European Coal and Steel Community, which indicated that it were energy-related issues that brought the nations of Europe together for the first time and united them in what would later become a unique *sui generis* entity. Soon after, the Treaty establishing the European Atomic Energy Community (EUROATOM) signed together with the Treaty establishing the European Economic Community in 1957 in Rome, introduced the obligation for Member States to develop nuclear energy for peaceful purposes.⁴ The provisions of the Treaty encompassed monitoring of the use of atomic energy, within the framework of safety standards but also aimed to create the common market for nuclear materials to be used in a controlled manner. The legislation under the EUROATOM laid the basis for the development of the Communities' energy policy sector in latter stages. A very strong impetus for the development of energy-related secondary legislation within the European Communities had roots in international events at the time, such as the 1973 petroleum crises, that was seen as one of the possible factors for disintegration.⁵ It first revealed the issue of energy security but also energy dependence that remains a persistent issue even to this day. When it comes to

⁴ Articles 2, 52, and 52a of the Treaty establishing the European Atomic Energy Community.

⁵ Stingelin, 1975, pp. 97–100, 132–134.

energy cooperation, regional connectivity became one of the main goals in the 1980s that resulted in the First Energy Package adopted between 1996 and 1998.⁶ The main idea behind this legislative framework was to establish the foundation for market liberalization with two new directives related to gas and electricity that Member States had the obligation to transpose into their national legal systems by the year 2000 at the latest.⁷ The provisions of the said directives also included the requirement to unbundle national transmission system operators (TSOs).

Following the Big Bang enlargement and its geopolitical perspectives, the EU decided to build upon the First Energy Package and to reform the energy sector by introducing a new set of legislative measures. In addition, the EU broadened the focus of energy policy framework to “new horizons” encompassing environmental sustainability, renewable energy, climate action and the reduction of greenhouse gas emissions. The Second Energy Package legislation aimed to prevent monopolies in all Member States, by opening gas and electricity markets and by integrating them into one liberalised market. The Second Energy Package, adopted in 2003, preceded the establishment of the Energy Community which for the first time extended the EU’s internal energy market and EU energy *acquis* to non-EU countries including potential candidate countries such as those in the Western Balkans. The goal was to ensure proper integration of the energy-related Second Energy Package *acquis* in the countries that are part of the Eastern neighbourhood and enlargement as well as to promote energy market integration. The two Directives, the second Electricity Directive,⁸ the second Gas Directive⁹ and the Regulation on conditions for access to the network for cross-border exchanges in electricity,¹⁰ became the backbone of the Second Energy Package. The emphasis was on further market liberalization which was to be achieved by ‘enabling, for instance, industrial and domestic consumers to choose their own gas and electricity suppliers freely,’¹¹ but also by unbundling the TSOs and creating independent national regulatory agencies. Moreover, the Second Energy Package, besides enhancing competition, emphasised the protection of end-consumers. With the introduction of these core comprehensive measures intended to strengthen the internal energy market, the EU also adopted the Energy Taxation Directive (ETD) 2003/96/EC setting the maximum rates for the taxation of electricity and heating fuels in Member States to protect the environment. The key achievements within the Second Energy Package framework, besides liberalization, were market transformation and the restructuring, enabling access and competition and encouraging cross-border trade and consumer-friendly approach.

6 Ciucci, 2024.

7 Electricity Directive 96/92/EC was adopted in 1996 and the first gas Directive 98/30/EC was adopted in 1998.

8 Directive 2003/54/EC, OJ L 176, 15.7.2003.

9 Directive 2003/55/EC, OJ L 176, 15.7.2003.

10 Regulation (EC) No 1228/2003, OJ L 176, 15.7.2003.

11 The Clean Energy for all Europeans Package. See: Florence School of Regulation, 2023b.

The Third Energy Package continued in the same direction as it pursued further liberalization of the internal energy market. It was adopted in 2009, around the same time as the Lisbon Treaty. Under the primary legislation, the Treaty on the Functioning of the EU (TFEU) determined that energy is among the shared competences that were for the first time regulated by the system of enumeration.¹² Secondly, the provisions of the Treaty established a nexus between the principle of solidarity and EU energy policy.¹³ In that spirit, article 194 TFEU lays down the principles of the functioning of the internal market by setting the objectives of the Union policy on energy that address the functioning of the energy market, the aim of ensuring security of energy supply, the promotion of energy efficiency and renewable sources of energy as well as energy networks' interconnection. The pillars of the Third Energy Package can be summed up in the following: unbundling of the energy market by separating the production of gas and electricity from the transmission and distribution networks, therefore ensuring competition, free market, and third-party access as well as ensuring that independent regulatory bodies are monitoring the implementation of energy legislation, discouraging discrimination. The most important legislative measures were introduced with the following regulations: Regulation establishing an Agency for the Cooperation of Energy Regulators,¹⁴ Regulation on conditions for access to the network for cross-border exchanges¹⁵ and Regulation on conditions for access to the natural gas transmission networks;¹⁶ and directives, namely: Directive concerning common rules for the internal market in electricity,¹⁷ and Directive concerning common rules for the internal market in natural gas.¹⁸ Union legislators introduced another innovation: the EU network codes, enabling the development of the Third Energy Market.¹⁹ One of the most important contributions of the Third Energy Package was the creation of the European Networks for Transmission System Operators for electricity and gas (ENTSO-E and ENTSO-G).²⁰ The aim of these European Networks was to facilitate cooperation between national gas and electricity transmission system operators (TSOs), in order to ensure the development of a coordinated pan-European transmission system.²¹ Furthermore, the EU Agency for the Cooperation of Energy Regulators (ACER) was established in 2011 with the aim of enhancing cooperation of National Regulatory Authorities (NRA), supporting integration of Member States energy markets in the EU Integral Energy Market and ensuring implementation of the EU *acquis* related to electricity and natural gas.

12 Article 4 of the Treaty on the Functioning of the EU, OJ C 326, 26.10.2012.

13 Articles 122 and 194 TFEU.

14 Regulation (EC) No 713/2009, OJ L 211, 14.8.2009.

15 Regulation (EC) No 714/2009, OJ L 211, 14.8.2009.

16 Regulation (EC) No 715/2009, OJ L 211, 14.8.2009.

17 Directive 2009/72/EC, OJ L 211, 14.8.2009.

18 Directive 2009/73/EC, OJ L 211, 14.8.2009.

19 Four network codes and a set of Guidelines have been adopted, see: Florence School of Regulation, 2023a.

20 Regulation (EC) 715/2009, OJ L 211, 14.8.2009.

21 Available at: <https://www.entsog.eu/> (Accessed: 16 October 2023).

One of the processes under the EU Energy Framework was the gradual shift of focus on renewable energy and energy efficiency that coincided with the development of the Third Energy Package. The milestones were set during the previous packages, with the first Renewable Energy Directive (RED) in 2001²² which determined the first ever targets for renewable sources and promoted the incentivization of the use of energy from renewable sources. This Directive was upgraded in 2009,²³ as it expanded the legislative framework dealing with renewables and promoted goals such as higher renewable energy consumption and binding targets by 2020 adjusting them to each Member State. The introduction of renewable energy consumption as one of the priorities of the EU policy framework was a result of an evolving process that reflected the expansion of the Union's goals and policies. It also depicted the first stage of the reorientation of the EU policies towards sustainability, climate action, technological neutrality and clean energy. Moreover, this was accompanied by the strengthening of climate action and emission reduction. Thus, the multiplication of legislative acts, such as the Energy Efficiency Directive,²⁴ announced new direction of the EU energy policy priorities as energy market transformation, research, and innovation.

2.2. Shift of focus – sustainability and security as key goals

Energy security and energy dependency continued to be the number one challenge for the EU energy sector. Therefore, on the initiative of the heads of states and governments of Member States, in 2015 the Commission presented the Energy Union Strategy that focused on the sustainability and security of energy. The Strategy rests on five pillars: energy security, integrated energy market, energy efficiency, decarbonisation of the economy and, last but not least, research and development.²⁵ This was an introduction to the Commission's Communication "Clean Energy for All Europeans" introduced in 2016, reflecting the fact that energy was in the ten priorities of Juncker's Commission. Following the Energy Union initiative, this Communication confirmed the change of focus to enable an efficient response for the above-mentioned challenges and to boost the role of the Energy Union and climate change in the modernization of the economy.

That same year, on October 4th, the EU ratified the Paris Agreement, an international treaty on climate change *en bloc*. The EU vouched to be an important actor

22 Renewable Energy Directive (2001/77/EC), OJ L 283, 27.10.2001.

23 Renewable Energy Directive (2009/28/EC), OJ L 140, 5.6.2009.

24 Energy Efficiency Directive (EED) – 2012 (2012/27/EU) together with Ecodesign Directive (2009/125/EC) and Directive (EU) 2010/31 (the Energy Performance of Buildings Directive).

25 European Council, 2023a.

in the implementation of the Paris Agreement to combat climate challenges through economic and social transformation. The main aim of the transition toward clean energy was to boost economic growth by reducing greenhouse emissions to become climate-neutral by the year 2050.²⁶ Some of the most important legislative acts that depict the new “going-green era” in the clean energy policy are: the 2018 RED II Directive setting a target of 32% for the overall share of energy from renewable sources by 2030,²⁷ and the Directive on energy efficiency,²⁸ of the same year, which set a goal of 32.5% reduction results and the Regulation on the Governance of the Energy Union and Climate Action which set ‘necessary legislative foundation for reliable, inclusive, cost-efficient, transparent and predictable governance of the Energy Union and Climate Action (governance mechanism).’²⁹ The following year, the Regulation on the internal market for electricity³⁰ and the Directive on common rules for the internal market for electricity³¹ accentuated integration of renewable energy in the electricity market and upgraded market rules and integrated cooperation.³² This was also part of an ambitious project by the EU titled The European Green Deal presented by the Commission in 2019. It seemed that the underlying motto for the interconnection³³ between transformed energy sources and the economy was sustainability. With the COVID-19 pandemic, the European Green Deal became the ‘lifeline out of the COVID-19 pandemic and part of the Next Generation EU Recovery Plan’,³⁴ establishing a network of solidarity among Member States, with the goal of developing sustainable energy sources. Under this Deal, a set of initiatives were presented as part of the Fit for 55 package in order to revise European energy legislation in line with climate goals, with special emphasis on the revision of the Energy Efficiency Directive, Renewable Energy Directive and Emission Trading System.³⁵ Moreover, the Council adopted five key laws ‘that will enable the EU to cut greenhouse gas emissions within the main sectors of the economy and reduce its net greenhouse gas emissions by at least 55% by 2030.’³⁶ Additionally, renewable sources of energy and clean energy transition were at the heart of the EU’s goal to become the world’s first carbon neutral continent by 2050.³⁷

26 European Council, 2023c.

27 Directive (EU) 2018/2001, OJ L 328, 21.12.2018.

28 Directive (EU) 2018/2002, OJ L 328, 21.12.2018.

29 Regulation (EU) 2018/1999, OJ L 328, 21.12.2018.

30 Regulation (EU) 2019/943, OJ L 158, 14.6.2019.

31 Directive (EU) 2019/944, OJ L 158, 14.6.2019.

32 A part of this framework package was also Regulation EU 2019/941 on risk preparedness in the electricity sector.

33 On 23 June 2022, the revised TEN-E Regulation laying down new EU rules for cross-border energy infrastructure entered into force.

34 European Commission, 2023b.

35 European Council, 2023b.

36 Ibid.

37 Stojanović, 2022, p. 112.

Considering that the previous years had been challenging with regard to security in the European continent *en général*, the EU put energy policy in the top priorities of every new strategy. The ultimate goal was diversification of the EU's energy supplies and sources. The aim was to address the energy crisis and to strengthen the European response. Thus, there was a strong geopolitical component in the growing importance of the renewables' presence on the EU map.³⁸ Hence, the targets set in the legislative framework, gained more importance and became crucial for overall progress. REPowerEU,³⁹ presented by Von der Leyen, outlined EU's strategic plan to reduce dependency on Russia's fossil fuels focusing on saving energy, production of clean energy, and diversification. Ambitious goals set in the energy efficiency and renewable energy legislation are at the core of EU efforts not only in terms of economic measures but also political initiatives, such as the European Political Union.⁴⁰ Interestingly, the European Political Community, which has already had three political summits,⁴¹ gathered the contracting countries of the Energy Community as well, underlining energy security as an issue of paramount importance for the political discourse in order to build resilience and have a better geostrategic response when it comes to energy in the region.

2.3. Energy before the Court of Justice of the EU

The decisions of the Court of Justice of the EU (CJEU) are important for numerous reasons, mostly because they provide legal interpretation, ensure further implementation and compliance with the EU legislative framework. By means of interpretation of important regulations and directives, i.e., the EU energy acquis, and consequently by enforcing the established rules, the CJEU contributes to the functioning of the internal energy market. The CJEU has played an important role in disciplining Member States and interpreting the EU energy rules thus securing better clarity and uniformity. The decisions impacted Member States' national policies and contributed to enhanced protection of consumers' rights, ensuring competition and the functioning of the energy market in accordance with not only EU energy framework, but the general principles of Union law. Furthermore, the decisions of the CJEU form so-called *quasi* precedents, meaning the principles and interpretations given by the Court become binding not only for Member States, but for the EU as a whole. Moreover, the CJEU energy policy case-law is important for candidate

38 Ibid., p. 109.

39 REPowerEU at a glance, available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en (Accessed: 16 October 2023).

40 This Intergovernmental forum was a proposition by the French president Emmanuel Macron at the Conference on the Future of Europe on 9 May 2022.

41 Meeting of the European Political Community, 6 October 2022, Meeting of the European Political Community, 1 June 2023 and Meeting of the European Political Community, 5 October 2023.

countries, striving to properly harmonise their energy policy with the EU energy framework during the negotiation process.

One of the most prominent decisions in relation to the Second and Third Energy Packages are cases *PreussenElektra AG v Schlesweg AG* from 2001,⁴² where the Court decided on the state aid and the compatibility with the free movement of goods in the electricity market and *Essent Netwerk B.V./TenneT TSO B.V. from 2008*,⁴³ regarding competition rules and indiscriminatory access to electricity market; case of *E.ON Földgáz*,⁴⁴ concerning preliminary questions referred to the CJEU by the Hungarian Court regarding the application of the EU rules when it comes to TSOs and capacity allocation at the entry point of a gas interconnector between Austria and Hungary; cases *Commission v Bulgaria*⁴⁵ and *Moravia Gas Storage*,⁴⁶ both related to the interpretation of third-party access. What stands out in CJEU's practice is that, on several occasions, the Court had to strike a balance between enforcing EU state aid rules, on one side, and implementation of renewable energy support mechanisms by Member States, on the other. In case of *Ålands Vindkraft AB*,⁴⁷ the CJEU insisted that it supports the promotion of the use of renewable energy but in a way that state aid granted by Sweden for promoting renewable energy meets necessary criteria, such as proportionality, and it does not lead to overcompensation. More specifically, after analysis, the Court allowed discriminatory green energy support schemes in this case which was groundbreaking. Similarly, in the case of *Essent and Others*,⁴⁸ the Court in Luxembourg decided on the Dutch green certificate that required that a certain percentage of electricity delivered by suppliers should come from renewable energy sources. The Court reminded, yet again, that state aid rules, including those aimed at promoting renewable energy sources and boosting clean energy, should respect the principles of proportionality and nondiscrimination. In both cases the EU Court confirmed support for local renewable energy schemes. Another case regarding state aid is *Commission v Mol Hungary* from 2013,⁴⁹ where the General Court of the EU annulled the Commission decision that considered the state aid given by the Hungarian state to Mol illegal. At times, the Court is criticised for a too strict

42 Case C-379/98, *PreussenElektra AG v Schlesweg AG*, in the presence of *Windpark Reußenköge III GmbH and Land Schleswig-Holstein*, ECLI:EU:C:2001:160.

43 Case No COMP/M.5467 – *RWE/ Essent*, Notification of 29 April 2009 pursuant to Article 4 of Council Regulation, No 139/2004.

44 ECJ 19 March 2015, Case C-510/13, *E.ON Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal*.

45 ECJ 5 June 2014, Case C-198/12, *European Commission v Republic of Bulgaria*.

46 ECJ 26 March 2015, Case C-596/13P, *European Commission v Moravia Gas Storage a.s., formerly Globula a.s.*

47 Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits- en Gasmarkt*.

48 C-573/12 Judgment of the Court (Grand Chamber) of 1 July 2014, *Ålands vindkraft AB v Energimyndigheten*.

49 General Court 12 November 2013, Case T-499/10, *MOL Magyar Olaj- és Gázipari Nyrt. v European Commission*.

approach toward Member States in order to ensure new tendencies in the EU energy policy⁵⁰ are to be respected and properly implemented. This was especially noted in the cases that involved national measures and incentives for energy infrastructure projects or the limits to national sovereignty when it comes to the implementation of the *acquis*. In addition, the interconnection between state aid, energy projects, and environmental standards has been in the Courts's focus in many recent cases. In some more recent cases, the Court provided a “fresh wind”,⁵¹ when it comes to determining whether Member States' renewable energy support measures involved state aid. In the case EEG 2012, the CJEU set aside a General Court judgment that confirmed a finding of the EU Commission that a German renewable energy support mechanism constituted state aid. This more flexible approach shown by the Court, even though praised to some extent, made more difficult for the Commission to determine whether particular measures by Member States fall within the scope of EU state aid rules⁵² in similar cases, *pro futuro*.

State aid in the electricity market generated from renewable energy sources and environmental protection was touched upon in the General Court's decision *Achema et Lifosa/Commission* from 2021,⁵³ where the Court annulled the Commission's decision on state aid concerning an aid scheme implemented by the Republic of Lithuania in support of producers of electricity from renewable energy sources. Finally, the environment-friendly orientation was confirmed in the judgment of the General Court *ClientEarth v European Investment Bank* of 2021, where the Court even analysed the Aarhus Convention and the access to justice in environmental matters.⁵⁴

Lastly, numerous infringement procedures have been initiated by the Commission for the failure of Member States to comply with EU energy legislation. One of the prominent examples took place in the aftermath of the transposition deadline for the Third Energy Package. More than 19 Member States failed to meet the deadline, and proceedings were initiated against Ireland and Romania for failure to transpose, while the former Member State was referred to the CJEU.⁵⁵ Recently, Poland was referred to the CJEU for incorrect transposition of Directive 2012/27/EU on energy efficiency. In the same manner and having in mind the main focus of EU energy policy and the importance of the unified approach to sustainability, the EU Commission have had a stricter approach when it comes to the transposition of the Renewable Energy Directive 2018/2001. Having in mind that Member States were obliged to transpose the said Directive by 30 June 2021, on 15 February 2023 the Commission

50 As it was the case in the Judgment of 1 July 2014 in *Ålands Vindkraft*, C-573/12. For more information, see: Sanchez-Graells, 2014.

51 Vasbeck, 2019.

52 *Ibid.*, p. 640.

53 Case T-300/19, Judgment of the General Court (Tenth Chamber) of 14 April 2021 *Achema AB and Lifosa AB v European Commission*.

54 Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021 *ClientEarth v European Investment Bank*. This decision is being appealed before the CJEU.

55 European Commission, 2023a.

referred Croatia, Hungary, and Portugal to the CJEU with a request to impose financial sanctions in accordance with Article 260(3) TFEU.⁵⁶

Taking into consideration that the Court of Justice ensures proper application of the EU law including EU energy policy and measures, adequate interpretation and a legal stance taken by the CJEU in these cases is of utmost importance for legal consistency and alignment in the EU Member States. However, the CJEU decisions are instrumental for shaping the legal landscape outside of the EU as well. In its external integrative circles, such as the Energy Community, the Court's interpretative influence is also taken into consideration. The CJEU decisions ensure certain level of legal certainty and predictability is already ensured and thus facilitate proper harmonization and implementation of the EU energy acquis.

3. EU Energy Policy outside the EU and its importance for candidate countries

3.1. The Evolution of the Energy Community

A milestone with regard to the expansion of the validity of EU law in the field of energy outside its territory took place just before the adoption of the Second Energy Package. At the time of the discussions leading to the adoption of these directives, it became apparent that sustainable internal energy market will not be attainable unless the external cooperation with immediate neighbouring countries is institutionalised. As early as in the year 2000, the Memorandum of Understanding for the establishment of a competitive Regional Electricity Market (REM) in South-eastern Europe was signed in Athens by Albania, Bosnia and Herzegovina, Bulgaria, Romania, FYROM, and the Hellenic Republic. This document expresses the commitment of the signatories to facilitate phased development of the regional electricity market. The document remained open for all countries of Southeastern Europe to join. Integration in the field of energy should only be observed together with the overall intent of the EU to expand to the South-East European region which was initiated by the Stability Pact for Southeastern Europe (subsequently replaced by the Regional Cooperation Council in 2008) and reaffirmed with all Western Balkan states present in 2003 with the adoption of the Thessaloniki Declaration which confirmed the Union's 'unequivocal support to the European perspective of the region and declared that the 'future of the Western Balkans is within the European Union.'⁵⁷

56 Full list of infringement procedures before the CJEU related to Energy can be available at: https://ec.europa.eu/atwork/applying-eu-law/infringements_proceedings/infringement_decisions/?lang_code=en. (Accessed: 16 October 2023).

57 Prifti, 2013, p. 15.

With the circumstances allowing for all states of the region to participate in these initiatives and discussions, a document that is considered a true milestone in the establishment of the Energy Community was adopted and it is known as the Athens Memorandum of 2002.⁵⁸ This document suggested the establishment of an integrated regional electricity market, the establishment of state energy authorities at the national level, the proposition for the transmission systems to be independent at least in terms of their legal form, organization and decision-making from other activities not related to transmission, if not fully independent in terms of ownership, and also set rules for the distribution systems and operationality of the regional market, created an institutional setup consisting of the Ministerial Council, a Permanent High Level Group, the Electricity Forum, and a Secretariat which will go on to become the Energy Community. The Memorandum was subsequently amended in 2003 as to include the gas market.

In order to be able to effectively bring to life all goals set out in the Athens Memoranda, a necessity for a major institutional shift inevitably imposed itself. In 2004, the Union started negotiations on the establishment of the Energy Community as an international organization established by the European Community on one side and Albania, Bosnia and Herzegovina, Bulgaria, Croatia, FYROM, Montenegro, Serbia, Romania, Turkey and UNMIK on behalf of Kosovo⁵⁹ on the other. The Treaty Establishing the Energy Community was signed in October 2005 and entered into force in July 2006 for a time period of 10 years. Since then, the Energy Community has expanded in all directions. Namely, the Ministerial Council extended the duration of the Treaty,⁶⁰ the number of contracting parties has increased, whereas some former contracting parties in the meantime became EU members (Romania, Bulgaria and Croatia), and the scope of the Treaty has been redefined to allow the Energy Community to expand its operations from electricity and gas to include security of supply, oil, climate action, the environment, renewable energy, energy infrastructure, energy efficiency and competition in the energy markets.

Serbia has also changed significantly over the course of the years, from initially not participating in the processes leading to the establishment of the Energy Community to engaging in the initiatives first as the Federal Republic of Yugoslavia, then as Serbia and Montenegro, and eventually as the Republic of Serbia, to become an EU candidate state. Throughout all these years, Serbia has undergone numerous legislative reforms of its energy sector, burdened by a complex geopolitical dimension, all governed by three related but different instruments: the obligations under the Energy

58 The Athens Memorandum, 2002.

59 In line with UNSCR 1244 and the ICJ Opinion on the Kosovo declaration of independence.

60 According to Ministerial Council Decision 2013/03/MC-EnC on extending the duration of the Energy Community Treaty, the duration of the Treaty is extended for a period of 10 years.

Community Treaty, the obligations pertaining to EU membership negotiations, and the obligations pursuant to the Stabilization and Association Agreement.⁶¹

3.2. The Energy Community: Institutional Structure and the Acquis

The Energy Community was constituted on the basis of the institutional setup established by the Athens Memorandum on Electricity. To this day, the organization is governed by the Ministerial Council consisting of each contracting party's minister responsible for energy, including two representatives of the EU, usually the commissioner for energy and a high-level representative of the Council.⁶² This active governing of the organization divided between all its members and in some aspects resembling the Council of the EU, allows for the much needed political steer and equal participation in the creation of the Energy Community objectives and specific obligations. The decision-making in the Ministerial Council requires different majorities depending on the measure to be implemented. Ideally, decisions should be made unanimously. The work of the Ministerial Council is supported by the Permanent high-level group. It consists of a representative from each contracting party and two senior officials of the European Commission.⁶³

The Energy Community also operates on the work of the fora. The Electricity forum and the Gas forum are the continuation of the same entities envisioned under the Athens Memoranda and are established as such by the Energy Community Treaty, whereas the Oil Forum was established by a decision of the Ministerial Council.⁶⁴ In addition, there are other fora that convene upon the initiative of the Secretariat such as the Law Forum or the Dispute Resolution Forum. One of the most organizationally independent Energy Community institutions is the Regulatory Board. It operates under the auspices of the Energy Community Treaty as an independent regional body of energy regulators tasked with advising the Ministerial Council and the Permanent High Level Group.⁶⁵

All the activities of various committees, task forces, and coordination groups are supported by the permanent Secretariat as the only permanently active institution performing daily work, headquartered in Vienna. The Secretariat is headed by a director appointed by the Ministerial Council,⁶⁶ and performs their duties impartially and in the interest of the Energy Community.

61 Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, OJ L 278, 18.10.2013, pp. 16–473.

62 Article 48 of EnCT.

63 Article 54 of EnCT.

64 Decision No. 2008/03/MG-EnC of 11 December 2008 concerning the implementation to the oil sector of certain provisions.

65 Article 58 of EnCT.

66 Article 69 of EnCT.

The institutional setup is undoubtedly the most elaborate and advanced as opposed to other regional initiatives of the Union in the Western Balkans and beyond. This clearly indicates the importance of the region in maintaining the stability of the Union's internal market and the role of energy in coordinating different processes of interest for further development. This set up allows for greater accountability of each contracting party, secures active involvement in the reform processes and guarantees participation of various stakeholders. As the initiator and the main stakeholder, the EU can most certainly dominate the situation, with additional representatives in the decision-making institutions such as the Ministerial Council and Permanent High Level Group⁶⁷ and certain measures adopted by the Ministerial Council requiring a positive vote of the European Union⁶⁸ or others can be taken solely on the ground of a proposal from the European Commission.⁶⁹ This is nevertheless disproportionate to the financial contributions of each party considering that the European Union's share for 2022-2023 for the budget is at almost 95%.⁷⁰

Apart from a highly developed organizational structure, the Energy Community Treaty imposes obligations for the contracting parties with regard to the implementation of relevant EU law. Each contracting party has the obligation to take measures aimed at transposition, implementation and application of the EU *acquis* in the relevant field and according to the set timetable. The Energy Community Treaty therefore allows for the extension of the EU *acquis* beyond the EU territory in a way that constitutes a legally binding obligation under international law. Accession negotiations bear similarity in this regard, however, the legislative alignment is performed on a voluntary basis. In contrast, the stabilization and association agreements also stipulate the harmonization of laws on a gradual basis, nevertheless less strictly and without an adjusted timeframe. Having all this in mind, we can conclude that the obligation of the harmonization of laws for the Western Balkans was first formulated in the field of energy and under the auspices of the Energy Community Treaty.

The Energy Community *acquis* is framed under Title II of the Treaty, and it consists of the *acquis* on energy, competition, environment, and renewables. It is extended by a unanimous decision of the Ministerial Council both for the need to keep track of the developments at EU level and to expand to other related areas.⁷¹ For instance, in 2009 by its decision,⁷² the Ministerial Council expanded the Treaty so as to include the energy efficiency *acquis* with set deadlines for its implementation. This approach to amending certain provisions of the Treaty allows for the Energy Community *acquis* to be dynamic and to be adapted to the developments in the EU.

67 Article 64 of EnCT.

68 Article 83 of EnCT.

69 Article 79 of EnCT.

70 Procedural Act 2021/01/MC-EnC on adoption of the Energy Community budget for the years 2022-2023.

71 Article 100 of EnCT.

72 Decision 2009/05/MC-EnC implementing certain directives on energy efficiency.

Furthermore, the deadlines for adoption formulate the obligation of law harmonization in a very concise manner. Supplemented by the implementation mechanism in case of failure to comply, the contracting parties not fulfilling their obligations under the Treaty may face suspension of rights deriving from the application of the Treaty, suspension of voting rights, or exclusion from meetings.⁷³ Unlike other instruments under which the territorial expansion of EU law is secured, the mechanism envisioned in the Energy Community Treaty enables strict adherence and determines consequences for failure to comply.

3.3. The EU Energy Policy and Enlargement: Introducing Reforms in Candidate Countries

The main course of action regarding the implementation of the EU energy policy outside its territory is most certainly under the auspices of the Energy Community Treaty. For the Western Balkans and Serbia, as a region that has been under the enlargement policy, in addition to the Energy Community membership, there have been other instruments securing transposition and implementation of EU energy policy. Nevertheless, the Energy Community Treaty establishes the most stringent obligation to align with the requirements of the EU energy acquis with implementation deadlines and a set of measures that can be taken in case of failure to adhere.

For the enlargement countries, another source of obligation to align with certain EU policies are the so-called stabilization and association agreements⁷⁴ and association agreements.⁷⁵ Although these policy instruments cover almost all areas under the competences of the EU, they normally contain provisions dealing with energy policy as well. For instance, the Stabilization and Association Agreement with Serbia⁷⁶ refers to the Energy Community Treaty as the basis for cooperation in the field.⁷⁷ Article 109 of the SAA with Serbia also requires cooperation in terms of establishing a framework for the restructuring of energy companies which is a clear indication of reaffirmed obligation of EU energy acquis implementation considering that both the Second and the Third Energy Packages are developed based on the concept of energy sector unbundling, i.e., the separation of energy generation, supply, and transmission operators. In addition, pursuant to Article 72 of the SAA, Serbia needs to make sure its existing legislation is gradually made more compatible with the EU acquis. The SAA also has an institutional framework that allows for monitoring the implementation

73 Article 99 of the Energy Community Treaty.

74 Framework agreements concluded with the Western Balkan countries, envisioned as policy instruments with a view of establishing free trade area and leading to eventual EU membership.

75 Framework agreements regulating relationships between the EU and pre-accession states aimed at achieving economic integration, enhancing political association, creating a free trade area, and promoting legislative alignment.

76 Stabilisation and Association Agreement (SAA) between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part, OJ L 278, 18.10.2013.

77 Article 109(1) of the SAA with Serbia.

of obligations. The developments in the field of energy under the SAA are annually monitored through the work of the Stabilization and Association Committee and the subcommittee on energy and other network infrastructures. Unlike the Energy Community Treaty, the SAA does not have a set of penalties in case of failure to comply with the obligations, the issue of breach is normally handled under the dispute resolution mechanism. Unlike the Energy Community Treaty, the SAA is concluded for an unlimited period.⁷⁸

Another process enabling the effect of EU law outside its territorial scope is the accession negotiations. This process is focused on three main elements, one of which is of direct relevance to the development of the energy policy in Serbia and in the Western Balkans: the ability to assume membership obligations. Energy is negotiated under Chapter 15 as part of the Green Agenda and Sustainable Connectivity cluster. In essence, the negotiation consists of the modalities and the quality of transposition of EU energy acquis. Aside from regulations, directives, and decisions, the accession negotiations also require alignments to be made with regard to relevant policy instruments and taking into consideration the most relevant CJEU decisions. Unlike the previous two processes, the accession negotiation is a voluntary process not determined by any kind of agreement. It may develop at any pace depending on the swiftness and the quality of legislative reforms. The Commission monitors the process on behalf of the Union and its Member States although most measures are of political nature and the annual assessment is presented in the EU Commission's Annual Progress Reports.⁷⁹ Adequate level of harmonization of laws in a specific chapter will be rewarded by a temporary closure of the chapter.

In essence, all enlargement countries, especially EU candidate countries, like Serbia, take measures to introduce reforms of their respective energy sectors under three pillars: the Energy Community Treaty, the stabilization and association or association agreements and under the accession negotiation framework. Effectively, they may lead to different outcomes and are theoretically not interdependent, however, they all allow for the EU energy law to become effective outside the EU territory and are the main factors that inspire legislative and policy reforms in all enlargement policy countries with the aim of creating a single regulatory space and integrated market.

⁷⁸ Article 133(1) of the SAA with Serbia.

⁷⁹ For Serbia, the latest Report is published in 2023 which stated that 'Serbia is moderately prepared in energy'. See: Commission Staff Working Document Serbia, 2023, pp. 129–134.

4. EU Energy Policy and the Republic Of Serbia

4.1. An Overview of Serbia's Energy Policy

Serbia has been a candidate for EU membership since March 2012 and it concluded the Stabilization and Association Agreement in 2008 which entered into force on 1st September 2013. In addition, as previously mentioned, Serbia is a contracting party to the Energy Community Treaty. The most significant legislative reforms of the energy sector have taken place under the umbrella of Serbia's relationship with the EU. There have been many circumstances over the course of almost two decades that hampered the development of the three processes. In the case of Serbia, the field of energy presented itself in its entire complexity, with the course of events being driven by foreign policy, economic factors, the transition into new concepts, and the intricacy of the legislative reform.

The first law in this field, aligned with the trends of EU legislative measures, was adopted in 2004,⁸⁰ which replaced the existing legal framework consisting of the Law on Electricity Industry,⁸¹ and the Law on Transport, Distribution and Use of Natural Gas,⁸² both being in force since 1991. The 2004 Energy Law that paved the way for all the developments that ensued is a radical break with the established fundamentals of the energy sector. First and foremost, this law provides for the establishment of the Serbian Energy Agency,⁸³ an independent, regulatory body mandated with performing tasks in relation to the development of energy markets. The concept of independent regulatory bodies is often a requirement in the accession negotiations in many other areas, however, to this day it encounters certain difficulties in implementation considering that it had not been previously known in the region. In addition, the first rules establishing the functioning of the energy markets were introduced and the performance of energy activities required mandatory authorisation. Although some of the main concepts of the 2004 Energy Law were modelled based on the Second Energy Package of 2003, their main feature, which is the unbundling of transmission systems operators, was only partially implemented. Finally, this law introduced the term “energy policy”, defined long-term policy goals, and envisioned the formulation of the Energy Strategy as a long-term policy document adopted for the time in a period of at least 10 years. It is interesting to note that the law, although mainly focusing on electricity, oil and oil derivatives and natural gas, established the first Serbian Energy Efficiency Agency, which was in fact founded in 2002 with the

80 Energy Law, no. 84/2004.

81 Law on Electricity Industry, OG RS, no. 45/91, 53/93, 67/93, 48/94, 69/94 and 44/95.

82 Law on Transport, Distribution and Use of Natural Gas, OG RS, no. 66/91, 53/93, 67/93, 48/94 and 12/96.

83 Founded on June 16, 2005.

financial help of the European Agency for Reconstruction⁸⁴ and later abolished in 2012 as a result of a decision to reduce the number of government agencies.

The second legislative step toward further development of energy markets took place in 2011 when a new Energy Law⁸⁵ was adopted, following the adoption of the Third Energy Package. The primary focus and the main objectives of the Union at that time pertained to the unbundling of the gas sector, considering that the unbundling of the electricity sector has already taken place to a considerable extent. In order to prepare to meet the requirements of the Energy Community Treaty⁸⁶ and align with the new 2009 Gas and Electricity Directives, Serbia prepared a new law based on the principles of the 2004 Energy Law, i.e., the inclusion of energy licensing, the horizontal unbundling of system operators, the expansion of the mandate and the competences of the Energy Agency, and a guarantee of its functional, organizational and financial independence. The Law refers to the use of renewable energy sources and regulates incentives for the generation of energy from renewable sources, third-party access, market liberalization in terms of regulating prices and stipulates provisions dealing with energy poverty. The second Energy Law represents a major regulatory shift encompassing all the development trends taking place in the EU.

However, the difficulties pertaining to the implementation and application of the law inspired the recommendations from the EU Commission and the Energy Community to adopt a new Energy Law covering all aspects of the Third Energy Package that had previously been left out. In this regard, the third Energy Law⁸⁷ was adopted in 2014 in order to achieve further alignment with the Third Energy Package. This law has been amended three times, in 2018, 2021, and 2023, respectively. The 2014 Energy Law was the subject of alignment with Directive 2009/73/EC, Directive 2009/72/EC, Regulation 714/2009, Regulation 715/2009, and Directive 2009/28/EC. Subsequent amendments dealt with network code on demand connection, capacity allocation, congestion management, and are harmonised with the most recent EU legislation, i.e., Regulation 2019/941 on risk-preparedness in the electricity sector⁸⁸ and Directive 2019/944 on common rules for the internal market for electricity.

In addition, the processes evolving under the auspices of the Energy Community Treaty and accession negotiations inspired the adoption of a number of laws regulating specific energy sectors such as the Law on Energy Efficiency and the Rational

84 Kovačić, 2008, p. 118.

85 Energy Law, no. 57/2011.

86 Decision of the Ministerial Council of the Energy Community D/2011/02/MC-EnC: Decision on the implementation of Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009, and Regulation (EC) No 715/2009, and amending Articles 11 and 59 of the Energy Community Treaty.

87 Energy Law, no. 145/2014.

88 Regulation (EU) 2019/941, OJ L 158, 14.6.2019.

Use of Energy⁸⁹ and the Law on the Use of Renewable Energy Sources.⁹⁰ Maintaining mandatory stocks of crude oil and petroleum products is also one of the activities initially undertaken to fulfil the obligations under the Energy Community Treaty and to align with Council Directive 2009/119.⁹¹ Based on domestic consumption,⁹² according to the data available for 2022, Serbia had a stock for 36 days instead of the minimum requirements of 61 days.

Taking into consideration that the energy sector consists of a number of sub-sectors that have been developing simultaneously but also independently, with their own obstacles and driving mechanisms behind each stepping stone, in order to get a clearer overview of the effect of the above-mentioned development process of Serbian energy law, we need to address in a nutshell some major energy sectors individually.

4.2. The Reform of the Electricity Sector

The entire process of securing the implementation of EU law outside its territory began with the electricity sector and the first Athens Memorandum. Over the course of the years, Serbia has amended its legislation and incorporated a completely new approach to energy-related matters, including unbundling of transmission and distribution system operators, the liberalization of the market, the operation of the wholesale market through the organised day-ahead market, the establishment of the competitive retail market, and as of recently intraday market opening.⁹³

Serbia has been under examination for potential breach of the Energy Community Treaty on several occasions since 2008. The first such procedure against Serbia was initiated by the Secretariat,⁹⁴ and was resolved by a Ministerial Council Decision in 2016.⁹⁵ Serbia has failed to comply with Article 6 of Regulation 1228/2003 by not using the revenues resulting from the allocation of interconnection capacity on the interconnectors with Albania, FYROM and Montenegro in terms of the purposes specified in Article 6(6) of Regulation 1228/2003, the Republic of Serbia, to which actions and non-actions of its state-owned transmission system operator are imputable.⁹⁶ The Ministerial Council determined that Serbia had taken appropriate measures to rectify the breach and hence closed this case. However, the Secretariat considered the measures taken by Serbia inefficient and initiated another case⁹⁷ in 2017 citing a lack of implementation under Article 91 of the Treaty and a serious

89 Law on Energy Efficiency and the Rational Use of Energy, OG RS, no. 40/2021.

90 Law on the Use of Renewable Energy Sources, OG RS, no. 40/2021 and 35/2023.

91 Council Directive 2009/119/EC, OJ L 265, 9.10.2009.

92 Serbia Annual Implementation Report, 2022, Energy Community Secretariat, p. 9.

93 SEEPEX, 2023.

94 Case ECS-03/08 against Serbia.

95 Ministerial Council Decision 2016/02/MC-EnC.

96 Ibid., Article 1.

97 Case ECS-03/08S.

and persistent breach.⁹⁸ The case is considered closed, following the adoption of the Connection Agreement between KOSTT⁹⁹ and transmission system operators from Continental Europe.¹⁰⁰

As for the future, Serbia and other contracting parties are required to continue to implement the EU electricity acquis adopted in 2019. By 1st January 2024, alignment is needed with Regulation 2019/942, Regulation 2019/943, Directive 2019/944, Commission Regulation 2016/1719, Regulation 2015/1222, Commission Regulation 2017/2195, Commission Regulation 2017/1485, and Commission Regulation (EU) 2017/2196. Serbia, as mentioned above, has already taken measures in 2021 and 2023 to make further improvements in accordance with the newest electricity acquis. In terms of security of supply, Regulation 2019/941 on risk-preparedness in the electricity sector¹⁰¹ also needs to be transposed by the afore-mentioned date in order to introduce the concept of risk-assessment in terms of identification of regional and national electricity crisis scenarios and development of plans for risk preparedness. This was all summed up in the latest EU Commission's 2023 Progress Report which stated that one of the primary goals for Serbia in the following period was to align and implement the Electricity Integration Package adopted by the Energy Community Ministerial Council in December 2022.¹⁰² Furthermore, in order to make further progress in establishing integrated electricity market, which is one of the key factors for the development of the electricity sector, Serbia should equally 'determine net transmission capacities and capacity allocation on all cross-border interconnections.'¹⁰³

4.3. The Reform of the Gas Sector

The reforms of the gas sector in Serbia have been the most complex and have taken the longest amount of time to achieve progress. It is still one of the major setbacks and a sector that is labelled as highly vulnerable to Russian ownership of assets and a major stumbling block in the EU–Serbia relations. Although the legislative alignment with the relevant EU acquis has been achieved, the implementation of the unbundling of transmission system operators has come to a halt since moderate steps forth were made with the adoption of the Government action plan in 2021. Substantial drawback in the gas sector reform is on the account of Serbia's

98 Case ECS-03/08: Serbia/electricity Case Summary. Available at: <https://www.energy-community.org/legal/cases/2008/case0308SRS.html> (Accessed: 25 October 2023).

99 Transmission system operator headquartered in Pristina.

100 Connection Agreement KOSTT to Continental Europe – improving contractual clarity in the South-East European electricity system [Online]. Available at: <https://docstore.entsoe.eu/news-events/announcements/announcements-archive/Pages/News/Connecting-Kosovo-to-Continental-Europe--deepening-ENTSO-E%E2%80%99s-relationship-with-South-East-European-TSOs.aspx> (Accessed 27 October 2023).

101 Regulation (EU) 2019/941, OJ L 158, 14.6.2019.

102 Commission Staff Working Document Serbia, 2023, p. 129.

103 Ibid.

benevolent participation in the construction of Nis-Sofia gas interconnector which is an infrastructure project of major importance for the EU.

There have been several cases in relation to Serbia's failure to transpose certain provision of the EU gas acquis over the course of the years. With regard to failure to secure independent decision-making, i.e., the functional unbundling of the gas transmission system operators, the Secretariat initiated a case¹⁰⁴ against Serbia in 2013 that was subsequently resolved by the decision of the Ministerial Council confirming failure to comply.¹⁰⁵ The Secretariat subsequently established failure to comply with the Ministerial Council decision and initiated a case¹⁰⁶ against Serbia under Article 92 of the Treaty which ended in another Ministerial Council decision¹⁰⁷ confirming failure to comply but postponing the adoption of measures. This was the only time since the establishment of the Energy Community that measures under Article 92 are requested to be taken against a contracting party for failing to comply. Even though to this day no measures have been imposed on Serbia, the request of the Secretariat with this regard remains unchanged. The Secretariat initiated another case¹⁰⁸ against Serbia for failing to comply with the EU acquis on gas sector unbundling because Yugorosgaz-Transport¹⁰⁹ was certified under the Independent System Operator model without fulfilling the requirements. The request to take measures against Serbia under Article 92 for failing to rectify the breach were requested but due to lack of unanimity, this case remains open.

In the meantime, the EU adopted new acquis such as the Gas Storage Regulation¹¹⁰ which imposes more stringent measures with regard to gas storage certification which is expected to render the issue of certification in the gas sector contrary to the EU rules even more challenging for Serbia in the near future.

4.4. Renewable Energy and Energy Efficiency

It is important to note that apart from the complete overhaul of the electricity and gas sectors, the integrative processes with the European Union lead to the introduction of the renewable energy and energy efficiency into Serbian legislation. The use of renewable energy was first regulated by the Energy Law and, as of 2021, relevant legal framework is provided for by the Law on the Use of Renewable Energy Sources (RES),¹¹¹ mostly focusing on various incentives and support schemes for the

104 Case ECS-09/13.

105 Decision 2014/03/MC-EnC.

106 Case ECS-09/13.

107 Decision 2016/17/MC-EnC.

108 Case ECS-10/17.

109 This was noted in the Commission Staff Working Document Serbia, 2023 in addition to the obligation of providing effective third-party access at all gas entry points certifying UGS Banatski Dvor in line with the Gas Storage Regulation, pp. 129–130.

110 Regulation (EU) 2022/1032, OJ L 173, 30.6.2022.

111 Law on the Use of Renewable Energy Sources, OG RS, no. 40/2021 and 35/2023.

production of energy from renewable sources. Under the Energy Community Treaty, full alignment with the Directive on the promotion of the use of energy from renewable sources¹¹² is expected. Serbia still needs to fully transpose the RED II Directive by simplifying permit-granting process and ensuring more contact points for guiding the applicants.

Energy efficiency is mentioned for the first time in the 2004 Energy Law with the establishment of the Energy Efficiency Agency which was later abolished. The first law¹¹³ regulating exclusively the issue of energy efficiency was adopted in 2013. The new Law on Energy Efficiency and the Rational Use of Energy was adopted in 2021,¹¹⁴ and in addition to several by-laws regulating the energy performance of buildings and energy labelling it constitutes the legal framework in this field in the Republic of Serbia mostly aligned with the relevant EU acquis. In July 2023 the Ministry of Mining and Energy presented the Integrated National Energy and Climate Plan, setting RES targets for the period to 2030 with projections until 2050 and accompanying the Strategic Environmental Impact Assessment Report¹¹⁵ with projections of positive as well as and negative impacts that could be located and thus limited.¹¹⁶

Overall, Serbia made progress in further alignment with the EU acquis when it comes to renewable energy sources.¹¹⁷ However, Serbia needs to put more effort into aligning with the Energy Performance of Buildings Directive and ‘set up an implementing legislation framework for the renovation of building stock.’¹¹⁸ The EU Commission also noted that Serbia needs to provide national calculation methodology for energy performance of buildings as well as standards for all new public and commercial buildings, ‘and a legislative framework for the increased use of renewable energy’ in accordance with that.¹¹⁹

5. Conclusion

Since the first steps taken toward the integration of the Western Balkans in various EU initiatives and policies, energy has been one of the pillars of this cooperation.

112 Directive (EU) 2018/200, OJ L 328, 21.12.2018.

113 Law on Energy Efficiency and the Rational Use of Energy, OG RS, no. 25/13.

114 Official Gazette of the Republic of Serbia, no. 40/21.

115 Serbia presents draft National Energy, Climate Plan, see: Balkan Green Energy News, 2023.

116 Ibid.

117 The EU Commission noted that ‘Serbia made no progress in introducing a national scheme to verify the sustainability criteria for biofuels, bioliquids and biomass fuels. The share of RES in the transport sector is still below 1% while the target for 2020 was 10%.’ Commission Staff Working Document Serbia, 2023, p. 132.

118 Commission Staff Working Document Serbia, 2023, p. 132.

119 Ibid.

The prospective membership, the main objective and motivating force behind the energy sector reforms in Serbia, has been the primary catalyst for the regulatory shifts that have taken place. In terms of alignment, we can conclude that the legislative framework is mostly in place, whereas implementation and application is often stalled or hampered by numerous factors outside the scope of what can be achieved through regulatory measures. Although, over the course of the years, Serbia has received a lot of criticism for failing to comply with a series of obligations under the legal framework of EU accession and enlargement with the Western Balkans, specifically those deriving from its relationship with Kosovo and the functioning of the gas market, that in nature are related to numerous external factors such as the distribution of primary energy sources and the remnants of the conflicts of the 90s in the region, it is worth noting that some of the core concepts of EU law have been transposed and implemented. Unbundling in the electricity and gas sectors, a series of measures allowing for the establishment of energy markets, the introduction of the concept of energy efficiency, and the increasing benefits of using energy generated from renewable sources, ensuring security of supply, the establishment of an independent energy regulator all represent major changes in the comprehension of the regulation of the energy sector which delivered results. Although the majority of primary energy production was still from coal with 65,1%,¹²⁰ the increase in hydro energy, wind energy, biomass and solar photovoltaic by 2020 is worth to be mentioned as well. The improvements achieved were recognised and rewarded when the EU agreed to open the Green Agenda and Sustainable Connectivity Cluster including Chapter 15 on Energy during the 13th Intergovernmental Conference in December 2021. Some key issues remain unresolved, having an impact on the accession process for years. The alignment with Energy Community 2030 targets, the finalisation of the unbundling of the gas system operators, the reduction of the country's exposure to Russian-owned key energy assets, and enabling third-party access to all gas entry points continue to be principal issues to be addressed.¹²¹

Serbia as part of the Western Balkans will inevitably continue to pursue further activities in relation to the energy sector reform in line with the obligations assumed under the Energy Community membership, pertaining to the accession negotiations and the implementation of the Stabilization and Association Agreement. With the Russian aggression against Ukraine, the outside factors that have been hampering the ongoing processes are bound to increase, however, the interest of the European Union and its Member States in the energy sector in Serbia is bound to follow. The developments with regard to EU energy policy will remain to have effect outside its territory with the tendency to expand beyond the solely potential members. With the most recent encompassing policy initiative, the European Green Deal confirms the need for clean, affordable and secure energy, also finding its way outside the territory of the Union through the Sofia Declaration on Western Balkans

120 Statisticki kalendar Republike Srbije, 2023, p. 52.

121 Commission Staff Working Document Serbia, 2023, pp. 152–153.

Green Agenda adopted on 20 November 2020. It allows for the targets and main pillars of the energy policy developments to be understood as precursors of national and regional policy initiatives. Although these policy changes have been criticised of being myopic, long-term goals are rarely reflected in the ensuing decision-making process,¹²² and the set goals may appear to be out of reach for struggling Western Balkan economies, they are an indication of the direction of all future developments in the region. In the case of Serbia, we can conclude that the reform process has been lengthy, demanding and some radical changes are required as to how energy is perceived, however, it has undoubtedly contributed to securing the sustainability of energy supply in years to come.

122 Gheuens and Oberthur, 2021, p. 339.

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EU MEMBERSHIP: IMPLICATIONS FOR CZECH ENERGY SECURITY



MARTIN SVEC

Abstract

This paper examines the evolution of the Czech Republic's energy security from the 1990s, focusing on its political, economic, and infrastructural challenges. During this period, the country was heavily dependent on imports of both oil and natural gas from the USSR/Russian Federation, with an energy infrastructure primarily structured to facilitate these imports. The first section of the paper examines the steps taken by Czechoslovakia and, later, the Czech Republic to diversify its energy sources and infrastructure, as well as the country's efforts to join international organizations, including the International Energy Agency. The second part analyses the evolution of the European Union's energy security policy and its implications for Czech energy security in the context of its EU membership. The paper mentions the role of the Czech Republic during its Presidency of the Council of the European Union in 2022, illustrating how EU membership has been central to enhancing the nation's energy resilience. Through EU solidarity and cooperation, the Czech Republic has strengthened its energy security, adapting to evolving challenges and crises.

Keywords: EU Energy Law; Energy Law; Energy Security; Czech Republic; EU Membership

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1. Introduction

During the 1990s, Czechoslovakia and later the Czech Republic found itself in very turbulent times.¹ The political and economic transformations in the region posed significant challenges for the Czech Republic. What is more, its energy sector was fully controlled and operated by the state, and its energy infrastructure had for decades been developed to interconnect only Eastern Bloc countries. Since then, the Czech Republic has taken various steps to strengthen its energy security, with joining the European Union appearing to be the most significant. The first part of this paper explores the dilemmas faced by Czechoslovakia/the Czech Republic in the 1990s and discusses measures adopted by the Czech Republic before it acceded to the EU; the second part examines the evolution of the EU's energy security policy and its implications for Czech energy security.

2. Energy Security

The concept of energy security is traditionally traced back to the beginning of the 20th century when societies began to rely on hydrocarbon fuels, which are unevenly distributed across the Earth's surface.² As energy has become increasingly important to society and national economies, so has energy security. There is no universally agreed definition of energy security because its meaning depends on a country's specific circumstances, priorities, and vulnerabilities. Furthermore, each state is exposed to different geopolitical realities, which have a major impact on its energy security.³ In addition, perceptions of energy security have evolved dynamically over the past century. While up until the 1970s the focus was on the need to ensure physical availability of fuels, after the 1973 oil crisis, the concept of energy security was extended to include fuels' economic availability. Since the 1990s, the environmental impact of energy has also been emphasised. The most recent expansion of the energy security concept was in response to the dramatic increase in global terrorism and concerned the protection of physical infrastructure from terrorism and sabotage.⁴

Energy-importing countries naturally prioritize concerns about the security of their energy supplies. The International Energy Agency (IEA), created as an instrument to limit the negative consequences and risks associated with dependence on

1 On 31 December 1992 Czechoslovakia formally separated into two independent countries, the Czech Republic and the Slovak Republic.

2 Yergin, 2012, p. 267; Yergin, 2006, pp. 69–70.

3 Energy Charter Secretariat, 2015, p. 6.

4 Barton, 2004, p. 5.

energy supplies,⁵ defines energy security as an uninterrupted availability of energy sources at an affordable price. The IEA further distinguishes between long-term aspects of energy security, which include sufficient and timely investment in exploration in line with economic developments and environmental needs, and short-term aspects, which represent the ability to respond to sudden changes in the balance between supply and demand.⁶ In contrast, energy-exporting countries primarily focus on ensuring steady, predictable demand when defining energy security.⁷

3. Weaponisation of energy

Energy weaponisation can be understood as the deliberate manipulation of energy resources to pursue geopolitical or policy objectives.⁸ According to Veronika Slakaityte and Izabela Surwillo, energy blackmail can take different forms; these may encompass complete or partial disruptions in supply, threats related to supply interruptions, coercive pricing strategies or leveraging of existing energy debts, and control over critical energy infrastructure.⁹

The emergence of a gas market in Europe was primarily driven by the discovery of gas reserves in the 1960s near Groningen, supplemented by natural gas transported by pipeline from the Soviet Union in the 1970s. With the discovery of gas in Western Siberia, which made the Soviet Union the largest producer of natural gas in the world, building a pipeline and an expansion of the gas supply to Europe appeared to be a logical step. However, the deepening of the energy relationship between Europe and the Soviet Union was met with categorical opposition from the United States, which feared that the money made from gas supplies would be used to arm the Soviet Union and Europe would become highly vulnerable to blackmail. The Western European countries estimated that supplies from the Soviet Union would not exceed 25% of total consumption and that gas imported from Norway would ensure a competitive environment. The Urengoy pipeline was therefore built despite criticism from the United States, and the amount of gas imported from the Soviet Union doubled. Up until the fall of the Soviet Union, US fears did not materialise.¹⁰ However, after the collapse of the Soviet Union, the Russian Federation began to use the energy sector to strengthen its influence, particularly in relation to former

5 IEA, 2024.

6 IEA, 2023.

7 Novikau, 2022, p. 2.

8 See Boute, 2023; Černocho, 2007, p. 7.

9 Slakaityte and Vurwillo, 2024.

10 Yergin, 2012, p. 337.

Soviet republics or former Soviet satellites. In addition, Russian energy companies have actively expanded operations in these regions.¹¹

According to Karen Smith Stegen, the key attributes necessary to use energy to advance foreign policy goals are consolidated energy resources and control of transit routes. Despite attempts to privatize the energy sector in the 1990s, the Russian government has since consolidated its control over the country's energy resources.¹² Belarus and Ukraine – key transit countries – have frequently been targeted by Russian Federation foreign energy policy. Specifically, the Russian Federation has pursued a highly aggressive pricing strategy towards both countries, offering significantly favorable gas prices when they remain loyal to the Russian Federation, and sharply increasing prices in response to any shifts in their foreign policy course. It also repeatedly cuts off gas supplies or acquires stakes in foreign companies that transport energy.¹³

4. The Czech Republic's energy system and domestic fossil fuels production in the 1990s

According to Filip Černoch, the development of the Czech energy sector in 1990s was driven by an ambition to reflect the geopolitical, political, and economic interests of the new state, including restructuring the centrally controlled energy system, as well as liberalisation and privatisation of the sector.¹⁴

Fossil fuels have historically constituted a critical component of the Czech Republic's energy mix. Coal is the dominant fuel source for total energy supply and serves as the primary fuel for electricity generation. In fact, large domestic coal resources have made the Czech Republic a net exporter of electricity. Conversely, the Czech Republic's oil and gas reserves are highly limited. In 1993, domestic production of crude oil accounted for only 2% of total oil consumption within the Czech Republic; similarly, domestic natural gas production contributed 2% to the nation's gas consumption. In the 1990s, the Czech Republic was heavily dependent on imports of both oil and natural gas from the USSR/Russian Federation.¹⁵

11 Korteweg, 2018, pp. 13–16.

12 Stegen, 2011, pp. 6505–6508; Korteweg, 2018, p. 14.

13 Korteweg, 2018, pp. 16–21.

14 Černoch, 2019, p. 28.

15 IEA, 2021a; Vlček, 2016b, pp. 151–152.

5. Early attempts to strengthen the energy security of the Czech Republic

Addressing energy dependency entails implementing various measures, with diversification recognised as a paramount policy approach. It is worth recalling Winston Churchill who famously held in 1907: ‘On no one quality, on no one process, on no one country, on no one route, and on no one field must we be dependent.’¹⁶ Today, diversification is considered the most effective way of ensuring energy security.

The primary difficulty faced by the Czech Republic revolved around the strategic orientation of its energy sector towards the Russian Federation, notably concerning oil and natural gas supplies. The vast majority of oil and natural gas consumed in Czechoslovakia was imported from the USSR/Russian Federation.¹⁷

With the clear intention of diversifying natural gas supplies and reducing Czech energy dependency on the Russian Federation, the state-owned company Transgas signed a long-term, 20-year gas supply contract in 1997 with Norwegian companies Statoil, Norsk Hydro, and Saga members of the Gas Negotiation Committee (GFU), for a total of 53 bcm of natural gas.¹⁸ The Czech Republic was the first country in post-communist Europe to diversify its natural gas suppliers. In 1996, the Czech Republic built an additional oil pipeline route – the IKL oil pipeline.¹⁹ The primary impetus for this expensive construction was the fear of potential problems with oil supplies through the Druzhba pipeline.²⁰ After being brought into operation in 1996, the IKL oil pipeline supplied around 35 % of oil, while the remaining import volume was transported via the Druzhba. By transporting 38 types of oil to the Czech Republic from a total of 16 countries, the IKL oil pipeline significantly reduced Czech dependency on oil transported from the Russian Federation.²¹

Another important step in increasing Czech resilience to energy crises was co-operation with the International Energy Agency (IEA), an international organisation established in 1974 to promote secure oil supplies. IEA member countries jointly committed to take common effective measures to meet oil supply emergencies by developing an emergency response system and coordinating strategies for oil stockpiling and distribution.²² The Czech Republic became a membership candidate as early as 1994 and commenced efforts to fulfil the requirements for acquiring

16 Yergin, 2012, p. 267.

17 NET4GAS, no date; Vlček, 2016b, pp. 151–152.

18 Naegelé, 1997; Strašíková, 2009.

19 Mero ČR, no date.

20 Vlček, 2016b, p. 151.

21 Mero ČR, no date.

22 IEA, 2024.

membership status.²³ These efforts included maintaining crude oil reserves or an equivalent product amounting to 90 days of the previous year's average net oil imports, ensuring that the government has immediate access to these reserves, adopting a demand restraint program to reduce national oil consumption by up to 10%, and adjusting the legal framework to comply with international obligations under the Agreement on an International Energy Program (a treaty establishing the IEA).²⁴ Emergency oil stocks in the Czech Republic are maintained by the Administration of State Material Reserves (SSHR). The Czech Republic formally became a full member of the IEA in 2001.²⁵

An equally important step towards strengthening energy security was the ratification of the General Agreement on Tariffs and Trade (1993) and the establishment of the WTO (1995). It is worth noting that the Czech Republic is a founding Member of the WTO. WTO membership has opened up new opportunities for the import of energy from diverse markets.²⁶

The Czech Republic further increased its energy resilience by signing the European Energy Charter in 1991 and the Energy Charter Treaty ("ECT") in 1995.²⁷ The ECT established a legal regime governing relations between energy exporting, importing, and transit countries. It is based on the principles of free trade and free transit of energy materials and products; it stimulates investment and depoliticises the energy sector in the belief that market-based principles enshrined in the ECT would preclude states from interfering in the energy sector and from using energy as a tool to pursue their political interests.²⁸ Due to the Czech Republic's dependency on Russian oil and gas, the Energy Charter Treaty was viewed as a vital tool of international law, having potential to effectively address energy security-related challenges faced by the Czech Republic in the early 1990s.

Overall, the diversification of natural gas supplies, building the IKL oil pipeline, membership in the IEA, WTO and the Energy Charter Treaty, represent remarkable achievements by the Czech Republic in strengthening its energy security during the early 90s.²⁹

23 Ministry of Industry and Trade of Czech Republic, 2017.

24 Ibid.

25 IEA, 2021a.

26 WTO, 1996.

27 The Czech Republic ratified the Energy Charter Treaty in 1996.

28 Konoplyanik and Walde, 2006, p. 524.

29 Vlček, 2016c, p. 315.

6. EU Energy Policy Membership and EU Energy Security

Notwithstanding the pivotal role of energy in the concept of European integration – evidenced by the establishment of both the European Coal and Steel Community (1951/1952) and the European Atomic Energy Community (1957/1958) – its political sensitivity has long prevented its deeper integration. For an extended period, electricity and gas markets were constrained by national borders and operated by state-owned energy monopolies. Although energy was subject to EU law,³⁰ the practical application of primary legislation in this sector was largely obstructed by political considerations. According to Kim Talus, energy played a strategic and political role in respect of national sovereignty and member states were not willing to transfer specific energy-related powers to the EU.³¹

The only exemption was the adoption of Council Directive 68/414/EEC imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products.³² It was adopted in response to an oil embargo imposed in the course of the Six Day War in 1967. Arab oil producing countries placed an embargo on all oil shipments to the United States, Great Britain, and West Germany, all of whom they believed at the time to be aiding the State of Israel.³³ The European Economic Community acknowledged that any difficulty, even temporary, having the effect of reducing supplies of such products imported from third states could cause serious disruption to the economic activity of the Community, and it should aim at offsetting or at least diminishing any harmful effects in such a case. More specifically, the Community aimed at increasing the security of supply for crude oil and petroleum products in Member States by establishing and maintaining minimum stocks of the most important petroleum products.³⁴

For decades, energy security considerations in the EU were predominantly associated with the potential disruption of crude oil supplies from the Middle East. Natural gas and its supply became the focus of EU interest in the 1990s. The European Commission's Communication *Security of Gas Supply*, issued in 1999, viewed natural gas as a source of energy contributing to competitiveness, protection of the environment, and security of supply. It is worth noting that the European Commission acknowledged that natural gas is the cleanest fuel and, hence, it could play a significant role in meeting the EU's Kyoto commitments to reduce emissions of CO₂ by replacing fossil fuels with higher carbon intensity. In addition, the European Commission believed that a growing share of gas in the EU energy mix could reduce

30 CJEU, *Costa v Enel*.

31 Talus, 2016, p. 3.

32 Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products.

33 Daoudi and Dajani, 1984, p. 67.

34 See the Preamble of Council Directive 68/414/EEC of 20 December 1968 imposing an obligation on Member States of the EEC to maintain minimum stocks of crude oil and/or petroleum products.

its oil dependency and contribute to a more diversified and better-balanced energy fuel mix in the EU.³⁵

Energy security was further discussed in the context of the EU enlargement. The European Commission noted the energy dependency of Central and Eastern European Countries (CEEC applicant countries) on the Russian Federation. While average dependency on Russian gas in the EU was around 17%, the CEECs were dependent on Russia for two-thirds of their gas consumption.³⁶ In this context, the European Commission noted that there was mutual dependency between EU and non-OECD gas suppliers and transit countries (Russian Federation and Algeria). It was believed that the EU's energy concerns were matched by reciprocal concerns and need for gas producers such as Russia to have secure markets and hard currency revenues in order to finance investments in exploration, production, and transportation infrastructure.³⁷

Energy security was further analysed in the 2000 Green paper *Towards a European Strategy for the Security of Energy Supply*. The Commission acknowledged that a policy of geopolitical diversification has not succeeded in mitigating the EU's dependence on the Middle East (for oil) and the Russian Federation (for natural gas). While the Commission again underlined that some applicant countries were entirely dependent on a single gas pipeline connecting them to a single supplier country, it also noted that the continuity of supplies from the USSR/Russian Federation over the preceding 25 years served as testimony to exemplary stability.³⁸

The Czech Republic became a Member State of the European Union on 1 May 2004. The Energy Policy adopted by the Czech government in 2000 acknowledged that the European Community's energy policy objectives – promoting competitiveness, ensuring a secure and reliable energy supply, and protecting the environment – were aligned with those of the Czech Republic's energy policy. The Czech Republic believed that the primary tool for achieving the aforementioned EU objectives is the completion of the internal market, representing the highest level of liberalization and integration among EU member states.³⁹

6.1. EU Energy Security: Internal Energy Market

The effectiveness of legal frameworks for strengthening energy security traditionally depends on analysing specific measures to mitigate the impacts of energy crises. Within the European Union context, this would entail the assessment of measures to safeguard gas supply security and enhance the energy resilience of the EU. However, limiting ourselves to these measures in the case of the EU would be

35 European Commission, 1999.

36 Ibid., p. 11.

37 Ibid., p. 25.

38 European Commission, 2000.

39 Government of the Czech Republic, 2000, p. 11.

short-sighted. The existence of an internal market itself is undoubtedly of great importance for energy security. In fact, transparent, competitive, and well-regulated energy markets can help mitigate political influences and promote efficient resource allocation and investment in the sector. The EU itself has acknowledged that the security of gas supply shall be primarily safeguarded by ensuring the proper and continuous functioning of the internal market in natural gas.⁴⁰ Exceptional measures may only be implemented when markets can no longer adequately address a disruption in gas supply. In such a situation, market – based measures should be prioritised over non-market-based security of gas supply measures.⁴¹

In 2012, the European Commission opened formal proceedings to investigate whether Gazprom, the Russian producer, and supplier of natural gas, might be hindering competition in Central and Eastern European gas markets, in breach of EU antitrust rules. More specifically, the European Commission investigated whether Gazprom divided gas markets by hindering the free flow of gas across Member States (via the so-called destination clause), whether Gazprom prevented the diversification of the supply of gas, and whether Gazprom imposed unfair prices on its customers by linking the price of gas to oil prices.⁴²

The three-year investigation led to the following preliminary conclusions: (1) Gazprom was using territorial restrictions, such as export ban clauses, destination clauses, or other measures that prevent the cross-border flow of gas, such as by requesting wholesalers to obtain Gazprom's approval for exports or refusing to change the location to which the gas should be delivered under certain circumstances, to prevent gas from flowing freely between and to the eight CEECs (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia); (2) Gazprom has charged unfair prices in five Central and Eastern European countries (Bulgaria, Estonia, Latvia, Lithuania and Poland); (3) Gazprom leveraged its market dominance in Bulgaria and Poland by making gas supplies conditional upon obtaining certain infrastructure-related commitments from wholesalers. A Statement of Objections was sent to Gazprom.⁴³

To address the Commission's concerns and to meet the Commission's overall objective of the free flow of gas at competitive prices across the Central and Eastern European countries, Gazprom offered a set of initial commitments.⁴⁴ The Commission found the commitments offered by Gazprom as effective and necessary to address the concerns and decided, under Article 9 of the EU's Antitrust Regulation 1/2003,

40 Regulation (EU) No 994/2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC, Preamble (11); Regulation (EU) No 2017/1938 concerning measures to safeguard security of gas supply and repealing Regulation (EU) No 994/2010, Preamble (3), (7), Article 1.

41 Regulation (EU) No 2017/1938 concerning measures to safeguard security of gas supply and repealing Regulation (EU) No 994/2010, Preamble (33).

42 European Commission, 2012.

43 European Commission, 2015.

44 Case AT 39816. Commitment Proposal, 2017.

to make these commitments legally binding on Gazprom.⁴⁵ As a result, Gazprom had to remove any restrictions placed on customers to re-sell gas cross-border, Gazprom had to facilitate gas flows to and from isolated markets, namely the Baltic States and Bulgaria, relevant Gazprom customers are given an effective tool to make sure their gas price reflects the price level in competitive Western European gas markets, and Gazprom was forbidden to act on any advantages concerning gas infrastructure that it may have obtained from customers by leveraging its market position in gas supply.⁴⁶

The antitrust investigation initiated by the European Commission in 2012 revealed that Gazprom was using territorial restrictions to prevent gas from flowing freely in eight CEE countries, including the Czech Republic. Hence, the effective functioning of the internal energy market together with rigorous enforcement of Competition Law in the EU have enhanced the energy security of the Czech Republic.

6.2. EU Energy Security: Security of Gas Supply

The Green Paper *Towards a European Strategy for the Security of Energy Supply*, adopted in 2000, acknowledged that natural gas is becoming an increasingly important component in the EU energy supply, and that over the long term, the EU is expected to become ever more dependent on gas imported from non-EU sources of supply. Furthermore, the Commission emphasised that the enlargement of the EU will only serve to reinforce this trend.⁴⁷ In addition, gas market liberalisation has exposed the gas industry to new challenges since any interruption of gas supplies could immediately affect the internal energy market. Thus, the EU, for the first time, adopted a legal framework ensuring a minimum common approach to the security of gas supply – Council Directive 2004/67/EC of 26 April 2004 concerning measures to safeguard the security of natural gas supply. The Directive established the Gas Coordination Group which has been useful in exchanging information and defining common actions among Member States, the Commission, the gas industry, and consumers.

In 2004, the EU was joined by 10 states of which 7 were part of the former Eastern Bloc. Very soon, the security of gas supplies appeared at the forefront of the EU energy policy. Major temporary disruptions in the supply of Russian gas in 2006 and 2009 revealed the EU's energy vulnerability.⁴⁸

To enhance its resilience to future interruptions of gas supplies, the EU adopted Regulation (EU) No 994/2010 concerning measures to safeguard the security of

45 Commission Decision of 24.5.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (TFEU) and Article 54 of the EEA Agreement Case AT.39816 – Upstream Gas Supplies in Central and Eastern Europe.

46 European Commission, 2018.

47 European Commission, 2000.

48 See Rodríguez-Fernández et al., 2020; European Commission, 2009; Stern, 2006; Pirani et al., 2009.

gas supply.⁴⁹ Key features of this regulation included the creation of preventive and emergency action plans, infrastructure and supply standards, and regional and Union-level emergency responses.

The EU's lack of competence in the field of energy has long hindered its ability to effectively pursue a cohesive energy policy. Hence, the EU was compelled to rely on its competence in areas such as common market regulation and environmental protection to regulate energy.⁵⁰ With the adoption of the Lisbon Treaty, energy became an area where EU competence was explicitly conferred, addressing the previous lack of legal certainty. According to Article 194 TFEU, the Union's energy policy shall, in a spirit of solidarity between Member States, aim to ensure the security of energy supply in the Union.

The exercise of this newly acquired competence was envisaged by the EU's first Energy Security Strategy, adopted in 2014. Furthermore, "energy security, solidarity, and trust" became one of the pillars of the *Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*.⁵¹ The latter strategy explicitly recalls that joint approaches in the field of energy can make all parts of the European Union stronger, for instance in case of supply shortages or disruptions. In addition, it stresses that the 'spirit of solidarity in energy matters is explicitly mentioned in the Treaty and is at the heart of the Energy Union.'⁵²

In line with the *Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, the EU adopted Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply. It was built on Regulation (EU) No 994/2010, however, two main new features have been added – the concept of risk groups for gas supply threats and a new solidarity mechanism for gas crises. Risk groups, established on the basis of gas supply routes, supply country risks, and the cohesion of capabilities to exchange gas,⁵³ shall serve as a basis for enhanced regional cooperation and risk assessment.⁵⁴ Under the solidarity mechanism, a directly connected Member State must reduce gas flows to customers, excluding "solidarity protected customers", in the event of a crisis. The freed-up gas volumes should then be redirected to a Member State requesting solidarity, until supply to "solidarity protected customers" in the requesting Member State can be ensured.⁵⁵ However, this is a last resort measure and can be applied only if the requesting State has exhausted all market and non-market-based measures. Fair and immediate compensation is to be paid to the Member State providing solidarity assistance.⁵⁶

49 European Commission, 2009, p. 7.

50 Haraldsdóttir, 2014, p. 209.

51 European Commission, 2015.

52 Ibid., p. 4.

53 Fleming, 2019, p. 105.

54 Regulation (EU) 2017/1938, Article 3 (7).

55 Fleming, 2019, p. 108.

56 Regulation (EU) 2017/1938, Preamble (42).

6.3. EU Energy Security: Energy Solidarity as a key principle of EU Energy Law

Article 194 of the TFEU serves as a general legal basis for all energy policy measures adopted by the EU. It aims to guarantee the smooth functioning of the energy market and the security of the EU energy supply, to promote energy efficiency and innovation, and to enhance the interconnection of energy networks. All these objectives shall be pursued “in the spirit of solidarity between Member States”. Little attention was paid to this explicit reference to solidarity until the OPAL judgement in 2019.

The OPAL pipeline connected the Nord Stream pipeline, which brought natural gas from the Russian Federation to Germany via the Baltic Sea, to the existing European gas infrastructure, particularly the German gas transmission network. The OPAL pipeline was granted an exemption from provisions of EU energy law on third-party access to the gas transmission network and the regulation of tariffs under the condition that Gazprom can reserve, as a dominant undertaking, only 50% of the cross-border capacities of the OPAL pipeline, unless releasing onto the market a volume of gas of 3 billion m³/year through that pipeline. In 2016, the Federal Network Agency with Commission’s approval amended these conditions essentially allowing Gazprom to operate the OPAL pipeline at its full capacity.⁵⁷ Poland challenged this decision, arguing that the Commission’s approval violated the principle of energy security and energy solidarity, as enshrined in the reference to ‘the spirit of solidarity between Member States’ in Article 194 TFEU. More specifically, Poland argued that the grant of a new exemption relating to the OPAL pipeline threatened the security of gas supply in Central Europe, since it enabled Gazprom and undertakings in the Gazprom group to redirect additional volumes of gas onto the EU market by fully exploiting the capacities of the North Stream 1 pipeline.⁵⁸ By contrast, Germany argued that the reference to “spirit between Member States” is merely a political and abstract concept and does not have binding legal effect in the sense that the validity of an act adopted by a Union institution can be assessed on the basis of that principle. The court (Grand Chamber) held that “the spirit of solidarity between Member States” under Article 194 constitutes a specific expression, in the field of energy, of the principle of solidarity, which is itself one of the fundamental principles of EU law.⁵⁹ Hence, the principle of energy solidarity entails a general obligation for the European Union and the Member States in the exercise of their respective competences concerning EU energy policy to take into account the interests of all stakeholders liable to be affected, by avoiding the adoption of measures that might affect their interests, as regards security of supply, economic and political viability and the diversification of sources of supply.⁶⁰ The court found that

⁵⁷ Riley, 2019.

⁵⁸ Case T-883/16, para 50.

⁵⁹ Case T-883/16, para 38.

⁶⁰ Case T-883/16, para 71.

the Commission had breached the principle of solidarity since it did not examine the impact of the amended exemption regime on the security of supply in Poland.⁶¹ Once the CJEU confirmed the General Court's findings in OPAL, it became clear that solidarity was central to EU energy policy.⁶²

Legal reference to the “spirit of solidarity between Member States” has far-reaching consequences for the energy security of the Czech Republic. Whenever EU institutions or other Member States exercise their energy competence, the Czech Republic may raise its concerns if it believes that its energy security may be affected. Furthermore, the Czech Republic may challenge the adoption of measures affecting its energy security before the Court of Justice of the EU.

6.4. EU Energy Security: Energy Diplomacy

Given the European Union's reliance on external energy supplies, cooperation with external partners is pivotal to its energy policy. From the perspective of EU law, EU external energy policy is implemented through the EU's exclusive competence in the area of the common commercial policy.⁶³

The EU has a general interest in stable, transparent, rule-based, and liquid international energy markets. Intended to diversify external suppliers of energies, the EU energy strategies traditionally emphasise the need for more coherent and targeted foreign policy vis-à-vis major energy producing and transit countries, as well as the need to find new suppliers.⁶⁴ According to the *Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy*, the EU should use all external policy instruments to ensure that a strong, united EU engages constructively with its partners and speaks with one voice on energy.⁶⁵

The EU discusses energy security-related issues at multilateral energy organisations, such as the IEA, and the Energy Charter Conference, and forums, such as the UN, G7, and G20. The EU also enables close integration of its closer neighbourhood into the EU energy market via the Energy Community or the EU4Energy. According to a joint communication *EU External Energy Engagement in a Changing World*, access to well-diversified supplies from international markets will be key to ensuring EU's resilience.⁶⁶ EU trade policy plays a key role in this regard since it can effectively open access to supplies through the development and implementation of trade agreements. Energy and Raw Materials Chapters of EU Free Trade Agreements (FTAs) play a central role in this ambition.

The importance of energy diplomacy has increased with Russia's invasion of Ukraine. Moving away from Russian fossil fuels will require replacing some of them

61 Case T-883/16, para 77–78.

62 Kaisa and Reins, 2023.

63 Treaty on the Functioning of the European Union, Art. 207; Craig and De Búrca, 2015, p. 336–339.

64 European Commission, 2014.

65 European Commission, 2015, pp. 7–8.

66 European Commission, 2023, p. 16.

with fossil fuels from other international suppliers. Stronger trade and engagement with new key partners, such as Africa, is expected to contribute to the EU's energy security today with oil and LNG supplies, and in the future through green hydrogen and renewable fuels as well as raw materials critical to the green energy transition.⁶⁷

7. Conclusions

In the 1990s, the Czech Republic demonstrated an extraordinary ability to mitigate the consequences of its energy dependence on the USSR/Russian Federation. Specifically, the Czech Republic built new energy infrastructure, diversified its supplies, and took steps to join key international organizations, such as the IEA, WTO, or the EU. This paper focuses on the implications of the Czech Republic's accession to the European Union for the country's energy security. Since its accession, the EU's energy policy and its role in enhancing energy security have evolved significantly. The EU has not only gained explicit competence in energy policy but has also addressed successive energy crises by implementing measures aimed at further enhancing its resilience.

During its Presidency of the Council of the European Union in 2022, the Czech Republic advocated for EU-wide solutions rather than uncoordinated national approaches, with the European Union emerging as the cornerstone of energy security for its Member States. In addition, various innovative measures – some of which were unimaginable before 2022 – have been expeditiously implemented, including the voluntary/mandatory 15% reduction in gas demand, the obligation to reduce gross electricity consumption, the requirement to ensure the filling of underground gas storage facilities within EU territory, and the establishment of the EU Energy Platform.

Overall, EU membership has significantly bolstered the Czech Republic's energy security, providing a framework for cooperation, investment, and resilience in the face of evolving energy challenges. This paper argues that the principles of solidarity, resilience, and cooperation, as embedded within the EU framework, will be instrumental in navigating the complex landscape of energy security and addressing future crises.

⁶⁷ Ibid., p. 18.

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THE EUROPEAN UNION'S ENERGY POLICY FROM THE PERSPECTIVE OF A CENTRAL-EASTERN EUROPEAN COUNTRY: ROMANIA



TAMÁS SZENDREI

Abstract

This scientific article examines the European Union's (EU) energy policy from the perspective of Romania, focusing on its unique position as a Central-Eastern European country. Against the backdrop of the 30-year anniversary of the Maastricht Treaty, the relevance and challenges of EU energy policy are explored in relation to Romania's energy landscape. The article analyses the current legislation, including the European Energy Charter Treaty¹, as well as the Energy Union initiative, which aims to improve energy efficiency, reduce import dependence, and stimulate economic growth. Additionally, it investigates the implications of the energy crisis triggered by the Russian–Ukrainian war on defining the “energy mix” and the extent of the EU's influence versus Member States' autonomy. The concept of solidarity, particularly regarding compulsory gas sharing, is examined through the lens of Western European, Central and Eastern European, and candidate countries, addressing the reasons behind sharing energy stocks. Furthermore, the article evaluates the contribution of Regulation (EU) 2022/869 and projects identified under Trans-European Networks to enhancing security of supply in the countries under review. Ultimately, this article offers insights into the complexities, challenges, and opportunities faced

1 Available at: https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en (Accessed: 10 October 2023).

Tamás Szendrei (2025) ‘The European Union's Energy Policy From the Perspective of a Central-Eastern European Country: Romania’. In: János Ede Szilágyi and György Marinkás (eds.) *Maastricht 30: A Central European Perspective*, pp. 633–651. Miskolc–Budapest, Central European Academic Publishing.

by Romania and the wider EU in shaping energy policies that promote sustainability, security, and cooperation.

Keywords: European Union Energy Policy, Romania Energy Perspective, Energy Security in the EU, Sustainable Energy Strategies, Energy Market Liberalization, Energy Diversification Strategies, Renewable Energy Targets, Romanian Electricity Sector, Nuclear Power in Romania, Hydro, Solar and Wind Energy in Romania, IPO, Energy Transmission Infrastructure, Energy Sustainability in EU, Security of Energy Supply

1. The European Union's Energy Policy

The main purpose of the European Union's energy policy is creating security, sustainability, and integrating the energy markets of the member states. The history of Europe's energy policy started with the European Coal and Steel Community, which was created in 1951 based on the principle of supranationalism, with the purpose of integrating Europe's coal and steel resources into one common market. It was established by the Treaty of Paris, and it was signed by Belgium, France, Italy, Luxembourg, the Netherlands, and the Federal Republic of Germany. The second important moment was the formation of the Euratom in 1957, focused on the collaboration on nuclear energy.

The European Union was founded in 1992, by the Treaty of Maastricht, which did not include a specific chapter on energy, this being rejected by member states with larger energy reserves, who wanted to retain their autonomy on this topic. In 1996, a directive was passed by the European Parliament, and another on the internal gas market in 1998. The directives stated that network operation and energy generation should not be done by a single company, and that separation would create competition in the area.

Even without including a specific chapter, the Treaty of Maastricht holds great significance in shaping the European Union's (EU) energy policy – as the treaty that established the framework for the EU and introduced the concept of European integration, it laid the foundation for increased cooperation among member states in various policy areas, including energy. The period around the drafting of the Maastricht Treaty coincided with pivotal developments in EU energy policy, which established rules and principles for energy cooperation, promoting the development of a stable and transparent energy market, notably the adoption of the European Energy Charter in 1991. Another essential development in that period was the Energy Charter Treaty established in 1994, currently having fifty-three signatories and contracting parties, focusing on four areas: the protection of foreign investments, based on the extensions of national treatment, or most favoured nation treatment;

non-discriminatory conditions for trade in energy materials; the resolution of disputes between participating states; and the promotion of energy efficiency.²

Directive 2001/77/EC, the first Renewable Energy Directive was passed in 2001 for promoting renewable energy use in electricity generation, in the context of the 1997 Kyoto Protocol against climate change. This directive set national indicative targets for renewable energy production from individual member states which were monitored by the European Commission. It included a target of doubling the share of renewable energy in the European Union's energy mix from 6% to 12% by 2010. The increase for the electricity sector was even higher, with a goal of 22%. Two years later, another directive increased the share of biofuels in transport.

In 2009, the 2020 climate and energy package was enacted in legislation, to ensure that the EU meets its climate and energy targets for the year 2020. This created the 20/20/20 objectives, binding for all EU member states: a 20% cut in greenhouse gas emissions (from 1990 levels); 20% of EU energy from renewables; and 20% improvement in energy efficiency.³ All these targets were met. According to European Economic Area (EEA) estimates, greenhouse gas emissions were 31% lower than in 1990. A 21.3% share of renewables was achieved, mainly due to the increased use of renewables for electricity, heating, and cooling. A 20% reduction in energy consumption was also achieved after the widespread lockdowns in 2020, due to COVID-19.⁴ New targets were set for 2030, focusing on a 55% reduction of greenhouse gas emissions in 10 years as part of the European Green Deal.

After the Russian invasion of Ukraine, the European Union's energy policy turned more towards decreasing the EU's dependency on Russian fossil fuels, adopting the REPowerEU policy package. This plan includes: increasing EU's 2030 target to 45% renewables in the EU mix, up from the current target of 40%; accelerating the rollout of photovoltaic (PV) energy, with a dedicated EU Solar Energy Strategy; introducing the European Solar Rooftop Initiative; aiming at doubling the current deployment rate of individual heat pumps; decarbonising the industry by accelerating the switch to electrification and renewable hydrogen; speeding up renewables' permit to minimise the time for the rollout of renewable projects and grid infrastructure improvements; increasing the EU's 2030 binding energy savings target to 13%.⁵ In May 2022, the European Commission launched calls for clean energy infrastructure projects to meet these targets set in the REPowerEU Plan, worth EUR 800 million.

The EU's competencies in energy policy are foreseen in Article 194 of the Treaty on the Functioning of the European Union (TFEU) which provides shared responsibility between EU member states and the EU in the case of energy policy. However, each member state has the right to decide on the conditions for exploiting its own

2 The Energy Charter Treaty, 2019.

3 The Climate and Energy Package, 2020.

4 European Environment Agency, 2021.

5 European Commission, 2022a.

energy resources, to choose between different energy sources and to define the general structure of its energy supply.

Currently, the energy system's legal framework is still incomplete, and it is not clear if the EU can meet the targets set out by the 2015 Paris Conference of the Parties 21 Agreement, considering that recent data show that carbon emissions increased in 2022.⁶ There has been too little innovation in the EU's energy policy, while old theories and methods still prevail.⁷

Within this context, as a Central-Eastern European country, Romania offers a unique perspective within the European Union's energy landscape. Situated at the crossroads of Eastern Europe, Romania possesses a diverse energy mix, including significant reserves of coal, natural gas, nuclear energy, and renewable energy sources. Its strategic location and rich energy resources place the country at the forefront of energy discussions within the European Union.

Romania's energy sector is key to its evolving economy and security policy. The country's electricity mix is one of the most balanced in the European Union, with coal, hydropower, fossil gas, nuclear energy and wind power, which will all be detailed separately. Based on 2021 energy statistics, the country's energy mix is composed of 36% coal and coal products, 30% natural gas, 14% oil and oil products, 30% renewable energy, and 8% nuclear energy.⁸

Romania is the 38th largest energy consumer in the world and the largest in Southeastern Europe, as well as an important producer of natural gas, oil, and coal. In terms of greenhouse gases, Romania is slightly greener than its neighbouring countries due to its hydroelectric, nuclear and growing number of wind power plants. In accordance with the opinion of European and international experts, the Romanian government encourages further greenhouse gas emission reductions through the strong support of nuclear power, as well as renewable energies.

In Romania, the project to update the national legislation on energy policy based on the Directive (EU) 2019/944 of the European Parliament and the Council of 5 June 2019 on common rules for the internal market, and also on Directive 2012/27/EU, started in September 2020, and was finalised with the passing of the Government Emergency Ordinance No. 143/2021 (*GEO 143*). This new normative act that was supposed to be ready by January 2021, came into force only on the last day of the year 2021. This complex process involved not only the work of the Ministry of Energy, a CMS team of expert lawyers from Romania and from the UK, but also the special advice and support of the state stakeholders ANRE, OPCOM and Transelec-trica. The GEO 143 introduced changes in the national legislation in different areas of electricity policy.

An important topic of the GEO 143 was the liberalisation of the electricity market, where bilateral transactions are freely negotiable outside the organised markets.

6 International Energy Agency, 2023.

7 Heffron, 2023.

8 European Commission, 2022b.

According to this, these energy markets are “markets for electricity, including over-the-counter markets and electricity exchanges, markets for the trading of energy, capacity, balancing and ancillary services in all timeframes, including forward, day-ahead and intraday markets”.⁹

It also introduces a significant change regarding all market participants' free choice to enter into directly negotiated electricity trading contracts. According to previous legislations, all electricity output was due to be sold via the exchange platform OPCOM. GEO 143 includes provisions regarding consumers' rights, which can now be parts of contracts with multiple suppliers and are provided with clearer information about offers and prices.¹⁰

Also, because of the current increases in energy prices across Europe, Romania's government put in place some measures to protect the consumers from the impact of the rising prices. On 7 September 2021, the Parliament passed a law to shield vulnerable consumers, on 4 October, the Minister of Energy announced compensation for electricity and gas bills, on 20 March 2022, the government imposed a one-year ceiling on electricity and natural gas prices, and on 11 April it announced a series of grants and vouchers to help vulnerable Romanians and key industries covered by EU funds.¹¹

2. Coal

About 20% of the electricity production in the European Union is based on coal, remaining a primary fuel in the European energy mix. It also provides jobs to around 230,000 people in mines and power plants in 11 member states.

In order to meet the target of reducing CO₂ emissions by at least 55% by 2030, the EU is transitioning to cleaner forms of energy and innovative technologies in this area. The total coal power generation has already dropped by approximately a third in the European Union since 2012, with mines closing down and power plants being decommissioned. However, one of the European Green Deal's targets is making Europe the first climate-neutral bloc in the world by 2050. Aiming to achieve this goal, the Commission adopted the Just Transition Mechanism in January 2022 as a regulation, to ensure that this transition towards a climate-neutral economy transpires in a fair way. This includes not only tailored financial and practical support,

9 European Commission, 2022a.

10 Radu, Dulamea and Diaconeasa, 2022.

11 Sgaravatti, Tagliapietra and Zachmann, 2021.

but it also helps the affected workers, and generate the necessary investments to areas particularly affected, like the EU coal regions.¹²

While we recognise coal production's importance in the European Union, we also understand the necessity of these regulations in the EU's plan, considering that producing energy using coal can be replaced with newer technologies that are less polluting. Some member states are already coal-free, some of them announced the future elimination of coal production, while some of the member states haven't taken any steps to reach this goal. Coal-fired power stations produce an immense amount of carbon dioxide, which contributes highly to climate change. In order to reduce this amount, another strategy of the European Union is the Green Taxation method, which is a set of taxes on energy, transport, pollution and resources, including a special tax for CO₂ emissions.

In Romania, coal production is slightly above the European Union average. Due to the pandemic-induced worldwide crisis, in the first five months of 2020, coal production decreased by 41%, while oil production dropped by 20%, according to the National Institute of Statistics. In 2022, coal production and consumption in the EU reached 349 million tonnes, and 454 million tonnes, respectively¹³. Romania produced approximately 1,308 million tonnes, becoming the fifth largest coal producer, after Germany, Poland, The Czech Republic, and Bulgaria.

The role of traditional fuel such as oil, natural gas, coal, and uranium in the energy mix is currently being reconsidered according to European Union-led new context and trends, like the EU Green Deal. Romania produces pit coal and lignite and operates several coal-fired power plants, all needing upgrades in the immediate future in order to comply with European Commission's guidelines. In June 2022, Romania's government adopted new legislation¹⁴ focusing on the country's decarbonisation and replacing traditional fuel with renewable and low-carbon energy sources, including clean hydrogen. The decarbonisation law is one of the milestones in Romania's National Recovery and Resilience Plan (*NRRP*) that had to be completed by the end of 2022 for Romania to receive the second tranche of EU recovery funds.

The country announced a new deadline for the definitive closure of coal-fired power plants and the total elimination of coal from the energy mix, setting it at the end of 2032. The cessation of the mining activity and the restoration of the environment will be accomplished based on the provisions of the Mining Law no. 85/2003, with subsequent amendments, additions, and directly applicable rules.¹⁵

12 Available at: https://energy.ec.europa.eu/topics/carbon-management-and-fossil-fuels/eu-coal-regions-transition_en (Accessed: 10 October 2023).

13 Eurostat, 2023.

14 Government Emergency Ordinance 108/2022 regarding the decarbonization of the energy sector was approved as Law 334 on December 5, 2022.

15 Bobei, Vasile and Ciolea, 2022, pp. 59–64.

3. Oil and Gas

According to the European Union's energy policy, national governments have control over oil and gas resources in their territories. Member states can determine the areas in which companies can search for and extract these resources. However, to get licenses for these areas, companies must follow a set of common EU regulations to ensure fair competition. These licensing rules for oil and gas production are set out in the Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration, and production of hydrocarbons. These common rules include the following: at least 90 days before the application deadline for a new license, an EU country must publish all relevant information about the license in the Official Journal of the European Union; licensing must be open to all interested companies and EU countries must grant licenses in a fair, competitive, and unbiased way; when granting licenses, EU countries can take into account issues such as national security, public safety, public health, security of transport, the protection of the environment, the protection of biological resources, or the planned management of hydrocarbon resources.¹⁶

On the territory of Romania, oil production goes back to 1857, but it became an important strategic country for its oil production in Europe during World War II. Once a significant player in the global oil industry, today Romania has relatively modest oil production and reserves, compared to other countries in the European Union – with high potential in the present. The most important oil refineries in the country today are: Petrobrazi Refinery (Petrom/OMV) in Ploiești, Petrotel Lukoil Refinery (LUKOIL) in Ploiești, Petromidia Constanța Refinery (Rompetrol) in Năvodari, Vega Ploiești Refinery (Rompetrol) in Ploiești, and Petrolsub Suplacu de Barcău Refinery (Petrom/OMV) in Suplacu de Barcău. The majority of petrochemical processing plants have been closed down, the remaining ones are KazMunayGas: Petro-midia, Chimcomplex, and Oltchim.

On the other hand, Romania was the first nation to employ natural gas for industrial purposes and has the largest natural gas market in Central Europe. The country also has the second largest natural gas reserves (except Russia) behind Ukraine, but twice as large as that of Poland. Being the second largest gas producer in the European Union, having sizeable reserves, including those recently found in the Black Sea, Romania is the nation in the region with the lowest reliance on imported natural gas. The country has proven natural gas reserves of 762 billion cubic meters and is ranked 30th among countries with proved reserves of natural gas. The majority of its natural gas reserves are located in Transylvania, in Sibiu and Mureș counties.

The production of Romania's natural gas is dominated by two very large companies: Romgaz and Petrom, with a market share of 51.25% and 46.33%, respectively. Several smaller companies are also present, such as Aurelian Oil&Gas with a

16 European Parliament and Council, 1994.

market share of 0.38%, Amromco with a market share of 1.85%, Lotus Petrol with a market share of 0.13%, and Wintershall with a market share of 0.06%.

Romania supports a long-term perspective of natural gas in the European Green Deal, because it forecasts that this resource will remain an important tool in changing the energy sector and transitioning to a more sustainable and carbon-free economy. Over 14,200 kilometres of pipes and gas connections transport natural gas, these are owned by Transgaz SA, while Conpet SA owns and is in control of the oil transporting infrastructure of Romania. Both joint stock companies are owned in majority by the Romanian state, and are listed on the Bucharest Stock Exchange (BVB).

Onshore natural oil and gas production in Romania is provided by traditional producers such as Romgaz SA, OMV Petrom SA, Amromco Energy SRL, Mazarine Energy Romania, Raffles Energy SRL, and Stratum Energy Romania. Romgaz SA and OMV Petrom SA are also companies listed on the Bucharest Stock Exchange, having the largest proportion in the BET index.¹⁷ However, with the current listing, Hidro-electrica SA will become first in this regard.

The newly discovered gas reserves in the Black Sea boosts Romania's energy independence narrative and is waiting for the adoption of legislation on offshore investments.¹⁸ OMV Petrom and Romgaz will exploit the recently discovered Neptune Deep gas field, which covers 7,500 square kilometres at a depth of 100-1,000 metres in the Black Sea, 160 kilometres offshore. This will require a major infrastructure investment – estimated at around €40 billion – to be built. This has just been announced recently, and Romania's now former Prime Minister Nicolae Ciuca encouraged every Romanian citizen to buy OMV Petrom and Romgaz shares. According to OMV Petrom, the natural gas from the Neptune Deep block could contribute to Romania's energy security and energy transition. Furthermore, Neptune Deep will boost the economic development of the country, bringing additional budget revenues and boosting the development of projects in related industries. In March 2023, OMV Petrom and Romgaz signed a contract with Transgaz for the transport of natural gas from the Black Sea, and in June they approved the development plan for the Domino and Pelican South commercial fields. The first cubic metres of natural gas are expected to be extracted and entered into the national transmission system in 2027.¹⁹ In addition to the Neptune Deep, Romania can diversify its energy supplies with the Midia Natural Gas Development Project of Black Sea Oil and Gas.

In accordance with Directive 2009/73/EC, the national natural gas market is now 100% open which means that customers can choose their suppliers and arrange direct sales-purchase agreements. In order to reach its 2030 renewables target of 30.7%, Romania plans to add around 7GW of new capacity, of which around 3.7 GW is planned to be solar projects. In terms of energy consumption, in 2019, little over

17 Bursa de Valori București, 2023.

18 Buzogány and Davidescu, 2022.

19 OMV Petrom Conference, 2023.

of 24% energy consumption originated from renewable energy sources, ranking the country 10th in the European Union and above the Union's average level.

4. Electricity

In the European Union, the largest share of power and electricity generation is made up by renewables, followed by fossil fuels, and nuclear energy. However, the percentage of renewable energy and other types of energy used to produce electricity is different in each member state. Following Russia's aggression against Ukraine, there has been a significant impact on the prices of fossil fuels in the European Union. This affected mostly gas, which led to higher prices for Europeans' electricity bills.

In the European Union, 2,641 TWh (terawatt-hours) of electricity were produced in 2022, 40% of this coming from renewable sources, 38.6% from fossil fuels (gas: 19.6% and coal: 15.8%), and 20% from nuclear power.²⁰ The percentage made from renewable energy sources will continue to grow every year, as the EU has committed to become climate neutral by the year 2050. The member states' electricity mix differs significantly, ranging from 93% of the electricity produced from renewables in Luxembourg, to only 13% in Malta. Romania is situated around the middle of the list, with 45% of its electricity being produced from renewable energy sources in 2022.

The EU's legal framework for the electricity market is based on the principle that competitive markets create the most efficient economical balance between supply and demand, based on Article 7 of the Electricity Market Directive that obligates states to adopt a non-discriminatory, objective, and transparent authorisation procedure for the construction of new generation capacity.²¹

In March 2023, the European Commission presented a legislative proposal to reform the energy market and to protect Europeans in the future from similar price shocks to the one caused by Russia's invasion of Ukraine. New emergency rules were made to allow member states to support their citizens and companies by cutting energy costs. Measures to cut down energy bills are the following: obligating EU countries to reduce electricity use, capping revenues of electricity producers, and securing a solidarity contribution from fossil fuel businesses.

In Romania, the main electricity producer companies are owned by the state, but there are still some privately operating businesses, too. The country has been mainly focused on developing nuclear power generation. The most important electricity sources are the following: Cernavodă Nuclear Power Plant with a 2x700 MW

20 European Council, 2023.

21 Huhta, 2017, pp. 7–14.

installed capacity for units 1+2, ensuring approximately 20% of the total energy mix; 208 hydropower and pumping plants with a 6.4 GW installed capacity ensuring more than 36% of the energy mix; and six coal-fired power plants, two within the Hunedoara Energy Complex, which is currently under insolvency, that intends to provide 1-3% of the national energy mix, and four within the Oltenia Energy Complex, providing 20% of national electricity production. These were established after the reorganisation of RENEL, the successor of the Ministry of Electricity from the communist regime.

In 2022, almost 50% of generated power had renewable resources. After fossil fuels, the second most important source of electricity generation in Romania is hydroelectricity, which accounted for 25% of production in 2022, with the main provider being Hidroelectrica. In the year 2022, wind power accounted for 12% of electricity generation, while solar technologies accounted for 3%.²²

5. Nuclear Energy

Nuclear energy represents a very important component in the European Union's energy mix, accounting for around 21% of the energy produced. Producing nuclear energy has been the topic of controversy for years now, as member states' point of view differs. In the aftermath of the 1986 Chernobyl disaster and the nuclear catastrophe in Fukushima, Japan in 2011, it was made clear that nuclear energy can be very dangerous, and that eliminating it can reduce these threats to the European society. Germany's decision to phase out the total nuclear industry from its territory has led to discussions about the abandonment of nuclear power in the European Union. On the other hand, nuclear energy proves to be an efficient low-carbon alternative for fossil fuels, that can help the European Union achieve their goal of being a greener continent.

The legal basis of nuclear energy production in the European Union is the Treaty establishing the European Atomic Energy Community (EURATOM Treaty), which includes separate articles on the nuclear common market, respectively the Nuclear Safety Directive 2009/71/Euratom, and its amendment, 2014/87/Euratom. Based on these regulations, EU member states can choose whether to include nuclear power in their energy mix or not. At the same time, if a member state chooses to utilise this method of energy production on its territory, the EU provides a set of safety standards of nuclear power stations ensuring that nuclear waste is safely handled and disposed of. The EU chooses to pay extreme attention to these safety regulations, as the aftermath of a nuclear catastrophe in any member state can have negative consequences across the whole continent and beyond. These regulations require EU

²² Fleck, 2023.

countries to submit national reports on addressing and implanting the directive and its obligations.

After the 2011 Fukushima accident, all EU nuclear plants carried out safety tests, so-called stress tests to check whether the safety standards used when specific power plants received their licenses were sufficient to cover unexpected, extreme events like earthquakes, floods, terrorist attacks, or aircraft collisions. Some of these power plants were found to require further improvements, but generally the tests proved that in the EU nuclear power plants were safe. The implementation of these kinds of tests remains a national responsibility and is ensured by operators and national regulators.

Another important topic is the waste management of the nuclear energy producing process. For this reason, a legal framework was created in the EU in 2011 with the adoption of Council Directive 2011/70/Euratom, focusing on the safe management of spent nuclear fuel and radioactive waste. Member states must submit national reports every three years on the implementation of this directive.

The EU also operates the European Community Radiological Information Exchange (ECURIE), which is a notification system in case of a radiological or nuclear emergency. This was implemented after the Chernobyl disaster, and signed by all 27 member states, as well as Switzerland, Norway, and North Macedonia. Iceland, Montenegro, Serbia, and Turkey have also been invited to join.

Today, approximately a quarter of the electricity and half of the low-carbon electricity in the Union is generated by nuclear energy. Currently, there are eight European countries that are building new reactors, or seriously considering the building of new nuclear power plants: France, Finland, Slovakia, United Kingdom, Poland, Hungary, Romania, and the Czech Republic. On the other hand, some countries like Germany, Austria, Portugal, Denmark, and Luxembourg are urging the European Commission to keep nuclear power out of the EU's green finance taxonomy.

Romania ranks 24th in the world for the highest use of nuclear power, with 1,400 MW of nuclear capacity produced by one active nuclear power plant, the Cernavodă Nuclear Power Plant (NPP), with two reactors.²³ The two reactors in operation supply approximately 20% of the total energy production in the country. With the production of nuclear energy, Romania reduces its greenhouse gas emissions by more than 10 million tonnes each year. Three more reactors exist on the same site, but their construction was discontinued at the fall of the communist regime in 1990. Currently, there are plans in cooperation with the United States of America, Canada, and France to make another two of these reactors functional by 2030 and 2031. The Cernavodă Nuclear Power Plant is owned by Nuclearelectrica SA, a company under the authority of the Ministry of Energy. The state owns 82.49% of the shares, while other shareholders have 17.50% after listing the company at the stock exchange in 2013.

23 World Nuclear Association, 2023.

The Romanian Government supports nuclear energy, and is having discussions about expanding the current nuclear system in the country. This is based on the government's commitment to phase out coal by the year 2032 as part of the European Green Deal, looking at nuclear energy as an effective replacement that will play an important role in Romania's energy mix for years to come. The country has a long tradition and deep nuclear expertise gained through the construction, commissioning, and safe operation of Units 1 and 2 of the Cernavodă Nuclear Power Plant (NPP), and other nuclear facilities such as the heavy water plant, the nuclear fuel plant, research institutes, engineering and advanced physics centres and education.

In Romania, the general legal framework in the field of nuclear activities is outlined in Chapter VIII, Regime of Nuclear activities (Art. 45–48) of GEO 195/2005 on environmental protection. This sets out the rules for obtaining the authorisation and the environmental permit to start nuclear activity. The legislation also contains the central public authority's primary obligations for environmental protection, more specifically: organising the monitoring of environmental radioactivity throughout the country; supervision, control, and taking of the necessary measures in the field of nuclear activities, in order to comply with the legal provisions on environmental protection; the obligation to cooperate with the competent bodies in disaster protection, the protection of public health and the environment. It also sets out the obligations of authorised natural and legal persons performing these activities. The most important obligations are the following: assessing the potential risk, requesting and to obtaining the environmental permits, applying the procedures and providing the equipment for new activities, monitoring the radioactive contamination of the environment, and more.²⁴

6. Renewable Energy

The European Union's future plans for energy production all focus on the importance and increasing role of using renewable energy. The EU's strategy for 2030 sets a target of at least 32% of gross final energy consumption from renewable sources. While in 2004 this made up only 9.6% of the EU's energy mix, it reached 22.1% in 2020, but fell to 21.8% in 2021.²⁵

To ensure that the European Union's targets in integrated energy and climate policies are met, EU legislation requires each member state to draft a 10-year National Energy and Climate Plan (NECP), setting out how to reach its binding national targets, such as reducing greenhouse gas emissions by at least 40%, increasing energy efficiency by at least 32.5%, increasing the share of renewable energy to at

²⁴ Duminica, Ramona and Popescu, 2022, p. 52.

²⁵ Eurostat, 2023.

least 32% of energy use, and guaranteeing at least 15% electricity inter-connection levels between neighbouring member states.

The European Green Deal, launched by the EU at the end of 2019, aims to make Europe the first climate-neutral continent in the world by 2050. Its main target is to reduce emissions by 55% compared to the 1990 levels, including renewable energy as much as possible, in all member states by 2030. The legal framework for the development and usage of renewable energy in the European Union is the European Renewable Energy Directive (RED) which establishes common rules for the promotion of clean energy, and also sets mandatory targets for renewables. With this legislation going through different revisions, the target was raised to 40% renewables by 2030, and later it was pushed further to 45%, with additional changes expected to be introduced in the future. It also establishes how entities can claim renewable energy use by using Guarantees of Origin, which exist with the purpose of proving that the final energy was in fact produced from renewable sources. Another component of the legislation that builds the renewable energy's legal framework in the EU is the Electricity Markets Directive (2009/72/EC) which requires European suppliers of electricity to disclose information on CO₂ emissions and radioactive waste regarding the fuel supplied by them, so that consumers can choose not only based on the product's price, but also based on its production. The European Union Energy Roadmap 2050²⁶ includes renewable energy production targets on the road to decarbonisation, with scenarios targeting an 80% reduction in greenhouse gases and an 85% decline in CO₂ emissions from energy production. The EU Taxonomy is also a great way of encouraging investors and consumers to make more environmentally positive choices by increasing transparency and informing the society.

Renewable energy is becoming an increasingly popular and appealing topic in Romania. Based on the plan adopted by the country to reach its 2030 renewables target of 30.7%, it plans to add approximately 7 GW of new capacity that includes 3.7 GW of energy made from solar projects. In 2019, 24% of energy consumption in Romania originated from renewable sources, which ranked the country 10th in the European Union, above EU member states' average level.²⁷

Romania has expedited its decarbonisation goals to 2030 from 2050. Renewable energy sources, nuclear power, and natural gas, as a transitional source, form the backbone of Romania's energy transformation. Investments needed to achieve the objectives of the Romanian Energy Strategy are estimated at EUR 127 billion overall from 2021 to 2030 (annually around 6% of current GDP), mostly in energy demand sectors. At the same time, Romanian authorities have allocated a budget of EUR 457.7 million for a new renewables procurement practice. Selected wind and solar projects will be granted rebates ranging from EUR 0.425 million to EUR 1.3 million per MW installed.²⁸

26 European Commission, 2011.

27 URBIO, 2020.

28 International Trade Administration, 2022.

The Romanian Government is supporting rooftop PV deployment via its Casa Verde Fotovoltaice (green PV home) scheme for residential solar installations, under the national net metering regime, that by the end of 2020 resulted in 1.39 GW of solar installed in the country. The use of Regenerable Sources of Energy (RES) is also promoted through a Regional Operational Program (ROP) for installation of photovoltaic systems for electricity production, in relation to covering the necessary consumption and delivery of surplus in the national network.

Another perspective worth taking is Romania's promising biomass potential and the numerous ongoing projects focusing on this. On the other hand, the sustainability of the Romanian biomass is vexing, since the country increased its production of liquid biofuels, biogas, conventional biofuel, and biodiesel.

At the same time, there seem to be good opportunities regarding wind energy, since the Romanian Association for Wind Energy (RWEA) launched RESInvest, a program that helps investment opportunities in this area based on an EU funded capacity of 3,000 MW.²⁹ This means that in the future there could be significant companies relocating to Romania, manufacturing equipment for renewable energy installations and training qualified personnel for the operation, maintenance, and repair centres.

However, the main category of renewable energy production in Romania is clearly hydropower energy. Hydroelectricity is the second most important source of electricity generation in the country, after fossil fuels. With the country's abundance of rivers, the hydropower potential in Romania is even greater than that used currently, the estimated additional potential countign for more than 9 GW.

The Romanian hydro power plants are owned by Hidroelectrica SA, a leading company in electricity production and the main provider of technological services required in the National Energy System in the country. Hidroelectrica SA is also the most valuable company in Romania right now, EUR 10.3 billion, according to Fondul Proprietatea's latest valuation, as of Hidroelectrica SA's IPO in July 2023.³⁰

The minority shareholder next to the state, Fondul Proprietatea (which is also partly owned by the Romanian state) decided to go public and list the shares of Hidroelectrica. The Initial Public Offering (IPO) that unfolded on the Bucharest Stock Exchange (BVB), through which Fondul Proprietatea sold its entire 19.94% stake in Hidroelectrica shares for 9.28 billion RON (1.87 billion EUR), was the largest in Europe and the third largest in the world in 2023.

The company's shares debuted at the Bucharest Stock Exchange with an initial price of 104 RON (€21.87) per share, and the valuation rose during trading due to strong investor demand.

This event foresees positive changes for Romania, it is expected to significantly increase its stock market and its liquidity. Hidroelectrica's IPO will bring Romanian assets to the attention of large international investment funds. Never before have

²⁹ Ibid.

³⁰ Also other financial details see: Bursa de valori București, 2023.

foreign institutional investors been offered the opportunity to make such a large bet on Romania. At the same time, Hidroelectrica has a history of continuous growth, with record profits in recent years from the rise of electricity prices. It's also the biggest power producer company in Romania, a country that currently faces an electricity deficit, which makes it a rather safe bet. Moreover, Hidroelectrica's capacities are mostly hydropower plants, which fit well into the EU drive to lower CO₂ emissions. On the other hand, other listed Romanian companies could benefit from this, because after a major investment fund buys Hidroelectrica shares, it will start looking more closely at what other Romanian assets are available. In particular, energy companies such as Nuclearelectrica, OMV Petrom, and Romgaz could also get to see a boost of interest from investors. In addition, Hidroelectrica's IPO is also a perfect opportunity to boost Romanian people's interest in the stock market.

The number of Romanian individual investors buying stocks on the Bucharest Stock Exchange has remained relatively low in recent years, in spite of the positive market evolution. The current number of trading accounts on the Bucharest Stock Exchange is lower than 100,000. By comparison, some estimates indicate that around one million Romanians may be investing in cryptocurrencies, however, the current economic context with high inflation and significant corrections for risky assets could determine more local investors to look at safer alternatives. Lastly, the IPO of Hidroelectrica is also good news for the pension of Romanian citizens. While the number of individual investors on the Bucharest Stock Exchange is low, over 7 million Romanians are indirectly investing in Romanian stocks through pension funds. The seven mandatory pension funds currently manage assets worth around EUR 19 billion, and they are constantly on the lookout for more investment options.

7. Energy Transmission

From the European Union's point of view, improving cross-border energy interconnections is an important area to improve. Having different resources and different climates, member states produce different types of energies, that need to be transmittable across countries. With a system focused on this, countries in need could easily get power from states with energy surpluses. This is also important when a power plant fails, or during extreme weather conditions, that EU countries are able to rely on their neighbours to import the electricity they need. Without a good transmission infrastructure, it would be impossible to buy and sell electricity across borders. For this purpose, the European Union set an interconnection target of at least 15% by the year 2030, to encourage EU countries to interconnect their installed electricity production capacity. To achieve this target, the European Commission set up an expert group on electricity interconnection in 2016, which is made up of 15 experts from industry organisations, academia, and NGOs, as well as the

Agency for the Cooperation of Energy Regulators (ACER), and the European Networks of Transmission System Operators for Electricity and for Gas (ENTSO-E and ENTSOG). This group's mission is to provide technical advice and to present reports, including on the interconnection capacity in the EU, and the public acceptance of the implementation. The 2030 target proposed to be implemented by the Commission was based on this group's recommendations, as outlined in the Communication on strengthening Europe's energy networks.³¹

Taking a look at the electricity transmission system in Romania and the interconnection system with its neighbouring countries, it becomes evident that it is managed and operated by one company, Transelectrica SA. Transelectrica SA is the only operator providing the services of electricity transmission of the Romanian Power System and electricity market administration, such domains being considered as a natural monopoly under the law. The company is majority state-owned.

Activities like the generation or distribution of electricity are totally segregated from the transmission system and the system operational services. The power generated is transmitted from the producer to the consumer in a safe way, the act of electricity transmission is carried out through the power grid, using overhead and underground power cables. The distribution network delivers high (110 kV), average (20 kV), and low (0.4 kV) voltages, whereas the transmission network delivers the highest voltages (220 and 400 kV).

The five major electricity suppliers that are active in Romania are Enel Energie Muntenia, Enel Energie, CEZ (currently Macquarie Infrastructure and Real Assets – MIRA), Electrica, covering different regions, and E.On. As of July 2021, there were 176 licensed gas suppliers and licensed electricity suppliers, 14 of these licensed for both. In 2019, over nine million users were connected to power grids through eight licensed distribution system operators (54.72% in urban areas: e-Distributie Muntenia, e-Distributie Banat, e-Distributie Dobrogea, Distribuție Energie Oltenia, Delgaz Grid, SDEE Muntenia Nord, SDEE Transilvania Nord, SDEE Transilvania Sud).

8. Conclusions

To sum up the information presented, Romania's perspective regarding the European Union's energy policy is shaped by its own energy challenges and aspirations. The country has made significant strides in recent years to align its energy sector with the standards and objectives implied by the European Union. It has prioritised

31 European Commission, 2017.

energy diversification, increased renewable energy deployment, and improved energy efficiency. Moreover, Romania's energy policy is influenced by its historical energy dependence, particularly on Russian natural gas, and its efforts to enhance energy security through alternative supply routes and sources, an ambition which was amplified by the Russian–Ukraine conflict.

The country's rich energy resources, commitment to diversification, and active engagement in regional cooperation all provide a solid foundation for its continued contributions to European Union's energy landscape. By seizing opportunities for collaboration, both within the European Union, and with neighbouring countries, Romania can enhance its own energy security while advancing the broader goals of the European Union's energy policy framework. Together, through cooperation and shared responsibility, Romania and the European Union can build a sustainable and resilient energy future to the benefit of all.

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THE EU'S ENERGY POLICY FROM THE PERSPECTIVE OF A CENTRAL-EASTERN EUROPEAN COUNTRY: HUNGARY



MIKLÓS VILMOS MÁDL

Abstract

Despite the fact that two of the fundamental treaties of the European Union, namely the ECSC and the EURATOM, concerned the energy sector, the following decades were characterised by a great deal of reluctance towards strengthening and deepening the community's role in the sector. This was partially due to the fact that electricity is a particular product: it is challenging to store, its price depends on how it is produced, and most importantly, for those who are dependent on it, it cannot be substituted. Because of these features, the electricity sector of the European states were dominated by vertically integrated state-owned monopolies where the same companies were responsible for generating and distributing electricity. In spite of the difficulties, the liberalisation of the energy sector began in 1996, and four energy packages were adopted, each of which has tried to address the shortcomings of the previous one. In this article, we will focus on the liberalisation of the European electricity sector by first discussing the rough road that led up to the first package; then, we will attempt to give an overview of each of the packages, followed by an elaboration on how these were implemented in the Hungarian legislation. As the extent of the success of the electricity sector liberalisation is a debated topic, we will also touch upon the issue of whether the market opening reached its goals or not, what are the potential barriers and what we can expect in the future.

Keywords: EU energy law, electricity, market opening, Hungarian electricity regulation, liberalisation

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1. Introduction

Energy and electricity play an essential role in obtaining our current standard of living, and they are crucial to any further development. Even though the Human Development Index¹ has flaws and is not a perfect indicator for assessing a country's development, when we analyse its health dimension by also taking into account the electricity consumption per capita, we can see a clear connection between electricity consumption and life expectancy.² Besides our longer life expectancy, electricity also plays a crucial role in education as access to electricity at schools and homes significantly improves education and combats illiteracy.³ Moreover, a cheap and stable energy flow is essential for economic prosperity, as it was realised by the founding fathers of the Community after the end of the Second World War. Subsequently, two of the fundamental spheres of integration, the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom), concerned the energy sector.

We can safely say that the European Union was founded on the pillars of energy. Despite this, the following decades were characterised by a general reluctance to strengthen and deepen the community's role in the sector. This unwillingness had multiple reasons, of which one is the sheer nature of electricity. Electricity was and still is a particular product: it is challenging to store; its price depends on how it is produced, and most importantly, for those who are dependent on it, it cannot be substituted. Because of these features, the electricity sector of the European states were dominated by vertically integrated state-owned monopolies where the same companies were responsible for generating and distributing electricity.⁴ In the sector, the states had a very dominant monopolistic position; they did not have significant interconnections with each other, and the idea of market opening was not beckoning for them. Due to these issues, it was clear that the mere abolishment of trade restrictions would not be enough, and there was a need for ideological and infrastructural reforms.⁵ Even though there were many challenges, the liberalisation of the energy sector (gas and electricity) began in 1996, and four energy packages were adopted. In this paper, due to the length constraints, we will limit ourselves to exclusively discussing the liberalisation of the electricity sector, however, it worth to be noted

- 1 Human Development Index (HDI) of the United Nations is a simplified indicator of human development that encapsulates three key areas, namely life expectancy, education, and standard of living.
- 2 Zohuri, 2016, p. 19.
- 3 Kelly et al., 2023, p. 27.
- 4 Rotaru, 2013, p. 101.
- 5 Talus, 2013, p. 99.

that the almost simultaneously adopted directives⁶ in the gas sector entailed a very similar liberalisation process.

We will analyse the liberalisation of the European electricity sector by first discussing the rough road that led up to the first package; then, we will attempt to give an overview of each of the packages, followed by an elaboration on how these were implemented in the Hungarian legislation. As the extent of the success of the electricity sector liberalisation is a debated topic, we will also touch upon the issue of whether the market opening reached its goals or not, what are the potential barriers and what we can expect in the future. This article is intended to provide the reader with a greater understanding of the electricity market liberalisation while also highlighting some of the specific challenges Hungary faced during the transformation of its electricity sector.

2. The European electricity sector before the first liberalisation package

As it was mentioned, the energy sector was one of the most fundamental uniting aspects when establishing the community. In 1952, the Paris Treaty was adopted, establishing the ECSC that created a common market for coal, which was by far the most crucial energy source at that time by constituting 80% of the energy mix. Just a few years later, in 1957, the Rome Treaty was adopted, establishing the Euratom. Euratom aimed to facilitate and spread the peaceful use of nuclear energy as, back then, it was perceived to be the energy of the future. Even though these two initial steps concerned the energy sector, no common energy policy and rules on general public services were achieved as the member states kept their sovereignty in the area. This reluctance carried on to the following decades, and the member states stayed with their own approaches in the field.

The first small steps towards closer cooperation came after the 1973 oil crisis when the Commission set up a common energy strategy that focused on combatting the insecure supply by establishing an emergency system.⁷ Despite its existence, in reality, the emergency system was not used as the member states rather relied on the emergency oil-sharing system of the International Energy Agency.⁸

6 Directives of the gas sector: Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC.

7 Lehotay, 2020, p. 264.

8 Penttinen, 2021, p. 81.

The still-existent unwillingness of the member states to strengthen the community's role in the energy sector was further proven by the 1986 Single European Act. At its creation, member states explicitly stated that the community should not take any roles concerning energy policy.⁹ Furthermore, due to the unclear provision on the environment, a declaration was attached to the document that stated, that 'The Conference confirms that the Community's activities in the sphere of the environment may not interfere with national policies regarding the exploitation of energy resources'.¹⁰

The next stage we would like to highlight from the path towards the first directive is the 1988 Commission Working Document on the Internal Energy Market. In it, the Commission rightly noted that in the preceding two decades, there has been minimal progress towards a common market in energy. It supported the idea that a more integrated energy market is vital for the future success of the community as it can reduce the cost of energy and, at the same time, it could benefit the environment.¹¹ Despite the ambitious reasoning of the Working Document, it did not achieve a significant change as Member States were not willing to give up their monopolies.¹²

From the beginning of the early 90's, certain European countries such as the United Kingdom, Sweden, and Norway opted for liberalised market structures that served as examples for the whole community.¹³ In this changing climate, a set of directives were adopted, which alone did not entail a giant leap toward the open market; still, in essence, they provided the basis for future liberalisation. These directives were the 90/547/EEC directive on the transit of electricity through transmission grids and the 90/377/EEC directive concerning the transparency of gas and electricity prices. The former one facilitated the transit of electricity by involving the Commission in the transit license granting procedure in order to ensure that the decisions on transits were non-discriminatory. According to the directive on the transparency of prices, certain industrial end users had to communicate information on the purchase price of electricity and gas to the Statistical Office of the European Communities. The disclosure of the industrial end prices was essential from the perspective of an open market as the transparency of the tariffs enhances the change of supplier.¹⁴

Before we get to the discussion of the first liberalisation package, it is worth highlighting that at the time of adopting the first package, energy issues lacked their specific legal basis. In the 1992 Maastricht Treaty, there were attempts to include a particular chapter on energy; nevertheless, in the end, it was unsuccessful.¹⁵ Subsequently, the treaty only briefly addressed the issue of energy under the

9 Hancher, 1990, p. 219.

10 Single European Act: declaration on article 130r of the EEC Treaty.

11 Working Paper: The Internal Energy Market COM(88) 238 final of 2 May 1988.

12 Vasconcelos, 2015, p. 19.

13 Pollitt, 2018, p. 2.

14 Kondorosi and Alföldy-Boruss, 2022, pp. 49–50.

15 Thaler, 2016, pp. 574–575.

umbrella of the trans-European networks and the environment.¹⁶ This lack of established legal basis provided the community with minimal options to regulate in the sector, meaning they had to rely on other bases such as competition rules.¹⁷ The issue of the legal basis was resolved with the Lisbon Treaty, but the effectiveness of the liberalisation packages up until that point was hindered by the lack of a dedicated legal basis.

In the years before the adoption of the first package, the Commission made several proposals regarding the liberalisation and third-party access to electricity grids; however, these were met with various reactions, most of which were sceptical, especially from the side of Germany and France. Nevertheless, in 1995, the number of countries in favour of changing the status quo was growing, and finally, Germany and France came to a compromise; subsequently, the first package was adopted.¹⁸ The reasons behind this success were that the concept of the monopolistic market structure was questioned, the increasing interest in the environment required massive investments, certain customers felt that the prices were irrationally high, and finally, the corruption scandals in the sector promoted dissatisfaction.¹⁹

3. The first 1996 energy package

Following the discussion of the attempts at the energy market opening, we can now elaborate on the first energy package and its provisions on electricity. Lacking its specific legal basis, the 96/92/EC directive concerning the common rules for the electricity market was based on Article 100a of the Treaty Establishing the European Community. This article, within the common rules of competition, taxation, and approximation, provided an opportunity to implement measures in order to establish the internal market. This first directive concerned the whole electricity chain and served to create a competitive internal market while ensuring the security of supply and addressing environmental concerns. In the following, we will highlight some of the novel features of the directive.

Regarding the establishment of new generating capacity, the states could choose between an authorisation and/or a tendering procedure, granted that these are objective, transparent, and non-discriminatory. Notwithstanding the two options, in practice, the states have all opted for the authorisation procedure.²⁰

¹⁶ Maastricht Treaty: Art. 129b, Art. 130s.

¹⁷ Csákó, 2006, p. 11.

¹⁸ Eising, 2002, pp. 93–95.

¹⁹ Penttinen, 2021, p. 82.

²⁰ Fazekas and Németh, 2022, p. 92.

The directive requires the designation of both transmission (TSO) and distribution (DSO) system operators, and it sets the basic rules for their responsibilities; most importantly, it requires them not to be discriminatory when providing access to the grids.

The next thing worth mentioning is the issue of third-party access (TPA), which enables competitive suppliers to enter the national energy markets. With regards to third-party access, the directive provides three possibilities: negotiated third-party access (in this case, generators and retailers negotiate with the TSO/DSO), regulated third-party access (access is granted based on a tariff), and the single-buyer option (in this case one legal person is designated to purchase on the territory of the system operator).

One of the most essential features of the directive is its rules on unbundling. According to this, vertically integrated companies had to keep separate accounts for their generation transmission and distribution activities to avoid discrimination or distortion of the competition.²¹

For opening the markets, the directive set up a staggered system where firstly, in 1999, the markets opened for large industrial consumers racking up consumption of more than 40 GWh per year, then a year later, the threshold was reduced to 20 GWh per year and in 2003 it had to be lowered to the annual consumption of 9 GWh.²²

If we evaluate the first electricity directive, we can safely say that it resembled a framework more than a strict regime. Member states were provided with a great deal of discretion in opening their markets, and the states who were not so keen on liberalisation could more or less keep their monopolies intact.²³ On the other hand, a significant number of member states went beyond their limited obligations and opened their markets to a greater extent.²⁴

3.1. The implementation of the first energy package in Hungary

Before we dive into the discussion of the structure of the Hungarian electricity sector prior to the liberalisation, it is important to briefly address the energy mix of Hungary. In the last decades Hungary has been increasingly reliant on imported energy, however, in terms of electricity our generation is not very far off from our consumption by being able to provide 80% of what we consume.²⁵ Our electricity generation is dominated by the Paks Nuclear Power Plant, which has been consistently providing more than 40% of our electricity consumption for the past decades. The second most important way Hungary produces electricity is with natural gas taking up around 25% of the generation. This is followed by solar which has demonstrated a

21 96/92/EC, Art. 13.

22 96/92/EC, Art. 19.

23 Hancher, 1998, pp. 51–52.

24 Heddenhausen, 2007, p. 6.

25 Hungarian Central Statistical Office, 6.1.1.8. Electricity balance [gigawatt hours].

huge increase in the past few years and currently provides for 13% of the generation. Contrary to this, coal and coal products have been declining in significance but still provide for 8% of the generation.²⁶ These increasing and declining trends visible in Hungarian electricity generation are in line with the goals of the National Energy Strategy of Hungary for the period between 2012–2030,²⁷ which seeks to increase the share of carbon-neutral energy generation. However, the goal did not materialise for every renewable energy source as wind has a shrinking share in electricity generation. Nevertheless this issue is also going to be addressed as in 2023 Hungary submitted its updated Draft National Energy and Climate Plans to the Commission in which we seek to triple our wind power capacity by 2030.

After this introduction to the Hungarian energy mix, we can discuss the evolution of the electricity sector structure. In Hungary, the communist takeover after the Second World War did not leave the electricity sector out of the scope of the nationalisation. The Act XX of 1946²⁸ was adopted which took the power-generating capacity and the grids into state ownership. The Soviet-type centralised structure, where one vertically integrated electricity company was responsible for the whole electricity chain, was established and carried on until the period of the regime change.²⁹ Following the change of regime, a few significant steps occurred from the perspective of the coming market opening. Firstly, the Hungarian Electricity Works Trust was transformed into a limited liability company, MVM Hungarian Electricity Works; although still connected to MVM, its power plants and distributors gained their own legal personality, which was crucial to denationalisation. Following the unsuccessful attempt at privatisation in 1993, the legislator realised a proper legal basis had to be adopted to succeed with privatisations, so subsequently, the 1994 Act on Electricity was adopted.³⁰ The act provided a massive change in the legislation of the Hungarian electricity sector; however, it did not aim to establish an open competitive market.³¹ At this point, the Hungarian electricity market operated on a single buyer process where MVM purchased the electricity and then sold it to the suppliers.

Following the Act, the privatisation process commenced, although not without any difficulties. Many decisions that back then seemed reasonable later gave rise to a multitude of challenges. For example, to make the power plants more appealing to investors during the privatisation procedure, MVM, who purchased electricity from

26 Hungarian Central Statistical Office, 6.1.1.9. Gross electricity production [gigawatt hours].

27 Nemzeti Energiestratégia 2030 (*National energy strategy of Hungary 2030*).

28 1946. évi XX. törvénycikk egyes villamosművek energiatelepeinek és távvezetékeinek állami tulajdonba vételéről és a villamos energiagazdálkodással kapcsolatos egyéb rendelkezésekről (Act XX of 1946 on the State ownership of certain power plants and transmission lines of electric power stations and other provisions relating to the electricity management).

29 Árva et al., 2016, p. 201.

30 Rátky and Tóth, 2022.

31 Kerekes, Szörényi and Diallo, 2019, p. 6.

them, entered into long-term energy purchase agreements³² which later became an obstacle in front of the competitive market.

Soon after 1994 Act on Electricity was adopted, considerable changes occurred in the Community with the adoption of the first energy package in 1996. Due to the country's aspiration to become a member of the EU, the directive had its fair share of influence on the Hungarian legislation. In line with the provisions of the 1996 directive, Act CX of 2001 on electricity was adopted. Interestingly, the legislator following the Portuguese example³³ opted for a dual market structure where there was a difference between those who purchased electricity from public utility providers and those eligible consumers who could purchase electricity from the power plants or electricity trading licensees. Regarding the status of the eligible consumers, government decree No. 181/2002 stated that firstly, consumers over the consumption of 6.5 GWh became eligible – this, in practical terms, meant the largest industrial users –; then, in 2004, the scope was extended to all non-domestic consumers. This dual market structure entailed that entering the competitive market was only an option, and this possibility was not forced on any consumers.

4. The second 2003 energy package

Also, because the adoption of the first directive included a lot of compromises, there was a specific requirement that the Commission evaluates the experiences on the functioning of the internal market to determine the possible need for further liberalisation. In 2005, the Commission indeed launched an inquiry into the functioning of the electricity market, and multiple reports were produced over the coming years. According to the reports³⁴ the Commission found that there were great discrepancies between the member states – especially concerning network access tariffs³⁵ – which resulted in an uneven playing field in the internal electricity market.³⁶ Moreover, consumers were not entirely satisfied with the prices even though the Commission, in its communication, stated that in the first three years of the directive, prices on average have fallen by 6% despite the clear infrastructural obstacles in front of market opening.³⁷

32 Vince, 2007, p. 304.

33 Brzózka, 2012, p. 37.

34 COM (1998) 167 final, 16.3.1998, COM(1999) 164 final.

35 Dehousse, Andoura and Dehin, 2007, p. 34.

36 Eikeland, 2011, p. 20.

37 Communication from the Commission to the Council and the European Parliament – Recent progress with building the internal electricity market COM/2000/0297 final.

To deepen the internal electricity market and to combat the shortcomings mentioned above, the second acceleration energy package was adopted in 2003 that contained multiple legislations on the electricity sector.

Most importantly, the new directive concerning common rules for the internal electricity market was adopted, which introduced quite a few changes compared to the 1996 directive.³⁸

Firstly, the rules for establishing new generating capacity changed significantly. From this point onward, the authorisation procedure became the default one, and the directive also provided member states with ideas on the authorisation criteria. According to the new directive, tendering procedure could only be used on three occasions: a) if the capacity reached through the authorisation procedure is not sufficient to provide the security of supply, b) in the interest of environmental protection if it cannot be granted through the authorisation, and c) for promoting less developed new technologies also only if it cannot be done through authorisation.

The previously highly debated issue of third-party access was simplified in the new legislation, and regulated access was pushed to the forefront.³⁹ The directive provides an opportunity to refuse access, but this can only be done in cases when the transmission or distribution systems lack capacity.

Unbundling was still a central issue in the new directive, so it was taken a step further. Legal unbundling was introduced, which entailed that transmission or distribution system operators, if they were part of a vertically integrated company, had to be independent in their legal form, their organisation, and their decision-making from those parts of the company, that does not fall under the scope of transmission or distribution activities. To achieve this desired independence, the directive set some minimum criteria. It is worth mentioning that this level of unbundling was not mandatory in the case of distribution system operators that served less than 100,000 customers.

The next novelty the second directive provided for was the fact that it contained much more detailed rules on the regulatory authorities. Member states had to set up national regulatory authorities – independent from the electricity industry – which were responsible for the following: non-discrimination, effective competition, market functioning, and monitoring.

Opening up the markets also continued. This meant that until 1 July 2004, the markets were opened for the eligible customers defined in the first directive, from 1 July 2004 all non-household customers became eligible, and from 1 July 2007 the market had to be opened for domestic customers, too.

38 Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC.

39 Johnston and Block, 2012, p. 21.

Quickly evaluating the second electricity directive, we can conclude that it was a more detailed legislation; moreover, the provisions were stringent; however, they still allowed a great deal of discretion.⁴⁰

As it was mentioned in the new package, the directive was not the only piece of legislation; in addition, the regulation on the prerequisites for gaining access to the network for cross-border exchanges in electricity was adopted.⁴¹ The regulation aimed at creating fair rules for cross-border trading in electricity to foster greater competition in the market.

4.1. The implementation of the second energy package in Hungary

In Hungary, it soon became evident that the dual market model the country opted for would not be sustainable in the long run. One of the key deficiencies of the system was that the competitive market, in reality, only appeared as an alternative, so the eligible customers were switching between the competitive market and the public utility provider, depending on the prices.⁴²

After the introduction of the second electricity directive, the process began in Hungary to adopt a legislation that corresponds to the directive and introduces a fully open market. In 2007, the new Act on Electricity (VET)⁴³ was adopted, which, among other things, aimed at creating an effectively functioning competitive electricity market while also supporting sustainable development, promoting the use of renewables, and ensuring the security of supply. As we can see, the goals of the VET correspond to the general notion of the energy triangle, according to which a balance has to be kept between the environment, the security of supply, and the financial side when formulating energy policies. In this new model, the distortion of the competition was only tolerated in two instances: either to combat the use of a dominant position or to protect vulnerable consumers.⁴⁴

The change in the market structure terminated the previous public utility sphere; however, the Act introduced the function of the universal provider, which more or less filled the void left by the public utility provider, but only for a limited circle of customers, namely domestic and small voltage customers. These universal providers are special electricity traders that have to supply a certain quality of electricity for an equitable price anywhere in the country to those who are eligible.⁴⁵ The purpose of the universal supply is to protect small consumers from abuses and to grant them the security of supply.⁴⁶ The significant difference from the discontinued public

40 Eberlein, 2008, pp. 81–82.

41 Regulation (EC) No 1228/2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross-border exchanges in electricity.

42 Fazekas and Németh, 2022, p. 98.

43 2007. LXXXVI. Act on Electricity.

44 Szilágyi, 2010, p. 153.

45 2007. LXXXVI. Act. Art. 3(7).

46 Nagy, 2022, p. 300.

utility providers was that the universal suppliers were able to purchase electricity from every source, whereas public utility providers could only purchase electricity from MVM.⁴⁷ Moreover, the minister no longer set prices, and supervised pricing rules became the norm.

The next issue we wish to highlight which is closely connected to the new universal supply structure is the introduction of the supplier of last resort. According to the Act, the supplier of last resort safeguards those eligible for universal supply if their supplier puts their security of supply in danger. The authority first selects the supplier of last resort from those traders and universal suppliers that voluntarily apply. If none of them applies voluntarily, then the authority selects one at its own discretion.⁴⁸

Finally, the last thing worth emphasising is the fact that the rules on legal unbundling were implemented in the Act, i.e., in a vertically integrated company, the transmission and distribution system operator has to be independent from other parts of the company legally, structurally, and in terms of decision-making that are not connected to transmission or distribution activities.⁴⁹

5. The third energy package in 2009

Following the adoption of the second package in 2005, the Commission again launched an inquiry into the sector, also pursued by the fact that consumers still complained about high prices.⁵⁰ The results were quite devastating. The inquiry highlighted that market dominance remained, the unbundling did not reach the desired success, the foreign market entrance was insufficient, and retail competition was not high enough. In response to the deficiencies of the market, the Commission underlined four key areas where further effort has to be made to reach a well-functioning internal market. According to the Commission, additional work is needed to achieve a sufficient unbundling, to address the regulatory gaps, to deal with the lack of liquidity that hindered the market entry, and to enhance general transparency.⁵¹ To address the aforementioned deficiencies, the third energy package was adopted in 2009, which was supposed to further liberalise the market while also promoting cross-border connections.⁵² Moreover, we can see a shift in the mindset of the third package as this time the EU's approach was not solely aimed at liberalisation

47 Fazekas and Németh, 2022, p. 101.

48 VET article 51.

49 VET article 100.

50 Penttinen, 2021, p. 86.

51 Communication from the Commission Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report).

52 Delgado, 2008, p. 5.

but at broader aspects as well, such as environmental protection and emergency situations.⁵³

The electricity provisions of the package consisted of multiple legislations; most importantly, the new directive concerning common rules for the internal electricity market was adopted. Besides this, the new regulation on the conditions for access to the network for cross-border exchanges in electricity was introduced, and thirdly, the directive that established the Agency for the Cooperation of Energy Regulators (ACER) was adopted.

So firstly, with regard to the changes introduced by the new directive,⁵⁴ we would like to highlight a few things. The most debated and important aspect of the directive concerned the rules on the unbundling of the transmission networks. Initially, the Commission proposed full ownership unbundling as the solution, which meant that the owner of the transmission system operator was not allowed to be a part of a vertically integrated company. As this was quite a strict requirement, member states were not really keen on accepting it, so the Commission had to make an alternative proposal. This alternate option was the independent system operator (ISO), according to which the network ownership remains in the vertically integrated company; however, the operation of the network has to be carried out by an independent system operator, who is not connected to the owner of the grid. Despite of this less strict option, some of the member states were still not satisfied, so a third option was established, too, namely the independent transmission operator (ITO). This entailed the lowest level of unbundling where the ownership of the transmission network is retained by the vertically integrated company, granted that the system operation is carried out in compliance with strict unbundling rules.⁵⁵ These strict rules, among other things, entailed a special position for the national regulatory authority as it required its approval for the contracts between the independent transmission operator and the vertically integrated company.⁵⁶ In essence, the difference between the ISO and the ITO system is that in the latter the vertically integrated company creates a supervisory board that is responsible for appointing the management and controlling the investments of the transmission system operator; thus, the company has more control over the system operator.⁵⁷

Another important area of the directive was its provisions on customer protection. In this regard, it stated that the customers have to be allowed to change suppliers within a three-week period and that they are entitled to be informed of their relevant consumption data.⁵⁸ Moreover, Annex I of the directive discusses the issue of smart meters, which play a key role in promoting the active participation

53 Johnston and Block, 2012, p. 25.

54 Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

55 Meletiou, Cambini and Masera, 2018, p. 15–16.

56 Sütő, 2014, p. 505.

57 Dreyer, Erixon and Winkler, 2010, p. 17.

58 2009/72/EC Art 3(5).

of consumers in the electricity market. The member states had to assess the use of smart meters, and in case it had a positive outcome, they had to ensure that by 2020, 80% of the consumers are equipped with them.⁵⁹ The last issue that we would like to discuss concerning the directive is its rules on national regulatory authorities. Compared to the previous provisions, the directive now established more stringent requirements; for example, from that time on, only one national regulatory authority could be established; in addition, the regulatory authority was required to be legally, functionally, and in terms of personnel, independent from any public or private entity.⁶⁰ Additionally, it is worth highlighting that the directive strictly required the cooperation and compliance of national regulatory authorities with the Agency for the Cooperation of Energy Regulators, as during the negotiations of the package, it became clear that stronger cooperation is needed between the member states' regulators. As we have already mentioned, in the package there were other pieces of legislation, one of them established the Agency for the Cooperation of Energy Regulators (ACER).⁶¹ ACER is an independent organ that seeks to warrant the functioning of the internal electricity market by enhancing cooperation between national regulatory authorities, ensuring that the EU legislations are implemented correctly, and making decisions on the terms and conditions of cross-border access. ACER has a very special position as it can solve transboundary conflicts by facilitating communication between the national regulatory agencies while also taking binding decisions without making the NRAs' role insignificant.⁶²

Also in the package, a new regulation on conditions for access to the network for cross-border exchanges in electricity was adopted, which aimed to further enhance the non-discriminatory network access.⁶³

5.1. The implementation of the Third Energy Package in Hungary

When implementing the third package in Hungary, no new act on electricity was adopted; however, the existing 2007 VET had to be amended in a number of respects.

59 2009/72/EC Annex I.(2).

60 2009/72/EC Art 35.

61 Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators.

62 Haverbeke, Naesens and Vandorpe, 2010, pp. 405–406.

63 Regulation (EC) No. 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No. 1228/2003.

The most critical issue in the amended Act concerned the unbundling of the transmission system. In Hungary, the Act adopted the least stringent independent transmission operator (ITO) structure. Since 2012, this role has been fulfilled by MAVIR Hungarian Independent Transmission Operator Company, which is within the vertically integrated MVM group.

Moreover, the Act implemented detailed provisions on the regulatory authorities, and from then on, it regulated the relationship of the Hungarian Energy Authority with ACER.

Also, at the time of the adoption of the third package, there was another significant change in the Hungarian electricity sector; the Hungarian Power Exchange (HUPX), a subsidiary of MAVIR, began its operation. Looking back at its establishment, we can say that it had an important position in the electricity sector of Hungary⁶⁴ through its non-discriminatory trading approach and its information-providing nature that served the customers' interest by reducing prices.⁶⁵

6. The fourth 2019 'Winter Energy Package'

At the EU level, the attention on the climate aspect of energy has been gradually increasing throughout the packages; however, the issue became especially contentious in the decade following the third energy package. In 2016, the Commission published its communication titled *Clean Energy for all Europeans* where it pursued three main goals, namely:

- a) putting energy efficiency first,
- b) achieving the EU's leadership in renewables, and
- c) providing a fair deal for consumers.⁶⁶

Subsequently, in 2019, the fourth "winter energy package" was adopted. The legislative package included multiple directives and regulations:

- a) energy performance in buildings directive,
- b) renewable energy directive,
- c) energy efficiency directive,
- d) governance of the energy union regulation,
- e) electricity regulation,
- f) electricity directive,

⁶⁴ Fazekas and Németh, 2022, p. 105.

⁶⁵ Csipkés, 2019, p. 138.

⁶⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank *Clean Energy For All Europeans* Com/2016/0860.

- g) risk preparedness regulation, and
- h) ACER regulation.

In its nature, this latest energy package is different from the previous three as this time the main focus was not the liberalisation⁶⁷ but on taking the leading position in switching to clean energy sources.⁶⁸

Even though market opening was not the sole focus, we would like to highlight a few issues that are important from this perspective. The basic premise behind the new electricity directive was that the electricity market structure had to be modernised to align with the evolving energy landscape with increasing integration of decentralised renewable energy sources into the grid, posing previously unexperienced challenges.⁶⁹ To adjust the structure of the directive,⁷⁰ firstly a significant focus was placed on the more active role of consumers as, compared to the previous system, they were not provided with an adequate enough framework to actively participate in the electricity market. In this regard, one of the critical issues was the market integration of prosumers (consumers who not only consume energy but also produce it), as this can help reduce the costs for consumers while producing clean energy.

The second issue with regard to the more active participation of consumers was the introduction of demand response, which entails that final consumers try to change their consumption in connection to price changes. In this, the accurate and up-to-date pricing information – that the package seeks to reach – plays a fundamental part. Moreover, it has to be mentioned that demand response also helps to facilitate the use of volatile renewable energy.⁷¹ To give more weight to the consumer demand response, the directive introduced aggregation which by connecting multiple consumers can help then reach better positions on the market.⁷²

In terms of the consumers, the last aspect of the package that we would like to highlight is the issue of providing the consumers with an adequate level of information that can assist them in making more informed decisions, especially in areas such as provider change, which proved to be challenging in many cases due to the lack of information.⁷³

With regard to the pricing of electricity the directive introduced the concept of market-based supply prices and stated that member states should primarily ensure the protection of energy-poor and vulnerable households by social policy rather than public interventions in the price setting. In the package price setting is viewed as

67 Anchustegui and Formosa, 2021, p. 94.

68 Szuchy, 2021, p. 151.

69 Szuchy, 2021, p. 157.

70 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU.

71 Szuchy, 2020, p. 430.

72 Kondorosi and Alföldy-Boruss, 2022, p. 71.

73 Szuchy, 2021, p. 161.

a great obstacle in front of establishing market-based prices as these measures do not take into account the changes in the electricity market.⁷⁴ Subsequently, member states can only result to public intervention in the price setting for the supply of electricity for the protection of energy-poor and vulnerable household customers if specific strict provisions are fulfilled.⁷⁵ The directive does not prohibit the application of price setting in the case of universal supply, however, those benefiting from the price setting have to fit into the respective categories.⁷⁶

Finally, the directive also had new provisions regarding national regulators, and transmission and distribution system operators. In general, their positions were strengthened, but no additional measures were introduced in terms of unbundling.⁷⁷

It has to be mentioned that the legislative process in the sector did not end with the fourth package and following the European Green Deal more climate-focused rules were adopted such as the Regulations 2021/1119⁷⁸ aimed at reducing greenhouse gas emissions.

6.1. The implementation of the fourth package in Hungary

When it comes to the implementation of the fourth package in Hungary, it is worth mentioning that three new actors were introduced in the Act on electricity. Firstly, active consumers are defined as those consumers who use, store, and feed electricity into the grid or offer the flexibility of their consumption of the electricity stored or generated by them, provided they do not carry out these activities as an occupation or a primary economic activity.⁷⁹ The second new term in the Hungarian legislation was the energy communities. The act on electricity gives a detailed definition of the energy communities: these are legal entities whose primary purpose is not aimed at making a financial profit but to provide environmental, economic, and social benefits to its members or in the area of operation by carrying out at least one of the activities such as generation, storage, consumption, electricity distribution, and aggregation. In practice, the forms of energy communities are quite varied, as these can be municipalities, agricultural cooperatives, apartment buildings, and so on. As we can see from their definition, the scope of the activities is diverse; however, as a critique of the Hungarian implementation, it can be said that on the EU level, the scope of activities covered by energy communities was even broader and such things as energy efficiency services were not included in the VET, moreover, on the EU level renewable energy communities can carry out activities not only relating to

74 Szuchy, 2021, p. 158.

75 2019/944 art. 5.

76 Kondorosi and Alföldy-Boruss, 2022, pp. 74–75.

77 Kondorosi and Alföldy-Boruss, 2022, pp. 77–78.

78 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law')

79 2020. CLXXVI Act. Art. 1.

electricity but to geothermal and biomass, whereas in Hungary the scope was limited exclusively to electricity.⁸⁰

The last important new term in the legislation was aggregation, which is combining power plants and electricity storage facilities that are connected to a distribution, transmission, or private grid for the purpose of buying and selling on an electricity market.⁸¹ As we have previously explained, by aggregating consumers can get a more favourable position in the electricity market while also facilitating the elevation of regular consumers to active consumers.

7. The success of the packages

In the last segment of the article, we would like to briefly evaluate the packages by using statistical data to determine whether they were able to reach their desired goals or not. Regarding the benefits and success of the market opening, many conjuring opinions can be found. The critics say that liberalisation was based on some false assumptions that never materialised. According to them, firstly, the market opening could not result in lower prices; secondly, the liberalisation process failed to mitigate energy poverty⁸² (if we look at the statistical data from Eurostat, we can say that, in general, energy poverty has been declining in the EU, however, in many cases it was not as significant as had been hoped to be. Moreover, the liberalised market was not so successful in reacting to the energy crisis as the energy poverty percentage rose by 2,5%),⁸³ thirdly, they failed to abolish national monopolies as these, as a favourable result of the market opening, became international monopolies,⁸⁴ and fourthly, it also failed to create greater security of supply as the subsidies for promoting the use of renewables have made conventional plants unprofitable which resulted in their closing, thus making energy supply more fragile.⁸⁵

The deficiencies in the liberalisation are also highlighted by the fact that it took multiple packages to open up the market, this was not because the EU wanted to take a step-by-step approach to liberalisation but due to the general reluctance of member states to open up their markets, and because the packages have never reached the desired goals and the insufficiencies had to be addressed. For example, consumers and their benefit from the market opening was one of the key aims of the liberalisation; firstly, they were granted the opportunity to change their suppliers, but the information provided was insufficient for the customers, who required further

80 Szuchy, 2022, pp. 560–561.

81 Vet. Art. 3(3).

82 EPSU, 2018, p. 7.

83 Eurostat, Inability to keep home adequately warm.

84 Járosi, 2008, p. 8.

85 Auverlot et al., 2014, p. 24.

details regarding the option to switch suppliers, but this was only implemented in a later package.⁸⁶

7.1. Wholesale markets

The first issue we would like to address is the wholesale market and its electricity generation competition. Before the liberalisation, generating capacity was dominated by vertically integrated monopolies. A great sign of the success of liberalisation would be an increasing number of wholesalers and the declining market share of the largest wholesaler.

Most of the countries saw a decreasing market share of the largest electricity generator, especially in those states where the largest generator had a very dominant position with 80% or more market share, like in Belgium, where from 92% market share in 1999 this data decreased to a 56% market share in 2022. However, in many cases where the largest producer was not that dominant, the decrease was incremental. Moreover, in some cases, such as Spain, the market share of the largest generator today is greater than that observed in 1999. What is more, in 12 of the EU countries – including Hungary – the most significant generator still has a highly dominant position with more than 40% market share.⁸⁷ At the time of the first package, it was perceived that large-scale plants – in many cases responsible for large market shares – such as nuclear plants are not going to be attractive options in the future as, in a non-monopolistic system, these would be too risky investments due to their massive costs.⁸⁸ The sceptical view about the future of nuclear energy was even more present after it became obvious that the packages are not entirely technology-neutral and there is massive support towards renewables.⁸⁹ However, if we look at the current electricity market and the interest after the energy crisis towards large-scale plants such as nuclear power plants, we see a very different picture. As others previously observed,⁹⁰ the liberalisation resulted in more competition; however, it cannot be considered a massive success, as not in one case the decrease was negligible, and in some cases, it was only caused by the shutdown of nuclear power plants.

The second issue we wish to elaborate on is the wholesale electricity prices. The prices on the wholesale market peaked during the 2008⁹¹ financial crisis and after the 2021⁹² energy crisis. All in all, wholesale prices have been showing a decreasing tendency after the liberalisation, but, unfortunately, the liberalised market could not avoid the impact of global crises.

86 Cseres, 2008, pp. 79–80.

87 Eurostat, Energy market indicator, Largest company electricity generation.

88 Patterson and Grubb, 1996, p. 3.

89 Georgiev, 2015, p. 99.

90 Rathke, 2015, pp. 20–21.

91 European Commission Directorate-General for Energy, 2018, pp. 51–52.

92 Kondorosi and Alföldy-Boruss, 2022, p. 81.

7.2. Retail markets

Following the wholesale markets, the retail segment is also essential to be mentioned. When customers became eligible, the issue of being able to choose from competitive retailers became critical, so firstly, we looked at whether there is greater retail market competition. From the data available starting from 2003, we can conclude that in almost all of the countries, the number of retailers available to final consumers has increased. However, their number is fluctuating and do not consistently demonstrate a growing tendency. For example, in the case of Hungary, the number of retailers was 12 in 2003, then 38 in 2010, then it reached its peak in 2015 with 52 retailers, but by 2021, it went down to 37.⁹³ To further elaborate on this issue, it is also worth looking at the number of leading retailers selling at least 5% of the total national electricity consumption. Their number in most countries has increased, especially where initially there was only one leading retailer; nevertheless, in some countries like Spain, Netherlands, Czech Republic, Romania, and Hungary, their number decreased.⁹⁴ Moreover, the market share of the largest electricity retailer generally has been showing a declining trend, but still, in 12 member states, they have a dominant position with a market share over 40%.⁹⁵

To sum up the competition side of the retail market, we can state that liberalisation was more or less successful in reaching greater competition, but in quite a few cases, retail markets are still dominated by influential retailers, which will presumably remain in this position as consumers remain reluctant to change retailers.⁹⁶

The second issue we would like to address concerning retail markets is the prices (excluding taxes and levies). First, we looked at the prices paid by medium-sized industrial consumers. Unfortunately, Eurostat did not exactly use the same methodology to determine medium-sized industrial users before and after 2007, however, the prices are comparable. In most of the countries, prices paid by industrial end users have increased over the years, and there is no visible effect of liberalisation driving the prices down. In some countries like Ireland, the increase was significant as the prices from 1995 have doubled by 2020. In a few cases, such as Germany, there was a decrease in the prices until the 2021 energy crisis, but the scale of this was only incremental. But the worst information is that after the energy crisis broke out, the prices skyrocketed, and in 2023, we are at a point where, on average, the prices charged to medium-sized industrial users are almost three times higher than in the early 90s.⁹⁷

Finally, the last issue that we would like to discuss is the prices charged to domestic consumers. Here, the situation is the same as with industrial prices, as the

93 Eurostat, Energy market indicator, Electricity retailers.

94 Eurostat, Energy market indicator, Electricity retailers with at least 5% of total electricity consumed.

95 Eurostat, Energy market indicator, Largest electricity retailer.

96 ACER/CEER, 2022, pp. 31–32.

97 Eurostat, Electricity prices for non-household consumers.

Eurostat, again, used different methods to determine certain households; notwithstanding this, the data is still comparable. Most of the countries in the community made domestic consumers eligible between 2003 and 2007, yet this was not visible in the domestic prices after 2003 – we witnessed a steady increase in prices that continued into the next decade. If we compare the average prices in the community following the 2003 eligibility option and the 2020 prices before the crisis, we can see approximately a 25% increase. Moreover, after the energy crisis, prices for domestic consumers have also skyrocketed, just like in the case of industrial customers of the energy sector.

Interestingly, in the case of Hungary, prices in the early 90s were one of the lowest at around 0.03 Euros/Kwh; however, they started to increase rapidly, and by 2010, they more than quadrupled. After 2010, a rapid decrease began, and before 2022, we arrived at 0.07 Euros /Kwh.⁹⁸

Considering all this, we can say that the liberalisation was not successful in reaching the desired lower prices neither for the industry nor for the households.

8. Conclusion

The energy market liberalisation within the community was a very slow process that was hindered by the general reluctance of the member states to deepen the communities' role in the sector. However, after the adoption of four different packages, each of which has tried to address the shortcomings of the previous one, many results have been achieved, starting from greater competition to more stringent environmental protection. On the other hand, after all these years, the packages' success has still been limited and thriving competition has not been achieved.⁹⁹ From what we have analysed in the article, we can say that the competition aspect of the packages was more or less successful in both wholesale and retail markets, but definitely not to the desired extent. When it comes to prices, the results were contrary to what was expected from liberalisation, as both industrial and domestic customers saw an increase, although with regards to prices it has to be mentioned that, as previously noted, simultaneously with liberalising, climate issues came to the fore which was not necessarily beneficial for the price of electricity.¹⁰⁰ The limited success of the competition and the prices, also factoring in the issue of information flow to the eligible consumers, are all connected. Yes, there was success on the competition side, but as we saw, dominant positions are still retained, and massive competition has not been achieved. The fact that customers could not and still cannot, in quite a

98 Eurostat, Electricity prices for household consumers.

99 Martinez, 2014, p. 128.

100 Noreng, 2018, pp. 228–229.

few instances, choose from a lot of different providers, combined with the fact that they were completely unaware of the option of switching retailers, results in higher prices, as this ineffective competition does not drive prices down. Other authors have very well observed this before me, but these observations still stand today: the liberalisation process is not yet complete, and the existing barriers stop it from reaching its success,¹⁰¹ although it has to be mentioned that there is no fully liberalised energy market present anywhere in the world.¹⁰² Until these barriers, such as the dominant positions, are removed, the idea of a liberalised European electricity market and its benefits remain a dream.¹⁰³ However, the question arises if, after all these years – especially considering that after the crisis, member states devote much more attention to energy security in their own countries –, attempts at removing these barriers were unsuccessful, can these actually be removed. Suppose the answer is no—then we have to ask ourselves why this process was necessary and what other ideas and structures could have been pursued in the electricity sector. In recent times, the dissatisfaction is also more palpable in the political sphere as in the French Senate, the resolution based on the unsatisfying outcomes of the liberalisation that sought to temporarily exit from the European electricity market gained more support than it was expected. Beyond such approaches, there are other proposals for how the electricity market could be structured such as the ones supporting more public ownership¹⁰⁴ or those advocating the European institutional control of electricity grids,¹⁰⁵ however, these are unlikely to become the standard in the near future.

101 Rathke, 2015, p. 28.

102 Morrison, 2022, p. 477.

103 Benedettini, 2015,

104 EPSU, 2018, p. 4.

105 Martinez, 2014, p. 128.

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