



## ARTICLES

### DIFFERENTIATED GOVERNANCE IN A EUROPE IN CRISES

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## THE RULE OF LAW IN THE EU: CRISIS, DIFFERENTIATION, CONDITIONALITY

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ABSTRACT: The EU’s decade-long rule of law crisis has normalized into an everyday constitutional and political experience. The lens of differentiated governance calls for a close inquiry into the legal and political dynamics – processes, incentive structures and inter-institutional conflicts – that are consequential for the future of the Union as a “community of values and of laws”. Tracing the debate on financial sanctions (budgetary conditionality) in the broader context of the rule of law crisis, this *Article* argues that the future of Europe hinges on attributing practical, political and legal significance to the founding values set forth in art. 2 TEU. Without respect for these founding values differentiated governance as a set of political or legal practices and as an academic-intellectual project has no purpose or endpoint.

KEYWORDS: art. 2 TEU – conditionality – crisis – differentiation – rule of law – values.

### I. INTRODUCTION

The EU’s decade-long the rule of law crisis has normalized into an everyday constitutional and political experience. By 2021 legal claims of national constitutional identity have been translated into political attacks on the primacy of EU law and the authority of the CJEU. In legal scholarship old debates about legal pluralism were reignited with a new urgency.<sup>1</sup>

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<sup>1</sup> E.g. G Davies and M Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).



The rule of law crisis presents a genuine challenge for scholarship on European integration. Encouraging lessons from the lasting, positive effects of pre-accession conditionality on post-accession compliance<sup>2</sup> started to give way to concerns about a steady post-accession decline in the quality of democratic deliberation in new member states.<sup>3</sup> Surveying grand theories on European integration Hooghe and Marks show that intergovernmentalist, neofunctionalist and postfunctionalist approaches capture different aspects of the illiberal democracy challenge.<sup>4</sup> Despite reservations about the scale and practical impact of democratic backsliding (the source of the rule of law crisis),<sup>5</sup> by 2020 Kelemen expressed concerns about the Union lack of capacity (and willingness) to address the rule of law crisis resulting in a state of authoritarian equilibrium within the Union.<sup>6</sup>

Traditionally the literature on differentiated integration has focused on legal mechanisms that enable member states and non-state entities (EU institutions) to cooperate in a flexible manner towards an ever-closer Union.<sup>7</sup> In the past decade, scholarship on differentiated integration has moved towards covering differentiated politicization,<sup>8</sup> differentiated governance,<sup>9</sup> and – more recently – has started to reckon with differentiated disintegration.<sup>10</sup> Disintegration amidst the rule of law crisis forcefully poses the question whether the fundamental values of the Union (art. 2 TEU) – such as the rule of law – can be differentiated.<sup>11</sup>

<sup>2</sup> T A Börzel and U Sedelmeier 'Larger and More Law Abiding? The Impact of Enlargement on Compliance in the European Union' (2016) Maximizing the Integration Capacity of the European Union: Lessons of and Prospects for Enlargement and Beyond (MAXCAP) [userpage.fu-berlin.de](http://userpage.fu-berlin.de).

<sup>3</sup> A Gora and P de Wilde, 'The Essence of Democratic Backsliding in the European Union: Deliberation and Rule of Law' (2020) *Journal of European Public Policy* 342 (based on the V-dem dataset).

<sup>4</sup> L Hooghe and G Marks, 'Grand Theories of European Integration in the Twenty First Century' (2019) *Journal of European Public Policy* 1113, 1128.

<sup>5</sup> L Cianetti, J Dawson and S Hanley, 'Rethinking "Democratic Backsliding" in Central and Eastern Europe – Looking beyond Hungary and Poland' (2018) *East European Politics* 243.

<sup>6</sup> RD Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) *Journal of European Public Policy* 48.

<sup>7</sup> For a recent comprehensive overview of the literature see N Pirozzi and M Bonomi, 'Governing Differentiation and Integration in the European Union: Patterns, Effectiveness and Legitimacy' (2022) *The International Spectator* 1.

<sup>8</sup> P de Wilde, A Leupold and H Schmidtke, 'Introduction: The Differentiated Politicization of European Governance' in P de Wilde, A Leupold and H Schmidtke (eds), *The Differentiated Politicization of European Governance* (Routledge 2015) 3; P de Wilde, 'No Polity of old Politics? A Framework for Analyzing the Politicization of European Integration' (2011) *Journal of European Integration* 55; M Zürn, 'Politicization Compared: At National, European and Global Levels' (2019) *Journal of European Public Policy* 977.

<sup>9</sup> See in this *Special Section* S Baroncelli and others, 'Introduction to the *Special Section*: Differentiated Governance in a Europe in Crises' (2022) *European Papers* [www.europeanpapers.eu](http://www.europeanpapers.eu) 857. Also recently S Lavenex and I Križič, 'Governance, Effectiveness and Legitimacy in Differentiated Integration: An Analytical Framework' (2022) *The International Spectator* 1.

<sup>10</sup> B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017); J E Fossum, 'Democracy and Differentiation in Europe' (2015) *Journal of European Public Policy* 799.

<sup>11</sup> R D Kelemen, 'Is Differentiation Possible in the Rule of Law?' (2019) *Comparative European Politics* 246.

The lens of differentiated governance calls for a close inquiry into the legal and political dynamics – processes, incentive structures and inter-institutional conflicts – that are consequential for the future of the Union as a “community of values and of laws”. Tracing the debate on financial sanctions (budgetary conditionality<sup>12</sup>) in the broader context of the rule of law crisis, this *Article* argues that the future of Europe hinges on attributing practical, political and legal significance to the founding values set forth in art. 2 TEU. On 16 February 2022, the CJEU expressed this sentiment in the following words:

“the Union budget is one of the principal instruments for giving practical effect, in the Union’s policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law, and, secondly, that the implementation of that principle, through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget. That mutual trust is itself based ... on the commitment of each Member State to comply with its obligations under EU law and to continue to comply... with the values contained in Article 2 TEU, which include the value of the rule of law”.<sup>13</sup>

Section II revisits key themes in the debate on differentiated governance in the age of the rule of law crisis. Section III provides a closer look at the dynamics of dialogue-based approaches to safeguarding the founding values, with a focus on the introduction of budgetary conditionality. Section IV maps the gradual escalation of attacks on the primacy of EU law. Section V traces the outlines of the CJEU’s response to the emerging state of affairs, highlighting the contributions of the case law to reduce disintegration through differentiation. The conclusion reminds that differentiated governance even of an ever-looser Union<sup>14</sup> hinges on effectively safeguarding the founding values set forth in art. 2 TEU. Without respect for these founding values differentiated governance as a set of political or legal practices and as an academic-intellectual project has no purpose or endpoint.

## II. DIFFERENTIATION: FROM PRAGMATIC PROBLEM-SOLVING TO MODE OF GOVERNANCE

### II.1. DIFFERENTIATED GOVERNANCE: THE NORMALIZATION OF DISINTEGRATION

Scholarship on differentiated integration and differentiated governance focuses on the flexibility of the EU’s legal framework in the face of adversity, unexpected challenges (or the

<sup>12</sup> Regulation (EU) 2020/2092 of the European Parliament and Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

<sup>13</sup> Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 129.

<sup>14</sup> F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (OUP 2020).

embarrassment of protracted accession processes).<sup>15</sup> Therein, differentiation is as much a feature of legal and institutional design as a matter of institutional (political) practice.

Differentiation may well be the force that enables the EU to muddle through challenges.<sup>16</sup> At the same time, the legal architecture that enables differentiated governance serves recalcitrant and/or illiberal member states equally well. To borrow an example from Thym: “the crisis of monetary union does not originate primarily in the asymmetric non-participation of some Member States but in the structural deficits of both the Treaty design and its implementation”.<sup>17</sup> While a legalistic-technical definition of differentiation leads to the reassuring conclusion that it “removes the most Eurosceptic states from the most advanced integration schemes and circumvents their veto on future integration decisions”,<sup>18</sup> differentiation also provides ample opportunities for illiberal member states to take advantage of EU membership without respecting the values it is built on or its legal foundations.

Accounts of differentiation regularly recall the positive experiences of closer cooperation under the Treaties (like the EMU), pointing also to further modalities of intergovernmental cooperation fostered outside the Treaties (like the ESM or the Fiscal Compact). Key examples of enhanced cooperation under the Treaties include the Schengen *acquis* or the creation of the European Public Prosecutor’s Office (EPPO) (over the objection of several member states, including Hungary and Poland). The experiences of the eastern enlargement of the Union inspired the introduction of the elaborate Cooperation and Verification Mechanism (CVM) to complete the Bulgarian and Romanian accession in the face of slow and contentious progress over deliverables. In these cases, differentiation meant buying time in order to make a community of values and of laws work.

The logic of differentiated governance is premised on the genuine political commitment of a member state to observe the terms of Union membership, with its benefits and burdens. The unanimity requirement in the domain of Common Foreign and Security Policy may be the perfect incentive for forging compromises between the member states, yet “a common commitment to values and norms is an insufficient basis for policy consensus on what are still largely perceived to be the foreign policy interests of individual member states”.<sup>19</sup> At the same time, the *à la carte* approach in the Area of Freedom, Justice and Security has led to extreme fragmentation, to the point of routinely recognized

<sup>15</sup> See e.g. B de Witte, ‘Variable Geometry and Differentiation as Structural Features of the EU Legal Order’ in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 9-27.

<sup>16</sup> F Fabbrini, *Brexit and the Future of the European Union. The Case for Constitutional Reforms* (Oxford University Press 2021) 81.

<sup>17</sup> D Thym, ‘Competing Models for Understanding Differentiated Integration’ in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 28.

<sup>18</sup> F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 121.

<sup>19</sup> S Blockmans, ‘Differentiation in CFSP: Potential and Limits’ in S Blockmans (ed.), *Differentiated Integration in the EU: From the Insider Looking Out* (CEPS 2014) 46.

disintegration.<sup>20</sup> And even in the terrain of enhanced cooperation, it is hard to overlook that the member states that refuse to join the EPPO continue to enjoy the benefits of membership without the burdens of adhering to the applicable legal safeguards.

Fabbrini describes this unfortunate side-effect to be a “new height” of differentiated integration.<sup>21</sup> The new integration theory of Jones, Kelemen and Meunier proposes a conceptualization in terms of *failing forward*, wherein “lowest common denominator inter-governmental bargains led to the creation of incomplete institutions, which in turn sowed the seeds of future crises, which then propelled deeper integration through reformed but still incomplete institutions”.<sup>22</sup>

Legal differences between policy areas may permit the emergence of overlapping governance regimes: Economic integration (the single market premised on the four freedoms) appears to be less fragmented than other policy areas.<sup>23</sup> One fear is that due to a seemingly unstoppable proliferation of mechanisms fostering flexibility differentiation leads to disintegration – to the point of endangering “the core principles and values of the European integration project”.<sup>24</sup> As de Witte notes, due to differentiation “the contours of the EU legal order have become rather fuzzy”, to the point that the CJEU’s “old ideal of EU legal rules being ‘fully applicable at the same time and with identical effects over the whole territory of the Community’ has become unattainable”.<sup>25</sup>

A decade into the rule of law crisis scholarship on differentiation has to account for a new form of disintegration: The normalization of national reluctance to respect the primacy of EU law. In 2021, the Polish Constitutional Tribunal issued two rulings in a few weeks, also defying the CJEU,<sup>26</sup> while the Romanian Constitutional Court banned lower courts from following a CJEU judgment.<sup>27</sup> These judgements followed in the footsteps of the German Constitutional Court,<sup>28</sup> directly disputing a judgment of the CJEU on the European Central Bank’s Public Sector Purchase Programme (PSPP/*Weiss*). In response President Koen

<sup>20</sup> See this *Special Section* J Silga, ‘Differentiation in the EU Migration Policy: “The Fractured” Values of the EU’ (2022) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 909.

<sup>21</sup> F Fabbrini, *Brexit and the Future of the European Union* cit. 81.

<sup>22</sup> E Jones, RD Kelemen and S Meunier, ‘Failing Forward? Crises and Patterns of European Integration’ (2021) *Journal of European Public Policy* 1519.

<sup>23</sup> S Fabbrini, ‘Differentiation or Federalisation: Which Democracy for the Future of Europe?’ (2021) *ELJ* 1, at 3-4.

<sup>24</sup> B De Witte, A Ott and E Vos, ‘Introduction’ in De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit.

<sup>25</sup> B de Witte, ‘Variable Geometry and Differentiation as Structural Features of the EU Legal Order’ cit. 25.

<sup>26</sup> See section IV for details.

<sup>27</sup> See case C-83/19 *Asociația “Forumul Judecătorilor din România” and Others v Inspekția Judiciară and Others* ECLI:EU:C:2021:393 and the refusal of the Romanian Constitutional Court banning lower courts from following it. See Romanian Constitutional Court judgment of 8 June 2021 n. 390.

<sup>28</sup> German Constitutional Court judgment of 5 May 2020 n. 859/1.

Lenaerts of the CJEU in a newspaper interview posited that “the first member state that ignores a judgment could unravel the entire European legal order”<sup>29</sup> (emphasis added).

These challenges against the primacy of EU Law quickly travelled from the legal to political sphere. On 19 October 2021, the European Parliament held a debate on the rule of law crisis and the primacy of EU law (in the shadow of an art. 7 TEU process that appears to be rather dormant in the Council). In his speech in the European Parliament, PM Morawiecki emphasized that the Constitutional Tribunal’s October ruling is narrow and very specific, affecting particular provisions of the Treaty in a specific case.<sup>30</sup> He also cited several examples, where European constitutional courts, including the German Constitutional Court, took similar stances.<sup>31</sup> For its part, the European Parliament emphasized that it

“[d]eeply deplores the decision of the illegitimate ‘Constitutional Tribunal’ of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU; expresses deep concern that this decision could set a dangerous precedent; underlines that the illegitimate ‘Constitutional Tribunal’ not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland”.<sup>32</sup>

and that “no EU taxpayers’ money should be given to governments that flagrantly, purposefully and systematically undermine values enshrined in Article 2 TEU”.<sup>33</sup>

In a subsequent letter addressed to fellow heads of government and all European institutions before the upcoming meeting of the European Council, PM Morawiecki argued for imposing limits on the primacy of EU law.<sup>34</sup> He called financial sanctions (budgetary conditionality) devoid of legal foundation, an instance of blackmail by EU institutions that are usurping powers “they do not have under the Treaties”.<sup>35</sup> The terms of the discussion in the European Council were not made available to the general public. (Subsequently, the CJEU’s judgment on budgetary conditionality confirmed the legal foundations of the conditionality regulation.)

That EU integration is a process of managing successive crises is taken for granted in the literature on differentiation. In turn, discourses on differentiation dilute the

<sup>29</sup> C de Gruyter, ‘President Koen Lenaerts: “Europese Hof komt meer center stage” (17 May 2020) NRC [www.nrc.nl](http://www.nrc.nl).

<sup>30</sup> ‘Statement by Prime Minister Mateusz Morawiecki in the European Parliament’ (19 October 2021) [www.gov.pl](http://www.gov.pl).

<sup>31</sup> *Ibid.*

<sup>32</sup> Resolution 2021/2935(RSP) of the European Parliament of 21 October 2021 on the rule of law crisis in Poland and the primacy of EU law, para. 1.

<sup>33</sup> *Ibid.* para 11.

<sup>34</sup> ‘Letter from Prime Minister Mateusz Morawiecki to the Heads of Governments and the Presidents of the European Council, the European Commission and the European Parliament on relations between national law and European law’ (18 October 2021) [www.gov.pl](http://www.gov.pl).

<sup>35</sup> *Ibid.*

distinction between ordinary politics and crisis management. Combined with the rise of illiberal political actors inside the Union<sup>36</sup> and the increasing popularity of claims framed in terms of national sovereignty, the crisis management mentality embedded in differentiation literature present a genuine challenge for the governance of the Union.<sup>37</sup> To start, notice how the crisis management mentality reinforces of sovereigntist claims in the face of plain legal argument. As an illustration: In late November 2021, Hungarian Prime Minister Viktor Orbán called on the Commission “to suspend all infringement procedures that undermine the measures taken by member states to protect the territorial and national integrity of their citizens and their security”.

Furthermore, in constitutional terms, this distinction between ordinary politics and crisis management (emergency) makes a considerable difference. Being in a permanent state of crisis management creates the distinct sense of governance through improvisation, a succession of flexible and adaptable practices that are enabled – but not constrained – by legal rules. The adverse effect of the normalization of crisis management (in lieu of ordinary politics and regular governance) is clear even without the bogey man of a Schmittian sovereign who runs politics as a series of decisions about the exception. When constitutional and legal rules are relegated into mere formalities, governance is replaced by the competition of raw political ambitions. Consequently, the emergence of naked sovereignty claims is both a symptom and a product of disintegration through differentiation in the Union. The familiar antidote for taming political ambitions in constitutional democracies has long been a gesture of pre-commitment, a voluntary subscription to a set of rules and principles that take precedence before rules produced by the regular political process.

## II.2. GETTING TO “A COMMUNITY OF VALUES AND OF LAWS”

In her first state of the union address in September 2020, the President of the European Commission, Ursula von der Leyen, made the Union as a “community of values and of laws” a central theme of the Commission’s work programme.<sup>38</sup> President von der Leyen’s tribute to Walter Hallstein’s political genius, complemented by the invocation of trust strongly resonates with a line of argument developed by Professor Armin von Bogdandy in a recent article.<sup>39</sup> Recalling that Hallstein’s concept of *Rechtsgemeinschaft* is richer than mere “integration through law”,<sup>40</sup> von Bogdandy argues that Hallstein’s concept is political in the sense that “it regulates by means of policies (today art. 26 ff TFEU), not, however, because it is a disputed object or forum of public debate. In other words: the

<sup>36</sup> L Hooghe and G Marks, ‘Grand Theories of European Integration in the Twenty First Century’ cit.

<sup>37</sup> S Fabbrini, ‘Differentiation or Federalisation’ cit. 23.

<sup>38</sup> Ursula von der Leyen, ‘State of the Union Address’ (16 September 2020) ec.europa.eu.

<sup>39</sup> A von Bogdandy, ‘Ways to Frame the European Rule of Law: *Rechtsgemeinschaft*, Trust, Revolution, and Kantian Peace’ (2018) EuConLR 675.

<sup>40</sup> *Ibid.* 681.

community of law was set up for regulatory politics, not for politics that deal with crises that might tear apart the body politic".<sup>41</sup>

The terms and stakes of the discussion between regulatory politics and the politics of crises are best explained with an illustration on the fate of the Commission's proposal for budgetary conditionality in defense of the rule of law, tabled in May 2018.<sup>42</sup> This proposal was triggered by the lack of progress surrounding the art. 7 TEU processes commenced against Poland and Hungary for exposing the rule of law to the risk of serious breaches. In response to the Commission's initial proposal, Hungarian Prime Minister Viktor Orbán was quick to proclaim that he was ready to veto the entire EU budget in the Council over the conditionality mechanism, adding pragmatically that "[t]here has to be unanimity, so Hungarians don't have to be worried".<sup>43</sup> This episode illustrates the differences between regulatory politics and political crisis management.

Indeed, von Bogdandy is concerned that as a narrow, legal concept, and especially in the manner as it is enforced by the CJEU, the rule of law is driving Europe apart. Thereupon he calls for recalibrating the concept of the rule of law through the positive force of trust: "chang[ing] from concern about the effectiveness of Union law to mutual trust among institutions highlights the latest European transformation".<sup>44</sup> This switch of perspectives does not only allow but requires pragmatically ignoring occasional violations of legal rules.<sup>45</sup> Strengthened by trust the rule of law becomes a cohesive force: It restores confidence in "Europe's self-understanding as a union of liberal democracies",<sup>46</sup> "the only transnational space close to Kantian peace and effective legal protection".<sup>47</sup> This requires European institutions to do less to safeguard the rule of law, and not more, in order to avoid antagonizing member states and citizens any further.

This approach runs the risk of treating the rule of law as a vessel for aspirations, a symbol of a better future in times of trouble – without a normative edge or practical consequences.

Note that in her 2020 State of the Union address President von der Leyen mentioned "ensur[ing] that money from our budget and NextGenerationEU is protected against any kind of fraud, corruption, and conflict of interest". Yet, the speech itself did not reference the Commission's controversial proposal for imposing budgetary conditionality at all. At this moment, President von der Leyen's silence could be read as a recognition of a hard-won

<sup>41</sup> *Ibid.* 684.

<sup>42</sup> Proposal for a regulation 2018/0136(COD) of the European Parliament and of the Council of 2 May 2018 on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States.

<sup>43</sup> France24, 'Hungary's Orbán Threatens Budget Veto' (4 May 2018) France24 [www.france24.com](http://www.france24.com).

<sup>44</sup> A von Bogdandy, 'Ways to Frame the European Rule of Law' cit. 692, original emphasis.

<sup>45</sup> *Ibid.* 694.

<sup>46</sup> *Ibid.* 693.

<sup>47</sup> *Ibid.* 697-8.



compromise about the Commission's conditionality proposal reached on the sidelines of negotiating an unprecedented recovery plan to address the effects of the COVID pandemic in the European Council.<sup>48</sup> Alternatively, this silence could also be interpreted as the new Commission giving up on securing respect for the rule of law through legal sanctions.

Predictably, images of a better future painted by President von der Leyen in terms of "a community of values and of laws" were openly attacked in the parliamentary debate following the State of the Union address. Ryszard Legutko – the co-chair of the European Conservatives and Reformists (also a professor of philosophy who is an intellectual architect of illiberal politics in Poland) – mobilized the founding value of democracy against the Commission's vision of Union as a community of values and of laws.<sup>49</sup> He accused the Commission of "brutal majoritarianism", submitting that on account of defending the rule of law the "mainstream majority wants to crush every form of dissent" and that "European Institutions wants to switch off democratically constituted institutions of the nation states".<sup>50</sup>

The constitutional bass for asserting claims about national identity "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government" is art. 4(2) TEU, the provision that gives effect to the sovereign equality of Member States. The extent to which theories on differentiation will accommodate sovereigntist rhetoric depends on their working definition of democracy, penchant for people's power and subsidiarity, and their acceptance of founding values or principles that are beyond differentiation through the processes of ordinary politics. Authors differ depending on whether they address the rule of law crisis as a series of symptoms associated with the accommodation of "core state powers" in a particular policy area,<sup>51</sup> or a larger phenomenon akin to the migration crisis or Brexit that imperils the foundations of the Union as a "community of values and the of laws".<sup>52</sup> Crisis scenarios with an appreciation for the constitutional dimension of the Union take into account the nature of member states' initial commitment to the membership at the time of accession to the Union, the responsibilities institution, their relations with member states and the nature of the relationship of member states to each other.

<sup>48</sup> J Morijn, 'The July 2020 Special European Council, the EU budget(s) and the Rule of Law: Reading the European Council Conclusions in their Legal and Policy Context' (23 July 2020) EU Law live eulawlive.com.

<sup>49</sup> 'Co-Chairman Prof. Ryszard Legutko on the State of the Union Speech' (16 September 2020) ecrgroup.eu.

<sup>50</sup> *Ibid.*

<sup>51</sup> N Pirozzi and M Bonomi, 'Differentiation and EU Governance: Key Elements and Impact' (2022) *The International Spectator* 160, 163.

<sup>52</sup> RD Kelemen, 'Is Differentiation Possible in the Rule of Law?' cit. 246.

### III. THE RULE OF LAW CRISIS: FROM DIALOGUES TO CONDITIONALITY

#### III.1. MUDDLING THROUGH POLITICAL DIALOGUE: FROM ART. 7(1) TEU TO ANNUAL REPORTS

A decade of polite dialogue managed to stall into irrelevance art. 7(1) TEU processes against Hungary and Poland in the Council. In response to open attacks on the Union's founding values (art. 2 TEU) by democratically elected illiberal governments of some member states, EU institutions gradually developed the so-called rule of law toolbox.<sup>53</sup> The latest tools include a comprehensive annual reporting mechanism on the rule of law that covers all member states, and a new regulation<sup>54</sup> that permits withholding EU funds from a member state that poses a risk to the Union's financial interest through breaching the principles of the rule of law (art. 3). In the meantime, the Parliament called for consolidating some of the existing mechanisms into a new EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.<sup>55</sup> The Parliament's proposal was based on the understanding that "Parliament, the Commission and the Council (the 'three institutions') share political responsibility for upholding Union values, within the limits of the powers conferred on them by the Treaties" (recital N).

The contrast between the Commission's emphasis on the inspirational ideal of the rule of law and the Parliament's emphasis on constitutional responsibilities is best illustrated by the Commission's mellow response to the ongoing Bulgarian constitutional crisis. Following a corruption scandal revolving around EU funds<sup>56</sup> and months-long street demonstrations then-Prime Minister Borissov launched a hasty constitutional amendment process seeking judicial reform and considerably reducing the parliament's size. On September 10, 2020 – a week before the State of the Union address – Commissioner Jourova responded to harsh criticism in Parliament's LIBE Committee by saying that "If democracy does not work bottom-up and top-down, *the Commission cannot do much if the things go too wrong in the member state [...] We have to bear in mind what the Commission is and isn't*".<sup>57</sup>

First, the Commission's rule of law toolbox is not the product of strategic engineering: It is a collection of miscellaneous instruments that yielded accidental benefits in response to illiberal national actors. This is especially true for the tools primarily meant to ensure economic cohesion and policy coordination (such as the European Semester). Second, the Commission's tools are complemented by the measures used by (or at least available

<sup>53</sup> European Commission, *The EU's Rule of Law toolbox* ec.europa.eu.

<sup>54</sup> Art. 3 of Regulation (EU) 2020/2092 of the European Parliament and Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

<sup>55</sup> Report 2020/2072(INL) of the Committee on Civil Liberties, Justice and Home Affairs of 29 September 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.

<sup>56</sup> C Oliver, 'How Bulgaria Became the EU's Mafia State' (9 September 2020) Politico www.politico.eu.

<sup>57</sup> M de la Baum, 'Jourová Faces Heat over EU's Soft Approach to Bulgarian Corruption' (10 September 2020) Politico www.politico.eu (emphasis added).

to) other EU institutions, sometimes independent of the Commission's actions (e.g. the Parliament's own initiatives). Third, the rule of law toolbox evolved over time, against a backdrop of serious contestation regarding their legal basis as well as their appropriateness. As a result, the tools themselves reflect compromises. In short, these tools and mechanisms were not designed to address a full-fledged crisis shaking the foundations of the EU legal order. And calls for addressing the systemic violations of the founding values through systemic infringement action so far have not been met.<sup>58</sup>

### III.2. FROM DIALOGUES TO BUDGETARY CONDITIONALITY: ON VETO THREATS AND FLEXIBLE LEGAL FRAMES

The Commission's approach to managing the rule of law crisis has long rejected hard, non-negotiable sanctions. The decade-long dialogue has created a climate where EU institutions do not need to explain their hesitance address the recalcitrance of illiberal member states. As predicted by Schimmelfennig and Sedelmeier's external incentives model, despite ample positive and negative incentives "once backsliding occurred in Hungary and Poland, EU institutions were unable to redress it due to the lack of credible sanctions".<sup>59</sup> By contrast, the budgetary conditionality mechanism proposed by the Commission requires clearly labelling breaches of the rule of law that put the financial interests of the Union at risk.

The logic of creating positive incentives has been advocated for reinvigorating the cohesion policy, as a tool of differentiation in the General Affairs Council in November 2016.<sup>60</sup> At this point, it is almost pedantic to recall that the EU institution dedicated to crimes against the EU's financial interests is the EPPO, which Hungary and Poland are refusing to join in the sovereigntist spirit of protecting the competences of their national prosecutors' offices. When courting these two governments to sign up to the EPPO in 2017, Commissioner Vera Jourova told journalists that "she would propose for the next Multiannual Financial Framework (MFF) to "simplify" and "soften" cohesion rules if countries agree to come under the new EU prosecutor's oversight".<sup>61</sup>

<sup>58</sup> KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) *Yearbook of European Law* 3.

<sup>59</sup> F Schimmelfennig and U Sedelmeier, 'The Europeanization of Eastern Europe: The External Incentives Model Revisited' (2020) *Journal of European Public Policy* 814, 822.

<sup>60</sup> European Council, 'Council Conclusions on Results and New Elements of Cohesion Policy and the European Structural and Investments Funds' (16 November 2016) [www.consilium.europa.eu](http://www.consilium.europa.eu). In the context of reducing administrative burdens on disbursement the Council was committed to "Broader application of proportionality and the introduction of differentiation into the implementation of the ESI Funds programmes based on objective criteria and positive incentives for programmes" (para 29(f)).

<sup>61</sup> J Valero, 'Commission Offers Softer Rules to Hungary, Poland to Soften EU Prosecutor Deal' (6 October 2017) [Euractiv](http://Euractiv.com) [www.euractiv.com](http://www.euractiv.com).

The conversation turned from positive incentives to conditionality for funding in the European Parliament ahead of the revision of the Common Provisions Regulation (CPR).<sup>62</sup> In its discharge decision for 2018, the Parliament was “deeply concerned that members of these oligarch structures draw on Union funds particularly in the area of agriculture and cohesion to strengthen their position of power”.<sup>63</sup> The Commission’s 2018 proposal for the new CPR included suspending payments in case “there is a reasoned opinion by the Commission in respect of an infringement under art. 258 of the TFEU that puts at risk the legality and regularity of expenditure”.<sup>64</sup> The negotiation on the Commission’s 2018 proposal for imposing budgetary conditionality was subject to a multi-step inter-institutional dialogue in the ordinary course of the legislative process, *i.e.* the very format that Hungary and Poland learned to master over the years.

The day after the State of the Union address, in September 2020 the European Parliament condemned the state of the rule of law in Poland detailing numerous violations with the forensic precision familiar from similar earlier resolutions.<sup>65</sup> The 21 distinct grounds range from multiple guarantees of judicial independence, freedom of speech, assembly and association, as well as LGBT rights. The Hungarian government was ready to offer its support to Poland, calling the EP resolution devoid of facts, adding in the spirit of grand ideals that: “The condemnation of Poland is a political stance, yet another attack of European liberals on Christian, conservative Poland”.<sup>66</sup> In return, the Polish government was ready to back the Hungarian veto threat on the EU’s multi-annual budget, complete with COVID recovery fund (NextGenEU), over the budgetary conditionality mechanism proposed by the Commission.<sup>67</sup>

The veto threat required stretching EU law to its limits, well into the twilight zone between ordinary regulatory politics and crisis management. Although by that time the regulation on budgetary conditionality had already been approved as an EU legal act by the

<sup>62</sup> Report 2016/2326(INI) of the Committee on Regional Development of 24 May 2017 on building blocks for a post-2020 EU cohesion policy.

<sup>63</sup> Decision (2019/2055(DEC) of the European Parliament of 13 May 2020 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, section III – Commission and executive agencies.

<sup>64</sup> See art. 91(1)(d) of the Proposal COM(2018) 375 final 2018/0196(COD) for a Regulation of the European Parliament and the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument.

<sup>65</sup> Resolution COM(2017) 0835 of the European Parliament of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

<sup>66</sup> Cabinet Office of the Prime Minister, ‘European Parliament’s Decision Condemning Poland has no Factual Foundations’ (18 September 2020) [miniszterelnok.hu](http://miniszterelnok.hu).

<sup>67</sup> M de la Baum, H von der Burchard and D M Herszenhorn, ‘Poland joins Hungary in Threatening to Block EU’s Budget and Coronavirus Recovery Package’ (18 September 2020) [Politico www.politico.eu](http://politico.eu).

Council and the Parliament, in December 2020 the European Council adopted in its conclusions a number of conditions to the implementation of the new conditionality regulation in practice.<sup>68</sup> According to Polish Prime Minister Morawiecki, “the conclusions are a permanent act of the European law, they’re close to primary law, they’re close to the treaty. They’re above regulations. Regulations can be changed, but a regulation that has to be in line with these conclusions that we’ve adopted is not so easy to change. It can only be changed if we change the conclusions in the future, which would require unanimity”.<sup>69</sup>

While Prime Minister Morawiecki’s take on the legal force of the European Council’s conclusions may be unorthodox, his public statement clearly echoes a keen interest in shaping EU law through novel means, with reference to the weight of unanimity between national governments. Differentiation enthusiasts may see the force afforded to the European Council’s conclusion as a tool of flexibility that facilitated avoiding a veto over the MFF. The price of differentiation, however, may well be further legal disintegration,<sup>70</sup> a rather dangerous prospect, considering that these additional conditions – worded in a mix of diplomatic language and legal references – expressly acknowledge the need “to respect the national identities of Member States inherent in their fundamental political and constitutional structures”.<sup>71</sup> This language echoes the sovereigntist political rhetoric that has become a staple of political dialogues with illiberal political actors.

As acknowledged in the European Council conclusions, Poland and Hungary filed a challenge against the legality of the conditionality mechanism before the CJEU in the spring of 2021.<sup>72</sup> Initially the Commission insisted – in line with the expectation of these member states – that it was not going to invoke the mechanism before the judgment of the CJEU, despite the European Parliament’s continued insistence.<sup>73</sup> The Commission appears to have changed its position as illiberal member states continue to undermine judicial independence and resort to even more direct attacks on the primacy of EU law, escalating the rule of law crisis.<sup>74</sup>

Recall that the budgetary conditionality is the consequence of practical difficulties with applying art. 7 TFEU, which ought to apply when there is a “clear risk of a serious breach” of the founding value of the Union. To be able to say that a particular behaviour (even when the facts are not disputed) “affects” a subject in a “sufficiently direct way”

<sup>68</sup> Conclusions EUCO 22/20 of the European Council meeting of 10 and 11 December 2020 [www.consilium.europa.eu](http://www.consilium.europa.eu).

<sup>69</sup> A Brzozowski and M Mojak, ‘Rule of Law Split Looms Over Poland’s Ruling Coalition’ (10 December 2020) Euractiv [www.euractiv.com](http://www.euractiv.com).

<sup>70</sup> C Hillion, ‘A(nother) Lost Opportunity? The European Council and Domestic Assaults on the EU Constitutional Order’ (3 November 2021) [Verfassungsblog verfassungsblog.de](http://Verfassungsblog.verfassungsblog.de).

<sup>71</sup> Conclusions EUCO 22/20 cit.

<sup>72</sup> *Hungary v Parliament and Council* cit. and *Poland v Parliament and Council* cit.

<sup>73</sup> V Maksimov, ‘Commission May Face Trouble over Rule of Law Conditionality Guidelines’ (25 March 2021) Euractiv [www.euractiv.com](http://www.euractiv.com).

<sup>74</sup> See below, section IV.

requires a series of discretionary decisions on rather unclear and imprecise terms. It is exactly the type of legal drafting that runs counter to the basic premises of the rule of law, emphasizing clarity, foreseeability, and anti-arbitrariness. Thus, it is a serious achievement on Hungary's and Poland's part to drive EU institutions so far into mocking the rule of law in the spirit of defending it, as a prime illustration of failing forward in the spirit of differentiated governance.

While the Hungarian and Polish challenges against the conditionality regulation were pending before the CJEU, the European Parliament intensified its demands on the Commission to put the mechanism to work (March 2021,<sup>75</sup> June 2021<sup>76</sup>). Then in October 2021, the European Parliament decided to take the ultimate step and turned to the CJEU<sup>77</sup> against the Commission's failure to use the conditionality mechanism.<sup>78</sup>

On November 20, 2021 the Commission leaked correspondence it was about to send to both the Polish and the Hungarian governments to indicate that the Commission was ready to trigger the budgetary conditionality mechanism.<sup>79</sup> In the case of Poland lack of judicial independence and direct attacks on the primacy of EU law were named as key concerns. In the case of Hungary, the Commission's letter demanded robust measures against state-sponsored corruption and transparency of public funds (including from the Hungarian national budget), together with safeguards for judicial independence. The letter followed the Commission's announcement of infringement action, complete with a periodic and a lump sum penalty, for the Hungarian government's failure to enforce the CJEU's judgment protecting the rights of asylum seekers.<sup>80</sup> It was this infringement action that triggered Prime Minister Orbán to call on the Commission to suspend all infringement procedures in defense of territorial and national integrity.<sup>81</sup>

#### IV. DIFFERENTIATED GOVERNANCE AND THE SOVEREIGNTIST CHALLENGE TO THE PRIMACY OF EU LAW

In the early days of the rule of law crisis, the constitutional discourse was replete with reservations phrased in terms of defending national constitutional identity, paying lip service

<sup>75</sup> Resolution 2021/2582(RSP) of the European Parliament of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism.

<sup>76</sup> Resolution 2021/2711(RSP) of the European Parliament of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092.

<sup>77</sup> Case C-657/21 *Parliament v Commission* filed on October 29, 2021.

<sup>78</sup> L Bayer, 'Parliament Sues Commission for Not Using New Rule of Law Power' (29 October 2021) Politico [www.politico.eu](http://www.politico.eu).

<sup>79</sup> L Bayer and Z Wanat, 'EU Commission Questions Hungary and Poland on Corruption, Judiciary' (20 November 2021) Politico [www.politico.eu](http://www.politico.eu).

<sup>80</sup> European Commission, *Migration: Commission Refers Hungary to the Court of Justice of the European Union over its Failure to Comply with Court Judgment* [ec.europa.eu](http://ec.europa.eu).

<sup>81</sup> 'PM Orbán in a Letter to Ursula von der Leyen' (22 November 2021) About Hungary [abouthungary.hu](http://abouthungary.hu).

to the Treaties. In 2019, Fabbrini and Sajó warned about the destructive potential of constitutional identity narratives, presenting how they undermine the process of European integration.<sup>82</sup> Their caveats appear to have been too modest, as a decade into the rule of law crisis the direct judicial challenges against the primacy of EU law are reinforced by the robust contributions of illiberal leaders in the European political discourse on the national as well as the European level. Strong national sovereigntist language has been normalized into the European public discourse, assisted by processes of differentiated governance that favor adaptation through continuing dialogue (and inaction) to conditionality backed by credible sanctions, even when such sanctions aim to preserve the foundations of the Union's constitutional order. The CJEU is the direct subject of illiberal attacks.

On October 7, 2021 – in response to Prime Minister Morawiecki's request – the Polish Constitutional Tribunal declared arts 1 and 19 of the TEU unconstitutional under the Polish Constitution.<sup>83</sup> In a majority decision, the Tribunal asserted the primacy of the Polish Constitution over EU law (the TEU) and defended the sovereignty of Poland in the face of an “ever closer Union”. The case potentially affects the legitimacy of hundreds of judges appointed by PiS, the Polish ruling party.<sup>84</sup> This outcome was hardly a surprise: This is the escalation of the rather bitter dialogue concerning the independence of the Disciplinary Chamber of the Polish Supreme Court.<sup>85</sup> In response, the Commission swiftly reaffirmed the primacy of EU law and the binding force of all CJEU rulings on national authorities, including national courts.<sup>86</sup> In a joint statement, the German and French foreign ministers supported the Commission, calling respect for the values and legal rules of the Union a moral imperative.<sup>87</sup>

The Polish Constitutional Tribunal followed a judgment of the CJEU a day earlier in the case of Judge *Zurek*, emphasizing that the principle of the primacy of EU law “requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States”.<sup>88</sup> The Polish Constitutional Tribunal's October 2021 ruling was

<sup>82</sup> F Fabbrini and A Sajó, 'The Dangers of Constitutional Identity' (2019) ELJ 457.

<sup>83</sup> Constitutional Tribunal of Poland judgment of 7 October 2021 n. K3/21.

<sup>84</sup> L Woznicki, 'CJEU Receives Another Case Questioning the Legitimacy of Hundreds of PiS-Appointed Judges' (9 April 2021) *Wyborcza wyborcza.pl*.

<sup>85</sup> Joined cases C-585/18, C-624/18 and C-625/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* ECLI:EU:C:2019:982; case C-824/1 *A.B. and Others (nomination of judges to the Supreme Court)* ECLI:EU:C:2021:153; case C-791/19 *Commission v Poland (Disciplinary regime for judges)* ECLI:EU:C:2021:596; case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)* ECLI:EU:C:2021:798.

<sup>86</sup> European Commission, *European Commission Reaffirms the Primacy of EU Law* [ec.europa.eu](https://ec.europa.eu)

<sup>87</sup> Federal Foreign Office, 'Joint statement by the Foreign Ministers of France and Germany on the Decision by the Polish Constitutional Tribunal' (7 October 2021) [www.auswaertiges-amt.de](https://www.auswaertiges-amt.de).

<sup>88</sup> *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)* cit. para. 156; repeated in *Commission v Poland (Disciplinary regime for judges)* cit. para. 18.

in line with its earlier ruling on July 14, 2021, where a 5 judge panel of the Polish Constitutional Tribunal ruled that the interim measures imposed by the CJEU interfered with the organization of the Polish judiciary in an *ultra vires* manner.<sup>89</sup>

It is tempting to explain the twists and turns of the rule of law crisis as illustrations of a difficult integration process, or a phase where new members re-negotiate the terms of belonging to the Union. After all, compliance rates with CJEU judgements are far from perfect in other – including older – member states.<sup>90</sup> Thus, creative compliance is hardly a specialty of illiberal member states.<sup>91</sup> Still, it would also be a mistake to use the familiar tropes of differentiated integration to diffuse tensions, as the blanket narrative of differentiation conceals the efforts of EU institutions – especially the CJEU – to defend the founding values of the Union and the premises of the European legal order. These efforts are especially important, as the CJEU provides other European constitutional actors with ample guidance for addressing illiberal constitutional mockery and chicanery in defence of the Union as a community of values and of law.

## V. HALTING DISINTEGRATION: THE CJEU ON THE UNION'S LEGAL FOUNDATIONS

In recent years, the CJEU has taken to defending the Union's founding values and legal foundations to counter the normalization of illiberal democracy in the Union.<sup>92</sup> The CJEU's focus has been on halting disintegration through defending the judicial architecture of the legal order, putting an end to constitutional retrogression and securing the minimal legal preconditions of membership, while leaving plenty of room for differentiated governance. In recent years the CJEU has started strategically highlighting the fundamental constitutional significance of seemingly technical legal rules.

In the *Zurek* case, the CJEU emphasized that the individual benefits stemming from an independent and impartial judiciary:

“requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded”.<sup>93</sup>

<sup>89</sup> Constitutional Tribunal of Poland judgment of 14 July 2021 n. P7/20.

<sup>90</sup> G Falkner, 'A Causal Loop? The Commission's New Enforcement Approach in the Context of Non-compliance with EU Law Even After CJEU Judgments' (2018) *Journal of European Integration* 769.

<sup>91</sup> A Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU' (2016) *Public Administration* 685.

<sup>92</sup> Arguably, the CJEU's record is less robust in preliminary references when the principle of mutual trust is at play: see L Pech, P Wachowiec and D Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) *Hague Journal of the Rule of Law* 1.

<sup>93</sup> *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court)* cit. para. 108.



Making the benefits of EU membership and EU law personal certainly resonates with the idea(l) of Europe as a community of values and of laws. It translates the abstract ideal or aspiration of the rule of law to a practical personal experience, in terms of the enjoyment of benefits of EU membership and EU law. This is an account of the “community of values and of laws” that calls for active institutional involvement in order to preserve that community and the individual membership benefits (rights) of its members. Arguably, this responsibility does not fall on the CJEU alone, but is equally a task for other EU institutions, including the Commission.

To date, the 2022 judgment of the CJEU on budgetary conditionality stated in the most robust terms that the obligation to respect the rule of law “is a specific expression of the requirements resulting, for the Member States, from their membership of the European Union, pursuant to Article 2 TEU”<sup>94</sup> and that this is an obligation that “flows directly from the commitments undertaken by the Member States vis-à-vis each other and with regard to the European Union”.<sup>95</sup> The CJEU added that “Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States”.<sup>96</sup>

The same judgment also acknowledges the premises of differentiated governance expressed in art. 4(2) TEU, within limits that follow from respect for shared values, such as the rule of law.<sup>97</sup> This aspect is especially important from the perspective of differentiated governance, as it suggests due to their accession member states cannot make strong unilateral sovereignty claims without regard to the nature of their membership in the Union. The emphasis on shared values is an expression of community between the member states that also sets limits to disintegration through differentiation.

That the rule of law is a core value in a Union as a “community of values and of laws” should certainly not come as a surprise for member states that joined the Union in accordance with the Copenhagen criteria. That the independence and impartiality of national judiciaries is part and parcel of the rule of law is equally evident. The CJEU’s approach safeguarding the independence and impartiality of national courts does not entail erasing the heterogeneity of national judicial systems.<sup>98</sup> Rather: defining European minimum standards ensures that judicial cooperation, and trust across national legal systems

<sup>94</sup> Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 231.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, para. 232.

<sup>97</sup> *Ibid.* paras 232-234.

<sup>98</sup> I Damjanovski, C Hillion and D Preshova, ‘Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts’ (31 May 2020) EUIDEA [euidea.eu](http://euidea.eu).

is founded on the institutional reality of judicial independence and impartiality (and is not replaced by myth or deceit).

The CJEU's judgment on budgetary conditionality carefully builds on its earlier case law that sought to halt the disintegration of the legal order. The CJEU confirmed the significance of *pre-commitment* to the foundations of the Union's constitutional order and expressed objections to *constitutional retrogression* regarding the Union's founding values.

While the principle of non-retrogression is familiar from the area of socio-economic rights, it is far from well-developed as a general principle of human rights law or constitutional law.<sup>99</sup> Recently, in the Maltese judges' case, the CJEU addressed the issue of constitutional retrogression on the level of ground principles, reading art. 2 TEU in conjunction with art. 49 TEU. The CJEU asserted that a Member State's decision to join the Union is an instance of constitutional pre-commitment.<sup>100</sup> According to the CJEU, a Member State's free and voluntary commitment to the Union's founding values at the time of accession entails that a Member State cannot amend its constitution after accession to the effect of reducing the existing protection its constitution provides to the Union's founding values.<sup>101</sup>

The consequences of viewing EU accession as a gesture of pre-commitment to the Union's founding values are significant for boosting the capacity of EU institutions and of national courts to address illiberal democratic backsliding. As a result, an emphasis on pre-commitment is a powerful tool to arrest disintegration and assists with resettling the premises and foundations of differentiated governance. After all, the point of differentiated governance is the daily functioning of the Union, its single market and numerous policy areas.

Before attacks on the primacy of EU law became so prevalent, the Commission preferred to counter disintegration through defending the four freedoms, as its default solution, whenever possible. This approach avoids the grand words (and uncertainties) associated with defending the Union's constitutional order and founding values, and often falls back on the technical terrain of secondary EU law. The 2020 State of the Union address stressed the need "to restore the four freedoms – in full and as fast as possible", in order to build a world we want to live in. This approach rooted in the fundamental freedoms is meant to recast community law as a trustworthy frame of regulatory politics in the European Rechtsgemeinschaft. By putting its policy objectives in terms of the four fundamental freedoms, the Commission marked the lines of legal contestation over the future of the Union. This is a line which the Commission is used to holding, through infringement action. Attacks on the primacy of EU law, however, do not spare the four freedoms. Rather, such attacks present a robust challenge to the functioning of the single

<sup>99</sup> BTC Warwick, 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) *Human Rights Law Review* 467. Admittedly, it is also a contentious topic in EU law ever since case C-399/11 *Stefano Melloni v Ministero Fiscal* ECLI:EU:C:2013:107.

<sup>100</sup> Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311 paras 60-61.

<sup>101</sup> *Ibid.* para. 63.

market (*i.e.* the stronghold that was assumed to be spared from the adverse effects of differentiation leading to disintegration).

Furthermore, the CJEU's emphasis on pre-commitment and non-retrogression enable the Commission and the European Parliament to demand respect for the founding values outside the (severely compromised) framework of art. 7 TEU. Thus, the CJEU's judgment on budgetary conditionality has potentially far-reaching implications, as it highlights the practical significance of legal and political obligations undertaken at the time of accession. At a minimum, it confirms the constitutional (normative) basis of the Parliament's efforts in defense of the founding values, despite the Commission's reluctance to act. Recall here the Parliament's insistence on the shared responsibility of the Parliament, the Commission and the Council of the EU for upholding Union values under the Treaties.<sup>102</sup> Brexit sheds new light on this responsibility as well as on the value and consequences of membership in the Union, in and beyond the single market.

The emphasis on pre-commitment and non-retrogression is an equally important source of inspiration and guidance for national courts at a time when the founding values of the Union are challenged by political actors on the national level. The rapidly unfurling war on the concept of gender in the name of defending Christian values (and illiberal Christian democracy) provides ample opportunity for recasting national constitutional debates in terms of *pre-commitment*. The consequences of embedding pre-commitment in constitutional interpretation are well illustrated in the judgment of the Romanian Constitutional Court that found a statutory ban on "spreading the theory of opinion of gender identity" in public schools unconstitutional in December 2020.<sup>103</sup> The Constitutional Court referred to ECtHR jurisprudence and several elements of the EU *acquis* to demonstrate the transformation of the meaning of constitutional equality protection since EU accession; it concluded that combating gender stereotypes has been attached to the traditional approach the roles of men and women in society.<sup>104</sup> What gives constitutional significance to such developments in EU secondary law on the national level is the pre-commitment to upholding the founding values of the Union embedded in the decision to join the EU.<sup>105</sup> It goes without saying that the adherence to pre-commitment counters the forces of disintegration and thus reinforces the foundations of the Union's constitutional order.

The jurisprudence of the CJEU should and does assist other European constitutional actors with clarifying positions in dialogues about the rule of law, and especially, for invoking budgetary conditionality. The long-running conflict over the independence of the Polish judiciary provides ample illustration for such inter-institutional dialogue, especially on how differentiated governance serves illiberal constitutional actors on the national

<sup>102</sup> Recital N. of Report 2020/2072(INL) *cit.*

<sup>103</sup> Constitutional Court of Romania judgment of 16 December 2020 n. 907.

<sup>104</sup> *Ibid.* para. 76.

<sup>105</sup> As a side note, the Romanian judgment demonstrates the significance of unblocking the legislative process on the Horizontal Discrimination Directive, urged by the July 8 EP resolution (para. 21).

level. At the same time, experiences of such dialogue provide helpful guidance for defusing the current tension triggered by the Polish Constitutional Tribunal's defiance of the primacy of EU law and the lawful authority of the CJEU. Thus, unpacking the political and legal forces behind differentiated governance assists with exposing dynamics that lead to disintegration that damages the foundations of the European constitutional order.

## VI. CONCLUSION

The discourse of differentiated governance can explain not only the flexibility of the EU legal order, but also different degrees of commitment in the member states to European integration, and ultimately to membership. Differentiation, however, cannot and should not be used to excuse the wilful violation of the founding values of the Union or the foundation of the EU legal order, the primacy of EU law. Without such foundations there is no basis for differentiated governance, as the premises of a "community of values and of laws" disappear.

The recent rulings of national courts declaring the primacy of national law over EU law and follow up statements of illiberal politicians are both a symptom of the escalation of the rule of law crisis, and a reminder that fascination with differentiated governance easily loses sight of disintegration – and the membership benefits it supplies to illiberal governments. At the same time, studying the rule of law crisis through the lens of differentiated governance provides an opportunity for resetting the terms of the EU's response to the strategic and systemic disrespecting of the legal foundations of the EU. Several strands in the recent jurisprudence of the CJEU provide support and inspiration for doing so, such as the express recognition of pre-commitment and a rejection of retrogression regarding the founding values. Recognizing such ills and attaching credible sanctions to them is the only way to halt the dismantling of the Union's legal order, a process that runs in defiance of the commitments member states made upon their entry to the Union. Consistent reminders of the lasting significance of such pre-commitment are also a solid foundation for guarding the constitutional idea(l) of the Union as a "community of values and of laws". The CJEU has made major advances to this effect in its recent judgment on the budgetary conditionality. Now it falls on the Commission to active the mechanism against offending member states.