European Papers

A Journal on Law and Integration

Vol. 7, 2022, No 3

www.europeanpapers.eu

EUROPEAN PAPERS – A JOURNAL ON LAW AND INTEGRATION (www.europeanpapers.eu)

EP-JMN
EUROPEAN PAPERS - JEAN MONNET NETWORK
SALAMANCA - SAPIENZA - GRONINGEN - KONSTANZ
SORBONNE - UNITELMASAPIENZA - AMSTERDAM
610707-EPP-1-2019-1-ES-EPPJMO-NETWORK

With the support of the Erasmus+ Programme of the European Union

European Papers is a double-blind peer-reviewed journal. This Issue of the *e-Journal* (final on 15 March 2023) may be cited as indicated on the ***European Papers*** web site at ***Official Citation***: *European Papers*, 2022, Vol. 7, No 3, www.europeanpapers.eu.

ISSN 2499-8249 – *European Papers* (Online Journal) doi: 10.15166/2499-8249/0

Registration: Tribunal of Rome (Italy), No 76 of 5 April 2016.

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Vol. 7, 2022, No 3*

Articles

New Options for Differentiated Integration in the European Union

edited by Juan Santos Vara *and* Ramses A. Wessel

* The page numbering follows the chronological order of publication on the *European Paper* web site.

European Forum

Articles

New Options for Differentiated Integration in the European Union

Edited by Juan Santos Vara *and* Ramses A. Wessel

New Options for Differentiated Integration in the European Union: Introduction to the *Special Section*

Brexit particularly triggered new discussions on so-called differentiated integration (DI) in the European Union. Not only was Brexit perceived as a potential tool to take further integrative steps in certain policy areas, it also pointed to the idea that there is a risk in trying to force each and every Member State to follow the same pace. Hence, while part of the scholarship sees Brexit as a tragedy for the European integration process, others have pointed to possible advantages that would allow for further integration in certain areas. In any case, Brexit seems to have renewed the debate on the ways in which the EU Member States could proceed, together or in smaller groups. In that sense, the current debates reflect the earlier discussions on a *géometrie variable* or concentric circles that were vivid some decades ago.[1]

The aim of the present *Special Section* is to assess theoretical, conceptual implications of Brexit for integration scenarios, and – more broadly – to take stock of the DI possibilities in different concrete policy areas and highlight options and obstacles. First drafts of the *Articles* of this *Special Section* were discussed in Salamanca on 28-29 October 2021 at a workshop organised in the framework of the European Papers Jean Monnet Network under the direction of Prof. Juan Santos Vara (University of Salamanca) and Prof. Ramses A. Wessel (University of Groningen), with support of the Centre for the Law of EU External Relations (CLEER) in The Hague on the topic: *The EU after Brexit: New Options for Differentiated Integration?* The *Articles* were subsequently discussed, reviewed and revised in various rounds. The end-result is laid down in this *Special Section*.

A first set of *Articles* deals with various approaches to European integration and differentiation. In his *Article*,[2] Robert Böttner, one of the key experts in this area, sets the stage by exploring the potential of enhanced cooperation as introduced by art. 20 TEU.

[1] See for a comprehensive overview of past and current developments from a political science/IR perspective B Leruth, S Gänzle and J Trondal (eds), *The Routledge Handbook of Differentiation in the European Union* (Routledge 2022).

[2] R Böttner, 'The Instrument of Enhanced Cooperation: Pitfalls and Possibilities for Differentiated Integration' (2022) European Papers www.europeanpapers.eu 1145.

ISSN 2499-8249
doi: 10.15166/2499-8249/604

Böttner argues that shifting political attitudes of EU Member States and – plainly and simply – the legal framework for this tool of differentiate integration influence how and when enhanced cooperation can and will be used as an instrument to overcome deadlocks in negotiation. This *Article* is followed by a contribution that assesses the limits of this potential. Armin Cuyvers argues that the legal space for truly structural forms of differentiation in the EU is limited by several sources of rigidity, understood as legal rules and principles that limit the scope for structurally significant differentiation in the EU's legal and constitutional set-up.[3] Cuyvers demonstrates how Brexit brought these sources of rigidity to the surface, and how legal rigidity can and likely will collide with an increasing political desire for more structural differentiation in the future. That structural differentiation can also be reached less drastically, is argued by Hübner and Van den Brink.[4] In their *Article*, they point to the potential of, what they term "legislative differentiation" as an alternative to more classic forms of DI. With legislative differentiation, they refer to the situation in which Member States are allowed to make substantive policy choices in the implementation of EU legislation and use such flexibility to customize EU legislation to their own domestic contexts. Fabian Terpan and Sabine Saurugger,[5] in their *Article*, reveal that differentiation is not *per se* about legislation, but that there is also a "soft law" dimension. The purpose of their *Article* is to provide a framework that helps analysing the relationship between soft law, differentiation, and the prospects of integration/disintegration. More specifically they aim at developing a typology of scenarios in order to show how soft law contributes to our understanding of differentiation and to the overall discussion about integration/disintegration in the European Union, in a context of crises. Finally, in this first – more theoretical – part, Maria Kendrick focusses on lessons to be learnt on differentiated integration from applying Brexit as a framework.[6] The confusion surrounding differentiated integration as a concept, and the prominent role of the UK in availing itself of opportunities to utilise differentiated integration mechanisms, has led differentiated integration to be attributed to the UK as a form of British exceptionalism. In the new situation, the maintenance of differences between the remaining Member States means that there needs to be increased open acceptance of the likely need for greater differentiated integration in the future.

[3] A Cuyvers, 'The Legal Space for Structural Differentiation in the EU: Reciprocity, Interconnectedness and Effectiveness as Sources of Constitutional Rigidity' (2022) European Papers www.europeanpapers.eu 1165.

[4] T van den Brink and M Hübner, 'Accommodating Diversity through Legislative Differentiation: An Untapped Potential and an Overlooked Reality?' (2022) European Papers www.europeanpapers.eu 1191.

[5] F Terpan and S Saurugger, 'Does Soft Law Trigger Differentiation and Disintegration?' (2022) European Papers www.europeanpapers.eu 1229.

[6] M Kendrick, 'Brexit the Ultimate Opt-Out: Learning the Lessons on Differentiated Integration' (2022) European Papers www.europeanpapers.eu 1211.

A second set of *Articles* address DI in specific policy fields with the aim to assess options in more concrete terms. First of all, Juan Santos Vara studies DI in the context of the EU's asylum policy.[7] The aim of his *Article* is to analyse to what extent the development of flexible solidarity in the field of asylum will allow the EU to address the shortcomings that the Common European Asylum System (CEAS) is facing today. A key question is whether differentiation as regards solidarity serves to further develop the EU asylum policy by introducing a useful degree of flexibility to accommodate the different interests of the Member States. Similar national sensitivities can be found in the area of financial markets regulation. The question of how Brexit affects the manner in which the EU manages financial rules and regulations with the UK is central in the *Article* by Shawn Donnelly.[8] He raises the question of how Brexit changed the EU's need to rely on differentiated law internally to overcome intergovernmental conflict over the proposed legislation. A consequence of Brexit may be that the EU need not rely on differentiated law as much as in the past. Effects of Brexit can also be seen in EU foreign, security and defence cooperation. Benjamin Martill and Monika Sus show that while the strategic benefits of differentiation increased following the Brexit vote, the growing concern in Brussels for the precedent set by Brexit, the collapse of issue-specific dynamics into a singular concern for UK "cherry picking", and the rightward shift in UK politics occasioned by the Brexit negotiations all undermined the prospects for a differentiated outcome in security and defence.[9] Still, as Beatriz Cózar Murillo analyses,[10] the launch and implementation of the Permanent Structured Cooperation (PESCO) in the EU in 2017 has emerged as a real game-changer. The author focuses on the analysis of both horizontal and vertical differentiated integration from an eminently practical point of view to distinguish a real group of front runners in the implementation of PESCO and the window of opportunity that opens up by allowing third states to participate in individual projects. In the end, however, the question remains to what extent defence cooperation under the umbrella of PESCO can be cut up in pieces and yet still be considered a *common* defence adhering to the EU's general principles of consistency and sincere cooperation, that are fundamental to any common policy. The question raised by Anneke Houdé and Ramses A. Wessel in their *Article*,[11] therefore, is whether DI in PESCO is limited by these principles, and consequently, whether the Common Security and Defence

[7] J Santos Vara, 'Flexible Solidarity in the New Pact on Migration and Asylum: a New Form of Differentiated Integration?' (2022) European Papers www.europeanpapers.eu 1243.

[8] S Donnelly, 'Brexit, EU Financial Markets and Differentiated Integration' (2022) European Papers www.europeanpapers.eu 1265.

[9] B Martill and M Sus, 'With or Without EU: Differentiated Integration and the Politics of Post-Brexit EU-UK Security Collaboration' (2022) European Papers www.europeanpapers.eu 1287.

[10] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' (2022) European Papers www.europeanpapers.eu 1303.

[11] AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers www.europeanpapers.eu 1325.

Policy (CSDP), despite the differentiation, still contributes to a common policy. In short, is there a tension between *commonness* and *differentiation*?

This final question can be seen as leading all contributions to this *Special Section*.

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ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

THE INSTRUMENT OF ENHANCED COOPERATION: PITFALLS AND POSSIBILITIES FOR DIFFERENTIATED INTEGRATION

ROBERT BÖTTNER*

ABSTRACT: Enhanced cooperation under art. 20 TEU is a tool introduced by the Treaty of Amsterdam to allow a group of at least nine member states to adopt rules of secondary law that binds only these participating States. Introduced as an instrument to tackle problems of a Union of 27 (and more) States, it has only been used on a few occasions. However, its use (and non-use) is not only dependent solely on the number of Union member states. Shifting political attitudes in the member states and – plainly and simply – the legal framework for this tool of differentiate integration influence how and when enhanced cooperation can and will be used as an instrument to overcome deadlocks in negotiation. Against the background of member state practice, the *Article* sets out to explore the potential of enhanced cooperation.

KEYWORDS: enhanced cooperation – differentiation – Rome III – European Patent – financial transaction tax – EPPO.

I. INTRODUCTION

In the past years, several crises have hit the Union and have put the idea of European integration to the test: the economic and financial crisis that revealed the pitfalls of asymmetric economic and monetary integration; the so called "migrant crisis", which exposed the reluctance of some member states to truly participate in certain integration projects; the rule

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/605

of law crisis, in which the Union must defend its values against erosion in some member states; and, not least, the withdrawal of a member state, an event that no one deemed even possible when art. 50 TEU was introduced with the Lisbon Treaty. On the other hand, membership negotiations are on-going with States of the Western Balkans, which will in the long run further increase the plethora of voices and approaches in European integration – and thus the potential for political blockades when pursuing legislative projects.

It seems therefore, that uniform integration will have to be compromised for forms of flexible integration in order to enable progress in some policy areas. In other words, integration by at least some member states – while granting others the option to refrain from participation – may be preferential. Since 1998, primary law contains the instrument of enhanced cooperation (now art. 20 TEU and arts 326-334 TFEU) as a tool of flexible integration. Flexible or differentiated integration (differentiation) is understood *grosso modo* as a form of integration where legal rules do not apply to all member states uniformly or at the same time. *Enhanced cooperation* as a specific tool of differentiation allows a group of at least nine member states to realise secondary-law projects among themselves. A cooperation can only be established as a last resort (after uniform integration has failed) and must further the integration process. Non-participating member states are not bound by their legal acts but have the possibility to join an established cooperation at any time.

After having remained unused for about a decade after its introduction, five cases of enhanced cooperation plus the "permanent structured cooperation" – a similar tool in CSDP – have been established to date (and even more have been proposed). The participating States have successfully implemented four of them (except for the financial transaction tax) and in some cases, other States even acceded to the respective cooperation. On other occasions, the "threat" to forge ahead with only a limited number of States eventually led to negotiation results that included all States. The success (of the use and non-use) of enhanced cooperation has decreased the reluctance of member states to depart from uniform integration. The European institutions have also endorsed it, first and foremost the Commission in its White Paper on the Future of Europe as one possible scenario ("those who want more, do more").[1]

The practical experience delivers insights into this tool of flexible integration that exceed the theoretical discussions available thus far. It sheds light on the possibilities of enhanced cooperation, but also the risks connected to it, *i.e.*, when not all member states participate in specific legislation. The locks and limits are contained in the primary law provisions on this instrument. This *Article* sets out to discuss the practical cases of enhanced cooperation in order to set the scene of this flexibility tool (see below section II) before discussing the prerequisites for the establishment and implementation of enhanced cooperation against this practical background (esp. section III) as well as the potential scope of cooperation. It will

[1] Communication COM(2017) 2025 final of 1 March 2017 from the Commission, White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025, 28 ff.

focus on the relationship between participating and non-participating member states that is characterised by the principle of openness towards non-participating States on the one hand, and on the other hand by the principle of mutual non-affection. On a related note, it will also tackle the question if enhanced cooperation can be a tool to accommodate reservations to common integration – such as the ones witnessed before Brexit (section IV), and, more generally, if enhanced cooperation may be a tool to strengthen integration or if it will be a risk for cohesion and solidarity among the Union's members.

II. Setting the scene: Use and "non-use" of enhanced cooperation

Since its introduction by the Treaty of Amsterdam, enhanced cooperation (currently art. 20 TEU and arts 326-334 TFEU) has been used in no fewer than five cases: the law applicable to divorce and legal separation,[2] unitary patent protection,[3] the financial transaction tax,[4] property regimes of international couples,[5] and the European Public Prosecutor's Office (EPPO).[6] Moreover, Permanent Structured Cooperation (PESCO) has been established on the basis of art. 46 TEU.[7] Frankly, this flexibility tool in the area of foreign and security policy is different from enhanced cooperation and not a *lex specialis* case of the latter. However,

[2] Decision 2010/405/EU of the Council of 12 June 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation, and Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

[3] Decision 2011/167/EU of the Council of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, and Regulation (EU) 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, as well as Regulation (EU) 1260/2012 of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

[4] Decision 2013/52/EU of the Council of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax. No implementing act has yet been adopted, but discussions are still on-going on the basis of the Commission's Proposal COM(2013) 71 and a Franco-German proposal of 2019. As the Commission intends to include a financial transaction tax as other own resource in the next MFF, discussions are intensifying; cf Doc. 5737/21 of the Council of 12 February 2021 on financial transaction tax.

[5] Decision (EU) 2016/954 of the Council of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, and Regulations (EU) 2016/1103 and 2016/1104 of the Council of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and in matters of the property consequences of registered partnerships.

[6] Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"). There is no authorising decision as enhanced cooperation for the EPPO has been established by a fast-track procedure.

[7] Decision (CFSP) 2017/2315 of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States. See also European Council, *Conclusions of 14 December 2017* consilium.europa.eu.

it bears some similarities both structurally and substantially which allows to use it as a point of reference for the interpretation of the enhanced cooperation instrument.[8]

The files on establishing and implementing enhanced cooperation are all characterised by different timeframes and intensity of discussions and different levels of political controversy, all of which are factors that eventually led to enhanced cooperation.[9] For example, the EPPO had been established only after thorough and profound discussions between all member states that lasted for several years. States were determined to come to a uniform solution and discussed very detailed aspects thoroughly. Similarly, the adoption of the cooperation concerning the European patent was predated by a decade-long discussion period. On the other hand, for example, the proposal for the financial transaction tax met strong resistance in principle so that willing member states resorted to enhanced cooperation relatively quickly. The picture would be incomplete, however, if we did not take into account those files in which – although not put into place – enhanced cooperation had been considered at some point and then had been abandoned: either because agreement was reached by all member states or because the file was abandoned altogether.

There are at least three examples of files for which enhanced cooperation was discussed but eventually not used as an alternative. As early as 2005, enhanced cooperation was considered as a potential tool to overcome the deadlock regarding the proposal for passenger car-related taxes.[10] It was one part of a larger strategy to reduce CO2 emissions in order to meet the standards set by the Kyoto Protocol. The legal basis (art. 93 TEC, now art. 113 TFEU) required a unanimous decision in the Council. Due to the fiscal nature and budgetary implications of the measure, the member states did not reach an agreement. In this situation, the rapporteur in the European Parliament proposed to use enhanced cooperation by the EU members favouring the Commission's proposal.[11] Nevertheless, the dossier was abandoned altogether without any further explanation[12] but it is likely that the more integration-friendly member states were not willing to carry a burden resulting from the envisaged secondary legislation while others were not ready to do the same.

Secondly, the Commission in 2008 proposed a directive on equal treatment.[13] The legal basis was what is now art. 19(1) TFEU, which requires unanimity in the Council and

[8] See on PESCO, B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' (2022) European Papers 1303 www.europeanpapers.eu.

[9] On the legislative history of the dossiers, see in detail R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* (Brill Nijhoff 2021) 47 ff.; see also C Heber, *Enhanced Cooperation and European Tax Law* (Oxford University Press 2021) 44 ff.

[10] Communication COM(2005) 261 final from the Commission of 5 July 2005 on passenger car related taxes.

[11] Report A6-0240/2006 of the European Parliament of 10 July 2006 on the proposal of a Council directive on passenger car related taxes, Explanatory statement (Rapporteur's position).

[12] Cf C Heber, *Enhanced Cooperation and European Tax Law* cit. 58.

[13] Communication COM(2008) 426 final from the Commission of 2 July 2008 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

Parliament's consent. A first policy debate in the Council revealed mixed feelings: mostly favourable, several ministers held that their existing national legal systems already went beyond the Commission proposal. Others questioned the need to establish Community rules in this area, while supporting the principle of equal treatment.[14] This situation prevailed throughout the next years. In late 2014, the Italian Presidency considered enhanced cooperation as one possible solution.[15] The Council, however, explicitly rejected this option,[16] *inter alia* for reasons of ensuring consistency in the protection of basic rights.[17] Since then, in search for an agreement, discussions have intensified and continue to this day.

Thirdly, in 2012, the European Commission proposed a legal act for the statute of European Foundations,[18] most importantly in order to tackle problems for cross-border activities of national foundations (such as taxation issues). Despite intense discussions, a number of member states opposed the draft. The flexibility clause of art. 352 TFEU, which served as the legal basis, requires unanimity in the Council, which seemed impossible to achieve. While some Members of the European Parliament openly advocated for the use of enhanced cooperation,[19] member states decided not to make use of this option, partly because it was unclear whether art. 352 TFEU could be deployed within enhanced cooperation at all, which adds to the general reluctance to resort this legal basis in order to avoid a competence creep on the part of the Union.[20] Research has shown, however, that this provision may well be the legal basis for acts adopted by only a group of member states.[21]

[14] Cf European Council, *Press release 13405/08 (Presse 271) of 2 October 2008 on the 2893rd Council Meeting on Employment, Social Policy, Health and Consumer Affairs* www.consilium.europa.eu 6.

[15] Doc. 15166/14 of the Council of 11 November 2014 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, p. 3; Doc. 15705/14 of the Council of 21 November 2014 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, p. 3.

[16] Doc. 16887/14 of the Council of 23 January 2015 on the 3357th meeting of the Council (EPSCO) of 11 December 2014, p. 7 ff.

[17] Doc. 15819/14 of the Council of 21 November 2014 on a proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Progress Report), p. 7.

[18] Communication COM(2012) 35 final from the Commission of 8 February 2012 on the statute for a European Foundation (FE).

[19] Doc. 16715/14 of the Council of 9 December 2014 on the summary record of the meeting of the European Parliament Committee on Legal Affairs (JURI), held in Brussels on 1-2 December 2014, p. 2; C Heber, *Enhanced Cooperation and European Tax Law* cit. 56.

[20] Cf C Heber, *Enhanced Cooperation and European Tax Law* cit. 57.

[21] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 156 ff.; U Derpa, *Die verstärkte Zusammenarbeit im Recht der Europäischen Union* (Brooberg 2003) 188; M Selmayr, 'Die "Euro-Rettung" und das Unionsprimärrecht: Von putativen, unnötigen und bisher versäumten Vertragsänderungen zur Stabilisierung der Wirtschafts- und Währungsunion' (2013) Zeitschrift für Öffentliches Recht 306; with doubts: C Heber, *Enhanced Cooperation and European Tax Law* cit. 57. The ECJ has ruled that reference to the Union at large ("throughout the Union" and "Union-wide" used in art. 118 TFEU) does not *per se*

Finally, there are cases in which enhanced cooperation was considered but eventually member states could agree on uniform integration. In 1997, the Commission proposed a directive on energy taxation based on what is now art. 113 TFEU, which requires unanimity in the Council.[22] In the following four years and after considerable work was done, the Council was unable to reach an agreement, which led the Commission to publicly consider the use of the enhanced cooperation mechanism.[23] By the end of the year, the Council noted that there was still no agreement on the issue.[24] The matter had been discussed by the EU leaders in the European Council in March 2002[25] and the Council was finally able to reach an agreement in October 2003 to adopt the directive.[26]

An interesting example where enhanced cooperation has *not* been used is the case of the European arrest warrant.[27] The Commission proposed a framework decision in 2001[28] whose adoption was subject to unanimity in the Council. Italy opposed the initial proposal and demanded a reduced list of offences for which double criminality would not be checked. Italy's opposition met strong resistance by the other member states, the Commission, and also national media. Both the European Parliament and the European Commission advocated for enhanced cooperation without Italy's participation should unanimity not be possible. Outside pressure and high domestic reputation costs eventually led Italy to give in so that the European arrest warrant could be adopted as an instrument by the Union as a whole.[29]

As a first aspect, we can conclude that there is a certain willingness among the member states, but also within the Union institutions, to resort to the instrument of enhanced cooperation. However, it is not always put into place, either because the costs of abandoning uniform integration are considered too high or because reluctant member states are successfully pushed into agreeing to a Union-wide measure.

prohibit enhanced cooperation: joined cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240 para. 68.

[22] Communication COM(97) 30 final from the Commission of 12 March 1997 on restructuring the community framework for the taxation of energy products.

[23] Agence Europe, *Bulletin Quotidien Europe No. 7897* agenceurope.eu.

[24] Doc. 15288/01 of the Council of 5 February 2002 on the 2401st meeting of the Council (ECOFIN), held in Brussels on 13 December 2001, p. 6 (as corrected by Council Doc. 15288/01 COR 1 REV 1 of 23 April 2002).

[25] European Council, *Presidency Conclusions of 15-16 March 2002* ec.europa.eu point 12.

[26] Doc. 14140/03 ADD 1 of the Council of 24 November 2003, p. 4 ff.; Directive 2003/96/EC of the Council of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

[27] See on this case DA Kroll and D Leuffen, 'Enhanced Cooperation in Practice: An Analysis of Differentiated Integration in EU Secondary Law' (2015) Journal of European Public Policy 353, 366 ff.; R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 346.

[28] Communication COM(2001) 522 final from the Commission of 19 September 2001 on a proposal for a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.

[29] Framework Decision 2002/584/JHA of the Council of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision.

III. Legal framework for enhanced cooperation

The existing practice of use and non-use of enhanced cooperation not only gives insight into policy areas in which the member states consider flexible integration as a viable option, but also gives some clarification on the rules governing this instrument. The following section will review the legal requirements for establishing and implementing enhanced cooperation in order to draw some conclusions on the instrument's limits and possibilities.

III.1. Establishing of enhanced cooperation

As art. 20(1) TEU provides, member states which wish to establish enhanced cooperation between themselves may make use of the Union's institutions and exercise those competences and this group, as art. 20(2) TEU adds, must comprise at least nine States. First of all, and this is rather trivial, enhanced cooperation may only be established among the members of the Union, *i.e.*, the EU member states. Other States, for example non-EU members of the European Economic Area or candidate countries, cannot be included in the group of cooperating States. Enhanced cooperation is a tool to create a sub-group of cooperating States *within* the Union, not across the Union's frontiers.[30] However, as research has shown, this group may establish, under certain conditions, relations with other States based on international agreements by making use of the Union's external competences.[31] Nonetheless, this is a first safety net that shall prevent flexible integration from creating "fuzzy edges" between Union members and outside States.

Secondly, art. 20(1) TEU also states that enhanced cooperation may be established only within the framework of the Union's non-exclusive competences. Not only does this exclude all exclusive Union competences as spelled out in art. 3 TFEU from being exercised by only a group of member states. It also means that member states can only cooperate in areas for which competences have been conferred on the Union at all. If there is no Union competence – a competence that could be exercised by the Union at large – then there can be no enhanced cooperation. In other words, flexible integration under enhanced cooperation cannot exceed the boundaries of competences that *all* founding States have agreed upon. This is only possible by amending the Treaties in accordance with art. 48 TEU, a procedure that requires the consent of all EU members. This is an important lock to prevent that a "second Union" or sub-union emerges that reaches a new level of integration that has not been subject to discussion by all States.

However, this also means that, should a group of member states wish to exceed the primary-law based state of integration, they must resort to classical international law-based cooperation. In this context, it must be noted that enhanced cooperation is not an

[30] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 66 ff., 210 ff.
[31] *Ibid*. 203 ff. with further references.

exclusive tool of flexibility for the EU members[32] and it seems that the CJEU shares this view.[33] In fact, the wording of art. 20(1) TEU indicates that the existence of the tool of enhanced cooperation does not prevent the member states from cooperating in other forms. Enhanced cooperation within the Union is merely an offer to these States ("*may* make use")[34] and does not exclude the possibility to work more closely together on the basis of an international agreement[35] as long as such agreement does not infringe Union law in general as required by the principles of sincere cooperation (art. 4(3) TEU)[36] and pre-emption and primacy of Union law.[37] This, of course, somewhat diminishes the integrative potential of enhanced cooperation as it cannot legally prevent intergovernmental for the benefit of supranational cooperation. Cooperation outside the EU framework on the basis of international agreements in the context of the euro crisis (European Stability

[32] *Ibid*. 67 ff.

[33] Case C-370/12 *Pringle* ECLI:EU:C:2012:756 paras 167–169; cf more clearly, case C-370/12 *Pringle* ECLI:EU:C:2012:675, opinion of AG Kokott, paras 174 ff.

[34] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 67; with the same view G Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty' (1998) CMLRev 855, 870; R Hofmann, 'Wieviel Flexibilität für welches Europa?' (1999) EuR 713, 727 ff.; K Langner, *Verstärkte Zusammenarbeit in der Europäischen Union* (Peter Lang 2004) 53. See also D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos 2004) 297 ff.

[35] C Thun-Hohenstein, 'Die Möglichkeit einer "verstärkten Zusammenarbeit" zwischen EU- Mitgliedstaaten: Chancen und Gefahren der "Flexibilität"' in W Hummer (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam* (Manz 1998) 127; G Papagianni, 'Flexibility in Justice and Home Affairs: An Old Phenomenon Taking New Forms' in B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 118; B De Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements' in B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 237 ff.; M Kellerbauer, *Von Maastricht bis Nizza: Neuformen differenzierter Integration in der Europäischen Union* (Duncker & Humblot 2003) 254 ff.; C Lacchi, 'How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis? Reflections on the EMU inter se International Agreements Between EU Member States' in T Giegerich and others (eds), *Flexibility in the EU and Beyond* (Nomos 2017) 232; A von Arnauld, '"Unions(ergänzungs)völkerrecht". Zur unions- und verfassungsrechtlichen Einbindung völkerrechtlicher Instrumente differenzierter Integration' in M Breuer and others (eds), *Der Staat im Recht* (Duncker & Humblot 2013) 514; R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 67 ff.; with a different view V Constantinesco, 'Les clauses de "coopération renforcée"' (1997) RTDE 751, 755; B Martenczuk, 'Die differenzierte Integration nach dem Vertrag von Amsterdam' (1998) Zeitschrift für europarechtliche Studien 447, 464; R Repasi, 'Völkervertragliche Freiräume für EU-Mitgliedstaaten' (2013) EuR 45, 59 ff. holds that the use of enhanced cooperation takes precedence over *inter se* treaties under international law due to the principle of sincere cooperation in art. 4(3) TEU.

[36] Cf R Streinz, 'Die Verstärkte Zusammenarbeit: eine realistische Form abgestufter Integration' (2013) Juristische Schulung 892, 893. See in this respect art. 1 of the so called Fiscal Compact Treaty.

[37] B De Witte, 'Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements' cit. 243 ff.; C Lacchi, 'How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis?' cit. 230; S Van den Bogaert and V Borger, 'Differentiated Integration in the EMU' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017) 209, 228 ff.

Mechanism, Fiscal Compact) is the most prominent example. This outside flexibility may have its cause also in a lack of inside flexibility.[38]

Furthermore, enhanced cooperation "shall aim to further the objectives of the Union, protect its interests and reinforce its integration process".[39] As a pioneering group, the members of enhanced cooperation are bound by the same set of objectives that the Union at large has been founded to achieve. Enhanced cooperation takes place within the framework of the Union and therefore it is to benefit the EU as a whole.[40] Art. 13(1) TEU has a similar wording in that it requires the Union's institutional framework, *inter alia*, to promote the Union's values, advance its objectives, and serve its interests. While objectives can be identified as those contained in art. 3 TEU, "interests" are much more difficult to assess. However, it is plain to see that the interests of an international organisation cannot be isolated from the objectives for whose attainment the organisation was founded. In fact, the main interest is the attainment of these objectives.[41] The Union's interests are a conglomerate of genuine interests of the EU itself as an (relatively) independent and specific (supranational) actor, the common interest of member states, and also partial and specific interests of individual actors, such as companies, consumers, and workers.[42] Lastly, art. 20 TEU requires enhanced cooperation to reinforce the Union's integration process. When evaluating enhanced cooperation and its potential effects on the Union and the integration process, one must also consider the principle of subsidiarity (art. 5(3) TEU), according to which the European Union can only act (outside its exclusive competences) if its action produces an added value.[43] This means that enhanced cooperation as well must produce an added value for the Union as a whole.[44] In essence, enhanced cooperation must show a positive effect on integration.[45] The institutions, most prominently the European Commission as a guardian of the Union's interests, must evaluate any cooperation (proposed or on-going) and ensure that it does not develop centrifugal forces that lead to a cleavage between the cooperating States and the remaining States, or, more generally, between States willing to pursue a path of flexible

[38] See M Kendrick, 'Brexit the Ultimate Opt-Out: Learning the Lessons on Differentiated Integration' (2022) European Papers www.europeanpapers.eu.

[39] Art. 20(1) and (2) TEU.

[40] M Schauer, *Schengen – Maastricht – Amsterdam: Auf dem Weg zu einer flexiblen Union* (Verlag Österreich 2000) 160.

[41] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 84.

[42] B Horváthy, 'The Concept of "Union Interest" in EU External Trade Law' (2014) Acta Juridica Hungarica 261, 264.

[43] See, among others, HJ Blanke, 'Protocol No. 2' in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union: A Commentary* (Springer 2013) 1641 ff. (on art. 1 of the protocol).

[44] M Schauer, *Schengen – Maastricht – Amsterdam* cit. 159 ff.; HJ Blanke, 'Article 20' in HJ Blanke and S Mangiameli (eds), *The Treaty on European Union* cit. 32; R Böttner, 'Eine Idee lernt laufen – zur Praxis der verstärkten Zusammenarbeit nach Lissabon' (2016) Zeitschrift für europarechtliche Studien 501, 514 ff.

[45] See in more detail R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 83 ff.

integration and those that wish not to do this. Practice has shown, however, that only very little requirements are imposed on the evaluation of the positive integrative effect. It is largely a comparison between enhanced cooperation and no legislation/regulation at all:[46] it is true that the rules adopted in the context of enhanced cooperation are all a "minus" compared to harmonisation across the Union. However, the regulation under enhanced cooperation with applicable rules for only a limited number of member states is usually a "plus" compared with the *status quo ante*.[47] This, of course, bears the risk that differentiation is granted to generously, which, in the long run, could jeopardise the unity of the integration project at large. The more cases of enhanced cooperation are established, the more important the requirement of a positive effect on integration of another instance of flexible integration becomes.

Taking a closer look, this has important links to another requirement: enhanced cooperation is permissible only as a "last resort", when the Council "has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole".[48] The Treaties are silent on the nature of the reasons for which agreement cannot be reached – be they political, economic, legal, or other. It has been argued, in this context, that enhanced cooperation is legitimate only if there is disagreement on the question *if* the Union should act at all while there could be no enhanced cooperation if there was agreement in principle but disagreement only on the substance of the proposal.[49] This, however, is not supported by the wording of the Treaty, which allows enhanced cooperation as a last resort when "the objectives of such cooperation cannot be attained [...] by the Union as a whole". This can result from both disagreement in principle and disagreement on the substance of legal action, as the practice of the member states supports. That the objectives of enhanced cooperation cannot be attained within a reasonable period by the Union as a whole can have different causes, for example that member states are not yet ready and able to take part in a legislative initiative by the entire Union or simply the lack of interest and willingness to adopt a measure at Union level or the inability to agree to specific measures when there is consensus on an initiative in principle.[50] As the Council is

[46] *Ibid*. 92.

[47] Cf S Peers, 'The Constitutional Implications of the EU Patent' (2011) EuConst 229, 255: "half a loaf is better than none". Cf also S Peers, 'Enhanced Cooperation: The Cinderella of Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* (Edward Elgar 2017) 76, 88.

[48] Art. 20(2) TEU.

[49] JJ Kuipers, 'The Law Applicable to Divorce as Test Ground for Enhanced Cooperation' (2012) ELJ 201, 213; also F Fabbrini, 'Enhanced Cooperation Under Scrutiny' (2013) LIEI 197, 207 ff.; F Fabbrini, 'Taxing and Spending in the Euro Zone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax' (2014) ELRev 155, 167.

[50] *Spain and Italy v Council* cit. para. 36; cf also C Lacchi, 'Développements récents sur les coopérations renforcées' (2013) Revue des affaires européennes 785, 789 ff.; T Balagović, 'Enhanced Cooperation: Is There Hope for the Unitary Patent?' (2012) Croatian Yearbook of European Law and Policy 299, 310 ff.; P Hall, 'Verstärkte Zusammenarbeit – "Flexibilität"' in J Bergmann and C Lenz (eds), *Der Amsterdamer Vertrag* (Omnia 1998) 17; U Derpa, *Die verstärkte Zusammenarbeit im Recht der Europäischen Union* cit. 177 ff.

the forum for political agreement between the member states, it must be deduced that both incapacity as well as unwillingness – both in principle and in substance – may be legitimate causes for disagreement in the sense of the last resort principle. It only has repercussions on the intensity of debates in the Council. Furthermore, this is reinforced by the thought that otherwise member states could only choose between abandoning a project (for lack of disagreement) or negotiate until all States are willing to agree: surely, a watered-down compromise for all is no more beneficial to the integration project than an ambitious forging ahead of a group of willing States.

Going on, the Treaty text refers to the Council's finding that the *objectives* of the envisaged cooperation cannot be attained within a reasonable period of time without demanding that the pursuing of the objectives has been subject to a specific procedure. However, with regard to the rationale of this criterion and in analogy to the accelerated procedures in the Area of Freedom, Security and Justice (arts 82(3), 83(3), 86(1)(3) and 87(3)(3) TFEU),[51] one cannot reasonably argue that the *ultima ratio* character is met unless a legislative initiative has been proposed and discussed in the Council and the member states have undertaken serious efforts to find a compromise.[52] In this case, enhanced cooperation would be the last resort only if no agreement could be reached in the regular law-making procedures.[53] In any case, it can be established that as a minimum requirement the Commission must have made use of their right of initiative,[54] but there does not have to be a formal vote as long as there is a "genuine deadlock, which could arise at all levels of the legislative process".[55]

At the same time, this finding limits the potential scope of any enhanced cooperation. Disagreement can be determined only if the member states have discussed specific projects and corresponding measures. It is therefore unlikely that disagreement can be as

[51] See on this R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 286 ff.

[52] H Bribosia, *Les coopérations renforcées: quel modèle d'intégration différenciée pour l'Union européenne?* (EUI 2007) 97; H Ullrich, 'Enhanced Cooperation in the Area of Unitary Patent Protection and European Integration' (2010) Rivista di Diritto Industriale 325, 332.

[53] Joined cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2012:782, opinion of AG Bot, para. 111. With an affirmative view JV Louis, 'La pratique de la coopération renforcée' (2013) CDE 277, 285; O Feraci, 'L'attuazione della cooperazione rafforzata nell'Unione europea: un primo bilancio critico' (2013) RivDirInt 955, 962 ff. According to F Fabbrini, 'Enhanced Cooperation Under Scrutiny' cit. 208, the requirement of last resort is met only if there is general disagreement on the "if" of a measure, not if there is disagreement on the "how".

[54] With the same view D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* cit. 53; see also F Martucci, 'Les coopérations renforcées, quelques années plus tard: une idée pas si mauvaise que cela?' in F Berrod and others (eds), *Europe(s), droit(s) européen(s)* (Bruylant 2015) 385, 389. With a different view the Praesidium of the European Convention, CONV 723/03 of 14 May 2003, 4 ff., 18.

[55] *Spain and Italy v Council*, opinion of AG Bot, cit. para. 111. Cf also A Cédelle and J Vella, 'Differentiated Integration in the EU: Lessons from the Financial Transaction Tax' in P Koutrakos and J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar 2017) 350, 363.

far reaching so as to authorise enhanced cooperation for an entire policy area.[56] Nonetheless, disagreement on a specific act does not necessarily mean that enhanced cooperation is the last resort only for this *particular* file. Discussions can reveal that there is disagreement on legislation in a specific area for which the act in question was only the starting point. This can suggest that there is general political disagreement on policy making in certain policy field, which entails that there is no agreement on the pursuing of the Union's objectives in that particular field. The underlying objectives, however, might have a wider scope than a single act. Therefore, the area in which the enhanced cooperation would operate may be broader and not restricted to the act for which a deadlock has been established.[57] Nevertheless, authorisation may not be granted for an entire policy area but only for measures whose scope and content is foreseeable to a certain degree. Otherwise, it would be impossible to establish if the envisaged cooperation is the last resort and has in fact a positive effect on integration, *i.e*., if the conditions for their establishment are actually met. If a whole sector is to be made subject to flexible integration, this can be done either by successively extending the original authorisation or by establishing several (individual) cases of cooperation.[58] In the latter case, it would be necessary to establish links between the individual cases of cooperation so as to not create fuzzy networks of "ins" and "outs", because this may be detrimental to integration.

In practice,[59] member states have used the enhanced cooperation mechanism only for specific dossiers that failed to reach the necessary quorum in the Council. Specifically, they were subject to unanimity voting in the Council, but certainly also cases under the ordinary legislative procedure are not barred from flexible integration. The ECJ considers that the establishment of enhanced cooperation does not constitute a circumvention of Union law if unanimity cannot be achieved in an area where it is required by the Treaties.[60] As is clear from art. 333(1) TFEU, which allows for transition from unanimity to qualified majority voting, enhanced cooperation is permissible in such policy areas.[61] Practice has shown that situations in which each individual member state has a veto are

[56] D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* cit. 53.

[57] *Ibid*. 53 ff.; European Convention, CONV 723/03 cit. 5 and 18; L Guilloud-Colliat, 'Le principe majoritaire et les coopérations renforcées' in F Picod (ed.), *Le principe majoritaire en droit de l'Union européenne* (Bruylant 2016) 155, 165 ff.

[58] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 156.

[59] *Ibid*. 101 ff.

[60] M Lamping, 'Enhanced Cooperation: A Proper Approach to Market Integration in the Field of Unitary Patent Protection?' (2011) International Review of Intellectual Property and Competition Law 879, 910 ff., with regard to the patent cooperation, considers that enhanced cooperation undermines the protection induced by the unanimity requirement and thus constitutes an unlawful circumvention of primary law decision-making processes. With a similar, critical view J Cloos, 'Les coopérations renforcées' (2000) RMCUE 512, 514; J Raitio, 'Fragmentation in the European Union and the Enhanced Cooperation Mechanism – Can it be Abused?' (2013) Europarättslig tidskrift 507, 512 ff.

[61] *Spain and Italy v Council* cit. paras 35 ff.; L Guilloud-Colliat, 'Le principe majoritaire et les coopérations renforcées' cit. 164.

more susceptible to blockades and in those cases enhanced cooperation can easily be regarded as a "last resort".

III.2. The implementation of enhanced cooperation

The implementation of an authorised cooperation follows the rules and procedures in the Treaties, except for special voting arrangements in the Council for participating States.[62] In other words, while enhanced cooperation has a specific authorisation procedure, it does not have specific rules for law-making within that cooperation. When adopting rules for the implementation of enhanced cooperation, the participating States must respect Union law and the rights and competences of non-participating member states. Art. 20(4) TEU makes clear that acts adopted within enhanced cooperation do not form part of the *acquis communautaire*.[63] Instead, they constitute a body of specific law within the Union legal order (*acquis particulier*).[64] Moreover, the member states are bound by art. 4(3)(3) TEU to not impair the attainment of the Union's objectives. Likewise, any enhanced cooperation shall aim to further the Union's objectives and protect its interests and thus have to respect not only the legal, but also the political corpus of the Union.[65] Hence, not only the legally binding acts of the Union, but also the "soft law", have to be respected by any enhanced cooperation. In other words, the *acquis particulier* of any enhanced cooperation must comply with the *acquis communautaire*. In the event of a conflict of laws, the Union *acquis* takes precedence over the rules adopted within the framework of enhanced cooperation, since the latter cannot derogate from the application of the *acquis communautaire*.[66] Taken together with the requirement to further the integration process, the call for compliance with Union law of legal acts adopted in enhanced cooperation sets another important limit to the possible implementing acts. Not only must they not *contradict* Union law. They must not derogate from general Union law either in the sense that they cannot mean a step back in integration, *i.e.*, they cannot renounce existing rules of Union law for the cooperating States. In other words, enhanced cooperation may not be used as a means to take a step back in integration.[67]

As regards the non-participating States, art. 20(1)(2) sentence 2 TEU stipulates as a general rule that enhanced cooperation shall be open at any time to all member states. It

[62] See in detail R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 122 ff.

[63] See also C Delcourt, 'The *Acquis Communautaire*: Has the Concept had its Days?' (2001) CMLRev 829, 867 ff., on the Nice Treaty.

[64] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 185.

[65] See, along those lines, C Delcourt, 'The *acquis communautaire*' cit. 866 (fn 180).

[66] AS Lamblin-Gourdin, 'Les coopérations renforcées au secours du brevet unique européen' (2012) RUE 254, 259; HJ Blanke, 'Article 20' cit. 48.

[67] Cf R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 187. See on the application of EU principles to PESCO AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers www.europeanpapers.eu.

contains the right of "opting in" for any member state either at the time of the establishment of the cooperation or at any later stage.[68] This "open door" principle is specified by art. 328(1) TFEU, which provides that enhanced cooperation shall be open to all member states when it is being established, subject to compliance with any conditions of participation laid down by the authorising decision, or at any other time, subject to compliance with the acts already adopted within that framework, in addition to those conditions. Furthermore, as arts 20(3) TEU and 330(1) TFEU provide, all members of the Council may at any time take part in the negotiations on the substantive acts implementing the cooperation, irrespective of the States' participation. This means that they can articulate any potential interest or concern which might facilitate their accession to that cooperation in the future. This openness and the possibility to take part in negotiations aims to prevent that an established cooperation develops a life of its own, detached from the Union as a whole.

Furthermore, art. 327 TFEU provides that an established cooperation shall respect the competences, rights and obligations of the non-participating States and that those member states shall not impede the implementation of said cooperation by the participating States. The aim of the provision is to ensure that enhanced cooperation does not lead to the adoption of measures which prevent the non-participating member states from exercising their competences and rights and fulfilling their obligations.[69] The non-affection clause not only demands that the implementation of an on-going cooperation itself respects the competences, rights and obligations. More generally, and in combination with the principle of the equality of States (art. 4(2) TEU), member states may not be discriminated against due to their (non-)participation in enhanced cooperation.[70]

As sentence 2 of art. 328(1) TFEU adds, accession can be subject to compliance with the acts already adopted within that framework. While it is clear that any member state that wishes to join a group of pioneering States must comply with what they have already adopted for the implementation of that cooperation, one may wonder if the principle of openness restricts the participating member states in what they can adopt as implementing measures. This is particularly relevant if the group of cooperating States decides to adopt measures that have been discussed before and that prevented (politically) the participation of some member states in the first place (and thus ultimately the adoption by the Union as a whole). This applies, for example, to the language regime adopted for the European patent, which originally prevented Spain and Italy from participating because they disagreed with Spanish and Italian not being included in the list of languages for the unitary patent protection. Another example is the linking of the two regulations on property regimes of international couples (in other words, the inclusion of same-sex couples), which has been

[68] Cf HJ Blanke, 'Article 20' cit. 36.

[69] *Spain and Italy v Council* cit. para. 82; C Lacchi, 'Développements récents sur les coopérations renforcées' cit. 793.

[70] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 199.

criticised by Poland especially.[71] In both cases, the implementing measures included these exact aspects that prevent some States from participating in a Union-wide adoption. However, as the ECJ has stated, participants in cooperation are free to adopt arrangements with which the non-participating States would not have agreed if they had participated. The introduction of such rules does not render ineffective the possibility for non-participating member states to join enhanced cooperation.[72] In other words, enhanced cooperation may adopt those rules that have led to the deadlock in the first place. This, however, may lead to a permanent separation between participating and non-participating States and may run counter to the character of enhanced cooperation as a sort of transition tool from flexible to uniform integration. Nevertheless, it is for the non-participating States to decide if they wish to abstain from a cooperation permanently or if they choose to accept a sort of late-mover disadvantage due to their late participation.

Furthermore, the character of a specific cooperation may make it necessary that certain requirements are fulfilled by the members to that cooperation. This is envisaged by arts 328(1) and 331 TFEU, when they refer to "conditions of participation" that can be laid down in the decision authorising enhanced cooperation. The treaties do not specify the nature of these entry conditions and current practice of enhanced cooperation does not give any indication either, but one could imagine economic indicators or the introduction of specific social, political or institutional elements as potential requirements.[73] However, it follows from the negotiations in the Constitutional Convention that the conditions of participation must be of an objective nature and cannot be established as a political instrument for the exclusion of certain member states.[74] This also means that these conditions must be formulated in such a way that they can be met by any member state. This limits the possibility to formulate conditions to the extent that they are not perceivably discriminatory to certain member states.[75] They may not lead to a limited or closed group, as this would contradict the cooperation's requirement of having a positive integrative effect.[76] To ensure this, they must be laid down in the *authorising* decision which

[71] *Ibid*. 235 ff.

[72] *Spain and Italy v Council* cit. paras 82 ff.

[73] Cf G Gaja, 'How Flexible is Flexibility under the Amsterdam Treaty' cit. 858 ff. With a different view F Amtenbrink and D Kochenov, 'Towards a More Flexible Approach to Enhanced Cooperation' in A Ott and E Vos (eds), *Fifty Years of European Integration* (T.M.C. Asser Press 2009) 181, 189, stating that "a Member State cannot be left out because of its political, economic, or social conditions if that State wishes to take part".

[74] European Convention, CONV 723/03 cit.; also B Martenczuk, 'Enhanced Cooperation: The Practice of Ad Hoc Differentiation in the EU since the Lisbon Treaty' (2013) StudDipl 83, 96; with a critical view on the language regime in the framework of enhanced cooperation on unitary patent protection, see M Lamping, 'Enhanced Cooperation: A Proper Approach to Market Integration in the Field of Unitary Patent Protection?' cit. 913.

[75] A Hatje, 'Artikel 328 AEUV' in J Schwarze and others (eds), *EU- Kommentar* (Nomos Helbing Lichtenhahn Verlag 2019) 2.

[76] Cf CR Fernández Liesa and MA Alcoceba Gallego, 'La cooperación reforzada en la Constitución Europea' in V Garrido Mayol and others (ed.), *Comentarios a la Constitución Europea* (Tirant lo Blanch 2004) 463, 485.

is subject to a vote by *all* Council members. Thus, the treaty does not require "unconditional openness"[77] but it does not place it solely in the hands of the participating member states either. The Treaty makers considered that this approach would widen the number of cases in which enhanced cooperation would be useful, as it would not in every case be depended on mere will, but rather on objective differences and even objective conditions of participation.[78] The mechanism would thus be an instrument that allows taking into account objective disparities, even if they are only temporary.[79]

As mentioned, cooperation between a group of member states in the context of an established enhanced cooperation can be extended by the authorisation of a new cooperation with identical membership or at least a sub-group of States from the group of cooperating States. In this context, participation in the first cooperation can be established as a "condition of participation" for the second cooperation in order to ensure synchrony between the two cases of cooperation and prevent the development of two groups on related topics but with asynchronous participation. This notwithstanding, it would be an objective requirement that could easily be fulfilled by any member state wishing to join a cooperation, and this condition would not be of a prohibitive character. Furthermore, this link would be justified by the intention to limit fragmentation within differentiated integration. It appears to be legally feasible to make participation in one cooperation conditional on the participation in a preceding cooperation.[80] Unfortunately, this route has not been taken by the member states when they established cooperation on property regimes of international couples in a legal environment where there has already been differentiated integration as regards Rome III (the conflict-of-law rules on divorce and separation).[81]

To sum up, the Treaties establish sufficient safeguards to ensure that sub-groups of cooperating States do not turn into closed clubs of States with their own rules. They must always fit into the existing body of EU law. In practice, however, cooperations establish to a certain degree a *de facto* limitation to participation in that the member states taking part in enhanced cooperation adopt – and this seems quite natural – those rules that led to the conflict and the establishment of that cooperation in the first place. There are, nonetheless, cases of accession – even of States that heavily resisted the adopted rules at first – which allow the conclusion that this is not a severe obstacle. In this context, flexibility in the form of enhanced cooperation can develop a centripetal effect on integration in specific areas.

[77] JA Emmanouilidis and C Giering, 'In Vielfalt geeint – Elemente der Differenzierung im Verfassungsentwurf' (2003) Integration 454, 459.

[78] European Convention, CONV 723/03 cit. 22.

[79] *Ibid*. 3.

[80] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 237 ff.

[81] Belgium, Bulgaria, Germany, Greece, Spain, France, Italy, Luxembourg, Malta, Austria, Portugal, and Slovenia take part in both cases of enhanced cooperation, while the Czech Republic, Latvia, Lithuania, Hungary, Romania, Croatia, the Netherlands, Finland, and Sweden only participate in one or the other.

IV. On a related note: Pre-Brexit negotiations and differentiation

When the United Kingdom became a member of the European Communities in 1973, it did so without holding a membership referendum. Two years later, the population expressed support for EC membership, with 67 per cent in favour on a national turnout of 64 per cent.[82] A good 40 years later, the United Kingdom would hold another referendum on EU membership. On 23 June 2016, in an advisory referendum 51.9 per cent of voters were in favour of the UK's leaving the European Union (turnout 72.2 per cent). Although not legally bound by the outcome of the popular vote, the government initiated the official EU withdrawal process on 29 March 2017 as it had promised to implement the referendum's result. The exit deal negotiations led to intense discussions on the future EU-UK relations and also on the possibility to exit from Brexit.

Before the Brexit referendum, the Heads of State and Government negotiated an agreement, taking effect in the event that the UK had decided not to leave the Union.[83] This package deal consisted of a Decision of the EU Member States' Heads of State and Government (including two amendments proposed to secondary legislation in the field of social benefits and free movement) and a number of statements and declarations by the Heads of State and Government, the European Council, and the Commission, some of which contained plans for EU secondary legislation. Upon closer inspection, this package deal was more political than legal,[84] the only elements having effect on EU law being the proposed legislative acts and even they are subject to adoption and implementation by the relevant actors and procedures under the EU Treaties.[85]

Nonetheless, the question may arise whether such special situation of a member state could be accommodated by means of enhanced cooperation. In this context, we have to remember art. 326 TFEU, according to which any enhanced cooperation must comply with the *acquis communautaire*, which cannot be suspended for the group of cooperating States. This provision in combination with the requirement that enhanced cooperation must have a positive integrative effect is an important substantial limit as it makes clear that enhanced cooperation may not be used as a means to take a step back in integration.[86] It cannot serve as an instrument for "differentiated disintegration" or the subsequent instalment of "opt-outs" for unwilling or hesitant member states.[87] On the

[82] See in general D Butler and U Kitzinger, *The 1975 Referendum* (Macmillan 1976).

[83] European Council, *Conclusions of 18-19 February 2016* www.consilium.europa.eu.

[84] Cf also K Oppermann, 'Nach der Unterhauswahl ist vor dem EU-Referendum: die britische Europapolitik am Scheideweg' (2015) Integration 276, 286.

[85] S Peers, 'The Final UK/EU Renegotiation Deal: Legal Status and Legal Effect' (21 February 2016) EU Law Analysis eulawanalysis.blogspot.com.

[86] B Martenczuk, 'Enhanced Cooperation' cit. 90; HJ Blanke, 'Article 20' cit. 32; M Kellerbauer, *Von Maastricht bis Nizza* cit. 177.

[87] C Deubner, 'Harnessing Differentiation in the EU-Flexibility after Amsterdam: Hearing with Parliamentarians and Government Officials in Seven European Capitals' (European Ccmmission Forward Studies

other hand, however, it is well possible that the *status quo* is preserved for all States and only member states willing to deepen integration pursue a path of enhanced cooperation in the sense that all States except the unwilling State(s) adopt legislation in a specific field using the enhanced cooperation mechanism. While this is technically possible, it is politically undesirable and may lead to a complex system of Union-wide and cooperation-specific rules. In effect, it could lead to *de facto* opt-outs that are generally not foreseen in EU (secondary) law-making. Moreover, as participation in any case of enhanced cooperation is voluntary, this path may quickly turn into a slippery slope of cherry-picking for other States, eventually jeopardising the integration project as a whole. Thus, while differentiation *in general* may be a suitable method to accommodate serious concerns of some member states (as has been done in the past for example with Schengen or EMU), enhanced cooperation is not the tool to realise this endeavour.

V. Outlook: Dusk or dawn for enhanced cooperation?

Although discussed for a number of files, it took around a decade until enhanced cooperation was first activated. It has been said that enhanced cooperation is in fact less relevant and significant than expected by its proponents.[88] However, one should not neglect the potential of this tool of flexibility as a threat, comprising the risk of being left behind by member states willing to deepen integration.[89] Since the entry into force of the Lisbon Treaty, enhanced cooperation has become part of the reality of differentiation in European integration. It is no longer just a concept that is carried from one treaty reform to another, but it has been filled with life in recent years. It seems that the member states develop a sort of routine to realise, by means of enhanced cooperation, policy objectives for which there is no consensus among all member states. This is underlined by the fact that the cases of differentiated integration by subgroups of States – including PESCO – cover a variety of subjects.[90] Nevertheless, if we consider the adoption of the Fiscal Compact (and, depending on the Union's competence, the ESM), the member states still consider using intergovernmental cooperation over enhanced cooperation.[91] Mostly due to its constitutional limits, enhanced cooperation cannot substitute for every case in which flexibility and differentiation is needed.

Unit Working Paper 2000) 53; AS Lamblin-Gourdin, 'Les coopérations renforcées au secours du brevet unique européen' cit. 259; R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 87; see also CD Ehlermann, 'Engere Zusammenarbeit nach dem Amsterdamer Vertrag: ein neues Verfassungsprinzip?' (1997) EuR 362, 372; R Hofmann, 'Wieviel Flexibilität für welches Europa?' cit. 723; F Martucci, 'Les coopérations renforcées, quelques années plus tard' cit. 390.

[88] G Della Cananea, 'Differentiated Integration in Europe after Brexit: An Institutional Analysis' in I Pernice and AM Guerra Martins (eds), *Brexit and the Future of EU Politics* (Nomos 2019) 45, 73.

[89] See R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 338 ff.

[90] *Ibid*. 335.

[91] Cf F Fabbrini, 'Enhanced Cooperation Under Scrutiny' cit. 206.

At the same time, however, initial practical experience shows that enhanced cooperation is more suitable for the implementation of concrete legislative projects than for the further development of larger regulatory complexes. The limited scope of application of individual cases of cooperation also results from the legal framework: if such cooperation is established, it must contain an outlook on the further steps in order to assess the extent to which the cooperation actually has a positive integrative effect. In addition, the *ultima ratio* criterion requires that serious attempts have already been made to implement a specific project. This works well for individual files. In the case of a larger regulatory complex, it would be necessary for one or more States to clearly communicate from the outset that they do not (intend to) support regulations in an entire subject area.[92]

Despite the limited scope of each area, it is easy to see that enhanced cooperation is particularly suitable for resolving political blockades.[93] In all cases of enhanced cooperation to date, a Union-wide solution has failed not because of the inability but rather because of the (political) unwillingness of some member states. This is all the more true since cooperation has only taken place in cases where the Treaties require unanimity.

Interestingly, in most recent times enhanced cooperation has been considered for subjects with major political implications. While eventually not put to use, enhanced cooperation has been discussed as an option for the reform of the Dublin system or the implementation of the NextGenerationEU instrument.[94] Furthermore, with regard to the "rule of law crisis" in Poland, some authors discuss whether enhanced cooperation could be used as a means of *de facto* expulsion of an EU member state,[95] because the Union is lacking the tools for actually expelling a member from the organisation. This situation is fundamentally different from the one where one State no longer wishes to participate in (certain areas of) integration (Brexit). Clearly, since enhanced cooperation requires only a qualified majority in the Council for its establishment, this may *prima facie* appear as a legally feasible option. However, it would be a very difficult endeavour to formulate conditions of participation that would actually keep one State out. After all, the open-door principle gives every State a right to participate in any established cooperation. Entry

[92] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 336.

[93] In this context, it is interesting to note that a recent study found that only 23 per cent of government officials from the (then) 28 Member States of the Union stated that "overcoming policy deadlocks" was their country's main motivation for flexible cooperation while 36 per cent wished to demonstrate benefits of collective European action through flexible cooperation. See A Möller and D Pardijs, 'The Future Shape of Europe: How the EU Can Bend Without Breaking' (2017) European Council on Foreign Relations Flash Scorecard 3.

[94] J Dempsey, 'Judy Asks: Can the EU Solve the Budget and Rule-of-Law Crisis?' (26 November 2020) Judy Dempsey's Strategic Europe, Carnegie Europe carnegieeurope.eu; S Giegold and R Repasi, 'Budget Blockade by Hungary/Poland: EU Council Presidency Should Start "Enhanced Cooperation" to Ensure Corona Aid Flows' (26 November 2020) The Greens/EFA sven-giegold.de; J Graf von Luckner, 'A Novel "Reinforced Cooperation" in the EU: The Viable Option of a NextGenEU without Poland and Hungary' (9 December 2020) Verfassungsblog verfassungsblog.de.

[95] M Chamon and T Theuns, 'Resisting Membership Fatalism: Dissociation Through Enhanced Cooperation or Collective Withdrawal' (11 October 2021) Verfassungsblog verfassungsblog.de.

conditions are allowed as long as they are not discriminatory. The only suitable criterion to exclude a member state from cooperation due to failure to comply with the Union's fundamental values would be the to implement this, for example the "rule of law", as an entry condition for further cooperation. It is hardly perceivable how this would be made operational. Moreover, it may not even be an admissible entry criterion, as Union law already has a tool (art. 7 TEU) to tackle this issue.

To sum up: enhanced cooperation as it stands is a suitable means to further the integration process in specific areas or for singular projects. However, this instrument is not the knight in shiny armour that will help the Union overcome great (structural) crises. The overall integration process as such must remain a common undertaking based on the agreement of all its constituent members. Nevertheless, enhanced cooperation is a practical tool to further integration within the common European house, not outside. Used carefully, it will not create a hard-core Europe with fuzzy edges (despite what current participation may suggest),[96] but instead be an asset to advance the Union as a whole.

[96] Cf N von Ondarza, 'Zwischen Integrationskern und Zerfaserung: Folgen und Chancen einer Strategie differenzierter Integration' (2012) SWP Study www.swp-berlin.org. For a visual representation of this, see the image published in R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* cit. 359.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

THE LEGAL SPACE FOR STRUCTURAL DIFFERENTIATION IN THE EU: RECIPROCITY, INTERCONNECTEDNESS AND EFFECTIVENESS AS SOURCES OF CONSTITUTIONAL RIGIDITY

ARMIN CUYVERS*

ABSTRACT: This *Article* argues that the legal space for truly structural forms of differentiation in the EU is limited by several sources of rigidity. Sources of rigidity are thereby understood as legal rules and principles that, either by themselves or in interaction with other rules, principles and material facts, limit the scope for structurally significant differentiation in the EU's legal and constitutional set-up. A source of rigidity can therefore be broader than a single legal rule or principle because the rigidity may stem from a combination of or interaction between multiple principles, rules and facts. Using Brexit as a prism, this *Article* identifies at least three such sources of legal rigidity, being reciprocity, interconnectedness and effectiveness. These sources of rigidity also place significant limits on the possible dynamics of differentiation. It is demonstrated how Brexit brought these sources of rigidity to the surface, and how legal rigidity can and likely will collide with an increasing political desire for more structural differentiation in the future.

KEYWORDS: differentiation – legal rigidity – Brexit – differentiated integration – future of EU integration – general principles of EU law.

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EUROPEAN PAPERS
VOL. 7, 2022, NO 3, PP. 1165-1190

www.europeanpapers.eu

ISSN 2499-8249
doi: 10.15166/2499-8249/606

I. Introduction

Differentiation has long been discussed as a possible tool to enable and improve future EU integration.[1] With a Union of 27 or more, it might not be possible to get unanimous agreement on further integration steps. Offering a choice to member states to participate might help overcome this challenge.[2] What is more, differentiation may have independent normative value. For example, it might offer more choice to member states and their electorates on the level of EU integration they want, potentially increasing legitimacy.[3]

Depending on ones' definition, moreover, a significant amount of differentiated integration already exists in the EU. Economic Monetary Union (EMU), Schengen and Permanent Structured Cooperation (PESCO) provide key examples, as does the mechanism for enhanced cooperation.[4] Yet one could also understand Treaty exceptions to free movement or the numerous exceptions contained in secondary legislation as a form of differentiation.[5] If differentiation simply means that EU law is not identical in all Member States, therefore, lots of differentiation already exists. Once we include the realities of how EU law is applied and enforced in different member states, moreover, differentiation may even turn out to be the norm, rather than the exception.[6]

The ubiquity of differentiation – broadly understood – is an important characteristic of the EU legal order. It offers an important counterweight to the more monolithic legal claims and principles that form the very foundation of the EU legal order.[7] Yet from a

[1] See for example already the 1979 speech by the then director of the LSE and former member of the European Commission R Dahrendorf, 'A Third Europe?' (26 November 1979) Archive of European Integration aei.pitt.edu; or the speech by former UK Prime Minister J Major, 'Europe: A Future that Works' (7 September 1994) John Major Archive johnmajorarchive.org.uk. More recently, see the option of more structural differentiation in the White Paper of the Commission on the future of Europe or the discussion in J Piris, *The future of Europe: Towards a Two-Speed Europe?* (CUP 2012).

[2] Cf B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 10.

[3] Cf for example M Demertzis and others, 'One Size Does Not Fit All: European Integration by Differentiation' (Bruegel Policy Brief 3/2018).

[4] See for a very useful and instructive discussion of the different models one can use to define and understand differentiation also D Thym, 'Competing Models for Understanding Differentiated Integration' in B de Witte and others (eds), *Between Flexibility and Disintegration: The State of EU Law* (Edward Elgar Publishing 2017) 28, 38-39.

[5] Cf also the contribution in this *Special Section* of T van den Brink and M Hübner, 'Accommodating Diversity through Legislative Differentiation: An Untapped Potential and an Overlooked Reality?' (2022) European Papers www.europeanpapers.eu 1191.

[6] See for example A Dimitrova and B Steunenberg, 'The Power of Implementers: A Three Level Game Model of Compliance with EU Policy and its Application to Cultural Heritage' (2016) Journal of European Public Policy 1211.

[7] See amongst many other examples case C-399/11 *Melloni* ECLI:EU:C:2013:107; joined cases C-402/05 and C-415/05 *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, or case C-284/16 *Achmea* ECLI:EU:C:2018:158, with interestingly also increasingly the values underpinning

more structural-constitutional perspective many forms of differentiation remain rather limited as to the flexibility they allow, and hence as to the actual choice they offer to member states and member peoples on their EU membership.[8] The freedom to join the patent court or not, for example, might not be the kind of choice that really gives the citizens a sense of control over EU integration. Consequently, many of the more limited forms of differentiation cannot fulfil the promise that is sometimes implied by or associated with differentiation: a real choice between different types or levels of EU memberships and the future path of EU integration for your member state.[9]

It is the legal space for such more far-reaching, structural forms of differentiation that form the focus of this *Article*. How much space does the EU legal and constitutional order provide for truly, structurally differentiated membership?[10] Structural differentiation is thereby understood as allowing a member state to dynamically choose a set of EU rights and obligations that deviates from the standard set to such an extent that this leads to an alternative level of membership instead of a 'mere' opt-out in one or more limited fields or domains.

The main tool used to chart the legal space for such structural differentiation is Brexit. Clearly Brexit concerns a third state, and hence does not constitute a form of differentiation *within* EU law. Nevertheless, the UK demands during Brexit forced the EU to assess the flexibility and divisibility of its own legal order. And over the course of the Brexit negotiations, EU law indeed appeared to become far more flexible than the initial EU legal theology on the unity and indivisibility of the acquis implied.[11] Under the Withdrawal Agreement, for example, Northern-Ireland was to remain semi-permanently in the internal market for goods, without the other freedoms applying, suggesting that the four freedoms are divisible, just like post-Brexit UK territorial sovereignty.

At first glance, therefore, it might appear that Brexit brought a more structurally differentiated EU a step closer. This *Article* argues that, on closer inspection, Brexit rather

the EU being included, as in case C-896/19 *Repubblika* ECLI:EU:C:2021:311 and cases C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

[8] See for a further discussion on the nature and role of Member Peoples A Cuyvers, 'The Confederal Come-Back: Rediscovering the Confederal Form for a Transnational World' (2013) ELJ 711.

[9] Cf also D Thym, 'Competing Models for Understanding Differentiated Integration' cit. 41.

[10] Although this *Article* often uses the example of different levels of EU Membership, which could be seen as a form of a "multiple speeds" Europe in the meaning of D Thym, 'Competing Models for Understanding Differentiated Integration' cit., the sources of rigidity seem relevant to all three conceptual ideal types of differentiation he identifies, even if it most directly connects with the ideal type of an EU *à la carte*, which really allows member state far-reaching and flexible powers to switch between different packages of EU rights and obligations.

[11] See for example, Special Meeting of the European Council (Art. 50) EUCO XT 20004/17 of 27 April 2017, Guidelines following the United Kingdom's notification under art. 50 TEU, p. 3 para. 1; and C Hillion, 'Withdrawal Under Article 50 TEU: An Integration-Friendly Process' (April 2018) CMLRev 29.

exposed several *structural sources of EU rigidity*.[12] Sources of rigidity are thereby understood as legal rules and principles that, either by themselves or in interaction with other rules, principles and material facts, limit the scope for structurally significant differentiation in the EU's legal and constitutional set-up. A source of rigidity can therefore be broader than a single legal rule or principle, like equality, precisely because the rigidity may stem from a combination of or interaction between multiple principles, rules and facts.[13]

Contrary to the more traditional approach, therefore, this *Article* does not focus on the positive examples of flexibility and potential ways to extrapolate them. Instead, it tries to identify those parts of the EU legal fabric that resist structural differentiation.[14] What are the sources of legal rigidity in the EU? How do they limit differentiation? And if some of these sources of rigidity were temporarily or partially overcome during Brexit, does this mean that they can also be overcome in a non-exit context or on a more permanent basis?[15] To use a building metaphor, the question is if there are some load-bearing walls in the EU legal construct that cannot be moved without bringing the whole building down. And if such load-bearing walls exist, what limits does this impose on any plans to structurally redesign the EU constitutional structure in a more flexible manner?

To keep the analysis manageable, the first part of this *Article* formulates three possible sources of legal rigidity, hypothesized to be particularly limiting.[16] These are: *i)*

[12] See for discussion on Brexit and differentiation also B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) CMLRev 227 and B De Witte, 'Near-Membership, Partial Membership and the EU Constitution' (2016) ELR 471.

[13] See for example on the limiting effects of equality J Wouters, 'Constitutional Limits to Differentiation: The Principle of Equality' in B de Witte and others (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 301.

[14] In this sense it builds on the observation of De Witte, Ott and Vos that "finally, the question whether flexibility is a tool for disintegration or integration can only be answered by establishing what are the core institutional and policy elements, the core principles and values from which the Union of all EU Member States cannot deviate without putting the essence and functioning of the supranational entity at stake" in B de Witte, A Ott and E Vos, 'Introduction' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 6. See for an analysis of limits derived from the principle of loyalty also A Miglio, 'Differentiated Integration and the Principle of Loyalty' (2018) EuConst 475, and for an analysis focusing on the limits imposed by the principles of consistency and sincere cooperation in the context of PESCO the insightful contribution in this *Special Section* by AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers www.europeanpapers.eu 1325.

[15] Cf also the recognition by Kingston that some form of an "essential, non-derogable core" is required to maintain the integrity and effectiveness of EU law and policy, even in the flexible domain of environmental policy. See S Kingston, 'Flexibility in EU Environmental Law and Policy: A Response to Complexity, of Fig Leaf for Expediency?' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 360.

[16] For analyses on other legal and constitutional limits to differentiation also see J Wouters, 'Constitutional Limits to Differentiation' cit. and A Ott, 'EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspective* (T.M.C. Asser Press 2009) 113.

reciprocity (many EU rights require Member State reciprocity);[17] *ii) interconnectedness* (many rights require a coherent package of rights to work);[18] and *iii) effectiveness* (lower levels of membership may still require full blown doctrines such as autonomy, supremacy and direct effect).[19] A fourth limiting factor concerns the cumulative *dynamics* of differentiation. Even if more far-reaching differentiation, such as creating different "levels" of EU membership, is legally possible, how would moving *between* these different levels work? And what would the cumulative effect be of multiple member states dynamically alternating between different packages of membership rights and obligations?

Once these possible sources of rigidity have been analysed, the next part of this *Article* explores if these sources of rigidity were overcome during Brexit. To that end, it zooms in on three legal outcomes, being the transition period, the Northern-Ireland Protocol and substantive free movement rights in the Trade and Cooperation Agreement (TCA). Subsequently, the conclusion assesses whether Brexit offers a legal steppingstone for more structural EU differentiation, or whether the sources of rigidity in reality limit the legal space for such differentiation unless some major constitutional redesign is successfully enacted.

Clearly the approach outlined here is limited and can only yield tentative conclusions. The conception of rigidity itself, for example, already requires more conceptual and legal work than can be offered here. This *Article* also largely focusses on the internal market, even if many other areas of EU law deserve and need to be included.[20] One should be, furthermore, be careful not to overlearn from Brexit, which was in part driven and determined by unique circumstances. The deliberate focus on legal limits to integration, moreover, is in no way intended to deny the many *political* limits to differentiation, the fact that several political limits have been dressed up as legal limits during Brexit negotiations, or the fact that in the EU seemingly rigid legal limits sometimes become rather fluid where sufficient political pressure builds up.[21] Lastly, the focus on limits to flexibility is in no way intended to deny the significant scope for flexibility, broadly understood, already present in the EU legal system nor its constitutional importance. To fully understand

[17] See already case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1 and for a Brexit analysis A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace: Free Movement of Goods Post-Brexit' in F Kainer and R Repasi (eds), *Trade Relations After Brexit* (Hart Publishing 2019).

[18] Cf Barnier's famous "Staircase to Hell", which even itself ran into significant legal complications, see B de Witte, 'An Undivided Union?' cit. 227.

[19] See in the context of Brexit, RC Tobler, 'One of Many Challenges After "Brexit": The Institutional Framework of an Alternative Agreement – Lessons from Switzerland and Elsewhere?' (2018) Maastricht Journal of European and Comparative Law 575.

[20] Cf also G de Búrca, 'Differentiation within the "Core"? The Case of the Internal Market' in G De Búrca and Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 133-171.

[21] See for example the fluidity of EMU law in case C-370/12 *Pringle* ECLI:EU:C:2012:756 and case C-62/14 *Gauweiler* ECLI:EU:C:2015:400, or the creativity behind the "one-off" funding mechanism enabling Next Generation EU.

flexibility, however, we must also understand the other half of the equation, being the legal forces that lead to rigidity and hence limit the scope for structural differentiation.

II. Sources of rigidity

Law inherently strives for a sufficient level of predictability and consistency. A law that changes daily would not even meet the minimum criteria for qualifying as law.[22] A certain amount of rigidity is therefore inherent in all law. For the EU legal order, however, the search for predictability and consistency is even more existential. With weaker political and societal foundations than most nation states, the EU relies on its legal order to a relatively large extent for effectiveness and stability.[23] EU law, moreover, must be rigid enough to guide and restrain 27 national legal orders. The existential threat experienced by EU lawyers when some of the foundational rules of EU law are challenged, for example by the German Constitutional Court or even more viscerally by the Polish Constitutional Court, illustrates the central importance of these foundational rules and the legal rigidity and stability they provide to the EU as a whole.[24] Many key norms of the EU polity have, therefore, been legally enshrined, often at the constitutional level, to ensure the stability of the EU. Such legalization and constitutionalizing itself already leads to more rigidity than where norms remain at the political or conventional level.

Consequently, underlying more specific sources of rigidity, there is already a level of conceptual and constitutional rigidity in EU law that seems to be higher than in national legal systems. As indicated, however, this *Article* will focus on several more specific sources of legal rigidity in the EU legal system which came to the fore during the Brexit negotiations. We will start with reciprocity, which is closely linked to the nature of the EU, and subsequently move on to interconnectedness and effectiveness.

[22] Cf L Fuller, *The Morality of Law* (Yale University Press 1969 2nd ed.) and R Raz, *The Morality of Freedom* (Clarendon Press 1998).

[23] See amongst many others *Van Gend en Loos v Administratie der Belastingen* cit., case C-6/64 *Costa v. E.N.E.L.* ECLI:EU:C:1964:66, case C-106/77 *Simmenthal* ECLI:EU:C:1978:49, or more recently case C-824/18 *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)* ECLI:EU:C:2021:153 and A Cuyvers, *The EU as a Confederal Union of Sovereign Member Peoples: Exploring the Potential of American (con)Federalism and Popular Sovereignty for a Constitutional Theory of the EU* (Diss. Leiden 2013) part. I.

[24] See especially BVerfG of 5 May 2020 2 BvR 859/15 and the preliminary reference underlying this judgment, following up on the *Gauweiler* saga, as well as, of a different nature, the judgment of the Polish Constitutional Tribunal of 7 October 2021 in case K 18/04 declaring certain parts of the EU Treaties, as interpreted by the CJEU, incompatible with the Polish Constitution and hence not binding on Poland.

II.1. Omnidirectional reciprocity as a source of rigidity

EU law is largely based on reciprocal promises.[25] Member states promise to grant each other, and each other's citizens, largely identical package of rights and obligations.[26] Clearly reciprocity is a feature of many international agreements. But in the EU, the nature, level and significance of reciprocity has been lifted to a higher level, in part by the CJEU. Already in *Costa v. E.N.E.L.*, for example, the autonomy and supremacy of EU law was directly linked to its reciprocal nature: "The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of *reciprocity*".[27]

One of the reasons that Member States have agreed to grant so many rights to others is because they receive the same rights in return. What is more, the right of one party often, by logical necessity, mirrors the obligation of the other party. The right of a Greek EU citizen to move freely to Estonia, for example, implies the obligation of Estonia to allow her in. What is more, for an internal market to work, the right of the Greek citizen to go to Estonia cannot not depend on the number of Estonians in Greece. Nor can it depend on whether Greece is respecting its own obligations under EU law.[28] As the CJEU has held, the failure of a member state to respect its obligations under EU law does not relieve other member states of their obligations under EU law towards this member state or its citizens. This is indeed a fundamental difference between the EU legal order and "ordinary" public international law which largely depends on self-policing and reprisals.

The importance of reciprocity is further illustrated by the principle of mutual recognition.[29] Mutual recognition in principle requires member states to reciprocally recognise the equivalence of each other's norms. Obviously, mutual recognition, and reciprocity in general, are far from absolute. For example, treaty exceptions and the rule of reason allow member states to restrict free movement rights to safeguard legitimate overriding objectives in a proportionate manner. Even in the strict mutual recognition framework of the European Arrest Warrant (EAW), the execution of an EAW may be halted, for example

[25] See for an example from the national perspective also how the French *Conseil constitutionnel* stresses the importance of reciprocity in its French Constitutional Council decision of 2 September 1992 no. 92-321 DC.

[26] Note that the prohibition of discrimination based on nationality as enshrined *inter alia* in art. 18 TFEU, one of the most fundamental norms of EU law, can also be understood as a form of reciprocity. Member States are not allowed to give more rights to their own citizens than to those of other Member States, essentially creating a reciprocal set of rights.

[27] Case C-6/64 *Costa v ENEL* cit.

[28] See for examples of reciprocity more common in "ordinary" public international law case C-265/19 *Recorded Artists Actors Performers* ECLI:EU:C:2020:677 para. 36, or case C-207/17 *Rotho Blaas Srl* ECLI:EU:C:2018:840 para. 45, where the CJEU confirms that it will not grant direct effect to WTO law as other WTO Members do not do so either.

[29] See already case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

because of failing fundamental rights protection in the other member state.[30] These limits to mutual recognition, however, truly are the exception, and the CJEU has worked very hard to keep them as such.[31] What is more, most exceptions to mutual recognition are *also reciprocal*. Each member state must meet the same standard to justify restrictions or limits. These exceptions, and one could see as a second-order reciprocity which reciprocally regulates the exceptions to reciprocity, therefore create the requisite flexibility to allow a reciprocal system to function. None of the exceptions to reciprocity, therefore, allow differentiation to a degree that would undermine the level of reciprocity required for the stability and effectiveness of the EU legal order.[32]

Reciprocity creates a certain level of rigidity. Member states reciprocally promise each other and each other's citizens the same package of rights.[33] Differentiation in the package of rights of one or more member states then undermines reciprocity or requires complex arrangements as soon as the rights and obligations *vis-à-vis* one member state start to differ as compared to all other member states. Brexit illustrated this challenge. Granting the UK a different set of rights and obligation would either mean that the UK received more than it gave, or that all member states would have to start giving fewer rights to the UK and its citizens than they gave to all other member states and EU citizens. Having such a separate bundle of rights and obligations for only the UK might in itself still have been possible, even if already rather complicated. Yet such an approach of differentiated yet reciprocal packages of rights and obligations rapidly becomes untenable where multiple member states receive their own unique blend of rights and obligations. In fact, what the cumulative impact of such differentiation shows is how the EU in many areas relies on multidirectional or even *omnidirectional* reciprocity to function.

Many norms of EU law, including most internal market rights, only function because *all* member states offer by and large the same package of rights to each other. For example, the internal market for goods works because one good can move freely from Luxemburg to Germany, and another can move from Germany to Italy through Austria. This creates an omnidirectional reciprocity, whereby it no longer becomes necessary to check from which member state a good originally comes. Were the rights of a good to depend

[30] See for example case C-404/15 *Aranyosi and Căldăraru* ECLI:EU:C:2016:198.

[31] See generally in the context of services S Van den Bogaert and others, 'Free Movement of Services, Establishment and Capital' in PJ Kuijperand others (eds), *The Law of the European Union* (Deventer: Wolters Kluwer 2018) 539 ff.

[32] See also already M Dougan, 'The Unfinished Business of Enhanced Co-operation: Some Institutional Questions and their Constitutional Implications' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (TMS Asser Press, 2009) 157, as well as the more general discussion on effectiveness below.

[33] Note in this context that exceptions to reciprocity through differentiation are also easier where they concern a limited, identifiable group of people with limited societal power such as non-EU citizens. For example, the far reaching opt outs of the UK in the area of asylum generally only affect the rights of asylum seekers. As such, they have a more limited impact on general reciprocity.

on bilateral reciprocity between each member state, however, it would remain necessary to check for each good in which state it originated and what the precise reciprocal rights are between the state of origin and the receiving state.

One member state with a different package of rights and obligations might not necessarily derail this omnidirectional set-up.[34] Yet if multiple member states receive the freedom to differentiate their packages of rights and obligations, it becomes almost impossible to maintain automatic, omnidirectional reciprocity. Rights and obligations will start to depend on *bilateral* reciprocity between Member States. The rights and obligations between specific member states and their citizens will then be determined by the overlap in the specific "packages" of rights and obligations each of these states has agreed to. The result would be a patchwork incapable of sustaining an effective internal market. For example, say Spain gives EU citizens equal access to its social security, yet Denmark does not. At some point, it will become untenable for Spain to continue awarding benefits to Spanish citizens in Denmark. This picture gets even more complicated where, for example, a Danish citizen moves to Portugal, acquires permanent residence, and then moves to Spain. Would this person be entitled to the Portuguese package of rights in Spain, or to the Danish? And what about individuals with multiple EU nationalities, or working in multiple member states? For goods, of course, as again illustrated by Brexit, a lack of omnidirectional reciprocity requires defining and tracking the origin of goods, seriously hampering free movement and reintroducing many of the barriers that an internal market is there to remove.[35]

The multidirectional reciprocity on which many parts of EU law, including the internal market, depends creates a rather high level of rigidity.[36] In turn, this limits the legal space for more structural differentiation in the rights and obligations of member states and EU citizens. Especially the *cumulative* effect of differentiation means that the packages of rights and obligations cannot differ too much from one member state to the next, *inter alia* where rights of individuals are concerned. Clearly, this reciprocity derived rigidity does not apply to all EU rights and obligations. The well-known areas of existing flexibility in EU law, including opt-outs in the areas of freedom, security and justice, and differentiation in membership in Schengen and the Eurozone, show that the rights and obligations of member states

[34] Cf for example the deviations allowed under art. 114(4) or (5) TFEU or limited exceptions such as for Swedish snus.

[35] See for a further discussion on goods A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace' cit.

[36] One could here also think of reciprocity in institutional rights and obligations. As debates about the creation of an EMU parliament and the "ins" and "outs" in the Eurogroup show, differentiating in the rights and obligations that Member States have in EU institutions rather quickly lead to rather intractable challenges. For example, on the one hand it is often untenable to differentiate in the representative rights of Member States or EU citizens. On the other hand, it will be equally untenable to continue to grant the same levels of representative rights to those Member States and EU citizens opting for smaller packages of rights and obligations. See for a discussion in the context of EMU LJ van Middelaar and V Borger, 'A Eurozone Congress' in S Hennette and others (eds), How to Democratize Europe (Harvard University Press 2019) 11.

can differ in certain areas and to a certain extent.[37] Yet even within these fields, however, the choice is often rather binary between participating or not participating.[38] For example, a member state cannot choose to join only certain parts of EMU, to accept only certain EAW's from certain member states or to ignore part of the Schengen Borders Code.[39] Once a choice to join has been made, the principle of reciprocity usually kicks in, precluding a member state to pick and choose its own basket of rights and obligations.[40]

In conclusion, reciprocity is a vital construct underlying the EU legal order. Structural differentiation, especially concerning the respective rights and obligations of member states, sits uneasily with (omnidirectional) reciprocity. Consequently, the need for reciprocity forms a source of legal rigidity which limits structural differentiation in the EU. This limiting effect is amplified by the related construct of interconnectedness, to which we now turn.

II.2. Interconnectedness as a source of rigidity

Your right to reside in another EU member state usually loses much of its value if you are not allowed to bring your spouse or send your kids to school. Equally, your right to provide medical services in another member state loses practical relevance if your medical degree is not recognized, you cannot insure yourself, or your services are not covered by national health insurance. As these examples show, many constructs of EU law depend on a web of interconnected rights and obligations to function. To use the example of a car: no matter how powerful your engine or shiny your rims, without a gearbox you will not get very far.

The level of interconnectedness required in part depends on the objectives pursued and the desired level of effectiveness. The CJEU thereby tends to opt for a rather ambitious interpretation of the objectives pursued and a very high level of effectiveness. Often, the CJEU will ask which interpretation of EU law *optimally* achieves a desired outcome. Consequently, EU law usually requires many interconnected rights to optimally ensure a certain right. For example, the CJEU has found that to be effective, the right to provide services must include the right to bring as many staff as you need for as long as you need them.[41] Similarly, an effective right to work in another member state not only includes

[37] For some strong overviews of differentiation in EU law see for example B de Witte and others (eds), Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law cit.

[38] See in this context also section II.2.

[39] It is recognized that certain non-EMU Members can selectively participate in some EMU-related mechanisms such as the ESM and the TSCG, but they cannot partially join the EMU as such.

[40] Cf also art. 326(2) TFEU which explicitly states that enhanced cooperation "shall not undermine the internal market". Even if a form of differentiation takes place outside the internal market proper, therefore, it may not undermine the internal market, turning the effectiveness and coherence of the internal market into a limit on differentiation. Cf also B de Witte, 'Variable Geometry and Differentiation as Structural Features of the EU Legal Order' cit. 21.

[41] See for example case C-113/89 *Rush Portuguesa v Office national d'immigration* ECLI:EU:C:1990:142.

the right of your children to go to school, but the right to *finish* this schooling. Even obstacles to participate in national sports competitions may threaten the effective free movement of workers.[42]

One can of course challenge the level of effectiveness the CJEU strives for. Yet even under lower standards, many EU rights and obligations are inherently interconnected. What is more, a certain level of interconnectedness already flows from simple *material* reality. People have babies and get sick, whether this is legally convenient or not. Similarly, physics, geography, production processes, logistical realities or the limits of ICT systems affect trade in goods and the possible ways to organize customs checks. If one truck carries packages from 50 different producers, for example, just tracking that truck is not enough to replace a customs border by "technology". Legal rules must therefore also consider the material interconnections between law and our physical reality.[43]

Consequently, any mechanisms for structural differentiation must respect the legal limits imposed by legal and material interconnections. One cannot, therefore, freely pick and choose from interconnected rights, which leads to rigidity. The limits imposed by interconnection, moreover, affect both attempts to *reduce* integration for certain member states as well as attempts to *deepen* integration for a coalition of the willing. For both reduction and deepening will likely not just affect a single rule or mechanism, but a whole web of related rules.

Interconnection, moreover, does not just play a role in the internal market. Even in areas that serve as prime examples of differentiation, such as EMU and Schengen, interconnectedness imposes clear limits on the nature and scope of differentiation. For instance, joining Schengen, and removing internal borders, creates the need to harmonize the protection of shared external borders. Hence, even if some flexibility remains, all states participating in the Schengen area need to sign up to a minimum of substantive rules as well as forms of institutional collaboration and coordination.[44] Similarly, a sufficient level of coherence also becomes necessary for an effective common asylum system.[45] As to EMU, a common currency not just requires a joint monetary policy but, as experience has shown, a host of norms on economic policy and banking supervision, combined with far reaching

[42] Case C-413/99 *Baumbast and R* ECLI:EU:C:2002:493 and case C-22/18 *TopFit and Biffi* ECLI:EU:C:2019:497.

[43] The author would like to thank Kalypso Nicolaïdis for her interesting suggestions on this point during the seminar.

[44] Cf Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

[45] See also the contribution in this *Special Section* by J Santos Vara, 'Flexible Solidarity in the New Pact on Migration and Asylum: A New Form of Differentiated Integration?' (2022) European Papers www.europeanpapers.eu 1243. For the additional point that we could (and should) understand fundamental rights as part of the interconnected set of rules, which thus add rigidity, especially in the area of asylum, see N El-Anany, 'The Perils of Differentiated Integration in the Field of Asylum' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 362, 367.

institutional commitments including an independent central bank, EU institutional capacity to act in times of crises and, to that end, commit formerly unprecedented sums of public money. In other words, Schengen and EMU allow a certain level of *binary* differentiation in the sense that one can choose to take part or not. Once a choice is made to join, however, a Member State must sign up to a host of interconnected norms and institutional structures. This leaves little space for differentiation *within* Schengen or EMU.

What is more, even policy areas that might formally be separate from the internal market may use internal market tools to achieve certain aims or simply affect the functioning of the internal market directly or indirectly. In those cases, even such non-internal market areas may be constrained by the rigidity that derives from the interconnectedness of the internal market.[46] The spill-over of internal market rigidity, moreover, can also extend to external obligations of the EU and its member states. For example, due to internal disagreement, initial EU legislation on GMOs left significant space for Member States to adopt stricter norms.[47] The subsequent patchwork of national prohibitions, however, was subsequently found to contravene World Trade Organization (WTO) law, especially as no adequate scientific risk assessment had been carried out to justify many stricter national norms.[48] This demonstrates the rigidity created by the interconnection between internal legislation and external obligations of the EU and its member states.[49]

Rigidity is further increased by the interconnection between substantive norms and the EU's democratic and decision-making machinery. Again EMU provides a clear example.[50] Even if substantively some member states can choose to remain outside EMU, significant difficulties arise in respecting the democratic and decision-making rights of the "outs", and more generally in fitting the Eurozone into an EU constitutional and legitimacy

[46] See for example Regulation 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU (Text with EEA relevance), which is part of the EU's environmental policy but also concerns the EU market for goods.

[47] See for example Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC.

[48] World Trade Organization, *DS921: European Communities – Measures Affecting the Approval and Marketing of Biotech Products* www.wto.org. See for discussion S Kingston, 'Flexibility in EU Environmental Law and Policy' cit. 354.

[49] Note in this context also that the increasingly strict requirement of coherence in the external position of the EU and its Member States may further increase rigidity and decrease the scope for differentiation. See for instance case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203. See also the contribution by AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' cit., with further thanks for their valuable comments on this point during the seminar.

[50] Cf critically D Thym, 'Competing Models for Understanding Differentiated Integration' cit. and T Beukers and M Van der Sluis, 'Differentiated Integration from the Perspective of the Non-Euro Area Member States' in T Beukers and others (eds), *Constitutional Change through Euro-Crisis Law* (Cambridge University Press 2017) 143.

structure designed for decision-making by all member states jointly.[51] The interconnection between substantive norms and the institutional set-up of the EU, therefore forms a further source of rigidity.[52] As one cannot create endless permutations of EU institutions, one at some point has to choose between either allowing the "outs" a say on decisions in areas of EU integration they do not participate in, or limiting substantive integration to the extent that can be accommodated by the unitary institutional framework of the EU.[53]

A further complication arises, moreover, where we consider the interaction between reciprocity and interconnectedness. Interconnectedness can limit the options for differentiation to certain coherent packages of rights and obligations. Even if multiple coherent packages of rights can be designed, however, reciprocity may subsequently limit the capacity of member states to freely choose between these packages. After all, due to (omnidirectional) reciprocity, it may be necessary that all member states choose the same package of interconnected rights. If in one field this is indeed the case, member states in fact only have the freedom to jointly choose which coherent package of rights they will all reciprocally adopt, which significantly reduces the scope for structural differentiation.

Brexit also illustrates the limitations imposed by interconnectedness. For example, the UK initially wanted to retain free movement of services to a certain extent, especially for financial services. At the same time, it wanted to remove all residence rights connected to this freedom, especially for staff of service providers. After all, one of the core promises behind Brexit was to limit migration. The UK demand, however, went squarely against the case law of the CJEU, which holds that the right of service providers and staff to move and reside is inherently connected to the freedom to provide services, as is the right of service recipients.[54] As a result, the EU could only accept the full package of rights related to freedom of services or none at all.

[51] See for instance K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) and A Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford University Press 2015).

[52] See making short shrift of proposals for an EMU parliament for example also B De Witte, 'The Law as Tool and Constraint of Differentiated Integration' (EUI Working Paper RSCAS 2019/47) 15.

[53] See on this point also D Thym, 'Competing Models for Understanding Differentiated Integration' cit. 61, stressing that it is important that differentiation "is regularly embedded into the single institutional framework". Importantly, the European Parliament has historically strongly opposed any attempts to create asymmetric participation of MEP's. The recognition since Lisbon in art. 14(2) TEU that the EP is "composed of representatives of the Union's citizens" has only further entrenched this approach legally. See for an example the reaction of the European Parliament to suggestions made in the EMU context the Resolution 2012/2151(INI) of the European Parliament of 20 November 2012 with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup "Towards a genuine Economic and Monetary Union". See for further discussion D Curtin and C Fasone, 'Differentiated Representation: Is a Flexible European Parliament Desirable?' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 118.

[54] See for an overview S Van den Bogaert and others, 'Free Movement of Services, Establishment and Capital' cit. 539 ff., and for an overview of the much more limited system under the TCA: SCG Van den Bogaert and A Cuyvers, 'Het dienstenverkeer tussen de EU en het Verenigd Koninkrijk na Brexit' (2021)

The tense debate on the level playing field provides another example of interconnectedness. The more markets are integrated, the more important it is to guarantee a level playing field, for example concerning competition policy or environmental, labour, data protection or consumer protection standards, which impact competitiveness. If you do not harmonize these standards, undertakings from the member state with the lowest standards have an unfair competitive advantage, which they can freely exploit if they have unfettered access to the markets of other member states. It is true that jointly regulating all these areas significantly decreases the freedom of member states and thereby increases the sovereignty costs of free movement. Yet from the perspective of EU law, all these norms are interconnected. Hence, little structural differentiation seems possible within this coherent package of rights and obligations. As the UK was unable or unwilling to accept this full package, the only legally viable option was to go for a relationship that was much further removed from a real internal market, and hence did not require the full set of level playing field norms.

Another important example of interconnectedness, which dominated much of the later debate on Brexit, was the trilemma on the Northern-Irish border.[55] All parties wanted to avoid a "hard" border between Ireland and Northern-Ireland. Removing borders, however, is connected to a host of norms and institutions. Even in the specific circumstances in Ireland, where free movement of persons was already covered by the Common Travel Area, avoiding a hard border still required shared norms on *inter alia* customs and almost all other norms related to free movement of goods. Ultimately, therefore, the only solution parties could agree to was to keep Northern-Ireland in the EU customs union and largely within the EU internal market for goods, even though this involved creating a de facto border between Northern-Ireland and the rest of the UK.[56] This solution, which is far from perfect or even stable, illustrates just how hard it can be to disentangle different EU rights and obligations, even with significant political will and societal pressure. Northern-Ireland also illustrates the importance of material interconnectedness. Most of the UK proposals to solve the Northern-Ireland trilemma through "technology" were already non-starters because they ignored the interconnection between customs and free movement law and the limits imposed by the material reality on the ground. For example, the check whether a sheep or a wheel of cheese meets EU standards, or that a truck does not contain goods directly shipped in from China, simply must take place *somewhere*, with some form of

Bedrijfsjuridische Berichten 149. Also note, however, that interestingly the right of service recipients to remain in a Member State during the provision of the service is apparently not a necessary, interconnected part of the freedom to provide services in the context of the EU – Turkey association agreement, as held in case C-221/11 *Demirkan* ECLI:EU:C:2013:583.

[55] SCG Van den Bogaert and A Cuyvers, 'Brexit Blues: They Still Haven't Found What They're Looking For…' (2019) Nederlands Juristenbladd 1388.

[56] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Northern-Ireland Protocol [2019].

oversight to ensure the check is done correctly.[57] As a result, the material reality of customs and product standards has so far always required a border somewhere.

II.3. Effectiveness as a source of rigidity

The effectives of EU law not only depends on the substance of EU rights and obligations. It also depends on the legal machinery developed to ensure these rights and obligations are respected in practice. The key legal building blocks of EU effectiveness are by now part of its constitutional self-identity and legal mythology. Yet from our perspective it is important to explore to what extent core effectiveness doctrines such as direct effect, supremacy, autonomy, sincere cooperation as well as Commission and CJEU oversight may form sources of legal rigidity.

Considering the already rather far-reaching and absolute nature of many EU effectiveness doctrines, it seems unlikely that future differentiation will introduce even more comprehensive effectiveness requirements. Hence, the main question is if structural differentiation could *lower* standards of effectiveness. For example, in a scenario with different levels of EU membership, could there be a level where member states accept less than absolute supremacy and autonomy, or do so in some areas like migration or judicial organization?[58] Or does any form of real membership inherently necessitate the full gamut of effectiveness doctrines?

This question was of course also critical for Brexit. "Taking back control" and liberation from foreign judges were core rallying cries for Brexiters. Ending EU supremacy and the jurisdiction of the CJEU hence became some of the most entrenched red lines of the UK. In fact, before joining the Leave camp, Johnson explored options for some kind of national sovereignty lock that would preserve UK sovereignty from EU supremacy. The thinking apparently was that, if such a lock could be designed, an exit might not be necessary. The reply from EU law experts in the UK was that it could not be done, seemingly contributing to his decision to support Brexit.[59]

Considering the foundational importance of effectiveness for EU law, it does indeed not seem likely that any form of differentiation could escape or significantly lower the effectiveness standards as developed by the CJEU. For starters, most effectiveness doctrines have been in place for decades. Hence, they were already deemed necessary by the CJEU in earlier, less far-reaching phases of EU integration. What is more, the CJEU has

[57] See for further analysis A Cuyvers, 'Balancing Sovereignty, Trade and Northern-Irish Peace' cit.

[58] Cf the recent statement of chief negotiator turned presidential candidate Barnier on 10 September 2021 calling for France to regain its legal sovereignty, particularly in the area of migration or the judgment of the Polish Constitutional Tribunal in case K 18/04 cit. M Pollet, 'Presidential Candidate Barnier Wants to Limit Role of European Courts' (10 September 2021) Euractiv www.euractiv.com.

[59] See for an excellent overview T Shipman, *All Out War: The Fully Story of How Brexit Sank Britain's Political Class* (HarperCollins 2017) and T Shipman, *Fall Out: A Year of Political Mayhem* (HarperCollins 2018).

consistently stressed the existential importance of these effectiveness doctrines.[60] These doctrines are part of "the very foundations" of the EU legal order. Hence, any challenge to these doctrines may threaten to bring the whole construct down. For this reason, the CJEU has also opted for rather absolute conceptions of, for example, supremacy and autonomy. Be it the UN Security Council acting under Title VII, a national constitutional court defending its own constitutional core, or an arbitral award claiming finality under an international agreement, supremacy and autonomy must be respected, and only the CJEU can potentially weigh these foundational principles against other norms of EU and international law, within the system of EU law itself.[61] Lastly, and perhaps most fundamentally, even if there might be legal and conceptual space to soften some of the EU effectiveness doctrines, it is difficult to imagine how this could be done for only some member states. The effectiveness doctrines codetermine the very nature and effect of EU law. And the nature and effect of EU law in principle cannot differ from one member state to the other, already for reasons of reciprocity and interconnectedness.[62] Imagine for example that EU law is less supreme in Poland than it is in Germany. Such differentiation in effectiveness would already undermine the unity and uniformity of EU law. Yet it would also undermine reciprocity. EU rights and obligations would not be as effectively protected in Poland as they are in Germany, meaning that in effect Germany is giving more rights to Polish citizens and undertakings in Germany than Poland is giving to German citizens and undertakings on its territory. Such differentiation in effectiveness, moreover, might also conflict with interconnectedness. As multiple rights depend on each other, reducing the effectiveness of only some of these rights might undermine the effectiveness of the entire web of rights involved.

Considering these difficulties in differentiating within effectiveness doctrines, there only seem to be three options to create more legal space for differentiation. First, one could try to lower or soften effectiveness standards for *all* Member States. Second, one accepts the current effectiveness doctrines as a given, meaning that any future forms of differentiation must remain within the rigidities imposed by these doctrines. Third, one moves outside the realm of EU law proper to avoid the limits imposed by effectiveness. Here the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and

[60] In this light, it is of course interesting in itself that in some areas of EU law the CJEU did not or does not have jurisdiction to *inter alia* enforce these doctrines, which apparently does not conflict with the very foundations of the EU legal order.

[61] *Melloni* cit.; *Kadi and Al Barakaat Internation Foundation v Council and Commision* cit.; case C-284/16 *Achmea* ECLI:EU:C:2018:158; case C-638/19 P *Commission v European Food and Others* ECLI:EU:C:2022:50; case C-234/04 *Kapferer* ECLI:EU:C:2006:178.

[62] Note though that it might be possible for Member States to reciprocally award each other the freedom to differentiate from effectiveness doctrines to a limited extent in a number of selected areas they themselves choose. This would resemble the second-order, reciprocal right to limit free movement based on legitimate objectives discussed above, which leads to differences in the application of EU law in different Member States but retains reciprocity at the higher level as the same exceptions and conditions apply to all Member States equally.

Governance (TSCG) provide interesting examples.[63] By acting through "ordinary" public international law, member states created a kind of flexible shell around EU law, which is not EU law in a strict sense, yet remains closely related and intertwined with the EU legal order and its institutions.[64] And although these "external" norms may not conflict with the EU law obligations of member states, the EU effectiveness doctrines do not fully apply within these international legal instruments.[65] One can of course debate whether this last option should be seen as differentiation *within* EU law, or if extensive us of this option might undermine the EU legal order and the "Community method".[66] Even leaving aside those, rather significant, questions, however, going outside of EU law only seems a feasible option where EU law wants to regulate a new field or wants to add or strengthen rules which are not yet fully contained in EU law, like in the case of the ESM and the TSCG.[67] Otherwise, it would become necessary to first remove some elements currently covered by EU law from the EU legal order, and then move them to an international agreement. Barring a full exit of a Member State, which like in the case of the UK would allow the EU and this now third state to reorganize all their obligations outside of EU law proper, this seems rather hard, especially where it would only be done for a selection of member states and would involve changes to primary law. No matter which of these three options is chosen, therefore, effectiveness will impose a certain level of rigidity on any attempt at differentiation.

Clearly, the rigidity imposed by effectiveness was also on full display before, during, and after Brexit. The inability of the UK to accept the EU's effectiveness doctrines not only created significant difficulties in itself. It also had a significant impact on the possible *substantive* rights and obligations that could be agreed between the EU and the UK in the TCA. The lack of supremacy and CJEU jurisdiction, for example, restricted the ways in which EU law could be integrated into the TCA, as under the principle of autonomy the CJEU must retain the final say over the interpretation and application of EU law.[68] In turn, the inability to directly integrate parts of EU law limits the options for the UK to directly

[63] See Treaty establishing the European Stability Mechanism [2012], as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union [2012]. For further suggestions along this path also the more recent suggestion floated by French President: E Macron, *Speech by Emmanuel Macron at the Closing Ceremony of the Conference on the Future of Europe* (9 May 2022) French Presidency of the Council of the European Union presidence-francaise.consilium.europa.eu.

[64] Cf V Borger and A Cuyvers, 'Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in de Economische en Monetaire Unie: de Juridische en Constitutionele Complicaties van de Eurocrisis' (2012) Tijdschrift voor Europees en Economisch Recht 370.

[65] For example, the duty of sincere cooperation will have to be respected in designing such international agreements. See SCG Van den Bogaert and V Borger, 'Differentiated Integration in EMU' in B de Witte and others (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 230.

[66] Cf also *Pringle* cit. and case C-258/14 *Florescu* ECLI:EU:C:2017:448.

[67] See for a discussion of the further limits, *inter alia* deriving from primacy, also B De Witte, 'The Law as Tool and Constraint of Differentiated Integration' cit. 11 ff.

[68] See for instance case C-706/17 *Achmea* ECLI:EU:C:2019:407, as well as for an apparent softening Opinion 1/17 ECLI:EU:C:2019:72, opinion of AG Bot.

connect to the EU acquis, for example in the area of free movement, asylum or the EAW. Rejecting EU effectives doctrines, therefore, limits the possible connection to and participation in key areas of the EU legal order to such an extent that the relationship that remains no longer really qualifies as a form of differentiated membership but rather as some form of relationship between the EU and a third state.

In addition to reciprocity and interconnectedness, the principle of effectiveness therefore also forms a significant source of rigidity. For no matter how far substantive rights and obligations might be differentiated, it seems that only limited differentiation is possible as to the effectiveness doctrines. And where effectiveness requirements are not met, substantive EU law might not be directly connected to or built upon. This is particularly relevant for the future of EU differentiation as it often seem to be these effectiveness doctrines that are felt to threaten national identity and sovereignty the most and hence lead to the most resistance and demand for differentiation or "lighter" forms of membership.[69] If differentiation in substantive rights does not lead to reduced effectiveness requirement, this may therefore also make such substantive differentiation less relevant or attractive for national electorates. This therefore raises the question if more far-reaching differentiation in substantive rights would even be able to address some of the key criticisms levelled against the EU, and if not, if it is worth the hassle. A hassle that is only increased if we do not just look at differentiation statically, but also consider that structural differentiation would have to be dynamic in nature.

II.4. The clash between rigidity and the dynamics of differentiation

So far, we have looked at differentiation as a rather static phenomenon. Could one or more states receive a different package of rights and obligations? For differentiation to become a structural feature, however, we need to explore the *dynamics* of structural differentiation, which lead to several additional complexities. To start with, simultaneous differentiation in multiple member states multiplies the tensions between differentiation and the principles of reciprocity and interconnectedness. As to reciprocity, most member state will no longer have the same bundles of rights and obligations, limiting the reciprocal nature of the EU. As to interconnectedness, with all these bilaterally different bundles of rights and obligations, it will become harder to make sure that all interconnected rights are sufficiently guaranteed in all member states. Consequently, it becomes very hard to determine the relation between all different levels of membership as a whole, which may lead to a de-facto system of bilateral relations between Member States instead of a real union.

In addition to the substantive complexities created by dynamic differentiation, moreover, additional problems arise as to *process*. Would moving to a different level of

[69] See for further discussion on this point A Cuyvers, 'Brexit and the Real Democratic Deficit: Refitting National and EU Democracy for a Global Reality' in E Ellian and R Blommestijn (eds), *Reflections on Democracy in the European Union* (Eleven Publishing 2020).

membership, for example, require consent from other member states, and, if so, from how many? Or would opting for a more differentiated relation with the EU be a "sovereign" choice of each Member State *à la* Wightman?[70] Yet if it is a sovereign, free choice, could a member state switch plans when it wants to and as often if it wants to, potentially leading to chaos? And if not, who gets to set these limits? As also demonstrated by Brexit, moreover, one might further need a form of transitional period to deal with the impact of moving between levels of membership. Such a transition is already complex in itself. Yet it becomes even more complex where multiple states are transitioning in overlapping intervals. In such a scenario, the different transitional regimes must fit together, both in relation to member states that do not differentiate and between all those member states that do. These dynamic challenges, moreover, increase where member states cannot just choose between certain predefined membership packages, but can customize their package of rights and obligations.

A fully flexible, dynamic model of differentiation therefore leads to impressive legal (and political) headaches. The EU is simply not a gym where one can easily move between levels of membership. One could of course try to address these complications by reducing the freedom of choice for member states. For instance, one could allow member states to only opt for *more* integration, but never less, keeping the current level of integration as a minimum and only allowing one-way traffic on the road to deeper integration. Alternatively, time periods could be imposed to limit how often member states could change their EU membership. All such limitations, however, have the effect of limiting the effective choices available to member states. If one key aim of differentiation is to offer member states, and national electorates, more control over their level of EU membership, thereby increasing the democratic legitimacy of the EU, restricting choice in this manner interferes with this objective. This especially applies where the only choice offered is to opt for *more* integration. At the same time, offering full flexibility simply seems legally impossible. Consequently, the need to limit the near exponential challenges created by the dynamics of differentiation seem to create a further source of rigidity. Any model of more structural EU differentiation must take these dynamics into account, requiring legally sound answers to questions such as how, when, and under which conditions member states can opt for differentiation, how much customization in rights and obligations is feasible, and what happens if multiple member states decide to opt for different forms of differentiation at the same time.

III. Brexit insights for future attempts at structural differentiation

The previous section outlined several sources of EU rigidity which must be respected, or at least considered, when designing future structural differentiation. Brexit brought these

[70] Case C-621/18 *Wightman* ECLI:EU:C:2018:999 and for discussion A Cuyvers, 'Wightman, Brexit, and the Sovereign Right to Remain' (2019) CMLRev 1303.

sources of rigidity to the fore. At the same time, as indicated in the introduction, Brexit also appeared a time of unprecedented flexibility. To better understand the limits imposed by the sources of rigidity for future attempts at structural differentiation this section will briefly look at three legal outcomes of Brexit, being the transition period, the Northern Ireland protocol and the free movement rights in the TCA. For reasons of space, the discussion will focus on key elements relating to rigidity only.

III.1. The transition period as sheer rigidity

What to do when you do not want to extend negotiations, but you do not agree on the new EU-UK relation either? You create a transitional period from 1 February 2020 to 1 January 2021 during which the UK formally leaves the EU, yet essentially all EU rights and obligations continue to apply.[71] Consequently, the UK remained bound by all EU law, even though it formally became a third country and lost all its political rights in EU decision-making. This to the frustration of some Brexiteers who did not perceive this as the sovereign freedom promised, or to the joy of some other Brexiteers who did not fully understand this solution and happily pointed out on 2 February 2020 that leaving the EU did not seem have any negative impact on the UK and its economy, proving all those experts wrong.

From one perspective, the transition period showed extreme flexibility. Before Brexit, most EU lawyers would have deemed it impossible to award full membership rights and obligations to a third country. After all, EU membership is a special status only acquired after a long and arduous accession process. Many membership rights, moreover, depend on operating within the overarching system of the EU legal order. In the context of withdrawal, however, and with a state which had been a member state until rather recently, it was deemed feasible to temporarily extend the application of all EU rights and obligations. The CJEU even held that European Arrest Warrants could continue during transition. Even though the mutual trust required for this mechanism is anchored directly in EU membership. Yet in the unique context of transition, the continuing commitment of the UK to the ECHR apparently sufficed, even if one hopes this does not apply to all ECHR members.[72]

On closer inspection, however, it can be argued that the transition period demonstrates extreme rigidity. The aim of the EU and the UK was to negotiate a new relationship with a new balance of rights and obligations. This proved a Herculean task, in no small part due to the reciprocal and interconnected nature of EU law and the effectiveness doctrines that kick in even if you only opt for some of the EU rights involved. Each time the UK wanted to eliminate a certain EU norm, such as free movement of persons, EU fish quota or state aid controls, it turned out that these norms were connected to a whole web of other rights and obligations that parties could not or did not want to scrap. Clearly

[71] Art. 126 ff. of the EU-UK Withdrawal agreement.

[72] Case C-327/18 *PPU RO* ECLI:EU:C:2018:733. Normally, one would imagine, the mere applicability of the ECHR would not suffice to enable mutual trust and mutual recognition with say Russia before its exit of the ECHR or Turkey.

some hard-nosed economic and political bargaining took place, also on the EU side. But the legal reciprocity and interconnectedness of rights and obligations greatly complicated this economic bargaining and limited the legal space for political compromise, often much more than the UK understood or was willing to understand. Similarly, the existential importance of the effectiveness doctrines for the EU further limited the scope for compromise. For as long as the UK demands implied continued application of some EU norms, the EU was legally obligated to insist on the *whole* array of effectiveness doctrines, including supremacy and jurisdiction for the CJEU, already not to run foul of the strict autonomy doctrine jealously guarded by Luxemburg.

Faced with this legal rigidity, as well as limited time and political deadlock in the UK, the only feasible option became to simply apply the *entirety* of EU law to the UK. From a perspective of differentiation this can only be seen as a victory for rigidity. The creativity and flexibility demonstrated by temporarily retaining a third country as a member state was actually driven by the inability to overcome rigidity. Consequently, the totality of EU law, with its interconnected and reciprocal web of substantive rights and effectiveness doctrines, had to remain in force. And this was the case even though Brexit only concerned one member state in a one-off, non-dynamic context, and even though the UK was loathe to accept continued application of the entirety of EU law, including new secondary acts adopted during transition. Instead of an example of flexibility and differentiation, therefore, the transition period can be better understood as proof of the enormous legal rigidity in EU law, and therefore provides a cautionary tale for future plans for structural differentiation.

III.2. The Northern-Ireland Protocol: Flexible borders and rigid law

Leaving aside important legal nuances, the key compromise underlying the protocol is that Northern-Ireland remains in the EU customs union and internal market as far as goods are concerned. This removes the need for border checks on goods between Northern Ireland and the Republic of Ireland, and hence the need for the feared "hard border". The price to pay, however, is a customs-border in the Irish sea. To prevent products moving from the UK to the EU internal market without paying EU customs or respecting EU product standards, all products that move from the rest of the UK to Northern-Ireland have to be checked.[73] What is more, the Commission and the CJEU retain significant jurisdiction to ensure that EU norms are effectively applied in Northern-Ireland.[74] In a softening of the initial so called back-stop, these legal quantum mechanics, where Northern-Ireland simultaneously is part of the EU and the UK internal market, remain in place until parties can find a better solution, or until the Northern-Irish parliament, with a sufficient majority, decides to remove itself from this mechanism and thereby risks a hard border with the EU.[75]

[73] See *inter alia* art. 5 and 7 of the Northern-Ireland Protocol of the EU-UK Withdrawal agreement.
[74] *Ibid*. art. 12(4) and (5).
[75] Art. 18 Northern-Ireland Protocol.

Again, one can see this protocol as an example of significant flexibility. To begin with, a part of a third country is allowed to remain in the EU customs union and internal market. To make this possible, an EU customs border is created within the sovereign territory of a third state. What is more, Northern-Ireland only partakes in the free movement of goods, and not in the other freedoms. Within the free movement of goods, moreover, some EU rules do not apply, and exceptions that do not exist under EU internal market law have been included.[76] These outcomes seem to fly in the face of the unity and indivisibility of the internal market proclaimed by the EU at the start of Brexit negotiations.[77] As such, one can understand why, at first sight, the protocol might raise visions of structural differentiation, at least within the EU internal market.

On closer inspection, however, the solution chosen again rather demonstrates rigidity. For starters, the EU position on the absolute unity of the internal market was itself a rather recent invention. Here it might suffice to point out that most freedoms developed separately from each other, services started life as a residual category, and that for example the agreements with the European Economic Area (EEA), Turkey and Switzerland already differentiate between the freedoms as well. Splitting the freedoms in the protocol is not as novel, therefore, as it may seem.

As far as customs and goods were concerned, moreover, it proved impossible to separate these two bodies of law. The only way to avoid a hard border was for Northern-Ireland to accept virtually the whole of EU substantive rules in these areas, and for the UK to accept the unprecedented, and according to a previous and current version of Boris Johnson, unconscionable, step of creating a de facto border between Northern Ireland and the rest of the UK.[78] Here again we can see different sources of rigidity at work. Preventing a border is a very reciprocal exercise. All parties need to agree to all the rights and obligations required to make a border legally redundant. In terms of interconnectedness, all parties furthermore need to accept *all* interconnected rules required to do away with borders, including shared norms on customs rates, collection, product standards and indirect taxes. If only one of these norms is not dealt with, a full border becomes necessary. To make all these norms sufficiently effective to allow for borderless coexistence, moreover, one needs the complete EU legal machinery on effectiveness. Even a reduction of free movement to "only" customs and goods, therefore, still requires the full set of EU effectiveness doctrines, revealing this third source of rigidity at work. Lastly, the tortured rules for a potential change in or end to the protocol, as well as the major political fight that ensued when the UK almost

[76] *Ibid*. art. 16.

[77] See on this point *inter alia* S Weatherill, 'The Several Internal Markets' (2017) YEL 125 and C Barnard, 'Brexit and the EU Internal Market' in F Fabbrini (ed.), *The Law and Politics of Brexit* (Oxford University Press 2017).

[78] At the time of writing, the Northern Ireland Protocol Bill, which unilaterally suspends and violates key aspects of the Northern-Ireland protocol, had just passed the first reading in the House of Commons, and is set for a long and bumpy road, especially in the Lords, see UK Parliament, *Northern Ireland Protocol Bill* bills.parliament.uk.

immediately started to demand changes, demonstrates the rigidity imposed by the challenge of dynamics. Even leaving the political dimension aside, dynamically changing the Norther-Ireland protocol is legally highly complex due to the rigidity imposed by reciprocity, interconnectedness and effectiveness.

The Northern-Ireland protocol, therefore, primarily testifies to the legal rigidity inherent in the EU legal framework enabling borderless trade. In turn, this raises serious doubts as to how much differentiation may be legally feasible in any area building on the free movement acquis, especially concerning effectiveness. At the same time it must be observed that the Northern-Ireland protocol does confirm that free movement of goods can be legally separated from other freedoms, most importantly from the free movement of persons.[79] Even though one can ask if a similar flexibility is possible *within* EU law and membership, especially in light of the fundamental status of EU citizenship and the free movement rights attached to that status, this might open up space for future differentiation.[80] Considering the close connection between free movement of persons and some of the most contested and sensitive issues of EU law, including migration and access to social benefits, this may prove an interesting area to explore further. Overall, however, the Northern-Ireland protocol, and its painful birth and existence so far, seem rather imply more rigidity than flexibility for future plans for structural differentiation.

III.3. The TCA as the residual space of rigidity

Few EU lawyers might even recognise the TCA as EU law, and indeed at multiple places the TCA tries very hard to stress that it is not EU law.[81] For example, there is no real free movement of goods, very little on services to talk of, and free movement of persons has certainly ended, except for retained rights of (former) EU citizens.[82] Similarly, all of the hallmarks of EU law including direct effect, supremacy and autonomy are almost completely gone, as is the jurisdiction of the CJEU, replaced by an arbitral system that feels much more like ordinary public international law.

In short, the UK wanted a different relation with the EU, and it certainly got one. Instead of anything still remotely resembling EU Membership, however, it seems more accurate to see the TCA as a very thin agreement, rather close to a hard Brexit. And one of the reasons why the TCA is so thin, is because the rigidities in EU law would not allow a thicker relation without crossing several UK red lines. In terms of reciprocity, the EU could not give the UK more rights than its member states would get in return, for example in fields of (financial)

[79] Of course, the movement of persons in Ireland is taken care of via the Common Travel Area, but this does not remove the legal flexibility on this point under EU law.

[80] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458.

[81] See for example art. 1 of the TCA stressing the "autonomy and sovereignty" of both parties, or art. 4 stressing that the TCA forms public international law, and should be interpreted like that, and not as EU law.

[82] For an excellent short overview see the analysis by S Peers, 'Analysis 2 of the Brexit Deal: EU/UK Trade and Cooperation Agreement – Overview' (31 December 2020) EU Law Analysis eulawanalysis.blogspot.com, for services specifically see SCG Van den Bogaert and A Cuyvers, 'Welcome to Brexit, It Ain't Pretty' cit.

services or the free flow of data. Due to interconnectedness, moreover, even if the UK would have wanted to retain something like free movement for financial services, it would have been very hard to legally separate these services from, *inter alia*, the free movement of all other services, as well as the free movement of the service providers and their staff. And even if it had been possible to disconnect individual free movement rights and for example only include a reciprocal right of free movement for financial services, even such a limited direct use of or connection to the EU acquis on free movement would have required the full application of all doctrines of effectiveness, including the doctrines of supremacy, direct effect and autonomy. To make matters worse, at least from the UK perspective, such a direct connection to the EU acquis would also necessitate an ongoing calibration between EU and UK law whereby they UK would be obligated to dynamically incorporate EU secondary law into UK law, without any input.[83]

Seen from Barniers famous staircase to hell (or to heaven, depending on one's view), the TCA ended up almost at the bottom, with an agreement that is basically a comprehensive free trade agreement based on other such agreements like CETA. From the perspective of rigidity, one could almost see the TCA therefore as the mirror image of transition. During transition it proved impossible to craft a genuinely new or differentiated form of EU membership, due in no small part to UK red lines but also partially due to EU rigidities, leading to a choice to simply retain the entire package of EU rights and obligation minus participation in decision-making. For the TCA this was clearly not an acceptable solution for the UK. Just as during transition, however, parties were again not able to come up with a relationship which one could genuinely call an alternative for EU membership. The only option remaining on the table, therefore, was to opt for a relationship based on public international law which is so far removed from EU membership that one would be hard pressed to call it a differentiated form of EU membership instead of a last-minute attempt to limit the legal and economic damage of a clear political choice.

IV. Conclusion: Rigidity roadblocks to future structural integration

So what legal space for structural differentiation do the sources of rigidity leave? The insights provided by Brexit suggest not that much. Instead of flexibility, Brexit rather illustrates the significant sources of rigidity in the EU legal order, and how these restrain structural differentiation. Of course many creative solutions were sought and found, and, as during the euro crisis, parts of EU law proved flexible in ways that lawyers might never have dared predict. On closer inspection, however, despite all the political and time pressure involved, despite all the cliffs that loomed along the way, and despite the fact that Brexit

[83] The UK currently still benefits from equivalence decisions in many areas, but this should not be confused with free movement of financial services. See *inter alia* N Moloney, 'Financial Services under the Trade and Cooperation Agreement: Reflections on Unfinished Business for the EU and UK' (Brexit Institute Working Paper Series 3/2021) and F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) CMLRev 39.

concerned one of the most powerful member states with which, for multiple reasons, many in the EU would have liked to retain a relatively close relationship, rigidity could often not be overcome. No new package of rights and obligations was found that could meet the requirements of reciprocity, interconnectedness and effectiveness, let alone in a dynamic manner involving multiple EU member states at a time.

This *Article*, moreover, only focused on three sources of rigidity. Other sources of rigidity exist, including some key principles of EU law such as equality, consistency and loyal cooperation.[84] In addition, this *Article* only touched briefly on the rigidity imposed by the need for a sufficiently coherent and uniform institutional framework. Yet any form of truly structural differentiation will run into massive complexities as to the design of the EU's system for decision-making, representation and legitimation. Either some member states and member peoples are excluded from decisions they should have a say on, or some receive a say over matters they should not be able to co-determine. These complexities are only deepened as the overall legitimacy demands on the EU increase, for example because the EU enters ever more deeply into sensitive areas like defense, health, social security, migration and environmental protection. Another potentially increasing source of rigidity concerns the ongoing legal operationalization of EU values, including especially the rule of law.[85] If EU values and objectives become enforceable legal limits, these might provide additional sources of legal rigidity, limiting the legal space for structural differentiation. After all, it is hard to see how any member state would be allowed to opt out of the values that are now being defined as the foundation of the EU, or the systems designed to enforce respect for these values and prevent backsliding. In this sense, legally operationalized values have a similar nature and impact as the effectiveness doctrines, which we saw are a significant source of rigidity that is hard to differentiate. The more the EU is pressed to transform its values into legally and financially enforced obligations, therefore, the more limited the space for differentiation will become. As a result, a future clash can arise between values and structural differentiation, just as between legal principles and differentiation, leading to some hard choices.

Although Brexit can in one way be understood as an almost desperate cry for more differentiation and choice in European integration, it at the same time seems to confirm how hard it is to offer such differentiation and choice in the current EU legal and constitutional framework. Several foundational principles of EU law create rigidities that make differentiation hard. This of course leads to the question if we can alter these sources of rigidity themselves, so as to create more space for differentiation. Could we have less reciprocal and less interconnected rights which require a lower standard of effectiveness to function? These are hard but necessary questions to answer. The analysis above,

[84] Cf J Wouters, 'Constitutional Limits to Differentiation' cit.; A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. and AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' cit.

[85] Cf *Repubblika* cit., *Hungary v Parliament and Council* cit. and *Poland v Parliament and Council* cit.

however, seems to suggest that creating such space for structural differentiation may indeed require us to move several of the load bearing walls of the EU legal order. An exercise that requires great care and time, and offers many opportunities for costly mistakes. So if structural differentiation is the only politically feasible option to enable future integration or further expansion of the EU, we are set for a significant clash between legal rigidity and political necessity. And though law might be able to become more flexible under political pressure, it should not be forgotten just how central law and legal stability are for the survival of the EU. In such a context, creating a second ring of public international law collaboration tied to the inner circle of EU law may again prove the safest and most feasible route, for example in the context of a European Political Community.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

ACCOMMODATING DIVERSITY THROUGH LEGISLATIVE DIFFERENTIATION: AN UNTAPPED POTENTIAL AND AN OVERLOOKED REALITY?

TON VAN DEN BRINK* AND MICHAEL HÜBNER**

ABSTRACT: The "uniformity-based"-model of EU integration has lost considerable ground. It has become more and more considered as a model which takes too little account of national differences in economic, social, cultural and constitutional conditions and in political views. Differentiated integration (DI) raises issues, however. Equality of the Member States and the effectiveness of EU law and policy may be seriously impaired. This *Article* explores the potential of legislative differentiation as an alternative to more classic forms of DI. With legislative differentiation, we refer to the situation in which Member States are allowed to make substantive policy choices in the implementation of EU legislation and use such flexibility to customize EU legislation to their own domestic contexts. We explore this potential by assessing two case studies: The General Data Protection Regulation and the Child Sexual Abuse Directive. The analysis of these case studies shows that legislative differentiation is a multifaceted phenomenon that indeed has the potential to be an alternative to the classic forms of DI. Yet, in practice sub-optimal results have been found as well. Therefore, more consideration and a better incorporation of diversity in legislative processes is required to further enhance the potential of differentiated legislation.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/607

KEYWORDS: differentiated integration – legislative differentiation – EU legislation – better law-making – GDPR – Sexual Abuse Directive.

I. INTRODUCTION

The "uniformity-based"-model of EU integration has lost considerable ground in past years. Increasingly, it is seen as a model that is too rigid and that takes too little account of the economic, social, cultural and constitutional differences between the Member States as well as their political views. Meeting resistance at first, differentiated integration (DI) has now come to be accepted as a mechanism allowing the pursuit of collective interests without eliminating these national differences.[1] At first, DI was seen as an exception that applies – and should apply – only in specific, politically sensitive fields of EU law and policy, such as EMU and the Schengen cooperation.[2] At the legislative level, the Treaty options for enhanced cooperation reflect this exceptional nature.[3] The mechanism allows a group of Member States (at least nine) to advance integration by adopting EU legislation which is only applicable to this group. Yet, strict conditions, such as the requirement that a measure may only be adopted as a last resort, apply.[4] Consequently, only a limited number of enhanced cooperation based legislation has been adopted.[5] The turning point came in 2017 when the European Commission presented DI as one of the main scenarios or models for the future development of the EU, and indeed one of the most likely.[6] Obviously, the Commission White Paper appeared in the middle of the Brexit process which had fuelled the need to better balance unity and diversity in the EU. The exit of the UK from the EU has certainly not diminished this need, however.

At the same time, it has become clear that DI is not some sort of magic potion but raises its own problems and concerns. Whereas Member States' equality has been, since the Treaty of Lisbon, explicitly recognized as a general principle of EU law, DI may actually result in serious inequalities between the Member States and even the prospect of "A" and "B" memberships.[7] Equally, EU law and policy may become simply less effective when not all Member States participate.

[1] B de Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) CMLRev 227, 230-232.

[2] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (2015) Journal of European Public Policy 764, 765.

[3] See, in particular, art. 20 TEU and arts 326-334 TFEU.

[4] Art. 20(2) TEU; S Peers, 'Enhanced Cooperation: The Cinderella of Differentiated Integration' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 77.

[5] R Böttner, *The Constitutional Framework for Enhanced Cooperation in EU Law* (Brill 2021) 7.

[6] European Commission COM(2017) 2025 of 1 March 2017 *White Paper on the Future of Europe and the Way forward: Reflections and Scenarios for the EU* ec.europa.eu.

[7] Art. 4(2) TEU.

Is there a way to address these downsides while still being able to benefit from what DI has to offer? In this *Article*, we assess the potential of ordinary EU legislation – by which we refer to legislation that has not been adopted within the framework of enhanced cooperation – to balance unity and diversity. Our aim is to examine whether such ordinary EU legislation may provide a good alternative to the established forms of DI. Not only the extent to which EU legislation allows for differentiation matters in this context, but also the way Member States implement such legislation as they see fit (within the legal borders of what EU law allows them to do). Perhaps rather counterintuitively, EU legislation more often than not creates such flexibility. Thus, EU legislation does not necessarily end diversity.

Schimmelfennig and Winzen adopted a definition of differentiated integration based on the legal effects in the Member States: the differential validity of formal EU rules across countries.[8] They explicitly exclude forms of what we call legislative differentiation, as these do not result in the differential validity of the EU rules. By contrast, legislative differentiation involves the *equal* validity of EU rules, but through the potential for differentiation offered by EU legislation and the national legislative strategies to exploit this an alternative mechanism to balance unity and diversity arises. Thus, we consider differentiated legislation as a form of DI, although it would not be included in most common definitions of that latter concept.[9]

But we first need to consider more carefully what legislative differentiation actually entails and how it diverges from other forms of DI. First, as indicated above and as we will further argue in this *Article*, flexibility offered by the EU legislature is actually a systematic aspect of EU legislation. It may appear in the form of minimum harmonization measures, but equally in other – perhaps less visible – forms, such as in open norms, in limitations of the scope of application of the legislative act at issue and in the form of explicit choices being offered. The outcome of legislative differentiation may lead to differences in implementation of uniform EU rules, which may be called "differentiated implementation".[10] Legislative differentiation is as such not a new phenomenon or concept. It has indeed provided a fruitful perspective for the study of EU sectoral legislation.[11] A more general approach, focused on its potential as an alternative for differentiated integration has, however, been missing thus far. Legislative differentiation aligns with a number of general principles of EU law, such as the subsidiarity and proportionality principles and also with the principle of national constitutional identity.[12] Obviously, these principles do not directly require the EU

[8] F Schimmelfennig and T Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) JComMarSt 354, 356.

[9] See B Leruth, S Gänzle, and J Trondal, 'Exploring Differentiated Disintegration in a Post-Brexit European Union' (2019) JComMarSt 1012, for an overview of the research on differentiated integration.

[10] S Fink and E Ruffing, 'The Differentiated Implementation of European Participation Rules in Energy Infrastructure Planning. Why Does the German Participation Regime Exceed European Requirements' (2017) European Policy Analysis 274.

[11] *Ibid*.

[12] Arts 4(2), 5(3) and 5(4) TEU.

legislature to allow Member States to be able to make substantive policy choices. However, these principles protect Member States in different ways. The subsidiarity principle requires the EU legislature to refrain from regulating those issues that Member States can better regulate themselves. Also from the proportionality principle – which requires the EU legislature to not go beyond what is necessary – the need to protect Member States policy discretion may be distilled. Leaving room for Member States to make their own policy choices allows them to "customize" the law to national circumstances, which arguably leads to a more effective combined regulatory framework.[13] Moreover, legislative differentiation may – similar to DI – be functional in overcoming deadlocks in legislative negotiation processes and may resolve reservations Member States have.[14] Legislative differentiation applies equally to the Member States, meaning that the position of all Member States is the same. This provides it with an *a piori* advantage over other forms of DI. Indeed, unlike other forms of DI, legislative differentiation does not result in separating members and non-members.[15] All Member States acquire the same potential for adapting EU legislation according to their own preferences.[16] The aim of our *Article* is to assess how legislative differentiation may provide a balancing mechanism for unity and diversity in the EU and to what extent it may thus serve as an alternative to other forms of DI. To this end we will examine two case studies to assess how differentiated legislation works in practice. This involves first of all assessing the scope of flexibility these legislative acts offer the Member States (section 2) and second how this flexibility has been used in selected Member States (section 3). In section 4 we will explore in greater depth whether differentiated legislation may indeed provide a fruitful alternative to differentiated integration.

The selected case studies include the General Data Protection Regulation (GDPR) and the Child Sexual Abuse Directive (SAD).[17] The GDPR – adopted in the form of a Regulation – aims for a high level of uniformity, also in light of its internal market objectives, but still allows for differentiation at various points. The Child Sexual Abuse Directive is a minimum harmonization measure but includes, as we will see, other forms of differentiation as well.

[13] E Thomann, 'Customizing Europe: Transposition as Bottom-up Implementation' (2015) Journal of European Public Policy 1368; E Thomann and A Zhelyazkova, 'Moving Beyond (Non-)Compliance: The Customization of European Union Policies in 27 Countries' (2017) Journal of European Public Policy 1269.

[14] S Andersen and N Sitter, 'Differentiated Integration: What Is It and How Much Can the EU Accommodate?' (2006) Journal of European Integration 313, 321.

[15] To this extent, it differs from secondary law differentiation through the enhanced cooperation procedure, cf. DA Kroll and D Leuffen, 'Enhanced Cooperation in Practice: An Analysis of Differentiated Integration in EU Secondary Law' (2015) Journal of European Public Policy 353.

[16] T Duttle and others, 'Opting Out from European Union Legislation: The Differentiation of Secondary Law' (2017) Journal of European Public Policy 406.

[17] 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); Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA (Sexual Abuse Directive).

Especially in light of its uncontested objectives, the Directive nevertheless equally reflects a strong desire to adopt a uniform approach to fight child abuse and child exploitation. This case-study approach has an explorative aim and seeks to demonstrate how legislative differentiation works and what its potential might be to shape diversity in the EU.

The two cases have been selected on the basis of the following criteria. They offer potential for differentiation, meaning that the legislation at the EU level includes a significant level of Member States' discretion: *i)* diverse legal acts: a regulation and a directive; *ii)* diverse policy fields: EU criminal law and internal market/data protection law; *iii)* diversity in terms of the legal situation at the national level: the directive impacts a well-established area of law at the national level (EU criminal law). For the GDPR, this is less the case: it builds on a prior EU directive but not so much on national law. This difference may equally impact how legislative differentiation works in practice.

The selected countries include Germany, Ireland and the Netherlands. These represent big, medium and small MS; common law and civil law systems; diverse political and cultural positions *vis-à-vis* the substantive topics that are regulated by the two legislative acts (*e.g.* Germany's position on data protection has been very different from the Irish). Admittedly, the country selection is limited in that it does not include Member States from the South and from the East. The current selection of countries meets, however, the overall purpose of this contribution, which is to explore legislative differentiation's potential to accommodate diversity in the EU.

The findings on the GDPR are based on ongoing Ph.D. research by the second author. The findings from the SAD case study are to a large extent based on research carried out in the framework of the Horizon 2020 funded research project Integrating Diversity in the European Union (InDivEU).[18]

II. Potential for legislative differentiation: Space offered by the EU legislature

II.1. Comparing the GDPR and the SAD

EU legislation itself is the obvious starting point for examining legislative differentiation. Indeed, the content of EU regulations and directives define the scope for differentiation and the type of national choices that can be made within the EU legislative framework. Our analysis includes two diverse legislative acts, the GDPR and the SAD. These acts differ not only in the type of legal act (Regulation *v* Directive), but equally in the type of policy fields they emanate from (internal market/data protection versus EU criminal law) and their respective stages of development. What the GDPR and the SAD have in common is that they both have replaced earlier legislation. In that respect, they both reflect a notion

[18] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' (EUI RSC Working Papers 35-2022).

of EU legislation as a continuous process, rather than as a process which is completed as soon as a legislative act is published in the Official Journal. Still, they differ in terms of what could be called "legislative maturity". Like a good wine, data protection legislation in the EU has been aging well. Building on previous international legislation, the EU in 1995 adopted the Data Protection Directive. Since then, legal experiences were gained, and technological developments occurred. Consequently, both of these factors influenced replacing the directive by a regulation, the GDPR, in 2018. In light of technological developments and the ever-increasing number of child abuse cases, the SAD seems more of an intermediate step. A revision of the Directive is being discussed now. Such legislative dynamics are important from the perspective of legislative differentiation: it may tell how experience and learning effects translate into more or less space for Member States to adapt EU legislation to their national situations and preferences, and, ultimately how the factor time impacts the balancing between unity and diversity.

II.2. Legislative contexts

A combination of factors fueled the adoption of the GDPR, including technological developments, higher exchanges of personal data and enforcement gaps.[19] Moreover, a new legal basis in the Treaty, art. 16 TFEU, allowed the EU legislature to take data protection out of the single market policy field and make it a genuine fundamental right.[20] Nevertheless, a double objective remained, the protection of natural persons in relation to the processing of personal data and the free movement of this personal data.[21] These objectives are to be achieved at the EU level, as the Regulation in principle fully regulates the matter. The Regulation covers provisions that determine whether personal data may be processed (arts 6 to 11, 44 to 49 and 85 to 89), and if so how personal data should be processed (arts 5 and 24 to 43). Furthermore, it sets out the rights of data subjects (arts 12 to 23 and 77 to 82) and the enforcement of these substantive rules on the national and EU level (arts 51 to 76).

The European Commission warranted action on EU level necessary, in particular the transfer of personal data across national borders at rapidly increasing rates and the need to reduce fragmentation formed a prominent argument to substantiate subsidiarity.[22] Generally, the European Parliament and the Council have been supportive of the objectives in the Regulation.[23] Yet, due to the Regulation's extensive nature there was much to do about details, seeing the 4000 amendments proposed by Members of the European

[19] CJ Hoofnagle, B van der Sloot and F Zuiderveen Borgesius, 'The European Union General Data Protection Regulation: What it Is and What it Means' (2019) Information & Communications Technology Law 65, 71.

[20] H Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (Springer 2016) 264.

[21] Art. 1 Regulation 2016/679 cit.

[22] Communication COM(2012) 11 final from the Commission of 25 January 2012 proposal for a regulation of the European parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) 6.

[23] *Ibid*. 4.

Parliament.[24] The issue was not so much whether there should be legislation, but rather what this legislation exactly regulates. In this regard, the type of legal instrument also played a role. A regulation would provide the same level of legally enforceable rights and obligations and provide consistent enforcement in all Member States.[25] At national level this was worrying, as a regulation would arguably leave no room for national legislation that takes into account national conditions or that provides more favourable conditions to personal data protection.[26]

In 2011, following the entry into force of the Treaty of Lisbon, the SAD was adopted to combat sexual abuse, sexual exploitation of children and child pornography. In line with the EU's limited legislative competence in the field, the Directive only establishes minimum rules concerning the definition of criminal offences and sanctions. The Directive equally contains provisions to strengthen prevention of these crimes and the protection of victims. These provisions cover investigation and prosecution of offences (arts 2 to 9 and 11 to 17), assistance to and protection of victims (arts 18 to 20), and prevention (arts 10 and 21 to 25). In terms of the political context of the Directive, it is important to observe that the general objectives of the Directive have been widely supported by the Member States.[27] Indeed, the predominant view has been that child abuse and exploitation are growing threats. Equally, the subsidiarity issue – whether the EU is better suited than the Member States to address these threats – has been answered positively as well. Apart from the obvious argument that the online element of abuse and exploitation by nature transcends national borders, the Commission has put forward other arguments as well to substantiate the subsidiarity of the proposal. It argued that existing national legislation and enforcement had been insufficiently strong and coherent to effectively address the threats. Such problems would be exacerbated by divergent approaches between the Member States.

The Commission has not been on its own in supporting the proposal.[28] Protection of children and preventing them from being harmed have been broadly shared and unequivocal objectives of the proposal. Still, significant importance is attached to accommodating diversity. This has less to do with the need to balance the objectives of the Directive with competing – national – interests, but rather with differences in national criminal law systems. As we will see, the height of maximum imprisonment sanctions for pre-existing crimes differs among Member States and national criminal laws equally differ on other elements – such as the age of sexual consent and views on consensual sexual activities.

[24] H Hijmans, 'The European Union as Guardian of Internet Privacy' cit. 492.

[25] Recital 13 Regulation 2016/679 cit.

[26] See reasoned opinions of Germany, Italy, Belgium, Sweden and France to be found in the website secure.ipex.eu.

[27] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit.

[28] See *e.g.* Opinion COM(2010) 94 final of the European Economic and Social Committee of 15 September 2010 on the 'Proposal for a Directive of the European Parliament and of the Council on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA' 138.

II.3. Zooming in: Identifying discretion

By their very nature, the two legal acts already presuppose a differing degree of discretion. As a regulation, the GDPR should, in principle, not require action by the national legislatures whereas the SAD, as a Directive, must be transposed in the national legal systems. Yet, the GDPR in various provisions provides the Member States discretion to either complement, modify or further specify the provisions of the GDPR, and where certain issues fall outside of the scope of the Regulation the Member States may adopt legislation on their own.[29] In total, the GDPR has about 70 provisions that provide the Member States with some sort of discretion.[30] Similarly, the SAD contains much discretion as well, as 38 out of 86 substantive provisions include a form of discretion for Member States. A closer look at these provisions highlights a multifaceted picture of different types of discretion. These types are not mutually exclusive, as they may sometimes overlap, yet they illustrate the broad possibility of legislative differentiation.

a) Minimum harmonization

One of the most familiar and most recognizable forms of discretion is minimum harmonization. This form is profoundly visible in the Child Sexual Abuse Directive, where the first set of provisions of the Directive contain *offences* that Member States should include in their criminal codes. The Directive distinguishes four categories of offences: sexual abuse, sexual exploitation, child pornography and the solicitation of children online for sexual purposes. Within these, the legal basis of the Directive is art. 83 TFEU which enables the EU legislature only to adopt minimum harmonization measures. Thus, the maximum imprisonment sanctions which are specified by the Directive should in any case be included in national criminal codes, but Member States may choose to set a higher maximum.

Perhaps surprisingly, minimum harmonization is not exclusively reserved for directives. Also in the GDPR minimum harmonisation is visible, though, in contrast to the SAD it is not a structural element. The GDPR, overall, regulates issues exhaustively, as Member States are not allowed to transpose a regulation in national law. Yet, some provisions may still provide a minimum level of protection from which the Member States may go beyond. In this respect, the Regulation determines the grounds for processing of sensitive personal

[29] P Laue, 'Öffnungsklauseln in der DS-GVO–Öffnung wohin. - Geltungsbereich einzelstaatlicher (Sonder-) Regelungen' (2016) Zeitschrift für Datenschutz 463; P Voigt and A von dem Bussche, *The EU General Data Protection Regulation (GDPR): A Practical Guide* (Springer 2017) 222.

[30] See L Feiler, 'Öffnungsklauseln in der Datenschutz-Grundverordnung - Regelungsspielraum des österreichischen Gesetzgebers' (2016) jusIT 210; K Yuliyanova Chakarova, 'General Data Protection Regulation: Challenges Posed by the Opening Clauses and Conflict of Laws Issues' (Stanford Law School Working Paper 41-2019) 11; P Voigt and A von dem Bussche, *The EU General Data Protection Regulation (GDPR)* cit. 220; J Kühling and others, *Die Datenschutz-Grundverordnung und das Nationale Recht* (Verlagshaus Monsenstien und Vannerdat OHG Münster 2016) 14; J Chen, 'How the Best-Laid Plans Go Away: The (Unsolved) Issues of Applicable Law in the General Data Protection Regulation' (2016) International Data Privacy Law 310.

data but allows the Member States to maintain or introduce further conditions with regard to some specific forms of data (genetic data, biometric data and data concerning health).[31] Equally, the GDPR determines the powers a supervisory authority should have but allows the Member States to provide the supervisory authority with additional powers.[32]

b) Policy options

Various provisions in the GDPR provide the Member States with the option to make policy. This option may essentially entail that a certain national policy is maintained or newly adopted. An important policy option for the Member States is to decide that the processing of personal data is necessary for the performance of a task carried out in the public interest or for compliance with a legal obligation, thereby providing a legal basis that allows the processing of this data.[33] In this way, national policies on social security, labour, healthcare or in law enforcement may be maintained. Similar, are the provisions that allow the Member States to restrict the rights of data subjects, where this is for example necessary to safeguard national security or an important financial interest of the Member State.[34]

In contrast, policy options are less visible in the SAD. Yet, they also exist, art. 25(2) of SAD provides the Member States with the option to block access to web pages containing or disseminating child pornography towards internet users. The Member States have the freedom to choose whether they block access and also how they do this.

c) Open norms

Especially in the field of prevention and protection of victims, the SAD offers a very different potential for legislative differentiation. In this context, freedom for national legislatures is offered by enabling them to elaborate and specify open-worded provisions from the Directive. This allows the Member States to "customize" provisions to fit their legislation and practices. The Directive includes various provisions that may be further fleshed out at the national level, but the degree to which these allow the Member States to make their own policy choices differs quite significantly. Limited freedom is offered by provisions such as art. 15(2) which ensures that for the most serious offences prosecution must be possible "for a sufficient period of time" after the victim has reached the age of majority. Equally limited freedom for the Member States flows from art. 11 SAD which requires the Member States to take the necessary measures to ensure that their competent authorities are entitled to seize and confiscate instrumentalities. By contrast, other provisions are worded in much more general terms and, consequently, allow the Member States a much broader margin of discretion. Perhaps the key examples in this regard are the provisions that require the Member States to develop prevention activities such as education, awareness

[31] Art. 9(4) Regulation 2016/679 cit.
[32] *Ibid*. art. 58(6).
[33] *Ibid*. art. 6.
[34] *Ibid*. art. 23.

raising and training of officials (art. 23) and to provide "assistance and support" to victims as soon as there are reasonable grounds to suspect an offence (art. 18(2)).

Similarly, the GDPR contains, though limited, provisions with an open-ended nature. Art. 82 GDPR provides such freedom, where the provision prescribes that any person who has suffered damages as a result of an infringement of the GDPR shall have the right to receive compensation. Here, the Member States may substantiate the "right to receive compensation" in their national legal order.[35]

d) Adjusting the scope

Discretion may also enable the Member States to set the scope of EU legislation, *i.e*. decide to what situations this legislation applies.[36] Such discretion exists where the legislation specifies that a certain topic is not covered, but Member States are free to regulate the issue. In the GDPR, this is the case with personal data of deceased persons, to which the Regulation does not apply.[37] Member States may here provide for rules, for example by extending the scope of application. Moreover, the GDPR provides that for processing of personal data of children below the age of 16, in relation to information society services for children, consent is required from the holder of parental responsibility over the child.[38] The GDPR sets the minimum age of protection at 16 years, but Member States can decide to lower this threshold up to 13 years of age. In this way the Member States have the freedom to decide to what situations the level of protection applies.

Scope discretion is also used in the SAD, where the EU legislature left certain choices on the scope of application explicitly up to the Member States. For example, on consensual sexual activities between peers the Directive provides that it is "within the discretion of Member States to decide whether Article 3(2) and (4) apply".[39]

e) Other forms of discretion

Some provisions just give two or three options for the Member States to choose from. The policy discretion is in such case specified by the EU legislative measure itself. This is the case with a provision on certification bodies in the GDPR, which requires that "Member States shall ensure certification bodies are accredited by one or both of the following".[40] Similar is the provision that allows Member States to provide that the prohibition to process sensitive

[35] However, this freedom is curtailed by the case law of the CJEU on the right to compensation.

[36] A van den Brink, 'Refining the Division of Competences in the EU: National Discretion in EU Legislation' in S Garben and I Govaere (eds), *The Division of Competences Between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 251.

[37] Recital 27 Regulation 2016/679 cit.

[38] Art. 8(1) Regulation 2016/679 cit.

[39] Art. 8(1) Directive 2011/93/EU cit.

[40] Art. 43(1) Regulation 2016/679 cit.

data may not be lifted by the data subject's explicit consent.[41] In these situations, the Member States can only implement the specified options. Yet another form of national discretion is provided by the GDPR: "Where the legal system of the Member State does not provide for administrative fines, this article may be applied in such manner [...]".[42] This is a form of what could be called restricted or qualified policy discretion. The provision is worded as a generally applicable form of discretion but it may only be invoked by a limited number of Member States: only those which are unfamiliar with administrative fines.

III. Using the potential: Member States' implementation

In line with its general EU implementation policy,[43] the Dutch legislator opted for a "policy neutral" implementation of the GDPR. The GDPR's discretionary provisions have been used to adhere to existing national law and policy choices. Where this was not an option, implementation provisions were adopted which substantively remained as close as possible to pre-existing laws.[44] The German and Irish legislators have not explicitly expressed their implementation strategies, yet in practice a similar approach is visible in which national regulatory traditions were preserved.[45]

The minimum harmonization provisions regarding offenses under the SAD have been implemented differently. Member States such as Ireland have created – much – higher maximum imprisonment sanctions than the minimum levels prescribed by the Directive. The offense of causing a child to witness sexual activities – for which the Directive prescribes a maximum term of imprisonment of at least one year – is in Ireland subject to a maximum imprisonment of 10 years. Other Member States have remained closer to the minimum required by the Directive. In the Netherlands, for instance, the maximum imprisonment term for causing a child to witness sexual activities is two years (still a year more than the Directive's prescribed minimum).

Art. 25 of the Directive concerns measures against websites containing or disseminating child pornography. This – in light of the growing risks of online child abuse and exploitation – crucial provision has been implemented quite differently by the Member States. The first part of this provision requires Member States to take measures for the

[41] *Ibid*. art. 9(2)(a).

[42] *Ibid*. art. 83(9).

[43] See further section 4.

[44] See, in Dutch, *Tweede Kamer der Staten-Generaal, Kamerstuk 34851 nr. 3, Regels ter uitvoering van Verordening (EU) 2016/679 van het Europees Parlement en de Raad van 27 april 2016 betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevens en betreffende het vrije verkeer van die gegevens en tot intrekking van Richtlijn 95/46/EG (algemene verordening gegevensbescherming) (PbEU 2016, L 119) (Uitvoeringswet Algemene verordening gegevensbescherming)- Memorie van Toelichting*, 14 December 2017, 14.

[45] P Gola and D Heckmann, *Bundesdatenschutzgesetz* (beck-online 2019); C Gusy and J Eichenhofer, *BeckOK DatenschutzR* (beck-online 2021) para. 1. See the explanatory notes in the General Scheme of Data Protection Bill (May 2017).

fast removal of harmful content on website. The Dutch implementation of the provision is based on a combination of a notice-and-take-down system (on the basis of which intermediaries are required to take down unlawful content) and a criminal law based arrangement on the basis of which Public Prosecutors and Examining Judges may decide to remove harmful content if automated searches generate child pornography on the Internet.[46] In Germany, voluntary cooperation agreements are in place between service providers, the Internet hotlines (INHOPE) and the police.[47] In Ireland, no specific legal provisions on removal of harmful content apply, but "a self-regulatory framework for internet service providers (ISP)" applies.[48] This framework consists of a national reporting centre, Hotline.ie, where anyone may report illegal online content.[49]

Art. 25 equally includes the option to block websites.[50] The original proposal included a mandatory requirement.[51] Especially the Dutch government pushed for making the provision optional. On the basis of earlier research, the Dutch government had concluded that the list of websites to be blocked would be rather small and the costs of a blocking requirement would be relatively high, especially in light of the benefits it would provide.[52] Moreover, such an obligation would not help as child pornography disseminators exchange pornography less via the internet and more via P2P networks.[53] Unsurprisingly, this optional provision has not been implemented in the Netherlands, but also other Member States – including Member States such as Germany – decided to leave the option unimplemented. [54] By contrast, Ireland decided to indeed adopt blocking measures. Effectiveness arguments were considered here as well, but other factors equally informed the Irish decision on this point. Such factors included the inspiration drawn from a comparable system of blocking websites applicable in the United Kingdom and the public awareness dimension of blocking websites.[55]

[46] Wetboek van Strafvordering (Dutch criminal procedure code) (2012) art. 125o; Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit.

[47] Missing Children Europe, ECPAT and eNACSO, *A Survey on the Transposition of Directive 2011/93/EU on Combating Sexual Abuse and Sexual Exploitation of Children and Child Pornography* (2015) www.enacso.eu 118; In 2020, the German legislature adopted a provision which allows the police to distribute virtual child pornography in order to infiltrate and achieve success in investigations on illegal content (Section 184b(5)(2) StGB).

[48] Communication COM(2016) 872 final report from the Commission to the European Parliament and the Council of 16 December 2016 assessing the implementation of the measures referred to in Article 25 of Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography' (2016) 9.

[49] Irish Internet Hotline, *Who are we* www.hotline.ie.

[50] Art. 25(2) of the Directive 2011/93/EU cit.

[51] P Jeney, 'Combatting Child Sexual Abuse Online' (2015) European Parliament www.europarl.europa.eu 42.

[52] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit. 25, 26.

[53] K Parti and L Marin, 'Ensuring Freedoms and Protecting Rights in the Governance of the Internet: A Comparative Analysis of Blocking Measures and Internet Providers' Removal of Illegal Internet Content' (2013) Journal of Contemporary European Research 138, 152.

[54] Communication COM(2016) 872 final cit. 10.

[55] Van den Brink and others, 'Flexible Implementation and the EU Sexual Abuse Directive' cit. 25, 26.

The GDPR essentially allows the Member States to regulate two substantive issues: *i)* whether personal data may be processed in the public interest (the legal basis), and *ii)* whether the data subject rights are restricted in particular situations in the public interest (restriction of the data subject rights). The discretion is in both cases widely used by the Member States in their respective sector-specific legislation and supplemented by general provisions in the national data protection act. These national provisions, for example, in Germany allow the naturalisation authority to process sensitive data to determine whether someone pursues or supports endeavours that are a threat to the security of the country, which may be a reason not to grant citizenship.[56] Moreover, credit institutions may process personal data of their customers for the determination and consideration of counterparty defaults risks.[57] The Irish law allows the authorities to process personal data to verify data supplied by an applicant of a student grant, but also to record a person's educational history in order to ascertain how best he or she may be assisted in availing his or her full educational potential.[58] Furthermore, the national anti-doping organisation may process personal data for the detection, prevention and elimination of doping in sport.[59] And in the Netherlands, the ship manager is obliged by law to process personal data concerning health in order to determine whether the ship crew of the ships managed by him meet the legal requirements of physical and mental fitness.[60] Thus, this resulted in not one single provision that is adopted in national law, but in a variety of provisions, illustrating the impact of the GDPR. Yet, it should be kept in mind that many of these national provisions already existed, but only required editorial changes.

In practice, the discretion does not only allow the Member States to maintain the possibility to process personal data for their respective public goals, but in Germany also to uphold a systematic distinction between processing by private and public bodies. Such a systematic approach already existed in the German law and was, were possible, again adopted.

Enforcement of the GDPR is extensively regulated by the Regulation itself. In particular, the choice on the main type of enforcement, by supervisory authorities, is set. Nevertheless, some discretion is left to the Member States and this is used to accommodate enforcement within the national constitutional model. With most of the discretion on enforcement it is not the question whether the Member States make use of it, as it contains a regulatory mandate, but how. This leads to differences in various aspects, such as the details of the respective appointment procedures and accountability mechanisms and also the relative height of the authorities' budgets. Fundamentally, some core characteristics can be preserved in the Member States. Again, Germany plays a prominent role, as

[56] *Staatsangehörigkeitsgesetz* (Nationality Act) para. 31.
[57] *Kreditwesengesetz* (Banking Act) para. 10(2).
[58] Student Support Act (2011) section 28; Education (Welfare) Act [2000] section 28.
[59] Sport Ireland Act (2015) section 42.
[60] *Wet Zeevarenden* (Seafarers Act) (2018) art. 3.

the discretion allows them to maintain a decentralized model of enforcement, with supervisory authorities in each federated State.

IV. Alternative to differentiated integration?

IV.1. Real decision-making authority or decisions on details?

The potential of EU legislation (and its national implementation) to provide a balancing mechanism between unity and diversity may have been clearly illustrated in the previous sections. This does not necessarily mean, however, that differentiated legislation would be a convincing alternative to the classic forms of DI. Critics could argue that DI is simply a different ball-game: the sphere of high-level politics – where decisions are adopted which impact the very status of a Member State. By contrast, legislative differentiation may be seen as allowing the Member States to merely flesh out EU legislation in further detail, whilst the real political choices would still be reserved to the EU level. The question is thus whether differentiated legislation includes real decision-making power for the Member States to accommodate national diversity or whether it is instead limited to the more technical specification of general norms.

Obviously, national decisions not to take part in specific EU legislative acts (enhanced cooperation) or even to remain outside of complete or large parts of policy areas are fundamentally different from using the potential EU legislation offers to make it fit national contexts better. The political weight of national decisions on classic forms of DI is demonstrated both at EU level (*e.g.* in the conditions that need to be fulfilled for enhanced cooperation) and at national levels. With regard to the latter, this may even include referenda, as demonstrated *i.e.* by the recent call from the Danish prime minister to hold a referendum on scrapping the Danish opt-out from the Common European Defense Policy.[61] In line with referenda decision-making, decisions on opting in our out of certain policies involve in principle a binary choice. In this sense, the options available to the Member States in case of legislative differentiation are more diverse (in as far as they relate to different forms) and measured (in as far as Member States may have discretion to decide on the intensity of protection). This concerns a first and important qualification of the argument that legislative differentiation involves no real decision-making authority.

The second requires a more careful consideration of the question *at which level* the desire to balance unity against diversity is the most prominent and *which balancing mechanisms* are exactly considered preferable. In this context, the British Balance of Competence review is instructive. This requires some explanation as this exercise has by now been mostly forgotten and tragically failed to fulfil its purpose. It was meant to create a solid basis for the decision-making on the UK membership of the EU, but it is common

[61] The Guardian, 'Denmark to hold Referendum on Scrapping EU Defence Opt-out' (6 March 2022) The Guardian www.theguardian.com.

knowledge that it has been completely neglected in the discussions before and after the Brexit referendum. Yet, the exercise has been a thorough and balanced overview of the EU's activities and how these impact the UK. Moreover, in providing this overview, it has much to say on the desire to balance unity and diversity in the EU more broadly. First, the outcomes of the Review suggest a strong preference for balancing unity and diversity at the level of individual legislation. The report on the Single Market, for instance, displays a strong preference to remain part (especially in light of the benefits for the UK) and at some points (*e.g.* services) to integrate further. Some legislation in the field of the Internal market is seen as problematic, such as the Toys Directive and rules on chemical content in products.[62] Even with regard to the Working Time Directive, which has been the subject of such strong contestation in the UK and which diverges substantially from pre-existing labour laws in the UK, the ultimate conclusion is not that the United Kingdom should not have been part of that Directive. Rather the costs involved and the need for greater flexibility were voiced.[63] What this shows is that flexibility is a particular priority at the level of concrete legislation, especially in areas in which a level playing field is an important concern. Rather than opt-outs, this need for flexibility focuses on the actual content of EU legislation. This observation is not just based on the British Balance of competences Review but may equally be drawn from the Member States' application of policy discretion left by the GDPR and the SAD, as explained in the previous section. Thus, legislative differentiation may perhaps cater even better for the need to balance unity and diversity, both in terms of the appropriate level to do so and in terms of ways to provide flexibility.

There is also a strong – third – argument to be made against the view that legislative differentiation would be located in the technocratic domain rather than in the domain of political decision-making. The selected EU legislative acts have demonstrated that political decision-making – in the sense of balancing public and private interests – is a systemic element of implementing EU legislation, even in the case of the densely regulated GDPR. The decision in which circumstances data may be processed in the public interest is one of the main provisions of the GDPR. The SAD equally includes substantial policy discretion for the Member States; the cost/benefit analyses in terms of whether to include a competence to block websites which contain harmful content demonstrate the political nature of such decisions. Equally, the implementation of the minimum harmonization provisions on the offenses displays Member States' criminal policies, especially since the minimum imprisonment terms have been set at rather low levels by the Directive.

Having argued that legislative differentiation indeed involves real decision-making authority rather than nitty-gritty technical details, we should not close our eyes to the downsides thereof. Timely implementation may be more challenging to achieve if

[62] Her Majesty's Government, 'Review of the Balance of Competences between the United Kingdom and the European Union: The Single Market' (2013) assets.publishing.service.gov.uk 42.

[63] Her Majesty's Government, 'Review of the Balance of Competences between the United Kingdom and the European Union: Social and Employment Policy' (2013) assets.publishing.service.gov.uk 61, 62.

political decisions are at stake. The case studies have also indicated that certain forms of policy discretion may ultimately be detrimental to the achievement of the very aims of EU legislation. The GDPR has reduced the scope for political decision-making by the Member States compared to the Data protection Directive for this very reason. The evaluation of the SAD reveals a similar picture: the open-worded obligation to adopt preventive measures allows indeed for wide policy discretion but prevention is now seen as one of the weakest points of the current Directive. These are important downsides. They may to some extent be addressed, *e.g.* by considering longer implementation deadlines or by delineating national discretion better. For another part, these issues are a perhaps more inherent aspect of legislative differentiation. It can therefore certainly not be considered a magic potion to balance unity and diversity in the EU.

IV.2. Political decision-making or fitting the directive into pre-existing structures?

Strikingly, a significant part of the discretion offered by the SAD Directive has been used to keep existing national laws as much as possible intact. This is not only true for the provisions on maximum imprisonment sanctions for child abuse and child exploitation offences. In particular with regard to adjacent provisions of substantive criminal law, *e.g.* art. 8 on consensual sexual activities, the dominant implementation strategy equally was to retain existing national laws as much as possible. This is equally true for provision on the age of sexual consent (the age below which it is prohibited to engage in sexual activities with a child). This concerns a key aspect of the Directive as it defines its scope of protection but it is left to the Member States to define. The selected Member States have largely decided to simply apply their pre-existing substantive criminal laws on this point. The Directive has thus not provided a reason to reconsider the age of sexual consent. Consequently, major differences exist between Member States such as Germany where the standard age limit is set at 14 years, and Ireland (17 years of age). Moreover, some Member States have opted for diversified levels of protection (*e.g.* Germany for the category between 14-18).

Retaining pre-existing legislation can even constitute a general and official EU implementation policy. In the Netherlands, the Guidelines for Legislation prescribe the government to only adopt new provisions when this is strictly necessary for the correct implementation of EU legislation.[64] Thus, the strategy for the implementation of the SAD was to first identify provisions of the Directive which could be considered to have already been implemented by pre-existing national laws. The second focus was on provisions which could be implemented by non-legislative measures. Only in third instance, the parts of the Directive were identified which would require the adoption of new legislative provisions.

[64] See, in Dutch, Ministry of General Affairs, *Aanwijzing 9.4 van de Aanwijzingen voor de regelgeving Tweede Kamer der Staten-Generaal* (2022).

The implementation of the GDPR equally reflected the strategy to leave existing legislative structures as much as possible intact. The decision not to implement the provision on blocking websites is an example, as are the ways in which Member States have used the discretion offered by the GDPR to make sector-specific arrangements. The German approach to uphold a systematic distinction between data processing by private and public bodies equally demonstrates Member States' preferences to maintain past legislative choices. At the same time, these examples from the implementation of the GDPR show that legislative conservatism is not the only factor at play. The Dutch government had indeed put forward substantive objectives against adopting an obligation to block websites containing harmful content. Attributing the non-implementation of the facultative provision to legislative conservatism would thus be simply wrong.

How to assess this tendency to leave pre-existing legislative frameworks as much as possible intact? At first sight, it seems to reflect a technocratic rationale and not so much the national political decision-making space that would allow for a careful balancing of interests involved to "customize" EU legislation to fit the national context. Indeed, the strategy to leave existing laws as much as possible intact is actually aimed exactly at avoiding such national political decision-making and to limit recourse to legislative capacity as much as possible. The risk thereof is that it gives too little consideration to changing circumstances and to the more recent balance of political interests encapsulated in the EU legislative act that needs to be implemented.

Other arguments speak in favour of this strategy though. Indeed, accommodating diversity may very well include approaches which have already found their way into national legislation. Such divergent national approaches may indeed have created important arguments for legislative differentiation in the first place, *e.g*. as part of impact assessments and/or subsidiarity calculus. In such a view, existing national laws are already the expression of a specific balancing of different interests.

Moreover, it could be questioned whether the overall aim of differentiated legislation should necessarily be to enable national legislatures to make their own specific political choices. A broader aim would be to keep existing heterogeneity in the European Union as much as possible intact. Protecting heterogeneity as a result of incremental and long-lasting evolvement of regulatory systems, such as in the field of criminal policy, may be a valid objective of differentiated legislation. If we would indeed accept that differentiated legislation should serve broader aims than merely providing for national political decision-making space, its protective scope would include national constitutional structures as well. The enforcement discretion offered by the GDPR has prevented the regulation from impacting on the federal structures in Germany. This discretion is thus not enabling national political decision-making, but it rather serves to prevent difficulties in aligning the requirements of correct implementation with basic constitutional structures. From this perspective, legislative differentiation acquires a new objective which fits the EU constitutional framework well, especially art. 4(2) TEU of which it indeed may be seen as an expression.

Another observation that we have drawn from the case-studies is that the strategy of retaining existing regulatory frameworks may prove to be only a temporary strategy. This was illustrated by the current "re-implementation" process of the SAD in the Netherlands. The time pressure involved in the initial implementation may be an additional factor why Member States would prioritize a strategy of not changing existing laws if not absolutely necessary. A later redesign of the regulatory system is not subject to such time pressure, thereby enabling more space to make fundamental political choices.

All in all, the argument that legislative differentiation would be mainly a vehicle for legislative conservatism – and would thereby hardly be relevant from the perspective of balancing unity and diversity in the EU – should be heavily qualified.

V. Conclusions

In this *Article* we explored the potential of legislative differentiation as an alternative to more classic forms of DI. We established principled advantages of legislative differentiation, most notably the absence of effects on the balance between the Member States. Unlike other forms of DI, differentiated legislation respects the principle of equality between the Member States. Obviously, the protection of individual Member States' interests is very different under differentiated legislation. When the ordinary legislative procedure applies – which is so in the vast majority of legislative procedures – Member States have no veto power on EU legislation. They thus lack the power to ensure the flexibility that they seek in order to be able to "customize" EU legislation to fit the national context. Especially when the national context differs from the (qualified) majority of other Member States, such flexibility is by no means guaranteed. Under the more classic forms of DI, individual Member States' power is stronger. Both for the Treaty-based forms of DI and for enhanced cooperation individual Member States' choice to join or not is key. Moreover, the other Member States need to accept DI, either as opt-outs that need to be agreed upon (and ratified) by all Member States, or in the form of the unanimity requirement needed for the Council to agree on proposals for enhanced cooperation.[65]

Differentiated legislation lacks such guarantees but this gives it also greater flexibility. It has the potential to be applied across all areas of EU legislative competence.[66] Flexibility is equally offered as the sequence of adopting legislation allows for adjusting the balance between unity and diversity. In both cases, subsequent legislation has been more geared towards establishing a more uniform EU approach.

Differentiated legislation is, moreover, a multifaceted phenomenon. The status of being "in" or "out" is a core element of other forms of DI. Differentiated legislation is different in that it allows a measured approach to balancing unity and diversity. In other

[65] Art. 329(2) last sentence TFEU.

[66] Obviously, in the absence of EU legislative competence, *e.g.* because the EU acts not by way of legislation, legislative differentiation lacks potential to accommodate diversity.

words, it may include more or less far-reaching forms of flexibility for the Member States, depending on the need to come to a uniform approach at the EU level on the one hand and the obstacles, political preferences and existing differences at the national level on the other. Some provisions thus allow only for technical and marginal policy choices at the national level. Other provisions create much more scope for political decision-making (in the sense of balancing public and other interests) at the national level.

Moreover, the multifaceted nature of differentiated legislation is not simply a matter of degree but also of form. The case studies have demonstrated a great variety of forms beyond the classic form of minimum harmonization. This creates more variety in the ways in which unity and diversity may be balanced, than the rather binary approach of other forms of DI.

This *Article* has also highlighted that differentiated legislation certainly not always works well. At first sight, the cases demonstrated an apparent need to accommodate diversity as the implementation of the legislative acts differs quite much between the Member States. Whether the balancing between unity and diversity is optimal is another issue. The fundamental transformation of the old Data protection Directive into the GDPR and equally the current discussion on the effectiveness of the preventive measures of the SAD demonstrate that diversity – both in terms of the EU legislature allowing for flexibility and the Member States using that flexibility to come to different legislative outcomes – may result in sub-optimal outcomes. However, it is equally important to observe that legislative differences should (no longer) be considered as inherently problematic. EU legislation has been presented in this article as what could be called a "diversity management mechanism",[67] which suggests that national diversity is indeed an inherent aspect of EU legislation. Moreover, the legislative dynamics at work in both cases ensure that balancing unity and diversity is not the product of a single decision but may be adjusted over time. This includes not just the EU legislature but the national level too.

Legislative differentiation fits well in the Commission's scenario according to which greater diversity could be a model for the future of the EU. The cases indeed demonstrated the potential thereto, although in practice sub-optimal results have been seen as well. In relation to more classic forms of DI, differentiated legislation can indeed create a meaningful alternative. Compared to enhanced cooperation, differentiated legislation has hitherto been quite invisible and, consequently, less structured. Enhanced cooperation requires an extensive decision-making process and must fulfil strict requirements. Differentiated legislation seems more "learning-by-doing". Making the motives for diversity explicit, as well as how these translate into space for national political decision-making could lead to a more structured approach and could further enhance the potential of differentiated legislation.

[67] M Avbelj, 'Differentiated Integration: Farewell to the EU-27?' (2013) German Law Journal 191, 209.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

BREXIT THE ULTIMATE OPT-OUT: LEARNING THE LESSONS ON DIFFERENTIATED INTEGRATION

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ABSTRACT: Historically, the use of differentiated integration mechanisms has been based on the idea of the widening and deepening of the European Union, necessitated by the enlargement of the bloc through the addition of Member State countries. The advent of Brexit means that we are in a rather different situation today, where the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured. The differences between all of the then 28 individual Member States in the pre-Brexit Union were multifarious. These differences have not disappeared along with the UK upon its exit from the Union. They still exist between the remaining 27 Member States and will likely increase in prominence as the European Union pursues its future path. Addressing those differences will require an alternative approach to uniform integration from the EU, it will require differentiated integration. This *Article* suggests that there are lessons to be learnt on differentiated integration from applying Brexit as a framework. The confusion surrounding differentiated integration as a concept, and the prominent role of the UK in availing itself of opportunities to utilise differentiated integration mechanisms, has led differentiated integration to be attributed to the UK as a form of British exceptionalism. Brexit is not just an opt-out but the ultimate opt-out, a form of flexibility sought from outside the European Union, consequent on a lack of wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union. The maintenance of differences between the remaining Member States means that there needs to be increased open acceptance of the likely need for greater differentiated integration in the future.

KEYWORDS: Brexit – differentiated integration – concept – opt-out – disintegration – integration.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/608

I. Introduction

Historically, the use of differentiated integration mechanisms has been based on the idea of the widening and deepening of the European Union,[1] necessitated by the enlargement of the bloc through the addition of Member State countries.[2] The advent of Brexit means that we are in a rather different situation today, where the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured.

The differences between all of the then twenty eight individual Member States in the pre-Brexit Union were multifarious. These differences have not disappeared along with the UK upon its exit from the Union. They still exist between the remaining twenty seven Member States and will likely increase in prominence as the European Union pursues its future path. Addressing those differences will require an alternative approach to uniform integration from the EU, it will require differentiated integration.[3]

However, through using Brexit as a framework it becomes apparent how differentiated integration has been perceived in the EU, and as this *Article* will propound, this perception has not been all embracing. Whilst this *Article* does not make a comment on the multifarious complex factors which contributed to the choice of holding the referendum itself or the resultant vote.[4] The argument made by this *Article* is that throughout the EU's history, differentiated integration has been used to find solutions to problems as apparently intractable as this, but there is a concurrent reluctance to do so with an explicitly wider acceptance of differentiated integration in terms of both legal permissiveness and

[1] CD Ehlermann, 'How Flexible is Community Law? An Unusual Approach to the Concept of "Two-Speeds"' (1984) Michigan Law Review 1274; B Langeheine and U Weinstock, 'Graduated Integration: A Modest Path Towards Progress: A Contribution to the Debate About the Future Development of the European Community' (1985) JcomMarSt 185; E Grabitz and B Langeheine, 'Legal Problems Related to a Proposed "Two-tier System" of Integration Within the European Community' (1981) CMLRev 33; E Grabitz (ed.), *Abgestufte Integration: Ein Alternative zum Herkömmlichen Integrationskonzept?* (Kehl am Rhein 1984); and E Phillipart and G Edwards, 'The Provisions on Closer Cooperation in the Treaty of Amsterdam: The Politics of Flexibility in the EU' (1999) JcomMarSt 89.

[2] M Dougan, 'The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and their Constitutional Implications' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspectives* (T.M.C. Asser Press 2009) 157; D Thym, 'Competing Models for Understanding Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar Publishing 2017) 29.

[3] M Kendrick, 'The Future of Differentiated Integration: The Tax Microcosm' (2020) Journal of International and Comparative Law 371; M Kendrick, 'A Question of Sovereignty: Tax and the Brexit Referendum' (2016) King's Law Journal 366; and M Kendrick, 'Differentiated Integration Amongst the EU27: Will Brexit Make the EU More Flexible?' in A Biondi, PJ Birkinshaw and M Kendrick (eds), *Brexit: The Legal Implications* (Kluwer Law International 2018).

[4] M Sobolewska and R Ford, *Brexitland* (Cambridge University Press 2020).

extent as well as attitude within the Union. The reality is that Brexit has actually highlighted issues with the perception of differentiated integration as a concept[5] and how it has been attributed to the United Kingdom as a form of British exceptionalism. The UK was the most noticeable Member State in availing itself of the opportunities for differentiation. Although the UK had never been the exclusive recipient or participant in the operation of differentiation mechanisms, indeed, it had sometimes been joined by founder Member States and had even been the participating Member State in an EU initiative while other States opted-out.[6] It is apparent as to how and why the UK received its reputation for being the "champion" of the opt-out,[7] as the UK's behaviour has been more widely publicised, sometimes by different UK governments themselves, which has had the unfortunate consequence of it attracting a reputation as a recalcitrant Member State, despite its strong support for the single market and relatively good EU law compliance rate. This *Article* would countenance against perceiving Brexit as a *sui generis* event, rather than acknowledging the reality of differentiated integration within the Union.

To acknowledge this reality, it is necessary to address firstly, the role arguably played by the confusion which surrounds the concept of differentiated integration itself. The confusing assortment of definitions,[8] which will be addressed in the next section, and indeed exceptions, to what the concept of differentiated integration means and what it does, or doesn't, incorporate does a disservice to the potential utility of the concept.[9] This has arguably facilitated rather than prevented Brexit being seen as sui generis as many, with the noblest of intentions, try to describe the concept as exceptional in the context of the UK and interpret it exceptionally further still in reference to Brexit. This *Article* will therefore use Brexit as a framework to address the issue of conceptual confusion (section II).

This *Article* will then proceed, on the basis of this framework, to discuss how Brexit has been seen as an example of British exceptionalism in the context of differentiated integration in section III where learning the lessons on differentiated integration will consider the advent of Brexit (section III.1) and the challenges for the future (section III.2) before concluding. It will suggest that with differentiated integration insufficiently embraced within the EU, the UK was, and still is, seeking a more flexible arrangement from outside the EU. There are therefore lessons to be learnt from the insufficient adoption of differentiated integration in the EU as seen by applying Brexit as a framework. Brexit is

[5] G Gaja, 'How Flexible is Flexibility Under the Amsterdam Treaty?' (1998) CMLRev 855.

[6] S Peers, 'Enhanced Cooperation: the Cinderella of Differentiated Integration' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration* cit. 76; M Kendrick, 'Judicial Protection and the UK's Opt-Outs: Is Britain Alone in the CJEU?' in P Birkinshaw and A Biondi (eds), *Britain Alone! The Implications and Consequences of United Kingdom Exit from the EU* (Kluwer Law International 2016) 166; M Kendrick, 'Differentiated Integration Amongst the EU27' cit.; and M Kendrick, *Differentiated Integration in the EU: Harmonising EU Tax Law* (Edward Elgar forthcoming 2023).

[7] R Adler-Nissen, *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration* (Cambridge University Press 2014).

[8] ACG Stubb, 'A Categorization of Differentiated Integration' (1996) JComMarSt 283.

[9] M Kendrick, *Differentiated Integration in the EU* cit.

not just an opt-out, or as suggested from seeing the UK as an exception, just another UK opt-out, but rather the ultimate attempt to obtain flexibility. This *Article* propounds that Brexit actually mirrors what has been going on historically with regard to differentiated integration. The EU's concern that if it allowed the UK to achieve divergence it may essentially create a competitor, not a close neighbour, are seemingly evidence of a reversion to the desire to achieve the rigid adherence to the rules, in order, so the concerns of the EU appear to be, to ensure the single market and indeed the entire EU project will not be undermined. However, the possibility of Union action is more effectively served by permitting a Member State to differentiate the application of a particular measure, rather than having a requirement of uniformity leading to an inability to act. The main difficulty is that the EU itself has got to see the merit in increased flexibility, rather than let Brexit be seen as a continued exercise in British exceptionalism, and therefore once it is rid of its difficult member the goal of uniformity is reinvigorated.

Brexit is not just an opt-out but the ultimate opt-out, a form of flexibility sought from outside the European Union, consequent on a lack of wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union. The maintenance of differences between the remaining Member States means that there needs to be increased open acceptance of the likely need for greater differentiated integration in the future. This *Article* suggests that the EU needs to recognise more openly that differentiated integration can be a principle to guide decisions about the development of the EU integration model and that differentiation should be capable of absorption into orthodoxy. Otherwise, viewing Brexit as an episode in British exceptionalism rather than the ultimate opt-out will mean that lessons on differentiated integration as a necessity for the future will not be learnt.

II. Conceptual confusion

There is considerable disagreement and confusion over the concept of differentiated integration.[10] Many of the excellent *Articles* to this *Special Section* demonstrate that the definitions and approaches to differentiated integration are extensive. A multiplicity of theories has been expounded within and between multiple disciplines.[11] Having surveyed the theories from a legal, historical, political, political sociology and political science perspective, all that becomes clear is that a confusing assortment of attempts to define the concept have served not to explain but to discourage what in essence means non-uniform integration.[12]

[10] ACG Stubb, 'A Categorization of Differentiated Integration' cit. 283.

[11] See, for example, B De Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001); A Ott and E Vos (eds), *Fifty Years of European Integration* cit.; and G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000).

[12] Whilst space precludes a detailed discussion of these various approaches, see further M Kendrick, *Differentiated Integration in the EU* cit.

Conceptual disagreement is not just evident regarding the concept of differentiated integration itself, but also in relation to explaining Brexit in the context of differentiated integration. For example, Vollaard suggests differentiated integration as "partial exits", such as opt-outs,[13] for Webber it's a form of "(dis)integration",[14] for Schimmelfennig and Winzen it's "differentiated disintegration".[15] Just in relation to Brexit the confusion demonstrates the conceptual problem, which serves only to make it easier to try and conceive Brexit as an example of British exceptionalism, rather than understand and accept differentiated integration in the EU. A closer look reveals this is the case.

Webber conceives (dis)integration as a multidimensional phenomenon with many conceptual distinctions, of which at least two are most pertinent for the current discussion. The first is "sectoral (dis)integration" which comprises "the expansion or reduction of the range of issue areas in which the EU exercises policy-making competences and, within specific issue areas, an expansion or reduction of the scope of existing common policies"[16] and the second is "horizontal (dis)integration" being, "the expansion or reduction of the number of EU member states".[17] Brexit, he considers, is an example of horizontal (dis)integration.[18] Patel identifies what is not helping this conceptual disagreement, especially the dichotomy between integration and disintegration, which is that "despite decades of debate on European integration, conceptualisation of European disintegration remains rudimentary".[19]

In a valiant attempt to provide clarity, Patel provides an interesting observation as to how integration prompts disintegration, in fact he suggests that disintegration and dysfunctionality have characterised the history of integration.[20] That history he identifies as being part of the historical development of European integration itself, "[s]ince the 1940s pro-European elites have embedded concrete steps towards European integration within a narrative that member states were on the road to an ever-closer union. The unification process was posited to be unidirectional and irreversible, resting on the win motors of ever progressing deepening and enlargement".[21] Patel explains that history also teaches

[13] H Vollaard, 'Explaining European Disintegration' (2014) JComMarSt 1155.

[14] D Webber, *European Disintegration? The Politics of Crisis in the European Union* (The European Union Series Macmillan 2019).

[15] F Schimmelfennig and T Winzen, *Ever Looser Union? Differentiated European Integration* (Oxford University Press 2020).

[16] D Webber, *European Disintegration?* cit. 13-14.

[17] *Ibid*. 14.

[18] *Ibid*.

[19] K Patel, *Project Europe: A History* (Cambridge University Press 2020) 220, fn 49, endnote p. 318. See also: PC Schmitter and Z Lefkofridi, 'Neo-Functionalism as a Theory of Disintegration' (2016) Chinese Political Science Review 1-29; H Vollaard, 'Explaining European Disintegration' cit.; and D Weber, 'How Likely is it that Europe will *Dis*integrate? A Critical Analysis of Competing Theoretical Perspectives' (2014) European Journal of International Relations 341.

[20] K Patel, *Project Europe* cit. 226.

[21] *Ibid*. 228-229.

us that "disintegration and dysfunctionality are part of the political normality of the integration process", this is because "they are produced by the treatment (or non-treatment) of complex problems and knock-on effects of the integration process itself".[22] Patel demonstrates this theory through the example of the European Monetary System (EMS), being an attempt at integration, which became dysfunctional and failed therefore causing disintegration between the Member States in that policy area. As the EMS was replaced with the Euro, Patel suggests that the response is differentiated integration. This pattern of integration then dysfunctionality then disintegration followed by differentiated integration is the current trend we are witnessing in the EU but that is nothing new.[23] It is an inevitable consequence of the EU's development and increased competences. The EU's efforts to integrate highlight the differences between the Member States thereby revealing the lack of willingness and ableness of some states to pursue uniformity through participation in certain EU initiatives.[24] This causes an attempt to integrate to become dysfunctional, leading to disintegration between the states in relation to that initiative. The response is resort to utilising mechanisms of differentiated integration This is reinforced when applying the framework of Brexit, as Patel states, "[d]isintegration and dysfunctionality are part of the political normality of the integration process. [...] The same also applies to the withdrawal of member states, for example, in the form of Brexit".[25] This *Article* propounds that a more open approach to differentiated integration will prevent this process, where differentiated integration follows dusfunctionality and disintegration. As differentiated integration is not a new but an historic and current phenomenon, the existence and necessity of which is likely to become more inevitable as the EU pursues its future path, there needs to be a greater openness towards differentiated integration. Instead of being the final consequence of the actions and objections of a Member State viewed as reluctant invoked in circumstances of disintegration, greater clarity on the need for differentiated integration assisted by less conceptual confusion could lead to learning the lesson Patel identifies, "[p]aradoxical as it may sound, precisely because the EU now occupies a dominant position in relation to European cooperation, legal differentiation represents the most important means of moving forward".[26]

In contrast, Schimmelfennig and Winzen view Brexit as a "novel process" in the history of European differentiated integration, describing it as "differentiated disintegration".[27] They explain that:

[22] *Ibid*. 230.
[23] *Ibid*. 220, for an in-depth discussion see chapter 7 in the volume.
[24] *Ibid*. 44.
[25] *Ibid*. 230.
[26] *Ibid*. 272-273.
[27] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit.137.

> "in a static perspective, differentiated integration and disintegration are the same. They result in a situation, in which a legal EU rule is not uniformly and exclusively valid across the EU member states. In a dynamic perspective, however, they differ. Differentiated integration refers to a situation, in which integration progresses overall but at least one state remains at the status quo or does not participate at the same level of integration as others. By contrast, differentiated disintegration is the selective reduction of a state's adherence to the integrated legal rules, which results in an overall lowering of the level and scope of integration".[28]

One can think of examples which test this characterisation, such as the authorising of the use of enhanced cooperation in the area of the creation of unitary patent protection including language provisions.[29] The Council's decision to authorise the use of the constitutionalised mechanism for differentiated integration in the Treaties[30] was challenged in the Court of Justice of the European Union (CJEU) by two Member States, Spain and Italy.[31] It was submitted on behalf of Spain and Italy, that all enhanced cooperation endeavours must contribute to the process of integration. In this case, however, they maintained that the true object of the contested decision was not to achieve integration but to exclude Spain and Italy from the negotiations on the issue of the language arrangements for the unitary patent. Whilst the Council unsurprisingly disagreed, arguing that if Spain and Italy did not play a part in the enhanced cooperation, it is because they have refused to do so and not because they have been kept out of negotiations, it is an interesting example to illustrate conceptual disagreement surrounding differentiated integration, and specifically here differentiated disintegration. This case is one example which demonstrates that these Member States felt excluded and therefore the integrated legal rules didn't apply to them which resulted in an overall lowering of the level and scope of integration for these states. The enhanced cooperation mechanism however is certainly not an example of differentiated disintegration but a legal mechanism provided in the primary law of the Treaty as a tool for differentiated integration.

From the initial Protocols that were part of the Treaty of Rome, to the enhanced cooperation mechanism in its Lisbon Treaty formulation, uniformity has never actually been the *status quo* in either the European Community or Union. However, this section has demonstrated, although admittedly barely scratching the surface, the distinct existence of conceptual disagreement and confusion surrounding differentiated integration. The fact that uniformity, although a goal of the European Union, has been more illusory than a practical reality, and that in actual fact differentiation, in one form or another has been alive and well in the Union since its conception, is difficult to detect because of the conceptual confusion and disagreement. The consequences of this have been twofold. First,

[28] *Ibid*.

[29] Decision 2011/167/EU of the European Council of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection.

[30] Art. 20 TEU and arts 326-334 TFEU.

[31] Joined cases C-274/11 and C-295/11 *Spain and Italy v Council* ECLI:EU:C:2013:240.

differentiation has been seen as the exception, difficult to obtain and subsequently discouraged. The extent to which it exists in the Union has not been explicitly advertised, which has compounded this problem. It has led to labels such as "second class" Member States being used to describe those which engage in differentiation, despite the fact that in one instance or another every single Member State in the Union engages in at least one instance of differentiated integration.[32] This is the genesis of the temptation for the EU to see Brexit itself, being the ultimate attempt to obtain flexibility, as an episode of British exceptionalism. Second, the rationale behind this reluctance to openly and explicitly advertise the extent of flexibility in the Union has led to mechanisms being too restrictive and ironically too inflexible to support what has actually fuelled the reluctance, which is the preservation of uniformity and the Union itself. Conceptual confusion and disagreement, whether a result, a cause, or both, is certainly not helpful. There is a tragic note to this situation, which is that, certainly in relation to the case of the UK, in attempting to prevent the disintegration of the Union, the lack of flexibility may in actual fact cause it. This demonstrates the lesson to be learnt on differentiated integration by applying the framework of Brexit, the UK is seeking a level of flexibility that is not available inside the EU, hence, Brexit is the ultimate opt-out.

III. Learning the lessons on differentiated integration

III.1. The advent of Brexit

The reality is that Brexit has actually highlighted issues with the perception of differentiated integration as a concept, and how it has been attributed to the UK as a form of British exceptionalism. This *Article* will now proceed to more explicitly apply Brexit as a framework, to discuss how Brexit has been seen as a *sui generis* event and an example of British exceptionalism in the context of differentiated integration. It will suggest that with differentiated integration insufficiently embraced within the EU, the UK was, and still is, seeking a more flexible arrangement from outside the EU. There are therefore lessons to be learnt from the insufficient adoption of differentiated integration in the EU as seen by applying Brexit as a framework. Brexit is not just an opt-out, or as suggested from seeing the UK as an exception, just another UK opt-out. But rather the ultimate attempt to obtain flexibility. This section of the *Article* will initially consider the advent of Brexit itself, including reference to the art. 50 TEU withdrawal process. It will then proceed to consider the challenge for the future of integration in the European Union, propounding the need for differentiated integration.

[32] D Chalmers and P Koutrakos, 'Editorial: Cut off from Europe: The Fog Surrounding Luxembourg' (2008) European Law Review 135, 136.

As a preliminary note it should be stated that this *Article* is not, however, predicated on the assumption that rules that apply equally to the Member States are a bad thing.[33] It does not seek to demolish the idea of a peaceful union or a trading market. It does not seek to call into question the concept of European union where laws, rules, values and principles exist.[34] A fair playing field in trade in Europe is a very positive idea which should be universally supported. In short, this *Article* is not arguing with the existence of rules and standards. The idea behind this *Article* is to promote, encourage and support differentiated integration in the EU.

This *Article* supports the existence of rules, and their fair application. However, rules should not be adhered to in a dogmatic fashion for their own sake. A staunch insistence on obedience to the EU's rules in order to try to prevent the Union from disintegrating is counter-productive, as it is evident since the Treaty of Rome, differentiated integration has always existed and has not brought about the destruction of the Union exercise. Furthermore, this *Article* would countenance against perceiving Brexit as a case of British exceptionalism. An attitude of exceptionalism treats those wanting flexibility in some areas as recalcitrant difficult Members whose commitment is questionable and are supposed to be "second class".[35] The UK is a pertinent example. Whilst (in)famous for "opting-out" of the social policy Protocol, European Monetary Union, and Schengen, to name but a few of the better-known examples, it has however been part of the "vanguard"[36] in the lesser known and advertised (admittedly sometimes because of the UK itself) instances of differentiated integration. One example of this we have already encountered is the enhanced cooperation regarding the unitary patent,[37] where there were twelve initial Member States, namely, Denmark, Germany, Estonia, France, Lithuania, Luxembourg, the Netherlands, Poland, Slovenia, Finland, Sweden and the United Kingdom, that wished to establish enhanced cooperation between themselves and asked the Commission to submit a proposal to the Council. It is consequently apparent that not only is the UK not always part of the "outs" but that it has jointly led the way in integration whilst other founder Member States have decided not to participate. It was therefore not always the exception.

It should also be recalled that the UK had a good record in compliance with its EU obligations.[38] It should be emphasised that differentiated integration was a seemingly preferable option to noncompliance, with the UK arguably wanting to opt-out of the areas

[33] On the reconciliation of the principle of equality among Member States and differentiated integration see LS Rossi, 'The Principle of Equality Among Member States of the European Union' in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 19-23.

[34] See T Tridimas, *The General Principles of EU Law* (Oxford University Press 2006 2nd ed.).

[35] R Adler-Nissen, *Opting Out of the European Union* cit. 32.

[36] W Schäuble and K Lamers, 'Reflections on European Policy' (1996) Bonn CDU/CSU Group in the Bundestag.

[37] Decision 2011/167/EU cit.

[38] Report COM/2017/370 final from the European Commission of 6 July 2017 on monitoring the application of European Union Law 2016 Annual Report.

of EU law it could not comply with, instead of failing to abide by its legal obligations. This demonstrates that castigating Member States, which seek to utilise differentiated integration with labels such as "recalcitrant", which have negative connotations,[39] is extremely unhelpful, as it needs to be borne in mind that there is no Member State to which the Treaties fully apply.[40] The main point of differentiated integration is that it enables integration, but the theories of integration, conceptual and terminological confusion and disagreements produce a reluctance to acknowledge, let alone use, the mechanisms that are available in a truly flexible manner. A more embracing attitude towards the use of differentiated integration is a significantly better approach, because there are differences between the Member States which are unlikely to disappear and therefore need to be accommodated. The sooner the need for an increased level of differentiated integration is recognised, rather than the existence of these mechanisms for differentiated integration marginalised, and their use treated as an exception awarded to the difficult State, the sooner the EU will confirm itself as having a firmer future.[41] The UK is, seen through applying Brexit as a framework, therefore trying to obtain a level of flexibility that was just not available in the Union, but this is not an exclusive UK phenomenon. The attempts that have been made by the EU to accommodate the differences between its members have been insufficient and consequently have provided neither uniformity nor proper flexibility for any, or all, of its Member States. Treating the UK as an exception as a way to excuse Brexit as a *sui generis* event,[42] rather than acknowledging the reality of the perception of differentiated integration within the Union, will only increase, rather than decrease, the likelihood of other Member States leaving the bloc.

The main difficulty is that the EU itself has got to see the merit in wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude, rather than let Brexit be seen as an exercise in British exceptionalism, and therefore once rid of its difficult member the goal of uniformity is reinvigorated. As Gormley states, "a possibility of Union action is more effectively served by permitting a Member State to opt out of applying a particular decision than having a requirement of unanimity leading to an inability to act".[43] In essence, in order to avoid another Brexit incidence, it needs to recognise more openly that differentiated integration can be a principle to guide

[39] R Adler-Nissen, *Opting Out of the European Union* cit. 32.

[40] D Chalmers and P Koutrakos, 'Editorial: Cut off from Europe' cit. 135.

[41] For a brief summary of the political approaches of the Commission, France and Germany, see P Morillas, 'Juncker's State of the Union: Where now for Multispeed Europe?' (14 September 2017) EUROPP European Politics and Policy blogs.lse.ac.uk.

[42] The Economist, 'Britain's Planned Departure is already Changing Brussels: Free-traders and Atlanticists have much to Mourn' (2 November 2017) The Economist www.economist.com.

[43] L Gormley, 'Reflections on the Architecture of the European Union After the Treaty of Amsterdam' in Democracy' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Treaty of Amsterdam* (Hart Publishing 1999) 61.

decisions about the development of the EU integration model[44] and that "flexibility is capable of absorption into orthodoxy".[45]

Furthermore, the advent of Brexit, is not an isolated exceptional incident dating back to just 2016. As was apparent with the UK even before the referendum was run on 23 June 2016,[46] and as highlighted by Walker, "[e]ven some of the Remain supporters in the referendum do not consider the existing multilateral framework of differentiated integration sufficient to meet Britain's needs and concerns; hence David Cameron's insistence in negotiating the February agreement on a future exemption from 'ever closer Union' as part of a new customized membership model".[47] Again, this is not just a British phenomenon, as Adler-Nissen suggests that there has been a trend towards an increased desire by Member States to secure their national sovereignty formally through the use of mechanisms of differentiation.[48] Consequently, and according to Hillion, "[t]he right to withdraw may thereby be interpreted as the ultimate elaboration of constitutional devices".[49] A more open acceptance of differentiated integration mechanisms, a greater willingness to use them, an end to treating the use of the mechanisms as an exception granted to "difficult" Member States, is possible. It needs, however, to be combined with an acknowledgement at EU level that unless differentiated integration is more accessible, available and obtainable, the consequence is that flexibility will be sought from outside the EU. As such, it is the argument of this article that ultimately what the UK is doing is

[44] H Wallace, 'Flexibility: A Tool of Integration or a Restraint on Disintegration?' in K Neunreither and A Wiener (eds), *European Integration After Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press 2000) 190-191.

[45] S Weatherill, '"If I'd Wanted You to Understand I Would have Explained it Better": What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?' in D O'Keeffe and P Twomey (eds), *Legal Issues of the Treaty of Amsterdam* cit. 25.

[46] See also: European Council, *Consclusions of 18-19 February: A new settlement for the United Kingdom within the European Union* eur-lex.europa.eu. It met to provide the UK with a renegotiated status within the EU as regards to elements of the following areas: economic governance; competitiveness; sovereignty; and social benefits and free movement, which would have come into effect but for the referendum result producing a majority in favour of leaving the EU. The Conclusions state at para. 4 that "should the result of the referendum in the United Kingdom be for it to leave the European Union, the set of arrangements [...] will cease to exist".

[47] N Walker, 'The Brexit Vote: The Wrong Question for Britain and Europe' (16 June 2016) Verfassungsblog verfassungsblog.de. See also A Biondi, 'Common law, UE e CEDU: passato, presente ed un incerto futuro' (2018) Federalismi.it www.federalismi.it.

[48] R Adler-Nissen, *Opting Out of the European Union* cit. 1-2. Also, Wallace, Moravcsik and Risse generally interpret opt-outs and differentiated integration mechanisms as ways to preserve the sovereignty Member States, see W Wallace, 'The Sharing of Sovereignty: the European Paradox' (1999) Political Studies 503; A Moravcsik, 'Europe's Integration at Century's End' in A Moravcsik (ed.), *Centralization or Fragmentation? Europe Facing the Challenges of Deepening, Diversity and Democracy* (Council on Foreign Relations Press 1998); and T Risse, 'Nationalism and Collective Identities: Europe Versus the Nation-State?' in P Hayward, E Jones and M Rhodes (eds), *Developments in West European Politics* (Palgrave 2002) 77.

[49] C Hillion, 'Leaving the European Union, the Union Way: A legal analysis of Article 50 TEU' (2016) Swedish Institute for European Policy Studies 10.

trying to achieve a level of flexibility that is not available to EU Member States inside the EU, hence, Brexit is the ultimate opt-out.[50]

As to the lessons to be learnt from applying the Brexit framework in relation to the Article 50 TEU process,[51] it will be recalled that the renegotiation prior to the referendum saw the then Prime Minister, David Cameron, seek to adjust the legal and political basis on which the UK was a Member State. Whilst there have been numerous accounts of the renegotiation, including discussions of what was requested by both sides, and arguably more importantly what was not agreed, the aim of this *Article* is not to provide a re-evaluation of these factors but to try to take a more holistic perspective. In essence, it can be argued that the UK was seeking a modification to the differentiated integration structure which formed the foundation of its membership. Crucially, it sought to do so initially without leaving the EU. This was effectively confirmed by Donald Tusk, the (then) President of the European Council, in November 2015, when he opined that the proposed reforms effectively amounted to a general confirmation and moderate expansion of Britain's differentiated integration in the EU.[52]

The renegotiation was unsurprisingly not, despite what its title would suggest, a significantly "new settlement"[53] and therefore it did little to mitigate the situation which immediately preceded the referendum. In fact, it was quite noticeable by its absence in the UK referendum campaign, with the then Prime Minister, David Cameron, "abandon[ing] any effort at 'persuading people of its merit'".[54]

One well noted concession from the EU, which is pertinent to the current discussion, is the differentiated status the UK obtained within the renegotiation in relation to the commitment to creating an ever closer union.[55] The "New Settlement" provided that :

> "[i]t is recognised that the United Kingdom, in the light of the specific situation it has under the Treaties, is not committed to further political integration into the European Union. The substance of this will be incorporated into the Treaties at the time of their next revision in accordance with the relevant provisions of the Treaties and the respective constitutional requirements of the Member States, so as to make it clear that the references to ever closer union do not apply to the United Kingdom".[56]

[50] See M Kendrick, 'Differentiated Integration Amongst the EU27' cit.

[51] For a comprehensive discussion of the art. 50 TEU process see: T Tridimas, 'Article 50: An Endgame Without an End?' (2016) King's Law Journal 297-313.

[52] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 146 and D Tusk, 'A New Settlement for the United Kingdom in a Reformed European Union' (10 November 2015) assets.publishing.service.gov.uk.

[53] European Council, *A New Settlement for the United Kingdom Within the European Union* cit.

[54] D Webber, *European Disintegration?* cit. 199 referring to D Korski, 'Why We Lost the Brexit Vote: Behind the Scenes of the Flawed Campaign to Keep the UK in the EU' (20 October 2016) Politico www.politico.eu.

[55] Art. 1 TEU.

[56] European Council, *A New Settlement for the United Kingdom Within the European Union* cit. section C, 'Sovereignty', para. 1.

Whilst it is suggested that all the EU offered here was to "merely acknowledged established practice",[57] it is hard to accept that a change to the UK's differentiated legal basis of membership, the nature of which requires altering the Treaty, is "merely" anything. It is easier to accept that this would have been a change, should it have come into force, rather than a restatement, and arguably of constitutional proportions. Perhaps this demonstrates how the perceptions of differentiated integration as a concept can impact on the ability of a State to utilise differentiated integration mechanisms. If so, this is not without serious consequence, as can be seen through applying the framework of Brexit. Webber shows insight into the attitude which was dominant at the time when he states that it was

> "feared that if the EU were to make too far-reaching concessions to the UK, this would provoke other members to make their own demands for special membership deals – which could provoke the unwinding of the EU in the same way that Brexit itself could [...] Germany wanted to keep the UK in the EU, but, in case of doubt, if it had to choose between having a larger, more loosely integrated EU with the UK (that it feared would unravel) and a smaller, more tightly integrated EU without the UK, it would prefer the latter – in line with its historical stance on the issue".[58]

Adherence to the view that differentiated integration is an exception, to an extent that it is considered something to be discouraged in order to avoid the collapse of the EU, which then has the consequence of calling into question the future of the EU when the Member States leaves, is hugely problematic.

This is not to say that having given a little more to the UK in the renegotiation the UK would have necessarily voted to remain, rather this *Article* does not make a comment on the multifarious complex factors which contributed to the choice of holding the referendum itself or the resultant vote. The argument made by this *Article* is that throughout the EU's history, differentiated integration has been used to find solutions to problems as apparently intractable as this, but there is a concurrent reluctance to do so with an explicitly wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union. The pursuit of convergence should not be premised on fear of disintegration or ineffectiveness and differences between the Member States should be addressed with differentiated integration in an open and accepting manner. Brexit is the framework which demonstrates the real consequence of reluctance to embrace differentiated integration more whole heartedly.

In consequence on the referendum outcome, the UK triggered the withdrawal process provided for in art. 50 TEU. As the ultimate elaboration of constitutional devices, Hillion suggests that the existence of the right to withdraw also confirms that participation in the

[57] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 146-147.
[58] D Webber, *European Disintegration?* cit. 196.

European integration process is essentially voluntary and that "the continental vocation of 'ever closer union' cannot trump its democratic foundations",[59] which one can arguably translate into the ultimate attempt at sovereignty preservation. The CJEU in *Wightman*[60] expounded the importance of sovereignty in the art. 50 TEU process, "the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice".[61] Perhaps the art. 50 TEU process is just an exercise in sovereignty restatement, or perhaps it is a form of managed differentiation, the ultimate opt-out mechanism?

This *Article* therefore propounds that Brexit actually mirrors what has been happening historically with regard to differentiated integration. The EU's concerns that if it allowed the UK to achieve divergence through the art. 50 TEU Brexit process it may essentially create a competitor, not a close neighbour, are seemingly evidence of a reversion to the desire to achieve the rigid adherence to the rules, in order, so the concerns of the EU appear to be, to ensure the single market and indeed the entire EU project will not be undermined.[62] However, trying to achieve uniformity is almost impossible with the widely diverged economies that there are in the EU, and sovereignty[63] means that there are

[59] C Hillion, 'Leaving the European Union, the Union Way' cit. 10. For more on this point, see C Hillion, 'Accession and Withdrawal in the Law of the European Union' in A Arnull and D Chalmers (eds), *Oxford Handbook of European Union Law* (Oxford University Press 2015) 126.

[60] Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999, especially para. 5 which provides, "[i]n addition, Article 50(1) TEU provides that any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements. It follows that the Member State is not required to take its decision in concert with the other Member States or with the EU institutions. The decision to withdraw is for that Member State alone to take, in accordance with its constitutional requirements, and therefore depends solely on its sovereign choice" and paragraph 56 "[i]t follows that Article 50 TEU pursues two objectives, namely, first, enshrining the sovereign right of a Member State to withdraw from the European Union and, secondly, establishing a procedure to enable such a withdrawal to take place in an orderly fashion" and again at para. 72 "[a]s regards the proposal of the Council and the Commission that the right of the Member State concerned to revoke the notification of its intention to withdraw should be subject to the unanimous approval of the European Council, that requirement would transform a unilateral sovereign right into a conditional right subject to an approval procedure. Such an approval procedure would be incompatible with the principle, referred to in paragraphs 65, 67 and 69 of the present judgment, that a Member State cannot be forced to leave the European Union against its will".

[61] *Ibid*. especially para. 5.

[62] The Economist, 'The EU Rejects Theresa May's "Pick 'n' Mix" Brexit Plan' (8 March 2018) The Economist www.economist.com and BBC, 'Andrew Marr Show: Full Interview with Theresa May MP' (25 March 2018) BBC www.bbc.com.

[63] This was a significant motivation behind the referendum result, as nearly half of leave campaigners (49%) gave this as their single biggest reason for their views in the referendum, specifically the principle that "decisions in the UK should be taken by the UK". See Lord M Ashcroft, 'How the United Kingdom Voted on Thursday… and Why' (24 June 2016) lordashcroftpolls.com. See also A Biondi, PJ Birkinshaw and M Kendrick (eds), *Brexit* cit. See also J Raz, 'The Future of State Sovereignty' (King's College London Law School Research Paper 2017-42) 7.

tensions caused by attempts to change and reform. Consequently, fear of disintegration provides too cautionary an approach to accommodating difference. Seeking uniformity as the goal risks achieving the opposite. Rather, a new attitude towards differentiated integration can have a positive effect in facilitating reform to the European Union project.

III.2. The challenge for the future

According to Hooghe and Marks, "permissive consensus" is being replaced with "constraining dissensus" as integration and competence expansion occurs, providing more political overlap between the Member States and the EU.[64] This has produced the negative perspective, which is evident today, against the use of differentiated integration mechanisms, and the attitude that they are the exception, and even the rare exception, rather than the norm. Stubb suggests that this is because most of the "flexibility debate revolved around 'what should not' as opposed to 'what should be done'".[65] It is the suggestion of this *Article* that the reverse of this historical attitude displayed by the EU towards the incorporation of differentiated integration should now transpire as a response to the advent of Brexit. The EU's attitude should no longer be based on what should not be done, but on how it can accommodate the differences of its Member States in an environment of openness and inclusivity, rather than obstructive exceptionalism.

Brexit arguably demonstrates that distrust of a "greater Europe", and fierce insistence on state sovereignty, remain live issues in today's politics.[66] This is suggested by Heuser, who has considered the history of sovereignty in Europe over the course of several centuries, reflecting on lessons which can be learnt from history when applied in the context of Brexit.[67] The intention of this section of this *Article* is to equally consider what the discussion so far could contribute to envisioning the future of differentiated integration in the EU.

In its "White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025", the European Commission set out five possible scenarios for the future post-

[64] L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2008) British Journal of Political Science 21.

[65] A Stubb, 'Negotiating Flexible Integration in the Amsterdam Treaty' in K Neunreither and A Wiener (eds), *European Integration After Amsterdam* cit. 171.

[66] B Heuser, *Brexit in History: Sovereignty or a European Union?* (Hurst 2019).

[67] *Ibid*. Heuser argues that attempts at "European Union" have been around since at least the early 1300s if not before and that the idea of a united states of Europe with states formally treated as equals, as "sovereigns" with a permanent Congress or Senate and the possibility of disputes being settled by arbitration or judicial pronouncement. In contrast to the current version of European Union, majority voting featured in previous designs throughout history. Heuser argues in essence that there has always been a discussion to deal with wars and lack of cooperation in Europe and that the idea of European Union is nothing new nor are the reasons for its design and existence. The question has always been about sovereignty and the current design was never inevitable, quite the opposite. The early ideas were not considered the most realistic or plausible with options of empires and super-states on the table, from suggestions by Saint-Pierre, Bentham and Kant, to name but a few.

Brexit.[68] Scenario one would be to just carry on as the EU is presently.[69] Scenario two, is to gradually re-centre the EU on the single market, and consequently everything the EU does would be to further single market objectives, "[t]he EU's re-centred priorities mean that differences of views between Member States on new emerging issues, often need to be solved bilaterally, on a case by case basis".[70] The third scenario is described as "[t]hose who want more do more", meaning that the EU will allow willing Member States to do more together in specific areas, "the EU27 proceeds as today but where certain Member States want to do more in common, one or several 'coalitions of the willing' emerge to work together in specific policy areas. These may cover policies such as defence, internal security, taxation or social matters".[71] Scenario four is unambitiously described as "[d]oing less more efficiently", which means that:

> "[i]n a scenario where there is a consensus on the need to better tackle certain priorities together, the EU27 decides to focus its attention and limited resources on a reduced number of areas. As a result, the EU27 is able to act much quicker and more decisively in its chosen priority areas. For these policies, stronger tools are given to the EU27 to directly implement and enforce collective decisions, as it does today in competition policy or for banking supervision. Elsewhere, the EU27 stops acting or does less".[72]

The final scenario is more ambitiously described as "Doing Much More Together".[73] According to the Commission, this means that "[i]n a scenario where there is consensus that neither the EU27 as it is, nor European countries on their own, are well-equipped enough to face the challenges of the day, Member States decide to share more power, resources and decision-making across the board. As a result, cooperation between all Member States goes further than ever before in all domains".[74] The Commission does however recognise that there could be an issue with this option, which is that "there is the risk of alienating parts of society which feel that the EU lacks legitimacy or has taken too much power away from national authorities",[75] we are therefore back, according to Heuser's analysis, to the centuries old problem of trying to reconcile sovereignty with a project to unify Europe.

The only option that can really be said to embrace differentiated integration, most explicitly, is scenario three.[76] What is envisaged are coalitions of the willing which crucially want to do more and are being given a choice as to if, and presumably how, they wish to

[68] European Commission COM(2017) 2025 final of 1 March 2017 White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025.

[69] *Ibid*. 16.

[70] *Ibid*. 18.

[71] *Ibid*. 20.

[72] *Ibid*. 22.

[73] *Ibid*. 24.

[74] *Ibid*.

[75] *Ibid*.

[76] F Schimmelfennig and T Winzen, *Ever Looser Union?* cit. 1.

proceed with integration. Whilst it is positive to see differentiated integration appearing as a potential scenario, in light of the argument put forward in this article, it would need to be accompanied by an attitude more accepting of flexibility arrangements.

In essence, whatever model is chosen, and whether or not any of these particular scenarios feature, what needs to be borne in mind is that the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured and the differences between the 27 Member States have not disappeared. The centuries old problem of trying to reconcile sovereignty with a project to unify Europe, which Heuser identifies,[77] is still very much alive and well. Having applied Brexit as a framework in this *Article*, the lesson to be learnt on differentiated integration is that it is not the exclusive domain of the UK and should not be seen as an exercise in British exceptionalism. The possibility of Union action post-Brexit will be more effectively served by permitting wider use of differentiated integration. Whatever model the EU chooses, the challenge for the future is whether or not the EU will be more embracing of differentiated integration.

IV. Conclusion

Historically, the use of differentiated integration mechanisms has been based on the idea of the widening and deepening of the European Union, necessitated by the enlargement of the bloc through the addition of Member State countries. The advent of Brexit means that we are in a rather different situation today, where the monodirectional march towards deeper, uniform integration between an ever increasing number of States is neither inevitable nor assured. Differentiated integration has always been an historical feature of Europe, "as integration has always meant joining together in differentiation".[78]

Whilst this *Article* does not make a comment on the multifarious complex factors which contributed to the choice of holding the referendum itself or the resultant vote. The argument made by this article is that throughout the EU's history, differentiated integration has been used to find solutions to problems as apparently intractable as this, but there is a concurrent reluctance to do so with an explicitly wider acceptance of differentiated integration in terms of both legal permissiveness and extent as well as attitude within the Union.However, Brexit essentially provides evidence that the level of flexibility available in the Union, far from causing its disintegration, has actually been insufficient to prevent its disintegration because it does not accommodate the differences between the Member States to a sufficient degree. This is exacerbated by conceptual confusion and disagreement. The title of this *Article*, "Brexit: the ultimate opt-out", summarises what this *Article* propounds, which is that with insufficient flexibility within the EU, the UK is seeking a more flexible arrangement from outside the EU.

[77] B Heuser, *Brexit in History* cit.
[78] K Patel, *Project Europe* cit. 229.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

DOES SOFT LAW TRIGGER DIFFERENTIATION AND DISINTEGRATION?

FABIEN TERPAN* AND SABINE SAURUGGER**

TABLE OF CONTENTS: I. Introduction. – II. Basic assumptions regarding crises, soft law and differentiation. – III. The dynamics of soft law, differentiation/disintegration: three scenarios. – III.1. Soft law, territorial differentiation, disintegration. – III.2. Soft law, territorial differentiation, integration. – III.3. Soft law, uniformly applied, integration. – IV. Factors making these scenarios more or less likely. – IV.1. Factors inherent in the soft law instrument. – IV.2. Factors related to the system of the EU. – V. Conclusion.

ABSTRACT: The purpose of this *Article* is to provide a framework that helps to analyse the relationship between soft law, differentiation, and the prospects of integration/disintegration. More specifically we aim at developing a typology of scenarios in order to show how soft law contributes to our understanding of differentiation and to the overall discussion about integration/disintegration in the European Union, in a context of crises. Section II presents and discusses three main assumptions: the EU is facing a context of political and economic turbulences; territorial differentiation has increased since the 1990s; EU policies more and more rely on soft law. Against this backdrop, we seek to capture, in section III, the dynamics between soft law, differentiation and integration/disintegration, by using three main scenarios (soft law leads to more territorial differentiation; soft law leads to differentiation but then results in more integration; soft law triggers integration). Section IV is dedicated to the factors making these three scenarios more or less likely to occur. Two types of factors are distinguished: those which are inherent in the soft law instruments and those related to the EU system of governance. In the end, we argue that further investigation is needed in order to verify whether the legal and political EU system is strong enough to prevent normative and territorial differentiation from escalating, and preserve the integration-through-law narrative.

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The research leading to this article stems from the EU3D Project (EU Differentiation, Dominance and Democracy), funded by the European Union's Horizon 2020 Research and Innovation Programme under Grant Agreement No. 822419.

ISSN 2499-8249
doi: 10.15166/2499-8249/609

KEYWORDS: soft law – differentiation – integration – disintegration – crises – implementation.

I. INTRODUCTION

Soft law and differentiation are widely used concepts to better understand the transformation of European Union law, the evolution of European integration and the possibility of disintegration. However, the academic literature has not yet paid much attention to the interaction between these notions. The purpose of this *Article* is to provide a framework that helps to analyse the relationship between soft law, differentiation, and the prospects of integration/disintegration.

To do so first requires a conceptual clarification. The definition of soft law is not crystal clear and far from being consensual, whether it is soft law at domestic, EU or international level.[1] It is not easy to situate soft law with regard to the sources of European Union law[2] and part of the scholarship would use the notion of 'informal law' rather than soft law.[3] In the context of this presentation, I will stick to the notion of soft law and the widely cited definition by Linda Senden, who sees soft law as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects".[4]

This definition is not precise enough to clearly delineate non-law, soft law and hard law. There are grey areas where soft law does not seem to be so soft, and hard law is not as hard as it looks. For example, hard law is sometimes softened by the absence of a proper enforcement mechanism, which is typical of those EU instruments that are not placed under the jurisdiction of the CJEU and whose non-compliance with does not give rise to sanctions. For the purpose of this *Article*, we will keep in mind this softness of certain hard acts while focusing on proper non-binding soft law.

Differentiation, the second crucial term in this analysis refers to the variation in the integration of policies (competences to the Union, *i.e*. vertical differentiation) and to the application of rules to some Member States and non-Member States, but not to all (horizontal differentiation).

[1] F Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2015) ELJ 68.

[2] B De Witte and B Smulders, 'Sources of European Union Law' in P J Kuijper and others (eds), *The Law of the European Union* (Kluwer Law International 2018) 193; O Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) The Modern Law Review 879.

[3] J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

[4] L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 3; See also the classical definition by F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin and F Snyder (eds), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer Law International 1994) 197.

Soft law can contribute in different ways to differentiation processes in the European Union. It can be seen as participating in normative or "vertical" differentiation,[5] defined as a form of differentiation in the way the EU takes normative action, with modes of governance and rulemaking departing from the traditional narrative of Integration through (hard) law.[6] But, of course, differentiation is also (and mainly) considered in its territorial dimension ("horizontal differentiation").[7] When EU decision-makers purposively choose that rules do not apply evenly in the territory of the Union, in order to make integration possible, and when this choice is enshrined either in primary law or in secondary law, differentiation then takes the specific form of differentiated integration. Differentiation can thus be presented either as a way to further integration or as a factor leading to disintegration.[8]

The main aim of this *Article* is to develop a typology of scenarios showing how soft law contributes to our understanding of differentiation and to the overall discussion about integration/disintegration in the European Union. More precisely, this *Article* will try to uncover the dynamics of soft law, differentiation, integration and disintegration in a context of multiple crises, which can be seen as a disruptive phenomenon.

To do so, section II will provide basic assumptions about, the crises, soft law and differentiation in the European Union respectively. Based on these assumptions, section III will present three scenarios aimed at catching the dynamics of soft law and differentiation with a view to better understanding their contribution to integration or disintegration processes. Section IV will discuss the factors that make these scenarios more or less likely.

II. Basic assumptions regarding crises, soft law and differentiation

This section presents three main assumptions regarding crises and integration/disintegration, differentiation and soft law.

First, the EU is facing a context of political and economic turbulences. Are there more crises than before? Are these crises more intense than prior crises? This is not so easy to say, and historical studies often remind us of the severity of certain past crises.[9] It is

[5] D Leuffen, B Rittberger and F Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan 2012).

[6] M Cappelletti, M Seccombe and J Weiler (eds), *Integration Through Law: Europe and the American Federal Experience* (de Gruyter 1985).

[7] D Leuffen, B Rittberger and F Schimmelfennig, *Differentiated Integration* cit.

[8] H Vollaard, *European Disintegration: A Search for Explanations* (Springer 2018); B Rosamond, 'Theorising the EU in Crisis: De-Europeanisation as Disintegration' (2019) Global Discourse: An Interdisciplinary Journal of Current Affairs 31.

[9] D Dinan, 'Crises in European History' in D Dinan, N Nugent and W Patterson (eds), *The European Union in Crisis* (Palgrave Mcmillan 2017).

however correct to say that the current context is undoubtedly a difficult one, with multiple layers of crises that occurred successively and sometimes simultaneously.[10]

Since the early 1990s, the permissive consensus[11] whereby citizens supported EU integration without putting much interest in it, and left it to the governments to advance EU integration in their own way, has come to an end, and has been replaced by a constraining dissensus (governments being constrained by different forms of citizens' opposition to policies and a general resistance to European integration).[12]

This general context has developed into different crises such as the rejection of revision treaties and of the Constitutional treaty more particularly, the economic and financial crisis, the migration crisis, the rule of law crisis, Brexit, the Covid-19 pandemic, the war in Ukraine and its consequences at EU level. The rise of populism, Euroscepticism and assertions of national sovereignty have made disintegration possible.[13] The EU and its Member States are placed in a situation where the need arises to choose between, on the one hand, avoiding exits at all costs and, on the other, accepting exits for the sake of the Union and with potential benefits in terms of integration. Against this background, soft law is sometimes presented as a valid option to convince reluctant Member States to stay on board. It allows, on the one hand, for implementation to the extent and the pace Member States wish, and on the other to retain the argument of sovereignty as non-compliance is not linked to sanction but can be presented to the voters as a learning process if soft law is indeed followed.

The second assumption is based on the idea that territorial differentiation has increased since the 1990s in at last two different directions. On the one hand, differentiated integration has been used in several areas such as Economic and Monetary Union, the Schengen area, CFSP-CSDP, based on the -contested- idea that it is a good way to further integration in a context of crisis. On the other hand, differentiation has aroused from the attitude of Member States resisting and contesting EU law. One example of this is the United Kingdom deciding to move towards Brexit.[14] Another example is given by Poland and Hungary, which challenge the rule of law through reforms threatening the

[10] M Riddervold, J Trondal and A Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2021); M Matthijs, 'Lessons and Learnings from a Decade of EU Crises' (2020) Journal of European Public Policy 1127.

[11] LN Lindberg and SA Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community* (Prentice Hall 1991).

[12] L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) British Journal of Political Science 1.

[13] H Vollaard, *European Disintegration* cit.; B Rosamond, 'Theorising the EU in Crisis' cit. 31.

[14] F Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' (2018) Journal of European Public Policy 1154; B Rosamond, 'Brexit and the Problem of European Disintegration' (2016) Journal of Contemporary European Research 864; B Leruth, S Gänzle and J Trondal, 'Exploring Differentiated Disintegration in a Post-Brexit European Union' (2019) JComMarSt 1013; B Leruth, S Gänzle and J Trondal, *Differentiated Integration and Disintegration in a Post-Brexit Era* (Routledge/UACES 2019).

independence of justice and the media.[15] These different forms of resistance and contestation can be considered as a direct threat to European values and norms enshrined in the Treaties.

The third assumption refers to the idea that soft law is said to be increasingly used since the early 1990s, in particular – but not only – in areas of competences posterior to the Treaty of Maastricht.[16] The EU would more and more rely on informal means, instead of formal ones. Soft instruments such as conclusions, communications, resolutions, strategies, programmes, codes of conduct, guidelines, arrangements, memoranda of understanding, would have mushroomed from the post-Maastricht period onwards. This trend would affect both internal and external policies.[17]

The growing use of soft law is not so easy to prove, as it requires comprehensive and systematic analyses.[18] The use of soft law at EU level may vary across policies and be sensitive to crisis situations, which makes generalization difficult. While we can measure the increase of soft law rules in the EU by counting their number, measuring their use by different actors is empirically and methodologically more complex. Datasets of soft and hard law, such as the one developed in the EfSoLaw project,[19] are indeed needed to fill this gap in the literature. Yet, there is sufficient evidence to say that, at critical moments and in a number of important policy areas, informal means are chosen over formal ones.

The increase of soft law in the EU is connected to two complementary evolutions: first, the desire of the European Union to coordinate policy areas outside the classical Community Method. These coordination methods are not based on hard law but try to create homogeneity through collective learning instruments such as the open method of coordination, or new modes of governance more generally, which are mostly based on

[15] L Pech and K Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3; RD Kelemen, 'Is Differentiation Possible in Rule of Law?' (2019) Comparative European Politics 246; S Saurugger and F Terpan, 'Differentiation and the European Court of Justice' in B Leruth, S Gänzle and J Trondal, *Differentiated Integration and Disintegration in a Post-Brexit Era* cit. 231.

[16] F Terpan, 'Soft Law in the European Union' cit.

[17] B Van Vooren, 'A Case-Study of "Soft Law" in EU External Relations: The Neighbourhood Policy' (2009) ELR 704; RA Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements' (2021) West European Politics 72.

[18] Arguing in favour of a growing use of soft law: A Zhelyazkova and others, 'Beyond Uniform Integration? Researching the Effects of Enlargement on the EU's Legal System' (MAXCAP Working Paper Series 8/2015).

[19] The EfSoLaw project analyses the "Effects of Soft Law in EU Multilevel Governance" based on a large dataset of soft and hard instruments. See the EfSoLaw website at www.efsolaw.eu, and for a presentation of the dataset: B Cappellina, 'EfSoLaw: A New Data set on the Evolution of Soft Law in the European Union' (August 2020) ECPR Virtual General Conference 2020; B Cappellina and others, 'Ever More Soft Law? A Dataset to Compare Binding and Non-binding EU Law across Policy Areas and over Time (2004-2019)' (15 July 2022) European Union Politics 741.

soft law.[20] Second, when hard law is used to regulate "old" policy fields decided under the Community Method, it is often combined with soft law.

Among the different reasons potentially explaining the use of EU soft law,[21] protecting Member States' sovereignty seems to be most convincing. In a context of crisis, and maybe even more in a post Brexit era, EU institutions and Member States are searching for effectiveness while avoiding sovereignty losses.[22] It is no surprise that soft instruments are particularly used in times of crisis. When decisions are difficult to make, informal law-making has the double advantage of being easier to adopt and of avoiding binding commitments. More generally, in a period of tensions over sovereignty, as is the one opened by the end of the permissive consensus, it makes sense to see the EU using informal means quite extensively. Soft law, as part of the so-called new modes of governance, was presented by the Commission in its White Paper of 2000 as a means of European integration.[23] It was supposed to convince the Member States to converge on common objectives without constraining them.

However, when focusing on the consequences of a more systematic use of soft law, we observe that it can be a source of normative differentiation and a challenge to integration through law. Integration through law, according to the seminal work of Cappelletti, Seccombe and Weiler in the mid-1980s,[24] is one of the central explanations of the EU integration process. The Court of Justice of the European Union (CJEU) would be instrumental in fostering EU integration through judicial activism.[25] Legal integration triggered by the Court would compensate for the lack of political will of the Member States and the blockades of decision-making in the Council of Ministers. The Community Method and hard law in the form of regulation, directives, external agreements as well

[20] J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) ELJ 1; DM Trubek and LG Trubek, 'The Open Method of Coordination and the Debate over "Hard" and "Soft" Law' in J Zeitlin, P Pochet and L Magnusson (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang 2005) 83.

[21] Many reasons are usually advanced to explain why actors make use of soft law although formal instruments are available. It would bring greater smoothness in the negotiation and the conclusion of the instruments. It would help decreasing transaction costs during the negotiations. The States could not agree on a formal arrangement. It is meant to be efficient while remaining flexible. It is more respectful of Member States sovereignty as the Court of Justice is not supposed to exert judicial control and the Parliament is not so much involved.

[22] C Bickerton, D Hodson and U Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press 2015).

[23] European Commission COM(2001) 428 final of 12 October 2001 European Governance: A White Paper eur-lex.europa.eu.

[24] M Cappelletti, M Seccombe and J Weiler (eds), *Integration Through Law* cit.

[25] S Saurugger and F Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan 2017); H Rasmussen, 'Between Self-restraint and Activism: A Judicial Policy for the European Court' (1988) ELR 28; B de Witte, M Dawson and E Muir (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013); A Grimmel, 'Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice' (2012) ELJ 518.

as Court rulings, would prevail over soft law. In line with the integration through law narrative, the EU has been described as an organization based on the rule of law,[26] with EU law being increasingly constitutionalised.[27] However, since the early 1990s, the integration through law narrative has been revisited or even contested at different levels.[28] Hence, the CJEU would exert self-restraint instead of activism,[29] the Community Method would be challenged by new modes of governance, or soft law would figure prominently among the factors that are said to be challenging integration through law. The growing use of soft law in the European Union is indeed a departure from the classical forms of legal integration, with possible effects in terms of differentiation and disintegration.

III. The dynamics of soft law, differentiation, integration/disintegration: three scenarios

Indeed, what are the effects of soft law on the EU integration process? Is soft law an effective tool to bring integration forward or to make Member States coordinate their policies? Does it contribute to weld the Member States together? Is integration through soft law a valid alternative to integration through law? These questions are complex. The literature dealing with soft law and new modes of governance is divided on the issue, a first group claiming that soft law and new modes of governance have an impact[30] while another one argues in the opposite direction.[31] The gap between the two groups may not

[26] K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) German Law Journal 29.

[27] J Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe: Modes de formation de la constitution des communautés et de l'union européenne* (Editions de l'Université de Bruxelles 1997); N Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2010); F Terpan, 'Le constitutionnalisme européen: penser la Constitution au-delà de l'Etat' in *Mélanges en l'honneur du Professeur Henri Oberdorff* (Lextenso 2015) 181.

[28] D Augenstein (ed.), *Integration through Law' Revisited: The Making of the European Polity* (Routledge 2016).

[29] K Alter, 'The European Court's Political Power' (1996) West European Politics 458; R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Palgrave Macmillan 1998) 148; D Keeling, 'In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?' in C Gialdino (ed.), *Scritti in onore di Giuseppe Federico Mancini* (Giuffrè 1998).

[30] I Bruno, S Jacquot and L Mandin, 'Europeanization Through its Instrumentation: Benchmarking, Mainstreaming and the Open Method of Co-ordination... Toolbox or Pandora's Box?' (2006) Journal of European Public Policy 519; K Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy' (2004) Journal of European Social Policy 355; S Jacquot, 'The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain' (2010) West European Politics 118; CF Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010).

[31] V Hatzopoulos, 'Why the Open Method of Coordination is Bad for You: A Letter to the EU' (2007) ELJ 309; E Radulova, 'Variations on Soft EU Governance: The Open Method(s) of Coordination' in D De Bièvre and C Neuhold (eds), *Dynamics and Obstacles of European Governance* (Elgar 2007) 3; DM Trubek and LG Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination' (2005) ELJ 343.

be so large, in reality, and could be partially explained by the way scholars see the glass, either half-full or half-empty. To get a clearer picture, more studies dealing with the use or the implementation of soft law at Member States' level are needed, in line with the work done within the SoLar[32] and the EfSoLaw[33] projects. In the context of this *Article*, three main scenarios are proposed to capture the dynamics between soft law, differentiation and integration/disintegration.

III.1. Soft law, territorial differentiation, disintegration

In this first scenario, soft law leads to more territorial differentiation because the implementation of soft law creates variations across Member States. The idea that soft law would help harmonizing domestic rules by convincing national governments instead of constraining them[34] is highly debatable. Resistance to soft law takes the same forms than resistance to hard law.[35]

Focusing on implementation at national level, Oana Stefan explains that "Member States chose between various options, which seem to reflect the continuum of 'legalisation' ranging from full engagement with soft law in the text of national hard law to brief website references and no engagement at all".[36] In the same vein Trubek and others argue that soft law gives consideration to divergent national circumstances "through flexible implementation", which offers Member States leeway to adapt European norms to national economic and social contexts.[37] This can lead to an anarchical situation regarding soft law implementation by the Member States, or at least to a clear-cut distinction between groups of state, with one group fully implementing soft rules while another one would not. In both cases, the result is further differentiation among the Member States.

Based on the observation that soft law favours differentiation, it remains to be seen whether the flexibility of soft law implementation contributes to disintegration or integration.

At first sight, the difference between soft and hard law does not seem significant in its overall impact on the dynamics of integration. Directives are transposed in various

[32] NoLesLaw, *European Network on Soft Law Research* noleslaw.net; see also, founded on empirical work undertaken by the European Network of Soft Law Research (SoLaR), across ten EU Member States, in competition policy, financial regulation, environmental protection and social policy: M Eliantonio, E Korkea-aho and S Oana Stefan (eds), *EU Soft Law in Member States: Theoretical Findings and Empirical Evidence* (Bloomsbury 2021).

[33] See also B Cappellina and others, 'Ever More Soft Law?' cit. 741.

[34] European Commission COM(2001) 428 final cit.

[35] S Saurugger and F Terpan, 'Resisting New Modes of Governance: An Agency-Centred Approach' (2016) Comparative European Politics 53; S Saurugger and F Terpan, 'Studying Resistance to EU Norms in Foreign and Security Policy' (2015) European Foreign Affairs Review 1.

[36] O Stefan, 'The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of COVID-19' (2020) Journal of International and Comparative Law 329.

[37] DM Trubek, MP Cottrell and M Nance, "'Soft Law", "Hard Law", and EU Integration: Toward a Theory of Hybridity' in J Scott and G de Búrca (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 88.

forms at national level and non-compliance with EU law exists, despite the possible opening of an infringement procedure. Member States benefit from different types of opt outs from primary and secondary law, even in policy areas at the core of European integration.[38] On this basis, soft law should not lead to disintegration, at least no more than hard law does. However, it can be argued that the flexible implementation of soft law results in more diversity than the transposition of directives, as no real legal constraints are provided for in soft law acts. Thus, if soft law is increasingly used in EU policymaking, and if it is used in areas where hard instruments could have been adopted, then we can conclude that soft law would not only lead to differentiation but also to disintegration.

The EU's migration policy offers a good example of such an evolution, with many soft rules adopted since 2015 in a policy field where hard instruments could have been widely used.[39] Trauner and Slominski have shown that, in the wake of the 2015/2016 migration crisis, EU policy-makers have urged returning more irregular migrants based on a series of non-binding documents for European administrations (such as the EU Return Handbook) and informal agreements signed with third countries.[40] Ramses Wessel confirms the rise of "soft" international agreements in establishing relations with non-EU States.[41] The softening of the EU's migration policy can be seen as a factor of disintegration at policy level. Should the same evolution occur in other areas, then the softening of EU law would be a factor of disintegration at EU level more generally.

In addition to this, it should be noted that soft law is criticized for undermining the legitimacy of the European Union. The choice of soft law over hard law circumvents the Parliament and creates a problem in terms of accountability. In addition to this, the use of soft law has an impact on justiciability and judicial review. By using informal means, the EU Member States escape the jurisdiction of the Court and challenge the rule of law. Although the Court of Justice in a few cases[42] has opted for an extensive interpretation of its own competence, in order to get a grip on some aspects of CFSP, and in the end, to protect the powers of the Parliament, it is not supposed to review the legality of a soft instrument, and in this case, there is no possible protection of the Parliament by the Court when soft instruments are chosen over hard ones.

[38] G de Búrca, 'Differentiation within the "Core"? The Case of the Internal Market' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 133.

[39] F Terpan and S Saurugger, 'Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity' (2021) West European Politics 21.

[40] P Slominski and F Trauner, 'Reforming Me Softly: How Soft Law has Changed EU Return Policy since the Migration Crisis' (2021) West European Politics 93.

[41] RA Wessel, 'Normative Transformations in EU External Relations' cit.72.

[42] Case C-658/11 *Mauritius* ECLI:EU:C:2014:2025; case C-263/14 *Tanzania* ECLI:EU:C:2016:435; case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

III.2. Soft law, territorial differentiation, integration

In this second scenario, a large use of soft law may at first produce differentiation but, contrary to the first scenario, would result in more integration. The evolution of macroeconomic and fiscal governance provides a good example of this causal sequence.

Depending on their budgetary situation, the Member States are submitted to different Country Specific Recommendations, which are policy recommendations made by the European Commission and endorsed by the Council after evaluation of the National Reforms Programmes submitted by EU Member States as part of the European Semester. As Bruno de Witte argues, "[i]n some policy areas, country-specific measures are ubiquitous and outnumber the acts with general territorial application. This is the case in macro-economic and fiscal governance, where the EU institutions adopt a myriad of decisions and recommendations addressed to individual countries, sometimes with major implications for their domestic policies. Such frequent renunciation to the uniform application of common norms is rare in unitary states and even in federal states".[43] In sum, Member States are placed in different situations regarding soft law, which seems to lead to territorial differentiation. However, it can be argued that the Country Specific Recommendations are turned towards the same objectives, which favours convergence between Member States' economies and strengthens integration. And on a broader level, macroeconomic and fiscal governance has finally been hardened, thanks to a series of reforms made in-between 2010 and 2013, confirming that soft law has not been part of a disintegration process. This period saw the creation of the European Semester in 2010,[44] followed in 2011 by the so-called "Six-Pack", five regulations and one directive, reinforcing the Stability and Growth Pack. In February 2012, the Eurozone member states adopted a permanent European Stability Mechanism (ESM), allowing for the issuing of emergency aid to Euro area countries. In March 2012, the intergovernmental "Fiscal Compact" (Treaty on Stability, Coordination and Governance in EMU (TSCG)) was signed by 25 of 27 EU Member States, with the exception of the United Kingdom and the Czech Republic. The TSCG/Fiscal Compact aims at reinforcing the Stability and Growth Pact though the introduction of new control mechanisms. It requires national budgets to be balanced or show a surplus: this so-called "golden rule" has to be incorporated into national law within one year of the entry into force of the treaty. With the entry into force of the TSCG, the CJEU supervises the enforcement of the new budget rules.

[43] B De Witte, 'Variable Geometry and Differentiation as Structural Features of EU Legal Order' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 19-20.

[44] Communication COM(2010) 250 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions of 12 May 2010 about reinforcing economic policy coordination.

III.3. Soft law, uniformly applied, integration

Finally, in the third scenario, soft law rules are adopted at EU level and implemented in a uniform manner at Member States' level. Therefore, they do not trigger territorial differentiation but on the contrary, they contribute to further integration.

An example of this can be found in social policy. The 2003 Directive on Working Time,[45] for instance, has been a controversial issue, before and after its adoption, with the CJEU delivering a number of highly discussed rulings on the definition of working time and rest periods.[46] In 2017, the Commission has adopted an Interpretative Communication on this Directive, a soft law act addressing problems with the implementation of the Directive. As argued in a collective publication of the SoLar project, "administrative actors in the Member States have happily used the clarifications", which led to uniform implementation and reinforced integration.[47]

IV. Factors making these scenarios more or less likely

What factors make these three scenarios more or less likely to occur? The argument here is that the causal chain between soft law, differentiation and integration/disintegration depends on factors inherent in the soft law instrument as well as factors to be found in the legal/political system of the European Union.

IV.1. Factors inherent in the soft law instrument

Far from being a uniform category, soft law is made of very different instruments and norms. Two main differences are worth studying in the context of this *Article*: first, the relation between the soft instrument and hard law, and second, the existence, or absence, of an enforcement measure within the instrument. Schematically, soft instruments can be divided in two main categories: steering soft law is adopted as an alternative to hard law (para law) while interpretative soft law is adopted to complement an existing hard instrument (post law). Intuitively, it seems more likely that interpretative soft law leads to uniform application and thus integration as hard law already regulates the policy field and soft law in this field is only used to provide supplementary guidelines. On the contrary, steering soft law would rather lead to differentiation and be a factor of disintegration, unless it proves to be effective in the long run.

The existing literature does not provide irrefutable evidence in this regard. Since their preferences are heterogenous, the Member States might have difficulties to agree on

[45] Directive 2003/88/EC of the Council and the European Parliament of 4 November 2003 concerning certain aspects of the organisation of working time.

[46] Case C-303/98 *SIMAP* ECLI:EU:C:2000:528 or recently case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* ECLI:EU:C:2019:402.

[47] M Hartlapp and others, *Studying EU Soft Law Effects in Social Policy* (King's College London Law School Research Paper Forthcoming 2020) SSRN papers.ssrn.com 22.

binding measures in particular policy fields and opt for soft measures as an alternative to soft law (soft steering measures). Instances of these decisions can be found in macroeconomic governance and in some areas of social policy. Based on the assumption made above, the effectiveness of para law (steering soft law) should be low. However, as seen in the previous section, empirical evidence shows variation.

Similarly, it has not been clearly proven that post law (interpretative soft law) is more effective. We have seen that the Commission Communication on the Working Time Directive, an example of post law, has led to uniform implementation.[48] Yet, there are counterexamples showing that post law may also trigger differentiation. The Commission has decentralized state aid control to national authorities, through soft rules, within the so-called SAM package (State Aid Modernization), in order for the Commission to focus its own enforcement on cases having the largest impact on the internal market. This has been presented as resulting in more differentiation, with state aid control varying a lot across Member States.[49] More systematic empirical evidence is therefore required, beyond these examples, to see whether the type of soft law is a pertinent factor.

The second factor intrinsic to the soft law instrument is related to enforcement. Soft law would more likely result in uniform application and integration if it is backed up with some kind of soft enforcement mechanism, such as monitoring by the Commission, for instance. It is often assumed that the lack of judicial control makes soft law ineffective or that it explains a very flexible implementation of soft law, but we do not really know whether the existence of a soft enforcement mechanism makes a difference compared to no enforcement at all.[50]

In some cases, soft law is not supposed to be controlled by a Court, nor is it framed by legal sanctions, but it may finally be subject to different forms of control and sanctions. A first possibility is that the CJEU finally decides to give legal effect to a soft act.[51] Another possibility is related to non-legal forms of constraints. For instance, during the economic and financial crisis the Greek government had to decide on a number of reforms under a Memorandum of Understanding (MoU) signed with the Commission and the International Monetary Fund. The MoU was clearly soft law, and as such not placed under the jurisdiction of the CJEU, but there were other types of possible sanctions in case Greece refused to "comply", starting with the withdrawal of financial support.[52]

[48] Directive 2003/88/EC cit.

[49] CM Colombo, 'State Aid Control in the Modernisation Era: Moving Towards a Differentiated Administrative Integration?' (2019) ELJ 292.

[50] A Ausfelder and others, 'EU Soft-Law: Non-binding but Enforceable' (29 June 2022) Paper presented at the 28th International Conference of the Europeanists, Council for European Studies, Lisbon (on file with the author).

[51] E Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge 2015).

[52] S Saurugger and F Terpan, 'Do Crisis Lead to the Policy Change? The Multiple-Streams Framework and the EU's Economic Governance Instruments' (2016) Policy Sciences 35.

IV.2. Factors related to the system of the EU

Three other factors are to be found in the overall system of the European Union.

First, soft law and the integration/disintegration perspectives might be linked to the context of a political or economic crisis. It can be argued that the severity of the crisis increases the likeliness for soft law to be transformed into hard law, and thus would further integration in the end.[53] But we already know that it is not necessarily the case. In recent years, we have witnessed integration processes in economic and financial governance, but not in migration policy.[54] For crises to have integrative effects, there must be specific conditions in the legal and political system.

The second systemic factor refers to the stringency of the EU's legal system. Against the idea of soft law triggering an evolution towards disintegration, a number of legal safeguards within EU law seem to prevent excessive differentiation and disintegration. The use of informal law-making should respect the principle of conferral (art. 5 TEU) and other principles such as institutional balance (art. 13 TEU),[55] sincere cooperation, coherence, and solidarity. It should also be respectful of fundamental rights as enshrined in the European Charter of Fundamental Rights. Generally speaking, and as seen before, the Court is protective of the EU legal order and can even decide that an informal instrument is in reality a binding commitment, because it was the intention of the parties to make it legally binding.

Finally, the third factor is to be found in the European system of actors. Here, the causal chain would include a small group of Member States and institutions, acting as policy entrepreneurs, and creating a large coalition in favour of integrative solutions.[56] Under these conditions, soft law would finally be transformed into hard law, and further integration. In an integrated organization such as the European Union, the governance system sometimes triggers hardening processes. This was the case for Justice and Home Affairs (JHA), the first pillar of the Maastricht Treaty, which is more and more embedded in hard law since the Amsterdam Treaty (partial communautarisation of JHA) and the Lisbon Treaty (end of the pillar structure). CFSP has also been partially "legalized", with for instance the possibility to conclude external agreements recognized by the Amsterdam Treaty, while only memoranda of understanding and informal agreements used to be concluded. The European Charter gives another example of a soft law act being transformed into hard law, thanks to the Lisbon Treaty. These examples show that the use of soft law at EU level may be a pathway leading to more classical formal integration.

[53] *Ibid*.

[54] F Terpan and S Saurugger, 'Soft and Hard Law in Times of Crisis' cit.

[55] For example: case C-233/02 *France v Commission* ECLI:EU/C/2004/173; see also P García Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments' (2016) European Papers www.europeanpapers.eu 115.

[56] S Saurugger and F Terpan, 'Do Crisis Lead to the Policy Change?' cit.

V. Conclusion

Is soft law challenging the idea of integration through law by increasing differentiation in the European Union? Or is it a viable solution to further integration in the post-Brexit era? This *Article* has shown that it is difficult to come up with a clear-cut answer to this question.

On the one hand, soft law acts indeed as a solution, at least a temporary one, to help continue the integration process in a context of crisis. It triggers a temporary process of differentiation, which in turn leads to Member States' convergence and integration through the hardening of soft law. But, on the other hand, it also contributes to the "problem" in a period where EU law is already facing many difficulties such as challenges to the rule of law in some Member States, contestation of the primacy principle, contestation of the CJEU and its monopoly over the interpretation of EU law. In this context, the increasing use of soft law for reasons related to the protection of sovereignty could also be seen as a threat if it systematically and continuously results in more differentiation. Soft law would then trigger a process of "normalization" of the European Union, which would more and more resemble a classical international organization, due to a larger use of informal law-making. In the end, the use of informal means in the EU would contribute to decrease the EU's distinctiveness as an integrated regional organization based on integration through law and a relatively high degree of legitimacy.

Henceforth we will have to further investigate: first, whether the characteristics of soft law (steering or interpretative; backed up or not backed up with some enforcement mechanism) determine the outcome in terms of differentiation and integration, and second, whether the legal and political EU system is strong enough to prevent normative and territorial differentiation from escalating, and preserve the integration through law narrative.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION
Edited by Juan Santos Vara *and* Ramses A. Wessel

FLEXIBLE SOLIDARITY IN THE NEW PACT ON MIGRATION AND ASYLUM: A NEW FORM OF DIFFERENTIATED INTEGRATION?

JUAN SANTOS VARA*

ABSTRACT: Flexible solidarity is presented by the Commission in the New Pact on Migration and Asylum as a solution to break the deadlock in the reform of the EU asylum policy. The aim of this *Article* is to analyse to what extent the development of flexible solidarity in the field of asylum will allow the EU to address the shortcomings that the CEAS is facing today. The key question is whether differentiation as regards solidarity serves to further develop the EU asylum policy by introducing a useful degree of flexibility to accommodate the different interests of the Member States or the multiplication of forms of solidarity will lead in the long run to more disintegration. It will also be assessed to what extent the gradual approach followed by the French Presidency of the Council in the first semester of 2022 will allow to make concrete progress on the New Pact on Migration and Asylum and achieve the ambition of a comprehensive asylum and migration policy at EU level in the future.

KEYWORDS: New Pact on Migration and Asylum – flexible solidarity – Common European Asylum system – external dimension of migration policies – differentiated integration – return sponsorship.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/613

I. Introduction

The existence of differentiation between Member States has become a structural feature of the EU legal order that has always been present in the integration process. Variable integration has constantly evolved through the different reforms of the Treaties in order to accommodate the political interests of some Member States or to take into account the lack of willingness of some countries to pursue further integration.[1] For this reason, various forms of differentiation have been developed in order to combine the right of some Member States not to participate in unwanted integration and the right of others to further pursue the integration process. Differentiated integration has been particularly intensive in the Area of Freedom, Security and Justice (AFSJ) in the last decades. The AFSJ covers a broad range of policies, including migration, asylum and border control, judicial cooperation in civil law and cooperation in police and criminal matters. The progress towards further integration has been combined with the emergence of intergovernmental cooperation in the AFSJ leading to the granting of derogations from common rules to a group of countries that opposed supranational cooperation, mainly the UK, Ireland and Denmark. The "opt-in/opt-out" arrangements are the most emblematic example of EU differentiation in the AFSJ. The relationship between supranational integration and intergovernmental cooperation has led to a complex decision-making system. As argued by Peers "the institutional framework for EU JHA (Justice and Home Affairs) is historically complex, in particular due to its use of different rules over time regarding decision-making, jurisdiction of the EU courts, legal instruments and their legal effect, and territorial scope".[2]

As regards migration policies, some Member States were reluctant to transfer competences to the EU since this issue is very sensitive for national sovereignty. However, Member States have been willing to address together common transnational challenges and protect at the same time their national interests. As pointed out by Monar, differentiation in relation to migration and asylum matters "has emerged primarily in order to allow for the pursuit of a 'deepening' of integration in circumstances in which the full participation of some countries is not possible".[3] EU migration policies illustrate a system of differentiated

[1] On this issue, see, among others: K Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) CMLR 1057-1059; B Martenczuk, 'Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs' in B Martenczuk and S van Thiel (eds), *Justice, Liberty, Security: New Challenges for EU External Relations* (VUB Press 2008) 493; J Santos Vara, 'The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty' (2008) European Journal of Law Reform 577-599; J Santos Vara and E Fahey, 'Transatlantic Relations and the Operation of AFSJ Flexibility' in S Blockmans (ed.), *Differentiated Integration in the EU: From the Inside Looking Out* (Centre for European Policy Studies 2014) 103; P García Andrade, 'La geometría variable y la dimensión exterior del espacio de libertad, seguridad y justicia' in J Martín y P de Nanclares (eds), *La dimensión exterior del espacio de libertad, seguridad y justicia de la Unión Europea* (Iustel 2012).

[2] S Peers, *EU Justice and Home Affairs Law. Volume I: EU Immigration and Asylum Law* (Oxford University Press 2016 Fourth Edition) 7.

[3] J Monar, 'The "Area of Freedom, Security and Justice: "Schengen" Europe, Opt-outs, Opt-ins and Associates' in K Dyson and A Sepos (eds), *Which Europe? The Politics of Differentiated Integration* (Palgrave 2010) 289.

integration *par excellence*.[4] Ireland and the UK before Brexit, together with Denmark, have been the main beneficiaries of differentiated integration in relation to asylum and migration, having obtained positions that the Member States that joined the EU in the last two decades were unable to achieve. Acceding countries are not granted the possibility to choose whether to become bound by asylum and migration measures or not. The special status given to this group of countries is perhaps the epitome of differentiation in contemporary EU law. The opt-out/in provisions ostensibly indicate an outward constitutional stance of isolation towards further and deeper integration and seem to have generated much legal and even political incoherence. The Court of Justice has tried to protect the integrity of the EU legal order and limit the cherry picking approach as regards new measures building upon the Schengen acquis.[5] After the withdrawal of the UK, the opt-out/in regime has lost its major significance since the UK was the biggest advocate of variable geometry in this field. As observed by Curtin and Patrin, "internal differentiation may thus shift towards legal instruments that are better embedded in the EU law framework and which allow for flexible participation in secondary law".[6]

The departure of the UK only partially softens the tensions existing in the Common European Asylum System (CEAS) context since it enjoyed a number of opt-outs in the field; rather, other Member States are the new objectors to common policies and integration in the fields of asylum and migration. The EU has not been able to provide for adequate measures of solidarity, trying to address migration emergencies through temporary and *ad hoc* solutions. As it has rightly been argued, "the reform of the CEAS has been stalled for more than four years mainly due to a lack of consensus among the Member States on the implementation of the principle of solidarity [...]".[7]

The implications of the principle of solidarity in asylum and migration policies are not well defined in the Treaties. According to arts 80 and 67(2) TFEU, the policies on border checks, asylum and migration shall be governed by the principle of solidarity and fair sharing of responsibility. However, the Treaties foresee only solidarity and fair sharing of responsibility between the Member States and not towards refugees and migrants. Art. 80 refers explicitly to financial solidarity, but the principle includes other forms of solidarity like the relocation of refugees, the establishment of redistribution quotas or of operational support.[8] There is clearly a lack of support among Member States that is not compatible with

[4] AC d'Appolinia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' (2019) Comparative European Politics 194.

[5] See Case C-137/05 *UK v Council* ECLI:EU:C:2007:805 para. 63.

[6] D Curtin and M Patrin, 'EU Constitutional Standards of Democracy in Differentiated Integration' (EUI Working Paper RSC 2021/80).

[7] M Moraru, 'The New Design of the EU's Return System Under the Pact on Asylum and Migration' (14 January 2021) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

[8] See D Thym and E L Tsourdi, 'Searching for Solidarity in the EU Asylum and Border Policies: Constitutional and Operational Dimensions' (2017) Maastricht Journal of European and Comparative Law 611.

art. 80 TFEU. This reality allows for different interpretations of what solidarity implies in practice.[9] As it has been pointed out, "although its concrete content may be fluid, contextual, and with varying degrees of thickness depending on the circumstances, it does permeate the European project in a structural way, whatever the policy area, type of competence, and level of integration concerned".[10]

In this *Article*, differentiation is understood as the non-application or exclusion from EU common rules or policies of at least one Member State. According to de Witte et al., differentiation refers to "the facilitation and accommodation of a degree of difference between Member States or regions in relation to what would be otherwise common union policies".[11] Differentiation in the field of asylum takes different legal forms, ranging from the non-participation of the UK in the past and Ireland and Denmark today in most legal instruments to the EU's tolerance in cases of incorrect implementation of common asylum standards.[12] This *Article* distinguishes formal differentiation from the model of flexible and differentiated solidarity proposed in the New Pact on Migration and Asylum, both of which can be conceived as differentiated integration in the field of asylum.[13] Even though flexible solidarity is not strictly speaking a form of differentiation, it might lead in practice to a lack of uniform application of the CEAS in various Member States.

Flexible solidarity is presented by the Commission in the New Pact on Migration and Asylum as a solution to break the deadlock in the reform of the EU asylum policy.[14] There are several references to the word "flexibility" in the Pact. Flexible solidarity in the fields of asylum and returns is considered a key instrument to advance in the reform of asylum system in the EU by allowing common agreement among Member States. The aim of this *Article* is to analyse to what extent the development of flexible solidarity in the field of asylum will allow the EU to address the shortcomings that the CEAS is facing today. The first section of this *Article* presents the evolution of differentiated integration taking into account its intergovernmental origins and its substantial implications in the field of asylum. In the second section, flexible solidarity in the New Pact on Migration and Asylum will be analysed paying

[9] See F Maiani, 'A "Fresh Start" or One More Clunker? Dublin and Solidarity in the New Pact' (20 October 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu; R Bejan, 'Problematizing the Norms of Fairness Grounding the EU's Relocation System of Shared Responsibility' (EUI Working Papers 2018/35) 10.

[10] V Moreno-Lax, 'Solidarity's Reach: Meaning, Dimensions and Implications for EU (External) Asylum Policy' (2010) Maastricht Journal of European and Comparative Law 740–762. See also S Peers, 'Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon' (2008) European Journal of Migration and Law 219-236.

[11] B de Witte, D Hanf and E Vos, *The Many Faces of Differentiation in EU Law* (Insersentia 2001).

[12] N EL-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 362.

[13] Communication COM(2020) 609 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 23 September 2020 on a New Pact on Migration and Asylum, p. 22.

[14] *Ibid*.

particular attention to the legal and political issues involved in this proposal. The key question is whether differentiation as regards solidarity serves to further develop the EU asylum policy by introducing a useful degree of flexibility to accommodate the different interests of the Member States or the multiplication of forms of solidarity will lead in the long run to more disintegration. The third section will be devoted to analysing the implications of flexible solidarity for the relations with third countries. As a result of the deadlock in the reform of CEAS, the EU institutions and the Members States are increasingly paying attention to enhancing cooperation with third countries in order to increase the rate of return of irregular migrants. The fourth section will focus on analysing to what extent the gradual approach followed by the French Presidency will allow to make concrete progress on the New Pact on Migration and Asylum and achieve the ambition of a comprehensive asylum and migration policy at EU level in the future.

II. The evolution of differentiated integration in the field of asylum

Differentiated integration is not a new phenomenon in the field of asylum and migration. Before their integration within the former Community pillar by the Treaty of Amsterdam in 1997, EU Member States started developing their cooperation in this area following an intergovernmental method. The most well-known example of this experience was the signature of the Schengen Agreement in 1985 and the subsequent adoption of an international Convention for its implementation in 1990. However, since migration and asylum policies are very sensitive from the perspective of national sovereignty, Member States have always been reluctant to transfer competences to the EU. The EU was endowed with competences in this area for the first time by the Maastricht Treaty. The entry into force of the Treaty of Amsterdam led to the introduction of differentiation in the field of migration and asylum since not all EU acts apply to all Member States. Those Member States that opposed communitarisation were given the possibility of participating in the AFSJ to the extent that they wished. For this reason, it has been argued that "the flexibility clause introduced within the framework of Title IV should be regarded less as closer cooperation, and more as a communitarisation *à la carte*".[15]

In the Amsterdam Treaty, the UK, Ireland and Denmark obtained opt-outs from Title IV of the former EC Treaty on visas, asylum, migration and other policies related to the free movement of persons. However, the Treaty of Lisbon complicated this situation by extending the exclusion of these two countries to police and judicial cooperation in criminal matters.[16] At

[15] G Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (Martinus Nijhoff 2006) 30.

[16] Currently, the situation of Ireland is regulated by three different protocols: Protocol 19 of the European Union of 26 October 2012 on the Schengen Acquis integrated into the framework of the European Union, Protocol 20 of the European Union of 26 October 2012 on the application of certain aspects of art. 26 TFEU to the United Kingdom and to Ireland and Protocol 21 of the European Union of 26 October 2012 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.

the same time, according to the Protocol on the Position of Denmark, this country remains completely out from the measures adopted in the AFSJ, with no possibility of opting in.[17] The application to Denmark of any measure adopted pursuant to Title V of the TFEU depends on the conclusion of an international agreement between this country and the other Member States.[18] Therefore, Denmark participates in Schengen related measures on an intergovernmental basis and not within the framework of EU law. In practice, the recourse to parallel agreements has allowed to develop an effective cooperation between Denmark and the other EU Member States.[19] The position of Ireland – and in the past the UK – differs substantially from the situation of Denmark. While the UK and Ireland were not willing to participate in a cooperation concerning the establishment of an area without borders, Denmark was concerned with the transfer of competences in this field to the EU. For this reason, the cooperation with Denmark has developed in this area following an intergovernmental method.

According to Protocol 21 on the Position of the UK and Ireland in respect of the entire AFSJ, these countries did not take part in the adoption of measures pursuant to Title V of Part Three of the TFEU. The reasons commonly asserted for the need for a particular regime relate, firstly, to the Common Travel Area shared by Ireland with the UK and, secondly, to the common law tradition also shared by both countries, a tradition that is asserted to require special treatment in this regard.[20] Consequently, its effect was that "no measure adopted pursuant to that Title, no provision of any international agreement concluded by the Union pursuant to that Title and no decision of the Court of Justice interpreting any such provision or measure shall be binding upon or applicable to the UK or Ireland".[21] The conclusion of international agreements was also complicated by the peculiar position of the UK and Ireland. Since the UK enjoyed an opt-out regime, it could be considered that the withdrawal of the UK from the EU did not have implications for migration policies. However, the UK has made ample use of the opt-in mechanism to take part in internal measures and international agreements involving a complex exercise of EU competences in this field. As it has been stated, "if extracting oneself from a derogation regime was expected to be simple, the legal imbroglio characterising variable geometry in the AFSJ [...] clearly contradicts this".[22]

[17] Protocol 22 of the European Union of 26 October 2012 on the Position of Denmark.

[18] The Danish Protocol provides that this country may decline to avail itself of all or part of this Protocol. However, Denmark rejected in a 2015 referendum the option to move towards an opt-out/opt-in regime similar UK/Irish model. As a result of it, the Danes maintained a full opt-out from the AFSJ.

[19] It has been held that "the fact that practical arrangements revert or at least minimize the explicit wish of exclusion of a Member State undermines the democratic legitimacy of such cooperation and diminishes the significance of popular vote", see D Curtin and M Patrin, 'EU Constitutional Standards of Democracy in Differentiated Integration' cit. 35.

[20] J Santos Vara and E Fahey, 'Transatlantic Relations and the Operation of AFSJ Flexibility' cit. 103-123.

[21] Art. 2 Protocol 21 cit. A similar provision is included in art. 2 of Protocol 22 cit.

[22] P García Andrade, 'Outside the Opt-out: Legal Consequences of the UK's Withdrawal from the EU for External Action in the AFSJ' in J Santos Vara and R Wessel (eds), *The Routledge Handbook on the International Dimension of Brexit* (Routledge 2021) 112.

The situation of the UK, Ireland and Denmark introduced a high level of complexity and diversity into the development of the asylum and migration policies. This was the price that had to be paid in order to achieve the "communitarisation" of the third pillar. As it has been argued, "allowing the possibility of too many 'speeds' going in too many different directions might have helped to end the pillarisation but [might have created] an Area of Freedom, Security and Justice too prone to 'differentiation' and 'exceptionalism'".[23] Furthermore, Title V of the TFEU continues to reflect the tension between Community and intergovernmental approaches.[24] The opt-out regime of Denmark, Ireland and the UK before Brexit raises serious challenges as regards representation, political and legal accountability as well as transparency since EU law provides different status of Member States and the jurisdiction of the Court of Justice is not uniform.[25] One of the major implications of differentiation in the AFSJ is that it is not always easy to understand "who is in, who is out and who is partially out".[26]

The possibilities of differentiated integration laid down in primary law have had a substantial impact in the field of asylum over the past few years. While the UK and Ireland have initially cooperated in the development of the CEAS, this attitude changed after the entry into force of the Lisbon Treaty and the hostile political atmosphere towards further integration that emerged in the UK in the first two decades of this century. The UK, Ireland and Denmark did not take part in the second phase of the CEAS. As a consequence, the directives on qualification, reception conditions and procedures were not binding on these three countries.[27] The only exception was the Dublin and Eurodac regulations that are applicable to all Member States, as well as to the Schengen associated countries (Norway, Iceland, Switzerland and Liechtenstein).[28] Such a differentiated regime granted the UK and Ireland

[23] S Carrera and G Florian, 'The Reform Treaty & Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice' (17 August 2007) CEPS Centre for European Policy Studies www.ceps.eu 8.

[24] J Santos Vara, 'The External Dimension of the Area of Freedom, Security and Justice in the Lisbon Treaty' cit. 577-599.

[25] D Curtin and M Patrin, 'EU Constitutional Standards of Democracy in Differentiated Integration' cit. 36-37.

[26] *Ibid*.

[27] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

[28] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person; Regulation (EU) 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-

a preferential status allowing them to return asylum seekers to the country of first entrance and to lower the protection standards for asylum seekers without applying the legislation that provides for minimum standards protection at EU level. EL-Enany has correctly argued that "the refusal to agree to the legally enforceable safeguards that underlie the Dublin system raises questions as to whether the EU should in principle tolerate such cherry-picking in a sensitive area of law that directly affects the lives of vulnerable individuals".[29] In the aftermath of Brexit, the UK/Irish opting out/in has lost its major implications as Ireland is the only Member State that can profit thereof. However, Ireland has not yet opted into the directives on qualification, reception conditions and procedures.

More recently, a new form of differentiation between Member States emerged as a result of the so called "European refugee crisis of 2015". Member States substantially diverged not only on the approach to be followed in order to confront the crisis, but also on how to reform migration policies. In recent years, the CEAS has revealed many of its shortcomings in the aftermath of the Arab Spring and the Syrian and Libyan crises. The Dublin system has put unsustainable pressure on the Mediterranean frontline states in the EU and has led to the collapse of asylum systems in Greece, Malta and partly also in Italy and Spain. The refugee crisis of 2015 revealed that the system was ill-suited to respond to the increase of refugee arrivals to the EU Member States. The reform of the Dublin rules or *ad hoc* relocation arrangements have been opposed by a group of mainly Central and Eastern European Member States that were not affected by migration until the outbreak of the war in Ukraine or were mere transit countries. This group has traditionally opposed extra-European migration for ideological and cultural reasons. However, the Mediterranean countries contested the criteria and mechanisms determining the country responsible for examining asylum applications. As a result of the crisis "what was already a multi-layered system became even more chaotic when EU member States reacted to this crisis by abusing existing legal elements allowing flexibility".[30] The lack of agreement between Member States is also explained by "the deep disagreement – if not 'fracture' – that exists between Member States on the values that lie at the foundation of this policy".[31]

Internal differentiation in the field of asylum has been combined with external differentiation since legal acts adopted in this area are applicable to a group of third countries. The four associated States to the Schengen system are included in the territorial scope of EU legislation in this area (Iceland, Liechtenstein, Norway and Switzerland). The

country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice.

[29] N EL-Enany, 'The Perils of Differentiated Integration in the Field of Asylum' cit. 367.

[30] AC d'Appolinia, 'EU Migration Policy and Border Controls: From Chaotic to Cohesive Differentiation' cit.

[31] J Silga, 'Differentiation in the EU Migration Policy: The "Fractured" Values of the EU' (2022) European Papers www.europeanpapers.eu.

participation of Denmark, Finland and Sweden in the Schengen system has led Norway and Iceland to join it in order to preserve the Nordic Passport Union between those five countries. Switzerland and Liechtenstein participate in the Schengen area respectively since 2008 and 2011. This group of countries are also part of the Dublin system establishing different criteria to determine the State that is responsible for examining asylum applications. As a result of the overlapping of internal and external differentiation, "a layer of international agreements is added on top of the EU supranational legal framework".[32] Furthermore, the UK may cooperate with the EU in the future within the framework of the Trade and Cooperation Agreement (TCA) since this broad international instrument is expected to be completed by specific agreements between both sides.[33]

III. Flexible solidarity in the New Pact on migration and asylum

III.1. The proposal for a regulation on asylum and migration management: A fresh start?

The Commission presented the New Pact on Migration and Asylum as "a fresh start" to address the challenges that the EU faces in the field of asylum.[34] The Commission intends to close gaps between the various realities faced by different Member States and promote mutual trust by delivering results through effective implementation. In its Proposal for a Regulation on asylum and migration management (RAMM), the Commission admitted that "the current migration system is insufficient in addressing these realities. In particular, there is currently no effective solidarity mechanism in place and no efficient rules on responsibility".[35] The incapacity to find political agreement to reform the Dublin system is a clear indicator of the limits of the current legal framework. During negotiations on the 2016 CEAS reforms, the proposal to introduce a mandatory scheme of solidarity was strongly opposed by a group of countries.[36]

In New Pact on Migration and Asylum, the Commission proposes to abolish Dublin III Regulation and to withdraw its 2016 proposal amending the Dublin Regulation while

[32] D Curtin and M Patrin, 'EU Constitutional Standards of Democracy in Differentiated Integration' cit. 44.

[33] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part of 30 April 2021.

[34] COM(2020) 609 final cit. 22.

[35] Communication COM(2020) 610 final Proposal for a Regulation of the European Parliament and of the Council of 23 September 2020 on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund], p. 2.

[36] According to COM(2016) 270 final Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, once a Member State received asylum applications exceeding 150% of its capacity level, a so-called corrective allocation mechanism would enter into place.

replacing them with a new, broader instrument for a common framework for asylum and migration management.[37] However, the core elements of the Dublin system, determining the State that is responsible for asylum applications, are preserved in the New Pact on Migration and Asylum.[38] The Commission considers that "no Member State should shoulder a disproportionate responsibility and that all Member States should contribute to solidarity on a constant basis".[39] Solidarity is conceived in the new Regulation "as a corrective mechanism to the functioning of the ordinary rules on the attribution of responsibility".[40] The objective of the RAMM is to develop an integrated approach for migration and asylum policies, that ensures a fair sharing of responsibility and addresses effectively mixed arrivals of persons in need of international protection and those who are not. This new solidarity mechanism aims to reflect the different challenges created by different geographical locations and ensures that irregular arrivals of refugees are handled by the EU as a whole.[41]

The Commission decided to move away from the mandatory relocation system. The Council Decisions of 2015 on relocation were adopted as emergency measures and derogated for the first time the rules on attribution of responsibility set by the Dublin system.[42] The Commission proposed in the RAMM a flexible solidarity system among Member States. If a Member State is faced with certain migratory pressure, other Member States will have to support it, depending on their GDP and population size.[43] According to the original proposal of the Commission, solidarity contributions allow other Member States to choose between the relocation of a number of asylum applicants, sponsorship of the return of illegally staying third-country nationals, relocation of beneficiaries of international protection, capacity-building and operational support, or a combination of these measures.[44] In other words, Member States will have the flexibility to decide whether and to what extent they will share their effort between persons to be relocated and those to whom return sponsorship would apply. The Commission considered that the new solidarity system leaves

[37] COM(2020) 610 final cit.

[38] COM(2020) 609 final cit. See Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

[39] COM(2020) 609 final cit. 2.

[40] European Parliament, 'The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment' (12 August 2021) www.europarl.europa.eu 88.

[41] European Commission staff working document SWD(2020) 207 final Proposal for a Regulation of the European Parliament and of the Council of 23 September 2020 on asylum and migration management amending Council Directive (EC)2003/109 and the proposed Regulation (EU)XXX/XXX [Asylum and Migration Fund].

[42] Decision 2015/1601 of the Council of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; Decision 2015/1523 of the Council of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

[43] Art. 54 COM(2020) 610 final cit.

[44] *Ibid*. art. 45.

Member States with viable alternatives to relocation and ensures that the pressure on a Member State is effectively alleviated by relocation or return sponsorship. A similar system will be applied when a Member State needs support in cases of disembarkation following Search And Rescue (SAR) operations.[45] This mechanism intended also to replace the *ad-hoc* solidarity initiatives following SAR disembarkations of the past years.

The mechanism of flexible solidarity responds to the realpolitik vision that is present in the proposals included in the New Pact.[46] In the last years, Member States have shown that they have different views on how to ensure a fair sharing of responsibility of persons in need of international protection. While Mediterranean countries have been calling for the introduction of an EU mandatory relocation system for asylum seekers, the Visegrád States (Hungary, the Czech Republic, Poland and Slovakia) have fiercely opposed such a system. The proposal of the Commission is based on the assumption that those Member States that strongly opposed mandatory relocations in the past will be more willing to accept a fair share of responsibility of asylum seekers if the mechanism is flexible.

III.2. The management of flexible solidarity

According to the system proposed by the Commission in 2020, every Member State will have the flexibility to decide whether and to what extent they will share their effort between persons to be relocated and those to whom return sponsorship would apply. Furthermore, Member States may choose to contribute through other forms of solidarity such as capacity building, operational support, technical and operational expertise, as well as support on the external aspects of migration. The solidarity mechanism was presented as comprehensive and it could be adapted to the different situations presented by the migratory challenges faced by the Member States.[47]

Flexible solidarity will primarily focus on relocation or return sponsorship. Under return sponsorship, Member States would provide all necessary support to the Member State under pressure to swiftly return those who have no right to stay, with the supporting Member State taking full responsibility if return is not carried out. If returns are not conducted within eight months, or four in cases of crisis, the migrants have to be transferred to the territory of the sponsoring state.[48] Member States can focus its support on the nationalities from which they are expecting to reach a better chance of effecting returns. The supporting State can provide financial or logistic assistance, support in

[45] *Ibid*. arts 47-49.

[46] D Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfall of the "New" Pact on Migration and Asylum' (29 September 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

[47] Proposal COM(2020) 613 final for a Regulation of the European Parliament and the Council of 23 September 2020 addressing situations of crisis and force majeure in the field of migration and asylum.

[48] Art. 55(2) COM(2020)610 final cit.

readmission negotiations with third countries, or even organize return flights.[49] As it has been argued, the RAMM "is purposely open and flexible about the forms of support that states acting as 'return sponsors' may offer".[50]

The Commission is entrusted itself with the role of identifying when a Member State is confronted with recurring arrivals, a situation of crisis or risk of migratory pressure, which allows for the activation of the solidarity mechanism.[51] In these circumstances, the Commission will identify the overall needs of the Member State that receives an unexpected influx of migrants and set out in a report the measures needed to address the situation, after close consultation with the Member State concerned. Other Member States may contribute voluntarily to solidarity at any time, under the coordination of the Commission, but the contributions have to be orientated to address the needs of a specific Member State. The RAMM leaves us "with a Dublin system in all but name", leading also to "an ultra-bureaucratic solidarity".[52]

The proposal of flexible solidarity also includes corrective mechanisms in case the contributions made by the Member States are not enough to address a specific migratory pressure. If, once all responses are received, there is a shortfall in relocation/return sponsorship, Member States will first be asked to revise their response choice in a Solidarity Forum. If, following this, there is still a shortfall of more than 30% of the necessary number of relocations or return sponsorships, each Member State would be asked to relocate or return at least 50% of the persons that they were allocated.[53] It is not entirely clear how the system would function in practice in case that it is adopted. As it has been rightly pointed out, "the solidarity mechanism will entail a complicated matching exercise between what benefiting states need and what sponsoring states are willing and able to offer".[54] The Member States that are not willing to contribute, may find ways to avoid contributing to the solidarity mechanism. It has been stated that "the proposal in fact concentrates the power to make all the key decisions in the hands of the Commission, to decide what the solidarity needs are and how these should be distributed".[55] Since the Commission is granted a wide discretional power in the management of the solidarity mechanism, it is essential that the institution is perceived as an impartial broker among Member States.[56]

[49] *Ibid*. art. 52(3).

[50] O Sundberg Diez and F Trauner, 'EU Return Sponsorships: High Stakes, Low Gains?' (19 January 2021) European Policy Centre www.epc.eu.

[51] See F Maiani, 'A "Fresh Start" or One More Clunker?' cit.

[52] See S Carrera and others, *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum* (Study Requested by the LIBE Committee July 2021) www.europarl.europa.eu; F Maiani, 'A "Fresh Start" or One More Clunker?' cit.

[53] Art. 53(2) COM(2020) 610 final cit.

[54] O Sundberg Diez and F Trauner, 'EU Return Sponsorships' cit.

[55] V Moreno-Lax, 'Solidarity's Reach' cit.

[56] C Woollard, 'Editorial: The Pact on Migration and Asylum: It's Never Enough, Never, Never' (25 September 2020) ECRE Weekly Bulletin ecre.org; F Maiani, 'A "Fresh Start" or One More Clunker?' cit.

III.3. Return sponsorship: A concept that did not please anyone

Return sponsorship has been presented as a solution to the political impasse that has characterised debates on solidarity in the EU.[57] However, this form of solidarity has been equally opposed both by Visegrád and Mediterranean countries. When the New Pact on Migration and Asylum was released, it was considered that the return sponsorship was a concession to the Visegrád group and countries, such as Austria, Denmark and Slovenia, because they have always opposed mandatory relocations of asylum seekers. This group of countries opposed the obligation to transfer migrants and refugees to the territory of the sponsoring State if the return to third countries is not successful.[58] Return sponsorship has even been qualified as relocation "through the back door".[59] In a non-paper document, published in December 2020, they argued that "the relocation or other forms of admission of migrants have to be of voluntary nature. Member States must not be forced to implement any particular instruments that could be considered as violation of their sovereignty".[60] On the other hand, Mediterranean countries expressed their concerns from the first moment as regards the concept of return sponsorship.[61] In November 2020, Spain, Italy, Greece and Malta published a joint letter considering that "the imbalances we see in the proposed elements of solidarity and responsibility need to be addressed" in order to develop a truly European migration and asylum policy.[62] They argued that the "the notion of mandatory relocation should remain and be pursued as the main solidarity tool".[63] As there are huge political differences between the Member States, it seems that the concept of return sponsorship has been abandoned. In June 2022, the French Presidency of the Council has convinced the majority of Member States to start implementing a voluntary solidarity mechanism that does not include the concept of return sponsorship. The implications of this political agreement will be analysed in the last section of this *Article*.

The key question that was raised from the first moment was whether the system of flexible solidarity could provide a satisfactory solution to the challenges that the EU is facing in the field of asylum today. As it has been pointed out, "this raises the question of

[57] O Sundberg Diez and F Trauner, 'EU Return Sponsorships' cit.

[58] See M Peel and S Fleming, 'Brussels unveils plan to overhaul EU migration policy (23 September 2020) Financial Times www.ft.com; M Martín, 'El pacto migratorio europeo ignora las pretensiones de España' (23 September 2020) El País elpais.com.

[59] J Barigazzi, 'Germany's Horst Seehofer: Yes, We Can Get a Political Deal on Migration' (8 October 2020) Politico www.politico.eu.

[60] Polish Presidency of the Visegrád Group, 'New Pact on Migration and Asylum: Joint Position of Poland, Hungary, Slovakia, Czech Republic, Estonia, and Slovenia' (non-paper, 10 December 2020) www.visegradgroup.eu.

[61] M Martín, 'Sánchez asume el control del pacto migratorio para ganar fuerza en Bruselas' (28 September 2020) El País elpais.com.

[62] Government of Spain, 'New Pact on Migration and Asylum: Comments by Greece, Italy, Malta and Spain' (non-paper, 2020) www.lamoncloa.gob.es.

[63] *Ibid*.

whether such a degree of flexibility can be provided without undermining the overall system's balanced and fair functioning".[64] However, the most recent experiences of relocations adopted in the EU show a lack of willingness to contribute to relocations. In recent years, other mechanisms of flexible solidarity in the field of asylum have been adopted by the EU or groups of Member States. These include the Joint Declaration of Intent (Malta Declaration) of September 2019, by which several Member States committed to relocating a share of migrants disembarked in Malta or Italy following SAR operations, or the Commission's scheme to facilitate voluntary relocations of unaccompanied minors from the Greek island.[65] Even though they have provided support to Southern Member States, only a few Member States have voluntarily participated in both programs. In the absence of a common understanding of the scope and content of the solidarity principle, the objective of establishing mandatory and flexible solidarity runs the risk of leaving the problem unaddressed. The introduction of a cherry-picking approach as regards solidarity may lead to more differentiated integration in the field of asylum without accommodating the different interests of the Member States.

On 7 March 2022, the Council decision granting temporary protection to people fleeing Ukraine entered into force.[66] This unprecedented decision introduced a legal framework providing immediate protection in the EU for Ukrainians refugees. However, the Council Decision on the introduction of temporary protection has left Member States a wide margin of manoeuvre as to whether to extend the benefits to non-Ukrainian third country nationals.[67] The swift activation of the Temporary Protection Directive contrasts with the political blockage by EU Member States over the proposals presented in 2016 for reforming the EU asylum system.[68] The reform of the EU Dublin system or the introduction of *ad hoc* relocation arrangements have been mainly opposed by a group of countries that have an external border with Ukraine, in particular Hungary, Poland and Slovakia. It does not seem obvious that this group of countries has changed its perception of migration and will be willing to contribute in the future to the implementation of *ad hoc* relocations mechanisms benefiting

[64] O Sundberg Diez and F Trauner, 'EU Return Sponsorships' cit.

[65] See S Carrera and R Cortinovis, 'The Malta Declaration on SAR and Relocation: A Predictable EU Solidarity Mechanism?' (2019) CEPS Centre for European Policy Studies www.ceps.eu; European Commission, 'Migration: Commission Takes Action to Find Solutions for Unaccompanied Migrant Children on Greek Islands' (6 March 2020) ec.europa.eu.

[66] Implementing Decision (EU) 2022/382 of the Council of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of art. 5 of Directive 2001/55/EC and having the effect of introducing temporary protection.

[67] Directive 2001/55/EC of the Council of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[68] See S Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine: Time to Rethink Unequal Solidarity in EU Asylum Policy' (14 March 2022) CEPS Centre for European Policy Studies www.ceps.eu p. 2.

Member States in Southern Europe. It is not straightforward that the acceptance to uphold their legal obligations as regards Ukrainian refugees will be extended to asylum seekers and refugees coming from Africa and other regions of the world. Poland and Hungary opted for not activating the solidarity mechanism between Member States foreseen in the Temporary Protection Directive.[69] As it has been observed, "this shows a consistent and persistent opposition of these governments to the wider idea of intra-EU 'relocation' of TP beneficiaries and asylum seekers more generally".[70]

IV. Solidarity in cooperating with third countries in the New Pact on Migration and Asylum

Cooperation with third countries of origin and transit of migration flows is considered a key element in the New Pact to support the functioning of return sponsorships. The Pact aims to enhance mutual support in the relations with third countries that are generating particular migratory flows to Member States establishing what has been called an "external dimension of solidarity".[71] Solidarity contributions for the benefit of a Member State under migratory pressure may include "operational support and measures aimed at responding to migratory trends affecting the benefitting Member State through cooperation with third countries".[72] It is argued in the New Pact on Migration and Asylum that "working closely with countries of origin and transit is a prerequisite for a well-functioning system of returns, readmission and reintegration".[73]

In the original proposal of the Commission, it was considered that the return sponsorship mechanism would allow an increase in the number of effective returns to third countries. Member States tend more easily to agree on issues relating to the external dimension –particularly, on return and readmission – than to the reform of CEAS or the introduction of *ad hoc* relocation arrangements. It is expected that the sponsoring Member State will mobilize its network of bilateral cooperation on readmission, or by opening a dialogue with the authorities of a given third country where the third-country national should be deported. As mentioned above, if returns are not conducted within eight months, the third-country national has to be transferred to the sponsoring Member State.

From the beginning of the New Pact on Migration and Asylum, the Commission reaffirms that "the internal and external dimensions of migration are inextricably linked".[74] Section 6 entitled "working with our international partners" is devoted to engaging third

[69] See arts 24-26 Directive 2001/55/EC cit.

[70] S Carrera and others, 'The EU Grants Temporary Protection for People Fleeing War in Ukraine' cit.

[71] European Parliament, *The European Commission's New Pact on Migration and Asylum: Horizontal Substitute Impact Assessment* (European Parliamentary Research Service August 2021) www.europarl.europa.eu 74.

[72] Art. 45(1)(d) COM(2020) 610 final cit.

[73] COM(2020) 609 final cit. p. 22.

[74] *Ibid*.

countries in managing migration. The relationships with third countries have a direct impact on the effectiveness of policies inside the EU. Apart from addressing the root causes of irregular migration and developing legal pathways for legal migration, the Commission mentions the objective of reaching more effective cooperation with third countries on return and readmission. According to the Commission's press release, the Pact introduces "a change of paradigm in cooperation with non-EU countries" that will lead to "comprehensive, balanced and tailor-made partnerships", in particular with key partner countries of origin and transit of migrants.[75] As it has rightly pointed out "the approach adopted towards cooperation with third countries on migration has been 'comprehensive', 'global', 'balanced' – and some other synonyms – since the European Council in Tampere in 1999".[76] Therefore, the idea of putting into place flexible instruments that intend to address both the EU and partner countries' interests has always been present in the external dimension of migration.[77]

The Commission expresses its willingness to address the challenges that the EU is facing in the area of returns. Readmission is a cornerstone element of the international migration partnerships. For this reason, it has been argued that the EU migration partnerships can be better understood as "insecurity Partnerships".[78] Apart from pursing the full and effective implementation of EU agreements and arrangements on readmission with third countries and the completion of ongoing readmission negotiations, the Commission is looking for practical cooperative solutions to increase the number of effective returns.[79] The Commission is leaving aside in the New Pact the practical human rights implications stemming from the increasing number of informal arrangements on return and readmission, which are concluded in the absence of due democratic scrutiny and parliamentary oversight and are not subject to judicial scrutiny. In addition, as it has been held, "the Pact gives no consideration to the lessons learned from the ineffectiveness of past 'Partnerships' and EU's readmission priority".[80]

[75] European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity' (23 September 2020) ec.europa.eu.

[76] P García Andrade, 'EU Cooperation on Migration with Partner Countries within the New Pact: New Instruments for a New Paradigm?' (8 December 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu.

[77] See J Santos Vara, 'Soft International Agreements on Migration Cooperation with Third Countries: A Challenge to Democratic and Judicial Controls in the EU in EU External Migration Law' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019); J Santos Vara, *La dimensión exterior de las políticas de inmigración en tiempos de crisis* (Tirant lo Blanch 2020).

[78] S Carrera, 'Whose Pact? The Cognitive Dimensions of the New Pact on Migration and Asylum' (25 September 2020) CEPS Policy Insights www.ceps.eu 10.

[79] COM(2020) 609 final cit. 22.

[80] S Carrera and R Cortinovis, 'The Malta Declaration on SAR and Relocation' cit. 10.

The Commission continues to advocate for using a carrot and stick approach through the instrumentalization of other policy areas in order to incentivize expulsions.[81] A first step was made by introducing a link between cooperation on readmission and access to Schengen visas.[82] The revised Visa Code stipulates that the Commission assesses the level of readmission cooperation with third countries and reports to the Council on an annual basis.[83] In case the Commission reaches the conclusion that a partner is not cooperating sufficiently and taking into account "the Union's overall relations with the country concerned", it is expected to propose the Council apply specific restrictions to short-stay visa processing.[84] That linkage between cooperation on readmission and access to visas has been considered unfair to visa applicants and prejudicial to good international relations.[85] The idea of incorporating readmission into the whole external dimension is also reflected in art. 7 of the RAMM.[86] The conditionality is extended by calling the Commission to identify any measures which could be taken to improve the cooperation of a third country as regards readmission. The New Pact includes the possibility of applying restrictive visa measures to national countries not cooperating on readmission.

The implementation of flexible solidarity in the field of asylum could raise serious concerns from the perspective of external relations. It is not obvious that the third country concerned will accept the application of a readmission bilateral agreement concluded with the sponsoring Member State in the territory of the benefiting Member State. As it has been stated, "in acting as a sponsoring Member State, one is entitled to wonder why an EU Member State might decide to expose itself to increased tensions with a given third country while putting at risk a broader framework of interactions".[87] In addition, not all the EU Member States have developed an extensive network of bilateral readmission agreements with third countries. In general terms, "more than 70 per cent of the total number of bilateral

[81] For an analysis see J Santos Vara and L Pascual Matellán, 'The Informalisation of EU Return Policy: A Change of Paradigm in Migration Cooperation with Third Countries?' in E Kassoti and N Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022) 37-52.

[82] Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) as amended by Regulation (EU) 209/1155 of the European Parliament and of the Council of 20 June 2019.

[83] *Ibid*. art. 25(a)(5). See Communication COM(2021) 56 final from the Commission to the European Parliament and the Council of 10 February 2021 on enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy.

[84] COM(2020) 609 final cit. 23.

[85] E Guild, 'Negotiating with Third Countries under the New Pact: Carrots and Sticks?' (27 November 2020) EU Migration and Asylum Law and Policy eumigrationlawblog.eu. Linking cooperation on readmission and visa policy does not necessarily lead to ensure the cooperation of third countries "especially when the latter are in position to capitalize on their strategic position with regard to some EU Member States", see J P Cassarino and L Marin, 'The New Pact on Migration and Asylum: Turning European Union Territory into a Non-Territory' (20 November 2020) EU Law Analysis eulawanalysis.blogspot.com.

[86] COM(2020) 609 final cit. 23.

[87] JP Cassarino and L Marin, 'The New Pact on Migration and Asylum' cit.

agreements linked to readmission [...] concluded with African countries are covered by France, Italy and Spain".[88] It can be sustained that countries, such as Poland, Hungary and Czech Republic, "[...] are poorly placed to address bilateral readmission negotiations or the implementation of EU readmission agreements, which are a key bottleneck to successful returns".[89] If the "return sponsorship" mechanism is introduced in the future, it is doubtful that it will be helpful to develop a fair share of responsibility in the management of asylum and migration in the relations with third countries. If the mechanism of flexible solidarity is introduced in its original form, the EU return policy might end up being managed by a few Member States. It is doubtful that the system of return sponsorship would be acceptable if it would involve France, Italy and Spain acting as sponsoring Member States in the majority of cases. For these reasons, the introduction of flexible solidarity in the relations with third countries might lead to further differentiation and less fair share of responsibility in the management of asylum and migration policies. It seems that the majority of Member States realized that the flexible solidarity will never be implemented if it includes the ambiguous and controversial concept of return sponsorships.

V. The gradual approach: Towards a voluntary solidarity mechanism

The French Presidency of the Council has followed a gradual approach in order to make concrete progress on the New Pact on Migration and Asylum and achieve the ambition of a comprehensive asylum and migration policy at EU level in the future. As a result of this step-by-step approach, on 22 June 2022, the Member States agreed to start implementing a voluntary solidarity mechanism that does not include the concept of return sponsorship.[90] Previously, the Justice and Home Affairs Council reached a provisional agreement on the reform of asylum and migration policies.[91] This agreement is very relevant since it is not expected that Czech Presidency makes a substantial effort to advance the different proposals that are part of the New Pact. It seems logical to abandon the idea to introduce return sponsorship since most Member States did not support it. The voluntary mechanism is based on contributions in the form of relocation, financial support to a benefitting Member State or also to projects in third countries that may have a direct impact on the flows at the external border. The voluntary nature of this mechanism allows Member States to freely decide "on the nature and the amount of their contributions, regarding for example the group of persons concerned by relocations (nationality, vulnerability, etc.) or the Member States to which solidarity is provided".[92] Precedence is given to relocation upon other forms of solidarity in this new mechanism. It is foreseen

[88] *Ibid*.

[89] O Sundberg Diez and F Trauner, 'EU Return Sponsorships' cit.

[90] European Commission, 'Migration and Asylum: Commission Welcomes Today's Progress in the Council on the New Pact on Migration and Asylum' (22 June 2022) ec.europa.eu.

[91] *Ibid*.

[92] *Ibid*.

that relocations should primarily benefit Member States confronted with disembarkations following search and rescue operations in the Mediterranean and Western Atlantic route and also apply to other circumstances to take into account Cyprus' current situation or possible evolutions in the Greek islands.

The new system has been supported so far by 18 Member States and three associated Schengen countries that signed the Declaration on a solidarity mechanism in support of frontline Member States. While many Member States are not willing to offer relocation pledges in practice, only six Member States rejected directly the new mechanism – Hungary, Poland, Slovakia, Austria, Latvia and Denmark. The political agreement reached on the flexible solidarity mechanism has allowed the Member States to adopt a negotiating position on the proposals for the Screening and Eurodac Regulations, two of the most important legislative files included in the New Pact.[93] As it has been stated, the French Presidency managed to convince the Mediterranean countries "to agree on certain reforms and by doing so abandon the package approach, by providing a concrete win for them that can be sold to their publics, showing that they have convinced other Member States to provide them with 'solidarity'".[94] The Commission organized immediately in June 2022 a meeting on the solidarity platform with a view to rapidly implementing this mechanism and taking stock of the contributions. The Member States and the three associated countries that signed the Declaration on a solidarity mechanism committed to accept between 8000 and 9000 relocations pledges.

Although the voluntary solidarity mechanism agreed in June 2022 is a non-legislative and temporary instrument, it is considered a first step for the introduction of a permanent mechanism by the RAMM in the future and the gradual implementation of the New Pact. The Commission considered that "the implementation of this mechanism will provide useful lessons for the permanent mechanism on solidarity to be introduced by the Asylum and Migration Management Regulation, as proposed by the European Commission in 2020".[95] There is no doubt that it is better to introduce a predictable system rather

[93] The Proposal on the Eurodac Regulation aims to modernise the database of asylum seekers and irregular migrants in order to better manage applications and fight against irregular movements. See Amended proposal COM/2020/614 final for a Regulation of the European Parliament and of the Council of 23 September 2020 on the establishment of 'Eurodac' for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818. The Council also approved the negotiation mandate of the "screening" regulation, which provides for uniform rules for the procedures for conducting security, health and identity checks on persons presenting themselves at the external border who do not meet the conditions for entry into the European Union. See Proposal COM/2020/612 final for a Regulation of the European Parliament and the Council of 23 September 2020 introducing a screening of third country nationals at the external borders and amending Regulations (EC) 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817.

[94] ECRE Editorial, *End Game of French Presidency: Passing on a Partial Reform* (25 June 2022) ecre.org.

[95] European Commission, 'Migration and Asylum' cit.

that *ad hoc* arrangements that have been put in place every time that a crisis has arisen. It is a correct step in the right direction because solidarity arrangements and mechanism put in place so far have been based on coalitions of the willing. Finally, it is still too early to determine if the partial agreement reached in June 2022 would lead to a new dynamic that would allow to introduce a substantial reform of the CEAS.

VI. Conclusions

The objectors to common policies and integration in the fields of asylum and migration wish to keep their freedom in the regulation of these matters and are reluctant to apply the burden-sharing that lies behind the development of a real CEAS. They assume that the limitation of discretion entailed in the burden-sharing in this field poses a challenge to their sovereignty. They even consider that some of the proposed elements of the flexible solidarity mechanism put its ability to reduce the number of refugees and migrants on its territory in jeopardy. This group of countries is not willing to introduce reforms that are not in line with their domestic policy agenda. In addition, the implementation of the CEAS varies dramatically from one Member State to another, leading to divergences in acceptance rates of asylum seekers' applications and the conditions of reception. Therefore, a common feature of EU asylum policy is the lack of uniform application across all Member States.

The Commission claims to have adopted a pragmatic approach taking into account different interests raised by the Member States in the New Pact on Migration and Asylum. It is doubtful that by developing flexible solidarity in the field of asylum it would be possible to put in place a functioning asylum system and improve the situation of refugees during the most vulnerable moments of arrival and reception. The failure to reach an agreement between the Member States on the reform of the CEAS has led the EU to intensify the external dimension of migration policies and, in particular, to the shifting of responsibilities to third countries of origin or transit of migrants in the management of migration. There is no doubt that the lack of trust towards particular Member States lies behind the proposal on flexible solidarity. The consequence is that "through the envisaged model of 'asymmetric' interstate solidarity, the Commission seeks to reach a compromise that would remedy the politically untenable 'one-size-fits-all' approach to solidarity but, would at the same time nurture more divergence leading to differentiated integration".[96]

Introducing flexible solidarity for the allocation of migrants may alleviate the reluctance of some EU Member States, in particular Poland and Hungary, and encourage them to get more involved in the implementation of a functioning CEAS. This assumption cannot be taken for granted. As it has been pointed out in this *Article*, the differentiated

[96] See S Carrera and others, *The European Commission's Legislative Proposals in the New Pact on Migration and Asylum* cit.

integration of the UK has not led to further integration of this country on migration and asylum policies in the past. It is not self-evident that differentiated integration through flexible solidarity would be useful to support frontline countries that face a high pressure in their asylum systems and develop a more balanced and efficient distribution of responsibilities. Mandatory solidarity is only activated when a Member State is confronted with SAR cases, migratory pressure or a situation of crisis. There are no assurances that a significant number of refugees will be relocated since Member States may avoid relocation by offering solidarity in different ways. The effort to introduce a voluntary solidarity mechanism based on a predictable system is a welcome step that will avoid the need to find practical solutions every time that a crisis arises in the Mediterranean Sea. However, only the adoption of the RAMM would lead to develop a mandatory solidarity mechanism with a legislative basis.

The implementation of asylum policies directly affects the lives of individuals that are in a vulnerable situation. Flexible solidarity would not necessarily lead to better protection of asylum seekers and the development of more solidarity between Member States. More differentiation will probably not allow the EU to address the shortcomings that the CEAS is facing today as long as there is a lack of agreement between Member States on the implementation of the principle of solidarity. In the case that flexible solidarity is finally accepted in its current form by Member States, it will introduce a high level of complexity in the management of asylum and migration policies that will lead to further differentiation.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

BREXIT, EU FINANCIAL MARKETS AND DIFFERENTIATED INTEGRATION

SHAWN DONNELLY*

ABSTRACT: How does Brexit affect the manner in which the EU manages financial rules and regulations with the UK? How does it change the EU's need to rely on differentiated law internally to overcome intergovernmental conflict over the proposed legislation? This *Article* examines five different areas of financial market regulation and shows how significant differences between the UK and the rest of the EU, but often Germany, could only be combined in EU law by significant discretions in how national law applied to a common policy, and protections to keep those distinctions intact. A consequence of Brexit is that the EU need not rely on differentiated law as much as in the past. A risk to this convergence is the potential for the EU becoming a rule taker from the UK through regime complexity, which would allow the UK to *de facto* determine EU financial market law.

KEYWORDS: financial regulation – company law – harmonisation – battle of systems – regime complexity – legal norms.

I. INTRODUCTION

How and where can differentiated law for financial market regulation be simplified in the future after the departure of the UK from the European Union? What happens in the place of differentiated integration to manage UK-EU financial relations given continued financial services links that impact EU financial services? This *Article* first discusses the disruptive challenges brought about in European financial markets by Brexit. It analyses the prospects for international regime complexity to supersede differentiated integration

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/610

as a challenging but fruitful mechanism, provided sufficient political willingness of UK and EU legislators. These insights are applied to the use of differentiated law inside the EU prior to Brexit and contributes to literature on the Future of Europe.[1] It concludes that divergent UK and EU preferences make regime complexity difficult to agree on, but that the European Commission in particular effectively accepts rules set in the UK given the continued reliance of European businesses on certain parts of finance centred in London. Regime complexity offers foundations for managing the relationship, with potential risks of regulatory conflict into the future. Meanwhile, the EU will likely harmonise more of its own financial market regulation in the UK's absence.

London was the European Union's premiere financial centre, and one of the planet's key financial hubs. American, Chinese, Arab and European capital flowed into the City's financial markets, attracted by the scope and volume of financial services on offer, the expertise of the workers, and the infrastructure supporting the work that they do, from IT services, to exchanges and information platforms. Brexit, particularly the hard Brexit that removed the UK entirely from the EU's legal and institutional order, raised pressing questions about how Europe would organise financial services on which its economy depends. Even if much of Europe's continental economy is financed on the surface through banks rather than bonds and stocks organised through capital markets, contemporary banks themselves rely heavily on a deeper set of wholesale services located in London to fund themselves and carry out most of their other back-office operations.[2]

Brexiteer members of the UK Government expected the City to continue providing financial services to the EU economy after their hard Brexit, as the EU recognised their dependence on London for their economic survival.[3] This would have created a porous EU barrier for the City to exploit, and continue the relationship in which the UK made financial services rules and the EU accepted them. In effect, it would have established a novel relationship in which a discussion of differentiated integration of financial services might be considered, with the UK and the EU bound together by a set of shared rules that respected EU financial regulation principles. However, this did not occur. The Trade and Cooperation Agreement[4] made no provisions for financial services access. The Commission did not

[1] N Moloney, 'Brexit and Financial Services: (Yet) Another Re-ordering of Institutional Governance for the EU Financial System?' (2018) CMLRev 175.

[2] I Hardie and others, 'Banks and the False Dichotomy in the Comparative Political Economy of Finance' (2013) World Politics 691.

[3] S Hix and others, 'The UK's Relationship with the EU After Brexit' (RSC Working Papers 19-2022); D Pesendorfer, *Financial Markets (Dis)Integration in a Post-Brexit EU: Towards a More Resilient Financial System in Europe* (Palgrave Macmillan 2020) 193.

[4] Decision 689/2021/EU of the Council of 29 April 2021 on the conclusion, on behalf of the Union, of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, and of the Agreement between the European Union and the United Kingdom of Great Britain and Northern Ireland concerning security procedures for exchanging and protecting classified information.

grant EU equivalence status after the end of the transition period, meaning that UK-based financial services firms would be barred from doing business on the continent without establishing a legally independent and independently-funded subsidiary within the Common Market subject to EU regulation. In addition, EU companies seeking to list their shares on stock exchanges, or bonds on bond exchanges, currencies on currency exchanges and derivatives on derivative exchanges would have to do that in Europe rather than in the UK. Legally and institutionally, Brexit did not lead to differentiated integration, but the disintegration of a core UK-EU relationship.[5]

One result of this break is the transfer of assets and financial services activity from the UK to the EU. Amsterdam emerged as the EU's premiere stock market, while wholesale financial services moved to Paris and Frankfurt, with other European financial centres serving as satellites to these cities. In addition, the Commission bestowed EU equivalency status to US-based companies under certain conditions in the absence of an equivalency ruling for London-based firms.[6] However, the transfer of financial services has been far from complete, with EU companies still relying on specialised services from London, and UK-based firms transferring as few resources as they can while maintaining regulatory approval. This means taking financial services orders in the EU but managing them in the UK, for example.[7] Given political mistrust and competition between the UK and the EU more generally, particularly over adherence to the terms of the Northern Ireland Protocol, EU concerns of UK divergence in financial market regulation moving forward, and the EU's replacement of UK-based financial services with American ones, there is every reason to believe that this lack of an international arrangement for EU financial services will continue into the future.[8]

Another result of this break is that the existing differentiation of company and financial market regulation within the EU is likely to reduce over time, without entirely going away. At the same time, the distance between the UK and the EU will widen, making any differentiated integration between the two sides difficult and unlikely.

II. Differentiated law prior to Brexit

In the EU, differentiated law (framework legislation that provides significant discretion and variation in national legal approaches to accommodate conflicting approaches to regulating

[5] S James and L Quaglia, 'Brexit, the City and the Contingent Power of Finance' (2018) New Political Economy 258.

[6] S Donnelly, 'Post-Brexit Financial Services in the EU' (2022) Journal of European Public Policy 1.

[7] M Kalaitzake, 'Resilience in the City of London: The Fate of UK financial Services after Brexit' (2021) New Political Economy 610.

[8] The EU and UK agreed a 'Joint Declaration on Financial Services Regulatory Cooperation between the European Union and the United Kingdom' alongside the TCA, but it has not been ratified or implemented. See UK Parliament, 'New UK-EU Financial Services Inquiry Launched' (4 February 2022) UK Parliament committees.parliament.uk.

the same matter) in financial market regulation reflected varying degrees of normative difference between the UK and the rest of the EU over proper regulation of companies, both financial and non-financial. Five interconnected areas of law had their own degree of harmonisation, prudential standards, Member State discretions, as well as self-regulation by private entities. Company law, which spells out the legal and regulatory requirements for establishing and operating a company,[9] has the lowest level of harmonisation across the EU, thanks to UK conflicts with the rest of the EU, but particularly with Germany, regarding basic legal doctrine and instruments that define what a company is, and what obligations it has to various third parties.[10] Accounting law, which spells out the terms by which all market entities provide financial information to investors, tax authorities and other stakeholders, requires listed companies to report with international rules (International Financial Reporting Standards) alongside national rules. This two-track reporting system also formed a compromise between British and European accounting standards, but with the difference that national accounting standards within the EU, which are also tied to national tax codes and are therefore politically sensitive and resistant to harmonisation, are likely to remain divergent enough to ensure that this complicated system is used in the future. Securities regulation is highly harmonised not only due to the leadership of the UK in promoting open and consistently regulated financial markets, but also the willingness of other Member States to do so in the search for ready sources of investment capital. Insurance regulation remains a highly national, but coordinated area. Finally, banking law and regulation is highly differentiated, both in sub-fields (supervision is highly centralised while resolution remains heavily national within an EU context), and in terms of membership (eurozone ins and outs).[11]

This *Article* argues that the UK's departure from the EU reduces the need for differentiated law within EU financial market regulation, with some key areas remaining. The UK's departure means that labour rights in national company laws across remaining EU Member States are more similar, making upgraded European minimum standards and reduced differentiation in EU company law possible. Financial reporting (accounting) law harmonisation will be remain limited to the use of international financial reporting standards alongside national accounts for EU listed companies, given the continued use of Member State tax codes for national accounts. Securities law and supervision[12] will remain highly harmonised. Banking

[9] P Davies, *Introduction to Company Law*. (Oxford University Press 2020).

[10] S Donnelly, *The Regimes of European Integration: Constructing Governance of the Single Market* (Oxford University Press 2010.

[11] S Donnelly, 'Financial Stability Board (FSB), Bank for International Settlements (BIS) and Financial Market Regulation Bodies' in RA Wessel and J Odermatt (eds), *Research Handbook on the European Union and International Organizations* (Edward Elgar 2019) 360.

[12] Securities law covers all financial market activities not covered by banking or insurance law. This includes listing requirements for companies (Directive 2001/34/EC of the European Parliament and the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities; Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive

law[13] is becoming less differentiated as Banking Union evolves, replacing differentiation and discretion with new directives and a single supervisory rule book. Differentiated integration based on eurozone membership will persist, however. Finally, insurance law but not integration will remain differentiated, based on national protection of country-specific arrangements.

The rest of the *Article* is structured as follows. The next section outlines a framework for analysing and explaining regime complexity (RC) as a mechanism for replacing differentiated integration (DI) after Brexit, which is better suited for post-Brexit relations between the UK and the EU. After this section, the *Article* examines the regulatory areas mentioned, the origins of their use of differentiated law, and the prospects for change in light of no longer having to accommodate UK legal features. The final section turns back to the questions with which we started, and discusses lessons for future research.

III. Regime complexity and EU relations with non-Member States

Regime complexity is a method of organising relations between states over access to their territories and managing regulatory difference in the absence of common membership to a single legal order. It is not the same as differentiated integration, which is normally thought of as a form of organised relations between EU Member States.[14] Differentiated

2001/34/EC (Text with EEA relevance); Directive now 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/72/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provision of Directive 2004/109/EC Text with EEA relevance), rules for traders (Directive 89/592/EEC of the Council of 13 November 1989 coordinating regulations on insider dealing; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive); Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/42/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 Text with EEA relevance; Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment on transferable securities (UCITS) (recast) (Text with EEA relevance); Short Selling Regulation (EU) 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps Text with EEA relevance), financial advisors (Directive 2004/39/E of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC), and financial infrastructure (Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories Text with EEA relevance).

[13] Banking law covers corporate governance, and capital adequacy rules for banks as methods of crisis prevention, bank supervision, bank resolution (the closure of a bank) and deposit insurance as means of crisis management.

[14] D Leuffen, B Rittberger and F Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan 2012); R Bellamy and S Kröger, 'A Democratic Justification of Differentiated Integration in a Heterogeneous EU' (2017) Journal of European integration 625.

integration was useful for the UK as a Member State because it allows integration to proceed between a large group of countries based on common ambitions and a desire to pursue those together regardless of reservations by other Member States. It can include relations with third countries adopting and implementing EU rules in exchange for access to the Single Market, for example through the European Economic Area or the Schengen Agreement. This makes the EU a rule maker and third countries rule takers.[15] This reflects standard power politics expectations of how powerful states relate to other countries,[16] but also the EU's general strategy of establishing contractual relationships with third parties to enhance the bloc's economic, political and even military objectives.[17] Conversely, however, it can allow EU Member States to opt out of certain EU programmes, such as the common currency, or the Common Security and Defence Policy, allowing the others to go ahead.

Regime complexity, in contrast, denotes a legal framework in which the EU adopts rules, standards and procedures decided outside the EU, where it is not the (only) rule maker, but possibly a joint decision-maker or a rule-taker. These arrangements might be codified or informal. Others are not bound to follow EU decision-making procedures or legal principles and vice versa, unless these are enshrined in the formal connection between regimes, typically in a memorandum of understanding. Regimes set international standards and rules to manage transnational or intergovernmental activity for its members. Countries may also form multiple, overlapping and/or interconnected regimes in the same policy areas that allow coexistence of incompatible national approaches,[18] pertaining to all or part of an area like financial market regulation. Regime complexity can also defuse intra-EU disputes over legal rules through external arbitration.[19] The standard setters may even be private or politically independent if public authorities recognise their decisions through EU and national law.[20] The Commission's role is to negotiate regime arrangements that are consistent with the EU's own goals, and with the cohesion of the EU's legal and administrative order more generally.

[15] VA Schmidt, 'The Future of Differentiated Integration: A "Soft-core", Multi-clustered Europe of Overlapping Policy Communities' (2019) Comparative European Politics 294.

[16] DW Drezner, 'The Power and Peril of International Regime Complexity' (2009) Perspectives on Politics 65; C Damro, 'Market Power Europe' (2012) Journal of European Public Policy 682; S Donnelly, 'Failing Outward: Power Politics, Regime Complexity, and Failing Forward under Deadlock' (2021) Journal of European Public Policy 1573.

[17] S Meunier and K Nicolaidis, 'The Geopoliticization of European Trade and Investment Policy' (2019) JComMarSt 103; EM Hafner-Burton, 'The Power Politics of Regime Complexity: Human Rights Trade Conditionality in Europe' (2009) Perspectives on politics 3.

[18] KJ Alter and S Meunier, 'The Politics of International Regime Complexity' (2009) Perspectives on politics 13.

[19] S Donnelly and RA Wessel, 'The International Dimension of EMU: The Interplay Between the Global Financial Stability Architecture and the European Union' in F Amtenbrink and C Herrmann (eds), *The EU Law of Economic and Monetary Union* (Oxford University Press 2020) 99; S Donnelly 'Financial Stability Board (FSB), Bank for International Settlements (BIS) and Financial Market Regulation Bodies' cit.

[20] J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012); W Mattli and T Büthe, 'Global Private Governance: Lessons from a National Model of Setting Standards in Accounting' (2005) Law&ContempProbs 225.

While voluntarism is often assumed, it depends on the absence of disadvantageous power relations and regulatory disagreements between countries. Powerful states controlling critical resources may exert control of regimes that determine other areas of law and policy, so that the supposed voluntarism of legal contracts underlying regimes fades away into the shadow of structural dominance and even coercion by a single powerful state.[21] One regime sets out rules that EU and national governments are effectively bound by, setting out the parameters of what is politically allowed and not.[22] While this provides political and legal certainty, it sidelines the interests of dissenting states. Within the EU, Germany leveraged control over European Stability Mechanism (ESM) resources to force its own vision of bank regulation on other Member States for example.[23] Similarly, any agreement, explicit or tacit, providing continued UK financial services for the EU would similarly turn the EU into a rule-taker, unable to set its own legislation over British preferences.[24] This could lead to the EU wanting higher regulatory standards to ensure financial stability, for example, while the UK lowers its own to pursue additional business globally. While there has been considerable migration of financial services from London to the EU,[25] this is not the case in areas of critical infrastructure, particularly central counterparties, which guarantee financial payments between seller and buyer across the financial system. Neither the Commission nor the European Central Bank (ECB) desire to see regulatory standards in this critical area diverge from their own preferences and requirements.

The European Union has the intent to establish itself as home to a global financial centre after Brexit,[26] subject to EU law and regulation, and to control access to its market, substituting UK-based financial services as needed. Although the EU arguably did not consider such geopolitical calculations before,[27] it is justifiably concerned about becoming a rule-taker to UK financial services through mechanisms of regime complexity as the UK Government pursues regulatory divergence from Europe as part of its Global Britain strategy, but continues to set financial regulations and provide financial services. Thus, regime complexity is a possible mechanism for cooperation, but one fraught with potential disadvantage for the EU.

IV. The five worlds of financial market regulation

This section explains the use of differentiated law in financial market regulation as a means to bridge differences between Member States, and outlines how Brexit supports

[21] DW Drezner, 'The Power and Peril of International Regime Complexity' cit.

[22] T Pratt, 'Deference and Hierarchy in International Regime Complexes' (2018) International Organization 561.

[23] S Donnelly, 'Failing Outward: Power Politics, Regime Complexity, and Failing Forward under Deadlock' cit.

[24] Reuters, 'UK Cautions EU against Financial "Self Harm" over Brexit' (28 May 2020) Reuters www.reuters.com.

[25] S Donnelly, 'Post-Brexit Financial Services in the EU' cit.

[26] BJ Cohen, *Currency Power: Understanding Monetary Rivalry* (Princeton University Press 2015).

[27] D Hodson, 'EMU and Political Union Revisited: What we Learnt from the Euro's Second Decade'. (2020) Journal of European Integration 295.

greater harmonisation. Financial market regulation involves five related realms of private law that vary in the philosophical/normative foundations of differing (and/or shared) approaches to law and regulation (what needs to be done and why); the material points of agreement or conflict (how it needs to be done); and differentiation between euro area members and others. It encompasses company law; securities law; accounting (financial reporting) law; insurance law and banking law. The first three are inseparable for the functioning of stock markets, but integrated to radically different degrees. Company law regulates the rights and responsibilities of various company stakeholders, including investors, employees and others. In this *Article*, we focus on listed companies, i.e. those listed on stock exchanges where shares can be bought and sold, given the central role of shares to financial markets and their regulation. European company law strongly supports national legal diversity despite CJEU judgements striking down national restrictions on company mobility and activity, based on the right of establishment.[28] Meanwhile, accounting (financial reporting) law,[29] sets out the financial reporting conditions companies must meet in order to offer their shares for sale on financial markets. In most EU countries, accounting law is synonymous with the country's tax code, which has deeply national political roots. In order to provide uniformly legible financial reporting information throughout the EU, a solution based on double reporting was reached in 2001 that holds to this day, in which companies prepare reports for tax authorities and a second set for financial markets. Securities law covers most financial market activity outside of banking and insurance (considered to include stock markets, bond markets, commodities markets, derivative markets, investment funds, financial advice bureaus, credit rating agencies and investment banking – legal instruments below). It regulates what kinds of financial assets and securities may be legally bought and sold, under what conditions, and how various companies providing information services to financial market participants are required to act. Here, since the late 1980s, the EU has witnessed an explosion of legislation, a remarkable growth of EU regulatory power, and an explicit drive to harmonise national law and regulation. Insurance law, meanwhile, is specific to minimum solvency requirements of insurance companies,[30] which build in considerable discretion for national insurance systems and associated law. Banking law meanwhile (legislation below), is rapidly changing from a national to a European responsibility, with high degrees of harmonisation within the eurozone, and significant degrees of overlap with the other EU Member States. The impact of Brexit on differentiated law and integration is the strongest

[28] Case C-167/01 *Inspire Art* ECLI:EU:C:2003:512 and case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* ECLI:EU:C:2007:772.

[29] Specifically, Directive 2001/65/EC of the European Parliament and of the Council of 27 September 2001 amending Directives 78/660/EEC, 83/349/EEC and 86/635/EEC as regards the valuation rules for the annual and consolidated accounts of certain types of companies as well as of banks and other financial institutions.

[30] Specifically, Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (Text with EEA relevance).

where UK conflicts with the rest of the EU was also the strongest — in company and banking law. In these areas, we should see less differentiated integration as a result. The sections below outline each of these legal areas in turn.

IV.1. Securities and assets law and regulation

Securities law and regulation is heavily harmonised, thanks in part to the efforts of the UK to promote financial markets within the Single Market rather than though banks. Much of the legislation on the books deals with the provision of accurate information to investors, including risks of investing (Prospectus Directive,[31] Transparency Directive,[32] Markets in Financial Instruments Directive);[33] with ensuring a level playing field for investors (Insider Trading Directive,[34] Market Abuse Directive),[35] particularly investors across national borders; ensuring quality infrastructure for payments systems and derivatives operations (European Market Infrastructure Regulation: EMIR, covering over-the-counter-derivatives, central counterparties and trade repositories);[36] standards for various financial market participants (UCITS Directive for mutual investment funds,[37] AIFM Directive for Hedge Funds,[38] Credit Rating Agency Regulation)[39] and with facilitating access to national financial platforms through regulatory passports.[40] When a company is registered by the relevant national competent authority as a financial market participant in one Member State, it is permitted to act in other Member States on the basis of the original authorisation, since national legislators and supervisors are working with the same legal requirements. The idea is primarily to simplify access, since capital is not as centralised in one Member State as in the case of London for the UK (or previously for the EU).

[31] Directive 2003/71 cit.

[32] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC; revised Directive 2013/50 cit.

[33] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation and Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast) Text with EEA relevance.

[34] Directive 89/592 cit.

[35] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

[36] Regulation 648/2012 cit.

[37] Directive 2009/65 cit.

[38] Directive 2011/61 cit.

[39] Regulation (EU) 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) 1060/2009 on credit rating agencies Text with EEA relevance.

[40] F Pennesi, 'Equivalence in the Area of Financial Services: An Effective Instrument to Protect EU Financial Stability in Global Capital Markets?' (2021) CMLRev 39. Without the UK agreeing to abide by EU financial market regulation, it chose to end passport access. See N Moloney, 'Financial Services, the EU, and Brexit: An Uncertain Future for the City?' (2016) German Law Journal 75.

While one might expect the UK's departure to result in less EU emphasis on capital markets (as an alternative to banks as a means of financing the economy), this does not appear to be the case.[41] There has been no rollback of the EU's program of Capital Markets Union, although the pandemic has diverted attention temporarily elsewhere, and stalled initiatives. However, the Commission has pushed through with a programme to expand capital markets to include digital finance. The Digital Finance Strategy seeks to promote the use of fintech that offers payment, loan and other combined financial services while ensuring consumer protection and financial stability.[42]

One main reason for the continuity is that there remains general consensus in the EU that financial markets are needed to finance the European economy, given the limited capacity of governments to borrow and spend compared to the massive capital costs of rejuvenating the Single Market, covering greening, digitalisation and general economic competitiveness and development.[43] This is even so in light of collectively increased willingness to borrow and invest in the wake of Covid. In this light, ending Capital Market Union (CMU) would most likely be seen to be a greater act of economic self-harm than the departure of the UK's financial market access to the EU itself. While EU Member States still have a relatively high degree of reliance on banks to fund their economies, there is realisation that financial markets provide a valuable addition to the banking landscape, above all in the provision of capital to riskier company strategies. This is not only for stock and bond markets, but for all of the additional financial instruments and services that support this investment.

Indeed, the EU has understood a need to increase financial services on the continent, and to look for alternatives to indispensable services provided from the UK where these could not be built up in time. The first of these impulses is reflected in actions to ramp up the provision of financial services on the European continent. Since the Brexit referendum in 2016, the Paris-based platform Euronext has acquired as many financial services companies from the EEA (at least one prominent acquisition is in Norway) as possible to ensure that their capacity is as high as possible. Paris has accordingly been the highest growth financial centre in Europe, with ambitions to become the most comprehensive through its links to other centres. Amsterdam in particular is now the centre of stock, bond and fund trading, but is affiliated with Euronext. Euronext is not alone, however. Its rival to be London's successor in the EU continues to be Frankfurt's Deutsche Börse, which started with much of its own internal capacity, and continues to build on that through its own efforts.[44] Both centres contain not only the markets most of us see, but also the backdrop of invest-

[41] WG Ringe, 'The Politics of Capital Markets Union: From Brexit to Eurozone' in F Allen and others, (eds), *Capital Markets Union and Beyond* (MIT Press 2019) 341.

[42] European Commission, *Digital Finance Package* ec.europa.eu; RP Buckley and others, 'The Road to RegTech: The (Astonishing) Example of the European Union' (2020) Journal of Banking Regulation 26.

[43] See European Commission, *Recovery Plan for Europe* ec.europa.eu.

[44] S Donnelly, 'Post-Brexit Financial Services in the EU' cit.

ment banks, derivatives trading, repositories and data management systems that constitutes much of the plumbing of a modern financial system. There is little if any tension between countries over the importance of such developments, or over regulatory content., although the UK is determined to keep its status as a world-leading financial centre. All of this means that Brexit keeps up the pressure to keep capital markets union alive, and that there is no differentiation to be seen or expected.

Despite this progress in generating own alternatives, the EU still lacks certain critical financial services, which raises the question of whether the UK might not still exert a structural influence over EU financial market policy. The most important of these are central counterparty services, which ensure that payments are fulfilled in financial markets even if one of the parties goes bankrupt.[45] This is particularly important for the interest rate and currency exchange swaps used by businesses in great quantity. While the ECB would like these services delivered from within the EU, where it can supervise compliance with rules and resource requirements, the Commission has found it difficult to pull European companies away from London and the control that UK authorities have over the process. Commission attempts to break this stranglehold by allowing companies to use counterparty services in the United States (giving it choice in an environment of regime complexity) have done nothing to change this. Overall then, differentiated law inside the EU is low, while regime complexity with the UK remains significant.[46]

IV.2. Banking law and regulation

Banking Union (since 2012) is the area in which integration is the most differentiated in membership.[47] It is also an area that has seen remarkable harmonisation, particularly in the setting and supervision of capital adequacy standards. The most recent Banking Package of 2019, for example, contained harmonisation of how much money to keep on hand, what debt instruments, which do not normally count as cash, could be converted into shares in the event of an insolvency,[48] building on prior commitments in the Bank Recovery

[45] S Van Kerckhoven and J Odermatt, 'Euro Clearing after Brexit: Shifting Locations and Oversight' (2020) Journal of Financial Regulation and Compliance 187.

[46] S Donnelly, 'Post-Brexit Financial Services in the EU' cit.

[47] For the development of Banking Union, see R Goyal and others, 'A Banking Union for the Euro Area' (12 February 2013) International Monetary Fund www.imf.org; D Howarth and L Quaglia, *The Political Economy of European Banking Union* (Oxford University Press 2016); S Donnelly, *Power Politics, Banking Union and EMU: Adjusting Europe to Germany* (Routledge 2018).

[48] Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for won funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) 648/2012 (Text with EEA relevance).

and Resolution Directive[49] to bail-in creditors and shareholders in the event of an insolvency. Although EU law regulating banks applies to all banks in the EEA in principle, there are additional features for members of the Eurozone, which are considered to have a special responsibility to one another as a result of sharing a single currency. Bankruptcies in individual Member States put governments under pressure to provide state aid to banks. To the extent that financial markets fear that the government cannot repay what they borrow, those Member States can effectively go bankrupt, causing a collapse of confidence in the euro for all Member States. The primary focus of Banking Union has therefore been financial stability—ensuring that financial services continue to be available to individuals and companies throughout the Union. It has a preventative arm and a corrective arm. A third arm, based on insurance, remains national, despite an urgent need for it.[50] The Commission's proposals for a European Deposit Insurance Scheme faltered due to German and Dutch opposition to what they saw as fiscal transfers from their own banks to banks in southern Europe, and their ever-growing list of demands for bank regulation harmonisation before talks on deposit insurance could resume.

The preventative arm is the Single Supervisory Mechanism.[51] The European Central Bank is the direct bank supervisor for all European Systemically-Important Banks (E-SIBs), about 120 of the largest banks in the EU, covering the largest three banks in each Member State of the Eurozone, plus any banks holding assets over specific thresholds. Non-Eurozone Member States are supervised by their own national competent authorities, often central banks, but sometimes specialised bank regulators alongside central banks. All of these agents are responsible for applying EU legislation on minimum capital requirements (having enough capital on hand, calibrated to the kinds of claims that can be made on the bank known as the Capital Requirements Directive),[52] risk management (everything from know-your-customer forms of reducing the risk of lending to borrowers that

[49] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) 1093/2010 and (EU) 648/2012, of the European Parliament and of the Council Text with EEA relevance.

[50] L Quaglia, 'The Politics of an "Incomplete" Banking Union and its "Asymmetric" Effects' (2019) Journal of European Integration 955.

[51] Regulation (EU) 1024/2013 of the Council of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions; Regulation (EU) 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).

[52] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (Text with EEA relevance).

does not get repaid, to advanced forms of financial engineering) and corporate governance (ensuring proper procedures, and ensuring that political demands on banks do not undermine the bank's obligations to pay attention to the first two issues).

Overall, preventative bank regulations have exploded in number since the onset of the Eurozone crisis, primarily by specifying how banks hold capital and what provisions have to be made for the risk of default on different assets. These rules apply to banks in all Member States, whether or not they are within the eurozone. What has changed in terms of differentiation is that some national central banks and bank supervisors have been reluctant to apply standards stringently due to the belief that national banks should not really be allowed to fail, even if they are not performing well or applying EU law with due diligence, while the ECB has proven to be stricter in its application of EU law. This indeed creates differentiated application of the law, though not differentiated law itself in a critical area of economic life in the EU. It also creates different mechanisms for output and exceptional intervention based on (non) eurozone-member status. While national supervisors of the Eurozone have seats at the table of the single supervisor, others must suffice with more informal linkages they have with the ECB as outsiders to the single currency. But this loose relationship is asymmetrical. The ECB retains the right to step in and take over supervision of any bank in the Union, regardless of size. The same is true (but only in principle) of the Single Resolution Mechanism (SRM, below).

It is notable that Banking Union generated enormous negative reactions from the UK Government, and that the latter successfully negotiated throughout the related bank legislation that the ECB would in no way interfere on the Bank of England's turf, and that the UK Government reserved the right to set its own standards, as long as they did not undercut what the EU was doing. The primary concern on the British side was to do anything necessary to instil global confidence in City, which sometimes meant being harder on banks in supervision and prevention than the EU was politically willing to go.[53]

The corrective arm of Banking Union, the Single Resolution Mechanism, deals with bank resolution, which is what happens to a bank that is bankrupt and can no longer remain in business. Banks can be closed, but more frequently they are dismantled to ensure that households and businesses retain their usual bank accounts and other financial services, and that arrangements can be made to decide what the bankruptcy means for other institutions that have investments with the bank. Rarely will they lose everything, but a resolution authority decides how much is lost, or how much money is demanded in the process. Resolution is designed to prevent a domino effect of financial collapses, and typically draws on deposit insurance. In the case of Banking Union, a special, limited resolution fund, the Single Resolution Fund (SRF), was established for this purpose.[54]

[53] D Hodson, 'EMU and Political Union Revisited: What we Learnt from the Euro's Second Decade' cit.

[54] Regulation (EU) 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

The SRM has a Single Resolution Board (SRB) at its heart,[55] which is responsible for the resolution of any bank that is under the supervision of the ECB and the Single Supervisory Mechanism. In practice, it oversees and approves whatever response national resolution authorities prepare in response to bankruptcy, including any potential use of the SRF.[56] The idea is to ensure that terminally ill banks are actually dealt with rather than becoming zombie banks. But unlike a normal resolution authority, it cannot unilaterally take action itself. It may only recommend to the European Commission, and Commission approval remains subject to blockage by the Council. The latter is particularly important in any use of the SRF, given that the agreement regulating its use and disbursement provides that funds can only be released by intergovernmental agreement.[57] In principle, the SRB is set up in such a way that it can mitigate differentiated integration by being able to ensure that national authorities apply resolution law in a consistent way inside and outside the eurozone, and between banks of different sizes. But it has shown in a number of recent cases, particularly in the cases of local alternative banks Veneto and Vicenza in Italy, that it lacks the political will to apply the law consistently.[58]

Finally, Banking Union lacks a deposit insurance scheme that could be used for bankruptcies, making the system lopsided, but at least keeping differentiated integrated to a minimum. This has everything to do with German and Dutch opposition to any single fund that would constitute financial transfers between national banking systems.[59] This situation, given the strong financial interdependencies in play, means that the EU remains highly financial unstable under stress.

IV.3. Financial reporting law and regulation

Accounting law and regulation in the EU is based on the International Accounting Standards (IAS) Directive 2001, which both harmonises EU law and leaves national discretions intact. Importantly, however, it is embedded in regime complexity, using rules established outside the EU, with significant UK involvement. Public companies (those listed on

in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010.

[55] *Ibid*.

[56] *Ibid*.

[57] A Kern, 'European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism' (2015) ELR 154.

[58] S Donnelly and IG Asimakopoulos, 'Bending and Breaking the Single Resolution Mechanism: The Case of Italy' (2019) JComMarSt 856; D Howarth and I G Asimakopoulos, 'Stillborn Banking Union: Explaining Ineffective European Union Bank Resolution Rules' (2021) JComMarSt 264; PD Culpepper and T Tesche, 'Death in Veneto? European Banking Union and the Structural Power of Large Banks' (2021) Journal of Economic Policy Reform 134; D Howarth and L Quaglia, 'The Difficult Construction of a European Deposit Insurance Scheme: A Step too far in Banking Union?' (2018) Journal of Economic Policy Reform 190; S Donnelly and G Pometto, 'Banking nationalism and resolution in Italy and Spain' (2022) Government and Opposition (forthcoming).

[59] S Donnelly, 'Advocacy Coalitions and the Lack of Deposit Insurance in Banking Union' (2017) Journal of Economic Policy Reform 210.

stock exchanges) in the EU are obligated to file their consolidated financial reports in accordance with these standards, now known as International Financial Reporting Standards (IFRS). Subsidiaries of holding companies are not affected and continue to report by national standards. The purpose is to guarantee that companies provide essential information on the finances of the company that investors can easily compare throughout the Single Market, regardless of traditional reports based on national tax codes, which vary significantly. National tax codes are still not subject to harmonisation or even approximation within the EU, with the exception of the minimum tax agreement reached between the EU and the US in fall of 2021.

These national tax differences have significant impacts on private companies, and owe their stickiness to differences in legal philosophy reflected in company law. They can force or allow companies to present radically different pictures of their financial strength, which in turn make them more attractive or less so to shareholder investors. This also affects their ability to hold and invest profits in future productivity. For example, UK reporting standards allow companies to amplify their reported profits and maximise dividends to shareholders, often at the expense of their ability to invest in the company, while German reporting standards allow companies to set aside profits rather than reporting it as cash to be paid out to shareholders, so that it can be invested in the company's long-term profitability.[60] Overall, the UK's departure increases practical harmonisation. While the IAS Directive is designed to ensure that company reports are readily comparable and promote cross-border investment, the exit of the UK from the EU reduces the emphasis on profit maximisation in practice.

The standards themselves are set outside the EU, by the International Accounting Standards Board, which is a private, global association. It has members from different regions of the world, with the Americas most heavily represented, followed by Asia, and then Europe, with one UK and one French member, plus a German Chair as of July 2021. IFRS do not impose direct legal obligations for the EU and its Member States; rather the EU must adopt each standard through the comitology procedure established in the directive. This ensures that IFRS remains a useful tool, but that the EU must explicitly agree to standards as they are developed, which shields the EU from unintended effects of exploiting regime complexity. This capacity and relative autonomy for Europe was one of the main reasons for choosing the International Accounting Standard Board (IASB)'s standards over U.S. standards (Generally Accepted Accounting Practices, or U.S. GAAP), which are solely the responsibility and product of the American political system.[61]

Since 2009, the Board is supported by the (private) IFRS Foundation, and subject to oversight by two boards of stakeholders to ensure some degree of public insight into the

[60] S Donnelly, 'Public Interest Politics, Corporate Governance and Company Regulation in Germany and Britain' (2000) German Politics 171.

[61] S Donnelly, 'Financial Stability Board (FSB), Bank for International Settlements (BIS) and Financial Market Regulation Bodies' cit.

governance of the body and the appropriateness of its decisions: the Public Interest Oversight Board (PIOB) and the Monitoring Board. Two of the PIOB's members are nominated by the European Commission, with others nominated by the World Bank and three other International Standard-Setting Bodies.[62] The Commission is also present on the Monitoring Board alongside representatives from Japan, the U.S. and International Organization of Securities Exchange Commission (IOSCO). Its standards are principles-based and soft law in nature, allowing for national legal diversity. Standards are accordingly subject to application by accountants in differing national jurisdictions with some degree of discretion and therefore of national difference.[63] But the standards themselves provide considerable direction on what companies may and may not do. Accordingly, the EU has pushed the Board repeatedly to take European concerns into account more heavily, and the IASB has found itself trying to walk a tightrope in between American (U.S. GAAP) and UK standards on the one hand, and other European expectations particularly.[64] The main issue remains financial reporting, whereby American and UK standards push companies to pay out profits to shareholders more extensively than in Europe, but European legislators seem set to demand more financial transparency in areas of Environmental, Social and Governance (ESG) standards for European companies.[65] This is above all visible in the introduction of the Taxonomy Regulation,[66] which pressures companies to outline their ESG policies and performance. Under economic strain, these differences are likely to increase as the UK seeks to ensure the viability of its own financial system.[67]

This is an area of likely future tension between the EU and the UK as differentiated integration is impossible, and regime complexity may impact negatively on generally accepted accounting practices in the EU. The Commission may choose to restrict regime complexity by withholding a decision of regulatory equivalency until certain conditions are met regarding how financial reports are made.[68] Given the UK's current trajectory of doubling down on its own investor-focused model of economic entrepreneurship, it

[62] The three bodies responsible for micro prudential supervision: Basel Committee on Banking Supervision, the International Association of Insurance Supervisors; and the International Organization of Securities Exchange Commissions (IOSCO).

[63] A Schaub, 'The Use of International Accounting Standards in the European Union' (2005) Northwestern Journal of International Law & Business 609.

[64] P Leblond, 'EU, US and International Accounting Standards: A Delicate Balancing Act in Governing Global Finance' (2011) Journal of European Public Policy 443.

[65] D Schoenmaker, 'Sustainable Investing: How to Do it' (2018) Bruegel Policy Contribution.

[66] CV Gortsos, 'The Taxonomy Regulation: More Important than Just as an Element of the Capital Markets Union' in D Busch, G Ferrarini and S Grunewald (eds), *Sustainable Finance in Europe: Corporate Governance, Financial Stability and Financial Markets* (Palgrave Macmillan 2021) 351.

[67] H Kassim and others, 'Preferences, Preference Formation and Position Taking in a Eurozone out: Lessons from the United Kingdom' (2020) Political Studies Review 525.

[68] P Böckli and others, 'The Consequences of Brexit for Companies and Company Law' (University of Cambridge Faculty of Law Research Paper 22-2017) 15.

seems more and more likely that there is even room to codify accounting standards that require more robust social and environmental components than is the case in the UK.

IV.4. Company law and regulation

Company law and regulation in the EU is heavily based on divergent national norms and laws regarding the conditions for registered companies to operate, requiring differentiated law. EU company law is based in part on the Treaty right of establishment throughout the European Union, allowing free movement of capital as interpreted by the CJEU in a series of rulings in the 1990s and early 2000s, which requires no differentiation.[69] For the half of the EU Member States that accept company registrations on the basis of mutual recognition of home country regulations and control, this poses no difficulty.

However, for the other half of EU countries that insist on incoming companies respecting national company law requirements, the right of establishment is entangled with social rights and responsibilities in particular, as well as company responsibilities to a wider set of stakeholders. At the EU level, the European Companies Statute [2001], the European Employees Participation Directive [2001][70] and the Takeover Directive [2004][71] established differentiated law within an EU framework as a lasting feature. The Participation Directive ensured that if a company without employee participation in management (board membership) or policy-making (works councils) took over another that did, it would not be able to get rid of them. The Takeover Directive struck a balance between the general right of companies to take over other companies, and the ability of target companies to fend off takeover bids to protect national ownership.[72] At stake for these countries, and for the EU's company law framework as a whole is whether companies have social obligations that cannot be undercut through regulatory arbitrage. The Company Law Directives effectively settled this dispute for the first time at the cost of greatly differentiated law, in which company discretion following national company and labour law remained high.

Instead of supporting a single company law standard, the UK and Germany pushed a different kind of European Company Statute (ECS) that effectively entrenched their national legal differences in perpetuity and pushed back the advances of the CJEU into what was conceived of as national prerogative. The ECS as adopted provided for companies to incorporate as a European company, or SE, which would allow it to operate throughout the Single Market on one legal and regulatory basis, but bowing to real seat theory and national law in the process. A company would only be allowed to incorporate as an SE in

[69] S Donnelly, *The Regimes of European Integration: Constructing Governance of the Single Market* cit.

[70] Directive 2001/86/EC of the Council of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

[71] Directive 2004/55/EC of the Commission of 20 April 2004 amending Council Directive 66/401/EEC on the marketing of fodder plant seed.

[72] S Donnelly, *The Regimes of European Integration: Constructing Governance of the Single Market* cit.

ways that mirrored national law where it was incorporated, and it had to be incorporated where its factual headquarters were located.

This meant that companies were locked into a differentiated legal landscape and could not shop around for their preferred legal structure. Furthermore, the ECS was accompanied by two other pieces of legislation that further entrenched national control of two areas, even as SEs grew and developed in a more transnational fashion. The European Employee Participation Regulation mandated that an SE could only dispense with worker participation rights under very high thresholds: 75 per cent of the workforce would have to approve such a removal of their rights; and the company would have to have shifted its centre of gravity so that it could reasonably be considered a company based on company law where employee participation was not the norm. This clearly created a ratchet effect in which the German model was expected to spread elsewhere, but the UK model was difficult to adopt. The Takeover Directive, meanwhile, reduced the use of poison pills and golden shares by creating a 75 percent threshold to approve a takeover. A bidding company that could purchase that threshold had a legal right to buy the company outright regardless of other regulatory restrictions. The use of poison pills remains legal, however. The Takeover Directive also ensured that the bidding company could no dismantle employee participation after purchasing a company. This would be regulated by the Employee Participation Regulation. The Takeover Directive's threshold rule constituted a concession to well-capitalised British firms (able to raise cash on the London Stock Exchange) was the primary incentive for the UK to agree the deal, and to put further threats of company law adversely affecting UK law at bay.

Brexit provides an opportunity to reduce this differentiation substantially, though not entirely. Materially, Commission proposals to create the Company Law Directives prior to 2000 faltered on conflict between UK company law which gave unquestioned priority to shareholder rights, and German company law, which insists on stakeholder (social, environmental, community and institutional investor) rights entrenched in corporate institutions (supervisory boards and works councils), and legal rights of company directors to reinvest profits into future employment, productivity, environmental protection and community quality of life rather than quarterly shareholder dividends.[73] Germany's regulations were not the same as in other Member States, but continental company law was generally less focused solely on shareholder rights. Similarly, provisions for golden shares, through which states can veto company decisions in the (national) public interest, anti-takeover measures (such as the Volkswagen law that prevents any shareholder from exercising more than 20 per cent of votes) and employee rights protection in a company shutdown, merger or takeover are found throughout the remainder of EU Member

[73] S Donnelly, 'Public Interest Politics, Corporate Governance and Company Regulation in Germany and Britain' cit.; S Donnelly, *The Regimes of European Integration: Constructing Governance of the Single Market* cit.

States. Without the need to accommodate the UK's rejection of restrictions on shareholder rights to profits, opportunities to pursue more harmonised company law standards with higher social imperatives present themselves.[74] However, this would have to tackle different corporate protection mechanisms beyond that found in Germany, particularly golden shares, in which the state retains veto rights in privatised companies. Such practices are found in France and Sweden.

Overall, the UK's departure from the EU provides the room to streamline and approximate company law for the single market, with a view to increasing social, environmental and community priorities for company directors, even where this is not a high priority at the current moment. However, as Europe emerges from the pandemic and returns attention to the Capital Markets Union, and incorporates concerns for Environmental, Social and Governance standards in EU companies and financial reporting standards, it should prove possible to agree on a more robust framework for how companies are regulated in the single market, to address how shareholder and stakeholder interests are balanced. Overall this means that the EU as a whole has more power over markets than it did during the UK's membership, given decreasing need for differentiation, and may address regulatory issues with a common approach.

IV.5. Insurance law and regulation

Like company and accounting law, European insurance law retains a strong national component. Legislation with hard legal obligations is primarily limited to the Solvency I and II Directives,[75] which require insurance companies and supervisors to invest their income in areas that are safe within reasonable expectations, and to have enough cash reserves to meet their financial obligations. Additionally, EU law covers fair treatment to potential buyers. These in turn are based on international principles generated by the International Association of Insurance Supervisors (IAIS), whose output can be categorised as soft law, providing for considerable divergence between countries. The discretion provided at both levels creates space for the long-term contracts typical of insurance to be shaped by the dictates of national law. The departure of the UK from the EU reduces the gaps between national insurance laws in material ways. For example, British life insurance companies,

[74] S Sabato, B Vanhercke, and AC Guio, 'A "Social Imbalances Procedure" for the EU: Towards Operationalisation' ETUI Working Paper 09-2022) 33; A Crespy, *The European Social Question. Tackling Key Controversis* (Agenda Publishing 2022); M Koutsia, 'Exit Britain Enter the Stakeholders: Could Brexit End the Cultural Wars within the European Union Company Law and Give Birth to a Truly "European Company"?' (2019) European Business Law Review 881.

[75] Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239/EEC and Directive 2009/138 cit., updated as Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I).

which offer products that compete with private pension investments, were able to invest more heavily in higher-return but higher-risk products than many of their competitors.

V. Conclusions

Brexit both complicates and simplifies prospects for financial market regulation in the EU. The UK is determined to forge its own path on financial market regulation as it seeks to retain its status as a prime global financial centre, even after losing some business to the EU. At the time of writing, this intent had not generated any notable divergence with the EU, but the intent to do so was clear. This means that the UK's central role in shaping EU financial market regulation, particularly in capital markets, retains some afterglow of its membership period, but that with time discrepancies will grow. The lack of an institutionalised agreement between the EU and the UK on financial services will mean that this divergence is unmanaged. The consequences for the EU are either for the Commission to negotiate some sort of regime complexity in which UK businesses continue to perform certain financial services for EU companies, but under certain conditions (as it currently does with the United States), to abdicate any ambition for negotiating these rules and accept whatever the UK government and the City of London generate, or to push harder to exclude UK financial services, even if they are legally equivalent.

Within the EU, Brexit provides opportunity for a more coherent legal and supervisory framework. The UK as a Member State contributed heavily to differentiated law, particularly in company law, where its preferences and rules were highly valued and very different from the rest of the EU. Differences in accounting law and practice, and banking law were also bridged with great national discretion in the details of EU directives. The remaining EU Member States now have the chance to upgrade these areas and reduce the use of differentiated law after the UK's departure, and in banking already have begun the process. In particular, the EU's interest in upgrading environmental, social and governance standards in company and financial law indicates the potential for less use of differentiated law, and little opportunity for an arrangement in which the UK would have guaranteed access through regime complexity. Policy and regulations are diverging, and therefore regulatory equivalence cannot be assumed.

At the same time, the EU appears to have retained the very strong harmonisation fostered by the UK while it was still a member. The UK was the overall driver of securities law and harmonisation through the Capital Markets Union program. This saw the EU develop greater acceptance of financial markets, of level playing fields and open access for financial services. This is visible as well in the EU's Digital Finance Strategy, which seeks to promote the use of fintech in the single market with EU-specific protections in the areas of consumer protection and prudential regulation. The EU's future work should see it revisit company law to entrench European rules for good corporate governance and

reporting that reflect its greater emphasis on legal standards over self-regulation, to ensure better level playing fields, and its desire to improve the attractiveness of European companies to investors on EU stock exchanges through more standardised information.

The remaining field of differentiated integration in the EU therefore remains between the Member States of the eurozone. But note, non-members are still tied into the rule structures of Banking Union through the single rulebook, and the coordination of the European Banking Authority. This differentiated integration still provides non-eurozone countries with voice in the rule-making process, as well as national supervision within these parameters.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

WITH OR WITHOUT EU: DIFFERENTIATED INTEGRATION AND THE POLITICS OF POST-BREXIT EU-UK SECURITY COLLABORATION

BENJAMIN MARTILL* AND MONIKA SUS**

TABLE OF CONTENTS: I. Introduction. – II. Post-Brexit security and defence cooperation as differentiated disintegration – III. Theresa May and the proposed "security partnership". – IV. The trade and cooperation agreement and beyond. – V. The war in Ukraine: A game changer? – VI. Conclusion.

ABSTRACT: Research on differentiated integration has flourished in recent years, highlighting the political and efficiency gains to be had from selective participation and third country engagement in EU policy areas. Proposals for an EU-UK security and defence agreement represented a paradigmatic example of differentiated *disintegration*, for which both strategic and political prospects initially appeared positive, yet which ultimately foundered on the back of the EU's reluctance to create new third country models and subsequent political upheaval in the UK. This *Article* asks why these proposals failed and what this can tell us about the politics of differentiated (dis)integration, focusing on the referendum to the recent Ukraine crisis, and drawing on several elite interviews conducted with policymakers in London and Brussels. It shows that while the strategic benefits of differentiation increased following the Brexit vote, the growing concern in Brussels for the precedent set by Brexit, the collapse of issue-specific dynamics into a singular concern for UK "cherry picking", and the rightward shift in UK politics occasioned by the Brexit negotiations all undermined the prospects for a differentiated outcome in security and defence. The Ukraine crisis, while precipitating significant changes in many European states, had thus far failed to alter the new status quo locked in after Brexit.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/611

KEYWORDS: Brexit – differentiated integration – Ukraine War – European security – EU-UK relations – United Kingdom.

I. INTRODUCTION

The Brexit vote in the United Kingdom (UK) on 23 June 2016 was more about sovereignty than it was about appropriate formats for European security and defence collaboration, but this policy area was nonetheless implicated in the UK's decision to withdraw from the European Union (EU). Observers suggested initially that Brexit might bring about a more differentiated relationship, with the UK participating in various policy areas as a non-member, including in security and defence – an area where both sides were keen for a deal to be agreed. And yet these proposals gradually became victim of the twists and turns of the Brexit negotiations, with Theresa May's vision of a bespoke security partnership receiving lukewarm support in Brussels owing to its "cakeism", and with Boris Johnson's subsequent decision to take security and defence off the table entirely prior to the negotiations on the Trade and Cooperation Agreement (TCA). The result was a "no deal" scenario in security and defence which persists to this day, with both sides falling back on informal relationships and non-EU institutionalized ties between the UK and the EU member states. Even Russia's invasion of Ukraine on 24 February 2022 has seemingly done nothing to alter this status quo, in spite of its having acted as a critical juncture in the European security landscape and having brought about profound changes of the security policies of several European states.

The purpose of this *Article* is to ask why proposals for a differentiated outcome failed in the case of Brexit, and what this can tell us about the politics of differentiated (dis)integration. We know from the literature that political expediency and underlying efficiencies can motivate differentiation, and that the Brexit vote itself raised expectations of new forms of differentiation.[1] With both sides keen to reach an agreement and with a clear strategic rationale to keep the UK involved in EU security and defence initiatives, it is somewhat surprising that both sides failed to engage in talks on the issue. Understanding why this was can help us understand how the politics of differentiation work in a context of withdrawal. Drawing on a range of policy documents as well as interviews conducted in London and Brussels during 2021-22, we show how the prospect of mutually beneficial security cooperation became embroiled in the broader politics of the Brexit negotiations, as the EU became more sensitive to the creation of damaging precedents and as the idea of a security agreement came to be seen as part of Theresa May's broader (and highly problematic) notion of cherry-picking aspects of EU membership. In this way, the distinct dynamics in security and defence that might have motivated an agreement based on mutually beneficial differentiation were subordinated to the politics of withdrawal.

[1] F Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union', (2018) Journal of European Public Policy 1154.

II. Post-Brexit security and defence cooperation as differentiated disintegration

While the concept of differentiation in European integration has its origins in the Tindemans Report of the mid-1970s,[2] it was not until the 1990s and the emergence of the politically salient opt-outs that research on this aspect of integration blossomed. Since the Maastricht Treaty, much has been written of the various forms of differentiation in the European Union [3] with a precipitous increase in the scholarship also following the 2016 Brexit vote in the United Kingdom.[4] Recent years have also witnessed a new focus within EU foreign, security and defence policy on differentiation, largely in response to the post-Brexit developments in this field, many of which – like Permanent Structured Cooperation (PESCO) – contain highly differentiated elements.[5] Research on differentiation has focused on two broad areas. One is mapping out the diverse forms through which difference is embedded in European integration, a task which has produced numerous valuable typologies of differentiation, with distinctions between vertical/horizontal,[6] external/internal,[7] positive/negative,[8] and integrative/disintegrative[9] forms now part of the common parlance. Beyond these typologies, scholars have sought to understand the sources of differentiation, highlighting a variety of rationales for introducing difference. These include political rationales, like the ability to overcome

[2] B Leruth, S Gänzle and J Trondal, 'Introduction' in B Leruth, S Gänzle and J Trondal (eds) *The Routledge Handbook of Differentiation in the European Union* (Routledge 2022) 4.

[3] R Adler-Nissen, *Opting Out of the European Union: Diplomacy, Sovereignty and European Integration*. (Cambridge University Press 2014); JE de Neve, 'The European Onion? How Differentiated Integration is Reshaping the EU' (2007) Journal of European Integration 503; F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicisation and Differentiation' (2015) Journal of European Public Policy 764; ACG Stubb, 'A Categorization of Differentiated Integration' (1996) JComMarSt 283.

[4] P Cardwell, 'The End of Exceptionalism and a Strengthening of Coherence? Law and Legal Integration in the EU Post-Brexit' (2019) JComMarSt 1407; B Leruth, S Gänzle and J Trondal, 'Differentiated Integration and Disintegration in the EU after Brexit: Risks versus Opportunities' (2019) JComMarSt 1383; B Martill, 'Unity over Diversity? The Politics of Differentiated Integration after Brexit' (2021) Journal of European Integration 973; B De Witte, 'An Undivided Union? Differentiated Integration in Post-Brexit Times' (2018) CMLRev 227.

[5] S Blockmans, 'Differentiation in CFSP' (2013) Studia Diplomatica 53; C Hoeffler, 'Differentiated Integration in CSDP Through Defence Market Integration' (2019) European Review of International Studies 43; J Howorth, 'Differentiation in Security and Defence Policy' (2019) Comparative European Politics 261; B Martill and M Sus, 'Growing apart Together? Brexit and the Dynamics of Differentiated Disintegration in Security and Defence' in B Leruth, S Gänzle and J Trondal (eds) *The Routledge Handbook of Differentiation in the European Union* cit. 696; Ø Svendsen, 'Brexit and the Future of EU Defence: A Practice Approach to Differentiated Defence Integration' (2019) Journal of European Integration 993.

[6] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicisation and Differentiation' cit. 765.

[7] S Lavenex, 'The External Face of Differentiated Integration: Third Country Participation in EU Sectoral Bodies' (2015) Journal of European Public Policy 836, 839.

[8] J Howorth, 'Differentiation in Security and Defence Policy' cit. 261.

[9] F Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' cit. 1156.

blocking coalitions[10] and the creation of pressure for laggards to "catch-up",[11] as well as more efficiency-based rationales, including the avoidance of "straitjacketing" common rules,[12] the establishment of functional divisions-of-labour,[13] and the ability to transform the EU's external environment by co-opting external actors into Union policies.[14]

The Brexit vote on 23 June 2016, in which 52 per cent of UK citizens voted to leave the EU, represented a rather unique case in the politics of European (dis)integration. Never before, except in the highly distinct cases of Algeria and Greenland, had a member state sought to leave the EU, and especially not one with the strategic and economic clout of the UK. And yet questions of differentiation remained at the forefront of debates over Brexit.[15] The UK had held the most opt-outs, and Cameron had sought further special treatment in the 2015-16 renegotiation, raising questions about whether exceptionalism was here the problem behind Brexit, or whether it was a potential solution to the difficulties it raised.[16] Commensurate with the shock of the referendum vote, proposals for renewing the European project proliferated following the referendum, many of which – including some of the options presented by Commission President Juncker himself – raised the prospect of a more differentiated Union.[17] Moreover, while the May government rejected existing forms of differentiation, elements of differentiation gradually crept into the UK's asks in the Brexit negotiations, including sectoral access to the Single Market and British participation in EU policies and programmes.[18] Indeed, such was the extent to which Brexit re-ignited discussion on differentiation that scholars began to speak of withdrawal a potential case of *differentiated disintegration*.[19]

Nowhere were the differentiated aspects of the future UK-EU relationship more evident than in the field of security and defence, where the May government proposed a deep and comprehensive partnership with Brussels to mitigate concern of a security gap

[10] R Adler-Nissen, 'Behind the Scenes of Differentiated Integration: Circumventing National Opt-Outs in Justice and Home Affairs' (2009) Journal of European Public Policy 62.

[11] T Chopin and C Lequesne, 'Differentiation as a Double-Edged Sword: Member States' Practices and Brexit' (2016) International Affairs 531, 534.

[12] CJ Bickerton, 'The Limits of Differentiation: Capitalist Diversity and Labour Mobility as Drivers of Brexit' (2019) Comparative European Politics 231.

[13] S Blockmans and DM Crosson, 'PESCO: A Force for Positive Integration in EU Defence' (2021) European Foreign Affairs Review 87.

[14] S Gstöhl, 'Scandinavia and Switzerland: Small, Successful and Stubborn Towards the EU' (2002) Journal of European Public Policy 529.

[15] T Chopin and C Lequesne, 'Differentiation as a Double-Edged Sword: Member States' Practices and Brexit' cit.

[16] B Martill, 'Unity over Diversity? The Politics of Differentiated Integration after Brexit' cit. 976.

[17] Communication COM(2017) 2025 final from the Commission of 1 March 2017, *White Paper on the Future of Europe* ec.europa.eu.

[18] M Barnier, *My Secret Brexit Diary: A Glorious Illusion* (Polity 2021) 119.

[19] B Leruth, S Gänzle and J Trondal, 'Differentiated Integration and Disintegration in the EU after Brexit: Risks versus Opportunities' cit.; F Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' cit.

arising from UK withdrawal. Politically speaking, the Brexit vote was more about immigration and sovereignty than it was about security and defence policy,[20] although some referendum materials did speak of the threat of the (mythical) EU Army.[21] But if citizens were uninterested in the politics of EU security policy, the politics of EU security policy were still interested in them, not least since the EU's frameworks for foreign, security and defence cooperation were part-and-parcel of Union membership and had developed much since the initiation of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP) in the 1990s. British withdrawal from the EU meant the end of UK access to this system of foreign policymaking, but also the loss to the EU of the contributions of a powerful and wealthy member state with an unparalleled diplomatic network and significant institutional memberships.[22] Seeking to mitigate any potential security gap arising from Brexit, the May government proposed in 2018 institutionalised security and defence collaboration between the UK and the EU. The proposals represented a form of external differentiation, in that they envisaged UK participation in EU structures and operations from outside the Union and sought to build upon (and expand) existing forms of third country participation in the CFSP/CSDP, thereby establishing a new model of security collaboration.

Notwithstanding the absence of specific legal formats for third party cooperation in the CFSP/CSDP beyond the classic Framework Participation Agreement (FPA), the prospects for differentiation in this domain were not all that bad. Brexit was forcing the UK out the door, with continued European security collaboration outside NATO requiring either non-EU solutions (such as French proposals for a European Intervention Initiative) or creative thinking that would allow the UK to remain connected to the CFSP/CSDP in some way. Politically, the format for European security collaboration was not a salient question in the UK, affording policymakers significant wiggle-room, while many EU member states – especially those in Central and Eastern Europe – feared UK disengagement and were keen to keep London onside. Strategically, continued collaboration made sense. Both sides regarded an agreement as being mutually beneficial, given the declining influence each side feared from the divorce. The UK, as a significant security and defence actor, had much to offer EU initiatives, with the ability to plug distinct strategic gaps (e.g. the provision of heavy airlift capabilities) and lend credibility to the Union's defence posture.[23] Geopolitical developments, including increased fears of US isolationism under the Trump Presidency, now justified fears of

[20] J Curtice, 'Why Leave Won the UK's Referendum' (2017) JComMarSt 19.

[21] Bruges Group, 'EU Militarisation: A Dangerous Future' (2016) LSE Digital Library digital.library.lse.ac.uk.

[22] B Martill and M Sus, 'Post-Brexit EU/UK Security Cooperation: NATO, CSDP+, or "French Connection"?' (2018) British Journal of Politics and International Relations 846,848.

[23] LD Turpin, 'UK-EU Military Cooperation and Brexit from a Neoclassical Realist Perspective: No Big Deal?' in C Baciu and J Doyle (eds) *Peace, Security and Defence Cooperation in Post-Brexit Europe: Risks and Opportunities?* (Springer 2019) 3, 13.

Russian aggression, and the gradual emergence of a more competitive global order, augured for greater collaboration between European states at the same time as Brexit was occurring. Security and defence cooperation, as a highly distinct domain of intergovernmental collaboration, was not subject to the same distributional dynamics as other policy areas, and its origins lay principally in the Anglo-French rapprochement that brought about the St Malo agreement,[24] rather than internal dynamics within the EU institutions, which played a coordinating role.[25]

Looking at post-referendum security and defence dynamics – the asks of each side, the strategic interests – we can see clear evidence of both political expediency and functional necessity alongside proposals for externally differentiated arrangements. In other words, we see precisely those conditions that have in the past brought about agreement on the need for differentiated outcomes. And yet, as we now know, such an outcome was not realised, as the EU first moved to preclude the more differentiated aspects of the British proposals, and as May's successor, Boris Johnson, made the decision to remove negotiations on security and defence from the talks on the Trade and Cooperation Agreement. Why these proposals for differentiation failed, and what this tells us about the politics of differentiated *disintegration*, is the subject of the remainder of this article. Looking at the principal developments between the referendum and the time of writing (June 2022), we ask how debates over security and defence collaboration evolved and how they were affected (or unaffected) by major political developments. To answer the question, we draw on interviews conducted in London and Brussels during 2021-22 and on relevant policy documents from the EU and from HM Government.

We show that even though strategic incentives pointed clearly towards continued collaboration on the basis of a differentiated outcome, the evolution of the post-referendum political environment worked to preclude this outcome in three respects: First, the risk of contagion inherent in Brexit inculcated a marked sensitivity in Brussels to the question of *precedents* rather than beneficial distributional outcomes.[26] Second, the UK's desire to "cherry-pick" elements of EU membership – of which the security proposals were a part – linked security and defence questions to more problematic issues associated with softer variants of Brexit, both in the minds of UK voters and EU officials. Third, the failure of the negotiations over the Withdrawal Agreement brought about a shift to the right politically (the rise of the Johnson administration) in the UK that served to alter the UK's perception of its strategic interests. The UK case demonstrates that even though differentiation may have an underlying strategic rationale, changing political

[24] SC Hofmann and F Mérand, 'In Search of Lost Time: Memory-framing, Bilateral Identity-making, and European Security' (2020) JComMarSt 155, 163.

[25] H Dijkstra, 'Agenda-setting in the Common Security and Defence Policy: An Institutionalist Perspective' (2012) Coop&Conflict 454, 456.

[26] I Jurado, S León and S Walter, 'Brexit Dilemmas: Shaping Postwithdrawal Relations with a Leaving State' (2022) International Organization 273, 280.

circumstances, including fears of contagion and the linking together of discrete issue-areas, can undermine even efficient differentiated solutions.

III. Theresa May and the proposed "security partnership"

The task of delivering on the mandate for Brexit established by the 23 June 2016 referendum fell to Theresa May, former UK Home Secretary and David Cameron's successor as prime minister and leader of the Conservative Party. Though May had voted Remain in the referendum, she was credibly Eurosceptic in many respects and was widely respected within the party, making her a strong unity candidate for the leadership.[27] In the immediate months following the vote May made it clear that her government would deliver Brexit, and that this would not involve continued membership by the back door. In subsequent speeches in October 2016 and January 2017, May spelled out an agenda for Brexit that appeared to presage a harder break than many had envisaged, but which still aimed to reconcile leaving with unrestricted trade and continued cooperation.[28] The prime minister had committed early on to triggering Article 50 by early 2017 and, following the government's defeat in the UK Supreme Court and the resulting passage of a bill in the UK Parliament, the UK notified the President of the European Council, Donald Tusk, of its intent to leave the EU on 29 March 2017.

The process for withdrawal was determined by art. 50 TEU and involved a two-year window for the completion of negotiations on a Withdrawal Agreement as well as a Political Declaration detailing arrangements for the future relationship. Security and defence issues were to be covered by the negotiations on the future relationship and would thus be part initially of the non-binding Political Declaration, and not the Withdrawal Agreement. Such phasing was encouraged in Brussels as it prevented the UK from using its economic and strategic clout to obtain concessions on budgetary contributions and citizens' rights, issues that were deemed of paramount importance in Brussels and thus covered under the terms of withdrawal.[29] Nevertheless, once talks on the future relationship had been underway for several months, and following a tumultuous year in foreign policy in the UK,[30] the UK government unveiled proposals for a "deep and comprehensive" agreement between the UK and the EU covering foreign and security policy,[31] some of the content of which had been prefigured in the earlier White Paper on Brexit.[32]

[27] N Allen, '"Brexit means Brexit": Theresa May and Post-referendum British Politics' (2018) British Politics 105, 107.

[28] A Seldon and R Newell, *May at 10: The Verdict* (Biteback 2020) 97.

[29] LA Schuette, 'Forging Unity: European Commission Leadership in the Brexit Negotiations' (2021) JComMarketSt 1142, 1152.

[30] A Seldon and R Newell, *May at 10* cit. 383.

[31] HM Government, 'Framework for the UK-EU Security Partnership' (9 May 2018) GOV.UK www.gov.uk.

[32] HM Government, 'The United Kingdom's Exit from and New Partnership with the European Union White Paper' (2 February 2017) GOV.UK www.gov.uk.

The proposed *Framework for the UK–EU Security Partnership* set out in May 2018 envisaged structured cooperation between the UK and the EU at all levels, including political, diplomatic and administrative, and across the different domains of foreign policy, security, defence, and internal security, including information sharing and intelligence. As well as frequent contacts through which a joint approach could be coordinated, the UK also sought to be consulted on decisions or operations which it was to take part in, and thus to be involved in discussions over mandates and the formulation of policy before signing up to them. The document suggested that the UK would participate in select CSDP missions as well as projects emanating from the recent EU initiatives, including the European Defence Fund (EDF) and PESCO.[33] The proposals were noteworthy both in envisioning continued structured cooperation post-Brexit and also in signalling a renewed commitment towards the CSDP and imagining participation in new EU initiatives redolent of further integration in the defence field, to which the UK had historically been opposed. An accelerated timeframe was also pushed by the prime minister during 2018, on the basis that the worsening security environment necessitated swift action to mitigate any security gap brought about by Brexit.[34]

Why did the May government seek not only continuity, but also signal a renewed interest in EU security and defence policy? Part of the reason is strategic. Brexit coincided with a period of heightened geopolitical tensions, coming as it did two years after Russia's annexation of the Crimean Peninsula and the onset of the separatist conflict in the Donbass, and one year after Russian intervention in the Syrian Civil War. It also occurred months before the election of Donald Trump as US President, whose vitriolic criticisms of levels of European defence spending and avoidance of a clear commitment to NATO cast a pall over the transatlantic security relationship.[35] Both the worsening external environment and the undermining of the status quo reinforced opinions across the continent (including in London) that the Europeans may need to take greater responsibility for their own security.

There was also a domestic political component to May's desire for an agreement on security, since it was an area which fell outside of the prime minister's interpretation of the mandate of the 2016 referendum, which she felt to have been principally about immigration and about sovereignty. Security and defence policy was an area where public salience was generally low, and which had taken a back-seat in the referendum campaign, making it a good candidate for the pursuit of continuity and further cooperation in spite of Brexit. Recall that May's overall strategy for implementing Brexit

[33] HM Government, 'Framework for the UK-EU Security Partnership' cit.

[34] BBC News, 'May: New Security Deal should be Effective by Next Year' (17 February 2018) BBC News www.bbc.co.uk.

[35] B Schreer, 'Trump, NATO and the Future of Europe's Defence' (2019) The RUSI Journal 10, 10.

sought to obtain the maximum autonomy from EU political institutions possibly whilst maintaining underlying high levels of underlying cooperation in specific policy areas.[36]

The immediate context of the Brexit negotiations was also discernible in the UK's renewed enthusiasm. National governments across the EU had feared the strategic disengagement of the UK after the Brexit vote, especially those in Central and Eastern Europe which saw Britain as a partial guarantor against Russian aggression, and a security agreement offered a clear means of signalling this was not about to happen. Moreover, the offer of continued British participation held out the prospect of leverage, since this was an area where the UK had much to contribute.[37] While early ideas on the pro-Brexit right on bargaining the UK's security commitment were branded dangerous and were in any case hardly credible, a contribution to EU initiatives was different in that the UK could go without and would be offering more than the post-Brexit *status quo*.

In any eventuality, and in spite of the prime facie strategic interests on both sides in reaching agreement on mutually beneficial terms, May's proposed security agreement became victim to the broader politics of the Brexit negotiations, albeit that it would take until March 2020 (almost a year after May had left office) for this to become clear. From the EU's perspective, there was indeed considerable demand for a security agreement with the UK, given the credibility this would lend EU foreign and security policy. But Brussels was not keen on the nature of the proposed agreement, which it saw as an effort to undermine the EU's decision-making autonomy by allowing British representatives to be "in the room" when decisions were made, and to alter the underlying basis of third country participation.[38] In other words, they saw the UK approach as akin to "cherry picking", the criticism levelled at May's broader approach to Brexit characterized by selective engagement in aspects of the integration project the UK felt it would benefit from.[39] And they did not agree with May's proposal that a separate agreement could be negotiated prior to the formal talks on the future relationship, since (it was feared) this would allow the UK to leverage its strategic and economic clout over the contents of the Withdrawal Agreement.

If May's security agreement failed to obtain unconditional support from Brussels, it also proved more contentious at home than the prime minister had perhaps assumed. In the heightened atmosphere of the post-referendum UK, the idea that the UK would continue to participate in EU security and defence policies after Brexit was seized upon by pro-Brexit lobbies and by the right-wing media as an example of May's lack of commitment to Brexit. In many respects, given the lack of salience during the referendum

[36] F Figueira and B Martill, 'Bounded Rationality and the Brexit Negotiations: Why Britain Failed to Understand the EU' (2020) Journal of European Public Policy 1871, 1879.

[37] Author interview with former Cabinet Office official, 23 May 2022, on file with the author.

[38] Ø Svendsen, 'The Security and Defence Aspect of Brexit: Altering the Third Country Balance?' in M Riddervold, J Trondal and A Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2021) 525.

[39] B Martill and M Sus, 'When Politics Trumps Strategy: UK-EU Security Collaboration after Brexit' (2021) International Political Science Review 404, 407.

campaign, security and defence fell victim to the changing politics of Brexit, as political entrepreneurs (like Nigel Farage and Boris Johnson) sought to out-bid May on the right and as intra-party competition within the Conservatives created incentives for each side in the hard/soft Brexit debate to hold out for their favoured outcome.[40] Security and defence cooperation, just as it did for the EU, became associated with efforts - unpopular among Brexiters – to negotiate an outcome that would see the UK so closely tied to Brussels that it would be "Brexit in name only" (BRINO).[41]

IV. The trade and cooperation agreement and beyond

The fate of the EU-UK security agreement, contained within the Political Declaration, was essentially tied to the fate of May's Withdrawal Agreement, which had been agreed with the European Council in November 2018, but which was facing considerable resistance domestically, such that many feared its passage in Parliament would be impossible. Indeed, on 15 January 2019 the UK Parliament rejected both the Withdrawal Agreement and Political Declaration by an unprecedented (in recent times) margin of 202-432, with two subsequent defeats following on 12 and 29 March after repeated attempts to renegotiate the Northern Ireland "backstop" with the EU. May's failure to pass her Brexit agreement exhausted her political capital and laid the ground for the rise of Johnson as Conservative leader and Prime Minister, a position he took up on 24 July 2019 following a successful leadership campaign.

Johnson had by this point become allied to the pro-Brexit wing of the Conservative Party, although he had wavered before supporting Leave in 2016, and was seen by many as a political opportunist. Nonetheless, Johnson's premiership is associated with harder designs on Brexit and a rejection of May's efforts to negotiate a closer relationship with Brussels. In government, under May, he voiced criticism of his predecessor's Brexit deal both within Cabinet until July 2018, and then (more vociferously) from outside following his resignation as Foreign Secretary. As Prime Minister, Johnson appointed several leading Brexiters to key posts, including Dominic Cummings, the Director of Vote Leave, and set out designs for a more distant future relationship that would maximise the UK's autonomy post-Brexit. Following an unsuccessful attempt to pass an amended Withdrawal Agreement in October 2019 with a workable timeframe, Johnson called a General Election for 12 December on which he campaigned (and won) on the slogan: "Get Brexit Done".[42] With an 80-seat majority

[40] T Heinkelmann-Wild and others, 'Divided they Fail: The Politics of Wedge Issues and Brexit' (2019) Journal of European Public Policy 723, 726; B Martill, 'Prisoners of Their Own Device: Brexit as a Failed Negotiating Strategy' (September 2021) The British Journal of Politics and International Relations 582, 592; T Quinn, N Allen and J Bartle, 'Why Was There a Hard Brexit? The British Legislative Party System, Divided Majorities and the Incentives for Factionalism' (5 March 2022) Political Studies journals.sagepub.com.

[41] C Grey, *Brexit Unfolded: How No One Got What They Wanted (And Why They Were Never Going to)* (Biteback 2021) 9.

[42] Conservative Party, 'Get Brexit Done and Unleash Britain's Potential' (December 2019) Conservatives www.conservatives.com.

for the Conservatives, the 2019 general election paved the way for the passage of the Withdrawal Agreement and Political Declaration in January 2020, with the UK entering a "transition period" until December of that year during which time an agreement on the future relationship – which would become the TCA – was to be negotiated.[43]

Although the Political Declaration contained a section on security and defence cooperation,[44] in February 2020 the UK government announced that this area would not be included in the future negotiations, and that the government did not consider itself bound by the commitments in the Political Declaration.[45] There are several reasons why Johnson removed the security and defence provisions from the negotiations on the future relationship. One was to do with timing. The government had won the 2019 election on the basis of delivering Brexit as quickly as possible, and Johnson was keen not to extend the timeframe of the negotiations beyond the end of 2020. Making this tight deadline would be made easier without the need to negotiate on security as well as trade and governance issues. Another reason was political. Johnson's ascendency had placed Brexiters, including Foreign Secretary Dominic Raab, in powerful positions, and many of these individuals preferred a cleaner break from the EU and had been unenthused with May's desire to maintain strong ties to the Union. Given the government's desire for a more autonomous Brexit deal, foreign and security policy appeared an easy victory, since the UK could fall back on national, bilateral and NATO cooperation with relative ease,[46] unlike in other policy domains where reversion to WTO rules would prove economically disastrous.

The EU response to the decision, which was communicated to Michel Barnier on 17 February 2020, was generally mixed, and ranged from cynicism towards the British rationale to disappointment that an agreement in this area would not be forthcoming. Barnier himself felt that the UK decision was a tactical move designed to establish a pattern in which London would dictate to Brussels how the negotiations were to proceed, yet the Chief Negotiator continued to insist a security agreement would remain on the table.[47] It was also suggested that London took the idea of a security agreement off the table as it was an "offensive EU interest" (i.e. something Brussels wanted) and would thus be rendered unavailable as an option in the talks.[48] Others felt that the UK decision had been motivated by the existence of bilateral agreements with the larger member states, but that it was still

[43] S Usherwood, "Our European Friends and Partners'? Negotiating the Trade and Cooperation Agreement' (2021) JComMarSt 115, 116.

[44] Johnson's revised Political Declaration of October 2019 committed to establishing "the parameters of an ambitious, broad, deep and flexible partnership across trade and economic cooperation with a comprehensive and balanced Free Trade Agreement at its core, law enforcement and criminal justice, foreign policy, security and defence and wider areas of cooperation". HM Government, 'Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom' (19 October 2019) GOV.UK www.gov.uk 2.

[45] M Barnier, *My Secret Brexit Diary: A Glorious Illusion* cit. 316.

[46] Author interview with Commission official, 6 July 2021, on file with the author.

[47] M Barnier, *My Secret Brexit Diary: A Glorious Illusion* cit. 324.

[48] Author interview with Commission official, 16 July 2021, on file with the author.

a shame, since these relationships would not cover all eventualities.[49] The British decision was viewed with regret in Brussels and viewed as a missed opportunity to highlight the importance of shared values, with the reason attributed to reasons of principle and politics on both sides.[50] Interestingly, while London's unilateral decision focused attention on the politics on the UK side, Brussels remained keen not to afford the UK the kind of observer status it was seeking in security forums,[51] meaning the starting point for negotiations would have been a long way from the UK's insistence it not become a "rule taker".

From early 2020, then, the outcome of the negotiations in security and defence policy is "no deal", and an agreement on international security cooperation is never negotiated (although the TCA, which is agreed in time for the New Year, contains provisions on internal security matters and information sharing).[52] And, as 2021 develops, it becomes clear that the UK's foreign policy orientation has been influenced in other ways by the Johnson government. In March 2021 the government published its long-awaited Integrated Review on Security and Defence, which spelled out a reduction in UK tank numbers and an increase in its nuclear arsenal, alongside an effort to re-articulate the UK's interests through the prism of "Global Britain".[53] The Review, perhaps tellingly, mentions the European Union only once, noting that the UK "will enjoy constructive and productive relationships with our neighbours in the European Union, based on mutual respect for sovereignty and the UK's freedom to do things differently, economically and politically, where that suits our interests".[54] In July 2021, the government initiated significant cuts to the Overseas Development Aid (ODA) budget from the target of 0.7 per cent of GDP to 0.5 per cent, culling a number of development initiatives in the process.[55] The shift was ostensible a response to the fiscal challenge of Covid, but it dovetailed with longstanding Conservative priorities and had been foreshadowed in June 2020 with the merger of the Foreign and Commonwealth Office with the Department for International Development.[56]

On 15 September 2021 the AUKUS pact between the US, UK and Australia was announced. The agreement, which would see American nuclear submarines sold to Australia (and undercut a previous deal signed by the French government) was seen as a

[49] Author interview with Commission official, 6 July 2021 cit.

[50] Author interview with Commission official, 1 July 2021, on file with the author.

[51] Author interview with former Conservative Party official, 1 July 2021, on file with the author.

[52] European Commission, Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021].

[53] HM Government, 'Global Britain in a Competitive Age: the Integrated Review of Security, Defence, Development and Foreign Policy' (16 March 2021) GOV.UK www.gov.uk.

[54] HM Government, 'Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy' cit. 6.

[55] BBC News, 'Foreign Aid: Who Will be Hit by the UK Government Cuts?' (8 November 2021) BBC News www.bbc.co.uk.

[56] BBC News, 'International Development and Foreign Office to Merge' (16 June 2020) BBC News www.bbc.co.uk.

means of further containing China whilst contributing to US defence-industrial interests and discursively bolstering the UK's Global Britain credentials, albeit at the expense of Franco-British relations which were strained by the announcement.[57] While not absent, UK strategic interests were less evidently served by the AUKUS pact than those of its other members, demonstrating just how seriously London took the task of performing its newfound "global" status, even when this contributed to a denigration of the bilateral relationships that had facilitated its disengagement from EU foreign and security policy. Independence was also performed through UK trade policy, with new trade agreements post-Brexit – notably with Japan in October 2020[58] – touted as vindicating the UK's decision to go it alone, even as critics pointed out the terms of Britain's new trade agreements were worse than those the EU had managed to obtain. Thus did the government turn "the widely perceived policy 'problem' of having to replicate EU trade agreements with third parties into a success story".[59]

For British foreign policy, then, the Brexit process has brought about considerable change, even though this has occurred indirectly through the change of the Brexiter worldview during the May years and its subsequent ascendence under Johnson. Interestingly, and perhaps counter to the expectations of some, the finalization of the negotiations did not bring an end to the tense atmosphere between both sides, with continued mistrust between both sides, ongoing (to the time of writing) spats over the implementation of the Northern Ireland protocol and elements of the TCA (especially concerning fisheries), and continuing efforts on both sides of the English Channel to convey a sense of moral victory coming at the expense of the other side.[60]

V. The war in Ukraine: a game changer?

The Russian invasion of Ukraine, beginning on 24 February 2022 after almost a year of preparatory mobilization, has shocked Europe out of its post-Cold War complacency and brought military conflict once again back to the continent, resulting in a protracted ongoing conflict in the region. Both the EU and its member states and the now independent UK have been active in efforts to support Ukraine and resist Moscow's encroachment on the country's sovereignty, alongside the United States and NATO, whilst at the same time seeking to avoid direct conflict with Russia. EU member states have taken in millions of Ukrainian refugees, sent civilian and military equipment to Kiev,

[57] BBC News, 'AUKUS Pact: France and US Seek to Mend Rift' (23 September 2021) BBC News www.bbc.co.uk.

[58] HM Government, 'UK-Japan Comprehensive Economic Partnership Agreement' (23 October 2020) GOV.UK www.gov.uk.

[59] T Heron and G Siles-Brügge, 'UK-US Trade Relations and 'Global Britain' (2021) The Political Quarterly 732, 736.

[60] P Beaumont, 'Brexit Futures: Between a Model and a Martyr: An Addendum to "Brexit and EU Legitimation"' (17 May 2020) New Perspectives 238, 239.

supported collective financing through the European Peace Facility of 2 billion euro (as of May 2022),[61] and imposed wide-ranging sanctions on individuals and firms close to the Russian state. Efforts at the EU level to work towards a common strategic culture resulted in the publication of the Strategic Compass in March 2022, much of which has focused on meeting challenge on the Eastern flank.[62] The UK, for its part, has stepped up its pre-existing cooperation with Baltic, Nordic and Central East European states[63], provided sizable military contributions to the Ukrainian effort, offered bilateral security guarantees to Finland and Sweden,[64] and enacted its own package of sanctions.

That the conflict has brought about considerable change in the strategic priorities of several of European countries. Germany, long the quintessential civilian power, and a country whose energy relationship with Russia has raised eyebrows in recent years, has – under SPD Chancellor Olaf Scholz – committed to a radical turnabout in its willingness to export heavy weaponry and has committed to increase its defence spending precipitously in response to the crisis.[65] Sweden and Finland, two of the EU's neutral (and thus non-NATO) member states, both of which are worryingly proximate to Russia, have applied to join the Atlantic alliance in a major political about-turn for both states.[66] Denmark, which secured an opt-out from the defence elements of the CFSP during the negotiation of the Maastricht Treaty, and which has thus been outside the CSDP since its inception (as well as more recent initiatives like PESCO), voted 67 per cent in favour of scrapping the opt-out in a national referendum on 1 June 2022 in response to the unfolding crisis.[67]

The extent of change in European states in response to the crisis raises the question of whether a rapprochement in EU-UK security and defence collaboration might be on the cards in the aftermath of the crisis. After all, both sides have indicated future talks could indeed take place, and the strategic benefits of coordination between the UK and the EU would seem to be at their greatest given the intensity of the current geostrategic crisis. In other words, if not *now*, then *when*? While it is early days still in the conflict, the prospects for a formal agreement would seem slim. Diplomatic relations are, in the security field at least, at a positive ebb, with informal coordination taking place through existing diplomatic networks as well as a joint meeting of the EU's Foreign Affairs Council and third countries,

[61] European Council, *EU Support to Ukraine: Council Agrees on Further Increase of Support Under the European Peace Facility* www.consilium.europa.eu.

[62] M Sus, 'The EU's Strategic Compass as the Manual for the EU Learning the Language of Power, but What Kind of Power?' (22 April 2022) UK in a Changing Europe ukandeu.ac.uk.

[63] Ministry of Defence, 'Polish-British Military Cooperation Strengthens NATO's Eastern Flank' (17 March 2022) Gov.pl www.gov.pl.

[64] HM Government, 'Prime Minister Signs New Assurances to Bolster European Security' (11 May 2022) GOV.UK www.gov.uk.

[65] J Kampfner, 'To the Kremlin's Chagrin, Germany is Back in the Game' (6 March 2022) The Times www.thetimes.co.uk.

[66] J Henley, Sweden and Finland Agree to Submit Nato Applications, Say Reports' (25 April 2022) The Guardian www.theguardian.com.

[67]E Schaart, 'Denmark Votes to Scrap EU Defense Opt-out' (1 June 2022) Politico www.politico.eu.

including the UK, the US, and Canada. But there is no sign of any movement towards a more comprehensive agreement, and coordination remains informal and ad hoc.

The absence of any significant turnaround in EU-UK security collaboration is perhaps not all that surprising, given the aforementioned impediments to an agreement, the fact that the Johnson administration remains in power in the UK, and continued disagreement on the implementation of the Northern Ireland Protocol. It is also a product of some significant background factors in the security and defence field. For one thing, it is very difficult indeed to engage in structured negotiations during period of crisis management, since existing diplomatic bandwidth is taken up by the need to respond to the immediate crisis at hand, and since locking in agreements during crises may not be the best times to agree the structure of the relationship going forwards. Indeed, the UK's intention to sign a trilateral agreement with Poland and Ukraine was upended, paradoxically perhaps, by the onset of the Ukraine crisis.[68] Moreover, in the broader European defence environment, the EU is far from the only player, with a major role in almost all aspects of defence for national, bilateral and NATO platforms outside of the EU frameworks, even where they involve a majority of EU member states. The significance of these non-EU mechanisms allows both the UK and the EU to forego a formal agreement without a major security gap from emerging (although not, as mentioned above, without significant efficiency losses). The current crisis would seem to show that even under conditions of intense strategic peril, the difficult politics of differentiated disintegration remain.

VI. Conclusion

This *Article* has examined the relationship between the UK and the EU in the security and defence domain since the 2016 Brexit referendum. Despite much initial enthusiasm for an agreement, British proposals – based on a distinct form of external differentiation – were received coolly by Brussels before themselves being unwound in the UK following the ascendency of Boris Johnson as Prime Minister. In many respects, the strategic rationale for such a differentiated outcome still exists, since the world has become more insecure since the UK referendum, since security and defence collaboration provided valuable efficiencies, and since the UK is such a significant actor in the defence field. What undermined the prospects of a differentiated outcome was concern in Brussels about setting a damaging precedent, the inability of actors to ring-fence security and defence concerns from broader worries about UK cherry-picking, and the seismic political changes in the UK brought about by the failure of May's Withdrawal Agreement. In other words, it was the changing political circumstances which unwound an otherwise strategically valuable agreement. Even the Russian invasion of Ukraine in February 2022 failed to motivate both sides to agree forms of security and defence collaboration,

[68] M Williams and G Baczynska, 'Britain, Poland and Ukraine in Cooperation Talks over Russian Threat' (1 February 2022) Reuters www.reuters.com.

although ad hoc cooperation has taken place, and the impact of the war is still playing out across the continent.

Given the continued interest in differentiation post-Brexit, the growing interest in applying the concept to the security and defence field, and the current focus on understanding the distinct dynamics of differentiated *disintegration*, the findings of this study should be of broader relevance also. Studies of differentiation have generally focused on the political incentives for allowing special treatment, even where it introduces greater complexity in the resulting policy regime. But whether political conditions are conducive to differentiation depend fundamentally on the direction of travel. Withdrawing from the Union risks creating damaging precedents and also undermines – rather than bolsters – EU credibility, making even mutually beneficial agreements politically problematic. Existing studies of differentiated disintegration note the challenges of withdrawal, but arguably underestimate the extent to which this can prevent the emergence of differentiated outcomes. Our findings also highlight the difficulty of relying upon issue-specific dynamics as an indicator of the prospects for differentiation. Much of the existing literature assumes questions of political expediency and underlying efficiencies operate on the basis of specific policy areas, but our findings show that in situations where the broader relationship is at stake, relevant issue-specific dynamics are collapsed, such that arenas like security and defence where distributive concerns are at the margins can quickly become part of a broader and more competitive game.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

PESCO AS A GAME-CHANGER FOR DIFFERENTIATED INTEGRATION IN CSDP AFTER BREXIT

BEATRIZ CÓZAR-MURILLO*

ABSTRACT: After decades of bi-national and multinational military programmes that arrived in dribs and drabs, and once the United Kingdom decided to withdraw from the EU, the launch and implementation of the Permanent Structured Cooperation (PESCO) in 2017 has emerged as a real game-changer. Thus, favouring differentiated integration in defence matters within the European Union after Brexit. This *Article* focuses on the analysis of both horizontal and vertical differentiated integration from an eminently practical point of view. All of this, aimed at illustrating the distinction between the pre-PESCO scenario and the current one with 60 projects underway within its framework. In this sense, the analysis makes it possible to distinguish a real group of frontrunners in the implementation of PESCO and the window of opportunity that opens up by allowing third states to participate in individual projects, with particular attention to the case of the United Kingdom.

KEYWORDS: PESCO – differentiated integration – game-changer – CSDP – Brexit – third States.

I. INTRODUCTION

Five years after the launch of the EU Global Strategy[1] and the United Kingdom's decision to withdraw from the European Union, the impetus given to European Security and Defence for closer cooperation is still palpable. This momentum will continue thanks to

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[1] European External Action Service (EEAS), *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign And Security Policy* eeas.europa.eu.

ISSN 2499-8249
doi: 10.15166/2499-8249/612

the new Strategic Compass[2] published on 21 March 2022 as planned, but in the midst of a war in Ukraine after Russia's aggression. The clearest example can be seen in the development and implementation of Permanent Structured Cooperation (PESCO), which undoubtedly offers endless opportunities to consolidate the Common Security and Defence Policy (CSDP).

In this regard, it cannot be overlooked that PESCO is now fully regulated at the legislative level, and this also represents a change in the game board in the European Union. On 5 November 2020, Decision 2020/1639/CFSP[3] was adopted, establishing the conditions under which third states could be exceptionally invited to participate in individual PESCO projects. Therefore, there is a clear opportunity for the United Kingdom, although the United States, Canada and Norway have already beaten it to the punch by being invited to participate in the *Military Mobility* project.

Furthermore, given that 60 projects are underway, it is to be expected that these or other third States will eventually show interest in more initiatives. In this light, and with the last wave of projects in mind, this *Article* will not only analyse PESCO, but also the Coordinated Annual Review on Defence (CARD) or the recently implemented European Defence Fund (EDF). It will thus comply with the basic premise that shall be kept in mind when addressing new CSDP initiatives: all these instruments should be understood as integral parts of a "*comprehensive defence package*" insofar as they are complementary and mutually reinforcing tools.

The conjunction of all these factors makes it mandatory to approach PESCO from the point of view of differentiated integration. Accordingly, the following *Article* question is formulated as a starting point and set as a central element of the *Article*: *Is PESCO a game-changer for differentiated integration in the Common Security and Defence Policy after Brexit?*

Moreover, the analysis will aim to address the main objective: to determine the articulation of the different types of differentiated integration within the PESCO framework. To this end, in addition to analysing horizontal and vertical differentiated integration, it will be necessary to examine the involvement of the participating Member States (pMS) in the mechanism. In addition, this will be done from an eminently practical point of view, differentiating between the *pre-PESCO* period and the current one, with the focus on the so-called "group of four" or *frontrunners*, made up of France, Germany, Italy and Spain.

The *Article* will be divided into three main sections. Section II will be devoted to addressing PESCO's role in differentiated integration. For this purpose, a comprehensive analysis of the articulation of differentiated integration in PESCO and its impact on CSDP will be provided. In section III, the possibility for third states to participate in individual

[2] European Council, Strategic Compass 7371/22 of the Council of 21 March 2022, *A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security* data.consilium.europa.eu

[3] Decision 2020/1639/CFSP of the Council of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects.

PESCO projects will be explored further, with particular emphasis on the UK's position and its ties with EU Member States. Section IV will be dedicated to the main findings of the first Strategic Review of PESCO, which will lay the foundations for the future of the mechanism in its 2021-2025 phase.

Notwithstanding the above, along these lines some considerations should be made regarding the reactions of the EU and some Member States to the war in Ukraine, as well as the forecasts on PESCO in the Strategic Compass.

Finally, conclusions on the subject will be drawn which, due to the current state of affairs, can only be considered as tentative. The question of to what extent PESCO affects the common nature of CSDP is largely felt out, as this is dealt with in another contribution to this Special Section.[4]

II. PESCO and differentiated integration in EU defence

This section will attempt to address all those questions that allow us to affirm that Permanent Structured Cooperation is a game-changer in differentiated integration, both in its conception and in its implementation in the context of Brexit. In other words, how PESCO has changed the rules of the CSDP game by enabling an unprecedented development.

To this end, one must start from the foundations. This ranges from the very concept of "differentiated integration" to the legal basis and *raison d'être* of PESCO.

II.1. Approaching the definition of differentiated integration

The concept of "differentiated integration" (DI) is not unfamiliar to scholars of European law. One starting point is the definition of Schimmelfennig and Winzen[5] about European integration: "The body of binding formal rules of the EU to which states agree to adhere. These rules can be uniform or differentiated. Uniform rules are equally valid in all Member States, whereas differentiated rules are not uniformly legally valid across the EU's Member States".

A definition that can be complemented by that of "differentiation" offered by Thierry Chopin and Christian Lequesne[6]: "the process that allows some EU member states to go further in the integration process, while allowing others to opt not to do so". Consequently, it can be clearly stated that *differentiation* and *integration* go hand in hand.

[4] AS Houdé and RA Wessel, 'A *Common* Security and Defence Policy: Limits to Differentiated Integration in PESCO?' (2022) European Papers www.europeanpapers.eu 1325.

[5] F Schimmelfennig and T Winzen, 'Differentiated EU Integration: Maps and Modes' (EUI Working Papers 24-2020) 2.

[6] T Chopin and C Lequesne, 'Differentiation as a Double-Edged Sword: Member States' Practices and Brexit' (2016) International Affairs 531.

This is also the understanding of the European Parliament in its 2019 Resolution on differentiated integration, stressing that "differentiated integration should reflect the idea that Europe does not work to a one-size-fits-all approach and should adapt to the needs and wishes of its citizens".[7] Furthermore, it offers a clarification of the concept of differentiated integration by assuming from the outset that it has different technical and political meanings. From a technical point of view, the Resolution distinguishes between several types of "differentiation" which can have a very different impact on the EU[8]: *i)* time differentiation: this corresponds to a "*multi-speed Europe*". The same objectives are set, but different speeds to achieve them; *ii)* formal differentiation: this is known as "*Europe à la carte*" and implies participation in policies of interest without the goal of ultimately achieving a single objective for all Member States; *iii)* space differentiation: identified with a "*Europe of variable geometry*", as the duration can be extended and is more geographical in nature.

By the same token, it also states in its Resolution that DI can take many different forms within the EU framework, including opt-outs, enhanced cooperation initiatives, permanent structured cooperation and intergovernmental formations outside the framework of the Treaty.[9]

In focusing on one of these differentiated forms of integration, Permanent Structured Cooperation, it should first be noted that it is a complex and complicated flexibility mechanism. Consequently, to shed light on DI in its framework, one has to go back to the essentials. That is, the definition as set out in art. 42(6) of the TEU, always understood in line with art. 46 TEU, as well as Protocol No. 10: "Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions shall establish permanent structured cooperation within the Union framework. Such cooperation shall be governed by Article 46. It shall not affect the provisions of Article 43".

As can be derived from the above, perhaps the most important and characteristic feature of PESCO is that it establishes legally binding commitments. At the same time, the mechanism is provided with the greatest possible flexibility while attempting not to affect national sovereignty.[10] In addition, as Wessel rightly points out, it is interesting to note that "the Treaty does not merely allow for this form of differentiated integration, but actually seems to *encourage* states to engage in it".[11] As demonstrated in the next section,

[7] Resolution 2018/2093(INI) of the European Parliament on differentiated integration of 17 January 2019.

[8] *Ibid*. para. D.

[9] *Ibid*.

[10] N Meershoek, 'The Constraints of Power Structures on EU Integration and Regulation of Military Procurement' (2021) European Papers www.europeanpapers.eu 831.

[11] RA Wessel, 'The Participation of Members and Non-Members in EU Foreign, Security and Defence Policy', in WT Douma and others (eds.), *The Evolving Nature of EU External Relations Law* (Springer 2021) 177.

this does not preclude that "practice has revealed the possibility of closer cooperation between EU member States, but *outside* the EU framework".[12]

Similarly, if all its features are put on the table together, the potential of the mechanism can be seen in comparison also with the facilities and differences with respect to the Enhanced Cooperation.[13]

It may seem irrelevant to bring up the definition today when the instrument is implemented, but it is precisely along these lines that the basis for talking about differentiated inclusion in the framework of PESCO can be found. Needless to say, despite having been the subject of study by countless academics and other experts in the field since the 1990s, it was only in 2017 that differentiated integration was explicitly recognised as a viable option for the EU's future development.[14] This recognition was embodied in Junker's 2017 future scenarios both in general terms in the "White paper on the future of Europe. Reflections and scenarios for the EU27 by 2025",[15] and in specific terms for the defence field in the "Reflection paper on the future of European defence".[16] A year that ended with the entry into force of PESCO on 11 December 2017,[17] thereby marking a new paradigm shift in terms of being able to differentiate between a *pre-PESCO* landscape and the current one in European defence.

II.2. Pre-PESCO landscape

In light of the foregoing definitions of differentiated integration and returning to the central question of this article – the role of PESCO as a game-changer in the defence integration process – it is worth looking back. To understand the significance of what has been happening outside the legal framework provided by the Treaties until the entry into force of PESCO on 11 December 2017, it is necessary to go back to the Cold War. Shortly after the entry into force of the Treaty of Rome, some of the first attempts were made to carry out multinational programmes between Member States. These were highly complex programmes involving companies from two or more countries and supported by their respective defence ministries, seeking to advance the development of new

[12] *Ibid*.

[13] LM Wolfstädter and V Kreilinger, 'European Integration Via Flexibility Tools: The Cases of EPPO and PESCO' (Jacques Delors Institute Policy Paper 209/2017) 13 ff.

[14] N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' (2019) L'Europe en formation 105, 106.

[15] White paper COM(2017) 2025 final from the Commission of 1 March 2017 on the future of Europe. Reflections and scenarios for the EU27 by 2025.

[16] Reflection paper COM(2017) 315 final from the Commission of 7 June 2017 on the future of European Defence.

[17] Decision 2017/2315/CFSP of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States.

technologies, weapons, and weapons systems beyond what each company and country could have done on its own.

That same year, 1958, at NATO's request, a programme was launched that years later would give rise to the Bréguet 1150 Atlantique maritime patrol aircraft.[18] Led by the French company Dassault, but with German, Italian and Dutch participation through the Société d'Étude et de Construction de Breguet Atlantic (SECBAT). These aircraft entered service in 1965 and, in their various evolutions – such as the Atlantique 2 –, are still in service with the French Naval Aviation.

Not long afterwards, in the late 1960s, France and Germany through Dassault and Dornier companies launched the Alpha Jet programme.[19] It sought to provide their respective air forces with an advanced light attack and training aircraft, minimising technological risk and sharing development costs. In only a few years, the programme accumulated milestones, achieving its first flight in 1973 and entering service in 1977.

Also in the 1970s, the French, Dutch and Belgians agreed to launch the Tripartite Programme[20] to design and build several dozen mine warfare vessels for their respective navies. The highly successful project would not only produce a capable ship, but would also serve to standardise the Tactics, Techniques and Procedures (TTPs) of the three navies.

In 1982, the Austrian Steyr-Daimler-Puch Spezialfahrzeug began designing a new infantry fighting vehicle. An effort that, after much to-ing and fro-ing, was joined in 1988 by Spain's Empresa Nacional Santa Bárbara. The joint programme was called Austrian Spanish Cooperative Development (ASCOD)[21] and resulted in the Ulan and Pizarro vehicles which are still in service, as well as several variants currently under development or even in production. For instance, the Scout SV or the ASCOD 2.

Yet another example of great significance can be found in the Typhoon fighter aircraft. Its origins date back to 1979 when the German company Messerschmitt-Bölkow-Blohm and the British company British Aerospace presented a project called the European Combat Fighter (ECF)[22] to their respective governments. France's Dassault would later join them. The project failed in 1981, both because of the different requirements of each partner, and because of Dassault's insistence (nothing new under the sun) to act as design leader in the programme. However, it would be taken up again a few years later and finally blossom in 1994 into the programme we all know: the EF-2000 Typhoon multirole fighter-bomber.[23] It is the result of a programme that involved the participation of hundreds of companies from all over the continent, with a total budget of more than 40 billion euro. Moreover, this

[18] Dassault Aviation, *Atlantic* www.dassault-aviation.com.
[19] X Capy and J Defecques, *Alpha Jet 40 ans, 1973-2013* (Lela Presse 2014)
[20] LM Surhone, MT Timpledon and SF Marseken (eds), *Tripartite Class Minehunter* (Betascript 2010).
[21] Ikonos Press (ed.), *Vehículo de Combate de Infantería PIZARRO* (2019) www.scalemates.com.
[22] A van Noye, 'The Eurofighter EF2000 Typhoon, Part I' (30 June 2011) Runway28 www.runway28.nl.
[23] Eurofighter Typhoon, *Technical Guide* (2013) www.eurofighter.com.

programme is the direct precedent for the Future Combat Air System (FCAS)/Next-Generation Weapon System (NGWS), now without British participation.

Furthermore, the Future International Military Airlifter (FIMA)[24] group was created in 1982. This was the seed of the current A-400M transport aircraft, which initially included the US company Lockheed Martin among its promoters. With the departure of the Americans and the arrival of Italy's Alenia and Spain's CASA, the foundations were laid for a project that was to put its first aircraft in the air in 2009 and is still in progress.

Almost at the same time, in 1984, another important programme took its first steps; the one that would lead to the future Eurocopter Tiger attack helicopter.[25] With major ups and downs, cancelled due to enormous transaction costs in 1986, reorganised and restarted a year later, the programme finally achieved its first flight in 1991. It was not until later, in 2003, that Spain joined the programme endowed with important industrial considerations.

In 1992, after the failure of the NFR-90 programme, France, the United Kingdom and Italy launched a joint project to design a new class of frigates. Due to differences between the partners, this project would eventually give rise to the Horizon/Orizzonte classes. In the British case, it would be the germ of the Type 45 destroyers.[26]

As it happens, there were many more binational and multinational projects affecting the whole range of military equipment. Although the leading role of the aeronautical industry, perhaps the most technically demanding, is evident. Of course, many of them failed before they came to anything, generally because of differences in the role and weight of each company and the difficulty of establishing unified requirements to meet the needs of such different players. In any case, each and every one of these projects and those that had not been mentioned (Transall transport aircraft, Panavia Tornado and SEPECAT Jaguar attack aircraft, the Patiño/Amsterdam supply ships, the Galicia/Rotterdam amphibious assault ships, etc.) represented a step forward in terms of integration, even though the Europe of Defence was still a chimera. Precisely one of the keys to all these projects, which brings them closer to what is happening with those that currently form part of PESCO and clearly speaks to us of integration in its broadest sense, has to do with the need to standardise components and processes. Even the doctrines within the armed forces that are the target of all these systems. In many cases, advantage was taken of the existence of NATO STANAGs,[27] given the need to comply with them and maximise interoperability with the rest of the partners. Nor can it be overlooked that all these programmes had a significant *pull capacity*, albeit reference is usually made to a handful of companies. In other words, all of them involved dozens or hundreds of

[24] Royal Air Force, *ATLAS C.1 (A400M)* www.raf.mod.uk.

[25] U Krotz, *Flying Tiger: International Relations Theory and the Politics of Advanced Weapons* (Oxford University Press 2011).

[26] R Mariette, 'Clase Horizonte: El Último Vástago del Programa NFR-90' (2010) Ejércitos issuu.com.

[27] NATO, *NATO Standardization Office* www.nato.int.

ancillary companies which, in many cases, had to establish relations with the rest, share information, end up sealing alliances, open up new markets, and so on. In the end, all of this was in fact differentiated defence integration *avant la lettre*.

As shown above, long before the most important CSDP milestones were reached, numerous business-government collaboration programmes were launched. Indeed, in terms of the number of public and private actors involved or their economic and technological depth, they differed little from those which currently fall under the umbrella of PESCO. Compared to the number of them currently underway (60), and given the almost seven decades covered, they should be considered as what they are: projects which have emerged in dribs and drabs.

In fact, only a handful of projects were developed between the late 1950s and 2017, which is surprising considering that the incentives for European defence collaboration were as great or greater than today: *i)* the Soviet threat far outweighed any other today; *ii)* the arms race resulting from inter-bloc competition served as a spur to innovation and collaboration and; *iii)* the number of defence companies was much greater and they were smaller than they are today. The latter, at least on paper, should favour the establishment of alliances between them in search of synergies.

Therefore, it can be concluded that the real differentiating factor was the lack of a legislative framework at the European level that would make it possible to systematise these efforts, establishing rules of governance, albeit minimal that would favour differentiated integration in defence. This is what PESCO has made possible. At least from a quantitative point of view, it is evident that it has been a resounding success, thus becoming a real *game-changer*.

II.3. Differentiated integration via PESCO

After the presentation of some key ideas on differentiated integration, as well as the situation prior to PESCO, it is possible to assess how this differentiation is articulated in the implementation of PESCO. Nevertheless, the aim of this section is not to evaluate or discuss at a theoretical level the possible notions of *horizontal* and *vertical*, or *internal* and *external*[28] differentiated integration, but rather their practical translation.

a) Horizontal differentiated integration

Horizontal DI is directly associated with the provision in the Lisbon Treaty enabling the establishment of PESCO.[29] Accordingly, it is intrinsically linked to primary law, while its

[28] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (Political Science Series Working Paper 137-2014); C Hoeffler, 'Differentiated Integration in CSDP Through Defence Market Integration' (2019) European Review of International Studies 43.

[29] L Lonardo, 'Integration in European Defence: Some Legal Considerations' (2017) European Papers www.europeanpapers.eu 887.

practical translation is reflected through the list of Member States that have opted to become participants in the mechanism. In total, 25 Member States form the basis for horizontal differentiated integration.[30]

The latter does this mean that we are dealing with a true case of horizontal differentiated integration as the opportunity for true differentiated integration was lost when the German vision of making the mechanism inclusive was pursued.[31] At this time, all Member States that are currently eligible for PESCO are already participating Member States. Only two states have been left out of the mechanism: Denmark and Malta. The United Kingdom also stayed out, as the referendum had already taken place by the date of entry into force of the Permanent Structured Cooperation.

On the one hand, Denmark could not join PESCO because of its defence *opt-out* clause.[32] Nevertheless, in response to the Russian aggression in Ukraine, the Danish government has called a referendum on 1 June 2022 for its population to decide whether the country should integrate into the CSDP.[33] In addition, along with other issues, their Prime Minister also announced that they will increase their defence spending until they reach 2 per cent of GDP.

On the other hand, Malta argued its refusal to join as a pMS by invoking a constitutional clause by virtue of which it is committed to neutrality and non-alignment. Nonetheless, the Prime Minister left the door open to future participation at the expense of PESCO's own course of implementation.[34]

b) Vertical differentiated integration

Whereas horizontal DI essentially refers to the number of pMS in PESCO through primary law, vertical DI is limited to the level of projects that can be developed on the basis of the adoption of secondary legislation. These are Decision 2017/2315/CFSP of the Council of 11 December 2017 establishing PESCO and determining the list of participating Member States, and Decision 2020/1639/CFSP of the Council of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects. In addition to these, Decision 2018/909/CFSP of the Council of 25 June 2018 establishing a common set of governance rules for PESCO projects should be added.

All those variables that enable the development of the projects and thus deepen integration would be included under the umbrella of vertical DI. For instance, the creation

[30] S Blockmans and D Macchiarini Crosson 'PESCO: A Force for Positive Integration in EU Defence' (2021) European Foreign Affairs Review 87, 88.

[31] See on the Franco-German debate E Lazarou and AM Friede, 'Permanent Structured Cooperation (PESCO): Beyond Establishment' (9 March 2018) European Parliament Briefing www.europarl.europa.eu 7.

[32] Denmark and the Treaty on European Union [1992].

[33] J Gronholt-Pedersen, 'Denmark to Boost Defence Spending and Phase out Russian Gas' (6 March 2022) Reuters www.reuters.com.

[34] E Lazarou and AM Friede, 'Permanent Structured Cooperation (PESCO): Beyond establishment' cit., 6.

of European clusters, the level of ambition and involvement of states, financing, etc. Equally, this integration is also connected to the numerous actors involved in the actual project design and decision-making at both national and European level, creating "a microcosm in which vertical differentiation is taking shape with the active participation of EU bodies and institutions".[35]

Hence, different types of DI are intertwined in the framework of PESCO, as well as different alternatives in project participation due to the inclusive character of the instrument. In spite of the implementation phase of 60 on-going projects, the debate between German inclusivity and French exclusivity does not seem to have been overcome today. It may have been overcome, but it has not been forgotten. The truth is that despite being inclusive in terms of the number of pMS, PESCO ends up being an exclusive mechanism if one looks at the individual contributions to projects and the ambition shown by each of these countries combined with their own strategic culture.[36]

This debate cannot be forgotten, since as outlined above, a commitment to inclusivity inevitably leads to differences in the level of differentiated integration in practice. Even though most of the projects involve between four and seven participating Member States.[37] Moreover, it is not only a question of the number itself, inasmuch as in many cases the same pMS are grouped together in a bi- or trilateral manner. In fact, they tend to follow the dynamics prior to PESCO which, as will be seen, are mostly carried out by the same actors.

Depending on the level of involvement and participation in the projects, different trends can be observed that allow pMS to be divided into different groups. Nevertheless, the classification established by Blockmans and Macchiarini is not entirely shared in this article, mainly due to the second category they offer.[38] A division of pMS is established around three categories: *frontrunners*, *laggards* and *disruptors*.

Within this vertical DI, it is clear there is a group of pioneering (*frontrunners*) countries that would be the *group of four* – France, Italy, Germany and Spain – as the authors referred to above point out. Nonetheless, it could be claimed that the only leader is France and that in reality we are also dealing with a group of "3+1" pioneers, being Spain the added state.

In practice, participation in projects and deepening of vertical DI depends on various factors such as industrial capacity, the defence budget, the level of ambition and commitment of each state, and so on. For these same reasons, the group of pioneers

[35] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 91.

[36] J Howorth, *Security and Defence Policy in the European Union* (Palgrave Macmillan 2007) 178 ff; HP Bartels, AM Kellner and U Optenhögel, *Strategic Autonomy and the Defence of Europe: On the Road to a European Army?* (Dietz 2017).

[37] N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' cit. 114 ff.

[38] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 96 ff.

coincides with those states with a more developed defence industry, higher budgets, and greater export vocation, among others.

Besides, if it assumed that after Brexit the balance of power within the EU must be adjusted in accordance with the assets of the countries that remain part of it, a window of opportunity arises. Especially, for countries such as Spain or Poland to make a leap in quality, becoming part of the group of four to replace the United Kingdom. If the latter is not entirely possible, at least there does seem to be a chance for partners such as Spain, Poland and the Netherlands to improve their relative position.

Furthermore, due to the Russian invasion of Ukraine, this rebalancing of power within the Union will be further heightened if the announcements made by various member states materialise. It is therefore important to take into account the announcements made by Germany, Italy, Spain, Poland, Estonia and Sweden, among others, regarding the increase in their defence budgets. In this vein, these announcements are in line with the commitments undertaken within the framework of PESCO, the Versailles Declaration of 10 and 11 March 2022[39], the Strategic Compass and last NATO summits.

With all this in mind, the peculiar situation of Spain[40] can be observed when looking at the data shown in the following table referring to the involvement of various Member States in the 60 approved PESCO projects.[41]

	GDP (2019)*	Defence Budget (2019)*	% of GDP	Population	Leader	Participant	Total
Germany	3.592.000	48.802	1,36	83.166.711	8	14	22
France	2.608.000	47.707	1,83	67.320.216	14	30	44
Italy	1.950.000	22.525	1,18	59.641.488	11	19	31
Spain	1.325.000	12.005	0,91	47.332.614	4	21	25
Netherlands	838.000	11.302	1,35	17.407.585	1	12	13
Poland	569.000	11.294	1,98	37.958.138	1	12	13

TABLE * At 2015 constant prices.

Firstly, it can be highlighted that Spain occupies an uncomfortable no-one's land in terms of both GDP and population (but not budget). Hence, it is halfway between the

[39] European Council, *The Versailles Declaration of 10 and 11 March 2022* www.consilium.europa.eu.

[40] See www.ipsa.org for 26th IPSA World Congress of Political Science full conference programme: B Cózar-Murillo and G Colom-Piella, 'The Permanent Structured Cooperation and Its Implications for Spain' (15 July 2021) IPSA World Congress of Political Science.

[41] Author's formulation based on data from NATO, *Defence Expenditure of NATO Countries (2013-2020)* www.nato.int; Decision 2021/2008/CFSP of the Council of 16 November 2021 amending and updating Decision 2018/340/CFSP establishing the list of projects to be developed under PESCO; and European Union, *Facts and Figures on Life in the European Union* europa.eu.

three most populous and richest countries (Germany, France and Italy) and the next two in the running (the Netherlands and Poland).

Secondly, Spain is therefore the most obvious candidate to replace the United Kingdom, taking over a large part of the former partner's share of power. Nevertheless, one should accept that neither its defence industry, in terms of turnover or technological capabilities, nor its investment capacity, is sufficient to fill the vacuum left by London. In this respect, it is possible that Poland could fill part of the gap. However, there are authors who describe Poland as a *disruptor*.[42] Due to its specific strategic concerns, very different from those of France, Germany or Spain and marked by the Russian threat, as well as its close alliance with the United States and doubts about its Europeanism, make it necessary to be cautious.

Thirdly, it should be assumed that this redistribution of power would affect the very composition of the group of four. If up to now one even spoke of a "three + one" formation in which Spain was this "additional" country, in the short and medium term the dynamic could even change to a "Germany and France + Italy + Spain" scenario.[43]

However, if Germany materialises its announcement to allocate two per cent of GDP to defence along with an additional 100 billion euros to restore capabilities and improve the operability of the German armed forces, it is equally likely that France and Italy will try to join forces to counterbalance German power. For the time being, Italy has also announced its willingness to move away from its stagnant 1.3 per cent of GDP spent on defence and reach the two per cent.[44] Similarly, Spain has announced its intention to exceed 1.22 per cent by 2024.[45]

It could also be the case that Poland and the Netherlands together with Spain join a second-tier group that could, under the circumstances, act as a hinge when important decisions are taken. Besides, it is worth noting that, on the one hand, Poland has indicated its intention to increase its defence budget from next year to three per cent of GDP.[46] On the other hand, the Netherlands has announced that it will allocate an additional five billion euros to its defence budget, which will represent an increase of

[42] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 96 ff; and M Terlikowski, 'PeSCo The Polish Perspective' (IRIS Ares Group Policy Paper 32-2018).

[43] B Cózar-Murillo, '¿Requiem por la Industria Española de Defensa? La Guerra de Ucrania y la Industria Española de Defensa' (2022) Ejércitos www.revistaejercitos.com.

[44] O Lanzavecchia, 'Italian Parliament Votes to Raise Defence Budget to 2% of GDP' (17 March 2022) Decode 39 decode39.com.

[45] See national briefing by Pedro Sánchez, Prime Minister of Spain, following the Informal meeting of Heads of State or Government, on 11 March 2022, in Versailles: European Council, *National briefing: Spain – Part 1* newsroom.consilium.europa.eu.

[46] Army Technology, 'Poland Plans to Boost Defence Spending as Ukraine Conflict Worsens' (4 March 2022) Army Technology www.army-technology.com.

approximately 40 per cent.[47] This would enable the Dutch government to meet the NATO and EU target of two per cent of GDP by 2024 and 2025.

Following Antonio Calcara and Luis Simón's postulates, the separation between system integrating countries such as Germany and France, and the rest is likely to be accentuated.[48] That said, it cannot be overlooked that Italy also has two vital assets: Fincantieri and Leonardo.

Finally, notwithstanding the above, the possibility that this group of four could continue to function at the institutional level with a strong Spanish presence cannot be excluded either, due to the relevance of its defence industry, as well as its staunch defence of the European project.

At another level, it is argued that the *lagging* States would be Denmark and Malta, which can be contradicted on the grounds of two main reasons: *i)* It would only obey postulates derived from horizontal DI as explained above, so that a large group of states that have not yet joined the mechanism is not discernible. *ii)* In this context of verticality derived from participation in projects, a lagging State could be understood as one whose national characteristics or particularities – for example, industry – do not allow it to keep pace with the frontrunners.

A clear example is the case of Portugal. This small country is involved in a total of fourteen projects, leading three of them. However, it has neither large defence companies nor the capacity to provide the necessary financial resources to develop large-scale programmes. In fact, the country has significant problems maintaining its own armed forces, resorting to second-hand purchases or early decommissioning of equipment. Besides, this is a case that is repeated in other parts of the world, as not all partners, however pro-European and willing they may be, have the means to make it effective by assuming greater responsibilities in PESCO matters.

Nevertheless, a scenario in which an exclusive position was adopted could have led to the same result. This is because what makes the real difference is "*who can*" be a participating Member State in practice in its broadest sense. Thus, it could be argued that a trick has been played and that there could indeed be horizontal DI at the project level. Indeed, this is because not all members participate in all projects, and as soon as there are frontrunners, this hypothesis could be validated.

In conclusion, as far as the accession of Member States to PESCO is concerned, this would not be a true case of horizontal differentiated integration, but it would be the case in the implementation of the mechanism. Similarly, due to the evident vertical differentiated integration at the project level, the assumption that PESCO acts as a true *game-changer* in the CSDP can be consolidated.

[47] See, in Dutch, Ministerie van Defensie, *Structureel € 5 miljard extra voor Defensie* (20 May 2022) www.defensie.nl.

[48] A Calcara and L Simón, 'Market Size and the Political Economy of European Defence' (2022) Security Studies 860.

III. The participation of third states

Since 5 November 2020, it has been possible for non-EU Member States to exceptionally participate in individual PESCO projects thanks to the aforementioned Decision 2020/1639/CFSP.

Four reasons can be mentioned why the Decision has been adopted in November 2020 and not earlier, when it was the remaining piece to complete the architecture of PESCO. Notwithstanding the foregoing, a basic premise must be kept in mind: the ultimate reason for taking so long to publish the Decision lay in Member States' national positions and their differing interests in allowing third states to participate in projects.[49] As can be deduced from previous sections, this may be reminiscent of the classic debate on the inclusive or exclusive nature of PESCO.

The first and most obvious of these reasons is the United Kingdom's withdrawal from the European Union. The result of the British referendum together with the very impetus given to the CSDP by the EU Global Strategy (EUGS) and the 2016 "winter package" on defence, suggest that not only has this Decision 2020/1639/CFSP been negotiated in parallel to the exit negotiations, but all the new initiatives and instruments have been addressed in the last five years.

When dealing with the relationship between PESCO and Brexit, it cannot remain untouched that, being a defence issue, this matter was left out of the table at the beginning of the negotiations. Moreover, no agreement has yet been reached beyond the revised Political Declaration on future relations 2019.[50] Thus, to a certain extent, it could be argued that this declaration seeks to cover the UK's possible involvement in the CSDP through a specific mechanism for collaboration: PESCO.

The second reason is related to the conclusion of the binding agreement between France and Germany signed on 23 October 2019.[51] The main objective of this agreement was to remove major obstacles to the development and export of Franco-German weapon systems. Thus, it lays the groundwork for the development of new projects such as the Main Ground Combat System (MGCS) or FCAS/NGWS.

On the other hand, the third of these reasons would be closely related to the "group of four" or *pioneers* in the framework of PESCO. It can be identified with the impetus given by the letter of the Defence Ministers of France, Germany, Spain and Italy, signed on 29 May 2020[52] and sent to their counterparts and to the High Representative and Vice-President of the Commission, Josep Borrell. In the letter, the ministers refer to PESCO as

[49] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' (EUIDEA Policy Paper 1-2020) 7.

[50] Political Declaration setting out framework for the future relationship between the European Union and the United Kingdom of 17 October 2019.

[51] Decree No. 2019-1168 of 13 November 2019 on the publication of the agreement in the form of an exchange of letters between the Government of the French Republic and the Government of the Federal Republic of Germany on defence export controls (together with an annex), signed in Paris on 23 October 2019 (1) www.legifrance.gouv.fr.

[52] Defence Ministers letter of 29 May 2020 on At the heart of our European Union, www.difesa.it.

the key framework for EU defence cooperation, underlining the need for projects to deliver visible and short-term operational results in support of the CSDP Level of Ambition. Furthermore, they expressly requested that the adoption of the Decision on the participation of third States in PESCO be resolved as soon as possible. The positioning of *the four* in the letter was undoubtedly reinforced by the special position of Germany, which held the rotating presidency of the Council from July until December 2020 and had an agenda strongly marked by security and defence priorities.

The fourth and last of these reasons may lie in the fact that the first phase of PESCO – established for the period 2018-2020 – was coming to an end. This led to the elaboration of the first Strategic Review, which aimed to set the orientations for the next phase of the mechanism for the period 2021-2025 and which will be discussed in section IV of this *Article*.

Furthermore, these reasons must be combined with the work that has been carried out within the European Parliament which is often a rather invisible Institution in these matters. Days before the publication of the Decision on third States, it issued a Recommendation to the Council and the High Representative on the implementation and governance of PESCO.[53] This Recommendation made express reference to the participation of third States, which could be taken as a kind of guide to the content that was later taken up in the Decision. In other words, both the Recommendation and the Decision are aligned.

As a result, the Decision on third States closes the legislative framework underpinning the architecture of PESCO built on the two previous key Decisions that have been discussed in the context of the analysis of vertical differentiated integration (Council Decisions 2017/2315 and 2018/909).

However, although Decision 2020/1639/CFSP is a step forward, it cannot be ignored that far from being a clarifying text it is extremely dense and difficult to understand despite its only nine articles. The analysis of the issue becomes complex as a result, in part, of the excessive references to Decision 2018/909/CFSP on the set of common governance rules for PESCO projects. These references, combined with the extreme laxity or ambiguity detected in certain points of the articles, make the task of clarifying the terms under which third parties may participate in PESCO a veritable gibberish.[54] In addition, it should be highlighted that this Decision is subject to and/or conditional upon the provisions of the decision on the set of governance rules. This text was due to be updated by 31 December 2020[55] but this task has not yet been done.

[53] Recommendation 2020/2080(INI) of the European Parliament to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy on the implementation and governance of Permanent Structured Cooperation (PESCO) of 20 October 2020.

[54] B Cózar-Murillo, 'La Cooperación Estructurada Permanente y la Participación de Terceros Estados' (2021) Revista General de Derecho Europeo 289.

[55] Decision 2018/909/CFSP of the Council of 25 June 2018 establishing a common set of governance rules for PESCO projects, art. 9.

In this sense, the Decision leaves numerous *open doors* or legal loopholes that could block the effective participation of third States. Moreover, numerous terms are still pending definition and clarification by the European Institutions.

Considering the wording of the Decision and given the fact that the governance considerations have not been fully defined, there is a high risk of problems in practice when it comes to its effective implementation. For instance, issues related to intellectual property. This would apply both to the negotiation of the entry of third States and to the regular functioning and the annual review of the mechanism. Not to mention the possible obstacles to suspending or terminating the participation of these third countries.

The fact of having Decision 2020/1639/CFSP on the participation of third States in PESCO also implies a form of horizontal DI precisely because of the possible alternatives that arise around individual project members. In other words, third countries invited to participate will help in the deepening of horizontal DI, not at the level of the mechanism, but at the level of the projects. Logically, it will also have an impact on vertical DI as there will be a greater number of actors involved and the number of projects in which these third states are involved. Despite the exceptional nature of the participation of non-Member States, it is therefore to be expected that another group of *trendsetters* will also emerge.

The integration of third parties into individual PESCO projects is now a reality thanks to the *Military Mobility* project. This is one of the projects that has been in the spotlight since its launch due to its association with the so-called "Schengen of Defence",[56] but in recent months its prominence has increased. In addition to being coordinated by the Netherlands and being the largest project with the participation of all pMS except Ireland, the United States, Canada and Norway[57] will join the project after submitting their respective applications. On 6 May 2021, the Council adopted three Decisions authorising the project coordinator to invite the three countries mentioned above, which will be the first countries to be invited to participate in an individual PESCO project.[58]

Along with these countries that have already been formally invited to participate, there were rumours that Turkey had also shown interest.[59] However, it would be very difficult for Turkey to participate in individual projects, not only because of the more than

[56] A Rettman, 'France and Germany Propose EU "Defence Union"' (12 September 2016) EU Observer euobserver.com.

[57] In addition to participating as a third State in the Military Mobility project, it is the only non-Member State participating in the EDF research window due to its special status in its relations with the EU (e.g. member of the Schengen Area and the European Economic Area). See extensively on European Commission, Directorate-General for Defence Industry and Space (DEFIS), *The European Defence Fund (EDF)* ec.europa.eu.

[58] Council of the European Union, *PESCO: Canada, Norway and the United States will be Invited to Participate in the Project Military Mobility* www.consilium.europa.eu.

[59] See Parliamentary Question E-002795/2021 of the European Parliament of 26 May 2021 on Turkey's request to take part in a PESCO military mobility project; and V Bacco, 'How Could Non-EU Countries Participation in PESCO Projects Strengthen EU Strategic Autonomy?' (16 January 2021) Vocal Europe www.vocaleurope.eu.

likely Greek veto, but also because it does not meet other requirements. Among others, it does not share the values on which the EU is based.

Moreover, if this was one of the projects under the spotlight before the Russian invasion of Ukraine began on 24 February 2022, it is even more so today. In fact, the Strategic Compass intends to give it greater impetus because it was the war in Ukraine that confirmed the "urgent need" to considerably improve the military mobility of European armed forces, both inside and outside the Union.[60]

Nevertheless, it cannot be overridden that it would also have been expected – and reasonable – for the UK to be the first third country or one of the first to step forward to show its interest in participating in individual projects. On the one hand, because it had already expressed interest in PESCO. On the other, because of the strong ties it still maintains with both the EU and its Member States, although it is true that the tension in relations has also been maintained after the effective exit. Also, it has even increased with chapters such as the recent creation of AUKUS alliance. Similarly, the government has stated that the UK would only decide to participate in PESCO projects where there is clear value for the UK, including the area of defence industry, and that they will make autonomous decisions on whether or not to participate.[61] So this should be combined with the Political Declaration setting out the framework for future relations between the EU and the UK[62], which foresees participation in PESCO projects as a measure to support the European Defence Policy.[63]

Nonetheless, following the debate in the House of Commons on 7 December 2020, the UK's participation no longer seems so likely, although future administrations may decide otherwise.[64] This is because the Secretary of State for Defence, Ben Wallace, stated the following:[65]

> "[...] we have no plans to participate in it [PESCO] because we have serious concerns about the intellectual property rights and export controls that it would seek to impose. However, we will always be open to working with European industries—on the future combat air system, for example. We have engaged with the Swedish and the Italians, for instance,

[60] Strategic Compass 7371/22 cit. 18 ff.

[61] C Mills, 'EU defence: the Realisation of Permanent Structured Cooperation (PESCO)' (23 September 2019) UK Parliament, House of Commons Library Briefing Paper commonslibrary.parliament.uk 17 ff.

[62] See extensively RA Wessel 'Friends with Benefits? Possibilities for the UK's Continued Participation in the EU's Foreign and Security Policy' (2019) www.europeanpapers.eu 435.

[63] Political Declaration of 17 October 2019 cit. para. 102.

[64] C Mills, 'EU Permanent Structured Cooperation (PESCO): A Future Role for UK Defence?' (21 November 2022) UK Parliament, House of Commons Library Briefing Paper commonslibrary.parliament.uk; and C Mills and B Smith, 'End of Brexit Transition: Implications for Defence and Foreign Policy Cooperation' (19 January 2021) UK Parliament, House of Commons Library Research Briefing commonslibrary.parliament.uk.

[65] Intervention of the Secretary of State for Defence Ben Wallace in House of Commons Debate of 7 December 2020: UK Parliament Hansard, *Military and Security Co-operation: European Union* hansard.parliament.uk.

> because the collective security of Europe is often based on a good sovereign capability in our industrial base. We will continue to do that on a case-by-case basis, and to do that with our other allies such as the United States. Britain is also the keystone of European security".

The importance of intellectual property rights and technological sovereignty, as mentioned above, can be drawn from this intervention. In addition, the Secretary made explicit reference to the Tempest project in which he participates with Sweden and Italy. This is in clear competition with the FCAS/NWGS involving Germany, France and Spain. However, it should be noted that PESCO is not the only form of collaboration with its former bloc partners. For example, in relation to France, it participates in the European Intervention Initiative (EI2) and the Lancaster House Treaties are still in force, having reached their tenth anniversary last year.[66] Another example would be the UK-led Expeditionary Force,[67] whose members have also decided to reinforce amidst the current situation with the ongoing war in Ukraine.[68]

Furthermore, given the successive reforms of the British defence strategy[69], it is clear that it is in the UK's interest to maintain the national and industrial alliances forged over decades prior to its exit from the club and the entry into force of PESCO. Nevertheless, as stressed by Benjamin Martill and Monika Sus, "the failure of the UK and the EU to reach an agreement on security and defence is therefore puzzling" bearing in mind that a partnership made strategic sense for both sides.[70]

In spite of the UK's current position, it is to be expected that in the medium and long term the special and also long-standing relationship between the continental and British defence industries – as well as shared interests –, will eventually prevail. This would make the UK a key partner and even a regular participant in future PESCO projects. Although in the short term the Johnson government's attitude, embodied in agreements such as AUKUS, will be a source of disagreement that will weigh down collaboration within the CSDP framework. Indeed, as Shea[71] points out, the best antidote to Brexit is for the EU to continue to move forward with initiatives in the direction that the UK has opposed. Then, once it has seen that they work in practice, it can be brought back into the fold by adopting a more pragmatic approach.

[66] C Mills and B Smith, 'End of Brexit transition: Implications for Defence and Foreign Policy Cooperation' cit. 3 ff.

[67] Ministry of Defence, *Iceland Becomes 10th Nation to Join UK-led Joint Expeditionary Force* www.gov.uk.

[68] Prime Minister's Office, *Joint Expeditionary Force Leaders' Statement: 15 March 2022* www.gov.uk.

[69] CD Villanueva-López, 'La Estrategia de Defensa Británica (1945-2021). Cómo ha cambiado la Estrategia de Defensa Británica en los últimos 75 Años' (2021) Ejércitos www.revistaejercitos.com.

[70] B Martill and M Sus, 'With or Without EU: Differentiated Integration and the Politics of Post-Brexit EU-UK Security Collaboration' (2022) European Papers www.europeanpapers.eu 1287.

[71] J Shea, 'European Defence After Brexit: A Plus or a Minus?' (2020) European View 88.

IV. Strategic Review 2020

Days after the adoption of the Decision on the participation of third States, the Council Conclusions on the Strategic Review of PESCO[72] were published as a prelude to the launch of the second phase of the mechanism foreseen for the period 2021-2025. In other words, the main objective, as stated in the document itself, is for the Council to finalise the strategic review process undertaken by the participating Member States and to provide guidance for the next phase of PESCO.

These orientations address several aspects: overall purpose, key strategic objectives and processes associated with PESCO, and incentives to improve the implementation of the most binding commitments.

In relation to the latter, it is highlighted that pMS have decided that these should not be modified in the framework of the first Review. However, with the agreed guidelines for translating these more binding commitments into practice, the apparent *circular fallacy* of this document stands out. All to say nothing of the fact that the document in general comes across as an empty text, and the proof is in the pudding: "To better use PESCO projects to enhance pMS operational capacities and to support work towards the coherent FSFP [full spectrum force package], in line with the EU LoA and the PESCO notification".[73]

In the same vein, it is stressed that "areas where improvement is needed and by working towards delivering tangible results" should be addressed based on the progress already achieved. It is also underlined that the Review "provided an opportunity for pMS to assess what has been achieved with regard to the fulfilment of the more binding commitments as well as projects at the end of the first initial phase (2018-2020)".[74]

However, although the whole document revolves around these considerations, no concrete facts or figures are publicly provided. It could be understood that this opportunity has been provided to pMS by exchanging information and updating the degree of implementation of commitments through the common workspace -based on the European Defence Agency's Collaborative Database (CODABA)- and the PESCO Secretariat.

Accordingly, it is not enough to say that the EU must move forward and improve, but without setting out concrete guidelines because this is detrimental to accountability, the search for coherence and remains in a state of constant indeterminacy.

One of the most interesting aspects of the Review is undoubtedly the one devoted to "Incentives to improve follow-up and fulfilment of the more binding commitments", [75] as it is not specified how this could be articulated. One might wonder, for example, whether the pMS are thinking of a bonus system comparable to the one followed by many companies when they are awarded a contract with the administration at least in some Member States. In this way, if such companies are capable of delivering on time or even

[72] Conclusions 13188/20 of the Council of 20 November 2020 on the PESCO Strategic Review 2020.
[73] *Ibid*. 6.
[74] *Ibid*. 4.
[75] *Ibid*. 9.

at a better cost, they receive a bonus stipulated in advance, which is a good incentive. Unfortunately, the text leaves a matter of the utmost importance up in the air.

Looking at the situation from the other side of the coin, it is also necessary to consider what happens if Member States repeatedly fail to comply with the most binding commitments and thus with the collective benchmarks. It is clear that, in cases such as Spain's, which is incapable of fulfilling its commitment to allocate two per cent of its GDP to defence, there is no punitive tool in the hands of the European institutions that could reverse a situation that could last forever. Despite the importance attached to the most binding commitments in official documents, the fact is that they are still dependent on the will of the Member States. In essence, the major handicap for the construction of a Europe of Defence.

In this sense, it is now possible to affirm that we are witnessing a new momentum for the CSDP and its different initiatives, although the important thing is what happens once the conflict ends. In other words, the question will be whether this political momentum will be maintained and whether it will comply with both the Versailles Declaration and the Strategic Compass to strengthen the EU's defence capabilities.[76]

On the other hand, the link with CARD would be well covered in the Strategic Review and, moreover, directly in the agreed orientations for the next PESCO stage. More specifically, it is stated that capacity development initiatives will aim to address the gaps already identified in the first CARD results,[77] but also considering the need to comply with the EU's Capability Development Plan (CDP) and the related EU Capacity Development Priorities and High Impact Capability Goals.[78]

Likewise, it should not be forgotten that the recently launched European Defence Fund must also be addressed in conjunction with PESCO and CARD as they should be understood as integral parts of a "*comprehensive defence package*" insofar as they are complementary and mutually reinforcing tools.[79] Hence, there must be a clear connection between CARD results, PESCO projects – both ongoing[80] and the fourth round to be adopted before the end of 2021– and projects funded through the EDF.[81] It is worth noting that on 30 June 2021, the first 26 projects to be funded under the European Defence Industrial Development Programme (EDIDP) – one of the two precursor programmes of the EDF – were announced. While the EDF is a success story for integration in European Defence,[82] the EDF's potential as a factor that alters the game

[76] Strategic Compass 7371/22 cit. 30 ff.

[77] European Defence Agency, *2020 CARD Report* eda.europa.eu.

[78] Conclusions 13188/20 cit. 7.

[79] European External Action Service (EEAS), *Permanent Structured Cooperation (PESCO)* eeas.europa.eu.

[80] See Decision 2020/1746/CFSP of the Council of 20 November 2020 amending and updating Decision 2018/340/CFSP establishing the list of projects to be developed under PESCO; and European Defence Agency (EDA), *Pesco* pesco.europa.eu

[81] The complete list of awarded projects is available at European Commission, Defence Industry and Space (DEFIS), *European Defence Industrial Development Programme (EDIDP)* ec.europa.eu.

[82] L Lonardo, 'Integration in European Defence: Some Legal Considerations' cit.

board shall be balanced against its financial constraints.[83] It might also be noted that within the European response, and in particular the Next Generation EU instrument, a total of 13.2 billion is allocated to joint security and defence items.[84]

As regards the direct link between the EDF and PESCO, it lies primarily in the fact that PESCO projects could benefit from increased EU co-financing of up to 30 per cent for prototypes.[85] In this light, 50 per cent of the actions to be funded through EDIDP are related to PESCO projects[86] to safeguard coherence and maximise potential synergies. Furthermore, it should not be forgotten that since the arrival of the Commission led by Von der Leyen, the EU has a Directorate-General for Defence Industry and Space (DG DEFIS). In addition, it will be interesting to see how this is articulated together with new measures to facilitate industry's access to private finance within the European Investment Bank.[87]

V. Conclusions

It is undeniable that Permanent Structured Cooperation has marked a turning point in the development of the Common Security and Defence Policy by establishing itself as a true facilitator in creating synergies between Member States.

In so doing, it has emerged as a real *game-changer* for promoting differentiated integration in the CSDP after Brexit. Especially because of its own configuration as a vector mechanism of maximum flexibility when it comes to cooperation. Moreover, all of this taking into account the brake that the United Kingdom represented when it came to making progress in defence matters.

In the same way, it has been confirmed that this form of institutionalised cooperation is a clear example of vertical differentiated integration, while horizontal differentiated integration can be controversial. It has also become clear that what is really relevant in PESCO is not so much its regulation, but its translation into practice. In other words, how the participating Member States implement what has been agreed and the possible divergences between them combined with their own idiosyncrasies. The best example could be explained by the group of four or frontrunners due to the role played by France, Italy, Germany and Spain. Similarly, it is also explained by the role of laggards such as Portugal or those countries that could be described -while remaining cautious- as disruptors. Such would be the case of Poland.

[83] R Csernatoni, 'Challenges: Toward a European Defense Winter?' (11 June 2020) Carnegie Europe carnegieeurope.eu.

[84] See European Council, *Infographic on Multiannual financial framework 2021-2027 and Next Generation EU* www.consilium.europa.eu.

[85] European External Action Service (EEAS), *Permanent Structured Cooperation (PESCO)* cit.

[86] European External Action Service (EEAS), *Permanent Structured Cooperation: Remarks by the High Representative/Vice President J Borrell at the EP Plenary on the Recommendation concerning the Implementation and Governance of PESCO* www.eeas.europa.eu.

[87] Strategic Compass 7371/22 cit. 30 ff.

Nonetheless, despite their divergent national positions and interests, ambition, funding, geography and strategic culture, synergies have emerged in the form of 60 projects. The results will take time to be seen, but as stated throughout this article, PESCO is quantitatively a resounding success. As projects flourish, they are contributing precisely to defence integration by promoting the European technological and industrial base and a common defence market.

Furthermore, this is reinforced by the nature of the mechanism, which makes it act as a centripetal force projecting a pulling capacity on all possible actors involved. However, as has also been illustrated, industry occupies a central role in all this maze, which can become PESCO on certain occasions.

In this regard, there is no denying that the industrial and national alliances from which PESCO benefits today also draw on the leftovers of previous projects. Thus, it is to be expected that the partnerships that continue to deepen, as well as the new ones that will be forged, will lay part of the foundations on which to build the single defence market. Moreover, with the roles of CARD and the EDF in mind. However, it must also be said that PESCO is a real lifeline for some defence industries such as the Spanish one. In fact, without benefiting from European Defence Fund financing and without collaborating with other companies on the continent, they will find it increasingly difficult to compete in a global market dominated by a handful of industrial giants. All this, considering the window of opportunity – but also of risk – that is opening up as it is now possible for third States to participate in individual PESCO projects.

Finally, if the desired results are achieved by generating the capabilities that the European Union needs, not just its members, it will contribute to achieving the yet undefined strategic autonomy. To this end, and following Sweeney and Winn,[88] the rhetoric surrounding the commitment to achieve "strategic autonomy" derived from the EU's Global Security Strategy requires states to make a real strategic difference. Besides, in support of their thesis, it is not entirely clear that Member States genuinely seek to see the EU develop collective and strategic autonomy or that they wish to define common strategic interests. It is hoped that the objectives and prospects adopted and endorsed in the *Strategic Compass*, as well as the reflections surrounding the Conference on the Future of Europe will help in this regard.

Ultimately, everything will depend on PESCO's *raison d'être* as a *coalition-of-the-willing*. In the end, PESCO is and can continue to be a catalyst for the promotion of differentiated integration if the political enthusiasm and commitment, the maintenance and creation of new synergies, as well as the level of ambition in successive waves and implementation of projects can be maintained.

[88] S Sweeney and N Winn, 'EU Security and Defence Cooperation in Times of Dissent: Analysing PESCO, the European Defence Fund and the European Intervention Initiative (EI2) in the Shadow of Brexit' (2020) Defence Studies 224, 226.

ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

Edited by Juan Santos Vara *and* Ramses A. Wessel

A *COMMON* SECURITY AND DEFENCE POLICY: LIMITS TO DIFFERENTIATED INTEGRATION IN PESCO?

ANNEKE HOUDÉ* AND RAMSES A. WESSEL**

ABSTRACT: The use of Permanent Structured Cooperation (PESCO) by the European Union to manage defence cooperation between its Member States is the most recent example of Differentiated Integration (DI) in the EU. Yet differentiation may come at a price. The main aim of the present *Article* is to assess to what extent defence cooperation under the umbrella of PESCO can be cut up in pieces and yet still be considered a *common* defence adhering to the EU's general principles of consistency and sincere cooperation. The question, therefore, is whether DI in PESCO is limited by these principles, and consequently, whether the CSDP, despite the differentiation, still contributes to a common policy. In short, the question is whether there is a tension between *commonness* and *differentiation* in EU security cooperation.

KEYWORDS: Common Foreign and Security Policy – Common Security and Defence Policy – differentiated integration – Permanent Structured Cooperation – principle of consistency – principle of loyal cooperation.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/614

I. Introduction

Post-Brexit, the political and academic debate about the future of the European Union has once again come to the fore, especially from the angle of differentiated integration (DI).[1] Differentiation, often referred to through metaphors[2] – such as variable geometry, multi-speed Europe, integration *à la carte* – functions as a mode of integration which attempts to harmonise heterogeneity within the EU by permitting Member States to join specific EU policies *ex proprio motu*.[3] Accordingly, DI embodies those instances where not all Member States participate in a particular EU policy at the same time and to the same extent.[4] Not only the European Commission,[5] but also several Member States have officially endorsed the idea of embracing differentiation as a strategy to pursue integration at challenging times.[6]

In EU defence, the norm has always been differentiation.[7] Traditionally, collaboration between a group of Member States in the area of EU defence has been considered "negative differentiation": "a status quo that poses severe obstacles to integration –

[1] For a discussion of the theories of European integration, see FG Snyder, 'European Integration' in DS Clark (ed.), *Encyclopedia of Law and Society* (Sage 1994) 1 ff; AS Sweet, 'Integration and the Europeanization of the Law' in P Craig and R Rawlings (eds), *Law and Administration: Essays in Honour of Carol Harlow* (Oxford University Press 2003) 197 ff; see also F Fabbrini, 'The Future of the EU27' (2019) European Journal of Legal Studies 305; B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017); G Della Cananea, 'Differentiated Integration in Europe After Brexit: A Legal Analysis' (2019) European Papers www.europeanpapers.eu 447.

[2] Note that according to Groenendijk: "such metaphors are enlightening, but lack rigour". See N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' (2019) L'Europe en formation 105, 107.

[3] AC-G Stubb, 'A Categorization of Differentiated Integration' (1996) JComMarSt 283; D Thym, 'Competing Models for Understanding Differentiated Integration' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 28.

[4] Differentiated integration should therefore be distinguished from flexibility in a wider sense, which encompasses a wide range of derogations from uniformity such as minimum harmonisation or the leeway left to the member states in the implementation of directives. On this distinction, see F Tuytschaever, *Differentiation in European Union Law* (Hart 1999) 2 ff; For a similar definition, emphasising the link between differentiated integration and the willingness of individual Member States to participate in EU policies, see AC-G Stubb, 'A Categorization of Differentiated Integration' cit.: where he describes differentiated integration as "a model of integration strategies that try to reconcile heterogeneity within the European Union and different groupings of member states to pursue an array of public policies with different procedural and institutional arrangements".

[5] Communication COM (2017) 2025 final from the Commission of 1 March 2017, White paper on the future of Europe, Reflections and scenarios for the EU27 by 2025.

[6] See 'Déclaration de M. François Hollande, Président de la République, sur les Défis e Priorités de la Construction Européenne, à Versailles les 6 Mars 2017' (6 March 2017) Vie publique www.vie-publique.fr.

[7] S Blockmans, 'Pesco's Microcosm of Differentiated Integration' in WT Douma and others (eds), *The Evolving Nature of EU External Relations Law* (Springer 2021) 163. Compare also the contribution by B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' (2022) European Papers www.europeanpapers.eu XX.

rather than a formula that allows for diverse experiences and approaches to facilitate integration ('positive integration')".[8] Moving beyond the "negative starting point" of DI has long been prevented by diversities among small and large states, non-nuclear/nuclear countries, territorial and expeditionary armed forces, neutrals and allies, conscript and professional armies, small and big spenders, land and naval army countries, and those without or with a defence industrial base.[9] Integration in Common Security and Defence Policy (CSDP) was generally little appealing as there are low levels of interdependence between Member States in what is a tremendously politicized policy area.[10]

Yet, as a reaction to years of abstinence, geopolitical shifts around the globe, a fickle Trump administration, Brexit, and a growing unstable neighbourhood, great progress has been made to establish a defence structure for the EU.[11] Recent developments – including the establishment of an EU military headquarters, the creation of Permanent Structured Cooperation (PESCO) and the new position for the Commission in defence funding – affirm a transformation towards a more inclusive defence policy within the EU framework:[12] a "European Defence Union",[13] instead of an "EU army".[14]

The creation of PESCO in 2017, by some referred to as "the sleeping beauty" of the Lisbon Treaty that has now been awoken from her slumber,[15] is the most symbolic of these novelties and the most recent example of DI in the EU.[16] The provisions on PESCO add up to "the most flexible template"[17] of enhanced cooperation of all policy areas which

[8] J Howorth, 'Differentiation in Security and Defence Policy' (2019) Comparative European Politics 261, 277.

[9] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' (2021) European Foreign Affairs Review 87 ff.

[10] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' (2015) Journal of European Public Policy 764, 778 ff.

[11] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 88.

[12] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' (2018) CMLRev 1785, 1789.

[13] See the proposals thereto in S Blockmans and G Faleg, 'More Union in European Defence' (CEPS Report 2015) www.ceps.eu.

[14] See A Sparrow, 'Jean-Claude Juncker Calls for EU Army' (8 March 2015) The Guardian www.theguardian.com; and HP Bartels, AM Kellner and U Optenhögel (eds), *Strategic Autonomy and the Defence of Europe. On the Road to a European Army?* (Dietz 2017).

[15] Commission, 'Speech by President Juncker at the Defence and Security Conference Prague: In Defence of Europe' (9 June 2017) European Commission ec.europa.eu; see also Commission, 'European Commission Welcomes First Operational Steps Towards a European Defence Union' (11 December 2017) European Commission ec.europa.eu; and F Mauro, 'PESCO: European Defence's Last Frontier' (GRIP 1-2017) 40.

[16] B Leruth, S Gänzle and J Trondal, 'Differentiated Integration and Disintegration in the EU After Brexit: Risks Versus Opportunities' (2019) JComMarSt 1383; S Gänzle, B Leruth and J Trondal (eds), *Differentiated Integration and Disintegration in a Post-Brexit Era* (Routledge 2020).

[17] D Fiott, A Missiroli and T Tardy, 'Permanent Structured Cooperation: What's in a Name?' (ISS Chaillot Papers 142-2017) 18.

fall within the ambit of the EU's non-exclusive competences.[18] PESCO has been advertised as the formula to bring about "positive differentiation", or greater convergence in Europe's field of defence.[19]

The increasing calls for DI have injected new life into a never faded scholarly debate on its merits and pitfalls. From a legal perspective, it has prompted scholars to look at the limits that DI finds in the Treaties and in a number of general principles of the EU legal order.[20] This *Article* contributes to and complements this literature by discussing the implications of two of such principles, namely the principle of consistency[21] and sincere cooperation,[22] for DI in PESCO. Although many efforts have been made to distinguish constraints on DI,[23] it appears that the potential of the principles of consistency and sincere cooperation have not yet been fully explored in this regard.[24] While it is broadly recognized, for example, that sincere cooperation may function as a constraint to differentiation, loyalty-based limitations on DI are seldom assessed in detail or systematically,[25] let alone its constraints on DI in PESCO. The same holds true for the

[18] Arts 329(2) and 331(2) of the Consolidated Version of the Treaty on the Functioning of the European Union [2012], requiring unanimity for enhanced cooperation in the field of CFSP, and art. 20 of the Consolidated Version of the Treaty on European Union [2008], requiring the participation of at least 9 Member States to further the objectives of the Union, protect its interests and reinforce its integration process.

[19] S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' (CEPS Research Report 04-2019) www.ceps.eu.

[20] A Miglio, 'Differentiated Integration and the Principle of Loyalty' (2018) EuConst 475.

[21] Whereas the Treaties use the word "consistency", the political and academic debates prefer "coherence". See M Estrada Cañamares, 'Building Coherent EU Responses: Coherence as a Structural Principle in EU External Relations' in M Cremona (eds), *Structural Principles in EU External Relations Law* (Hart 2018) 243. Besides, in different language versions of the Treaties other than English (and sometimes in the English version as well) the term is often "coherence" (kohärenz, coherence, coerenza, samenhang) instead of consistency. See CNK Franklin, 'The Burgeoning Principle of Consistency in EU Law' (2011) Yearbook of European Law 42; Therefore, the thesis uses the terms consistency and coherence interchangeably.

[22] It is debatable whether loyalty and sincere cooperation are actually synonyms or whether sincere cooperation only covers one dimension of the principle of loyalty. In this thesis, however, which does not aim at a comprehensive analysis of loyalty, the two terms will be used interchangeably, even though this implies a certain degree of simplification.

[23] See, for instance, J Wouters, 'Constitutional Limits to Differentiation: The Principle of Equality' in B de Witte, D Hanf and E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 301; D Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* (Nomos 2004); A Ott, 'EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?' in A Ott and E Vos (eds), *Fifty Years of European Integration: Foundations and Perspective* (T.M.C. Asser Press 2009) 113; E Pistoia, *Limiti all'Integrazione Differenziata dell'Unione Europea* (Cacucci 2018); D Curtin and M Patrin, 'EU Constitutional Standards of Democracy in Differentiated Integration' (EUI RSC Working Paper 80-2021); J Wouters and P Schmitt, 'Equality Among Member States and Differentiated Integration in the EU' in LS Rossi and F Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 43.

[24] A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit.

[25] For an important exception, though only discussing the role of loyalty in constraining international agreements between member states, see A Dimopoulos, 'Taming the Conclusion of *Inter Se* Agreements Between EU Member States: The Role of the Duty of Loyalty' (2015) Yearbook of European Law 286.

principle of consistency. Early works on the topic considered coherence and consistency potentially jeopardized if too much differentiation was permitted in EU policymaking.[26] However, a detailed and systematic analysis of consistency-based limitations on differentiation seems to be lacking in the existing literature, with some minor exceptions.[27] Moreover, research on the role of general principles in Common Foreign and Security Policy (CFSP) law seems to be scarce,[28] and only a relatively small number of scholars have researched differentiation in EU CFSP.[29] Here, it is important to point out that the context in the policy domain of the CFSP is fundamentally different from the context in which most of the scholarly research on DI has been done. In this regard, most of the research take non-differentiation as a starting point,[30] while such uniformity has never been the main premise in the intergovernmentalist area of the CFSP.[31] More specifically, according to most scholars,[32] the default mode in the field of CFSP has actually been DI ever since the birth of the Communities. Recognition of this fundamental difference in reference point is key to any study of DI within the field of CFSP.[33]

The main aim of the present *Article* is thus to assess to what extent defence cooperation under the umbrella of PESCO can be cut up in pieces and yet still be considered a *common* defence adhering to the EU's general principles of consistency and sincere cooperation, that are fundamental to any common policy. The question, therefore, is whether DI in PESCO is limited by these principles, and consequently, whether the CSDP, despite the differentiation, still contributes to a common policy. Section II will first of all address the notion of "common" in CSDP. This will be followed by an analysis of PESCO as the example *par excellence* of differentiation in that same policy area (section III). Section IV then aims to answer the question of to what extent the principles of consistency and sincere cooperation, that are key to any common policy, are

[26] RA Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' in M Trybus and N White (eds), *European Security Law* (Oxford University Press 2007) 225, 247.

[27] See, e.g., E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' in S Blockmans (ed.), 'Differentiated Integration in the EU. From the Inside Looking Out' (CEPS 2014) 26; E Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' (2013) CYELS 139.

[28] See, RA Wessel, 'General Principles in EU Common Foreign and Security Policy' in V Moreno-Lax, PJ Neuvonen and KS Ziegler (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar 2022) 607.

[29] M Siddi, T Karjalainen and J Jokela, 'Differentiated Cooperation in the EU's Foreign and Security Policy: Effectiveness, Accountability, Legitimacy' (2022) The International Spectator 107.

[30] This yardstick is relevant mainly to the former first Maastricht pillar, with its supranationalist character and with the classical Community method as the main tool to guarantee proper functioning of the internal market.

[31] N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' cit. 106 ff.

[32] See for example P Koutrakos, 'Foreign Policy Between Opt-outs and Closer Cooperation' in B de Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* cit. 405; S Biscop, 'Differentiated Integration in Defence: A Plea for PESCO' (7 February 2017) Istituto Affari Internazionali www.iai.it 2; J Howorth, 'Differentiation in Security and Defence Policy' cit.

[33] N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' cit. 107.

restraining factors to DI in PESCO. Section V, finally, will draw some conclusions on the possible tension between *commonness* and *differentiation*.

II. CSDP: BETWEEN A *COMMON* AND *DIFFERENTIATED* POLICY

II.1. CSDP AS A COMMON POLICY OF THE EU

The term *Common* Security and Defence Policy was only introduced by the Lisbon Treaty, and replaced the title *European* Security and Defence Policy (ESDP) under which the Union's security and defence policy was organised before. By using the term "Common", the drafters of the Treaty express commonality of purpose and the higher status of the policy within the EU's policy framework.[34] The significance of CSDP and its link with CFSP is illustrated in art. 42(1) Treaty on the European Union (TEU), which provides that "the common security and defence policy shall be an integral part of the common foreign and security policy".[35] The commonality of purpose of the CSDP can be found in the way CSDP operates: Member States supply the EU with "an operational capacity drawing on civilian and military assets", which may be used "on missions outside the Union".[36] CSDP is therefore intended to authorise the EU to play a separate role as a global and regional security actor, distinct from that of the Member States.[37]

Since the first drafts of the TEU, the objectives encompassed the mentioning of the eventual construction of a defence policy. This idea is reflected in art. 24(1): "The *Union's competence* in matters of common foreign and security policy shall cover … all questions relating to the Union's security, *including the progressive framing of a common defence policy* that might lead to a common defence".[38] This is recalled in art. 42(2) TEU, which defines the ambit of CSDP as follows: "The common security and defence policy shall include the progressive framing of a *common Union defence policy*. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements".[39]

Both provisions clearly underline that the progressive framing of a common defence policy is a *Union* competence. While the Nice Treaty generally referred to a "common defence policy", now the Union nature of the new policy is emphasised. This indicates the increasing importance that the Member States place on the role of the policy and faith in

[34] P Koutrakos, *the EU Common Security and Defence Policy* (Oxford University Press 2013) 30.

[35] V Szép and others, 'The Current Legal Basis and Governance Structures of the EU's Defence Activities' (ENGAGE Working Paper 4-2021) 6.

[36] Art. 42(1) TEU.

[37] This is underlined by art. 43 TEU, which specifies the uses of CSDP.

[38] Art. 24(1) TEU (emphasis added).

[39] *Ibid*. art. 42(2) TEU (emphasis added).

its system.[40] However, this does not mean that the policy should be approached in isolation, or that Member States' policies will be disregarded. In this regard, the second subparagraph of art. 42(2) states that: "The policy of the Union in accordance with this Section *shall not prejudice the specific character of the security and defence policy of certain Member States* and shall respect the obligations of certain Member States, which see their common defence realized in the North Atlantic Treaty Organisation (NATO), under the North Atlantic Treaty and be compatible with the common security and defence policy established within that framework".[41]

Since a common policy cannot replace distinct national interests in foreign policy (see also art. 32 TEU), the Treaty provides a mechanism within which the duty to consult would either bring about their convergence, or control their differences. Interestingly, it is "the convergence of their actions" which will make the EU "able to assert its interests and values on the international scene". Therefore, the Treaty recognizes that the definition of the Common Foreign, Security and Defence Policy (CFSDP) is the result of a constant, step-by-step developing process of creating a culture of cooperation between Member States with distinct, and therefore occasionally differing, foreign policy interests.[42]

An additional element concerns the voting rules. In the wider picture of CFSDP, the initial requirement of unanimity for every decision was needed in order to persuade Member States that EU foreign policies would never set aside or disturb domestic foreign policies.[43] Accordingly, there has been a conflict between the EU's ambition to create and uphold a *common* policy and the frequently diverging opinions of the Member States from the beginning.[44] Although, the idea of a common policy is *inter alia* that it includes *all* Member States, in practice many difficulties exist to establish a common foreign policy by the EU, without resorting to the familiar apparatus of the ordinary legislative procedure and the usual role of the institutions.[45] Frequently, a shared commitment to a common strategic vision, values and norms based on the treaty, is a deficient basis for policy unanimity on what are still understood as divergent foreign policy interests and threat perceptions by Member States.[46] Therefore, the Treaty allows for exceptions on unanimity rather than

[40] P Koutrakos, *The EU Common Security and Defence Policy* cit. 57.

[41] Art. 42(2) TEU, second sub-paragraph (emphasis added).

[42] P Koutrakos, *the EU Common Security and Defence Policy* cit. 62.

[43] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' in WT Douma and others (eds), *The Evolving Nature of EU External Relations Law* cit. 177, 178; this requirement is defined in art. 31(1) TEU, which provides that: "Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise".

[44] See RA Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' cit. 247 ff.

[45] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 179.

[46] S Blockmans, 'Differentiation in CFSP' in S Blockmans (ed.), 'Differentiated Integration in the EU. From the Inside Looking Out' cit. 46.

qualified majority voting (QMV) as the default voting rule,[47] which again underlines the idea of an EU policy that is supported by most, but not necessarily all, Member States.

II.2. Differentiated integration in CFSDP

The *common* nature of CFSDP has also not stopped Member States to establish initiatives in which not all of them take part.[48] This can be explained by the fact that Member States have different (geo-)political interests.[49] In the wider field of CFSDP, enhanced cooperation is a first example of closer cooperation introduced by the Lisbon Treaty,[50] and allows smaller groups of Member States to work together in certain policy or security fields.[51] However, a number of criteria apply: a minimum number of nine participants, the requirement of unanimity in the Council for authorizing any kind of enhanced cooperation in CFSP, and the requirement of the consent of the European Parliament.[52] Besides, enhanced cooperation shall function as a last resort, when the Council "has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as whole".[53] These criteria imply that any decision on DI in CFSDP cannot be taken lightly.[54] While practice shows that Member States have not been able to agree on establishing any form of institutionalized enhanced cooperation in CFSP, coalitions of Member States working closer together have been created.[55]

In the sphere of CSDP, differentiation in participation of Member States is far from new.[56] Membership differentiation in this area is even built into the Treaty.[57] The previous opt-out by Denmark in relation to defence matters was the most-far reaching form of

[47] See K Pomorska and RA Wessel, 'Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?' (2021) European Foreign Affairs Review 351.

[48] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 183.

[49] P Koutrakos, 'Foreign Policy Between Opt-outs and Closer Cooperation' cit. 405: "As foreign policy and security and defence lie at the core of national sovereignty, their conduct is in greater need of being attuned to the different interests which Member States have in the area of high politics. This is all the more so in the light of the wide range of diverse Member States – small and large, north and south, new and old, rich and poor".

[50] Art. 20 TEU.

[51] M Cremona, 'Enhanced Cooperation and the European Foreign and Security and Defence Policy' in JM Beneyto and others (eds), *Unity and Flexibility in the future of the European Union: The Challenge of Enhanced Cooperation* (CEU Ediciones 2009) 75.

[52] JC Piris, *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press 2011) 89 ff.

[53] Art. 20(2) TEU.

[54] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 185.

[55] S Blockmans, 'Differentiation in CFSP' cit. 53.

[56] A Missiroli, 'CFSP, Defence, and Flexibility' (ISS Chaillot Papers 38-2000).

[57] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 187.

differentiation. Basically, this allows Member States not to participate in a common policy.[58] In addition, the Treaty also seems to explicitly allow all Member States' non-participation in case their EU commitments would hamper, especially, NATO obligations.[59] Besides, "less close cooperation" in CSDP is illustrated by ad hoc opt-outs and opt-ins in most EU military missions, since not every Member State participates in such a mission, and by the fact that not all Member States are required to implement CSDP decisions in the same way.[60] Furthermore, the Treaty expressly envisages a potential differentiation in security and defence policy by allowing the Council to "entrust the execution of a task, within the Union framework, to a group of Member States in order to protect the Union's values and serve its interests".[61] Yet, a general responsibility for the Council remains.[62] A more institutionalized form of closer cooperation in CSDP is PESCO, to which we will return later.[63] Finally, closer cooperation between EU members even exists *outside* the EU legal framework in practice.[64].

It can be concluded that differentiation in membership participation has been common practice in CSDP.[65] Simultaneously, this has been regarded as contributing to a stronger EU rather than fragmentation.[66] As argued by Törö, the repeated examples of

[58] *Ibid*. 186.

[59] See art. 42(2) TEU.

[60] C Törö, 'The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation' (2005) ELJ 641, 650.

[61] Art. 42(5) TEU.

[62] *Ibid*. arts 42(5) and 44 TEU.

[63] See further below, section IV. See, also S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit.

[64] EUROCORPS, the Franco-German Brigade, with units from Spain, Belgium and Luxembourg as national contributions is the most prominent example. In addition, we have witnessed other institutionalised groups of EU members, such as the EUROMARFOR (naval forces bringing together France, Italy, Spain, Portugal), the European Air Group (Germany, Belgium, Spain, France, Italy, the UK) and the German-Netherlands First Corps (Germany, the Netherlands, the UK). Looser cooperation frameworks (lacking a joint HQ) also exist, as exemplified by the Spanish-Italian Amphibious Force. See RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 188; C Töró, 'The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation' cit. 642; however, this falls outside the scope of this *Article*.

[65] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 189.

[66] Cf. the speech from Federica Mogherini, 2014 to 2019 High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission: "We have activated a Permanent Structured Cooperation on Defence – ambitious and inclusive. Member States have committed to join forces on a regular basis, to do things together, spend together, invest together, buy together, act together. The possibilities of the Permanent Structured Cooperation are immense", European External Action Service (EEAS), *Permanent Structured Cooperation – PESCO. Depending Defence Cooperation among EU Member States* www.eca.europa.eu.

CSDP missions by variable combinations of states from inside and outside the EU illustrate a *consolidated pattern of practice*. Acting in coalition by some or many of the Member States representing the entire EU continues to define the prevailing mode of execution of CSDP missions.[67]

Finally, the term "common" in Common Foreign, Security and Defence Policy refers to the EU and its *Member States*.[68] The CFSDP provisions do not envisage the participation of third countries in the decision-making process,[69] and CFSDP Decisions shall only commit "*the Member States* in the positions they adopt and in the conduct of their activity".[70] While participation of third states in EU decision-making is in principle excluded,[71] in the specific context of CSDP, it has been demonstrated that participation of third countries is possible in military and civilian missions. About 45 third countries have provided troops to these missions and operations.[72] Besides, four third countries have joined EU Battlegroups.[73] These modes of third country cooperation have been legally based on a treaty in the form of a Framework Participation Agreement (for more structural participation in CSDP missions), or a Participation Agreement (for *ad hoc* participation in a mission). They are concluded in the form of bilateral EU-only agreements on the basis of arts 37 TEU and 218 TFEU,[74] and guarantee the autonomy of the Union's decision-making. Therefore, the operations keep being a true EU mission which are governed by the EU legal order and follow the specific procedures of CSDP.

[67] C Törö, 'The Latest Example of Enhanced Cooperation in the Constitutional Treaty: The Benefits of Flexibility and Differentiation in European Security and Defence Policy Decisions and their Implementation' cit. 648.

[68] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit.

[69] See arts. 26(2) and 16(2) TEU: which entail a general competence for the Council to "frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council". The Council, in turn, "shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote".

[70] Art. 28(2) TEU (emphasis added).

[71] RA Wessel, 'Friends with Benefits? Possibilities for the UK's Continued Participation in the EU's Foreign and Security Policy' (2019) European Papers www.europeanpapers.eu 427.

[72] One could even argue that it seems to contribute to the objective in art. 21 TEU that "The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share [its] principles". See RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 195.

[73] These are Turkey, Norway, Ukraine and Macedonia. See A Bakker, M Drent and D Zandee, 'European Defence: How to Engage the UK after Brexit?' (2017) Clingendael Netherlands Institute of International Relations. This report also provides a good overview of the current and past participation of the UK in CSDP missions.

[74] See also L Lonardo, 'Common Foreign and Security Policy and the EU's external Action Objectives: An Analysis of Article 21 of the Treaty on the European Union' (2018) EuConst 584, 601; A Bakker, M Drent and D Zandee, 'European Defence: How to Engage the UK after Brexit?' cit.

III. PESCO's microcosm of differentiated integration

The previous section has shown that the *commonness* of CSDP is not mainly the result of having all Member States participate in the policy and involving Member States only, but is more likely to be the result of *a process of cooperation* between Member States, at times involving cooperation with third countries. As a consequence, DI is part and parcel of the CSDP. In this regard, cooperation in PESCO (Permanent Structured Cooperation) is the example *par excellence* of which its differentiation is claimed to strengthen the CSDP. The main objective of the present section is to ascertain the articulation of the categories of DI within the PESCO framework.[75]

III.1. The awakening of the "Sleeping Beauty"

In the field of defence, DI outside the EU Treaty framework has been the norm for decades.[76] Initially, cooperation between groups of Member States in the area of European defence has been regarded as "negative differentiation": "a status quo that poses severe obstacles to integration – rather than a formula that allows for diverse experiences and approaches to facilitate integration ('positive integration')".[77] In general, the interest in integration in CSDP has been low, since there are low levels of interdependence between Member States in the highly politicized field of defence.[78] It was only in 2016 that the Parliament called for the establishment of a European Defence Union.[79] This is taking concrete shape by *inter alia* the establishment of PESCO.[80] PESCO has been referred to as the sleeping beauty of the Lisbon Treaty,[81] as it has not been used

[75] Nevertheless, the aim of this Chapter is not to evaluate or discuss at a theoretical level the possible notions of *horizontal* and *vertical*, or *internal* and *external,* DI, but rather their practical translation. See F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' cit.; C Hoeffler, 'Differentiated Integration in CSDP Through Defence Market Integration' (2019) European Review of International Studies 43.

[76] See S Biscop, 'Differentiated Integration in Defence: A Plea for PESCO'? cit.

[77] J Howorth, 'Differentiation in Security and Defence Policy' cit.

[78] F Schimmelfennig, D Leuffen and B Rittberger, 'The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation' cit. 778 ff.

[79] Resolution 2016/2052(INI) of the European Parliament of 22 November 2016 on the European Defence Union; this is foreseen in art. 42(2) TEU, as part of the CSDP.

[80] Decision (CFSP) 2017/2315 of the Council of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States; it should be noted that PESCO is by no means the only possible option to serve as a legal basis for a common European Defence, see L Lonardo, 'Integration in European Defence: Some Legal Considerations' (2017) European Papers www.europeanpapers.eu 887, 892.

[81] F Mauro, 'Permanent Structured Cooperation. The Sleeping Beauty of European Defence' (27 May 2015) GRIP www.grip.org; Commission, 'Speech by President Juncker at the Defence and Security Conference Prague: In defence of Europe' cit.; see also Commission, 'European Commission Welcomes First Operational Steps Towards a European Defence Union' cit.; and F Mauro, 'PESCO: European Defence's Last Frontier' cit. 40.

since its incorporation in the Treaty of Lisbon in 2009, in spite of its perceived potential to make the CSDP more effective.[82]

Yet, the establishment of PESCO was in fact much longer in the making. The Maastricht Treaty of 1991 and the rise of an EU of "bits and pieces", containing an intergovernmentally operated CFSP, sowed the seeds for this form of DI.[83] The brutal disintegration of the former Yugoslavia did not only reveal the deficiencies of decision-making by unanimity, but also that the Union needed to transcend paper security structures, because of an absence of a comprehensive set of tools to deal with violent conflict on its frontiers.[84] The urge to insert more flexibility in the Treaties became more apparent as a result of Denmark's fruitful demand for an opt-out from, amongst others, security and defence policy[85] and when three non-NATO members becoming a member of the EU in 1995 sided with neutral-Ireland.[86] The Treaty of Amsterdam of 1997 initiated the mechanism of "constructive abstention", a greatly symbolic safety net for the unanimity requirement of decision-making in CFSP.[87] In the Treaty of Nice of 2001, "closer cooperation"[88] became the slightly less confining "enhanced cooperation".[89] The 2004 Treaty creating a Constitution for Europe put this generic type of DI on a distinct basis for the legally "unique" field of CFSP.[90] It also established wide accession

[82] Commission, 'Speech by President Juncker at the Defence and Security Conference Prague: In defence of Europe' cit.

[83] D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) CMLRev 17.

[84] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1805.

[85] Denmark secured its opt-outs under the "Edinburgh Agreement" of 1992, after a referendum for the ratification of the Maastricht Treaty was rejected by a majority of voters. See European Council Conclusions of 11 - 12 December 1992, Conclusion of the Presidency; the opt-out was codified in Protocol n. 22 TFEU on the position of Denmark, art 5; the opt-out has recently been withdrawn.

[86] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1805 ff.

[87] See S Blockmans, 'Differentiation in CFSP' (2013) Studia Diplomatica 53.

[88] Arts 43–45 TEU.

[89] As we have seen in the previous chapter, this is a "last resort" opportunity demanding at least one third of the Member States to be established: minimum nine in an EU of 27+ Member States. So far, this general instrument of enhanced cooperation has been triggered only four times. See Regulation (EU) 2017/1939 of the Council of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'); Decision 2010/405/EU of the Council of 12 July 2010 authorizing enhanced cooperation in the areas of the law applicable to divorce and legal separation; Decision 2011/167/EU of the Council of 10 March 2011 authorizing enhanced cooperation in the area of the creation of unitary patent protection; and Communication COM(2013) 71 final from the Commission of 14 February 2013, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, (currently at a standstill); in all these cases, legislative proposals failed to obtain unanimous support for EU-wide implementation, with individual countries blocking the adoption of secondary legislation and sub-groups of Member States forging ahead by way of enhanced cooperation.

[90] Art. III-214 of the Treaty establishing a Constitution for Europe [2004].

norms[91] and QMV[92] to produce a new PESCO provision in the field of defence. The provisions on PESCO in the Constitutional Treaty followed the shared willingness to improve the EU's capacity to act united in the international system as a Union.[93] Practically unaltered, these provisions were converted in the Treaty of Lisbon.[94] Art. 42(6) TEU now reads: "Those Member States whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions *shall establish* permanent structured cooperation within the Union framework".[95]

This provision provides the unique possibility to create a permanent structured cooperation between prone Member States "whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions". It contains the *raison d'être* of PESCO: members of PESCO pledge to spend more, and more cleverly, equipment, capabilities and defence training so that they are better capable to run operations at the higher end of the military spectrum.[96] It has the objective of generating a coordinating framework for increased defence cooperation and individual- and collective Member State driven capability development and innovation in the field of defence.[97] Interestingly, the Treaty of Lisbon does not simply allow this model of DI, but seems to stimulate Member States to participate in it.[98]

Despite earlier attempts of certain Member States to outline PESCO and to put it on the agenda,[99] Council Decision (CFSP) 2017/2315 establishing PESCO was adopted on 11 December 2017.[100] Although PESCO was adopted by the Council unanimously, it is striking that QMV[101] would have been enough to launch the mechanism while this form of decision-making is explicitly ruled out in CSDP.[102]

[91] E.g. no minimum number of pMS.

[92] Rather than unanimity for CFSP writ large.

[93] L Lonardo, 'Integration in European Defence: Some Legal Considerations' cit. 890.

[94] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1806.

[95] Art. 42(6) TEU (emphasis added).

[96] S Blockmans, 'Pesco's Microcosm of Differentiated Integration' cit. 166.

[97] J Bátora, 'Dynamics of Differentiated Integration in EU Defence: Organizational Field Formation and Segmentation' (2021) European Foreign Affairs Review 63, 72.

[98] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 188.

[99] See S Biscop and J Coelmont, 'CSDP and the Ghent framework: The Indirect Approach to Permanent Structured Cooperation' (2011) European Foreign Affairs Review 149.

[100] Decision (CFSP) 2017/2315 cit.; See also L Lonardo, 'Integration in European Defence: Some Legal Considerations' cit. 887; A first attempt to start a discussion on permanent structured cooperation was made by the Belgians in 2010, but it fell on deaf ears. See S Biscop and J Coelmont, 'CSDP and the Ghent framework: The Indirect Approach to Permanent Structured Cooperation' cit.

[101] QMV as defined in art. 238(3)(a) TFEU.

[102] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 181; art. 42(4) TEU.

Most importantly in the context of the present *Article*, PESCO is seen as "a crucial step towards strengthening the common defence policy".[103] It is, however, conditioned by Protocol No. 10 attached to the Lisbon Treaty,[104] which addresses individual Member States' concerns by immediately citing the special character of their security and defence policy.[105] Consequently, the fundamental aspect of the character of the CSDP that Member States make the principal decisions about their defence is also preserved in the specific framework of PESCO. Besides, the sovereignty of the Member States seems to be partially guaranteed by the fact that governance of PESCO shall not be organised only at the level of the Council, but also "in the framework of projects implemented by groups of those participating Member States which have agreed among themselves to undertake such projects".[106] However, cooperation in PESCO has the advantage of being able to rely on the EU's institutional infrastructure[107] and provides an incentive for incorporating such cooperation into the EU system and not establishing cooperation outside the Treaty regime.[108] Importantly, decisions and recommendations taken within the PESCO framework have to be adopted by unanimity in the Council, which shall be constituted by the votes of the representatives of the participating Member States (pMS).[109] The fact that all pMS need to be on board points to the "*commonness*" of PESCO. Therefore, PESCO is a "hub and spoke" model, whereby decision-making by consensus at the level of the Council (the hub) preserves inclusivity, while simultaneously permitting different groups of pMS to initiate projects (the spokes) increases the level of ambition in general.[110] To a great extent, this is the product of a German push for inclusivity, which predominated over a French aim for a higher level of ambition. However, Germany and France agreed to apply a "modular approach"[111] to enhanced cooperation in the area of defence.[112]

[103] Annex I Decision (CFSP) 2017/2315 cit.

[104] Protocol n. 10 on permanent structured cooperation established by art. 42 of the Treaty on European Union annexed to the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2008].

[105] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 88.

[106] Art. 4(1) Decision (CFSP) 2017/2315 cit .

[107] PESCO involves EU-level institutions such as the EEAS, the Commission (running EDF), the Council, the EDA, and the European Parliament. See J Bátora, 'Dynamics of Differentiated Integration in EU Defence: Organizational Field Formation and Segmentation' cit. 73 ff; The EDF is a funding framework aimed at support most (if not all) of projects within the PESCO framework, see L Béraud-Sudreau, YS Efstathiou and C Hannigan, 'Keeping the Momentum in European Defence Collaboration: An Early Assessment of PESCO Implementation' (14 May 2019) IISS, The International Institute for Strategic Studies www.iiss.org.

[108] LM Wolfstädter and V Kreilinger, 'European Integration via Flexibility Tools: The Cases of EPPO and PESCO' (Jacques Delors Institut Berlin Policy Paper 209/2017) 14.

[109] Art. 46(6) TEU.

[110] See D Fiott, A Missiroli and T Tardy, 'Permanent Structured Cooperation: What's in a Name?' cit. 21.

[111] European Council Conclusions EUCO 34/16 of 15 December 2016, European Council meeting, 4.

[112] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1785.

Contradictorily, this approach may also allow for informal opt-outs and exemptions at downstream levels of PESCO.[113]

As Cremona noted, "in a number of ways permanent structured cooperation resembles enhanced cooperation, but agreed in advance by way of a specific Protocol".[114] The drafters of the Constitutional Treaty and the Lisbon Treaty made sure to describe in a rather detailed manner the institutional and substantial format of PESCO, making it into an "off-the shelf form of cooperation" which may have eased the launch once the political momentum was there. PESCO's principal institutional feature is the fact that decision-making is completely situated *within* the EU legal order, that is to say with the Council and its preparatory bodies.[115] In the same vein, Cózar-Murillo noted that the numerous business-government collaboration programmes that were launched long before the most important CSDP milestones were reached, differ little from those which currently fall under the umbrella of PESCO. What distinguishes the former from the latter, however, is the lack of a legislative framework at the level of the EU that would allow to systematize these efforts, setting up rules of governance, albeit minimal, that would facilitate DI in defence. This is what PESCO has enabled.[116]

III.2. Participation in PESCO

The objectives of PESCO are set out in art. 1 of Protocol No. 10,[117] which provides that PESCO "shall be open to any Member State" able and willing to develop its defence capacities.[118] Thus, it requires pMS to proceed more intensively to develop defence capacities and to supply troops and kit. Besides the entry criteria in art. 1and art. 2 of this Protocol includes a number of standard commitments for pMS.[119] Accordingly, the tasks of the pMS seem an attempt to harmonise the distinct national defence policies.[120]

In addition, the Treaty provides the possibility for Member States to join PESCO at a later stage,[121] or to suspend a pMS.[122] These decisions are again adopted by the Council

[113] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 91.

[114] M Cremona, 'Enhanced Cooperation and the European Foreign and Security and Defence Policy' (EUI Working Papers 21-2009) 14.

[115] B de Witte, 'The Law as Tool and Constraint of Differentiated Integration' (EUI Working Papers RSCAS 47-2019) 7.

[116] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' cit.

[117] N Nováky, 'The EU's Permanent Structured Cooperation in Defence: Keeping Sleeping Beauty from Snoozing' (2018) European View 97, 98.

[118] Protocol n. 10, art 1.

[119] *Ibid*. art 2.

[120] RA Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' cit. 235.

[121] Art. 46(3) TEU.

[122] Art. 46(4) TEU.

acting by QMV rather than anonymity,[123] constituted by the votes of the representatives of the pMS.[124] If, however, a pMS wishes to withdraw from PESCO unilaterally, this can simply be done on the basis of a notification.[125]

So far, PESCO has proven to be the most inclusive form of enhanced cooperation.[126] In total, 25 Member States have opted to become members of the mechanism.[127] The commitments undertaken by pMS in the five areas are set out by art. 2 of Protocol 10, and aim to harmonise the different national defence policies.[128] Furthermore, these legally binding commitments aim to prepare the EU to be ready to carry out all crisis management tasks defined in art. 43 TEU.[129] pMS must "review annually, and shall update as appropriate, their National Implementation Plans, in which they are to outline how they will meet the more binding commitments, specifying how they will fulfil the more precise objectives that are to be set at each phase". These National Implementation Plans shall annually be communicated to the European External Action Service (EEAS) and the European Defence Agency (EDA), and shall be made available to all pMS.[130] An underlying aspect of these binding commitments is the pursuance of alignment in strategic cultures at the level of the EU to redress what is considered as a weakness of the EU's external action in the field of defence.[131] These commitments add up to a move from mere cooperation towards the integration of Member States' defence efforts.[132] However,

[123] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 182.

[124] See art. 46(3) and (4) TEU.

[125] Art. 46(5) TEU.

[126] Prior to PESCO, the most inclusive of enhanced cooperative frameworks was the establishment of the EPPO by 16 member states, joined later by four more. See LM Wolfstädter and V Kreilinger, 'European Integraion via Flexibility Tools: The Cases of EPPO and PESCO' cit.

[127] Art 2 Decision (CFSP) 2017/2315,: The pMS are: Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden; However, it must be noted that only a few months before its launch it was estimated that only 10 to 15 Member States would be able and willing to participate in PESCO. See B de Witte, 'The Law as Tool and Constraint of Differentiated Integration' cit. 7.

[128] RA Wessel, 'Differentiation in EU Foreign, Security, and Defence Policy: Between Coherence and Flexibility' cit. 235.

[129] Art. 43 TEU, first sub-paragraph provides: "The tasks referred to in Article 42(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories"; see also RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 188.

[130] Art 3(2) Decision 2017/2315 cit.

[131] J Howorth and A Menon, 'Still Not Pushing Back: Why the European Union Is Not Balancing the United States' (2009) The Journal of Conflict Resolution 727, 738.

[132] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' (EU IDEA Policy Papers 1-2020) 5.

although these commitments are politically binding in nature, they are difficult to enforce in legal terms.[133] Moreover, as Pannier and Schmitt argue, "contrary to the arguments of many discussions, think-tank reports and political actors, there is no evidence that institutionalised cooperation leads to policy convergence as far as defence is concerned".[134] The commitments will thus not be ensured by legal or judicial enforcement mechanisms, but rather by an annual assessment administered by the HR and supported by the EDA and the EEAS.[135] Accordingly, the HR shall present an annual report on PESCO to the Council, in which it describes "the status of PESCO implementation, including the fulfilment, by each participating Member State, of its commitments, in accordance with its National Implementation Plan". On the basis of this report, the Council "shall review once a year whether the participating Member States continue to fulfil the more binding commitments".[136] Consequently, compliance with the commitments thus depends on increased transparency and annual naming of pMS that meet their commitments and possibly shaming of those pMS that don't. Therefore, pMS that fail to meet the more binding commitments will face peer pressure rather than penalties,[137] or suspension from PESCO.[138] Yet, although QMV is enough to suspend a pMS, it is unlikely that underperforming pMS will be kicked out of a mechanism in which inclusivity prevails.[139]

III.3. PESCO PROJECTS

DI also occurs to a great extent through the ways in which the pMS participate in the (currently) 60 "PESCO projects" that have been adopted by the Council in a series of waves.[140] Interestingly, however, the procedure for establishing new projects starts at the

[133] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1826.

[134] A Pannier and O Schmitt, 'Institutionalised Cooperation and Policy Convergence in European Defence: Lessons from the Relations Between France, Germany and the UK' (2014) European Security 270.

[135] Annex I Decision 2017/2315 cit.

[136] Decision (CFSP) 2017/2315 cit. art 6(3).

[137] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1821.

[138] Art. 46(4) TEU.

[139] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1821.

[140] In this regard, art 4(2)(e) Decision 2017/2315 cit. provides that the Council is to establish the list of projects to be developed under PESCO; Decision 2021/2008/CFSP of the Council of 16 November 2021 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO; see, also, RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 188; it has been noted that DI also occurs regarding the thematic scope of the PESCO projects and financing, which provides an additional layer to secondary-level DI in EU defence. However, this is not relevant to the thesis. See S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' cit.

level of the pMS.[141] In this regard, "Participating Member States which intend to propose an individual project shall inform the other participating Member States in due time before presenting their proposal, in order to gather support and give them the opportunity to join in collectively submitting the proposal. The project members shall be the participating Member States which submitted the proposal".[142] Consequently, Council Decisions (CFSP) 2018/340,[143] 2018/1797[144] and 2019/1909[145] defined the first, second, and third waves of PESCO projects. Most recently, the Council has adopted a fourth wave of joint projects within PESCO on 16 November 2021.[146] This new wave contains 14 new projects, taking the total number of projects established under PESCO to 60.[147] Consequently, synergies have emerged in the form of 60 projects despite of different national positions and interests, ambition, funding, geography and strategic culture.[148]

In spite of being inclusive in terms of the number of pMS, PESCO turns out to be an exclusive mechanism if one looks at the countries' individual contributions to projects and the ambition shown by each of them combined with their own strategic culture.[149] This can be explained by the fact that a commitment to inclusivity unavoidably causes differences in the level of DI in practice.[150] The average number of participants in PESCO projects is five. Most projects reach a figure of between four and seven pMS,[151] and in many cases the same pMS are grouped together in a bi- or trilateral manner, in many cases copying the dynamics before PESCO.[152] Yet, if the objective of PESCO is upward

[141] Art 5(1) Decision 2017/2315 cit. provides: "*Following proposals by the participating Member States which intend to take part in an individual project*, the High Representative may make a recommendation concerning the identification and evaluation of PESCO projects, on the basis of assessments provided in accordance with Article 7, for Council decisions and recommendations to be adopted in accordance with Article 4(2)(e), following military advice by the Military Committee of the European Union (EUMC)" (emphasis added).

[142] Art 5(2) Decision 2017/2315 cit.

[143] Decision 2018/340/CFSP of the Council of 19 November 2018 establishing the list of projects to be developed under PESCO.

[144] Decision 2018/1797/CFSP of the Council of 19 November 2018 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO.

[145] Decision 2019/1909/CFSP of the Council of 12 November 2019 amending and updating Decision (CFSP) 2018/340 establishing the list of projects to be developed under PESCO.

[146] Decision 2021/2008 cit.

[147] See European Defence Agency (EDA), '14 New PESCO Projects Launched in Boost for European Defence Cooperation' (16 November 2021) eda.europa.eu.

[148] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' cit. 21 ff.

[149] See J Howorth, *Security and Defence Policy in the European Union* (Palgrave Macmillan 2007) 178 ff; HP Bartels, AM Kellner and U Optenhögel (eds), *Strategic Autonomy and the Defence of Europe. On the Road to a European Army?* cit. 16.

[150] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' cit. 10.

[151] N Groenendijk, 'Flexibility and Differentiated Integration in European Defence Policy' cit. 114 ff.

[152] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' cit. 10.

convergence, projects should gradually fill up.[153] Finally, while the first wave of projects included all twenty- five pMS, this number decreased to twenty-one in the second wave and to just fifteen in the third round. The tendency, therefore, was more exclusive project selection.[154] However, in the recently launched fourth wave, the number of partaking pMS has again increased to twenty-one.[155]

It is striking that PESCO does not require a minimum number of participants per project, which is, for example, the case for enhanced cooperation.[156] This minimum requirement can be interpreted as a provision to prevent small avant-garde groups that could provoke fragmentation within the EU. Therefore, PESCO projects do not emphasise the priority of unitary integration, which is the general idea of developing CSDP defined in art. 42(2) subparagraph 1 TEU.[157]

Another form of DI is related to the individual project arrangements.[158] In this regard, art. 5(3) of Council Decision (CFSP) 2017/2315 provides: "The participating Member States taking part in a project shall agree among themselves on the arrangements for, and the scope of, their cooperation, and the management of that project. The participating Member States taking part in a project shall regularly inform the Council about the development of the project, as appropriate".[159]

Council Decision (CFSP) 2018/909 establishing a common set of governance rules for PESCO projects further specifies the rules on the project arrangements. First of all, they need to be decided by unanimity among the project members.[160] Furthermore, art. 7 dictates the areas these arrangements may, *inter alia*, include.[161]

Subsequently, art. 4(4) stipulates: "The project members may agree among themselves by unanimity that certain decisions, such as those relating to administrative matters, will be taken according to different voting rules".[162]

Taking these provisions into account, the most notable modes of deep DI in PESCO could manifest themselves in the form of a change to decision-making procedures.[163] Despite the low threshold for the establishment of PESCO (by QMV), decisions and

[153] S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' cit. 8.

[154] S Blockmans and D Macchiarini Crosson, 'PESCO: A Force for Positive Integration in EU Defence' cit. 94.

[155] European Defence Agency (EDA), '14 New PESCO Projects Launched in Boost for European Defence Cooperation' cit.

[156] A minimum number of nine participants, as we have seen in the previous Section.

[157] LM Wolfstädter and V Kreilinger, 'European Integration via Flexibility Tools: The Cases of EPPO and PESCO' cit 13.

[158] S Blockmans, 'Pesco's Microcosm of Differentiated Integration' cit. 173.

[159] Art. 5(3) Decision 2017/2315 cit.

[160] Art. 4(1) Decision 2018/909 cit.

[161] *Ibid*. arts 7(1) and (2).

[162] Art. 4(4) Decision 2018/909 cit.

[163] S Blockmans, 'Pesco's Microcosm of Differentiated Integration' cit. 173.

recommendations adopted within the framework of PESCO are taken by unanimity, comprised by the votes of the representatives of all pMS.[164] Yet, art. 4(4) of the governance rules for PESCO projects allows different voting rules, such as QMV. Blockmans argues, however, that the prospect that states joining individual PESCO projects would change the governance rules for those projects in order to take decisions by QMV is low. Therefore, decision-making by unanimity will perpetuate consensus politics.[165] Furthermore, DI in the PESCO framework could also take place through implementation of art. 7(1) of the governance rules for PESCO projects, with regard to the invitation to the Commission to be involved in the proceedings of the project. Up to now, this has not happened.[166] Moreover, it must be noted that some projects have thus far failed to agree upon any project arrangements.[167] Therefore, Council Decision 2020/1639 (as will be discussed in the next section) also inserted a template for project arrangements.[168]

IV. PESCO: CONTRIBUTING TO A *COMMON* SECURITY AND DEFENCE POLICY?

The previous sections have shown that DI and the pursuit of a common policy do not necessarily exclude one another, PESCO being the example par excellence. However, the question remains whether there are limits to DI in order for a policy to still be considered *common*. More specifically, the question that arises is to what extent the principles of consistency and sincere cooperation, that are key to any common policy, are restraining factors to DI in PESCO. As fragmentation in PESCO may make it more difficult to live up to these principles, a balance needs to be sought between the need to uphold them and the advantages of working in smaller groups of both EU and non-EU members.[169].

IV.1. GENERAL PRINCIPLES IN EU CFSP AND THEIR ENFORCEMENT

Despite of what is occasionally still exclaimed, the CFSDP, and thus PESCO, is not a sheer intergovernmental process among the Member States. CFSP is first of all based on a Union competence and a *common* policy which is independent from the national foreign policies

[164] Art. 46(6) TEU.

[165] S Blockmans, 'Pesco's Microcosm of Differentiated Integration' cit. 173.

[166] *Ibid*. 173 ff.

[167] In this regard, the Council recommended that pMS are "encouraged to enhance and accelerate the processes leading to the adoption of Project Arrangements". See Recommendation 2020/C of the Council of 15 June 2020 assessing the progress made by the participating Member States to fulfil commitments undertaken in the framework of permanent structured cooperation (PESCO), para 12.

[168] S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' cit. 102.

[169] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 197 ff.

that are based upon parallel competences of the Member States.[170] Consequently, it should be kept in mind that Member States remain bound by the principles underlying all EU external action both in their internal cooperation as in dealing with third countries. This includes the principles of consistency and sincere cooperation.[171] Although, admittedly, the CFSP is an area which is still "subject to specific rules and procedures",[172] there seems to be no reason not to apply the general principles of EU external action to this specific field of EU law.[173] To the contrary, the very first provision in the CFSP Chapter unambiguously refers to the general provisions on the EU's external action: "The Union's action on the international scene, pursuant to this Chapter, *shall be guided by the principles*, shall pursue the objectives of, and be conducted in accordance with, the general provisions laid down in Chapter 1".[174] This seems to be confirmed by art. 24(2) TEU, which states that the Union shall conduct, define and implement a common foreign and security policy "[w]ithin the framework of the principles and objectives of its external action".[175]

The principle of consistency has developed as one of the main principles of the EU's external relations.[176] It is not named a principle in the Treaties as such,[177] but nonetheless governs the EU's external action more generally and serves as a principle to pursue the realization of its objectives.[178] Particularly because of the case-law of the Court of Justice of the European Union (CJEU), the requirement of loyalty has become directly linked to the principle of consistency. It held that art. 4(3) TEU imposed at the very least a duty of close cooperation between the Member States and the Union institutions – not only in order to facilitate the achievement of European Community (EC) tasks, but also to "ensur[ing] the coherence and consistency of the action and its [the Union's] international

[170] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1816.

[171] RA Wessel, 'General Principles in EU Common Foreign and Security Policy' cit. 624: the above analysis not only reveals that a valid presumption exists that all structural as well as more substantive principles apply to the CFSP, which is not easily rebuttable.

[172] Compare art. 24(1) TEU.

[173] See also P Craig, 'General principles of law: treaty, historical and normative foundations' in V Moreno-Lax, PJ Neuvonen and KS Ziegler (eds), *Research Handbook on General Principles of EU Law* cit.

[174] Art. 23(1) TEU. (Emphasis added).

[175] Art. 24(1) TEU.

[176] P Koutrakos, *the EU Common Security and Defence Policy* cit. 96.

[177] Yet, art. 22 TEU refers to "the principles and objectives set out in Article 21".

[178] See also M Estrada Cañamares, 'Building Coherent EU Responses: Coherence as a Structural Principle in EU External Relations' cit. 256: "Because of its location under Article 7 TFEU, coherence can be considered a 'Principle' of 'General Application' to the Union"; J Larik, 'From Speciality to the Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) ICLQ 935, 962: who suggests that the EU objectives "provide a sense of purpose as to the exercise of powers through the structures of the constitutionalised legal order".

representation".[179] The requirement of sincere cooperation obliges Member States to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity".[180] Both principles push EU law forwards by requiring uniformity of outcomes from the view of EU law.[181] Therefore, these principles must be kept in mind when examining DI in CFSDP.[182] Moreover, they form an appealing solution to reconcile DI in the EU with the basic constitutional framework of European integration.[183]

However, equal application of the general principles in CFSP does not necessarily result in equal enforcement prospects.[184] In principle, jurisdiction of the EU judicature is largely excluded in CFSDP.[185] Therefore, Member States which are reluctant to cede their autonomy in defence and wish to bring an action for annulment under art. 263 TFEU against PESCO decisions would have to face the peculiarity of the CFSDP.[186] Vice versa, this also means that if a Member State fails to fulfil an obligation under the Treaties, it cannot be held responsible in front of the Court.[187] Nevertheless, this does not mean that these principles are superfluous in the field of CSDP and should not be taken into account, as CFSP is now "part and parcel of the EU legal order, even if it retains certain particular features".[188] Indeed, the Court has used EU principles to extend its jurisdiction to the field of CFSP to protect, for example, the rule of law.[189] However, the still relatively

[179] Case C-266/03 *Commission v Luxembourg* ECLI:EU:C:2005:341 para 60; case C-433/03 *Commission v Germany* ECLI:EU:C:2005:462 para 66; reiterated in case C-246/07 *Commission v Sweden* ELI:EU:C:2010:203 para 75; see more extensively on the role of the Court in CFSP: C Hillion and RA Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar 2018) 6; see on the role of loyalty in mixed external relations: PJ Kuijper, 'Union Loyalty in Mixed External Relations and the Weight of Informal Preparatory Acts: *Commission v Sweden* (PFOS)' in G Butler and RA Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart 2022) 619.

[180] Art. 24(3) TEU.

[181] E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 30.

[182] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 185.

[183] E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 26.

[184] RA Wessel, 'General Principles in EU Common Foreign and Security Policy' cit.

[185] Art. 24 TEU and art. 275 TFEU: The only cases on which the Court has jurisdiction is to monitor compliance with art. 40 TEU and to review the legality of sanctions. Art. 40 TEU provides that CFSP and TFEU external competences shall not affect each other's powers and procedures; see also the decision of the Court in Grau Gomis, case C-167/94 *Grau Gomis and Others* ECLI:EU:C:1995:113.

[186] E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 35 ff.

[187] Arts. 258, 259 and 260 in conjunction with art. 275 TFEU.

[188] Case C-455/14P *H v Council and Commission* ECLI:EU:C:2016:212, Opinion of AG Wahl, para. 46.

[189] It could be deduced that the Court simply emphasizes a Union-wide application of, *inter alia*, principles on the role of the European Parliament in the procedure to conclude international agreements (case C-130/10 *Parliament v Council* ECLI:EU:C:2012:472; case C-658/11 *European Parliament v Council* ECLI:EU:C:2014:2025; case

restricted role of the Court in CFSP limits its possibilities to enforce certain EU principles in this field.[190] Nevertheless, monitoring and enforcement of principles in CFSP is not only the task of the Court, but also the task of other institutions.[191] Besides, "as enforcement mechanisms, both administrative control and judicial review may be used to directly enforce a structural principle".[192]

IV.2. Consistency in relation to differentiated integration in PESCO

The requirement of consistency can be utilized as a tool in managing the outcomes in DI.[193] In case that consistency is considered as a one-size-fits-all principle, the question rises whether it is weakened by the different forms of differentiation in which not all Member States take part.[194] At first glance, it seems impossible to reconcile differentiation with the requirement of consistency because differentiation seems contradictory to the traditional view of consistency as symmetry of the components of the particular legal system. Yet, constitutional asymmetry, is a long-standing aspect of European integration. The point can even be made that differentiation simply reflects a touchstone of subsidiarity.[195] Therefore, although at face value certain characteristics of consistency as a legal principle may be impaired by differentiation, the principle may be able to transferring the classic integrative values to newly created sub-systems designed to promote individualization.[196] For example, under art. 21(3) TEU, consistency can mandate

C-263/14 *Parliament v Council* ECLI:EU:C:2016:435), legal protection by the different EU and/or national courts (case C-72/15 *Rosneft* ECLI:EU:C:2017:236, para 75: '[s]ince the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under art. 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of art. 275 TFEU, to which reference is made by art. 24(1) TEU'.), regulations for (seconded) staff to EU bodies and missions (case C-455/14P *H v Council and Commission* ECLI:EU:C:2016:569), or of rules on public procurement (case C-439/13P *Elitaliana v Eulex Kosovo* ECLI:EU:C:2015:753). See RA Wessel, 'General Principles in EU Common Foreign and Security Policy' cit.

[190] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para 252: "certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice". See in more detail on the judicial gaps: C Hillion and RA Wessel, 'The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP' cit.

[191] Arts 24(3) and 26(2) TEU.

[192] See E Chiti, 'Enforcement of and Compliance with Structural Principles' in M Cremona (ed.), *Structural Principles in EU External Relations Law* cit. 47, 52.

[193] *Ibid*. 27.

[194] E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 155.

[195] S Weatherill, 'If I'd Wanted You to Understand I Would Have Explained It Better: What is the Purpose of the Provisions on Closer Co-operation Introduced by the Treaty of Amsterdam?' in D O'Keeffe and PM Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart 1999) 21 ff.

[196] T Konstadinides, *Division of Powers in the European Union: The Delimitation of Internal Competence Between the EU and the Member States* (Kluwer Law International 2009) 256 ff.

a certain pattern of behaviour *vis-à-vis* the conduct of Union institutions and the uniformity of their activities with the wider policies of the EU.[197]

However, DI may cause problems of vertical consistency between the EU's CFSP and the foreign policies of Member States, and problems of horizontal consistency between the different national foreign policies.[198] With regard to vertical consistency, what counts is proper consultation and coordination between the Member States and the central EU actors. With the creation of the HR and EEAS, the Treaty of Lisbon has provided the necessary mechanisms to ensure and support this vertical consistency between the EU and varying sets of Member States.[199] Besides, the principle of consistency may cause problems when third countries are involved. This is because rules and principles flowing from other external policies of the EU where CFSP is connected to will not be easy to uphold when participating third countries are not equally bound by them.[200]

As art. 21(3) TEU aims to eliminate contradiction,[201] it makes sense that such desire for consistency accompanies the specific forms of DI under the Treaties.[202] Hence, also the ubiquitous references in the policy documents of PESCO that the mechanism "will be undertaken in full compliance with the provisions of the TEU and the protocols attached thereto".[203] Besides, the Council invited the HR to explore the potential connections between the distinct building blocks of the EU's new defence architecture. Accordingly, the notions of inclusivity, coherence, continuity, coordination and collaborations are inserted all over the founding documents of PESCO. Indeed, PESCO is the binding component in the "EU's alphabet soup" on defence integration.[204] Interestingly, PESCO is seen "as the most important instrument to foster common security and defence in an area where more coherence, continuity, coordination and collaboration are needed. European efforts to this end must be united, coordinated, and meaningful and must be based on commonly agreed political guidelines".[205] Thus, PESCO is considered as contributing to coherence in the field of CSDP.

[197] E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 29.

[198] See E Herlin-Karnell and T Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' cit. 139.

[199] S Blockmans, 'Differentiation in CFSP' cit. 56.

[200] RA Wessel, 'The Participation of Members and Non-Members in EU-Foreign, Security and Defence Policy' cit. 189 ff.

[201] G De Baere, *Constitutional Principles of EU External Relations* (Oxford University Press 2008) 251.

[202] E Herlin-Karnell and T Konstadinides, 'EU Constitutional Principles as Housekeeping Rules in EU External Variable Geometry' cit. 29.

[203] Annex I Decision 2017/2315 cit., fifth bullet point; S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1817.

[204] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1822.

[205] Annex I Decision 2017/2315 cit., fourth bullet point.

If we look at the specific provisions applicable to PESCO, art. 21(3) obliges the Council and the Commission, assisted by the HR, to ensure consistency. However, art. 26(2) TEU delegates this obligation to ensure consistency only to the Council and the HR. This confusion is also visible in the specific secondary legislation on PESCO. According to the preamble of Council Decision 2017/2315, the task to ensure consistency rests upon all three as it provides that "there should be consistency between actions undertaken within the framework of PESCO and other CFSP actions and other Union policies. The Council and, within their respective areas of responsibility, the HR and the Commission, should cooperate in order to maximise synergies where applicable".[206] However, art. 6 of the same Council Decision ascribes this role only to the Council, with the help of the HR.[207] Accordingly, coordination between the different PESCO projects is overseen by the Council, assisted by the HR.[208] Although coordination across institutions and policy areas might be challenging for the HR and her supporting structures, the above looks familiar to trained EU external relations observers.[209] Nevertheless, considering that European Defence Fund (EDF) funding will be distributed by the Commission's DG DEFIS and that certain aspects of PESCO have implications for the EU single market, it could be argued that Commission participation in project proceedings should be mandatory. This could raise the potential for upward convergence among projects.[210]

Furthermore, consistency in the PESCO framework is ensured by the fact that the implementation of all PESCO projects will be based on the common set of governance rules for projects.[211] In this regard, art. 4 of Council Decision 2018/909 provides that "the project members shall strive to design each project in order to ensure the coherence of output and timelines with other PESCO projects, and for the project be coherent with initiatives developed in other relevant institutional frameworks, while ensuring transparency and inclusiveness and avoiding unnecessary duplication". Thus, whilst there are 60 different projects, with different project members and different individual project

[206] *Ibid*. tenth bullet point.

[207] Art. 6(1) Decision 2017/2315 cit., provides: "The Council, within the framework of Article 46(6) TEU, shall ensure the unity, consistency and effectiveness of PESCO. The High Representative shall also contribute to those objectives".

[208] Arts. 18(2), 26(2) and 27 TEU.

[209] Ultimately, what is needed is a transparent selection process which respects EU (public procurement) rules and prioritizes PESCO projects that have a structuring impact on the technological and industrial base while raising the EU's strategic autonomy in the operational realm. Real obstacles arise in pursuing coherence beyond the outer limits of the EU regime, however, this falls outside the scope of the thesis. See S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1823.

[210] S Blockmans and D Macchiarini Crosson, 'Differentiated Integration Within PESCO: Clusters and Convergence in EU Defence' cit. 102.

[211] See in this regard, Decision 2018/340 cit., point 5 of the preamble, and Decision 2018/909 cit., point 3 of the preamble.

arrangements, an attempt to ensure coherence of output is made. However, this is not a hard obligation, as project members only shall "strive" to design projects in such a way to ensure coherence of output. Moreover, Biscop has stated that although none of the projects are useless, "it is such a disparate and incoherent set" that even if Member States were to realise all 60, "they would still not be much more capable than they are today".[212]

In addition, the requirement of consistency is once again stressed in relation to the participation of third countries, as Council Decision 2020/1639 provides that "there should be consistency between actions undertaken within the framework of PESCO and other CFSP actions and other Union policies".[213] In other words, this is a duplication of art. 21(3) TEU. However, it is striking that not all objectives of art. 21(2) TEU have to be shared by the third countries, only those mentioned in points *(a)*, *(b)*, *(c)* and *(h)*.[214] Accordingly, the question that arises is how this distinction between participating third countries and pMS, for whom all points of art. 21(2) TEU apply, impacts the required consistency between the different areas of external action and between these and the EU's other policies. Besides, the fact that the administrative arrangements entered into by the project members and the third State are not based on art. 218 TFEU, does not contribute to the consistency of the role of the CJEU and the Parliament. However, it does not mean that the Council or the Member States can evade the EU's general principles.[215] In this regard, the administrative arrangements "shall ensure consistency with provisions of Decision (CFSP) 2017/2315 and Decision (CFSP) 2018/909"[216] and the participation of the third State must be "consistent with the more binding PESCO commitments (…), in particular those commitments which that PESCO project is helping to fulfil".[217] Thus, these requirements serve to ensure a common output in both pMS and participating third countries, and therefore contribute to CSDP as a *common* policy to the outside world. However, it was asked in the parliamentary questions of 8 April 2021 how these third countries, particularly the US, fit in with the declared objective of European

[212] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' cit. 5 ff.

[213] Decision 2020/1639/CFSP of the Council of 5 November 2020 establishing the general conditions under which third States could exceptionally be invited to participate in individual PESCO projects, point 10 of the preamble.

[214] *Ibid*. art 3(a).

[215] Case C-370/12 *Pringle* ECLI:EU:C:2012:756; B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle' (2013) CMLRev 805; P García Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments' (2016) European Papers www.europeanpapers.eu 115, 115; P García Andrade, 'The Role of the European Parliament in the Adoption of Non-Legally Binding Agreements with Third Countries' in J Santos Vara and SR Sánchez-Tabernero (eds), *The Democratization of EU International Relations Through EU Law* (Routledge 2018) 115; RA Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements' (2020) West European Politics 72.

[216] Art. 2(6) TEU.

[217] Art. 3 TEU.

empowerment and autonomy.[218] Indeed, in light of art. 42 TEU the aim of PESCO is to bolster the industrial base of the European defence sector while fostering the EU's strategic autonomy. The question would then be whether the involvement of third countries would contribute to this aim and thus be consistent with it or not.

IV.3. Sincere cooperation in relation to differentiated integration in PESCO

Although the principle of loyalty has existed in the EU's legal regime from the beginning, it has gradually become a main aspect in shaping the relationship between the EU and its Member States.[219] Importantly, the Treaty rule on loyalty was referred to as "the single most dynamic provision in the Treaty",[220] and has always played a central role in shaping the contours of the effectiveness of EU law.[221] It is reproduced in art. 4(3) TEU and specified for the CFSDP context in art. 24(3) TEU as the "loyalty principle".

Some features of these principles suggest that it is of relevance to DI.[222] First of all, sincere cooperation is contributory to achieving the EU's objectives. By emphasizing that the Member States must cooperate for their accomplishment, the Treaty creates a strong connection between sincere cooperation and the effectiveness and uniform application of EU law.[223] Secondly, there is a connection between sincere cooperation and unity.[224]

[218] European Parliament, *Legitimacy of Participation of Three Third-country NATO Members in the Permanent Structured Cooperation Project on Military Mobility* www.europarl.europa.eu; see also the reaction to it: European Parliament, *Reply* www.europarl.europa.eu: "Those Council Decisions take into account three Political and Security Committee (PSC) opinions regarding the requests by Norway, Canada and the US to participate in the PESCO project and state that their participation will contribute to strengthening the Common Security and Defence Policy (CSDP) and the Union level of ambition, including in support of CSDP missions and operations. They also state that these countries will bring substantial added value to the PESCO project".

[219] See J Temple Lang, 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' (2007) 31(5) FordhamIntlLJ 1483; O Porchia, *Principi dell'ordinamento europeo* (Zanichelli 2008).

[220] LW Gormley, 'Some Further Reflections on the Development of General Principles of Law within Article 10 EC' in U Bernitz and J Nergelius (eds), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 303.

[221] J Temple Lang (n 349), 'The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC' cit.; for a recent analysis on loyalty see also E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' (2010) CMLRev 323; C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' (CLEER Working Papers 2009-2).

[222] A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 482.

[223] This link is also clear from cases such as Von Colsen and Francovich, where the CJEU relied on loyalty to justify a duty of consistent interpretation and the liability of Member States for breaches of EU law. See case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153 para. 26 and joined cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428, para. 36.

[224] A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 482; In the field of external relations, the CJEU has extensively relied on loyalty as a legal tool to ensure the unity of EU action, see, for instance, in its Opinion 1/78 *Accord international sur le caoutchouc naturel* ECLI:EU:C:1979:224, para 33, the

Because DI is by nature a derogation from unity, loyalty could then be able to operate as a source of limitations on differentiation.[225] Thirdly, loyalty also represents an autonomous source of constraints.[226] Consequently, these characteristics imply that sincere cooperation may play a considerable role in regulating DI in PESCO, by acting as a restraint to fragmentation that could arise from the Member States both participating and not participating in this policy field.[227]

In every situation of internal differentiation, Member States and the EU institutions are restricted by loyalty obligations under art 4(3) TEU.[228] Indeed, PESCO is entirely embedded in the EU framework. Therefore, all the loyalty obligations art 4(3) TEU refers to are fully applicable. In particular, pMS are obliged to guarantee the full effectiveness of EU measures notwithstanding limitations in geographic scope that may derive from PESCO and especially from its projects. Furthermore, all pMS must refrain from taking measures that could jeopardise the attainment of the EU's objectives, including those pursued through differentiation in PESCO. This requirement not only applies to the pMS, but necessarily also to those Member States not participating in PESCO, who should not hamper the effective implementation of actions they do not engage in. Lastly, duties of mutual assistance and cooperation between the EU institutions and the Member States are of particular importance in the context of DI, in order to curb fragmentation and guarantee the coherence of the EU acquis.[229]

CJEU held that under art. 192 of the Euratom Treaty member states were prevented from taking "unilateral action [...], even if it were collective and concerted action, [which] would have the effect of calling in question certain of the essential functions of the Community and in addition of affecting detrimentally its independent action in external relations"; similarly, in Opinion 2/91 *Convention no. 170 de l'OIT* ECLI:EU:C:1993:106, para. 36 it stated that a "duty of cooperation [...] results from the requirement of unity in the international representation of the Community"; see also joined cases 3, 4 and 6/76 *Cornelis Kramer and Others* ECLI:EU:C:1976:114, paras 42-44; Opinion 1/94 *Accords annexés à l'accord OMC* ECLI:EU:C:1994:384, para. 108; Opinion 2/00 *Protocole de Cartagena sur la prevention des risques biotechniques* ECLI:EU:C:2001:664, para. 18; for a comprehensive overview of the case law on loyalty in the context of external relations, see C Hillion, 'Mixity and Coherence in EU External Relations: The Significance of the "Duty of Cooperation"' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited. The EU and its Member States in the World* (Hart Publishing 2010) 87; E Neframi, 'The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations' cit. 323; F Casolari, 'The Principle of Loyal Co-operation: A "Master Key" for EU External Representation?' in S Blockmans and RA Wessel (eds), 'Principles and Practice of EU External Representation' (CLEER Working Papers 2012-5) 11; S Saluzzo, *Accordi Internazionali degli Stati Membri dell'Unione Europea e Stati Terzi* (Ledizioni 2018) 274 ff; A Thies, 'The Search for Effectiveness and the Need for Loyalty in EU External Action' in M Cremona (eds), *Structural Principles in EU External Relations Law* cit. 263.

[225] A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 483.

[226] M Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) 234 ff.

[227] See by analogy, A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 483.

[228] Art. 4(3) TEU.

[229] A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 483.

To start with, art. 46 TEU promotes the participation of Member States in PESCO,[230] and reflects the principle of openness. This principle is closely linked to loyalty,[231] and means to ensure that PESCO remains a tool for the advancement of integration and to prevent it from being abused by discriminating a minority of Member States.[232]

However, although art. 24(3) TEU stresses the general duty of sincere cooperation in CFSDP, the culture of non-compliance in the area of CSDP influences PESCO as well. Unfortunately, pMS use PESCO to pursue national goals instead of a common EU objective.[233] To illustrate, a main barrier in many PESCO projects is the absence of multilateral commitment on behalf of the pMS.[234] Yet, while pMS are at least proposing projects, they are paying far less attention to the binding commitments.[235] The fact is that compliance with these commitments is still dependent on the will of the pMS.[236] First of all, they are entered into voluntarily. This results from the open framework provided by the Treaties, which enables Member States to accede or withdraw after the launch of PESCO. This is reiterated in the notification on PESCO, which provides that "participation in PESCO is voluntary and leaves national sovereignty untouched".[237] This voluntary nature of the mechanism presumes that there is no legal way of having pMS comply with their commitments against their will.[238] A legitimate question that arises is how many pMS actually intended to meet the more binding commitments when they joined PESCO. As Biscop noted, the defence establishment in some countries saw PESCO as a useful tool to emphasize the importance of a serious defence attempt upon their national political authorities. However, he suggests that many governments probably signed up for PESCO out of fear being left out than from a genuine ambition to join in the mechanism.[239] On top of this, when a pMS does not comply with the commitments, it is unlikely that the nuclear option of suspending a pMS is ever to be used.[240] However, the duty of sincere cooperation is reflected in the fact that a suspension decision will be taken only after the

[230] Art. 46 TEU.

[231] D Thym, '*Ungleichzeitigkeit und Europaïsches Verfassungsrecht*'*?* cit.; A Ott, 'EU Constitutional Boundaries to Differentiation: How to Reconcile Differentiation with Integration?' cit., 113; E Pistoia, *Limiti all'Integrazione Differenziata dell'Unione Europea* cit. 247.

[232] See by analogy A Miglio, 'Differentiated Integration and the Principle of Loyalty' cit. 484.

[233] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' cit. 3.

[234] L Béraud-Sudreau, YS Efstathiou and C Hannigan, 'Keeping the Momentum in European Defence Collaboration: An Early Assessment of PESCO Implementation' cit.

[235] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' cit. 5.

[236] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' cit. 19 ff.

[237] Annex I Decision 2017/2315 cit., seventh bullet point.

[238] S Blockmans, 'The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?' cit. 1819.

[239] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' cit. 7.

[240] Art 6(3) Decision 2017/2315 cit. provides that once a year the Council must review whether the pMS are fulfilling their commitments on the basis of the HR's annual PESCO report. IF a pMS systematically fails to meet its commitments, its membership of PESCO should be suspended.

pMS in question "has been given a clearly defined timeframe for individual consultation and reaction measures".[241] But, as Nováky states, the reaction measures should be presented as a list of steps that the pMS in question has to perform in order to stay in PESCO. These steps should be phrased clearly and explicitly, and their realization should be monitored. The "clearly defined timeframe" should be an exact deadline by which the pMS in question has to show that it has performed the requisite steps to fulfil its commitments. When it fails or is reluctant to do so, the Council should suspend that pMS without any doubt, notwithstanding how "diplomatically unfriendly" that might be.[242] PESCO should not become a mechanism where members who violate the rules cannot be kicked out for the sake of inclusivity.[243] Yet, many commitments are so broadly and vaguely formulated, that it leaves considerable room for interpretation and makes it possible to formally adhere without in practice doing very much that one wasn't doing already. Thus, the minimum threshold for fulfilling the commitments will be low.[244] As a result, if we look at cases such as Spain, which is not able of adhering to its commitment to allocate two per cent of its GDP to defence, there is no punitive tool in the hands of the European institutions. This is a major handicap for the creation of a Europe of defence.[245] Therefore, little prevents pMS from pursuing their individual national projects instead of using PESCO as an instrument to reach a common EU objective. Precisely, what PESCO can do for them is providing money via the EDF. Vice versa, pMS have not been very eager to convert the PESCO commitments into more precise goals and set deadlines, which would involve firm budgetary commitments, and possibly more naming-and-shaming of the laggards. Furthermore, if PESCO would be more integrative, this would result in more consolidation of the defence industry. However, most pMS remain very protective of their national defence industry. This was illustrated by the debate on third-State participation in PESCO projects. pMS want to decide on third country participation on a project-by-project basis, without automatic, and without them benefitting from EU funding. Some pMS prefer a restrictive approach, seeing it as a chance to push British and American competitors out of the EU market. However, the advantage of participation of third countries is that it can help projects to become economically viable.[246]

[241] *Ibid*. art 6(4).

[242] S Blockmans, 'Europe's Defence Train Has Left the Station—Speed and Destination Unknown' (CEPS Commentary 2017) 3 aei.pitt.edu.

[243] N Nováky, 'The EU's Permanent Structured Cooperation in Defence: Keeping Sleeping Beauty from Snoozing' cit. 102.

[244] *Ibid*. 100 ff.

[245] B Cózar-Murillo, 'PESCO as a Game-changer for Differentiated Integration in CSDP after Brexit' cit. 19 ff.

[246] S Biscop, 'European Defence and PESCO: Don't Waste the Chance' cit. 7 ff

V. Conclusion

This *Article* has investigated DI in PESCO in light of the EU's general principles of consistency and sincere cooperation. Although differentiation seems to be at odds with the idea of a common policy (a policy in which all Member States take part and involves Member States only), DI has become part and parcel of the EU's legal framework, with PESCO as the example par excellence. To reconcile DI with integration, general principles of EU law, among which the principles of consistency and sincere cooperation, may play a prominent role.

Our analysis revealed that that the nature of the CSDP within the wider framework of the CFSP is not as *common* as the word would suggest. Although it is called a *Union* policy, the Treaty acknowledges that a *Common* Foreign, Security and Defence Policy is the result of *a process of cooperation* between the Union and its Member States Besides, differentiation has been a solution to circumvent the unanimity rule, and thus to accommodate differences and be able to move forward when certain Member States are not on board. Thus, DI in CSDP exemplifies that differentiation does not necessarily stand in the way of pursuing a common policy, as it might be the only way to build a common policy where otherwise consensus would never be reached due to different national interests.

Secondly, it was demonstrated that PESCO is the most recent and far-going example of institutionalised DI within EU defence and functions as a standing platform for the accommodation of diverse commitments and capabilities in CSDP.[247] PESCO serves as a "hub and spoke" model, whereby decision-making by consensus at the level of the Council (the hub) preserves inclusivity, while simultaneously permitting different groups of Member States to initiate projects (the spokes) increases the level of ambition in general. However, the average number of project participants is only five, which means that the total of 60 projects arguably does not change the situation of fragmentation in the field of defense. The only difference with the pre-PESCO situation is that cooperation between pMS is now able to rely on the EU's institutional infrastructure, with the associated benefits.

Thirdly, we revealed that the possibility of DI as a means to pursue a common policy is definitely not unlimited: general principles of EU law require a certain pattern of behaviour of the pMS, institutions and third countries. In the end, the question that needs to be asked is this: *Does this particular form of DI strengthen the EU's performance as a global actor?* As long as consistency between the EU's internal and external policies is preserved and all actors involved work together in a spirit of loyalty, the answer to this question is *yes*. However, several shortcomings in the PESCO mechanism related to the principles of consistency and sincere cooperation came to the fore, especially on the part of the pMS. To uphold these general principles in the future and for PESCO to genuinely contribute to a *common* defence policy, pMS should be required to help the EU achieve its strategic

[247] See C Törö, 'Accommodating Differences within the CSDP: Leeway in the Treaty Framework?' in S Blockmans (ed.), 'Differentiated Integration in the EU. From the Inside Looking Out' (CEPS 2014) 70.

autonomy by doing more than the minimum required to fulfil the binding commitments. In this regard, more detailed and clearly formulated guidelines are needed. Besides, the implementation of PESCO should be monitored rigorously at national and EU level, and real consequences should be in place for pMS that fail to meet their commitments. When the requirements of consistency and sincere cooperation are fulfilled, however, the CSDP sets to gain from the support of PESCO's microcosm of DI, be that in terms of legitimacy, visibility and effectiveness of the EU as a global actor.[248]

In conclusion, the extent to which DI in PESCO affects the common nature in CSDP seems relatively small at first sight, as DI in the wider policy sphere of CFSDP is far from new. Yet, while enhanced cooperation, for example, has built in a limitation regarding the number of participants in order to uphold a certain *commonness*, this is not the case for PESCO. This lack of prioritisation of unitary integration creates a risk of fragmentation, which might possibly lead to inconsistencies. In this regard, the general principles of consistency and sincere cooperation should serve as a benchmark to DI in PESCO, thus "putting the C back into the CSDP".[249] However, the Treaties and subsequent secondary legislation on PESCO lack clear guidelines to measure adherence to these principles and therefore fail to establish clear limits to DI in this regard. Moreover, without the jurisdiction of the CJEU, a risk appears that the EU institutions responsible for monitoring consistency and sincere cooperation in the PESCO framework will base their examination on political- rather than legal considerations. Consequently, considering the flexibility in PESCO, PESCO runs the risk of creating too much fragmentation instead of contributing to the *commonness* the Treaties actually envisaged for the *Common* Security and Defence Policy.

[248] See, by analogy, S Blockmans, 'Differentiation in CFSP' cit. 56.
[249] *Ibid*. 55.

ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU THROUGH THE LENS OF THE COURT OF JUSTICE

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ABSTRACT: The horizontal clauses of arts 8-13 TFEU address a persistent challenge for the European Union: combining distinct policy objectives across the many areas of Union activity. Whilst they cannot be used as a legal basis for the adoption of EU measures, they legitimize the pursuit of the objectives they set forth, through legal bases that are designed to pursue some other treaty objective. This *Article* explores case law of the Court of Justice of the European Union (CJEU) on the legal nature of arts 8-13 TFEU, as well as their functions and input to judicial review. The analysis examines whether the horizontal clauses, as construed by the CJEU, create a legal obligation for mainstreaming. It also probes their relationship with the exercise of Union competences in the broader areas that they address (save for art. 13 TFEU due to the lack of an EU competence for animal welfare) and their implications for the choice of the legal basis of a mainstreaming measure. This *Article* further sheds light on the CJEU's treatment of the horizontal clauses in cases concerning restrictions of fundamental rights and free movement, it discusses their contribution to the interpretation of EU secondary legislation and examines whether the horizontal clauses may serve to invalidate an EU measure. The analysis overall attests to moderate judicial use of arts 8-13 TFEU but shows that relevant provisions enrich and corroborate the CJEU's reasoning on different accounts.

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EUROPEAN PAPERS
VOL. 7, 2022, NO 3, PP. 1357-1380

www.europeanpapers.eu

ISSN 2499-8249
doi: 10.15166/2499-8249/618

KEYWORDS: horizontal clauses – arts 8-13 TFEU – mainstreaming – EU overarching objectives – Charter of Fundamental Rights – Court of Justice of the European Union.

I. INTRODUCTION

The *horizontal clauses* of arts 8-13 TFEU, also known as *mainstreaming clauses* or *integration principles*, are set forth in Title II "Provisions having general application" of Part One of the TFEU, entitled "Principles". These horizontal clauses have been brought together by the Treaty of Lisbon and focus on gender equality (art. 8 TFEU), social protection (art. 9 TFEU), non-discrimination (art. 10 TFEU), environmental protection (art. 11 TFEU), consumer protection (art. 12 TFEU) and animal welfare (art. 13 TFEU). Although they do not employ identical wording, they all seek to influence the nature of EU measures in various domains of EU policy and activity. They do so by laying down transversal policy objectives and requirements, which are meant to imbue and characterize EU action in general. EU measures adopted on some legal basis in the pursuit of some EU objective as determined by EU primary law are not precluded from integrating the transversal objectives of the horizontal clauses. This is indeed the underlying rationale of the horizontal clauses.

However, arts 8-13 TFEU leave many questions unanswered. Their legal nature and effects are not entirely clear, as the horizontal clauses offer no guidance on what the integration exercise precisely means in law and in practice and how this is to be achieved. The uncertainly created by their vague wording is accentuated by the fact that arts 8-13 TFEU are not unique in EU law. Not only does a wider group of such horizontal clauses exist in the TFEU but also most of the horizontal clauses of arts 8-13 TFEU overlap with other provisions of EU primary law. This raises broader questions about the combination of a range of different Union objectives at once, mainstreaming pressure and competition as well as the normative quality of arts 8-13 TFEU.

This *Article* seeks to work towards a better understanding of arts 8-13 TFEU by focusing on how the Court of Justice of the European Union (CJEU) has been confronted with these clauses in the aftermath of the Treaty of Lisbon. Given the variety of the horizontal clauses available in EU primary law and the abstract formulation of arts 8-13 TFEU, the jurisprudence of the CJEU might help elucidate the legal nature and effects of arts 8-13 TFEU. The next section examines the legal value of arts 8-13 TFEU, as construed by the CJEU. The following sections explore the ways in which arts 8-13 TFEU have been accommodated in CJEU jurisprudence, identifying their functions and input to judicial review. The analysis demonstrates limited judicial use of arts 8-13 TFEU but overall shows that relevant provisions, when used, enrich and corroborate judicial reasoning on different accounts.

II. ARTS 8-13 TFEU AND OTHER SIMILAR CLAUSES OF EU PRIMARY LAW

Art. 8 TFEU on gender equality provides that "[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women". This echoes

an earlier mainstreaming provision introduced by the Treaty of Amsterdam[1] and addresses gender equality as a negative (*to eliminate*) and a positive (*to promote*) objective to underpin Union activity in its entirety.[2] Art. 8 TFEU is complemented by art. 10 TFEU, which states that "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". Enacted with the Treaty of Lisbon, art. 10 TFEU underlines the fight against discrimination on the same list of grounds set forth in art. 19 TFEU (*i.e*. the TFEU legal basis for the adoption of measures to combat discrimination) as a horizontal objective to integrate in the definition and implementation of all EU policies and activities.[3] The horizontal social protection clause of art. 9 TFEU, also adopted with the Treaty of Lisbon, stipulates that "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". The language here is different: art. 9 TFEU points to requirements associated with a wider set of social objectives that should be *taken into account* (rather than *aimed at*) when formulating and implementing EU policies and activities.[4]

[1] Art. 3(2) of the Treaty establishing the European Community (TEC) [1997], inserted by the Treaty of Amsterdam [1997], read: "[i]n all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women".

[2] On gender mainstreaming, see, amongst others, T Rees, *Mainstreaming Equality in the European Union* (Routledge 1998); M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) Journal of European Public Policy 435; S Mazey, *Gender Mainstreaming in the EU: Principles and Practice* (Kogan 2001); R Guerrina, 'Gender, Mainstreaming and the EU Charter of Fundamental Rights' (2003) Policy and Society 97; E Caracciolo di Torella, 'The Principle of Gender Mainstreaming: Possibilities and Challenges' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 45.

[3] On mainstreaming equality, see M Bell, *Racism and Equality in the European Union* (Oxford University Press 2009); B de Witte and others, 'Legislating after Lisbon: New Opportunities for the European Parliament' (EUDO Report 2010/1); F Ippolito, 'Mainstreaming Equality in the EU Legal Order: More than a Cinderella Provision?' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 55; L Waddington and M Priestley (eds), *Mainstreaming Disability Rights in the European Pillar of Social Rights: A Compendium* (Academic Network of European Disability Experts, 2018).

[4] The interplay between market-making and social policy concerns has been the object of extensive scholarly debate. On art. 9 TFEU and the reconciliation of market and social values, see indicatively P Vielle, 'How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming' in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 105; MD Ferrara, 'The Horizontal Social Clause and the Social and Economic Mainstreaming: A New Approach for Social Integration?' (2013) European Journal of Social Law 288; ME Bartoloni, 'The Horizontal Social Clause in a Legal Dimension' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 83; E Muir, 'Drawing Positive Lessons From the Presence of "The Social" Outside of EU Social Policy Stricto Sensu' (2018) EuConst 81; A Aranguiz, 'Social Mainstreaming Through the European Pillar of Social Rights: Shielding "the Social" from "the Economic" in EU Policymaking' (2018) European Journal of Social Security 341.

Art. 11 TFEU is admittedly the stronger horizontal provision of the TFEU. It declares that "environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".[5] Environmental mainstreaming is a long-standing duty of the European institutions. It goes back to the Single European Act, which added art. 130R in the Treaty establishing the European Economic Community (TEEC), affirming *inter alia* that "[e]nvironmental protection requirements shall be a component of other Community policies".[6] Art. 11 TFEU now qualifies the greening of EU policies and activities[7] by underscoring promotion of sustainable development as the aim to attain – a concept that combines economic growth, social justice and environmental protection, seeking their balance. The horizontal consumer protection clause of art. 12 TFEU is formulated in weaker terms.[8] It states that "[c]onsumer protection requirements shall be taken into account in defining and implementing other Union policies and activities". It essentially repeats the horizontal consumer protection clause, inserted in the Treaty establishing the European Community (TEC), by the Treaty of Amsterdam.[9] Art. 13 TFEU, an innovation of the Treaty of Lisbon in the wake of *Protocol n. 33 on protection and welfare of animals*, which was annexed to the TEC by the Treaty of Amsterdam,[10] reads as follows: "[i]n

[5] On environmental mainstreaming, see, amongst others, A Lenschow (ed.), *Environmental Policy Integration: Greening Sectoral Policies in Europe* (Earthscan Publications 2002); N Dhondt, *Integration of Environmental Protection into Other EC Policies: Legal Theory and Practice* (Europa Law Publishing 2003); S Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) ELJ 780; JH Jans, 'Stop the Integration Principle?' (2011) FordhamIntLJ 1533; GM Durán and E Morgera, *Environmental Integration in the EU's External Relations: Beyond Multilateral Dimensions* (Hart Publishing 2012); J Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016); E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Bloomsbury Publishing 2017); B Sjåfjell, 'The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 105; M Montini, 'The Principle of Integration' in M Faure (ed.), *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing 2018) 139.

[6] See art. 25 of the Single European Act [1987] and art. 130R(2) TEEC.

[7] Concerning the EU policies and activities involved, the CJEU ruled in case C-594/18 P *Austria v Commission* ECLI:EU:C:2020:742 that the application of art. 11 TFEU in the nuclear energy sector is not precluded by the Euratom Treaty because the latter does not deal exhaustively with environmental issues.

[8] On the horizontal consumer protection clause, see SA de Vries, 'The Court of Justice's "Paradigm Consumer" in EU Free Movement Law' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 416; F Seatzu, 'On the Current Meaning and Potential Effects of the Horizontal Consumer Clause of Article 12 of the TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 123.

[9] Art. 129(A)(2) TEC, as replaced by the Treaty of Amsterdam, read as follows: "[c]onsumer protection requirements shall be taken into account in defining and implementing other Community policies and activities".

[10] This stipulated that "[i]n formulating and implementing the Community's agriculture, transport, internal market and research policies, the Community and the Member States shall pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs

formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage".[11] A specific set of EU policies, from agriculture and fisheries to space and the internal market, are thus identified for integrating an animal welfare perspective, with due respect for Member States' customs and legal and administrative frameworks on cultural and religious practices.

Notably, arts 8-13 TFEU form part of a wider set of horizontal clauses laying down transversal objectives and requirements for the EU. Whilst some of these other horizontal clauses overlap with arts 8-13 TFEU, others focus on other policy objectives and requirements. Art. 147(2) TFEU for instance proclaims that "[t]he objective of a high level of employment shall be taken into consideration in the formulation and implementation of Union policies and activities". Art. 168(1) TFEU states that "[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities". Both provisions partly reflect art. 9 TFEU, which provides that the Union shall take into account requirements *inter alia* "linked to the promotion of a high level of employment" and "a high level of [...] protection of human health", with art. 168(1) TFEU adopting stronger language (*shall be ensured*) than art. 9 TFEU (*shall take into account*). Art. 167(4) TFEU does not match any of the horizontal clauses of arts 8-13 TFEU. It declares that "[t]he Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures".[12] Art. 175 TFEU contains a mainstreaming provision for economic, social and territorial cohesion, according to which "[t]he formulation and implementation of Union's policies and actions and the implementation of the internal market shall take into account" cohesion objectives such as "reducing disparities between levels of regional

of the Member States relating in particular to religious rites, cultural traditions and regional heritage". See Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Protocol annexed to the Treaty of the European Community, Protocol on protection and welfare of animals [1997].

[11] On the horizontal animal welfare clause, see D Ryland and A Nurse, 'Mainstreaming after Lisbon: Advancing Animal Welfare in the EU Internal Market' (2013) European Energy and Environmental Law Review 101; J Beqiraj, 'Animal Welfare' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 136; K Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) CMLRev 55; L Leone, 'Farm Animal Welfare Under Scrutiny: Issues Unsolved by the EU Legislator' (2020) European Journal of Legal Studies 47.

[12] On the horizontal cultural clause, see R Craufurd Smith, 'Community Intervention in the Cultural Field: Continuity or Change?' in R Craufurd Smith, *Culture and European Union Law* (Oxford University Press 2004) 22; E Psychogiopoulou, *The Integration of Cultural Considerations in EU Law and Policies* (Martinus Nijhoff Publishers 2008) and E Psychogiopoulou, 'Cultural Mainstreaming: The European Union's Horizontal Cultural Diversity Agenda and its Evolution' (2014) ELR 626.

development and the backwardness of the least favoured regions".[13] Art. 173(3) TFEU focuses on industrial policy. It provides that the Union "shall contribute" to the achievement of the industrial policy objectives of art. 173(1) TFEU,[14] "through the policies and activities it pursues under other provisions of the Treaties". Art. 208(1) TFEU includes a mainstreaming clause for development cooperation. According to this, the Union "shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries", in particular "the reduction and, in the long term, the eradication of poverty".[15]

Arguably, the best known horizontal clause of the TFEU is art. 114(3) TFEU, which requires the European institutions to "take as a base" a high level of health, safety, environmental protection and consumer protection when adopting legislation that has as its object the establishment and functioning of the internal market. Originally introduced with the Single European Act,[16] with reference to European Commission (Commission) proposals, this provision clarified at an early stage that internal market measures should combine a high level of health, safety, environmental and consumer protection with their economic and market-building goals.[17] Art. 169(2) TFEU explains specifically as regards consumer protection that EU internal market measures, adopted on the basis of art. 114 TFEU, "shall contribute to the attainment" of the consumer protection objectives set forth in art. 169(1) TFEU. The latter refers to promoting the interests of consumers and ensuring a high level of consumer protection in particular by "protecting the health, safety and economic interests of consumers" and by "promoting their right to information, education and to organise themselves in order to safeguard their interests".[18]

Whilst part of this broader collection of horizontal clauses in the TFEU, arts 8-13 TFEU, by being grouped together under Part One of the TFEU, make more visible and assertive the transversality of the objectives and requirements they refer to. Their prominent place in the TFEU, even if some long predate it, exemplifies their importance for EU law and policies. The argument has indeed been made that arts 8-13 TFEU provide a *constitutional* basis for incorporating central EU values and objectives into different areas of EU law and

[13] See art. 174(1) TFEU.

[14] Art. 173(1) TFEU refers in particular to speeding up the adjustment of industry to structural changes; encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings; encouraging an environment favourable to cooperation between undertakings; and fostering better exploitation of the industrial potential of policies of innovation, research and technological development.

[15] Other development cooperation objectives derive from the objectives of the Union's external action. See art. 208(1) TFEU.

[16] See art. 18 of the Single European Act cit., inserting art. 100A in the TEEC.

[17] On the non-market objectives of EU internal market legislation, see B de Witte, 'Non-Market Values in Internal Market Legislation' in NN Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar 2006) 61.

[18] See art. 169(1) TFEU.

policy.[19] Both the provisions that should be seen as long-established, consolidated horizontal clauses, *i.e*. arts 8, 11 and 12 TFEU, and the Lisbon-established provisions of arts 9, 10 and 13 TFEU identify *overarching objectives* for EU law and policy-making. So construed, the horizontal clauses, without modifying the Union's competences, widen EU action in the pursuit of equality, social protection, environmental protection and consumer protection, beyond the treaty articles that are specifically devised to attain such objectives. As for animal welfare, this is an area where the EU has no competence. As the Union is under duty to act within the limits of its competences respecting the principle of conferral, art. 13 TFEU does not create any new competences for the Union. What it does is to alert the EU institutions about the animal welfare implications of their action when exercising Union competences in a cluster of areas that come within the Union's purview (agriculture, fisheries, the internal market, etc.), thus supporting the development of animal welfare-friendly policies at EU level.

Having said this, some of the horizontal clauses of arts 8-13 TFEU have a similar provision in the Charter of Fundamental Rights (the Charter) of the Union. Art. 23 of the Charter adopts stronger language than art. 8 TFEU for instance when stipulating that "[e]quality between women and men must be ensured" (rather than *aimed at*) "in all areas, including employment, work and pay". Art. 35 of the Charter proclaims, in a more forceful manner than art. 9 TFEU, that "[a] high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities", matching the language of art. 168(1) TFEU. Art. 37 of the Charter ascertains, similarly to art. 11 TFEU, that "[a] high level of environmental protection", besides the improvement of the quality of the environment, "must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development".[20] By stipulating that "Union policies shall ensure a high level of consumer protection", art. 38 of the Charter recalls art. 12 TFEU in stronger terms. Other provisions of the Charter concerning equality and non-discrimination, social security and assistance, employment and education are also relevant. This is because by means of art. 51(1) the Charter imposes a horizontal duty to mainstream fundamental rights in the exercise of Union competences, to the extent that it requires the European institutions – and the Member States when they implement EU law – not only to respect the rights and observe the principles thereof but also to promote their application "in accordance with their respective powers".[21]

[19] F Ippolito, ME Bartoloni and M Condinanzi, 'Introduction. Integration Clauses: A Prologue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 1.

[20] On the relationship of art. 37 of the Charter with art. 11 TFEU, see E Scotford, 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights' in S Bogojevic and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 133.

[21] See V Kosta, 'Fundamental Rights Mainstreaming in the EU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 14, at 22; and B de Witte,

III. The legal value of the horizontal clauses of Arts 8-13 TFEU

The horizontal clauses of arts 8-13 TFEU address a persistent challenge for the Union: combining distinct policy objectives among the many areas of Union activity. Whilst they cannot be used as a legal basis for the adoption of EU measures, they legitimize the pursuit of the objectives they set forth by using legal bases that are designed to achieve other treaty objectives and thus in the context of various EU policies and activities. Whether or not they create any legal obligations for the EU institutions (and the Member States for that matter) has generated controversy. Other issues requiring clarification have centred around the relationship of the horizontal clauses (if any) with the exercise of Union competences in the broader policy areas that they address (save for art. 13 TFEU, as the Union has no competence in animal welfare as such) and their implications for the "centre of gravity" doctrine when it comes to the choice of a legal basis for the adoption of measures that engage in mainstreaming. The CJEU's jurisprudence is relatively illuminating on these aspects.

III.1. Horizontal clauses and legal obligations

Hungary v European Parliament and Council is enlightening on whether or not the horizontal clauses establish any legal requirements for the Union.[22] The dispute focused on whether or not Directive 2018/957 concerning the posting of workers in the framework of the provision of services[23] had been rightly founded on art. 62 TFEU, in conjunction with art. 53(1) TFEU. Hungary asked the CJEU to annul the directive, with the argument that art. 153 TFEU on social policy should have been its legal basis: the directive's "only or principal aim", Hungary claimed, "[was] the protection of workers" – not the removal of obstacles to the freedom to provide services.[24]

The CJEU ascertained that the Directive, which amended Directive 96/71/EC,[25] sought to strike a balance between two distinct interests: guaranteeing that Member States' undertakings may supply services within the internal market through the posting of workers from where they are established to other Member States; and protecting the rights of the posted workers.[26] The directive accordingly sought to ensure "the freedom to provide services on a fair basis".[27] When coordinating national rules that could impede the freedom to provide services, it should not be concluded, the CJEU declared, that "the EU

'Conclusions: Integration Clauses: A Comparative Epilogue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 181, at 182.

[22] Case C-620/18 *Hungary v European Parliament and Council* ECLI:EU:C:2020:1001.

[23] Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[24] *Hungary v European Parliament and Council* cit. paras 28-29.

[25] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

[26] *Hungary v European Parliament and Council* cit. para. 50.

[27] *Ibid*. para. 57.

legislature is [...] not bound to ensure respect for [...] the objectives, laid down in Article 9 TFEU".[28] A measure based on arts 53(1) and 62 TFEU should "not only have the objective of making it easier to exercise the freedom to provide services, but also of ensuring, when necessary, the protection of other fundamental interests that may be affected by that freedom",[29] covering the interests laid down in art. 9 TFEU, in particular "the promotion of a high level of employment" and "the guarantee of adequate social protection".[30]

Hungary v European Parliament and Council is important,[31] not because the CJEU recognized the social dimension of the internal market (such a social dimension is emphasized in art. 3(3) of the Treaty on European Union, TEU[32]), but because the CJEU accepted, with reference to art. 9 TFEU, that the horizontal clauses create a *legal requirement* for the EU legislator: the latter is *bound* to *ensure respect* for the objectives of the horizontal clauses when taking action to pursue some other EU objective. This legal requirement should essentially be interpreted as avoiding undermining the objectives at issue by *disregarding* them and *going against* them. Interestingly, the CJEU added that the "overarching objectives" of art. 9 TFEU could be safeguarded only if EU legislation could be adapted to take account of changes in circumstances and knowledge.[33] Given the impact of successive EU enlargements and evidence of market segmentation due to differentiation in rules on wages applicable to posted workers and to workers employed by undertakings established in the host Member State,[34] the EU legislature should be allowed to adjust the legal framework created by Directive 96/71/EC to strengthen the rights of posted workers.[35] This indicates that for the CJEU, the pursuit of the EU's "overarching objectives", as reflected in the horizontal clauses, is a continuous task which must mirror the evolution of the Union's socio-economic and other conditions.

Support for this progressive implementation of the mainstreaming duty can also be found in *Association Belge des Consommateurs Test-Achats and others*,[36] where the CJEU held that EU law derogations from gender equality should not last without a limit. In its reference for a preliminary ruling, the Belgian Constitutional Court (BCC) asked the CJEU

[28] *Ibid*. para. 46.

[29] *Ibid*. para. 48.

[30] *Ibid*. para. 46, in conjunction with para. 41.

[31] See also in this respect case C-626/18 *Poland v European Parliament and Council* ECLI:EU:C:2020:1000.

[32] Art. 3(3) TEU on the Union's task to establish an internal market provides inter alia that the EU shall work for the sustainable development of Europe based amongst other issues on "a highly competitive social market economy, aiming at full employment and social progress". It also mentions that the EU "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child" as well as social cohesion.

[33] *Hungary v European Parliament and Council* cit. para. 42, read together with paras 41 and 61.

[34] *Ibid*. paras 62-63 and 68.

[35] *Ibid*. para. 64.

[36] Case C-236/09 *Association Belge des Consommateurs Test-Achats and others* ECLI:EU:C:2011:100.

to rule on the validity of art. 5(2) of Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.[37] Although Directive 2004/113/EC prescribed gender equality in insurance matters, requiring the Member States to guarantee unisex premiums and benefits following a transitional period, art. 5(2) of the Directive introduced a derogation, which allowed the Member States to permit proportionate differences in individuals' premiums and benefits, using sex as a determining factor in the assessment of risk.

Taking note of the horizontal gender equality clause of art. 8 TFEU, in conjunction with art. 3(3) TEU, which underlines the social facet of the internal market, the CJEU observed that gender equality should be achieved progressively.[38] The EU legislature should determine when to take action, "having regard to the development of economic and social conditions" in the EU.[39] It was therefore permissible for the EU legislature to *gradually* require the application of unisex premiums and benefits. Any action decided upon however should *coherently* contribute to the objective of gender equality.[40] Here, the gender equality derogation had no temporal limitation.[41] It could persist indefinitely, which rendered it incompatible with arts 21 and 23 of the Charter on non-discrimination and equality between women and men respectively.[42]

III.2. Horizontal clauses and the exercise of union competences in the areas concerned

In *Association Belge des Consommateurs Test-Achats and others*, the CJEU held that the competence conferred by art. 19(1) TFEU on the Council to take appropriate action to combat discrimination based *inter alia* on sex should be exercised *in accordance with* the horizontal gender equality clause of art. 8 TFEU.[43] A traditional understanding of mainstreaming suggests that the horizontal clauses of the TFEU are relevant for EU measures that have as their legal basis a treaty provision that enables action to attain some other objective – not the objectives laid down in the horizontal clauses. The CJEU's ruling appears to suggest that art. 8 TFEU is also relevant for EU equality law-making as such. No further guidance, however, is offered on this point. Other rulings of the CJEU depict a more conventional understanding of mainstreaming. This is the case with *Commission v Council (Antarctic MPAs)*,[44] which sheds light on the relationship of the horizontal environmental

[37] Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

[38] *Association Belge des Consommateurs Test-Achats and others* cit. para. 20.

[39] *Ibid*.

[40] *Ibid*. para. 21.

[41] *Ibid*. paras 31-32.

[42] *Ibid*. para. 32.

[43] *Ibid*. para. 19.

[44] Joined cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* ECLI:EU:C:2018:925.

protection clause of art. 11 TFEU with the TFEU provisions enabling the adoption of environmental protection measures.[45]

The case focused on two Council decisions approving submission to the competent international body of a set of proposals and a reflection paper for the creation of marine protected areas (MPAs) and special areas for scientific study in the Antarctic, as part of the implementation of the Convention on the Conservation of Antarctic Marine Living Resources,[46] to which the EU is party. The Commission claimed, amongst other issues, that the Council decisions came within the scope of the exclusive competence of the EU in the area of the conservation of marine biological resources under the common fisheries policy.[47] Consequently, the documents concerned should have been submitted on behalf of the EU alone, rather than on behalf of the EU and its Member States as falling within the shared competence of the EU and its Member States in environmental matters. To strengthen its argument, the Commission drew attention to art. 11 TFEU, affirming that the mere fact that a measure was linked to environmental protection did not necessarily mean that it fell within EU environmental competence.[48] The creation of the suggested areas at issue was partly a response to environmental concerns but according to the Commission, the *centre of gravity* of the envisaged measures did not lie on the side of environmental policy.[49]

The CJEU took the view that environmental protection was the main purpose and component of the measures approved by the Council for submission, which meant that they fell within the shared competence of the EU on environmental matters. Such a conclusion, the CJEU noted, could not be called into question by art. 11 TFEU. The CJEU stated: "Whilst the European Union must comply with that provision when it exercises one of its competences, the fact remains that environmental policy is expressly referred to in the Treaties as constituting an autonomous area of competence and that, consequently, when the main purpose and component of a measure relate to that area of competence, the measure must also be regarded as falling within that area of competence".[50]

The *Antarctic MPAs* exemplifies the usefulness of the horizontal clauses for the exercise of Union competences in areas that do not aim at the objectives of the horizontal clauses. This is in line with earlier pronouncements of the CJEU. Regarding the horizontal environmental clause for instance, the CJEU has ruled that the treaty provisions conferring powers on the Union to undertake specific action in the environmental field and thus develop an environmental policy leave intact its powers under other provisions of the treaty, which can

[45] See art. 191 TFEU ff.

[46] See Convention on the Conservation of Antarctic Marine Living Resources, concluded at Canberra on 20 May 1980 (No 22301) treaties.un.org.

[47] See art. 3(1)(d) TFEU.

[48] *Commission v Council (Antarctic MPAs)* cit. para. 71.

[49] *Ibid*.

[50] *Ibid*. para. 101.

be used for the adoption of measures that concurrently pursue environmental objectives, in light of the environmental mainstreaming requirements under EU law.[51] However, the fact that the horizontal clauses can contribute to EU policy-making in various areas does not necessarily rule out their relevance for the measures that pursue, as per their legal basis, the *same* objectives as them (art. 13 TFEU excluded). This is what appears to have been hinted at in *Association Belge des Consommateurs Test-Achats and others*. After all, some horizontal clauses expressly refer to integrating their objectives and requirements in *all* Union activities; not all of them do so though and some horizontal clauses specifically refer to "other" Union policies and activities for the purposes of mainstreaming.[52]

III.3. Horizontal clauses and the boundaries of an EU legal basis

In accordance with the centre of gravity doctrine, the *Antarctic MPAs* also indicates than when a measure has several purposes or components, if one of these is identified as *main* or *predominant*, whereas the others are merely *incidental*, the measure taken must be founded on a single legal basis; that is, the legal basis corresponding to the main purpose or component.[53] One could argue however that in light of the horizontal clauses, a single legal basis provision could also be used for the introduction of measures that *decisively* combine the objectives of the horizontal clauses with the objectives of the legal basis. There is indeed nothing in the wording of the horizontal clauses mandating the pursuit of the objectives that they determine *only* in an incidental or subsidiary way. What is necessary for mainstreaming is that the EU legislator convincingly demonstrates that the conditions for the use of the chosen legal basis are fulfilled, namely that the measure *genuinely* pursues the objectives of its legal basis. If that is the case, then there should be nothing to prevent reliance on that legal basis on the grounds that the objective of the

[51] See case C-336/00 *Huber* ECLI:EU:C:2002:509 para. 33. In *Huber*, the referring court had asked whether Regulation No 2078/92 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside was valid. The Regulation had been adopted on the basis of what are now arts 42 and 43 TFEU. The CJEU held that the primary purpose of the Regulation, *i.e*. the transition to a more extensive and higher quality cultivation system, did not justify recourse to art. 192 TFEU as an additional legal basis, even if the measure was of a nature such as to promote more environmentally-friendly forms of production (see paras 35-36). See Council Regulation (EEC) 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside.

[52] Art. 8 TFEU refers to all Union activities. Arts 9-11 TFEU generally refer to the definition and implementation of the Union's policies and activities, without excluding any particular policy or activity. Art. 12 TFEU refers to taking consumer protection requirements into account when defining and implementing *other* Union policies and activities.

[53] *Commission v Council (Antarctic MPAs)* cit. para. 77. For the CJEU, it is only exceptionally that an EU measure must be founded simultaneously on several legal bases. This will be the case when the measure "simultaneously pursues a number of objectives or has several components that are inseparably linked, without one being incidental to the other", see *Commission v Council (Antarctic MPAs)* cit. para. 78.

horizontal clause is pivotal in the adoption of the measure concerned, alongside the objective pursued by the latter's legal basis.

Philip Morris Brands and others corroborates this.[54] The CJEU may have refrained from using the horizontal social protection clause of art. 9 TFEU when assessing the correctness of art. 114 TFEU as the legal basis of Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products (the Tobacco Products Directive).[55] However, it has not held back from using art. 168(1) TFEU, a provision that emphasises the health dimension of art. 9 TFEU, and art. 114(3) TFEU, which mandates a high level of health protection in internal market measures,[56] to underline that when the conditions for recourse to art. 114 TFEU as a legal basis are fulfilled, the measure taken cannot be prevented from pursuing *decisively* a high level of health protection.[57]

IV. The functions and judicial input of the horizontal clauses of arts 8-13 TFEU

CJEU case law on arts 8-13 TFEU generally shows moderate use of relevant provisions. There is a limited number of cases where the CJEU has referred to and built its reasoning on arts 8-13 TFEU. Existing case law yet shows that arts 8-13 TFEU, when used, contribute to CJEU adjudication in various ways. For one thing, they lend support to the significance of certain objectives of general interest that can justify restrictions to fundamental rights and free movement. They also play a decisive role for the interpretation of EU law in ways supportive of their objectives. Thus far, however, they have not served as grounds for the invalidation of EU law.

IV.1. Horizontal clauses and restrictions to fundamental rights

According to CJEU case law, the horizontal clauses lay down objectives of general interest that may justify restrictions of fundamental rights. *Deutsches Weintor* is a prominent example

[54] Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325.

[55] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC.

[56] *Philip Morris Brands and others* cit. para. 61.

[57] *Ibid*. para. 60. It has been argued that such a decisive role can be assumed by the horizontal objectives when they cannot be pursued autonomously through sector-specific harmonization measures, for lack of harmonization powers assigned to the EU, and on condition that mainstreaming takes place in the context of EU policies allowing for harmonization. The argument is based on the understanding that the centre of gravity doctrine only applies when the legal basis corresponding to the "main" objective pursued and the legal basis corresponding to the "incidental" objective are "compatible", allowing for instance both for the adoption of harmonization measures. For more details, see B de Witte, 'A Competence to Protect: The Pursuit of Non-Market Aims Through Internal Market Legislation' in P Syrpis (ed.), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 25, 35-36.

of this.[58] The case stemmed from domestic proceedings in Germany concerning the marketing of a wine as "easily digestible", indicating low acidity levels. Pursuant to secondary EU legislation, health claims, understood as any claim stating, suggesting or implying a relationship between food and health, was prohibited for alcoholic beverages.[59] The question raised with the CJEU was whether such a prohibition was compatible with fundamental rights, in particular art. 15 of the Charter on the freedom to choose an occupation and the right to engage in work and art. 16 of the Charter on the freedom to conduct a business.

The CJEU approached the question put forward as one about the reconciliation of distinct fundamental rights,[60] adding to the equation art. 35 of the Charter,[61] which echoes the requirements of the horizontal social protection clause of art. 9 TFEU regarding a high level of protection of human health in the definition and implementation of Union policies and activities. Drawing in particular on art. 9 TFEU, the CJEU recognized that the protection of public health constitutes an objective of general interest that can justify restrictions of fundamental rights,[62] including the freedom to pursue an occupation and the freedom to conduct a business.[63] The freedom to pursue a trade or profession, the CJEU affirmed, was not an absolute right but should be considered in relation to its social function.[64] Against this background, the CJEU found that the prohibition of health claims at issue was necessary and proportionate for ensuring compliance with art. 35 of the Charter.

The fact that the horizontal clauses set forth objectives that can justify limitations of fundamental rights was confirmed in subsequent case law. *Neptune Distribution*[65] was about the validity of a prohibition under EU secondary legislation to display on the packaging, labels and in advertising misleading claims and indications for the volume of sodium content of natural mineral waters.[66] Mentioning art. 9 TFEU and the horizontal consumer protection clause of art. 12 TFEU, the CJEU held that a high level of human health and consumer protection were legitimate general interest objectives that could justify restrictions to freedom of expression (art. 11 of the Charter) (including commercial speech) and the freedom to conduct a business.[67] Here, mention of arts 9 and 12 TFEU

[58] Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526.

[59] See the first subparagraph of art. 4(3) of Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, according to which health claims are not permitted for alcoholic beverages.

[60] *Deutsches Weintor* cit. paras 46-47.

[61] *Ibid*. para. 45.

[62] *Ibid*. para. 49.

[63] *Ibid*. para. 54.

[64] *Ibid.*

[65] Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823.

[66] See art. 9(1) and (2) of Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters, read together with Annex III of the Directive and the annex to Regulation 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods.

[67] *Neptune Distribution* cit. para. 73, read in conjunction with para. 68.

was combined with reference to an array of mainstreaming proxies: art. 114(3) TFEU, art. 168(1) TFEU, art. 35 of the Charter and art. 38 of the Charter,[68] the latter mandating a high level of consumer protection in Union policies. Framing then the assessment of the disputed prohibition as requiring the balancing of arts 11, 16, 35 and 38 of the Charter, the CJEU held that a fair balance had been struck. Regarding in particular the proportionality of the interference at issue with freedom of expression and freedom to conduct a business,[69] the CJEU observed that the EU legislature should be allowed broad discretion in a complex area for assessment, entailing political, economic and social choices on its part,[70] which implied that art. 9 TFEU may also have a role to play in the context of the proportionality test performed.[71]

The point has been taken up and explored in *Philip Morris Brands and others*[72] in the context of assessing the validity of art. 13(1) of the Tobacco Products Directive,[73] prohibiting the promotion of tobacco consumption on tobacco labelling, packaging and tobacco itself, regarding compliance with art. 11 of the Charter. Considering that judicial review pertained to striking a balance between freedom of commercial speech and the protection of health as a legitimate general interest objective of the EU,[74] the CJEU built on art. 9 TFEU when assessing the proportionality of the interference in question. The discretion enjoyed by the EU legislature, the CJEU ruled, was subject to variation, depending on the general interest objective justifying a restriction of free speech and the nature of the speech activity in question.[75] Art. 9 TFEU, alongside art. 35 of the Charter, art. 114(3) TFEU and art. 168(1) TFEU, pointed to a high level of human health protection as the general interest objective at hand,[76] whilst the speech activity concerned commercial speech.[77] Given the proven harmfulness of tobacco, the former clearly outweighed the interest in the latter.[78]

[68] *Ibid*. para. 73.

[69] *Ibid*. para. 85.

[70] *Ibid*. para. 76.

[71] See ME Bartoloni, 'The Horizontal Social Clause in a Legal Dimension' cit. 97.

[72] *Philip Morris Brands and others* cit.

[73] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (Tobacco Products Directive).

[74] *Philip Morris Brands and others* cit. para. 154, read together with para. 152.

[75] *Ibid*. para. 155.

[76] *Ibid*. para. 157.

[77] *Ibid*. para. 155.

[78] *Ibid*. In *Pillbox* (case C-477/14 *Pillbox* ECLI:EU:C:2016:324), the CJEU similarly held on the basis of art. 9 TFEU, read together with art. 114(3) TFEU, art. 168(1) TFEU and art. 35 of the Charter, that the prohibition of commercial communications and sponsorship for electronic cigarettes and their refill containers, laid down in art. 20(5) of the Tobacco Products Directive, was not a disproportionate interference with the freedom to conduct a business and the right to intellectual property, enshrined in arts 16 and 17(2) of the Charter respectively.

On other occasions, the horizontal clauses contributed to the assessment of Member States' fundamental rights restrictions. *Centraal Israëlitisch Consistorie van België and others* is telling.[79] The case arose from domestic proceedings before the BCC concerning the validity of a Flemish Region decree, putting an end to a derogation that had permitted, for the purposes of respecting religious freedom, animal slaughtering without prior stunning[80] for "slaughter prescribed by a religious rite".[81] Regulation 1099/2009 on the protection of animals at the time of killing,[82] adopted under art. 43 TFEU, provided that an animal should be stunned prior to being killed – a manifestation of animal welfare, enshrined in art. 13 TFEU,[83] in common agricultural policy. With the aim of protecting freedom of religion, safeguarded under art. 10 of the Charter, the Regulation authorized, by way of derogation, animal slaughtering without prior stunning prescribed by religious rites. However, it also allowed Member States to provide for more extensive protection of animals.

Asked to interpret the leeway afforded Member States for more extensive animal protection, the CJEU ruled that the Regulation had not failed to acknowledge both religious freedom and animal welfare. The legal framework introduced reflected the animal welfare requirements of art. 13 TFEU[84] and also gave expression, in accordance with art. 10 of the Charter, to the "positive commitment of the EU legislature to ensure effective observance of freedom of religion", in particular the freedom to manifest religion.[85] The Regulation did not yet struck the balance between animal welfare and religious freedom itself but devolved the task to the Member States,[86] which could go beyond its provisions to enhance animal welfare.

When adopting rules to ensure greater protection for animals, Member States, the CJEU ascertained, were "implementing EU law" within the meaning of art. 51(1) of the Charter and had therefore to respect fundamental rights, including freedom of religion.[87] Considering the Flemish decree to be a limitation on the exercise of the right to manifest one's

[79] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031.

[80] *I.e.* a method to reduce animal suffering by intentionally causing loss of consciousness and sensibility without pain, including any process resulting in instantaneous death. See art. 2(f) of Council Regulation 1099/2009 of 24 September 2009 on the protection of animals at the time of killing.

[81] *Centraal Israëlitisch Consistorie van België and others* cit. para. 11. The decree provided in art. 3 that "if the animals are slaughtered according to special methods required for religious rites, the stunning must be reversible and the animal's death must not be caused by stunning". The application of reversible, non-lethal stunning during the practice of ritual slaughter had been considered to be a proportionate measure, respecting ritual slaughter in the framework of freedom of religion whilst taking maximum account of animal welfare.

[82] Regulation 1099/2009 cit.

[83] *Centraal Israëlitisch Consistorie van België and others* cit. para. 41.

[84] *Ibid*. para. 47.

[85] *Ibid*. para. 44.

[86] *Ibid*. para. 47.

[87] *Ibid*. paras 48-49.

religion,[88] for being incompatible with Jewish and Islamic religious precepts,[89] the CJEU examined whether the limitation could be justified. Pursuant to art. 13 TFEU, animal welfare was an EU objective of general interest which could justify the limitation at issue.[90] As for proportionality, the CJEU declared that Member States had wide discretion when seeking to balance freedom of religion and animal welfare.[91] Given the absence of European consensus on ritual slaughter and levels of animal welfare protection,[92] the EU legislature had sought, through the rules introduced, to "preserve the specific social context of each Member State [...] and [...] give each Member State a broad discretion" in the field.[93] The CJEU concluded that the Flemish Region was entitled to adopt the decree at issue.

The attention art. 13 TFEU received in *Centraal Israëlitisch Consistorie van België and Others* is remarkable. The horizontal animal welfare clause was found to lay down animal welfare as an EU *value*,[94] a *principle*[95] and an EU *objective of general interest* that can justify restrictions of religious freedom.[96] It was also held to be significant for the assessment of the proportionality of the restriction of religious freedom. The Charter, the CJEU affirmed, constitutes "a living instrument which must be interpreted in the light of present-day conditions" with due consideration to "changes in values and ideas, both in terms of society and legislation".[97] Given the increasing importance attached by contemporary democratic societies to animal welfare, animal welfare considerations should be able to receive increased consideration vis-à-vis the exercise of freedom of religion and ritual slaughter in particular.[98]

IV.2. Horizontal clauses and restrictions to free movement

Besides laying down objectives of general interest that can justify restrictions of fundamental rights, the CJEU has also acknowledged that the horizontal clauses lay down objectives that can justify restrictions to free movement as *overriding requirements in the public interest*. In *AGET Iraklis*,[99] a case focused on Greek legislation introducing an administrative authorization regime for collective redundancies, the CJEU drew on art. 9 TFEU to assert that social protection considerations could justify restrictions to freedom of

[88] *Ibid*. paras 53-54.

[89] Jewish and Muslim believers were to consume only meat from animals slaughtered without prior stunning whose blood was drained. See *ibid*. paras 13 and 54.

[90] *Ibid*. paras 58 and 63.

[91] *Ibid*. para. 65.

[92] *Ibid*. paras 68 and 70.

[93] *Ibid*. para. 71.

[94] *Ibid*. para. 41.

[95] *Ibid*. para. 65.

[96] *Ibid*. para. 63.

[97] *Ibid*. para. 77.

[98] *Ibid*.

[99] Case C-201/15 *AGET Iraklis* EU:C:2016:972.

establishment, in addition to restrictions to the freedom to conduct a business under art. 16 of the Charter. Having clarified that the national legislation impacted the ability of undertakings to implement collective redundancies by establishing a requirement of non-opposition by the competent public authority,[100] the CJEU held that the rules adopted were liable to constitute a serious obstacle to freedom of establishment.[101] Freedom of establishment, the CJEU stated, encompasses the freedom to determine the "extent of the economic activity" to carry out in a host Member State, in particular "the size of the fixed establishments and the number of workers required" and "the freedom subsequently to scale down that activity or even the freedom to give up [...] [the] activity and establishment".[102] Greek legislation affected the capacity of economic operators from other Member States to adjust, once they had entered the Greek market.[103]

The protection of workers and combatting unemployment were both key public interest objectives pursued by domestic legislation.[104] Such overriding reasons in the public interest could justify, according to the CJEU, restrictions on freedom of establishment.[105] The CJEU noted in this regard the requirements deriving from art. 9 TFEU for the promotion of a high level of employment and the guarantee of adequate social protection.[106] It also referred to treaty provisions, such as art. 3(3) TEU on the EU's task to work towards a highly competitive social market economy and the horizontal employment-specific clause of art. 147(2) TFEU.[107] Notwithstanding, in a combined assessment of the proportionality of Greek legislation as a restriction to freedom of establishment and a limitation on the freedom to conduct a business, the CJEU held that national rules infringed art. 49 TFEU and art. 16 of the Charter.[108] This was because the specific criteria upon which the domestic authorities should base their assessment on whether or not to oppose collective redundancies (*i.e.* the "situation of the undertaking" and the "conditions in the labour market") had been formulated in imprecise and general terms.[109]

IV.3. Horizontal clauses and supportive EU law interpretation

The horizontal clauses have assisted more broadly in the interpretation of EU law. Whilst they have occasionally contributed to finding the issue in the main proceedings as

[100] *Ibid*. para. 54.
[101] *Ibid*. para. 57.
[102] *Ibid*. para. 53.
[103] *Ibid*. paras 55-56.
[104] *Ibid*. para. 71.
[105] *Ibid*. paras 73-75.
[106] *Ibid*. para. 78.
[107] *Ibid*. paras 76-78.
[108] *Ibid*. paras 102-103.
[109] *Ibid*. paras 99-100.

outside the scope of EU law,[110] they have also steered the interpretation of EU secondary legislation in ways that facilitate the attainment of their objectives. Usefully, they have corroborated the interpretation of both legal requirements set forth in EU legislation and derogations foreseen. To illustrate, in *Zuchtvieh-Export*,[111] which focused on the interpretation of Council Regulation 1/2005 on the protection of animals during transport and related operations,[112] adopted on the basis of art. 43 TFEU, the CJEU used the horizontal animal welfare clause of art. 13 TFEU to determine the territorial scope of the rules enacted on matters such as watering and feeding intervals, journey times and resting periods. Noting that the Regulation sought to create a framework "based on the principle that animals must not be transported in a way likely to cause injury or undue suffering [...] for reasons of animal welfare",[113] the CJEU drew attention to art. 13 TFEU as "a provision of general application"[114] to hold that the obligations deriving from the Regulation applied not only to transport taking place within the territory of the EU but also to transport from the EU to a third country.

Œuvre d'assistance aux bêtes d'abattoirs originated in domestic proceedings against the use of the EU organic logo[115] for products derived from animals slaughtered, in accordance with religious rites, without prior stunning, for failure to comply with high animal welfare standards.[116] The CJEU held that Regulation 834/2007 on organic production and labelling of organic products[117] should be interpreted in the light of art. 13 TFEU and could not therefore be read without taking into account Regulation 1099/2009 on the protection of animals at the time of killing.[118] The aim of Regulation 834/2007 was to create a system of farm management and food production based on high animal welfare standards but none of its provisions expressly defined the most appropriate method for slaughtering of animals to minimize animal suffering.[119] Relevant standards had been

[110] See for instance case C-354/13 *FOA* ECLI:EU:C:2014:2463, where the horizontal equality clause of art. 10 TFEU was used to corroborate the CJEU's finding that EU law does not prohibit discrimination on grounds of obesity as such.

[111] Case C-424/13 *Zuchtvieh-Export* ECLI:EU:C:2015:259.

[112] Regulation (EC) 1/2005 of the Council of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) 1255/97.

[113] *Zuchtvieh-Export* cit. para. 36.

[114] *Ibid*. para. 35.

[115] See art. 25 of Regulation (EU) 834/2007 of the Council of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91. See also art. 57 of Regulation (EC) 889/2008 of the Commission of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control.

[116] Case C-497/17 *Oeuvre d'assistance aux bêtes d'abattoirs* ECLI:EU:C:2019:137.

[117] Regulation (EC) 834/2007 cit.

[118] Regulation 1099/2009 cit.

[119] *Oeuvre d'assistance aux bêtes d'abattoirs* cit. para. 41.

defined in Regulation 1099/2009, which laid down as a general rule that an animal should be stunned prior to death, allowing slaughter without pre-stunning prescribed by religious rites, only as a derogation. For the CJEU, a combined reading of Regulations 834/2007 and 1099/2009, in accordance with art. 13 TFEU, should prevent use of the EU organic logo on products from animals slaughtered, in the context of religious rites, without first being stunned because slaughter *without* pre-stunning was not tantamount, in terms of ensuring a high level of animal welfare, to slaughter *with* pre-stunning.[120] Art. 13 TFEU thus served in this case to link Regulation 1099/2009 to Regulation 834/2007, the former giving concrete expression to legal requirements stemming from the latter.

In *Olympiako Athlitiko Kentro Athinon*,[121] a case concerning the interpretation of Council Directive 2000/78/EC on equal treatment in employment and occupation,[122] the horizontal social protection clause of art. 9 TFEU offered guidance on the interpretation of derogations allowed by EU legislation. The CJEU was asked to examine the compatibility with the directive of Greek legislation concerning the placement of employees in the broader public sector in a labour reserve system, prior to retirement. Art. 6(1) of the Directive provided that a difference in treatment on grounds of age shall not constitute discrimination, if, "within the context of national law, [such grounds] are objectively and reasonably justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives", on condition that the means of achieving that aim are appropriate and necessary. The CJEU held that pursuant to art. 9 TFEU, read together with art. 3(3) TEU, promoting a high level of employment could justify a difference in treatment on grounds of age under the directive.[123] National legislation had been enacted in the context of the severe economic crisis facing the country at the time. Whilst budgetary considerations could not constitute a legitimate aim justifying a difference in treatment, they were a factor influencing the context within which employment policy was conducted.[124] The labour reserve system, the CJEU observed, sought to give effect to the undertakings given by the Greek state to its creditors concerning the reduction in wage costs in the public sector.[125] There was accordingly a clear budgetary objective.[126] However, by targeting older workers, the Greek legislation concurrently protected them by avoiding their dismissal and also contributed to preventing the dismissal of younger workers altogether.[127] According to the CJEU, these were employment-related policy

[120] *Ibid*. paras 50 and 52.

[121] Case C-511/19 *Olympiako Athlitiko Kentro Athinon* ECLI:EU:C:2021:274.

[122] Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[123] *Olympiako Athlitiko Kentro Athinon* cit. para. 39.

[124] *Ibid*. paras 34 and 36.

[125] *Ibid*. para. 31.

[126] *Ibid*. para. 35.

[127] *Ibid*. para. 44.

objectives,[128] which on the basis of art. 6(1) of the Directive, read in conjunction with art. 9 TFEU, could justify a difference in treatment on grounds of age.[129]

IV.4. Judicial review of compliance with the horizontal clauses

The question of whether or not the horizontal clauses may serve to invalidate an EU measure[130] has been boldly answered by the Commission in the affirmative. In an earlier document dating from the 1990s, the Commission affirmed, with reference to the horizontal environmental protection clause,[131] that "adherence to the integration requirements is in principle subject to judicial control by the European Court of Justice as is the case with the subsidiarity principle".[132]

Non-compliance with the *integration requirements* can of course be difficult to prove, given the discretionary powers left to the European institutions. The CJEU's stance has generally been that when the European institutions are required to make complex assessments, they enjoy a wide margin of discretion; judicial review should accordingly be limited to verifying first, that the measure in question is not vitiated by a manifest error or misuse of powers, and secondly, that the competent authority did not manifestly exceed the limits of its discretion. Earlier case law on the protection of the environment and public health,[133] testifying to this hands-off approach of the CJEU, has been recently confirmed in *E.ON Biofor Sverige*.[134]

[128] *Ibid*. paras 39-40.

[129] *Ibid*. paras 39 and 42.

[130] Note that the horizontal clauses have mostly been used as grounds confirming the proportionality of EU measures and thus in support of their validity. See for instance *Philip Morris Brands and others* cit., where art. 9 TFEU, read together with art. 35 of the Charter, arts 114(3) and 168(1) TFEU, served to confirm the validity of arts 7(1) and (7) of Directive 2014/40/EU cit. Relevant provisions prohibited the sale of tobacco products with a characterising flavour or containing flavourings altering the smell, taste or smoke intensity of tobacco products. The CJEU found that they properly weighed the economic consequences of the prohibition with the requirement to ensure a high level of human health protection deriving from the abovementioned provisions and were therefore proportionate.

[131] See former art. 6 TEC.

[132] Communication COM(1998) 333 final from the Commission to the European Council of June 1998, Partnership for integration. A strategy for integrating environment into EU policies. Cardiff, p. 3.

[133] See for instance case C-405/92 *Mondiet v Armement Islais* ECLI:EU:C:1993:906; case C-180/96 *United Kingdom v Commission* ECLI:EU:C:1998:192; case C-210/03 *Swedish Match* ECLI:EU:C:2004:802.

[134] Case C-549/15 *E.ON Biofor Sverige* ECLI:EU:C:2017:490. The CJEU held that the EU legislator, when establishing a common framework for the promotion of energy from renewable resources (see Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC), had not exceeded its discretion by opting for a "mass balance" system of verification of the sustainability criteria for biofuels identified in relevant legislation. The specific area in which the EU legislator intervened required making complex assessments, particularly of economic and technical factors, in pursuit of the objective set forth in art. 114(3) TFEU for a high level of environmental protection, read in conjunction with the horizontal environmental protection clause of art. 11 TFEU.

Crucially, there have been instances where the CJEU has been called upon to review compliance of EU secondary legislation with the horizontal clauses. Claims contesting the validity of EU law by building directly on the requirements of arts 8 and 10 TFEU and art. 13 TFEU were made in *Z.* and *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others* respectively. In *Z.*,[135] the CJEU concluded that the facts of the case did not come within the scope of EU law[136] and therefore it was not necessary to examine the validity of the challenged measures. In *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others*,[137] the claim advanced was not about non-compliance with the animal welfare integration requirements deriving from art. 13 TFEU; it was about failure to comply with the second component of art. 13 TFEU, namely the requirement to respect "the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage" when mainstreaming animal welfare specifically in common agricultural policy. The CJEU found no breach, for no clear evidence had been provided.[138]

Relevant cases did not lead to the annulment of EU secondary legislation but did not rule out use of the horizontal clauses as a ground for contesting EU law. The argument has indeed been made that *Z.* could be seen as an indirect recognition of the fact that arts 8 and 10 TFEU may serve as a yardstick for the judicial review of EU secondary legislation, provided of course that the disputed provisions are applicable in situations that come within the scope of EU law.[139] The same could be fairly said concerning *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen* and art. 13 TFEU, on condition that there is sufficient substantiation, even if the dispute was not about mainstreaming animal welfare as such. What was at issue here was the balancing of the mainstreamed

[135] Case C-363/12 *Z.* ECLI:EU:C:2014:159.

[136] The CJEU ruled that domestic authorities' refusal to provide paid leave equivalent to maternity or adoptive leave to a female worker who had had a baby through a surrogacy arrangement did not constitute discrimination on grounds of sex within the scope of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In addition, the condition of the female worker at issue who was unable to bear a child did not come within the concept of "disability" under Directive 2000/78/EC cit. See *Z.* cit. paras 65-66 and 82-83 respectively.

[137] Case C-426/16 *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others* ECLI:EU:C:2018:335.

[138] The case concerned the validity of art. 4(4) of Regulation 1099/2009 cit., read together with art. 2(k) thereof, according to which the practice of ritual slaughter of an animal without prior stunning, authorized by way of derogation, could only take place in certified establishments satisfying certain technical requirements in accordance with EU secondary legislation, with a view to minimizing animal suffering and ensuring food hygiene and safety. The claim was put forward that the EU legislator had failed to comply with Belgian customs regarding religious rituals, given the lack of capacity in approved slaughterhouses but the CJEU took the view that the Belgian legislative and administrative provisions and customs at issue had not been clearly identified.

[139] F Ippolito, 'Mainstreaming Equality in the EU Legal Order' cit. 79.

animal welfare requirements with public interest considerations in the Member States pertaining to religious rituals and practices. Mainstreaming animal welfare requirements under the first component of art. 13 TFEU is also about balancing: animal welfare on the one hand and the legitimate public interest objectives pursued by the EU policies engaging in mainstreaming animal welfare on the other.

Association Belge des Consommateurs Test-Achats and others may be more illuminating.[140] In this case, the annulment of the provisions of Directive 2004/113/EC providing for a derogation from unisex premiums and benefits for insured women and men went hand in hand with emphasizing the ability of EU legislation to genuinely pursue gender equality: in the absence of a temporal limit, the derogation was to apply perpetually. This could be seen as amounting to a complete *disregard* of gender equality (as the derogation was continuous) and therefore to "a manifest error of appraisal" by the EU legislator, which can be judicially reviewed. A manifest error of appraisal of this kind (*i.e*. totally disregarding the objectives of the horizontal clauses) could perhaps lead to invalidation of an EU act for infringement of the horizontal clauses.

V. Conclusion

The mainstreaming clauses of the TFEU have been a direct consequence of the recognition that action by the Union in some policy fields may not suffice to countervail the possible adverse pressure exerted by other EU policies and actions on the objectives of the former. Intersecting with various areas of Union activity, certain EU goals have been considered to necessitate systematic efforts from the Union for their attainment. The horizontal clauses of arts 8-13 TFEU integrate sensitivity for such objectives in EU action in general and give clear constitutional backing for their pursuit through various EU policies and activities. In doing so, they also exemplify the EU's non-market facet: most of the cross-cutting objectives laid down in the horizontal clauses are non-economic in nature.[141]

The integration of horizontal objectives in EU policies and actions that are devised to pursue some other EU objective is certainly a complicated venture. The horizontal clauses do not inform on how the mainstreaming exercise is to take place. The objectives involved may be conflicting and their reconciliation may not always be easy or straightforward. The horizontal clauses underline the need to shape the Union's institutional and procedural structures in ways that may forge positive links between distinct Union objectives. From this perspective, they also support *coherence* in EU action. Action in one EU

[140] *Association Belge des Consommateurs Test-Achats and others* cit.

[141] On this see B de Witte, 'A Competence to Protect' cit., who notes that although pursuing those objectives may in fact have an economically beneficial effect, the economic cost/benefit analysis is not their driving force.

policy field should not work against action in another.[142] The variety of horizontal clauses in the TFEU and the variety of the EU policies and activities entrusted with the mainstreaming task is not however without risk. Such variety can trigger competition between horizontal and non-horizontal EU objectives; and between different horizontal objectives identified for mainstreaming. How such competition is to be neutralized is not explained. The vague wording of the horizontal clauses and the differences in language they display further complicate the picture, obstructing a clear understanding of their implications for the Union's legal order.

As an attempt to shed light on the legal value and functions of the horizontal clauses, this *Article* has probed CJEU jurisprudence where use of the horizontal clauses of arts 8-13 TFEU has been made. The CJEU's case law shows moderate use of arts 8-13 TFEU. This should not obscure the distinct ways in which arts 8-13 TFEU have been approached by the CJEU when incorporated in judicial reasoning. The CJEU has construed the mainstreaming exercise as imposing a legal duty on the EU legislator to ensure *respect* for the horizontal objectives when taking action to achieve other legitimate EU goals. The emphasis here has been on not turning a blind eye to what should be seen as overarching objectives of the Union. Arts 8-13 TFEU have also been interpreted as laying down objectives that can justify restrictions of fundamental rights and free movement. Moreover, they have re-orientated rule-interpretation in ways particularly supportive of the attainment of their objectives. So far however they have not been used as grounds for the invalidation of EU law. As a matter of fact, the degree of attention to be given to the horizontal clauses by the EU legislator remains unclear. Their effects on the choice of the legal basis of an EU measure engaging in mainstreaming and their repercussions on the broader policy areas that they address (with the exception of art. 13 TFEU, given that animal welfare objectives cannot be pursued autonomously by the EU institutions) could also benefit from further elucidation.

Perhaps what needs to be stressed by way of conclusion is that single use of the horizontal clauses is rare. In the cases reviewed, the horizontal clauses have been mostly used in conjunction with other similar provisions of the TFEU and the Charter. Considering in particular the CJEU's firm use of the Charter after it acquired binding legal force, one could argue that the overall limited use of arts 8-13 TFEU may have to do with the Charter containing corresponding provisions for most of these clauses. The Charter may have thus had a role to play in diluting their importance – not though the importance of their objectives.

[142] On this see also art. 7 TFEU, which proclaims that "[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers". On art. 7 TFEU, see NN Shuibhne, 'Deconstructing and Reconstructing Article 7 TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 160.

ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

THE HORIZONTAL EQUALITY CLAUSES (ARTS 8 & 10 TFEU) AND THEIR CONTRIBUTION TO THE COURSE OF EU EQUALITY LAW: STILL AN EMPTY VESSEL?

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ABSTRACT: About 15 years ago, Jo Shaw asserted that what is the current art. 10 TFEU was "largely an empty vessel". Several years down the road, the present *Article* takes Shaw's statement as a starting point to examine the two articles of the current EU Treaties that are most commonly associated with the idea of equality mainstreaming in contemporary EU law: art. 8 TFEU and art. 10 TFEU (section I). It is argued that these articles rather than fulfilling a new function, actually primarily illustrate and give visibility to a political will to use existing tools to enhance the protection of equal treatment in EU law. We will explain first why these articles taken in isolation can still be considered an empty vessel (section II). Yet, although the horizontal clauses have not had much added value, they have actually been used. We therefore subsequently explore how the clauses have been employed, both in ECJ case-law and in

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Elise Muir is the Principal investigator of the RESHUFFLE research project hosted by KU Leuven and supported by the European Research Council (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621). Victor Davio and Lucia van der Meulen are doctoral researchers employed by the RESHUFFLE research project.

ISSN 2499-8249
doi: 10.15166/2499-8249/621

a broader EU governance context (section III). By way of concluding comments, we investigate the existence of other possible avenues for improving the equality agenda in the EU legal order (section IV).

KEYWORDS: equality mainstreaming – art. 8 TFEU – art. 10 TFEU – equal treatment – horizontal clauses – equality agenda.

I. INTRODUCTION

About 15 years ago, Jo Shaw, in an article entitled "Mainstreaming Equality and Diversity in European Law and Policy", asserted that art. III-118 of the Draft Treaty establishing a Constitution for Europe, which is the current art. 10 of the TFEU, was "largely an *empty vessel*".[1] Several years down the road, and more than a decade after the latest major revision of the EU Treaty framework (Treaty of Lisbon, 2009), the present *Article* takes Shaw's statement as a starting point to examine the two articles of the current EU Treaties that are most commonly associated to the idea of equality mainstreaming in contemporary EU law: art. 8 TFEU on the elimination of inequalities and promotion of equality between men and women (hereafter: "horizontal gender equality clause"), which states as follows: "[i]n all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women"; and art. 10 TFEU on aiming to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (hereafter: "horizontal gender equality clause"), which states as follows: "[i]n defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation". These articles are part of Title II of the TFEU on provisions having general application. In this title, a number of articles are included that indeed aim to draw attention to given values or interests in all activities of the Union.

Can these two articles (still) be considered an empty vessel for the purpose of enhancing the protection and the promotion of equality in the EU legal order? As we will illustrate, the said clauses have not played roles of much significance. As Shaw herself had noted, this may be related to the "crowded" nature of EU equality law, which leaves a horizontal equality clause with little added value. Her observation on the multitude of legal provisions fleshing out either the right to equality and non-discrimination in EU law itself, or the competences of the EU to further do so, is no less true today than it was at the time.

Indeed, equality is an old principle of law that performs several prominent functions in the EU legal order. First and foremost, equality is a *founding principle* of the EU legal order. This is noticeable among others from the wording of art. 4(2) of the Treaty on European Union (hereafter: the TEU) on equality between Member States, as well as that of art. 18 TFEU on equality between citizens of the Member States or art. 157 TFEU on equal pay for equal work or work of equal value between men and women. On a related note, combatting

[1] J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' (2005) CLP 289, emphasis added.

discrimination and promoting equality between men and women are *objectives* of the Union (art. 3(3) para. 1 TEU), and equality is a *value* on which the Union is founded and which is common to the Member States (art. 2 TEU). The EU has gained *competence* to flesh out EU equality policies, independently from the dynamics of the internal market. This is visible in particular from art. 157(3) TFEU, which enables the adoption of legislative acts on equal treatment between men and women in matters of employment and occupation, and art. 19 TFEU, which makes it possible for the EU legislator to take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[2] Last but not least, equality and non-discrimination are *fundamental rights* in the EU legal order, as is particularly clear today from the wording of several provisions of the Charter of Fundamental Rights (hereafter: the Charter): art. 20 on equality before the law, art. 21 on non-discrimination on the basis of an open-ended list of grounds and art. 23 on equality between men and women.[3]

In this rather crowded environment, it is legitimate to ask what role(s) arts 8 and 10 TFEU can, do, or even could, play in the EU legal order. A preliminary observation relates to the specific structure of this legal order and the wording of the clauses under scrutiny. The EU legal order is articulated on the basis of conferred competences,[4] which covers a broad range of policy areas including competences specifically devoted to equal treatment as just noted. EU competences in matters of equal treatment enable EU institutions to "take appropriate action to combat discrimination" or "to ensure the application of equal opportunities and equal treatment".[5] However, these enabling provisions do not create any obligation on EU institutions to exercise these competences, or to exercise them in a specific direction. In contrast, arts 8 and 10 TFEU do not enable EU organs to act; instead, they do give directions for EU action, "to promote equality between men and women" and "to combat discrimination". Rather than referring to arts 8 and 10 TFEU as "mainstreaming clauses",[6] which could be perceived as limiting their function to the integration of equality concerns in policy development in areas of EU competences *other* than

[2] See also art. 153(1)(i) TFEU. These legal bases were inserted by the Treaty of Amsterdam. Before that, EU legislation on equal treatment between men and women was adopted on the basis of Treaty provisions enabling legislative intervention with a view to improve the functioning of the internal market (see arts 100 and 235 TEEC).

[3] One could also look back at the *Defrenne* judgment, where the ECJ acknowledged the direct and horizontal effect of the right to equal pay between men and women as it was then enshrined in the Treaty (case C-43/75 *Defrenne* ECLI:EU:C:1976:56); or also look at the far-reaching effects of the general principle of equal treatment (case C-144/04 *Mangold* ECLI:EU:C:2005:709; case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21).

[4] Arts 4(1) and 5(1-2) TEU.

[5] See arts 19(1) and 157(3) TFEU.

[6] For the use of the terminology "mainstreaming clauses" when referring to the horizontal equality clauses, see *e.g.* F Ippolito, 'Mainstreaming Equality in the EU Legal Order: More than a Cinderella Provision?' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019).

EU equality law, this *Article* will now refer to them as "horizontal equality clauses". This choice of words makes it possible to show that the clauses may not only contribute to the analysis of policy and law-making on matters not explicitly related to equality but may also inform our understanding of EU equality law itself.

In human rights law thinking, the idea of mainstreaming rights is to integrate a human rights perspective into the very first stages of policy development.[7] By making sure that human rights considerations are taken into account during the process of policy-making, violations of human rights can be prevented and policies can be improved. Importing this approach to mainstreaming in the functioning of the EU legal order is most welcome in the pursuit of the objectives of the EU of combatting discrimination and promoting gender equality.[8] Yet, there is nothing in the wording of arts 8 and 10 TFEU to suggest that the function of these clauses should be "limited" to this specific understanding of mainstreaming. A critical examination of the "horizontal equality clauses" ought thus to explore not only their potential in terms of mainstreaming as just defined but also their broader contribution to the functioning of the EU legal order and the specificities of EU equality law in particular.

Throughout this *Article*, it is argued that these horizontal equality clauses, rather than fulfilling a wholly new function compared to other provisions of EU law on equality, actually primarily illustrate and give visibility to a political will to use existing tools to enhance the protection of equal treatment in EU law. In that sense, the clauses are best understood as giving direction to EU (equality) law. We explain first why these articles taken in isolation can (still) be considered an empty vessel (section II). Yet, although the horizontal clauses have not had much added value, they have actually been used. We therefore explore how the clauses have been utilized both in the case-law of the Court of Justice of the EU (hereafter: the ECJ) and in a broader EU governance context (section III). For that purpose, the research is based on systematic database searches in the case-law of the ECJ and other EU legal documentation.[9] As the ECJ case-law shows, these clauses do not *per se* impose legal obligations on EU authorities, but this has not prevented EU authorities from integrating equality into their activities to various degrees. By way of concluding comments (section IV), we query whether there are other avenues for improving the equality agenda in the "crowded" EU legal order.

[7] M Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) Humanity: An International Journal of Human Rights, Humanitarianism, and Development 49.

[8] Art. 3(3) TEU.

[9] The authors conducted systematic research for horizontal equality clauses in ECJ case-law and documents of the EU institutions using the following keywords "Article 8 TFEU" and "Article 10 TFEU" respectively on CURIA for ECJ case law and on EUR-Lex for documents of the EU institutions. The authors also carried out systematic searches for other horizontal clauses (notably arts 7, 9, 11, 12 and 13 TFEU). We would like to thank Maksymilian Michal Kuzmicz for his valuable assistance in carrying out this research.

II. Individual horizontal clauses as an empty vessel

Scholars have observed that horizontal equality clauses are often bypassed in law. This preliminary negative assessment of the added value of the horizontal equality clauses is not only to be found in Shaw's work but in more contemporary analyses as well.[10] This disappointment is commonly attributed to the wording of the horizontal clauses. Indeed, the use of vague legal terms in these provisions has led to some confusion as to the degree of obligation created by these clauses as well as their normative quality and their normative implications.[11]

However, this is not the only explanation for the reluctance to regard these clauses as having significantly strengthened the protection of equality within the EU legal order. In this section, we highlight two other considerations. First, the incorporation of equality concerns in EU decision-making was already an important theme before the introduction of the horizontal equality clauses (section II.1). Second, the horizontal equality clauses do not perform a clear and distinct legal function in the EU legal order (section II.2).

II.1. Equality concerns incorporated in EU law-making before the horizontal clauses

To start with, it shall be recalled that, even if the horizontal equality clauses have been inserted in the TFEU fairly recently, the possibility to incorporate equality considerations in EU law-making existed before, and is thus in many ways independent from these clauses.

a) Protection of non-market values as an integral part of EU internal law-making

Equal treatment considerations are reflected in the legislative process and output of the EU well before the insertion into the TFEU of any horizontal clauses, or in fact of any specific legal basis explicitly creating EU competences on matters of equality and non-discrimination. The adoption of EU legislation for the protection of gender equality was initially channelled through internal market law-making. In the first EU Directive on equal pay between men and women (1975) for instance, which was adopted on the basis of earlier equivalent to today's art. 114 TFEU, the principle that men and women should receive equal pay was understood as forming an "integral part of the establishment and functioning of the common market".[12] In a bolder move, a year later, the preamble of the Directive on gender equality at the workplace (1976) acknowledged that, although the Treaty did not confer specific powers for the EU to legislate in this field, "equal treatment for male and female

[10] See *e.g.* B de Witte, 'Conclusions: Integration Clauses – a Comparative Epilogue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 184.

[11] F Ippolito, ME Bartoloni and M Condinanzi, 'Introduction: Integration Clauses – A Prologue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 5.

[12] Directive 75/117/EEC of the Council of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, preamble recital (1).

workers constitutes one of the objectives of the Community, in so far as the harmonization of living and working conditions while maintaining their improvement are inter alia to be furthered". As a result, the Directive could be adopted on the basis of the flexibility clause which, as it was worded at the time, enabled necessary action "pour réaliser, dans le fonctionnement du marché commun, l'un des objets de la Communauté, sans que le présent Traité ait prévu les pouvoirs d'action requis à cet effet".[13]

In more general terms, Bruno de Witte has convincingly shown that the broad scope of the legal basis for the adoption of EU legislation to establish or facilitate the functioning of the internal market (thus art. 114 TFEU, or its earlier versions) enables the protection of "non-economic common objectives".[14] This possibility does not depend on whether there is an explicit requirement to integrate a specific value or objective in the text of the EU Treaties, as done by the horizontal equality clauses. Nothing prevents the Member States from deciding that they want to achieve a common objective, independently of its economic benefit.[15] For instance, the Directive on the Posting of Workers in the internal market, in its original version and thus before the horizontal equality clauses were inserted in the EU Treaties, included "equality of treatment between men and women *and other provisions on non-discrimination*" as part of the "hard core" guarantees that must be available to posted workers in the host state.[16] More recently, the EU adopted, on the basis of art. 114 TFEU, the EU Accessibility Act which seeks to promote the rights of persons with disabilities.[17] The latter mainstreams the protection of persons with disabilities in EU internal market law to give effect to the UN Convention on the Rights of Persons with Disabilities.[18]

b) Looking back at equality mainstreaming in EU-law making

Next to the possibility of incorporating equality considerations in EU legislation, the concern for adjusting the internal functioning of EU organs as well as the greater use of existing general EU policies to incorporate equality considerations in EU law-making – thus constituting "mainstreaming" as defined in the introduction – has also preceded the adoption of the horizontal equality clauses.

[13] Art. 235 TEEC; Directive 76/207/EEC of the Council of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, preamble (3).

[14] B de Witte, 'Non-Market Values in Internal Market Legislation' in NN Shuibhne (ed.), *Regulating the Internal Market* (Edward Elgar 2006) 62.

[15] *Ibid*. See also V Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015) 22; C Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2016) ILJ 208.

[16] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, preamble (14) and art. 3(1)(g), emphasis added.

[17] Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services, preamble (103).

[18] *Ibid*. preamble (12-17).

c) Mainstreaming gender equality

The horizontal clause on gender equality, the current art. 8 TFEU, was inserted by the Treaty of Amsterdam.[19] However, the fact that this clause appeared in the late 1990s does not mean that gender mainstreaming was not already a major concern at the European level by then. Indeed, gender mainstreaming is the fruit of a long history and was notably reflected in the work of the United Nations Third World Conference on Women in 1985.[20] At the EU level, gender mainstreaming became particularly visible ten years later, in 1995.[21] The *Santer* Commission came in with a new Commissioners' Group on Equal Opportunities and a strong commitment to the equality agenda.[22] Furthermore, the Commission contributed decisively to the preparations of the United Nations Fourth World Conference on Women in 1995, which culminated in the Beijing Platform for Action, in which gender mainstreaming figured prominently.[23]

This decisive year was followed by the drafting of two key documents on gender mainstreaming by the Commission, namely the fourth Community action programme on equal opportunities for women and men[24] and the Communication on Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities.[25] While the former strongly endorsed gender mainstreaming, the latter provided the first definition of gender mainstreaming at the EU level, which reads as follows: "mobilising all general policies and measures specifically to achieve equality by actively and openly taking into account, at the planning stage, their effects on the respective situation of women and men in implementation, monitoring and evaluation".[26]

This strong commitment towards gender mainstreaming in the 1990s did not emerge in a vacuum. The issue of gender mainstreaming was also high on the agenda of the

[19] Art. 3(2) TEC. This provision was also enshrined in art. III-116 of the Treaty establishing a Constitution for Europe. Hence, this horizontal clause came chronologically after the one on environmental protection, the oldest horizontal clause, which was already enshrined in art. 130(R)2 of Single European Act.

[20] C Booth and B Cinnamon Bennett, 'Gender Mainstreaming in the European Union: Towards a New Conception and Practice of Equal Opportunities?' (2002) European Journal of Women's Studies 430; J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' cit. 260.

[21] M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' (2000) Journal of European Public Policy 435. It should also be noted that gender mainstreaming was included in the Third Community Action Programme (1991-1996). See E di Torella, 'The Principle of Gender Mainstreaming: Possibilities and Challenges' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 48.

[22] M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' cit. 435-436.

[23] C Booth and B Cinnamon Bennett, 'Gender Mainstreaming in the European Union' cit. 438; E di Torella, 'The Principle of Gender Mainstreaming Possibilities and Challenges' cit. 48-49.

[24] Proposal for a Council Decision COM(95) 381 final from the Commission of 19 July 1995 on the Fourth Medium-Term Community Action Programme on Equal Opportunities for Women and Men (1996–2000).

[25] Communication COM(96) 67 final from the Commission of 21 February 1996 on Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities.

[26] *Ibid*. 2.

Council of Europe at that time. The Council of Europe provided one of the still leading definitions of the concept of gender mainstreaming in 1998, which is the following: "reorganization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels at all stages, by the actors normally involved in policymaking".[27]

The gender mainstreaming strategy of the EU developed in coincidence with global interest in this concept, specifically among human rights scholars. However, there are some differences between the approach to mainstreaming taken by the EU and the Council of Europe. Looking at the two different definitions of gender mainstreaming identified above it is striking how much broader the definition of the Council of Europe is. The EU definition, for example, asks for intervention at the planning stage, while the Council of Europe definition asks for a reorganization at all levels and stages of policy-making. Moreover, the EU definition requires to identify different effects of a policy measure on men and women, while the Council of Europe definition demands for the broader integration of a "gender equality perspective" into policy. Concretely, the EU definition does not explicitly cover the ex-post evaluation of policy processes. In addition, the explicit reference to men and women excludes individuals whose gender identity does not fit the binary. Hence, as the above illustrates, the gender equality horizontal clause included in the Treaty of Amsterdam, rather than a wholly innovative concept, was built upon existing practices and commitments of the EU institutions towards gender mainstreaming.[28]

d) Mainstreaming equality on other grounds

A rather similar story of formalisation of existing practices occurred with regard to the other horizontal equality clause, which was enshrined in art. 10 TFEU by the Lisbon Treaty. This provision was first inscribed in art. III-118 of the Treaty establishing a Constitution for Europe. Nevertheless, the preparatory works of the Convention on the future of Europe hardly touched upon the matter. The most noteworthy document on this issue would appear to be the Final report of working group XI "Social Europe" of 4 February 2003, where a comprehensive horizontal clause regarding social values was proposed.[29]

Before the Lisbon Treaty, however, the idea of mainstreaming equality on these specific grounds had already found its way into the EU's institutional practice and discourse, particularly in relation to disability and racism. Firstly, the Commission had advocated

[27] Final Report of Activities EG-S-MS (98) 2 from the Group of Specialists on Mainstreaming for the Council of Europe of May 1998 on Gender Mainstreaming. Conceptual Framework, Methodology and Presentation of Good Practices.

[28] See in this vein, *e.g.* C Booth and B Cinnamon Bennett, 'Gender Mainstreaming in the European Union' cit. 443.

[29] Final Report CONV 516/1/03 from Working Group XI 'Social Europe' to the Members of the European Convention of 4 February 2003, available at www.cvce.eu.

mainstreaming non-discrimination of people with disabilities in 1996[30] and had strengthened its discourse over the years.[31] Secondly, mainstreaming non-discrimination on the basis of race was prominent in the 1997 European Year against Racism and the 1998 Action Plan Against Racism.[32] In a report of 2000 on mainstreaming anti-racism, the Commission even referred to the possibility of extending the concept of mainstreaming to all grounds of discrimination covered by art. 13 TEC.[33]

II.2. No autonomous function for horizontal equality clauses

A second important set of reasons for the reluctance to regard the horizontal clauses as having significantly strengthened the protection of equality within the EU legal order is that these clauses have not been attributed – nor do they perform – any autonomous function in the EU legal order. It is thus unsurprising to observe, along with other scholars, that the horizontal clauses have played a very modest role in the ECJ's case-law.[34]

a) No new competences

First and foremost, the horizontal equality clauses have not resulted in the creation of competences for the EU legislator in the field of equality law. Although there is no explicit case-law concerning the horizontal equality clauses on the matter, a relevant example may be found with regard to another horizontal clause, namely the one on environmental protection, in *Antarctic MPAs*. In this judgment of 2018, the ECJ implied that this clause was not sufficient as such to create competence in the field of environment.[35] On a related note, the horizontal equality clauses cannot be used to extend the scope of application of the Charter, which is set out in its art. 51, as noted by AG Jaaskinen in *FOA*.[36]

For most of the horizontal clauses, there is in fact no need for them to create competences as the EU Treaties provide for specific competences in the areas concerned. This is the case for equality law as noted in the introduction. By way of illustration, while

[30] Communication COM(1996) 406 final from the Commission of 30 July 1996 on Equality of Opportunity for People with Disabilities, A New European Community Disability Strategy.

[31] See in particular Communication COM(2003) 650 final from the Commission of 30 October 2003 on Equal Opportunities for People with Disabilities: a European Action Plan where the Commission advocated for reinforcing mainstreaming of disability issues in Community policies. In this vein, F Ippolito, 'Mainstreaming equality in the EU legal order' cit. 61.

[32] Communication COM (1998) 183 final from the Commission of 25 March 1998 on An Action Plan Against Racism, p. 3; see for instance "The Commission will continue to take full account of the principles of non-discrimination in its own recruitment and promotion policies". See also J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' cit. 300.

[33] J Shaw, 'Mainstreaming Equality and Diversity in European Union Law and Policy' cit. 264.

[34] See *e.g.* P Vieille, 'How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming' in N Bruun, K Lorcher and I Schomann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 119; B de Witte, 'Conclusions: Integration Clauses' cit. 186-187.

[35] Case C-626/15 *Commission v Council (Antartic MPAs)* ECLI:EU:C:2018:925 para. 71.

[36] Case C-354/13 *FOA* ECLI:EU:C:2014:2463, opinion of AG Jaaskinen, para. 23.

the recent Commission proposal for a Pay Transparency Directive refers to art. 8 TFEU, the proposed legal basis is art. 157(3) TFEU.[37]

b) No grounds for review

A second function that has not been filled by the horizontal equality clauses is that, in principle, they do not constitute a ground for judicial review. In this respect, however, it should be noted that a distinct approach was suggested, with some ambiguity, by two Advocates General in *Soukupova*[38] and *Z*.[39] In the first case, AG Jaaskinen appears to include arts 8 and 10 TFEU as potential grounds for reviewing the application by the Member States of Regulation n.1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF).[40] In the second case, AG Wahl adopts a fairly ambivalent approach. As a first step, the AG seems to argue that art. 8 TFEU can serve as a basis for reviewing EU secondary legislation: "it is clear that, in tandem with the general principle of equal treatment, [Article 3 TEU, Article 8 TFEU and Article 157 TFEU as well as Articles 21, 23, 33 and 34 of the Charter of Fundamental Rights of the European Union] may operate as a basis for the review of EU secondary legislation".[41]

Nevertheless, in a second step, the AG takes an opposite view concerning art. 10 TFEU. According to the AG:

> "[art.] 10 TFEU contains a general clause which articulates a particular policy aim to which the European Union is committed. It sets out the aim of combating discrimination based on, among other reasons, disability: an aim furthered by Directive 2000/78 in the field of employment and occupation. It is my understanding that that provision of primary law does not lay down any precise rights or obligations which might call into question the validity of Directive 2000/78".[42]

The latter approach is in line with the ECJ case-law on horizontal clauses, as well as with what can be expected from such clauses. For instance, in *Front Polisario*, the General

[37] Proposal for a Directive COM/2021/93 final of the European Parliament and of the Council of 4 March 2021 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, p. 3-4.

[38] Case C-401/11 *Soukupová* ECLI:EU:C:2012:658, opinion of AG Jaaskinen.

[39] Case C-363/12 *Z* ECLI:EU:C:2013:604, opinion of AG Wahl.

[40] *Soukupova*, opinion of AG Jaaskinen, cit. para. 51. In this paragraph, the AG argues that, while Member States are able to determine the normal retirement age in national legislation, this legislation may not breach the prohibition on discrimination based on sex. The AG explains this prohibition as being contained in arts 8 and 10 TFEU among other sources (case-law, arts 2 and 3 TEU and arts 21 and 23 of the Charter). Thereby, the AG indirectly uses the horizontal equality clauses as a standard (non-discrimination) against which the application of the Directive can be examined. However, it is important to note that arts 8 and 10 TFEU are quoted by the AG among other sources of EU equality law and not used independently.

[41] *Z*, opinion of AG Wahl, cit. paras 69-70.

[42] *Ibid*. para. 112.

Court suggested that art. 7 TFEU, the horizontal consistency clause,[43] is not a ground for judicial review and that, in any case, there exist other proxies in EU law that can fulfil this function.[44] For equality law, such proxies may for example be arts 21 and 23 of the Charter, as well as art. 157(1) TFEU.

c) No autonomous substantive legal obligations

More generally, the horizontal equality clauses do not generate substantive legal obligations for either the EU institutions or the Member States.[45] Perhaps the strongest statement in this regard is to be found in *DG v ENISA* concerning the horizontal social clause. In this case, concerning a civil servant dispute, the former Civil Service Tribunal held that: "So far as concerns Article 9 TFEU, that provision does not lay down any specific obligations. It cannot be inferred from it that, in a case such as that presently before the Tribunal, there is necessarily a prior obligation on ENISA to examine the possibility of redeploying the member of staff".[46]

However, it should be noted that the ECJ has sent some mixed signals on this matter, notably in *Pillbox*[47] and in *Poland v Parliament and Council*. In the latter case, the Court indeed ruled that: "It cannot [...] be concluded from the above that, when coordinating such rules, the EU legislature is not also bound to ensure respect for the general interest, pursued by the various Member States, and for the objectives, laid down in Article 9 TFEU, that the Union must take into account in the definition and implementation of all its policies and measures".[48]

Interestingly, and as will be discussed below, AG Geelhoed in *Austria v Parliament and Council* suggested that the horizontal clauses could be violated if one of the interests protected by these clauses was completely disregarded by the EU legislator in the decision-making process.[49]

III. The contribution of horizontal clauses to the crossing

While the above echoes disenchantment on the horizontal clauses, the story of the added value of these clauses deserves to be more nuanced. Despite this preliminary negative assessment, it must be noted that the horizontal clauses are being used in practice. On the one hand, the horizontal equality clauses enable the Court to support attention given

[43] See on the horizontal consistency clause, NN Shuibhne, 'Deconstructing and Reconstructing Article 7 TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 160-180.

[44] Case T-512/12 *Front Polisario v Council* ECLI:EU:T:2015:953 para. 153.

[45] In this vein, M Pollack and E Hafner-Burton, 'Mainstreaming Gender in the European Union' cit. 437.

[46] Case F-109/13 *DG v ENISA* ECLI:EU:F:2014:259 para. 60.

[47] Case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324, see in particular para. 116.

[48] Case C-626/18 *Poland v Council* ECLI:EU:C:2020:1000 para. 51, see also para. 46. Further elaborating in favour of a progressive reading of this approach see E Psychogiopoulou, 'The Horizontal Clauses of Arts 8-13 TFEU Through the Lens of the Court of Justice' (2022) European Papers 1357.

[49] Case C-161/04 *Austria v Parliament and Council* ECLI:EU:C:2006:66, opinion of AG Geelhoed, para. 59.

to the related interest or value (section III.1). Yet, in the field of EU equality law, the function thereby performed by the clauses can also be fulfilled by other tools of EU law. On the other hand, and perhaps more interestingly, the benefits of these clauses may be more visible when they are considered in terms of broader European governance (section III.2). In this context, the horizontal clauses fit into a general trend towards more engagement of the EU with the principle of equal treatment.

III.1. An aid in the case-law of the ECJ

In certain cases, the horizontal equality clauses have been used as interpretative tools by the ECJ and they could also serve to support the legitimacy of an interest to restrict the internal market or a fundamental right. In such contexts and as will be explained below, the horizontal equality clauses have prominent proxies within EU equality law.

a) Interpretative tools

The most significant role of the horizontal equality clauses in the case-law of the ECJ is arguably that they have been embraced as interpretative tools. Indeed, this function has been acknowledged by both the ECJ[50] and Advocates General. A telling illustration can be found in the Opinion of AG Stux-Hackl in *Dory*, which concerned a German measure that limited compulsory military service to men. Although the AG deemed that EU law did not preclude such a measure, he emphatically asserted the interpretative value of the "horizontal gender equality clause" as regards the material scope of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions:

> "The above considerations do not, however, justify the conclusion that any purported subject-matter of a national measure would be capable of removing altogether from review by reference to Directive 76/207 a measure which merely has the effect of thus producing sex-specific disadvantages in access to the labour market. That is because, in my opinion, in interpreting the scope of Directive 76/207, Article 3(2) EC [today: Article 8 TFEU] must now also be taken into account. That provision of primary law was not yet in force at the time when the directive was drawn up. However, the Community is now expressly required by that provision actively to promote equality between men and women".[51]

Another example is provided more recently by the Opinion of AG Tanchev in *Egenberger*. The AG put forward that the horizontal equality clause should be taken into account when interpreting EU primary law. In particular, arts 17(1) and (2) of the TFEU, which are about the respect of the status of churches and religious associations or communities in the Member States under national law, and of philosophical and non-confessional organisations.[52]

[50] See *e.g.* case C-463/19 *Syndicat CFTC* ECLI:EU:C:2020:932 para. 43.
[51] Case C-186/01 *Dory* ECLI:EU:C:2002:718, opinion of AG Stix-Hackl, para. 101.
[52] Case C-414/16 *Egenberger* ECLI:EU:C:2017:851, opinion of AG Tanchev, para. 93.

b) Supporting the legitimacy of restrictions to EU rights

More specifically, the horizontal equality clauses can be used to support the legitimacy of an interest that is used to restrict an EU right. This holds true both for a restriction of EU fundamental freedoms and of fundamental rights. While there is as yet no case-law on this subject concerning the horizontal equality clauses, there is a wealth of case-law concerning the social horizontal clause (art. 9 TFEU), whose similarities with the former have been highlighted in the literature.[53] For instance, in *Deutsches Weintor*, the ECJ held that the protection of public health, which is covered by art. 9 TFEU, could constitute an objective of general interest justifying a restriction of fundamental freedoms.[54]

Similarly, with regard to a restriction of a fundamental right, the ECJ deemed in *Neptune distribution* that a high level of human health protection and consumer protection, also protected by art. 9 TFEU, are legitimate objectives of general interest which may, under certain circumstances, justify limitations on the freedom of expression and information of a person carrying on a business or his freedom to conduct a business.[55] Interestingly, it seems that horizontal clauses may not only play a role in identifying a legitimate interest, but also in assessing the proportionality of a restrictive measure, as alluded to by the ECJ in *Philip Morris Brands and others*.[56]

c) Horizontal equality clauses and their proxies: contrasting with animal welfare

Yet, the added value of the horizontal equality clauses in relation to both the interpretative function and the more specific identification of a legitimate interest must be tempered. Indeed, it is most likely that these functions could be performed by other instruments belonging to the EU's equality law palette identified in the introduction, such as the Charter equality rights. This is in stark contrast to the horizontal animal welfare clause (art. 13 TFEU) for which there is limited proxy in EU law.

For example, in the recent *One Voice and Ligue pour la protection des oiseaux* case, the ECJ relied heavily on art. 13 TFEU to interpret restrictively art. 9(1)(c) of the Directive 2009/147/EC on the conservation of wild birds, so that it opposes a national regulation which authorises a catching method which results in by-catches, when these by-catches, even if small in volume and for a limited period of time, are likely to cause other than negligible damage to the non-target species caught.[57] The animal welfare clause has also served as an objective of general interest to restrict a fundamental right and in particular the right to freedom of thought, conscience and religion enshrined in art. 10 of the Charter, as illustrated in the *Centraal Israëlitisch Consistorie van België* case.[58]

[53] P Vieille, 'How the Horizontal Social Clause Can Be Made to Work' cit. 108.

[54] Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526 para. 49.

[55] Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823 paras 73-74.

[56] Case C-547/14 *Philip Morris Brands and Others* ECLI:EU:C:2016:325 para. 153.

[57] Case C-900/19 *One Voice and Ligue pour la protection des oiseaux* ECLI:EU:C:2021:211 paras 39, 65 and 71.

[58] Case C-336/19 *Centraal Israëlitisch Consistorie van België and Others* ECLI:EU:C:2020:1031 para. 63.

III.2. An aid in the broader context of EU governance

Looking only at the ECJ case-law to assess the added value of the horizontal equality clauses would not do them justice. After all, the fact that they have a modest role in the ECJ case-law is not so surprising since, as rightly observed by di Torella, the horizontal clauses are primarily addressed to policymakers and legislators at the stages of the policy-making process.[59] Therefore, it is necessary to also examine their contribution to the wider process of EU governance to better understand the role they play in the EU legal order. The equality agenda appears to be increasingly embedded into the EU policy machinery. While it is difficult to assess the degree to which this is the result of the insertion of the horizontal equality clauses in the EU Treaties, these clauses do illustrate a political willingness to diversify the forms of protection and promotion of equality within the EU legal order.

a) Horizontal equality clauses in the Commission's impact assessments

In this respect, perhaps the most natural way to evaluate the integration of equality concerns into the EU decision-making process is to look at the mechanisms by which particular interests are taken into account within that process. Here, the Commission's impact assessments are taken as our focal point as they represent the main tool to screen horizontally all major EU policy initiatives in light of specific interests.[60] The picture that arises from an analysis of the horizontal equality clauses in the impact assessments is a mixed one, which concurs with the occasionally positive attitude of some authors,[61] and the more sceptical stance of others.[62]

First and foremost, it is striking that the equality grounds protected by the horizontal equality clauses are hardly mentioned in the Commission's better regulation documents. Indeed, the main document where these grounds appear, without express reference to the horizontal equality clauses, is the Better Regulation "Toolbox", which complements the Better Regulation Guideline.[63] More specifically, this document lists a number of questions regarding equality that need to be assessed qualitatively and, if possible, quantitatively for all Commission initiatives.

[59] E di Torella, 'The Principle of Gender Mainstreaming Possibilities and Challenges' cit. 49. See also, V Kosta, 'Fundamental Rights Mainstreaming in the EU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 17; O De Schutter, 'Mainstreaming Human Rights in the European Union' in P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005) 44.

[60] See also V Kosta, 'Fundamental Rights Mainstreaming in the EU' cit. 22 ff.

[61] F Ippolito, 'Mainstreaming Equality in the EU Legal Order' cit. 65 ff.

[62] S Smismans and R Minto, 'Are Integrated Impact Assessments the Way Forward for Mainstreaming in the European Union?' (2017) Regulation and Governance 231.

[63] See Staff Working Document SWD(2021) 305 final from the Commission of 3 November 2021, Better Regulation Guidelines and the complementary Staff Working Document from the Commission of 25 November 2021, Better Regulation 'Toolbox', available at commission.europa.eu. More specifically, the list of questions is mentioned under the tool 19 'Identification/Screening of Impacts'.

Three observations may be made when considering this list of questions. Firstly, one can observe a certain imbalance between the weight given to the grounds protected by arts 8 and 10 TFEU, since the questions mainly target gender equality, and far less the grounds protected by art. 10 TFEU. Secondly, the list related to equality appears to be just one among many lists, which cover a great variety of subjects, such as the impacts on operating and business costs, on consumers and households, or on third countries and international relations. Thirdly, and perhaps most importantly, the logic behind these questions is that of a tick-box, and thus distances itself from a vision that would consist in giving a positive reading of equality, by actively promoting it.[64]

Besides, references to the horizontal equality clauses are to a large extent at the discretion of the Commission, with no guarantee of a consistent and systematic integration. This is reflected in the practice of the impact assessments carried out by the Commission. As the qualitative study of Smismans and Minto shows, impact assessments do not systematically evaluate whether a policy initiative is likely to have a negative or positive impact on the interests protected by the horizontal clauses.[65] This is especially true for the horizontal equality clauses, and gender equality is the area where the gap between – institutional guidance and practice seems to be the widest.[66]

This somewhat mixed picture has led to calls for the strengthening of equality mainstreaming, including suggestions to impose a procedural guarantee to ensure that mainstreaming takes place systematically throughout the decision-making process.[67] Can the horizontal clauses offer a solution in this regard? As noted above, AG Geelhoed in *Austria v Parliament and Council* has suggested that the horizontal clauses could be breached if one of the interests protected by these clauses was disregarded in the decision-making process. That being said, no ECJ case-law has so far confirmed this view, and it seems difficult to argue that EU institutions are obliged to integrate the concerns enshrined in the horizontal equality clauses during the decision-making process, although they retain the option to do so.

b) Incorporating equality concerns across EU activities with no reference to horizontal clauses

Along the same lines, and for a more positive image, a frequent phenomenon in the practice of EU institutions is that equality is integrated into the decision-making process, while no references to horizontal equality clauses are made. This is particularly apparent in the field of external relations. As de Witte observed, the EU's external relations are one area where there is a strong presence of horizontal concerns without the "mainstreaming flag".[68]

[64] In this vein, S Smismans and R Minto, 'Are Integrated Impact Assessments the Way Forward for Mainstreaming in the European Union?' cit. 235-239.

[65] *Ibid*. 245-246.

[66] *Ibid*. 242.

[67] *Ibid*. 245-246.

[68] B de Witte, 'Conclusions: Integration Clauses' cit. 184. See also A Thies, 'The EU's Law and Policy Framework for the Promotion of Gender Equality in the World' in T Giegerich (ed.), *The European Union as Protector and Promoter of Equality* (Springer 2020) 429-454.

For instance, the 2020 joint communication from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament and the Council "EU gender equality action plan (GAP) III" includes concrete objectives for paying attention to gender equality in the context of external relations but does not refer to the "horizontal gender equality clause", art. 8 TFEU.[69] Another telling example is the Commission Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, namely the Istanbul Convention, where art. 8 TFEU is only mentioned in passing.[70] This may seem particularly surprising in the light of Declaration no. 19 to the TFEU on art. 8 TFEU, which states that the Union will aim in its various policies to combat all forms of domestic violence, which is one of the core subjects of the Istanbul Convention.[71]

In addition to external relations, EU funding is another place in the EU architecture where equality concerns appear to be important. Gender equality concerns in EU funds have already shown their presence in decisions from the early 2000s,[72] and are also present in most recent decisions.[73] In this regard, we should distinguish two situations. On the one hand, there are specific budgets that directly target the enhancement of equality, such as the Rights and Values programme.[74] On the other hand, some funds are not directly related to equality, but where the equality dimension will be integrated into a

[69] Joint Communication JOIN/2020/17 final from the Commission and the High Representative of the Union for Foreign Affairs and Security Policy to the European Parliament and the Council of 25 November 2020 on Gender Action Plan (GAP) III – An Ambitious Vision on Gender Equality and Women's Empowerment for EU External Action.

[70] Proposal for a Council Decision COM/2016/0111 final – 2016/063 (NLE) from the Commission of 4 March 2016 on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence.

[71] Declaration n. 19 on art. 8 TFEU.

[72] See *e.g.* Decision 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, point 3 of the annex.

[73] It is of note that in the context of the Recovery and Resilience Facility, Member States are required to include in their Recovery and Resilience Plan "an explanation of how the measures in the recovery and resilience plan are expected to contribute to gender equality and equal opportunities for all and the mainstreaming of those objectives (…)" (art. 18(4)(o) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility). See more on the reporting on gender equality in the Report COM(2022) 383 final from the Commission to the European Parliament and the Council of 29 July 2022, Review report on the implementation of the Recovery and Resilience Facility, 23-24. See also the Draft Council Conclusions (2022) 12067 from the General Secretariat of the Council of 30 September 2022 on Gender equality in disrupted economies: focus on the young generation which highlights the need to integrate a gender perspective into national recovery and resilience plans, and more broadly in the responses to the socio-economic challenges caused by the Covid-19 pandemic and the war in Ukraine.

[74] See Regulation 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014, in particular arts 2(2)(b) and 4.

number of provisions of EU funds. A prime example of the latter is the Regulation establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020), which included a specific clause to integrate gender equality in the context of research and innovation in strategies, programmes and projects.[75]

Yet, what stands out from the examination of these instruments related to EU funding is that there is a disparate and non-uniform approach to what aspect of equality should be integrated or to what extent it should be integrated. For example, some funding regulations only refer to gender equality concerns,[76] while others also include concerns for equality on other grounds.[77] Similarly, some contain a more generic reference to the fact that equality must be promoted throughout the preparation, implementation, monitoring and evaluation of programmes, whereas others also include a specific monitoring clause.[78] As another example, the reference to equality concerns is sometimes placed only in the preamble of the text.[79]

Despite the diversity of approaches, it shall be stressed that some of the instruments of EU secondary law on funding contain their own horizontal equality clauses; and these may be included in a legal construct giving them legal bite. It is of note for instance that the Commission has relied on the horizontal equality clause formulated in the EU Regulation laying down common provisions on several EU Funds[80] to cut funds in the context

[75] Regulation 1291/2013 of the European Parliament and of the Council of 11 December 2013 establishing Horizon 2020 – the Framework Programme for Research and Innovation (2014-2020) and repealing Decision 1982/2006/EC, preamble (25) and art. 16. Note that the new version of the Regulation now refers to art. 8 TFEU (Regulation 2021/695 of the European Parliament and of the Council of 28 April 2021 establishing Horizon Europe – the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination and repealing Regulations (EU) 1290/2013 and (EU) 1291/2013, *e.g*. preamble (53) and art. 7(6)). The preamble of Regulation 2021/695 also provides that "the activities under the Programme should aim to eliminate inequalities and promote equality and diversity in all aspects of R&I with regard to age, disability, race and ethnicity, religion or belief, and sexual orientation" (preamble (53)).

[76] See in particular Regulation 1291/2013 cit.

[77] *E.g*. Regulation 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, art. 9(3).

[78] *E.g*. Regulation 1296/2013 of the European Parliament and of the Council of 11 December 2013 on a European Union Programme for Employment and Social Innovation ("EaSI") and amending Decision No 283/2010/EU establishing a European Progress Microfinance Facility for employment and social inclusion Text with EEA relevance, art. 12.

[79] *E.g*. Regulation 2021/695 cit., where gender equality is mentioned both in preamble (53) and art. 7(6), while equality on grounds of age, disability, race and ethnicity, religion or belief, and sexual orientation is mentioned in preamble (53) but there is no specific provision for incorporating equality on these grounds.

[80] Regulation 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the

of the "LGBTIQ-ideology free zones" declarations, statements or resolutions made by Polish regional authorities.[81] The Commission noted as follows:

> "In accordance with Article 30(1) of the Regulation [...] requests for any amendment of a programme shall always take into account the respect of horizontal principles set out in [inter alia Article 7 on the 'Promotion of equality between men and women and non-discrimination'] of this Regulation. The actions of your regional authorities, which adopted declarations, statements or resolutions branding LGBTIQ community postulates as 'an ideology' and declaring their territories LGBTIQ-unwelcome, put into question the capacity of regional managing authorities to ensure compliance with the horizontal principle of non-discrimination in the implementation of ESIF programmes".[82]

c) Looking forward

To conclude this section, it is worth noting that the latest Commission documents show the latter's willingness to intensify the inclusion of concerns for equality across EU law- and policy-making, which could herald a new era for references to the horizontal equality clauses. Hence, in its Communication "A Union of Equality: Gender Equality Strategy 2020-2025 (2020)", the Commission has affirmed that it will integrate a gender perspective in all major Commission initiatives, such as the European Green Deal, the EU Beating Cancer Plan and the EU Drugs Agenda 2021-2015.[83] In the same vein, in its Communication "A Union of equality: EU anti-racism action plan 2020-2025 (2020)", the Commission has stated that: "the Commission will seek to ensure that the fight against discrimination on specific grounds and their intersections with other grounds of discrimination, such as sex, disability, age, religion or sexual orientation is integrated into all EU policies, legislation and funding programmes".[84]

This renewed commitment should be supported by the establishment of a new Equality Task Force, composed of representatives from all Commission services and the European External Action Service, which will support the integration of an equality

European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, art. 7 on gender equality. Note that the new Regulation laying down common provisions on several EU Funds (Regulation 2021/1060 cit.) also refers to gender equality (art. 9(2)).

[81] See letter of the Commission of 3 October 2021 to Polish regional Managing Authorities, Responsibilities of the regional Managing Authorities to provide comprehensive answers to the letter of formal notice of 14 July 2021 and to undertake corrective measures, available at roztocze.net.

[82] *Ibid*. 2.

[83] Communication COM(2020) 152 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions of 5 March 2020 on 'A Union of Equality: Gender Equality Strategy 2020-2025'.

[84] Communication COM(2020) 565 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions of 18 September 2020 on 'A Union of Equality: EU Anti-racism Action Plan 2020-2025'.

perspective in all major EU policies and initiatives.[85] It remains however to be seen to what extent this commitment will be translated into the practice of the EU institutions. It can already be observed that there is a certain imbalance in the references to the various grounds of discrimination referred to by arts 8 and 10 TFEU. Indeed, while some grounds are the subject of specific strategies, such as the LGBTIQ Equality Strategy 2020-2025,[86] the EU Roma Policy Framework[87] and the above-mentioned Gender Equality Strategy 2020-2025, this is not the case for other grounds.

IV. Where is the vessel heading? The quest for the effectiveness of the principle of equal treatment in EU law

The conclusion that the horizontal equality clauses have a modest added value may originate in the preliminary assumption on which references to the EU "mainstreaming clauses" is based. Equality mainstreaming is premised on the idea that other means of combatting discrimination, such as legislation, litigation or positive action, are too limited in their ability to actually change underlying patterns of discrimination.[88] Gender mainstreaming in particular has been claimed to have the potential to "transform" the law-making process so that gender biases are eliminated.[89] Moreover, equality mainstreaming flows from the perception that concerns on non-discrimination, particularly the position of vulnerable groups or minorities, are easily overlooked or side-lined.[90] Equality mainstreaming is intended to ensure more consistent attention to the position of these groups.[91] Yet, overall, mainstreaming has proven to be more successful in theory than in practice.[92] The transformation of policy-making procedures is not easy and proper consideration of equality considerations requires quite a lot of expertise, which is not always present at all levels of

[85] See Statement from the European Commission of 22 December 2020 on Union of Equality: The First Year of Actions and Achievements. We would like to thank Gillian More for drawing our attention to this point.

[86] Communication COM(2020) 698 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions of 12 November 2020 on 'Union of Equality: LGBTIQ Equality Strategy 2020-2025'.

[87] Communication COM(2020) 620 final from the Commission to the European Parliament and the Council of 7 October 2020 on 'A Union of Equality: EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020-2030'.

[88] C McCrudden, 'Mainstreaming Human Rights' (2004) University of Michigan School of Law Public Law & Legal Theory Research Paper Series 1, 5; J Squires, 'Is Gender Mainstreaming Transformative? Theorizing Mainstreaming in the Context of Diversity and Deliberation' (2005) Social Politics 366, 369; M Verloo, 'Another Velvet Revolution? Gender Mainstreaming and the Politics of Implementation' (IWM Working Paper 5-2001) 1, 6.

[89] M Daly, 'Gender Mainstreaming in Theory and Practice' (2005) Social Politics 442.

[90] C McCrudden, 'Mainstreaming Human Rights' cit. 13.

[91] E Hafner-Burton E and M Pollack, 'Gender Mainstreaming and Global Governance' (2002) Feminist Legal Studies 287.

[92] M Daly, 'Gender Mainstreaming in Theory and Practice' cit. 433.

government.[93] In the context of EU law, the horizontal equality clauses taken in isolation do not have much added value and indeed so far largely remain an empty vessel.

As noted in the introduction though, the horizontal equality clauses do not have to be set aside from other instruments of EU equality law, and could instead be further used as interpretative aids adding to those already giving the latter direction.[94] Despite their lack of autonomous legal functions as evidenced above, they can indeed inform our understanding of EU equality law itself. When examined as one element among others of EU equality law and governance then, references to the clauses spread across EU instruments illustrate the recurrence – even if imperfect and not consistent – of the principle of equal treatment in the policy agenda of the EU. In this context, visible change is more likely to result from the operation of legal instruments which co-exist with the horizontal equality clauses and that might be read in conjunction with them. This modest observation acts as a reminder that progress in combatting discrimination and promoting equal treatment can only result from a coexistence of tools.

Let us thus return, by way of concluding comment, to the traditional legal instruments of EU equality law and reflect on where there is still room for improvement. Perhaps the old age of provisions on EU equality law shall not be equated with a loss of vitality. We first turn to EU equality legislation. Long-standing instruments can be revised, their scope extended[95] and the instruments for equality governance contained therein modernized. One may for instance point at the recent opening by the Commission of a consultation procedure on strengthening equality bodies by setting minimum standards for their functioning in all grounds and fields covered by the EU Equality Directives.[96]

Furthermore, following up on the solemn proclamation of the European Pillar of Social Rights by the Parliament, the Council and the Commission in 1997,[97] which includes references to gender equality and equal treatment and opportunities on other grounds, several important new legislative initiatives were taken. The work-life balance directive for instance contributes to gender equality as well as to the better protection of persons with disabilities

[93] E Hafner-Burton E and M Pollack, 'Gender Mainstreaming and Global Governance' cit. 288.

[94] See section I and III.1 sub-section *a)* in this *Article*.

[95] See Proposal for a Council Directive COM(2008) 426 final from the Commission of the European Communities of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation. Although progress on this specific file is still on hold after more than a decade: see Proposal for a Council Directive (2021) 14046 from the Council of 23 November 2021 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

[96] Consultation period 10 December 2021 – 18 March 2022, more information at Equality bodies – binding standards available at europa.eu.

[97] See also the latest version of the related Action Plan: European Commission, *The European Pillar of Social Rights Action Plan* (4 March 2021) europa.eu. See further: S Garben, 'The European Pillar of Social Rights: An Assessment of its Meaning and Significance' (2019) CYELS 21.

and their careers.[98] The Commission has also now tabled a proposal for a Directive to further strengthen equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms.[99] For another example, the President of the Commission, as well as the French Presidency of the Council,[100] seem hopeful about the prompt adoption of a directive on improving gender balance on company boards that has been on the negotiation table since 2012.[101] There is thus interesting legislative activity in recent years on matters of equal treatment at the EU level.

The second set of developments related to traditional prongs of EU equality law that is worthy of attention relates to their judicial interpretation. The doctrine of effectiveness of EU law, applied to EU equality, has provided a fertile ground for strengthening equality protection in the EU legal order. The Court of Justice just reiterated its attachment to the "effectiveness" of art. 157 TFEU and asserted its horizontal direct effect, irrespective of whether the principle of equal pay for male and female workers is relied upon in respect of "equal work" or of "work of equal value".[102]

Furthermore, within the area of EU competences, and where such competences have been exercised by the EU legislator, the Court of Justice of the EU gains interpretative jurisdiction with respect to both the legislative instrument and the related provisions of the Charter. Recent case law illustrates the far-reaching implications of judicial interpretation driven by the concern to ensure effective protection of the principle of equal treatment in such a setting. A first example relates to the horizontal direct effect of equal treatment clauses enshrined in the Charter, as triggered by the applicability of a directive on equal treatment. This may enable to fill in important individual gaps in protection. In *Cresco*, for instance, the Court concluded that "until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to

[98] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and careers, p. 79–93. See further L Waddington and M Bell, 'Similar, Yet Different: The Work-life Balance Directive and the Expanding Frontiers of EU Non-Discrimination Law' (2021) CMLRev 1401; L Waddington and M Bell, 'The Right to Request Flexible Working Arrangements under the Work-life Balance Directive: A Comparative Perspective' (2021) European Labour Law Journal 508.

[99] Proposal for a Directive COM/2021/93 final of the European Parliament and the Council of 4 March 2021 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms; the proposed directive would be based on art. 157(3) TFEU.

[100] S Fleming and E Solomon, 'Von del Leyen Expects EU Deal on Rules for Women in Boardrooms' (12 January 2022) Financial Times www.ft.com.

[101] Proposal for a Directive COM(2012/) 614 final of the European Parliament and of the Council of 14 November 2012 on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. As this *Article* was being processed for publication, a political agreement was indeed reached on the text. See M Brion, 'EU-Listed Companies Should Aim to Have at Least 40% of their Non-Executive Director Positions Held by Women Starting mid-2026' (8 June 2022) Agence Europe agenceurope.eu.

[102] Case C-624/19 *Tesco Stores* ECLI:EU:C:2021:429 para. 35.

employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday".[103]

Yet a possibly more promising development, with broader structural and thus societal implications, relates to the procedural spillover effects of obligations contained in EU equality legislation. In *CCOO*, related to the neighbouring area of EU law on working time, the Court of Justice has interpreted the provisions of the Working Time Directive[104] as well as of art. 31(2) of the Charter on working time in light of the principle of effectiveness. This resulted in a far-reaching duty imposed on employers to actually set up a system enabling the duration of time worked each day by each worker to be measured.[105] The Court noted, "in order to ensure the effectiveness of those rights provided for in [the Working Time Directive] *and* of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured".[106] Although such a system is not mentioned anywhere in the related piece of EU legislation, its creation will unquestionably contribute to the realisation of the rights protected by EU law across the EU.

The combination of a dynamic legislative agenda, including more attention being paid to enforcement of the rights therein, as well as an effectiveness-based reading of EU legislation giving expression to fundamental rights protection in the Charter, may at the moment carry more promises for EU equality law than the horizontal equality clauses taken in isolation.[107] A comparison has been set between the effectiveness based reading of EU legislation giving expression to fundamental rights and forms of "positive obligations", a concept which does not (yet) exist in EU law.[108] There may, therefore, be more

[103] Case C-193/17 *Cresco Investigation* ECLI:EU:C:2019:43 para. 89.

[104] Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, p. 9–19 .

[105] Case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO)* ECLI:EU:C:2019:402. The legislative act must be read in light of the corresponding provision of the Charter (paras 30-32); the legislative act ought to be read so as to ensure its full effectivity (paras 40 ff).

[106] *Federación de Servicios de Comisiones Obreras (CCOO)* cit. para. 60. Emphasis is added herein as it is remarkable that the Court of Justice seeks to ensure the effectiveness not only of EU legislation – whereby the EU exercises its competences – but also of the Charter itself.

[107] For a recent illustration in the context of EU equality law, see case C-30/19 *Braathens Regional Aviation* ECLI:EU:C:2021:269, in particular paras 44 ff. Initiating a broader reflection on the topic see: T Plat, 'L'effectivité des directives sociales à travers la Charte des droits fondamentaux de l'Union européenne', Mémoire présenté pour le Diplôme d'Etudes Juridiques Européennes du Collège d'Europe (Bruges 2021-2022); available at the library of the said institution.

[108] See B de Witte, 'The Strange Absence of a Doctrine of Positive Obligations under the EU Charter of Rights' in G de Búrca, *The EU Charter of Fundamental Rights and Freedoms at 20* (Quaderni costituzionali 2020) 854-857. See also the cautious reference to positive obligations that "may" derive from the Charter, with reference to equivalent provisions in the ECHR, and in response to preliminary questions on that point by

need in the coming years for us to draw parallels between EU and human rights law, as the present exercise on mainstreaming invites, while acknowledging the nuances between their dynamics.

the Belgian Constitutional Court: joined cases C-511/18, C-512/18 and C-520/18 *La Quadrature du Net* ECLI:EU:C:2020:791 paras 126-128 and 145-146.

ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

BETWEEN HOPE AND FEAR: THE CREATION OF A MORE INCLUSIVE EU SINGLE MARKET THROUGH ART. 9 TFEU

SYBE DE VRIES* AND RIK DE JAGER**

ABSTRACT: In this *Article*, we assess to what extent art. 9 TFEU, which contains the social mainstreaming clause, may be used to shore up the social dimension of the EU Single Market. The story of hope of a more socially inclusive internal market starts with the "porous" EU internal market legal framework itself and ends with art. 153 TFEU and the European Pillar of Social Rights. Yet, there are also fears that, despite the language of social mainstreaming, the EU cannot deliver on the promise of art. 9 TFEU for various reasons, including the limited legislative competences of the EU to pursue social policies. While we mainly want to emphasize the story of hope, we will also look into the fears and how some of these could be addressed.

KEYWORDS: art. 9 TFEU – social mainstreaming – EU Single Market – social policy – EU Charter – European Court of Justice.

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ISSN 2499-8249
doi: 10.15166/2499-8249/619

I. Introduction

Art. 9 TFEU constitutes the horizontal, integration or mainstreaming clause for social aspects. The requirement for the EU to take into account social aspects in defining and implementing its policies and activities includes internal market policy, which has since long constituted the legal core of the EU. The language of mainstreaming of social interests gives rise to the hope that the social dimension of the EU Single Market can be reinforced and expanded. This story of hope begins with the "porous" legal framework of the EU Single Market itself,[1] whose rules on free movement and competition are not absolute and allow for the protection of public interests in general, and social policy interests in particular. Already back in 1976, the European Court of Justice (hereafter: ECJ or Court) explicitly recognized the social dimension of the EU Single Market in the *Defrenne II* case, wherein it held that the European Economic Community (EEC) is not merely an economic union, "but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of their peoples, as is emphasized by the Preamble to the Treaty".[2]

Nevertheless, there is also the fear that the language of mainstreaming may raise expectations of a more socially inclusive internal market which the EU cannot or only in part can deliver. These fears relate *inter alia* to the fact that social protection, through the adoption of market-correcting policies,[3] largely remains a matter for individual Member States. Meanwhile, the realisation of a more socially inclusive internal market faces important challenges, including growing inequality, migration, disruptive technological innovation and digitalization, as well as climate change and environmental depravation.

Before turning to the specific role and (potential) legal effects of art. 9 TFEU with respect to the EU Single Market, we will briefly describe how the economic and social spheres have become intertwined at EU level. We will then look more specifically at the extent to which art. 9 TFEU has reinforced or can strengthen the social dimension of the EU Single Market within the Court's case law and the EU's legislative praxis. We will subsequently identify and address the fears that may undermine the creation of a more socially inclusive EU internal market and how these fears could be addressed.

II. Different levels of social mainstreaming and EU law

Social mainstreaming may occur at different levels of governance. At a more macro or meso level, the question of social mainstreaming relates to the interdependence of social

[1] S Weatherill, 'Protecting the Internal Market from the Charter' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015).

[2] Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* ECLI:EU:C:1976:56 para. 10.

[3] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe: Does it Make a Difference?' (2019) Utrecht Law Review 47.

and economic spheres – or the shaping of the social market economy – within states or within the European Union. With respect to the latter, what the European Pillar of Social Rights (EPSR) envisages is mainstreaming on a macro or meso level. The EPSR consists of twenty principles and is intended to provide a counterweight to the economic orientation of the EU. It is ambitious in scope and has political will behind it.[4] The EPSR serves as an instrument collecting and consolidating different social rights and principles, stemming from different sources with different addressees, all under the consenting umbrella of Member States and EU institutions.[5]

Social mainstreaming of EU internal market law on a more micro level is required on the basis of art. 9 TFEU but has, as will be seen hereafter in sections III and IV, already been inherent in, for instance, EU free movement law and the EU's legislative harmonisation practice, which is not only aimed at creating a level playing field for businesses but also involves the protection of public and social interests.

II.1. The relationship between the economic and social at EU level

At the level of the Member States, the social and economic spheres are severely intertwined and highly interdependent. Whereas the promotion of social values can require market-correcting policies, economic rights and values are supported by market-making policies. Hence, there are tensions between social and economic values, yet at the same time, policies in the sphere of income and social protection may have, according to different economic theories and philosophies, not only impeding but also reinforcing effects. The Hayekian (liberal) economics, for instance, perceive income and employment protection as a distortion of competition, burdening the market with unjustifiable costs and rigidities. Keynesian (social-democratic) economics, however, perceive it as enhancing consumption. In any event, the social and economic spheres of welfare states are severely intertwined and highly interdependent, in that policies in the one sphere have consequences for the other and *vice versa*.[6] As Polanyi observed, "[i]f markets are not woven into the fabric of societies [...] this may arouse social dislocation and spontaneous movements. In the end this could threaten political stability, as was witnessed with the initial process of industrial revolution".[7] Markets are therefore necessarily socially

[4] European Commission, *European Social Pillar of Rights* ec.europa.eu. See also C Barnard and S de Vries, 'The 'Social Market Economy' in a (Heterogeneous) Social Europe' cit. 47.

[5] Communication COM(2017) 250 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 26 April 2017 establishing a European Pillar of Social Rights.

[6] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights: A Thorny Distribution of Sovereignty' in T van den Brink, M Luchtman and M Scholten (eds), *Sovereignty in the Shared Legal Order of the EU: Core Values of Regulation and Enforcement* (Intersentia 2015).

[7] K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Rinehart 1944).

embedded[8] and, at the national level of capitalist social welfare states, *social mainstreaming* is part of the political agenda, whereby a balance is sought between economic and social values.[9]

At the level of the EU, legislative harmonisation in the field of social policy was originally not part of the internal market project and mainly fell within the national agenda.[10] This "decoupling" of the economic and social spheres, as famously phrased by Scharpf,[11] led to a constitutional asymmetry between the EU economic freedoms and national social values. Whilst the economic freedoms are firmly rooted and protected at EU level through the principles of primacy and direct effect, this has for a long time been different for social interests and rights. This dichotomy has created problems, particularly since the widening and deepening of the internal market since the 1980s.[12] Nevertheless, public economic law, even though initially created in light of the internal market and to overcome competitive concerns on this market, has provided public authorities with a varied pallet of instruments to achieve social objectives and, therefore, been able to temper some of the "social deficit" concerns.[13]

The current Treaty framework, particularly since the adoption of the Treaty of Lisbon, seeks to "recouple" the economic and social spheres at EU level in various ways. Firstly, through the inclusion of the notion of social market economy in art. 3(3) TEU. This *Article* states that the EU strives to a attain a highly competitive "social market economy" aimed at full employment and social progress. Although it is unclear what a "social market economy" at EU level exactly means, the inclusion in the Treaty of Lisbon marks an important shift by combining European social and economic objectives and values in one single phrase. Art. 3(3) TEU forms a bridge between market and social policy objectives, expressing the need to strike a balance under the auspices of an open market economy as stated in art. 119 TFEU.[14] Whereas the pre-Lisbon social clauses were subject to the economic objectives and merely aspirational in nature,[15] art. 3(3) TEU reinforces the idea that social

[8] *Ibid*. Cf on Polanyi: C Joerges and F Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval' (2009) ELJ 1. See also A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 71.

[9] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 71.

[10] *Ibid*. 72.

[11] FW Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

[12] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 76.

[13] See A Gerbrandy, W Janssen and L Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How "Social" is Public Economic Law' (2019) Utrecht Law Review 32; G Monti and J Mulder, 'Escaping the Clutches of EU Competition Law' (2017) European Law Review 635.

[14] F Pennings, 'The Relevance of the Concept of the Social Market Economy: Concluding Observations on the Contributions in this Special Issue' (2019) Utrecht Law Review 1; see also D Ferri and F Cortese, *The EU Social Market Economy and the Law: Theoretical Perspectives and Practical Challenges for the EU* (Routledge 2020).

[15] See case C-126/86 *Giménez Zaera v Instituto Nacional de la Seguridad Social and Tesoreria General de la Seguridad Social* ECLI:EU:C:1987:395 paras 10-11.

and economic interests should be reconciled. This was confirmed by the Court in the *AGET Iraklis* case (see hereafter, section III).[16]

Secondly, post Maastricht, the EU's most prominent legal basis for social policy, art. 153 TFEU, has been improved and covers a variety of issues, ranging from the more traditional improvement, such as the working environment to protect workers' health and safety and working conditions, to social security and social protection of workers; protection of workers where their employment contract is terminated; and the conditions of employment for third-country nationals legally residing in Union territory.[17] But the ability to introduce social policy based on art. 153 TFEU is not unlimited, as it adds in para. 5 that "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs".

Thirdly, the EU Charter of Fundamental Rights (hereafter: the EU Charter) has been widely viewed as significantly raising the status of social rights in the EU by recognizing their constitutional status. Social rights are now adopted in the same document as economic rights, thereby underlining their importance as part of the core legal basis of the EU. And, according to the case law of the Court, some of the fundamental rights included in the Solidarity Title of the EU Charter have direct effect and are judicially cognisable, even in horizontal disputes, considering their mandatory and unconditional wording.[18] The assumption that all EU fundamental social rights within the meaning of art. 52(5) of the EU Charter should by their very nature be regarded as merely principles, which need to be elaborated by EU or national legislation first, is thus wrong (see hereafter, section III).

And lastly, the inclusion of the social mainstreaming provision of art. 9 TFEU, which will be discussed hereafter, and the incorporation of the non-discrimination principle as contained in art. 10 TFEU have, as Muir writes, "[injected] the social" across the entire sphere of EU policies.[19] Art. 8 TFEU prescribes the EU to eliminate inequalities and to promote equality between men and women in all its activities. Art. 10 TFEU states that the EU shall further aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The horizontal clauses of arts 8 and 10 TFEU, accompanied by art. 9 TFEU, all seek to contribute to social mainstreaming of EU policies, as well as helping the EU legislature to strike a balance between the EU's social and economic objectives.[20]

[16] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972.

[17] See, for example, C Barnard, *EU Employment Law* (Oxford University Press 2012); and G De Baere and K Gutman, 'The Basis in EU Constitutional Law for Further Social Integration' in F Vandenbroucke, C Barnard and G De Baere (eds), *A European Social Union after the Crisis* (Cambridge University Press 2017) 348.

[18] Joined cases C-569/16 and C-570/16 *Bauer* ECLI:EU:C:2018:871; case C-684/16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* ECLI:EU:C:2018:874.

[19] E Muir, 'Drawing Positive Lessons From the Presence of "The Social" Outside of EU Social Policy Stricto Sensu' (2018) EuConst 81.

[20] See A Aranguiz, 'Social Mainstreaming Through the European Pillar of Social Rights: Shielding "the Social" from "the Economic" in EU Policymaking' (2018) European Journal of Social Security 343.

II.2. Art. 9 TFEU

Social mainstreaming is thus specifically required based on art. 9 TFEU, which reads as follows: "In defining and implementing its policies and activities the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and the protection of human health".

The application of art. 9 TFEU stretches out towards all policies. The requirement to implement the aims mentioned in art. 9 TFEU in all policy domains, emphasises the interdependency of EU policies. With this extensive application, the horizontal social clause aims to foster the EU's fundamental social values and objectives, which we can also find in arts 2 and 3 TEU, all within the framework of the EU's responsibilities.[21] And art. 9 TFEU includes several social issues such as education, training and human health, which do not necessarily concern social policy *stricto sensu*.[22]

The importance of art. 9 TFEU is *inter alia* emphasized by its place in the Treaty under Title II on provisions having general application. Art. 9 TFEU clearly reinforces the social dimension of EU policies, including internal market and competition policies. In taking a closer look at the mainstreaming provisions as set forth in Title II, it appears, though, that they are differently formulated. It has been submitted that the environmental integration clause of art. 11 TFEU is most forcefully formulated, particularly through the inclusion of the word "must", and seems to be the strongest of all the mainstreaming clauses.[23] By contrast, art. 9 TFEU is seen as a weaker provision which is written in a more "reluctant manner" using "less straightforward language", which raises questions about the "degree of obligation" for the EU institutions.[24]

But just like the other mainstreaming clauses, art. 9 TFEU constitutes a legal tool to reinforce the social dimension of EU policies. As AG Cruz-Villalon states in the *Palhota* case, these changes by the Treaty of Lisbon should have a definite impact on the relationship between the Treaty freedoms and the rules on social protection.[25] What this impact concretely means in light of the Court's case law and the legislative praxis in the field of the internal market, will be discussed hereafter.

[21] Opinion 2012/C 24/06 of the European Economic and Social Committee of 28 January 2012 on Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU.

[22] These concern policies and measures outside the Title on Social Policy in the TFEU, see also E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit.

[23] N Dhondt, *Integration of Environmental Protection into Other EC Policies. Legal Theory and Practice* (Europa Law Publishing 2003) 102-103. See also S de Vries, *Tensions Within the Internal Market: The Functioning of the Internal Market and the Development of Horizontal and Flanking Polices* (Europa Law Publishing 2006) 20.

[24] See A Aranguiz, 'Social Mainstreaming Through the European Pillar of Social Rights' cit. 344.

[25] Case C-515/08 *Santos Palhota* ECLI:EU:C:2010:245, opinion of AG Cruz Villalón, paras 51-55.

III. A story of hope (I): Art. 9 TFEU, EU competition law and the Four Freedoms

Due to their broad scope of application, there is hardly any area of socio-economic life that escapes from the application of EU free movement and competition law. The fact that these market rules determine the normative framework for the assessment of social policies has raised considerable criticism by some, who argue that the EU institutions and the Court of Justice, by inclination, have a market-oriented and instrumental vision.[26] In our view, this criticism is based upon a misconception of EU Single Market law, as this in principle offers sufficient guarantees for the protection of domestic, public interests and social rights.

There are basically two ways in which mainstreaming of public and, more specifically, social interests in the Court's case law on free movement and competition has been given shape. Firstly, the ECJ has excluded certain agreements that pursue social aims from the scope of application of the EU competition rules altogether, which involves, for example the (exercise of) the right of collective bargaining. As such, the protection of these particular social interests remains outside the reach of competition law. Secondly, the ECJ allows Member States – and to some extent private actors – to justify restrictions on trade and free movement for social policy reasons within the framework of the exceptions to free movement. And this has been without an explicit role for art. 9 TFEU, which either had not yet been included in the Treaty or has not – or rarely – been referred to by the Court or, in the field of competition law, by the European Commission. The question is then how the application of art. 9 TFEU could (potentially) steer the direction of the Court's case law.

III.1. The "social exemption" for collective bargaining

In *Albany*, the Court excluded collective bargaining agreements between social partners from the cartel prohibition of art. 101(1) TFEU. In doing so, the Court has avoided a delicate balancing exercise altogether by granting *per se* "immunity" from European competition law to collective labour agreements pursuing the improvement of employment conditions. While the Court did not explicitly refer to the fundamental right's character of autonomous collective bargaining, it held that "the social policy objectives pursued by such [collective] agreements would be seriously undermined if management and labour were subject to [the Treaty provisions on competition law] when seeking jointly to adopt measures to improve conditions of work and employment".[27]

The Albany line of reasoning has recently been extended by the Commission to collective labour agreements which are concluded by *solo self-employed* working in the

[26] D Augenstein, 'On the Autonomous Substance of EU Fundamental Rights Law' (2013) German Law Journal 1917.

[27] Case C-67/96 *Albany* ECLI:EU:C:1999:430 para. 59.

platform economy, in line with the earlier *FNV Kiem* case.[28] Although the relevant Guidelines do not explicitly mention the social mainstreaming provision of art. 9 TFEU, they show an overall generous – and thus socially friendly – approach of the Commission to collective labour agreements, and EU competition law and social policies are still seen as two distinct policies.[29] This "immunity" approach is, however, limited and not always an option for EU internal market law, particularly considering the often interwovenness of the economic and social spheres as mentioned, and has thus not been followed by the Court in the field of free movement.[30]

III.2. Social interests as an exception ground to free movement

As the four freedoms are not absolute,[31] Member States are allowed to restrict trade and free movement with a view to protecting non-economic, public interests, thereby relying on either one of the Treaty exceptions or the mandatory requirements as developed in the Court's case law.[32] According to Weatherill, the case law of the Court reveals "just how porous EU free movement law [...] to justification has become".[33] And this readiness to accept justification grounds under the scheme of the four freedoms also applies to fundamental rights.[34] In cases like *Schmidberger* or *Omega*, the Court has shown its willingness to take fundamental rights seriously and put them on an equal footing with the EU rules on free movement.[35] At the background art. 9 TFEU may play a role here as well. In respect of public health, which is also included in art. 9 TFEU, the Court stipulated: "In that regard, the Court has already recognised on several occasions that [...] the protection of public health constitutes, as follows also from art. 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom [...]".[36]

Based on the proportionality principle, which plays a key role here, the Court balances non-economic, public interests with the four freedoms. The crucial question is,

[28] Annex C(2021) 8838 final to the Communication COM(2021) 762 final from the Commission of 9 December 2021 on the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work. See also case C-413/13 *FNV Kunsten Informatie en Media* ECLI:EU:C:2014:2411.

[29] A Kornezov, 'For a Socially Sensitive Competition Law Enforcement' (2020) Journal of European Competition Law 399.

[30] The ECJ held, for instance, in *Viking* that "it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree", case C-438/05 *The International Transport Workers' Federation and the Finnish Seamen's Union* ECLI:EU:C:2007:772 paras 52-55.

[31] P Oliver and WH Roth, 'The Internal Market and the Four Freedoms' (2004) CMLRev 410.

[32] Starting with the Court's case law in *Dassonville* and *Cassis de Dijon*, see case C-8-74 *Dassonville* ECLI:EU:C:1974:82; case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

[33] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 217.

[34] Case C-390/12 *Pfleger and Others* ECLI:EU:C:2014:281 paras 59 and 60.

[35] Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333; case C-36/02 *Omega* ECLI:EU:C:2004:614.

[36] Case C-544/10 *Deutsches Weintor* ECLI:EU:C:2012:526 para. 49.

though: how should the Court in the light of art. 9 TFEU balance the conflicting interests of free movement and social protection under its traditional scheme of adjudication?

a) Viking and Laval, and an uncomfortable balancing exercise

The way in which the proportionality test has been carried out in the much-criticised *Viking* and *Laval* cases law suggests that the Court put "the four freedoms and thereby political economic values as its first point on the agenda".[37] Both cases concerned attempts by employers to take advantage of cheaper Eastern European labour, by reflagging a Finnish vessel as Estonian in the case of *Viking* and by posting Latvian labour to fulfil a building project in Sweden. In both cases the trade unions protested, threatening strike action (*Viking*) or blocking the site (*Laval*) with a view to stopping the employers' conduct.[38]

Although the Court in its judgments reiterated the principle that the EU pursues social aims, it took a restrictive approach to justification and proportionality.[39] The Court ruled that the trade unions' actions could only be justified if they served a wider aim, *i.e.* there should be a serious threat to employment. The particularly strict interpretation of the Posted Workers Directive 96/71 in *Laval*, leaving little or no scope for the Swedish tradition of collective bargaining, also raised serious concerns for the trade union movement. With the social dimension being seen as inferior, various commentators have argued that the approach in the *Viking* and *Laval* case law in fact sits uneasily with how the Court normally adjudicates conflicts between the four freedoms and public interests.[40]

As stated above, according to AG Cruz Villalón in the *Santos Palhota* case, though, the inclusion of art. 9 TFEU in the Treaty should have specific repercussions as to how the derogations to the four freedoms are being applied.[41] In his Opinion, he argues that, regarding the posting of workers, the provision of art. 9 TFEU as primary social law must result in a less strict interpretation of working conditions, constituting an overriding public interest, that justifies a derogation from the freedom to provide services.[42] Because the primary law framework warrants a high level of social protection, Member States must be granted a certain leeway in restricting a fundamental freedom under the header of safeguarding social protection.

This view was confirmed by the Court in the *AGET Iraklis* case, which concerned Greek legislation allowing the prefect or the Minister for Labour to oppose collective

[37] A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 84.

[38] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 50.

[39] See, for example, S Weatherill, 'Protecting the Internal Market from the Charter' cit. 223-227; A Veldman and S de Vries, 'Regulation and Enforcement of Economic Freedoms and Social Rights' cit. 83-85; C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon: A Question of Conflicts of Interest' in S De Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 37-59.

[40] See S Weatherill, 'Protecting the Internal Market from the Charter' cit. 227.

[41] Case C-515/08 *Santos Palhota* ECLI:EU:C:2010:245, opinion of AG Cruz Villalón.

[42] *Santos Palhota* cit. para. 52-53.

redundancies in certain circumstances in the interests of the protection of workers and of employment, and whether that legislation was compatible with the freedom of establishment, the free movement of services and the freedom to conduct a business as enshrined in art. 16 of the EU Charter.[43] Explicitly referring to *inter alia* art. 9 TFEU, the Court held that "Member States have a broad discretion when choosing the measures capable of achieving the aims of their social policy, [...] however, that discretion may not have the effect of undermining the rights granted to individuals by the Treaty provisions in which their fundamental freedoms are enshrined [...]".[44]

b) Article 9 TFEU and improving the balancing exercise

Legal scholars and Advocates-General have put forward a number of suggestions as to how to improve the balancing exercise and make EU free movement law more responsive to social interests and rights, operationalising art. 9 TFEU.[45] Options are either, first, a relaxation of the proportionality test, or, second, the adoption of a true balancing approach, which entails a "double proportionality review" as applied in the above-mentioned *Schmidberger* case, taking as a starting point the equal ranking between fundamental (social) rights and fundamental freedoms.

Regarding the first option, Barnard has argued in several contributions that the Court should focus on the procedural rather than substantive elements of the question whether national measures can be justified.[46] According to her, proportionality does not work in some social contexts, in particular strike action, given that "the more successful the strike action, the less likely it is to be proportionate".[47] In a similar vein, the Court considered in *AGET Iraklis* that a national law opposing collective redundancies for social policy reasons may in principle be proportional if certain requirements of good administration are met. Regarding the specific characteristics of the debated Greek national measure, the ECJ held that the criteria applied by the competent relevant national body were "formulated in very general and imprecise terms".[48] The ECJ continued:

> "[...] in the absence of details of the particular circumstances in which the power in question may be exercised, the employers concerned do not know in what specific objective circumstances that power may be applied, as the situations allowing its exercise are potentially numerous, undetermined and indeterminable and leave the authority concerned

[43] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972 para. 71.

[44] *AGET Iraklis* cit. para. 81.

[45] See, for example, D Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) EuConst 618; S Garben, 'Balancing Social and Economic Fundamental Rights in the EU Legal Order' (2020) European Labour Law Journal 364.

[46] See also S Prechal, 'Free Movement and Procedural Requirements: Proportionality Reconsidered' (2008) LIEI 203; C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) ELR 117. See also C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon' cit. 50-51.

[47] C Barnard, 'The Protection of Fundamental Social Rights in Europe after Lisbon' cit. 50-51.

[48] *AGET Iraklis* cit. para. 99.

> a broad discretion that is difficult to review. Such criteria which are not precise and are not therefore founded on objective, verifiable conditions go beyond what is necessary in order to attain the objectives stated and cannot therefore satisfy the requirements of the principle of proportionality [...]".[49]

The Greek authorities should thus have opted for more objective conditions the fulfilment of which could be reviewed by the national courts.[50] AG Wahl held a similar procedural view. In his Opinion, he stated that "[a]n alternative might have consisted in listing the types of dismissals considered to be unjustified", referring to the Appendix to the European Social Charter.[51]

Regarding the second option, *i.e*. the "double proportionality review", AG Trstenjak held in *Commission v Germany* that the balancing approach of the Court in *Schmidberger* would contribute to an optimum effectiveness of fundamental rights and fundamental freedoms.[52] This approach is not confined to an assessment of the appropriateness and necessity of a restriction of a fundamental freedom for the benefit of fundamental rights protection. It must also include an assessment of whether the restriction of the fundamental rights is appropriate in the light of the fundamental freedom. And such a scheme of analysis would, according to AG Trstenjak, be more in line with the "principle of equal ranking for fundamental rights and fundamental freedoms".[53] This equal ranking bodes well for art. 9 TFEU, especially concerning the social objectives the EU legislator needs to take into account, as the risk of "losing out" to more economic objectives may be mitigated under the double proportionality review. According to Weatherill, this review implies a rebalancing of priorities "with consequences sympathetic to social protection" and in line with other case law of the Court on EU free movement law, which is generally more sensitive to certain national practices and concerns.[54]

c) Article 9 TFEU and the socio-economic constitution

Another, and to the foregoing related, path that can be followed with a view to socially mainstream EU free movement law and to give more weight to art. 9 TFEU, concerns the more explicit recognition of the four freedoms as constitutionally conditioned rights. After all, art. 26 TFEU states that the internal market is ensured *in accordance with the provisions of the Treaties*. Furthermore, the four freedoms can be seen as a specific

[49] *Ibid*. 100.

[50] M Markakis, 'Case C-201/15 AGET Iraklis: Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights' (3 January 2017) EU Law Analysis eulawanalysis.blogspot.com.

[51] Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:429, AG Wahl, para. 71.

[52] Case C-271/08 *Commission v Germany* ECLI:EU:C:2010:183, opinion of AG Trstenjak, para. 191.

[53] *Ibid*. para. 183.

[54] Beginning with *Rewe v Bundesmonopolverwaltung für Branntwein* cit., see S Weatherill, 'Protecting the Internal Market from the Charter' cit. 226-227.

amplification of the EU Charter of Fundamental Rights, "which accepts that the internal market is constitutionally conditioned, particularly by social rights".[55]

At the same time, EU fundamental social rights have gained traction since the binding EU Charter. The rulings in *Bauer et al* and *Max Planck* are important as the Court, according to Frantziou, affirms the constitutional status of social rights by aligning them with the right to equal treatment, and makes EU social rights more useful for individuals, especially in situations where social rights are jeopardised.[56] In these judgments, following up on its previous decision in *Egenberger* on *inter alia* the principle of non-discrimination as enshrined in art. 20 of the EU Charter, the Court has strengthened the protection of fundamental social rights by unequivocally affirming that some of the social rights enshrined in Title IV (Solidarity) have direct effect. This means that these rights can be invoked and applied, even directly in a dispute between private parties. The strengthening of some EU fundamental social rights responds to the needs of art. 9 TFEU, placing them on an equal footing with the economic rights in the EU Charter, like the right to choose an occupation (art. 14 of the EU Charter), the right to property (art. 15 of the EU Charter) and the freedom to conduct a business (art. 16 of the EU Charter).

In the *Bauer et al*. judgment, the Court determined that a worker's right to paid annual leave under art. 31(2) of the EU Charter could not only be applied *vis-à-vis* a public employer, *i.e.*, the City of Wuppertal, but also horizontally *vis-à-vis* the private employer Mr. Willmeroth. The Court held that art. 31(2), concerning certain aspects of the organisation of working time, is an essential principle of social law, which is mandatory and unconditional. What matters is the nature of the provision and that the provision must be sufficient in itself to confer a right.[57] The Court added that even though art. 51(1) of the EU Charter does not directly address private parties, it does not "systematically preclude such a possibility". Thus, the right to fair and just working conditions in art. 31 of the EU Charter can have horizontal direct effect.

With *Bauer et al.* and *Max Planck*, the Court takes a further step towards increased protection of EU social rights, as the application of the EU Charter should not be dependent on the status of the employer (either public or private). This is especially relevant in the social policy field with a view to protect workers in vertical and horizontal labour disputes with their employers.[58] It has thereby followed a route that had been set out in several

[55] D Schiek, 'Towards More Resilience for a Social EU' cit. 626.

[56] S de Vries, 'The Bauer et al. and Max Planck Judgments and EU Citizens' Fundamental Rights: An Outlook for Harmony' (2019) European Equality Law Review 29; E Frantziou, 'Joined cases C-569/16 and C-570/16 Bauer et al: (Most of) the Charter of Fundamental Rights is Horizontally Applicable' (19 November 2018) European Law Blog europeanlawblog.eu.

[57] S Prechal 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' (2020) Revista de Derecho Comunitario Europeo 420.

[58] J Fraczyk, 'EU Fundamental Rights and the Financial Crisis' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU law and Human Rights* (Edward Elgar Publishing 2019) 480.

judgments concerning non-discrimination between men and women (*Defrenne*), nationality (*Angonese*), age (*Mangold* and *Kucükdevici*) and religious discrimination (*Egenberger*).[59] As such, the horizontal direct effect of (at least some) fundamental social rights will contribute to the realization of a more socially inclusive EU Single Market as it allows for more adequate protection of citizens and workers, also in cases of private relationships.

The idea of a constitutional conditioned internal market entails that trade or free movement is conditional upon respecting the social constitution and that individual rights of economic actors are no longer – or at least not always – prioritised. As stated above, such an approach fits well into the (implicit) underlying ratio and the (explicit) social objectives of art. 9 TFEU. In addition, a constitutional conditioned market may amount to a more restrained test used by the Court under the prohibitive Treaty rules on free movement. This approach could take the form of a mere discrimination test, *i.e.* to assess whether national legislation or national practices protecting fundamental social rights (including the right to strike) have more detrimental effects on non-nationals, either directly or indirectly.[60]

IV. A story of hope (ii): Art. 9 TFEU and EU legislative harmonisation

In giving effect to the social dimension of the EU internal market and, in particular, art. 9 TFEU, the EU legislator could – roughly – follow two routes. First, through legislative harmonisation based on the internal market legal bases, including art. 114 TFEU. EU internal market legislation is by its very nature receptive to public and social policy interests. After all, harmonisation has a dual function, as it "sets common rules for the European market, but, against a background of diverse national sources of regulatory inspiration, it also involves a standard of re-regulatory protection [...]".[61] This function is also relevant for the social policy domain, in which pre-existing diverse regulatory choices amongst the Member States leading to barriers to free movement are widespread.[62] The second route concerns legislative harmonisation, more specifically in the social policy field on the basis of art. 153 TFEU, which use may make the internal market more socially inclusive and contribute to the realisation of the social market economy.

[59] *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* cit.; case C-281/98 *Angonese* ECLI:EU:C:2000:296; case C-144/04 *Mangold* ECLI:EU:C:2005:709; case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21 and case C-414/16 *Egenberger* ECLI:EU:C:2018:257.

[60] In a similar vein, D Schiek, 'Towards More Resilience for a Social EU' cit. 628 and S Garben, 'Balancing Social and Economic Fundamental Rights in the EU Legal Order' cit. 383.

[61] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 228. See also S de Vries, *Tensions within the Internal Market* cit. 247-296.

[62] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 228.

IV.1. The internal market legal bases of *inter alia* art. 114 TFEU

By using the potentially very wide legal basis of art. 114 TFEU, the EU legislator has managed to touch upon nearly all policy domains of socio-economic life. After all, art. 114 TFEU allows for the harmonization of national laws, which are designed to protect public interests or fundamental rights, but constitute an obstacle to free movement, even when the Treaty limits or excludes legislative powers in certain policy fields.[63] As follows from the *Tobacco Advertising* case, a directive, which (also) aims to protect public health, can be adopted only if measures have as their object either the objective of removal of obstacles to the exercise of fundamental freedoms, or alternatively the removal of appreciable distortions of competition.[64]

The Court's judgment implies that once these threshold requirements have been met, the EU legislature has the power to intervene in practically any policy field, even the field of public health for which art. 168 TFEU contains a prohibition for the EU to adopt binding harmonisation measures. In a similar vein, art. 114 TFEU or other internal market legal bases exploiting their "broad and fuzzy contours" could potentially be used in the social policy field, where the EU does not or hardly dispose of specific harmonization powers. The problem is, however, that art. 114(2) TFEU itself explicitly excludes harmonization in relation to the rights and interests of employed persons. This is not the case for art. 115 TFEU, the other provision on the internal market, or for art. 62 TFEU in conjunction with arts 53 and 59 TFEU in the field of services.[65] However, art. 115 TFEU requires unanimity and it is unclear to what extent the provisions on services can be used in the social policy field, although the revised Posted Workers Directive offers an interesting example of how internal market legislation may strengthen the social face of the EU (see hereafter).[66]

Art. 114(3) TFEU includes a mainstreaming clause, as it requires the Commission to take "a high level of protection" into account concerning proposals in the field of health, safety, environmental protection, and consumer protection. But the provision does not mention social protection, which emphasizes the additional value of art. 9 TFEU. In light thereof, the (possible) influence of art. 9 TFEU on the application of art. 114 TFEU is

[63] Case C-376/98 *Germany v Parliament and Council* ECLI:EU:C:2000:544; case C-380/03 *Germany v Parliament and Council* ECLI:EU:C:2006:772.

[64] *Germany v Parliament and Council* ECLI:EU:C:2000:544 cit. para. 69.

[65] S de Vries, 'Protecting Fundamental (Social) Rights through the Lens of the EU Single Market: The Quest for a More 'Holistic Approach'' (2016) The International Journal of Comparative Labour Law and Industrial Relations 203.

[66] Another option is, of course, art. 352 TFEU, reserved for unforeseen cases, but its utility is severely limited, as the Monti II saga showed. This was the EU's failed attempt to address some of the issues raised by the decisions of the Court of Justice in *Viking* (and *Laval*) through a Council Regulation, as discussed in section III.2. See Communication COM(2012) 130 final of the Commission of 21 March 2012 on the Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. See also C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 47.

threefold. Firstly, the requirement to take into account social interests delimits the EU's discretionary powers, *i.e.* the full effect of the internal market must be mitigated where social interests are at issue. As such, art. 9 TFEU should prevent a purely market-oriented expansion of the EU internal market, without taking due account of social policy interests. In addition, although the discretionary powers of the EU legislature remain broad, there is a strong duty to motivate on the part of the EU as to whether and how the objectives of art. 9 TFEU have been taken into account.

Secondly, the mainstreaming clause reaffirms the view that social issues must be promoted within the context of the internal market, thereby emphasizing the social dimension of the internal market and the link with the social market economy as mentioned by art. 3(3) TEU (see hereafter). It may result in more robust legislation that provides for a high level of protection of social rights and interests.[67] In this way, the provision takes up a balancing role that ensures the integration of social policy at Union level.[68] At the same time, however, art. 9 TFEU does neither prescribe how exactly different interests should be balanced by the EU legislature, nor does it constitute a legal basis in itself for binding EU measures and thereby bypass art. 114(2) TFEU just like that.[69]

Drawing on experiences in the broader field of public economic law and non-discrimination, the powerful EU internal market infrastructure has nevertheless proven to be a driving force to "convey social values and enhance individuals' protection".[70] An example is the Accessibility Act, which is based on art. 114 TFEU and lays down requirements for goods and services, and gives specific effect to obligations arising from the United Nations Convention on the Rights of Persons with Disabilities and art. 26 of the EU Charter.[71] Another example is EU procurement legislation, which seeks to enhance sustainable and inclusive growth and prescribes public authorities to comply with social and labour law provisions.[72] Furthermore, the EU anti-discrimination legal framework has been pivotal in combating discrimination in employment and "thus deals with questions that are at the core of a traditional approach to social policy although viewed through the lens of

[67] C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 60.

[68] A Aranguiz, 'Social Mainstreaming through the European Pillar of Social Rights' cit. 345.

[69] *Ibid*. 345.

[70] E Muir, 'Drawing Positive Lessons from the Presence of 'the Social' Outside of EU Social Policy Stricto Sensu' cit. 84; C Barnard and S de Vries, 'The "Social Market Economy" in a (Heterogeneous) Social Europe' cit. 60.

[71] Directive 2019/882/EU of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services. See also S de Vries and T de Sterke, 'De Europese Toegankelijkheidsrichtlijn voor mensen met een handicap: grondrechtenbevordering binnen de Europese interne markt' (2020) Nederlands tijdschrift voor Europees recht 168.

[72] E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit. 85. See Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

human dignity".[73] However, while in all three examples art. 114 TFEU forms a driving-force in shaping the EU's social acquis, an explicit reference to art. 9 TFEU is missing.

By contrast, the Posted Workers Directive, perhaps the most well-known example of internal market legislation conveying social values and enhancing individuals' protection, explicitly mentions art. 9 TFEU.[74] The Posted Workers Directive is premised not on differential treatment between domestic workers and posted workers but on equality of treatment. This shifted focus is positive news for the individual posted workers, whereas the (mostly Eastern European) posting companies may see their competitive advantage removed. The preamble of the Directive refers to art. 9 TFEU, as well as to art. 3 TEU and the promotion of "social justice and protection" (found in art. 3(3), para. 2 TEU). The horizontal social clause's substantive demand thus seems to be taken into consideration. Rather surprisingly, the Directive does not refer to art. 3(3), para. 1 TEU on the social market economy, even though art. 9 TFEU forms a bridge between the internal market and the social market economy.[75]

The concrete impact of art. 9 TFEU on EU "social" legislation based on art. 114 TFEU thus seems on occasions limited. The EU legislator does not often explicitly mention whether the horizontal social clause served as, for example, a concrete cause for introducing the legislation, or as a guiding principle during the drafting of the legislation. Any possible, substantive role of art. 9 TFEU in introducing these regulatory initiatives remains second-guessing.

A third and last way as to how art. 9 TFEU influences EU internal market legislation is that it, although addressed to the EU institutions, indirectly binds Member States as well, for instance when they implement EU Directives and would like to take more restrictive measures to protect social rights and interests.[76] On a more practical note, to give flesh to the bones of art. 9 TFEU, it has been brought forward that there is a need for the EU to carry out impact assessments, assessing the impact on social policy interests of EU actions.[77]

If the result of all this is more socially robust EU internal market legislation, either through an explicit or implicit recognition of the role of art. 9 TFEU in regulatory initiatives,

[73] E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit. 88.

[74] In addition to the Revised Posted Workers Directive, the European Labour Authority (ELA), created in October 2019, aims to "to support Member States in implementing EU legislation in the areas of cross-border labour mobility and social security coordination, including free movement of workers, posting of workers and highly mobile services". The ELA could thus play a useful role in ensuring the continuing adherence to the objectives of art. 9 TFEU in the field of posted workers. See European Council Press Release, 'European Labour Authority: Council Agrees its Position' (6 December 2018) European Council www.consilium.europa.eu.

[75] Directive 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

[76] See also S de Vries, *Tensions within the Internal Market* cit. 19-20.

[77] E Muir, 'Drawing Positive Lessons from the Presence of "the Social" Outside of EU Social Policy Stricto Sensu' cit. 82.

it will be easier for the ECJ to interpret this legislation in a socially friendly manner. Legislative constraints set by the EU legislator on economic rights, including the four freedoms or the freedom to conduct a business as enshrined in art. 16 EU Charter, which played a too prominent role in the *Alemo-Herron* case (see hereafter), may be upheld accordingly. The judgments of the Court in the *Sky Österreich* and *Google Spain* cases, although situated outside the social policy domain, may serve as source of inspiration. In *Sky Österreich* the Court, in interpreting the Audiovisual Media Services Directive, ruled that the EU legislature was entitled to adopt rules on the basis of the internal market legal provision, which limited the free movement of audiovisual media services or rather the freedom to conduct a business, whilst giving priority to public access to information for the sake of media pluralism.[78] In a similar vein, the Court in *Google Spain* held that the rights to privacy and data protection do "as a rule, [...] override the economic interests of the operator of the search engine [...]".[79]

IV.2. The importance of art. 153 TFEU in making the EU internal market more socially inclusive

The important role of art. 153 TFEU in fleshing out the horizontal social clause of art. 9 TFEU, is shown in several recent legislative proposals, amongst others the recently adopted Minimum Wage Directive and the proposal for a Directive on improving working conditions.[80] As for the Minimum Wage Directive, in light of the goal to ensure a "fair and adequate minimum wage" with the argument that "the dignity of work is sacred",[81] the first recital of the act explicitly refers to art. 3(3) TEU and art. 9 TFEU, thus underlining the importance of both provisions as a set of guiding principles. This role is also shown in the legislative process of the Directive. For example, the European Parliament (unsuccessfully) proposed to amend recital 11, which states that, in 2018, the statutory minimum wage did not provide sufficient income for a single minimum-wage earner to reach the at-risk-of-poverty threshold in nine Member States. Accordingly, recital 11 – in the view of the European Parliament – should have explicitly stated that this risk "is not in line with the aims of the Union as outlined in Article 9 TFEU".[82] In addition, the Directive shows the role of the EPSR as the driving force of social policy legislative proposals. The act refers

[78] Case C-283/11 *Sky Österreich* ECLI:EU:C:2013:28.

[79] Case C-131/12 *Google Spain and Google* ECLI:EU:C:2014:317 para. 97.

[80] Directive 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union; Proposal for a Directive COM(2021) 762 final of the European Parliament and of the Council of 9 December 2021 on improving working conditions in platform work.

[81] European Commission, 'State of the Union Address by President Von der Leyen at the European Parliament Plenary' (16 September 2020) ec.europa.eu.

[82] European Parliament Report, Amendments 001-106 by the Committee on Employment and Social Affairs of 7 September 2022 on Employment and Social Affairs www.europarl.europa.eu 11.

to principle 6 of the EPSR to reaffirm workers' right to fair and minimum wages, to prevent in-work poverty, and to set all wages in a transparent and predictable way.[83]

The proposed Directive on improving conditions in platform work is based on art. 153(1)(b) TFEU as well.[84] Inspired by the ever-increasing presence of platform-oriented work, the proposal has the threefold aim to promote employees having or obtaining the correct employment status, to ensure a fairer and more transparent algorithmic management, and to enhance transparency and improve enforcement of the applicable rules in platform work.[85] Already labelled as a "welcome and decisive step" towards improving working conditions for platform workers, the proposed Directive seems a promising legislative tool to grant gig economy workers more protection against algorithmic-based employment.[86] At the same time, contrary to the Minimum Wage Directive, no explicit mention is made of art. 9 TFEU. Yet, the explanatory memorandum refers to principle 5 of the EPSR that "regardless of the type and duration of the employment relationship, workers have the right to fair and equal treatment regarding working conditions and access to social protection". This reference highlights the increasingly important role of the EPSR in shaping EU "social" legislation and forming a specific policy bridge between art. 9 TFEU and the EU social acquis.

V. Fears undermining the safeguarding of social interests in the EU single market through art. 9 TFEU

Although art. 9 TFEU could thus (and sometimes does) play an important function in integrating social interests in the EU internal market, there are fears that the horizontal social clause cannot deliver on (all) of its promises. We divide these fears into two categories, *i.e.* fears stemming from art. 9 TFEU itself (*e.g.* the relatively vague and unclear wording of the provision), and fears that go beyond art. 9 TFEU *stricto sensu* but nonetheless relate to the difficulties in mainstreaming social policy interests in EU internal market law. At any rate, there must be a *political* will in the EU to find common ground for making EU law and policies more socially inclusive and to deliver a more ambitious social policy agenda. In the following sections we will focus on the *legal* difficulties and challenges that the EU faces in this respect.

V.1. The relatively vague and unclear wording of art. 9 TFEU

As described, art. 9 TFEU provides the ultimate balancing exercise between economic and market goals and social policy objectives. From a strictly legal perspective, however, its significance is less clear.

[83] Recital 3 Directive 2022/2041 cit.

[84] Communication COM(2021) 762 final cit.

[85] *Ibid*. 9.

[86] A Kelly-Lyth and J Adams-Prassl, 'The EU's Proposed Platform Work Directive: A Promising Step' (8 December 2021) Verfassungsblog verfassungsblog.de.

First, the language of art. 9 TFEU is relatively vague and unclear. Given the need to "take into account" the social needs set out in the horizontal social clause, art. 9 TFEU seems designed as suggesting a series of objectives to increase overall policy coherence in the EU.[87] Although the ECJ held in the *Pillbox 38* case that art. 9 TFEU "require[s]" the EU legislator to ensure a high level of protection of human health in its policies,[88] which could suggest a certain binding to achieving social objectives,[89] art. 9 TFEU in itself does not contain any commitment language. As a result, the wording of art. 9 TFEU limits its function to a mere guiding nature, *i.e.* to provide the pathway of developing and implementing policies that *do* have a material nature.[90] One risk of this guiding nature is that references in legislative acts to art. 9 TFEU could lack significance, for example because the act merely repeats the wording of the clause or parts thereof.[91] In such cases, a true indication of art. 9's role in drafting the legislative act and its content remains missing, given that the wording of the horizontal social clause does not prescribe the EU legislator in more commanding fashion to explain how it committed to executing art. 9 TFEU in the particular act.

In addition, the lack of commitment in art. 9 TFEU causes difficulties regarding the judicial review of art. 9 TFEU. To determine whether the EU legislator has complied with the obligation to "take into account" social considerations in designing a legislative act proves to be problematic. The ECJ has already held that, regarding the judicial review of the conditions of the implementation of the principle of proportionality, the EU legislature "must be allowed a broad discretion" in areas "which [entail] political, economic and social choices on its part, and in which it is called upon to undertake complex assessments".[92]

V.2. The constitutionalisation of EU (free movement) law and the unclear scope of EU fundamental social rights protection

Although the constitutional embeddedness of the four freedoms and economic rights may, as stated above in section III, contribute to social mainstreaming, the fundamentalisation or constitutionalisation of EU law may at the same time challenge social rights protection laid down by national and EU law. The effective application of art. 9 TFEU could be threatened in two ways.

[87] ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' (2018) Italian Journal of Public Law 105.

[88] Case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324 para. 116.

[89] As Bartoloni argues, see ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' cit. 102.

[90] ME Bartoloni, 'The EU Social Integration Clause in a Legal Perspective' cit. 106.

[91] See, for example, Regulation (EU) 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 (European Social Fund Directive), which states that "[i]n accordance with Article 9 TFEU, the [European Social Fund] should take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health".

[92] Case C-157/14 *Neptune Distribution* ECLI:EU:C:2015:823 para. 76.

Firstly, the EU Charter may be used to strengthen the internal market freedoms at the cost of other fundamental (social) rights. This happened in a way in *Alemo-Herron*, which concerned the interpretation of the Directive on employees' rights in the event of transfer of undertakings.[93] The Court relied on the freedom to conduct a business as enshrined in art. 16 of the EU Charter, to conclude that the higher national protection granted by UK law to employees was deemed to interfere with the employer's managerial freedom.[94] As such, the Court emphasized the importance of protecting employers' economic rights under the Directive, without making any reference to the social rights in Title IV of the EU Charter.[95] This judgment gives the impression that the economic freedoms and rights are over-stretched with the help of the Charter,[96] but this over-reading of art. 16 of the EU Charter has been severely criticized as out of line with the Court's orthodoxy.[97]

If the four freedoms are interpreted in terms of fundamental rights, in particular the freedom to conduct a business (art. 16 EU Charter), the freedom to choose an occupation (art. 15 EU Charter) and the right to property (art. 17 EU Charter), this may have implications for the scheme of analysis employed by the Court. The Cassis de Dijon-type of test carried out within the context of EU free movement law is "lighter" and "friendlier", creating more room for Member States to protect public and social interests than the test prescribed by art. 52(1) of the EU Charter in case of conflicts between fundamental rights. A potential erosion of the Cassis de Dijon test could benefit individual and businesses' rights over collective (social) interests. The question is, however, whether things are as bad as they present themselves, as art. 52(1) EU Charter also explicitly recognises the importance and seriousness of the protected general interest.[98] Furthermore, as explained above, fundamental social rights in the EU Charter have gained prominence, particularly through the judgments of the ECJ in *Egenberger, Bauer et al* and *Max Planck.*

[93] Case C-426/11 *Alemo-Herron and others* ECLI:EU:C:2013:521; Directive 2001/23/EC of the European Council of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses.

[94] See C Barnard, 'Are Social "Rights" Rights?' (2020) European Labour Law Journal 356. See, with regard to art. 16 and national level of workers' protection, F Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction?: The Clash between the European Business Freedoms and the National Levels of Workers' Protection' (2018) European Labour Law Journal 50.

[95] S de Vries, 'General Reflections on Current Threats and Challenges to, and Opportunities for, the Exercise of Economic Rights by EU Citizens' in S de Vries and others (eds), *EU Citizens' Economic Rights in Action: Re-Thinking Legal and Factual Barriers in the Internal Market* (Edward Elgar Publishing 2018). The different ways in which the proportionality principle has been applied in cases like *Viking Line* or *Schmidberger* may furthermore create legal uncertainty.

[96] S de Vries, 'The EU Single Market as "Normative Corridor" for the Protection of Fundamental Rights: The Example of Data Protection' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* cit. 242.

[97] S Weatherill, 'Protecting the Internal Market from the Charter' cit. 234.

[98] M Van der Woude, S Prechal and S de Vries, 'In gesprek met René Barents…' (2022) SEW 392.

A second fear or concern relates to the unclear and limited scope of application of the EU Charter and the fundamental social rights enshrined therein. The point of departure is that the EU Charter applies to acts of Member States when they act within the scope of Union law.[99] However, in several cases concerning social rights, the Court has denied jurisdiction to apply the EU Charter because of the lack of a (sufficient) connection with EU law, although the national measures were adopted within the framework of EU legislation.[100]

In addition, due to the EU legislature's limited competences in the social policy field, social rights may remain out of sight and are thus less "covered" in preliminary rulings of the Court. The right of association or the right to strike, for example, are explicitly excluded from art. 153(5) TFEU, and even art. 114 TFEU, although it provides for broad legislative powers in the field of the internal market, cannot (always) be used in the social domain as stated above. As such, the fact that the Court, in interpreting EU internal market legislation touching upon social aspects, often does not and cannot establish a nexus may hamper the integration of social policy objectives across all EU domains and undermine social mainstreaming on the basis of art. 9 TFEU. This is different for fundamental rights that are and can be covered by internal market legislation, such as the principle of non-discrimination, the right to data protection, the right to (intellectual) property, or the freedom to conduct a business.[101]

To add to that, if a certain situation does fall within the scope of application of the EU Charter, it is unsure whether the fundamental social rights can be invoked by an individual. As art. 52(2) EU Charter sets out, EU Charter "principles" cannot generate the same legal effects as "rights". They need further implementation by EU institutions or Member States and are judicially cognisable only when the legality or interpretation of the underlying implementing act is at issue. Neither the Court nor the Advocate Generals have given much clarity so far regarding the "rights" vs "principles" debate.[102] And despite the Court's judgment in *Bauer et al.*, many of the fundamental social rights enshrined in Title IV on Solidarity seem to have been drafted as principles and do not thus confer rights on individuals that they can claim directly before national courts.[103] This may constitute

[99] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 paras 20-21.

[100] Case C-333/13 *Dano* ECLI:EU:C:2014:2358. See P Phoa, *EU Law as a Creative Process: A Hermeneutic Approach for the EU Internal Market and Fundamental Rights Protection* (Europa Law Publishing 2021). See also C Barnard, 'The Charter, the Court – and the Crisis' (2013) University of Cambridge Legal Studies Research Paper Series, and the case C-128/12 *Sindicatos dos Bancários do Norte* ECLI:EU:C:2013:149. Here, the Court concluded it lacked jurisdiction to review Portuguese national labour law reforms adopted on the basis financial assistance programs during the Eurozone crisis era. Furthermore, C Barnard, 'The Silence of the Charter: Social Rights and the Court of Justice' in S de Vries, U Bernitz and S Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument* cit. 173-188.

[101] See S de Vries, 'General Reflections on Current Threats and Challenges to, and Opportunities for, the Exercise of Economic Rights by EU Citizens' cit.

[102] See, for example, case C-176/12 *AMS* ECLI:EU:C:2014:2, in which the Court did not opt to provide clarity on the issue.

[103] S Prechal, 'Horizontal Direct Effect of the Charter of Fundamental Rights of the EU' cit. 421.

further constraints on the possibility of social mainstreaming via art. 9 TFEU across the EU's policies. After all, the stronger the legal effects of fundamental social rights enshrined in the EU Charter are, the easier it will become to integrate and enforce them in EU internal market law, and thus to meet the needs of art. 9 TFEU.

V.3 The (sometimes) flawed reasoning in the case law on EU free movement law

In some cases, the reasoning of the Court is flawed, which gives rise to the fear that EU free movement law may not be suitable to sufficiently accommodate social policy concerns. The language of a *prima facie* breach of the four freedoms may entail a more market-led and instrumental approach to the protection of social rights and values. This can particularly be seen in the *Viking* case, which illustrates how the fundamental right to take collective action and to strike may be "subsumed" under a rule of reason exception ground, *i.e.*, the protection of workers, instead of the Court examining whether the fundamental rights *as such* may justify a restriction on free movement.[104] This development, whereby "a written or unwritten ground of justification within that fundamental right must [...] always be found",[105] could thus threaten the equal ranking of fundamental rights.[106]

The broad interpretation of the four freedoms and the market access approach of the Court entail that (national) social policy initiatives fall relatively easy within the scope of the fundamental market freedoms, especially if the said policy discourages foreign entities of setting up shop or providing a service in another Member State.[107] Given that the market freedoms could engulf national measures that (even) have an indirect and potential effect on cross-border trade, foreign companies possess a wide array of possibilities to challenge national (social) policy that hinders their business. This trend is also shown in the earlier mentioned *AGET Iraklis* case, given that the Court considered the Greek legislation on collective redundancies to be at odds with the freedom of establishment. In a similar vein, *Alemo-Herron* illustrates how the Court may be induced to give more weight to economic rights in interpreting EU internal market legislation, which also pursues social policy aims.

Market-led considerations by the Court in social policy issues may thus mitigate the integration of EU social policy objectives in the EU's legislative action and, as a result, could form an obstacle to an effective use of the horizontal social clause. Art. 9 TFEU, in

[104] C Barnard, 'EU "Social" Policy: From Employment Law to Labour Market Reform' in P Craig and G De Búrca, *The Evolution of EU Law* (Oxford University Press 2021) 671.

[105] *Commission v Germany*, opinion of AG Trstenjak, cit. para. 183.

[106] See also T Novitz, 'A Human Rights Analysis of the Viking and Laval Judgments' (2008) CYELS 541; J Malmberg and T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' (2008) CMLRev 1130. The Court has been criticized for prioritizing economic rights over social rights: C Barnard, 'The Charter, the Court – and the Crisis' cit. See also *Commission v Germany*, opinion of AG Trstenjak, cit. para. 183.

[107] F Laagland, 'Member States' Sovereignty in the Socio-Economic Field: Fact or Fiction?' cit. 55.

its core, precisely aims to *balance* market and social objectives in the policies and initiatives of the Union. The afore-mentioned cases by the Court could be said to be at odds with this balancing exercise. Having said that, we consider the "business friendly" case law by the Court (such as *Viking* and *Alemo-Herron*) to be of a symptomatic nature and not structural, which mitigates the fear regarding the use of the horizontal social clause. The above-mentioned cases are not typical examples of how the Court normally deals with fundamental rights and public interests under the scheme of free movement.[108]

V.4. The question of competence, technological innovation and digitalization

Digitalization will lead to a wide range of ethical and legal challenges for the EU's internal market and the EU's social acquis, which may pose obstacles to an effective use of art. 9 TFEU. The impact of digitalisation is for example visible in the field of Artificial Intelligence (AI), as the recently proposed Artificial Intelligence Act (AI Act), which is based on art. 114 TFEU and adopts the typically internal market "New Approach harmonisation technique", shows.

AI systems play an increasingly important role in questions of economic inequality and social rights.[109] The underlying algorithm is designed in such a way that the AI system is instructed to "learn and adapt", often on an autonomous basis, which in turn can lead to algorithmic discrimination and makes it hard to pinpoint and prove infringements on people's life, health, and property.[110] The rights of privacy and data protection, non-discrimination, human dignity and self-determination, and freedom of expression can all be negatively affected by AI systems.[111] The AI Act forms an important first step in regulating this current legal no-man's-land, by – amongst others – introducing a risk-based categorisation of AI systems, with each system having a different set of harmonised rules.[112]

Nevertheless, social policy considerations have received only marginal attention in the debate about how to regulate AI, which runs contrary to the specific guidance of art. 9 TFEU to incorporate social elements in the EU's policy. The main priority of the EU legislature concerns (somewhat understandably) the internal market, privacy and data

[108] S Weatherill, 'From Economic Rights to Fundamental Rights' in S de Vries, U Bernitz and S Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 213-234.

[109] J Niklas and L Dencik, 'What Rights Matter? Examining the Place of Social Rights in the EU's Artificial Intelligence Policy Debate' (2021) Internet Policy Review 1.

[110] M Ebers, 'Standardizing AI: The Case of the European Commission's Proposal for an Artificial Intelligence Act' in LA Di Matteo, C Pongibò and M Cannarsa (eds), *The Cambridge Handbook of Artificial Intelligence: Global Perspectives on Law and Ethics* (July 2022) 4.

[111] *Ibid*. 3.

[112] Communication COM(2021) 206 final from the Commission of 21 April 2021 on the Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts.

protection, transparency and non-discrimination.[113] However, although the proposed AI act is not entirely silent on some social policy considerations – the AI Act states that AI systems used for recruitment, promotion, termination, and evaluation of workers should be classified as high-risk AI systems given their potential impact on future career prospects and livelihoods[114] – social policy considerations as a whole seem to have been insufficiently taken into account. The proposal, for example, lacks specific provisions on AI's impact on workers' rights or (government-issued) social services. [115] In addition, the text may risk curtailing the freedom of social partners and employee representation bodies in the implementation and deployment of AI software intended to be used at work.[116] Given the autonomous nature of AI, social partners and employee representation bodies could lack sufficient insight as to *how* the AI system works and processes personal data, and whether practices like algorithmic bias can be prevented or mitigated.

Based on this, it could be argued that the EU legislator has missed the "Article 9 TFEU boat" in designing the proposed AI Act, especially when it concerns adequate protection for workers and other vulnerable groups. As such, the proposed AI Act shows the difficulty of balancing social policy objectives with the – often – primary aims of data protection, privacy and non-discrimination in the regulation of digital (and disruptive) technologies. In this interplay, an effective and prominent use of art. 9 TFEU in future regulation, making it a *true* guiding principle in EU legislation, seems a prerequisite for ensuring adequate social rights protection in the coming digital decades, in which new and (even more) disruptive technologies will continue to be developed.

VI. Conclusion

In this *Article*, we looked at the role of art. 9 TFEU in social mainstreaming in EU internal market law. Art. 9 TFEU calls upon the EU institutions to take their responsibility in achieving a more socially inclusive internal market seriously. Yet, art. 9 TFEU is hardly ever mentioned explicitly by the Court or the EU legislator. We positioned art. 9 TFEU between hope and fear. The story of hope reveals that, despite the lack of explicit or clear references to art. 9 TFEU, EU internal market law has become – or has the potential to become – more socially inclusive. There are various pathways followed by the Court to take account of social rights and social interests, which range from an "immunity" or balancing approach, to a more constitutionally and socially conditioned internal market. Meanwhile, the EU legislature starts using the potential of the legal bases in the fields of the

[113] J Niklas and L Dencik, 'What Rights Matter?' cit. 20.

[114] Communication COM(2021) 206 final cit. para. 36.

[115] See A Ponce Del Castillo, 'The AI Regulation: Entering an AI Regulatory Winter? Why an ad hoc Directive on AI in Employment is Required' (2021) ETUI Policy Brief 7.

[116] See A Cefaliello and M Kullmann, 'Offering False Security: How the Draft Artificial Intelligence Act Undermines Fundamental Worker Rights' (2022) European Labour Law Journal 561-562.

internal market and social policy, inspired by the European Pillar of Social Rights and art. 9 TFEU, to adopt more socially robust legislation.

Nevertheless, although "the social" seems to be increasingly firmly embedded in the current Treaty framework and in EU internal market law, there are fears that the language of mainstreaming promises more than what can be delivered by the EU, considering *inter alia* the limited legislative competences for the EU in the social policy domain. Some of these fears can be overcome, some relate to more structural, legal weaknesses including a lack of competences, and for others we need political willpower and courage.

ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

Edited by Evangelia Psychogiopoulou

THE INACTIVE INTEGRATION CLAUSE: CAN ART. 12 TFEU SHAPE FUTURE SUSTAINABLE CONSUMER POLICIES?

FEDERICA CASAROSA*

ABSTRACT: The integration clause contained in art. 12 TFEU has been rarely invoked in European policymaking. This is due to the generic language adopted by the EU legislator, who does not impose an obligation on the EU bodies to integrate consumer protection in other Union policies or on Member States, thus reducing the justiciability of the provision. Compared to other TFEU provisions dedicated to consumer protection, the strength of art. 12 TFEU seems extremely low. However, art. 12 TFEU may come in handy in the development of a more sustainable economy in which the interests of consumers are not only focused on strengthening the internal market but also on safeguarding the environment and reducing industrial waste. This *Article* evaluates whether and how art. 12 TFEU may impact the choices of European bodies on the circular economy, the European Green Deal and the recent Consumer Agenda strengthening the role of consumers in the green transition.

KEYWORDS: consumer protection – sustainability – horizontal clause – policy integration – internal market – green transition.

I. INTRODUCTION

Among the horizontal clauses included in Title II of the TFEU, the integration principle contained in art. 12 addressing consumer protection is one of the less invoked in European policymaking. This lack of application can be justified in several ways: first, the

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ISSN 2499-8249
doi: 10.15166/2499-8249/620

particular development process that has characterised consumer protection in the framework of Union policies; and second, the terminology used by the EU legislator to qualify the role of consumer protection *vis-à-vis* other policies, which also affected the justiciability of the provision. As a result, compared to other horizontal provisions in the same title such as those on equality (art. 8), on non-discrimination (art. 10), on environmental protection (art. 11) and also *vis-à-vis* other TFEU provisions dedicated to consumer protection such as arts 114 and 169 TFEU, the impact of art. 12 TFEU seems extremely low.[1] However, this legal provision may come in handy in the development of a more sustainable economy in which the interests of consumers are not only focused on strengthening the internal market but also on safeguarding the environment and reducing industrial waste. In fact, the most recent Consumer Agenda[2] provides an interesting starting point to evaluate whether and how art. 12 TFEU may impact the choices of European bodies on the circular economy, the European Green Deal and the recent legislative proposal strengthening the role of consumers in the green transition.

This *Article* first addresses the development of European consumer protection policy, which led to the inclusion of art. 12 in the TFEU among the horizontal clauses (section II). Then it clarifies the limits that emerge from the wording of the provision (section III). The analysis subsequently focuses on the potential application of art. 12 TFEU in recent European interventions addressing environmental protection and shows the added value that this provision may have when looking at sustainability policies (section IV). Conclusions follow.

II. The development of European consumer protection policy

Consumer protection is one of the "young areas" of law that has been subject to significant changes in recent decades. Although the first laws addressing the protection of the public against commercial fraud date back to the French revolution and were followed by criminal legislation in the early 20th century, the first qualification of consumer protection as a systematic policy goal can be found in the aftermath of World War II.[3] It

[1] It must be acknowledged that other clauses have also had limited impact on EU policy making, for instance art. 9 – the social horizontal clause – is deemed to still have some potential to be exploited. See V Šmejkal, 'The Horizontal Social Clause of Art. 9 TFEU and its Potential to Push the EU towards Social Europe' (Charles University in Prague Faculty of Law Research Paper No. 2016/III/1).

[2] Communication COM(2020) 696 final of the European Commission to the European Parliament and the Council of 13 November 2020 New Consumer Agenda Strengthening consumer resilience for sustainable recovery.

[3] A first express definition of consumer protection objectives can be found in President John F Kennedy's famous speech in 1962, which proposed establishing four basic consumer rights. The speech was later called the Consumer Bill of Rights. See a more detailed description of the legislation adopted in each Member State in J Stuyck, 'European Consumer Law After the Treaty of Amsterdam: Consumer Policy in or Beyond the Internal Market?' (2000) CMLRev 368 ff and also I Benöhr and HW Micklitz, 'Consumer Protection and Human Rights' in G Howells and others (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2010) 16.

followed the evolution of the market and the growth in transnational trade, resulting in enactment of legislation and regulations with the purpose of protecting consumers from market abuse.[4]

At the EU level, consumer protection was initially conceived as a means to integrate the economies of the Member States and was aimed almost exclusively at enhancing transnational market performance. In other words, consumers were the final beneficiaries of an efficient integrated common market.[5] Consumer protection was mentioned in the Treaty establishing the European Economic Community (TEEC) only as a reference in arts 85, 86 and 92(2) TEEC regarding economic competition and in arts 39 and 40 TEEC regarding common agricultural policy.

Then, consumer protection policy was put at centre stage with a Council Resolution of 14 April 1975 on a preliminary European Economic Community programme for consumer protection and information policy.[6] For the first time this set out the rights which should be safeguarded, namely: the right to protection of health and safety; the right to protection of economic interests; the right of redress; the right to information and education; and the right of representation (the right to be heard). Although the Council Resolution did not provide a legal basis for further legal intervention, it can be interpreted as a moment of change of perspective: from a competition-based approach, in which the main points of reference were producers and their reciprocal behaviours, to a more holistic perspective in which the balance between producers and consumers is also considered so as to enhance the confidence of the latter in the market.

In the same period, a few pieces of secondary legislation were adopted addressing issues related to consumer protection, namely the Directive on liability for defective products,[7] the Directive on consumer contracts negotiated away from business premises[8] and the Directive on consumer credit.[9] In all these directives the legal basis adopted was art. 100 TEEC addressing the approximation of laws affecting the establishment or functioning

[4] For a history of the early years of consumer law and policy at the EU level, see H Micklitzand and others (eds), *The Fathers and Mothers of Consumer Law and Policy in Europe: The Foundational Years 1950-1980* (European University Institute 2019); L Krämer, 'The Origins of Consumer Law and Policy at EU Level' in H Micklitz (ed.), *The Making of Consumer Law and Policy in Europe* (Hart Publishing 2021) 13.

[5] S Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2013 second edition); I Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (3rd edn Hart Publishing 2012).

[6] Resolution of the European Council of 14 April 1975 on a preliminary European Economic Community programme for consumer protection and information policy.

[7] Directive 85/374/EEC of the European Council of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, p. 29-33.

[8] Directive 85/577/EEC of the European Council of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, p. 31-33.

[9] Directive 87/102/EEC of the European Council of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, p. 48-53.

of the common market, still confirming that consumer protection can be qualified as a by-product of the common market (later the internal market) programme.

A following step was the Single European Act (SEA), which in 1987 included a provision entitling the European institutions to adopt legal regulations addressing consumer protection.[10] Art. 18 of the Single European Act (now, art. 114 TFEU) in its proposals for measures addressing the establishing and functioning of the internal market concerning health, safety, environmental protection and consumer protection provides that the European Commission will take as a base a high level of protection. Although the legal basis of art. 114 TFEU triggered a new wave of legislation,[11] consumer protection was still not qualified as an autonomous policy but remained embedded in the internal market objective.[12]

A step towards policy autonomy was achieved with the adoption of the Maastricht Treaty in 1993, in which a new art. 129(a) of the Treaty establishing the European Community (TEC) was included qualifying consumer protection as a single policy.[13] Art. 129(1) provided that "[t]he Community shall contribute to the attainment of a high level of consumer protection through: (a) measures adopted pursuant to art. 100a in the context of the completion of the internal market; (b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers". In both cases the measures adopted should follow the new co-decision procedure introduced in the same Treaty, and in the case of measures adopted by Member States they were not prevented from maintaining or introducing more stringent protective measures.

It is clear that art. 129(a) TEC still identified as a legal basis for European legislative intervention the internal market (under letter (a)), although it also included an additional element which was previously absent, namely actions pursued by Member States in

[10] J Stuyck, 'European Consumer Law After the Treaty of Amsterdam' cit. 364.

[11] After the entry into force of the SEA, further important consumer protection directives were adopted: Directive 90/314/EEC of the European Council of 13 June 1990 on package travel, package holidays and package tours; Directive 92/59/EEC of the European Council of 29 June 1992 on general product safety; Directive 93/13/EEC of the European Council of 5 April 1993 on unfair terms in consumer contracts; Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts – Statement by the Council and the Parliament re art. 6(1) – Statement by the Commission re art. 3(1), first indent; Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

[12] J Lazíková, 'The Consumer Policy in the EU Law / Spotrebiteľská Politika V Práve Eú' (2016) EU Agrarian Law 21-26.

[13] See, for instance Opinion 96/C 39/12 of the Economic and Social Committee of 30 March 1995 on the 'Single Market and Consumer Protection: Opportunities and Obstacles'.

order to achieve the object of consumer protection in which EU intervention can play a subsidiary role.[14]

However, the interpretation provided by the CJEU of this art. 129(a) TEC moved back consumer policy to a cross-sectional policy that pursues objectives that are also part of the internal market ones. This was clearly affirmed by the Court in case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, in which the Court affirmed that consumer protection was not the sole objective (at that time) of the Community. The Court stated "the Directive aims to promote the right of establishment and the freedom to provide services in the banking sector. Admittedly, there must be a high level of consumer protection concomitantly with those freedoms; however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State".[15]

The same approach was confirmed in the reform undertaken with the Amsterdam Treaty,[16] which renumbered art. 129(a) as art. 153 (TEC). According to the literature, the change in content was the result of a compromise between the Nordic countries, Germany and Great Britain, the latter two being opposed to an increased allocation of powers to the European Community.[17] However, limited information is available on the preparatory work. What is clear is that the new wording of art. 153 TEC added a set of new features to the consumer protection policy. First, it acknowledged the right to information, the right to education and the right for consumers to organise themselves in order to safeguard their interests as consumers rights. This was a clear step forward, as previously in art. 129(a) the reference to "proper information" was only mentioned alongside other consumer interests such as health, safety and economic interests. The list of consumer rights and interests, moreover, was no longer part of the paragraph dedicated to actions that are not directly aimed at achieving the internal market objective. Instead, the rights and interests were defined as applying to both internal and non-internal market procedures.

A second important change was the wording of art. 153(3) TEC affirming that "The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to art. 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States". Accordingly, not only could the European institutions adopt measures aimed at achieving the internal market objectives but they could also take action when measures were adopted by Member States and the Community supported and supplemented them. Finally, the most interesting part for the purposes of art. 153 was the

[14] On the subsidiary role of European legislation in this case, see case C-192/94 *El Corte Inglés v Blázquez Rivero* ECLI:EU:C:1996:88.

[15] Case C-233/94 *Germany v Parliament and Council* ECLI:EU:C:1997:231 para. 48.

[16] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997].

[17] As cited in J Stuyck, 'European Consumer Law after the Treaty of Amsterdam' cit.

inclusion in para. 2 of a provision – the first appearance of a horizontal clause – according to which consumer protection requirements should be taken into account by the European legislator when "defining and implementing other Community policies and activities".

Later, the Lisbon Treaty[18] reorganised art. 153 addressing consumer protection not only by renumbering art. 153 TEC as art. 169 TFEU but also by adding consumer protection to the competences shared between the Union and the Member States pursuant to art. 4(2) TFEU and introducing the horizontal consumer protection clause in art. 12 TFEU. This reorganisation had para. 2 of art. 153 TEC moved from the new wording of art. 169 TFEU and gaining autonomous status in art. 12 TFEU. Although scholars had advocated for a reform of the consumer protection horizontal clause in art. 153(2) TEC so as to strengthen the argument in favour of clearer recognition of the role of EU law in promoting consumer confidence in the market,[19] the political compromise achieved by the Member States did not take into account the concern for effective consumer protection. In fact, the transfer of the consumer protection integration clause to an autonomous provision in art. 12 TFEU was justified by the fact that consumer protection could not be limited to the rights and interests listed in art. 169 TFEU.[20] According to Jozon,[21] the wording of art. 12 TFEU regarding "consumer protection requirements" may be interpreted as including not only the consumer rights listed in art. 169(1) but also the legitimate interests and freedoms of consumers pursued by fundamental rights and the general principles of EU law.

Although the new position of the consumer protection integration clause in the treaty system could have provided better visibility and more attention to the harmonisation of consumer protection and its integration in the framework of various EU policies,[22] the wording and the obligations allocated to the EU institutions by art. 12 TFEU still lowered its impact on European policymaking.

[18] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007].

[19] See, for instance, HW Micklitz, N Reich and S Weatherill, 'EU Treaty Revision and Consumer Protection' (2004) Journal of Consumer Policy 379, in which the authors suggest the following reformulation: "The achievement of a high level of consumer protection shall be an essential objective in the definition and implementation of other Union policies and activities. The interest of the consumer in participating actively and confidently in the internal market shall be fully taken into account in the development of the Union's activities". According to the authors, such rewording would have had the effect of changing the interpretation of the competence of the Union vis-à-vis the application of art. 114 TFEU on the internal market objective.

[20] Note that art. 169 TFEU lists the same rights and interests already mentioned in art. 153 TEC, namely health, safety and economic interests and the right of consumers to information, education and to organise themselves in order to safeguard their interests. For more, see S Garben, 'Article 169 TFEU' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019) 1458.

[21] M Józon, 'Article 12 (Consumer Protection): ex-Article 153.2 TEC' in J B Hermann and S Mangiameli (eds), *Treaty on the Functioning of the European Union: A Commentary* (Springer 2021) 314.

[22] See I Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press 2013); AS De Vries, 'The Court of Justice's "Paradigm Consumer" in EU Free Movement Law' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Hart Publishing 2016) 416.

However, the Lisbon Treaty had a positive effect by introducing art. 6 TFEU, which affirms that the Charter of Fundamental Rights of the European Union (Charter), drafted in 2000, acquires the same legal value as the Treaties and becomes legally binding. This led to establishing a connection between consumer protection and fundamental rights, as a specific article dedicated to consumer protection is included in the EU Charter, namely art. 38 Charter. Consumer protection is included in Chapter IV of the Charter on "Solidarity", where art. 38 Charter affirms that "Union policies shall ensure a high level of consumer protection". Regardless of its short and concise wording, art. 38 Charter represents an important change in the European approach as it shows that consumers are valued not only as market actors but also as human beings.[23] While this norm aims at improving public confidence both in the market and in the institutions of the EU, it also indicates that consumer protection is now regarded as a fundamental social goal in the Union.[24]

Academic literature initially suggested that art. 38 Charter would support the application of art. 12 TFEU by providing a "human dimension" to consumer protection, possibly leading to enhancing social justice.[25] However, this was not the case due to the legal status of art. 38 Charter. According to its wording, this article on consumer protection is intended as a *principle* and not as a subjective right. Pursuant to art. 51(1) Charter, principles shall be "observed" (whereas rights shall be "respected"), leading to them having limited justiciability.[26] A clearer indication in this respect is given in art. 52(5) Charter, which states that principles may be implemented by EU legislative and executive acts and by acts of Member States when they are implementing EU law. Moreover, principles "shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality".[27] This implies that principles may be used to analyse the validity of legislative acts, but they do not provide a basis for direct claims for positive measures.[28] This does not exclude the possibility that

[23] I Benöhr and H-W Micklitz, 'Consumer Protection and Human Rights' in G Howells and others (eds), *Handbook of Research on International Consumer Law* cit.

[24] This is not the only Charter provision which may help to further consumer protection as art. 1 Charter on human dignity, art. 3 Charter on the right to the integrity of the person, art. 8 Charter on data protection, art. 11 Charter on freedom of expression and information, and art. 12 Charter on freedom of assembly and of association may be relevant to promoting consumer interests. However, to date few CJEU cases have addressed these dimensions from the consumer protection perspective. See HW Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* cit. 21 part. 35-36.

[25] See AS De Vries, 'The Court of Justice's "Paradigm Consumer" in EU Free Movement Law' cit. 416; H-W Micklitz, N Reich and S Weatherill, 'EU Treaty Revision and Consumer Protection' cit. 382.

[26] See N Lazzerini, *La Carta dei diritti fondamentali dell'Unione europea: I limiti di applicazione* (Franco Angeli 2018).

[27] See art. 52(5) Charter last sentence.

[28] See case C-470/12 Pohotovosťs. r. o. v Miroslav Vašuta ECLI:EU:C:2014:101 and also the decision of the Czech Constitutional Court of 10 April 2014 III. ÚS 3725/13 that affirmed "Consumer protection cannot be deemed to be one of the fundamental rights and freedoms guaranteed under the constitution [...]; constitutions usually speak not of a subjective right but rather of a constitutionally set goal of State policy [...]

legal principles may evolve into a subjective right through the development of case law, but to date the CJEU case law has not yet made any steps in this direction.

Another limitation of art. 38 Charter is the fact that it is not a competence norm which allocates new powers to EU bodies and neither does it modify existing ones. Accordingly, art. 38 Charter cannot be used as the sole legal basis for secondary legislation but instead it is to be used jointly with competence provisions such as art. 169 TFEU and art. 114 TFEU. This is different to art. 12 TFEU, which addresses the competence of the EU by referring to the consumer protection requirement and demands a coherent approach in EU policy and measures, although within limits, which will be addressed in the next section.

III. The limits of art. 12 TFEU

Art. 12 TFEU reads as follows: "Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities". Analysis of the wording and the contextual legal framework of this provision allows one to identify a set of crucial factors that limit its impact on EU policymaking. It is important to clarify that art. 12 TFEU is to be read in conjunction with art. 4(2) TFEU.[29] The latter allocates the EU and the Member States shared competence on consumer policy without extending the powers of the EU. Therefore, art. 12 TFEU should be interpreted within the same boundaries applicable to shared competence.

Regarding the addressees of art. 12 TFEU, they are not explicitly mentioned. However, the article refers to the activity of "defining and implementing Union policies". This may be interpreted in a broad sense as implementing EU law and policies, not only by the EU institutions, EU agencies, other EU bodies and so on but also by Member States. Although the provision does not expressly mention Member States, they are also involved in the implementation and enforcement of EU policies affecting consumers at the national level.[30] Moreover, the terminology refers not only to preparatory acts, but it explicitly mentions the

Article 38(2) [of the Charter] is also not a subjective right enforceable directly by a legal action, but is a principle that EU institutions and Member States reflect when transposing EU legislation, whereas it is possible to claim the principle of consumer protection before the courts only for the purpose of interpretation and to check the legality of these acts, as set out in Article 52, section 2 of the EU Fundamental Rights Charter and explanatory reports to the Charter" (translation available in the FRA Annual Report: Fundamental rights: challenges and achievements in 2014 – Annual report Asylum, migration and borders, Sex, sexual orientation and gender hate crime, available at fra.europa.eu).

[29] Art. 4(1) TFEU provides: "The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6. 2. Shared competence between the Union and the Member States applies in the following principal areas: (a) internal market; [...] (f) consumer protection".

[30] For an analysis of the policy approaches in Member States regarding consumer protection, see MH Austgulen, 'Understanding National Preferences in EU Consumer Policy: A Regime Approach' (2020) Journal of Consumer Policy 767; S Nessel, 'Consumer Policy in 28 EU Member States: An Empirical Assessment in Four Dimensions' (2019) Journal of Consumer Policy 455.

implementation phase, thus also secondary law should be interpreted within the scope of art. 12 TFEU. However, this requirement should not affect the Member States' broad discretion in the process of implementing EU consumer policy, and neither should it affect them acting autonomously, namely when initiating or intervening in other EU policies that are not directly addressing consumer protection, still that may raise consumer protection concerns. In case of autonomous action, art. 12 TFEU may bind the Member States to consider consumer protection requirements in the process of implementing and enforcing Union acts only within the scope of the EU policy concerned.[31] However, neither the Member States nor the EU institutions have tools under art. 12 TFEU to pursue a corrective action before the Court of Justice when, respectively, the EU or the Member States have not taken in due consideration the consumer interests in other policies.

A second element, linked to the previous one, is the justiciability of the provision. This article can be qualified as a *principle* norm that does not allocate any subjective rights to consumers *vis-à-vis* the EU institutions and Member States.[32] Although in principle the integration clauses included in Title II of the TFEU are legally binding and therefore capable of being used by the Court of Justice as a standard for assessing the validity of EU measures or the compatibility of national implementing measures with the Treaties,[33] the formulation of art. 12 TFEU does not support this legal status: the provision only affirms that consumer protection "shall be taken into account" when defining Union policies, without providing criteria to apply when such "consideration" is carried out. The issue may emerge both in cases when consumer protection is disregarded and also when consumer protection is considered but then evaluated as not relevant to modify the policy approach. In both cases the absence of established criteria may leave an extremely wide discretionary power to EU institutions (and Member States). Only when secondary law confers subjective rights on individuals may art. 12 TFEU become relevant as guidance in order to verify if the interests of consumers have been duly taken into account.[34]

A third consideration emerges when looking at the level of protection required by art. 12 TFEU: the provision only requires the *integration* of consumer protection in the policy-drafting process and its implementation without expressing any preference for consumer protection over other policy goals involved. The article therefore requires at least a balancing exercise so that other EU policies do not impact negatively on consumer

[31] See M Józon, 'Article 12 TFEU' cit. 316.

[32] In this sense, it may resemble art. 38 Charter discussed above.

[33] B De Witte, 'Conclusions: Integration Clauses: A Comparative Epilogue' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 186.

[34] F Seatzu, 'On the Current Meaning and Potential Effects of the Horizontal Consumer Clause of Article 12 of the TFEU' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2018) 128.

protection.[35] However, this can be compared with art. 169(1) TFEU and art. 114 TFEU, which instead push the threshold of protection higher. Both provisions affirm that legislative proposals addressing consumer protection "will take as a basis a *high level* of protection" (emphasis added). Therefore, the strength of art. 12 TFEU seems lacking, leaving the EU institutions to select other Treaty provisions to support legislative interventions on consumer protection.[36]

A final element that can be raised is the absence of criteria or guidance on policies and actions in which the interests of consumers should be considered. Although some scholars affirm that the obligation included in art. 12 TFEU is only a procedural one[37] asking the EU institutions or the Member States to state the reasons for addressing or, conversely, disregarding the interests of consumers in the policy or action adopted, others interpret the provision as a substantial obligation. According to Stuyck,[38] for instance, "the point of view of consumers can be taken into account in respect of virtually every policy", from agricultural policy to competition policy and environmental policy. Although the wording in this case could have potential to expand the impact of art. 12 TFEU outside the boundaries of the internal market, the EU institutions have rarely exploited this, showing that consumer protection tends to be interpreted as limited to market aims.[39]

IV. Coordination between consumer and environmental policy: a new avenue to activate art. 12 TFEU?

Given the limitations stemming from the wording and interpretation of art. 12 TFEU, it is not surprising that the provision has so far remained inactive. Looking in particular at art. 169(2) TFEU, it emerges that consumer protection can be addressed *indirectly* in pursuit of the internal market objective. As Garben highlights, consumer protection lies between "differing political economic conceptions of the market, society, and the role of the EU therein".[40] If the choice of the EU institutions is to adopt a more liberal approach, legislative intervention may focus, on the one hand, on removing national rules that constitute potential barriers to the free movement of products and services and, on the other, on the

[35] Note that N Reich in 'Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam' (1999) Verbraucher und Recht 4, when commenting on the previous location of the provision as art. 153(2) TEC, affirms that it could be interpreted as a request to EU institutions to state the reasons for the policy choices made, indicating whether or not and why the interests of consumers were taken into account.

[36] However, see F Seatzu, 'On the Current Meaning and Potential Effects of the Horizontal Consumer Clause of Article 12 of the TFEU' cit. 126, where the author affirms that the wording (in particular the use of adjectives such as high, proper and vulnerable) used in different treaty provisions does not affect their practical effect, as "both the TFEU and TEU employ these words rather freely or generically".

[37] N Reich, 'Verbraucherpolitik und Verbraucherschutz im Vertrag von Amsterdam' cit. 4.

[38] J Stuyck, 'European Consumer Law After the Treaty of Amsterdam' cit. 386.

[39] M Józon, 'Article 12 TFEU' cit. 319; G Howells, C Twigg-Flesner and T Wilhelmsson, *Rethinking EU Consumer Law* (Routledge 2017).

[40] S Garben, 'Comment to Article 169 TFEU' cit. 1459.

definition of some substantive (harmonised) standards for consumer protection. This has led to the adoption of legislative acts such as Directive 2005/29 on unfair commercial practices[41] and Directive 2011/83 on consumer rights.[42] Although they address the interests of consumers, both directives were based on art. 114 TFEU concerning the internal market.[43]

A braver approach would require the EU institutions to play a pro-active role in the pursuit of consumer protection without reducing it to an incidental element in the internal market objectives. It is true that consumer protection has not been missing as an element in the policies and activities of the EU, but mainstreaming consumer protection still remains work in progress. Some hints can be noted on the awakening of the integration clause going beyond the limits of the internal market by exploiting possible interactions with other policy objectives by coordinating consumer protection objectives with sustainability and more generally environmental protection.

It must be acknowledged that environmental protection is the subject of another horizontal clause, namely art. 11 TFEU.[44] This not only provides that environmental requirements "must" be integrated in other Union policies and activities but also gives environmental protection priority over other TFEU goals.[45] Art. 11 TFEU refers explicitly to sustainable development, which may help in linking consumer and environmental protection.

Sustainability as a legal concept was defined in the 1992 Rio Declaration as a result of the United Nations Earth Summit, which saw endorsement by 178 states.[46] The declaration brought to the world's attention the two sides of the coin regarding the influential factors underpinning risks to the global environment: unsustainable harmful over-

[41] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

[42] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

[43] Note that the full harmonisation approach adopted in both Directives triggered a large number of preliminary rulings sent to the CJEU regarding the compliance of national legislation with European law. See S Garben, 'Comment to Article 169 TFEU' cit. 1462.

[44] Art. 11 TFEU provides that "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".

[45] See J Nowag, 'Article 11 TFEU and Environmental Rights' in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 155; B Sjåfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States' in B Sjåfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 51; and the contribution to this *Special Section* written by V Karageorgou, 'The Environmental Integration Principle: Regulative Content and Functions also in Light of New Developments, such as the EU Green Deal' (2023) European Papers (forthcoming).

[46] United Nations Conferences, Environment and Sustainable Development, *United Nations Conference on Environment & Development* www.un.org.

production and unsustainable consumption. Accordingly, sustainability was defined as the objective of meeting the needs of the present market and society "without compromising the ability of future generations to meet their own needs".[47]

Sustainability covers the entire product lifecycle from production-related investment decisions to logistics and marketing, and from retailing to waste management.[48] From this perspective, both production and consumption should be addressed in policies that aim to reduce ecological footprints and the global ecological deficit.[49] Sustainable consumption policies may then impact the choices available to consumers in order to achieve the sustainability goals. To illustrate this, the current legislative framework provided in the Consumer Sales Directive[50] provides as a solution in the case of a good breaking due to a defective production process either substitution of the good and eventually a claim for damages or repair of the defective good by the manufacturer. The first choice seems more appealing for the consumer as he/she will receive a new non-defective good. However, it may not be the most suitable choice to achieve the objective of sustainability. In fact, substitution of the good would increase the amount of waste goods and maintain the high level of industrial production.[51] An alternative that would be more efficient in safeguarding the environment could be the possibility to repair (or recycle) the good in question.

In more detail, art. 3(3) of the Consumer Sales Directive provides the remedies available to consumers for non-conformity of goods: the consumer can in the first place ask for repair or replacement free of charge. Although the choice to ask for repair is available, the Directive does not provide any incentive to opt for repair instead of replacement. Moreover, also when the consumer opts for repair, the seller can in turn refuse to repair and offer replacement if repairing would be "disproportionate" and would cause "unreasonable costs".[52] In order to achieve sustainable results, the choices for consumers – and

[47] See A do Amaral Junior, L de Almeida and L Klein Vieira, 'An Introduction to Sustainable Consumption and the Law' in A do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption: The Right to a Healthy Environment* (Springer 2020) 3; M Geissdoerfer and others, 'The Circular Economy: A New Sustainability Paradigm?' (2017) Journal of Cleaner Production 757 at 766.

[48] A do Amaral Junior, L de Almeida and L Klein Vieira, 'An Introduction to Sustainable Consumption and the Law' cit. 4.

[49] See T Bourgoignie, 'Sustainable Consumption and Obsolescence of Consumer Products' in A do Amaral Junior, L de Almeida and L Klein Vieira (eds), *Sustainable Consumption* cit. 29.

[50] Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, p. 28–50.

[51] See G Lipovetsky, *Le bonheur paradoxal: Essai sur la société d'hyperconsommation* (Gallimard 2006).

[52] See V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment Through Consumer Law' (2020) Journal of Consumer Policy 235-236; E Terryn, 'A Right to Repair? Towards Sustainable Remedies in Consumer Law' (2019) European Review of Private Law 851; A Beckers, 'Environmental Protection meets Consumer Sales: The Influence of Environmental Market Communication on Consumer Contracts and Remedies' (2018) European Review of Contract

also for manufacturers – could shift towards criteria that are not limited to price and quality but also relate to the potential effects on the environment, preferring solutions that are less or not at all damaging to the environment.

The example given clarifies that sustainability and consumer protection do not always converge from the short-term perspective: consumer protection aims at diminishing the asymmetry between businesses and consumers, in particular by providing consumers with information that enables them to assess the quality of goods and services without taking into account the effects of consumer choices on the environment.[53] However, if we address the interplay between sustainability and consumer protection from the long-term perspective, climate and environmental policies that, for instance, support more sustainable energy, housing, mobility, food, services and products may offer opportunities to improve consumers' health, safety and well-being, and to bring people economic value.[54]

Until a few years ago, interventions that went towards adapting consumer choices toward sustainability were present although still fragmented across multiple areas. This was the case, for instance, with the introduction of the eco-label, which is a voluntary award scheme intended to promote products with a reduced environmental impact during their entire lifecycle able to provide consumers with accurate, non-deceptive, science-based information on the environmental impact of products;[55] the Product Safety and Market Surveillance Package, which ensures that products on the market conform with the applicable laws and regulations and comply with existing EU health and safety requirements;[56] and the Rapid Information System (RAPEX), which allows exchanges of information between EU countries and the European Commission on products posing a serious risk to the health and safety of consumers.[57] As a legal basis, most of these interventions used the internal market clause, namely art. 114 TFEU, with specific attention given to achieving a high level of consumer protection.[58]

Law 157. See also the connected issue of technical and economic obsolescence in T Bourgoignie, 'Sustainable Consumption and Obsolescence of Consumer Products' cit. 27.

[53] This point was clearly explained in C Kye, 'Environmental Law and the Consumer in the European Union' (1995) JEL 7, 31: "[c]onsumers may advocate for a better environment, but they may advocate even more strongly in favour of the right to the widest possible selection of goods at the cheapest price".

[54] See BEUC, *Climate Action as an Opportunity for All – How the Green Transition Should and Can Benefit Consumers Daily Lives* www.beuc.eu 17, where it is underlined that "this economic assessment of the costs of the transition for consumers need to be looked at as a whole, and not in silos. This means that the price increase of some activities might well be compensated by savings in other areas".

[55] Regulation (EC) 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, p. 1-19.

[56] Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, p. 4-17.

[57] Implementing Decision (EU) 2019/417 of the Commission of 8 November 2018 laying down guidelines for the management of the European Union Rapid Information System 'RAPEX' established under Article 12 of Directive 2001/95/EC on general product safety and its notification system.

[58] See, for instance, recitals 4 and 5 of the General Product Safety Directive cit., where it is explicitly stated that: "4) In order to ensure a high level of consumer protection, the Community must contribute to

A turning point is to be found in the 2020 Consumer Agenda,[59] in which the European Commission explicitly combines consumer protection and sustainability, coordinating its actions by also taking into account the previous Circular Economy Action Plan,[60] the European Green Deal[61] and the Communication on shaping Europe's digital future.[62]

IV.1. The 2020 Consumer agenda

The title of the new Consumer Agenda sets the two main objectives that will guide policy strategy for the subsequent five years, namely "strengthening consumer resilience for sustainable recovery". The Consumer Agenda identifies five key priority areas while also trying to address the immediate needs of consumers in view of the COVID-19 pandemic: *i)* the green transition; *ii)* the digital transformation; *iii)* redress and enforcement of consumer rights; *iv)* specific needs of certain consumer groups; and *v)* international cooperation.

From the beginning the Consumer Agenda clarifies that the policy objectives listed are to be interpreted according to a holistic approach reflecting "the need to take account of consumer protection requirements in the formulation and implementation of other policies and activities" pursuant to art. 12 TFEU. However, the Commission only provides lip-service to the provision as limited efforts are devoted to implementing such a holistic approach. If the interplay between environmental and consumer protection is considered in actions dedicated to the green transition, less attention is given to the governance mechanisms that can be put in place in order to integrate consumer interests in policies addressing the green transition. For example, the Consumer Agenda identifies measures that can enable consumers to play an active role in climate neutrality, preserving natural resources and biodiversity, and reducing water, air and soil pollution. The Agenda then lists and coordinates the existing initiatives already set up in the European Green Deal and the Circular Economy Action Plan with additional efforts to improve sustainable

protecting the health and safety of consumers. Horizontal Community legislation introducing a general product safety requirement, and containing provisions on the general obligations of producers and distributors, on the enforcement of Community product safety requirements and on rapid exchange of information and action at Community level in certain cases, should contribute to that aim. (5) It is very difficult to adopt Community legislation for every product which exists or which may be developed; there is a need for a broad-based legislative framework of a horizontal nature to deal with such products, and also to cover lacunae, in particular pending revision of the existing specific legislation, and to complement provisions in existing or forthcoming specific legislation, in particular with a view to ensuring a high level of protection of safety and health of consumers, as required by Article 95 of the Treaty".

[59] Communication COM(2020) 696 final cit.

[60] Communication COM(2020)98 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2020 'A new Circular Economy Action Plan For a Cleaner and more Competitive Europe'.

[61] Communication COM(2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019 The European Green Deal.

[62] European Commission, *Communication: Shaping Europe's Digital Future* ec.europa.eu.

consumption choices. In particular, the proposed actions include consumer access to information on the environmental characteristics of products, including their durability, reparability or upgradeability, and the reliability and comparability of such information.[63] As a corollary to the enhanced opportunities to gather more targeted and understandable information on sustainable products and process, the Commission envisages an action against so-called "greenwashing", *i.e*. "information that is not true or presented in a confusing or misleading way to give the inaccurate impression that a product or enterprise is more environmentally sound".[64] In this case the revisions of the Unfair Commercial Practices Directive[65] and the Consumer Rights Directive[66] will require companies to substantiate their environmental claims using product and organisation environmental footprint methods to provide consumers with reliable environmental information.[67] These actions are to be supported by the digital transformation as digital information could empower consumers to check the reliability of information and make comparisons between products, but also make consumers aware in a more holistic way of their environmental impacts. Another intervention aims to promote repair and recycle options in the review of the Sale of goods Directive. The remedy options will give preference to repair over replacement and the minimum liability period for new and second-hand goods will be extended with a new liability period starting after repair.[68]

When looking at the governance mechanisms envisaged, however, the Consumer Agenda only focuses on the creation of a Consumer Policy Advisory Group. This should involve all the relevant stakeholders, including consumer organisations, industry and academics at the national and European levels, and be in charge of discussing and suggesting priorities and actions. No effort is then made towards braver initiatives that could enhance the integration of consumer protection requirements in other policy areas like, for instance, the creation of consumer teams in all relevant DGs that could assess the impact of other policy measures on consumer protection, or an annual report on the implementation of article 12 TFEU.[69]

[63] See Communication COM(2020) 696 cit. 7.

[64] *Ibid*. 8.

[65] Directive 2005/29/EC cit.

[66] Directive 2011/83/EU cit. 64.

[67] Proposal for a Directive COM(2022) 143 final of the European Parliament and of the Council of 30 March 2022 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information.

[68] Regarding the limits of the most recent reform of the Consumer sales Directive, see M García Goldar, 'The Inadequate Approach of Directive (EU) 2019/771 Towards the Circular Economy' (2021) Maastricht Journal of European and Comparative Law.

[69] These suggestions were provided by the BEUC as a response to the EU Commission Roadmap Consultation in 2019, BEUC, *BEUC's Preliminary Input for the Consumer Agenda 2021-2027: Response to the Roadmap Consultation* www.beuc.eu.

V. Conclusion

Art. 12 TFEU is the result of a long (legislative) process that saw strengthening of consumer protection within the EU policy framework: from a cross-sectoral policy that did not enjoy complete autonomy to a fundamental social goal of the EU with specific constitutional status in the EU Charter of Fundamental Rights. However, the application of art. 12 TFEU as an instrument to safeguard the interests of consumers in other policy areas is limited by its lack of justiciability. There is no procedural or judicial avenue for individuals and Member States to verify that consumer interests have been taken into account in policy drafting and implementation. This limitation is even more frustrating if we look at the intertwining that characterises consumer protection with environmental protection, with the objective of achieving a sustainable economy.

The most recent Consumer Agenda makes some first steps in this direction: it explicitly mentions art. 12 TFEU and the need to adopt a holistic approach regarding consumer protection issues with actions and interventions that address the green transition. However, the potential of art. 12 TFEU is yet to be exploited.

Articles

The European Social Charter Turns 60: Advancing Economic and Social Rights across Jurisdictions

Edited by Giovanni Boggero, Francesco Costamagna *and* Lorenza Mola

The European Social Charter Turns 60: Introduction to the *Special Section*

Six decades ago, on 18 October 1961, the European Social Charter (ESC) was opened to signature by the member States of the Council of Europe (CoE), in Turin, Italy.[1] This treaty was conceived by the Council of Europe as complementary to the European Convention of Human Rights (ECHR), on the side of economic and social rights, for the protection of human rights in the pursuit of the Organization's objective. The 1961 Charter's catalogue of corresponding rights and obligations was first expanded by a 1988 Additional Protocol, and subsequently the 1996 European Social Charter (revised) reinforced some of the rights of the 1961 Charter and recognized additional rights. Overall, this treaty system mostly focuses on labor rights, employment, training and equal opportunities, health, social security and social protection, housing, and protection against poverty, with particular attention paid to children, the elderly, the family and migrants as specific categories of beneficiaries. Indeed, the European Social Charter system provides the broadest and most advanced standard of protection of economic and social rights in Europe, envisioning itself as the "social constitution for Europe".[2] The ESC is al-

[1] This *Special Session* is the output of research activity carried out within the project "The European Social Charter Turns 60: Advancing Economic and Social Rights across Jurisdictions", co-financed by the Council of Europe and the Law Department of the University of Turin. On the European Social Charter, see, among others, D Harris, *The European Social Charter* (University Press of Virginia 1984); D Gomien, D Harris and L Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing 1996); JF Akandji-Kombé and S Leclerc (eds), *La Charte sociale européenne* (Bruylant 2001); J Darcy and D Harris, *The European Social Charter* (Transnational publisher 2001 second edition); AM Swiatkowski, *Charter of Social Rights of the Council of Europe* (Kluwer Law International 2007); O De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe* (Bruylant 2010); M Mikkola, *Social Human Rights of Europe* (Legisaction 2010); O Dörr, 'The European Social Charter' in S Schmahl and M Breuer (eds), *The Council of Europe: Its Laws and Policies* (Oxford University Press 2017 first edition) 507; K Lucas, 'The European Social Charter' in C Binder, JA Hofbauer, F Piovesan and A Úbeda de Torres (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 127; G Palmisano, *L'Europa dei diritti sociali. Significato, valore e prospettive della Carta sociale europea* (il Mulino 2022).

[2] O De Schutter, *International Human Rights Law* (Cambridge University Press 2010) 22.

ISSN 2499-8249
doi: 10.15166/2499-8249/622

so the main "source of inspiration" for the economic and social rights in the Charter of Fundamental Rights of the European Union, which, however, includes only some of the rights that find recognition under the ESC.[3]

At the same time, while some CoE members are bound by the 1996 Charter, others are bound by the 1961 Charter, and, contrary to the subjective scope of the ECHR, some CoE members have not ratified either Charter (notably, Switzerland). The EU is not a contracting party nor is its accession to the (revised) ESC explicitly provided for in the TEU. The original Charter aimed at harmonizing State parties' legislation and practice. To this end, each can select, within quantitative and qualitative limits, the provisions on obligations it accepts to be bound to (the "accepted provisions"). Consequently, different commitments are binding upon the parties, even within the *core* provisions of the ESC, although each contracting party also generally undertakes to pursue "by all appropriate means [...] the attainment of conditions in which [all the Charter rights] can be effectively realized". The Charter further specifies that the resulting guarantee of social human rights is owed by a contracting State to its own nationals and to nationals of the other contracting States meeting certain conditions of work and residence, as well as refugees and stateless persons, rather than all persons under its jurisdiction.

Moreover, the ESC system also presents unique features in the landscape of international human rights treaties with regard to procedural guarantees: alongside the traditional, general procedure of State reporting, the 1995 Protocol established an optional collective complaints procedure, allowing international and national trade unions and international NGOs to raise allegations of violations by a State party of its international obligations under the ESC, with respect to a general, non-individual-victim-specific situation (and thus, without need of prior exhaustion of local remedies). Both State reports and collective complaints are examined by the ESC's body of independent experts – the European Committee of Social Rights (ECSR). The other bodies involved in the two procedures are the Governmental committee, a treaty body consisting of governmental representatives, a CoE statutory body, the Committee of Ministers, and the Secretary General with the Secretariat. The Conclusions and Decisions on the merits, which are adopted by the ECSR at the end of its examination of State reports and collective complaints declared admissible, respectively, are transmitted to the CoE Committee of Ministers, which in turn adopts resolutions and addresses recommendations to individual States found in non-compliance with one or more of its obligations.

For several decades, the Charter remained "dormant"[4] and ineffective. It underwent a process of reform from the late 1980s to the mid-1990s. Partly as a result of such reforms, and primarily because of the multiple crises that have affected Europe over the past decade, the Charter has witnessed a renewed interest in its effective implementa-

[3] Explanations relating to the Charter of Fundamental Rights [2007].

[4] O De Schutter, *International Human Rights Law* cit. 25.

tion. Critical junctures in the last ten years have strengthened the need for effective protection of economic and social rights in Europe and emphasized the relevance of the ESC to this end. During the 2007 financial and economic crisis, the ESC was considered as a reference source of international protection, especially by NGOs, against the negative impact of the crisis and of the austerity measures adopted as a reaction to it. The Charter has also emerged as a source of labor rights protection in the context of domestic labor market reforms and in the midst of the Covid-19 pandemic.[5]

The breadth and level of the Charter's standard of protection of social and economic rights has been increasingly considered in procedural safeguards. The European Court of Human Rights routinely refers to the ESC and the ECSR's practice[6] when it deals with social rights or socio-economic aspects of rights under the ECHR.[7] In juxtaposition with the ECHR and EU law, the ESC has been used before municipal courts as a yardstick of review for domestic adjudication of national legislations throughout Europe, promoting the legal systematization of the Charter-sourced obligations within the domestic legal order of several contracting States (notably, in Italy, by the Constitutional Court). This increased interest in and knowledge of the ESC by its stakeholders can be seen as a result and, at the same time, as a trigger for increased recourse to the collective complaints procedure, against those ESC contracting States that have accepted it – but with wider resonance across all "constituencies" of the Charter. It is also motivated by the need to legally frame new phenomena such as work in the gig economy. Overall, awareness and participation of organized civil society has grown. Practitioners have started training themselves and providing consultancy on this instrument at the domestic level. This makes even clearer that international human rights protection should increasingly be viewed through an "experimentalist lens" as a bottom-up grassroots phenomenon, in which human rights movements play a role at least as significant as that played by international organizations.[8]

In parallel, the issue of further strengthening the ESC system as the main instrument of social human rights protection in Europe has attracted the attention of CoE

[5] *E.g.*, ECSR Conclusions 2009, General Introduction on the implementation of the Charter in times of economic crises, and ECSR Statement of interpretation on the right to protection of health in times of pandemic of April 2020.

[6] Notably, ECtHR *Demir and Baykara v Turkey* App n. 34503/97 [12 November 2008] paras 50, 77, 84, 149.

[7] C Warbrick, 'Economic and Social Interests and the European Convention on Human Rights' in M Baderin and R McCorquodale (eds), *Economic, Social, and Cultural Rights in Action* (Oxford University Press 2007) 241; G Malinverni, 'The European Court of Human Rights, the Protection of Social Rights, its Relationship with the European Committee of Social Rights' in M D'Amico and G Guiglia (eds), *European Social Charter and the Challenges of the XXI Century* (Edizioni scientifiche italiane 2014) 98; I Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (Cambridge University Press 2018).

[8] G De Búrca, *Reframing Human Rights in a Turbulent Era* (Oxford University Press 2021).

members and bodies in the last years – from the 2014-2016 "Turin Process"[9] to the European Social Cohesion Platform to the most recent CoE initiatives. Focusing on the latter, worth mentioning are the Secretary General's proposals on *Improving the implementation of social rights – reinforcing the European Social Charter system*,[10] several decisions by the Committee of Ministers, culminating so far in the adoption of Operational proposals for the reform the European Social Charter[11] and the Parliamentary Assembly's recommendation on an additional protocol to the European Social Charter on the Right to a Safe, Clean, Healthy and Sustainable Environment.[12] Meanwhile, the relationship between the Charter's system and EU law has gained increased attention. The "Turin Process" specifically focused on it, and this fed into the process leading to the adoption by the EU of the so-called Social Pillar.[13]

Alongside these political and legal developments, there is a growing academic interest and need for wider knowledge and better understanding of this regional treaty and the legal dynamics involving it at multiple levels. Literature has flourished on the ESC itself, its rights and procedural guarantees, and compliance by contracting States, including measures implementing EU law and measures that have been generated by the above crises.[14] The Charter is directly or indirectly the object of critical and empirical research on the effectiveness of economic and social human rights treaty law and on

[9] M Nicoletti, *General Report of the High-Level Conference on the European Social Charter (Turin, 17-18 October 2014)* (Council of Europe Publishing 2015). On the challenges faced by the ESC system at the launch of the "Turin Process", see J Luther and L Mola, *Europe's Social Rights Under the "Turin Process"* (Editoriale scientifica 2016).

[10] European Council Information Documents SG/Inf(2021)13 of 22 April 2021 Improving the implementation of social rights – Reinforcing the European Social Charter System: Secretary General's proposals rm.coe.int.

[11] Committee of Ministers, The Committee of Ministers Adopts Changes to the European Social Charter System (27 September 2022) www.coe.int. Committee of Ministers, GT-Charte: Improving the European Social Charter System (7 October 2021) www.coe.int.

[12] Resolution 2396 (2021) of the European Parliament of 29 September 2021 on anchoring the right to a healthy environment: need for enhanced action by the Council of Europe.

[13] Proposal COM(2017) 0251 final of the European Parliament, the Council and European Commission of 13 December 2017 Interinstitutional Proclamation on the European Pillar of Social Rights.

[14] Recently, G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* (Anthem Press 2022); G Palmisano, 'La procédure des réclamations collectives en tant qu'instrument de protection internationale des droits sociaux' (2020) RGDIP 513; K Lukas, *The Revised European Social Charter: An Article by Article Commentary* (Edward Elgar Publishing 2021); S Quinlivan, 'Emerging Jurisprudence on Inclusive Education Under the European Social Charter (Revisited)' in G de Beco, S Quinlivan and J Lord (eds), *The Right to Inclusive Education in International Human Rights Law* (Cambridge University Press 2019). On the role of the ESC in EU law see, among others, K Lucas, 'The EU Charter of Fundamental Rights and the European Social Charter: An Alliance for Social Rights?' in W Benedekand others (eds), *European Yearbook of Human Rights* (Intersentia 2015) 153; O De Schutter, 'L'adhésion de l'Union européenne à la Charte sociale européenne' (2015) RTDH 259; also, D Falcomatà, 'The Strange Case of the European Social Charter in the EU-UK Trade and Cooperation Agreement' (30 November 2022) federalismi.it.

the impact of quasi-judicial review bodies.[15] One notable feature concerns the plurality of scholarship engaging with studies on the ESC (labor law, social law, health law; constitutional law, EU law, international law). However, there is still much room for further academic work to comprehensively address the role and impact of this treaty system in the multi-sourced and multi-level framework of human rights protection in Europe.

From the latter perspective, the following observations and theoretical principles can stimulate legal research on the ESC. It is observed that European States are bound to protect economic and social human rights by domestic constitutions, EU primary and secondary law, the ESC, the ECHR, other CoE treaties, and universal treaties such as the UN Covenants and the ILO Conventions. In such a plural, multilevel and diversified landscape, the role of each instrument develops also in relation with the others. On the one hand, human rights standards may find definition in the comparison, harmonization or integration between and among concurrent legal sources. On the other hand, multi-sourced rights may also be defined through the concomitant activation and interaction of the enforcement mechanisms which pertain to each source or legal order (the domestic judicial system, the integrated system of judicial protection in EU law, the ECtHR, and the various compliance mechanisms set under the ESC, the ICESCR, and the ILO Constitution and Conventions). On the contrary, each of these instruments may be applied "in isolation" from the others, in frameworks of fragmentation, competition, and autonomy. Different approaches and techniques on the part of courts and monitoring bodies can contribute to advancing, or undermining, the effectiveness of legal protection instruments and, ultimately, the effective protection of economic and social rights in Europe.

To apprehend and advance theoretical framing of the impact of the European Social Charter on the protection of economic and social rights in Europe, this *Special Section* brings together legal expertise in different fields of law (from international law to EU law, from constitutional law to labor law). In this context, the authors have engaged in cutting-edge research in their respective fields through an interdisciplinary perspective. Moreover, the *Special Section* engages in a plurality of tasks.

Some contributions mainly address the procedural paths through which ESC rights interplay with rights from other sources, analyzing the legal value of ECSR's pronouncements,[16] while others propose an interpretative methodology aimed at enhancing effective protection of socio-economic rights ensuing from the Charter throughout

[15] Among others, C Binder, JA Hofbauer, F Piovesan and A Úbeda de Torres (eds), *Research Handbook on International Law and Social Rights* cit.; J Dugard, B Porter, D Ikawa and L Chenwi (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020).

[16] A Spagnolo, '*They Are not Enforceable, but States Must Respect Them*: An Attempt to Explain the Legal Value of the Decisions of the European Committee of Social Rights' (2022) European Papers www.europeanpapers.eu 1495.

different European legal orders.[17] Approaching multi-sourced protection of social rights in Europe from the side of procedural guarantees, dynamics of concurrent or complementary activation in the vertical or horizontal dimension may be clarified. Other contributions focus instead on the contents of those rights which have most recently provided fertile grounds for cross-sectional investigations and comparative analyses, such as equal pay[18] and protection of workers from unlawful dismissals.[19] Focusing on substantive protection, rights-specific studies help identify which contents emerge from the interaction of multi-sourced norms of protection or from the isolation of certain sources from others.

Lorenza Mola*, Giovanni Boggero and Francesco Costamagna*****

[17] P Hardy, 'From the Principle of Systemic Integration to the Integrated Approach: The Pathway to the Integration of the European Social Charter for the Interpretation of the European Union Charter of Fundamental Rights' (2022) European Papers www.europeanpapers.eu 1517.

[18] K Arabadjieva and M Kotsoni, 'Mind the Gap: Emerging Standards of Protection of the Right to Equal Pay Under the European Social Charter and EU Law' (2022) European Papers www.europeanpapers.eu 1537.

[19] NA Papadopoulos, 'Assessing the Effectiveness of the European Social Charter: A Case Study on Dismissal Reforms' (2022) European Papers www.europeanpapers.eu 1569.

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ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

Edited by Giovanni Boggero, Francesco Costamagna *and* Lorenza Mola

THEY ARE NOT ENFORCEABLE, BUT STATES MUST RESPECT THEM: AN ATTEMPT TO EXPLAIN THE LEGAL VALUE OF DECISIONS OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

ANDREA SPAGNOLO*

ABSTRACT: This *Article* offers a contextual interpretation of the legal value of decisions of the European Committee of Social Rights in light of the broader debate on the binding nature of pronouncements of human rights treaty bodies. This *Article* demonstrates the utility of this latter debate in understanding the former decisions. It interprets the recent case-law of the Italian Constitutional Court on the domestic implementation of the European Social Charter from the perspective of the work of the International Law Commission, the case-law of the International Court of Justice, and some recent domestic judgments. It offers some concluding remarks on the possibility of upholding a duty to take into account the decisions of the European Committee of Social Rights.

KEYWORDS: European Committee of Social Rights – human rights treaty bodies – European Social Charter – treaty interpretation – soft law – collective complaints procedure.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/623

I. Introduction

The European Committee of Social Rights (ECSR) is responsible for monitoring compliance with the European Social Charter.[1] The ECSR website describes the legal value of ECSR decisions and Conclusions as follows "[they] must be respected by the States concerned; even if they are not directly enforceable in the domestic legal systems, they set out the law and can provide the basis for positive developments in social rights through legislation and case-law at national level".[2]

This description immediately appears problematic or even provocative. Indeed, it is statutory that the Conclusions and decisions of the ECSR are not, in themselves, directly enforceable in the domestic legal orders of the Member States, as the ECSR is listed among the human (social) rights monitoring bodies that have no binding power over States. However, the description found on its website according to which its pronouncements "must be respected by the States concerned"[3] gives rise to the following question: can the non-binding nature of ECSR decisions be reconciled with the duty of States to respect them?

At first glance, an affirmative answer appears unlikely due to the absence of the States Parties' consent, namely, due to the consent of the States Parties to the treaties establishing the ECSR and the two procedures of State reports and collective complaints to be bound by the output of a non-binding monitoring committee.

However, a negative answer must be tested against some recent trends in the practice concerning the domestic judicial implementation of ECSR decisions. In 2018, the Italian Constitutional Court upheld that ECSR decisions, albeit not binding as such, are authoritative, and it discussed those outputs at length.[4] New practice is also emerging in the context of the domestic judicial implementation of pronouncements of human rights treaty bodies. The Spanish Supreme Court held, also in 2018, that the State must comply with the decisions of the Committee on the Elimination of Discrimination against Women. More recently, in June 2021, Mexico's Supreme Court of Justice declared that urgent actions required by the Committee on Enforced Disappearance are legally binding.[5]

The emergence of new judicial practice justifies a fresh review of the debate on the legal value of final pronouncements of human rights treaty bodies, in general, and of the ECSR, in particular. More specifically, this *Article* offers a contextual interpretation of the judgments of the Italian Constitutional Court, in light of practice and of the main arguments advanced in literature for understanding the legal value of the findings of human rights treaties' monitoring bodies.

After providing a brief overview of the main features of human rights treaties' monitoring bodies and of the debate on the legal value of their pronouncements, this *Article*

[1] European Social Charter [1961] 529 UNTS 89, ETS n. 35 (European Social Charter).

[2] Council of Europe, *European Committee of Social Rights* www.coe.int.

[3] *Ibid*.

[4] The two judgments of the Italian Constitutional Court are analysed below in section V.

[5] The judgments of the Spanish and of the Mexican Supreme Court are discussed below in section III.

will analyse the functions of the ECSR in overseeing compliance with the European Social Charter so as to ascertain whether and to what extent the ECSR can be assimilated to a human rights treaty monitoring body. In the final part of this *Article*, some conclusions will be drawn regarding the judgments of the Italian Constitutional Court, proposing an interpretation that may assist in gaining a better understanding of the main question presented above, concerning the (non)binding nature of ECSR decisions.

II. A BRIEF OVERVIEW OF THE MAIN FEATURES OF HUMAN RIGHTS TREATY BODIES

The legal value of decisions issued by human rights treaty bodies or other expert bodies has been thoroughly debated, also due to a growing and interesting practice.

Monitoring bodies are established under several human rights treaties, particularly the so-called core UN human rights treaties.[6]

As is known, there are nine core international human rights treaties. Each of these treaties has established a treaty body – usually known as a Committee – consisting of experts who monitor the implementation of the treaty provisions by the States Parties and receive communications from individuals. The establishment of such Committees is foreseen in the treaty itself,[7] although the responsibility for addressing individual complaints may follow different paths. Some human rights treaties contain a provision stating that the States Parties may opt in for the competence of the Committee through a declaration.[8] In others, the individual complaints procedure is regulated by an additional protocol, with optional ratification.[9] In both cases, therefore, the States Parties are able to

[6] They are, notably, the International Convention on the Elimination of All Forms of Racial Discrimination [1965] 660 UNTS 195 (ICERD); the International Covenant on Economic, Social and Cultural Rights [1966] 993 UNTS 3 (ICESCR); the International Covenant on Civil and Political [1966] 999 UNTS 171 (ICCPR); the Convention on the Elimination of All Forms of Discrimination against Women [1979] 1249 UNTS 13 (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [1984] 1465 UNTS 85 (CAT); the Convention on the Rights of the Child [1989] 1577 UNTS 3 (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families [1990] 2220 UNTS 3 (CMW); the Convention on the Rights of Persons with Disabilities [2006] 2515 UNTS 3 (CRPD); the International Convention for the Protection of All Persons from Enforced Disappearance [2010] 2716 UNTS 3 (CED).

[7] With the exception of the ICESCR, which gave that responsibility to the Economic and Social Council of the United Nations. It was this Council which then established the Committee on Economic, Social and Cultural Rights (CESCR) itself with resolution n. 1985/17 of the Economic and Social Council of 28 May 1985.

[8] This is the case, for instance, in relation to the Committee on the Elimination of Racial Discrimination, established pursuant to art. 8 of the CERD; art. 14 of the CERD enables the States Parties to accept the competence of the Committee for reviewing individual cases. The same can be said with reference to the CAT (see arts 17, 21 and 22), CED (see arts 26, 31 and 32), and CMW (see arts 72, 76 and 77).

[9] As an example, the Optional Protocol to the International Covenant on Civil and Political Rights [1966] 999 UNTS 171 allows the States Parties to accept the competence of the HRC for receiving individual communications. Similar protocols regulate the individual complaints procedure in the context of the following other human rights treaties: ICESCR, CEDAW, CRC, CRPD.

decide whether or not the Committees are given responsibility for addressing individual cases against the States Parties themselves.

All Committees share some common features, which can be summarised as follows (as it would be extremely time-consuming to identify the rules applicable to all of them individually).[10]

They all exercise two functions.

They receive and examine periodic reports from the States Parties to the human rights treaties in the context of which they are established. Such reports address legislative, judicial, administrative or other measures adopted by the States Parties, giving effect to the provisions of the respective treaty.

The examination of the States Parties' reports then forms part of the main report submitted by the Committees annually, through the Secretary General, to the General Assembly of the United Nations on their activities. In that report, the Committees may make suggestions and general recommendations based on the examination of the reports and on information received from the States Parties.

As for the second function, the Committees may receive communications from States and from individuals regarding (other) States Parties, if they accept – through a declaration or by adhering to the optional protocol – this competence. With particular regard to the examination of individual cases, the Committees follow pre-determined rules of procedure and issue final decisions concerning recommendations for the respondent State to implement those measures aimed at restoring the situation that existed prior to the disputed human rights violations.

The Committees consider each case in closed session, examining the complaints only on the basis of written information supplied by the complainant and the respondent States.

Once the communication is received and recorded, it is sent to the State Party concerned to allow the latter to comment, within a set time frame. The complainant is then offered an opportunity to comment on the State Party's observations, following which the case is normally ready for the Committee's considerations on its admissibility and merits.

All Committees may adopt urgent measures if the circumstances so require. The legal competence for adopting such measures is usually attributed to the Committees by their rules of procedure.[11]

Once the Committees issue a decision on the case, that decision is sent to the complainant and to the State Party at the same time. One or more Committee members may append a separate opinion to the decision if they reach a conclusion that differs from the majority or if they reach the same conclusion but for different reasons. The text of any final

[10] For a broader discussion see the chapters of the edited volumes: H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012); P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2000).

[11] See, for instance, Human Rights Committee, Rules of Procedure of the Human Rights Committee of 4 January 2021 UN Doc. CCPR/C/3/Rev 12 rule 94.

decision on the merits of the case or a decision on inadmissibility is posted on the website of the Office of the High Commissioner of Human Rights, which acts as the Secretariat.

When the Committees conclude that the treaty has been violated, they make recommendations to the respondent States, which are then invited to provide information on the steps they have taken to implement the recommendations. The case is monitored by the Committee through a follow-up procedure.

Follow-up procedures are not set forth in the treaties establishing the Committees, with the exception of the CEDAW.[12] They are adopted by the Committees themselves to make up for the absence of a body responsible for ascertaining compliance with their findings;[13] however, not all Committees have established follow-up procedures.[14] A dialogue is thus pursued with the State Party and the case remains open until satisfactory measures are found to have been taken. More specifically, the Committees assess the States' response through pre-established criteria which ascertain the level of satisfaction of the response itself.[15]

III. The legal value of pronouncements of human rights treaty bodies

The final outcomes of human rights treaty monitoring bodies are labelled by the treaties as "views", "recommendations", or "findings". This gave rise to the opinion held by earlier commentators that those labels indicated the will of the States to exclude any binding force.[16]

As anticipated in the Introduction, however, the absence of any binding force is certainly not fully accepted, and the labels used in themselves do not incorporate the complexity of the legal value of pronouncements of human rights treaties' monitoring bodies; such complexity is well reflected in General Comment no. 33 of the Human Rights Committee (HRC) on the extent of the States Parties' obligations under the ICCPR and the Optional Protocol. The HRC took a bold position in stating that:

> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under

[12] Art. 7(4) CEDAW.

[13] See, accordingly, G Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges' in N Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 284, 298.

[14] They are the HRC, CESCR, CERD, CAT, CEDAW, CRPD and CED. For further insights, see M Schmidt, 'Follow-Up Activities by UN Human Rights Treaty Bodies and Special Procedures Mechanisms of the Human Rights Council: Recent Developments' in *International Human Rights Monitoring Mechanisms. Essays in Honor of Jakob Th. Möller* (2nd edn, Brill 2009) 25.

[15] See, for instance, the criteria used by the HRC: Human Rights Committee, Follow-up progress report on individual communications received and processed between June 2014 and January 2015 of 29 June 2015 UN Doc. CCPR/C/113/3 Annex I.

[16] See T Buergenthal, 'The UN Human Rights Committee's (2001) Max Planck Yearbook of United Nations Law 341, 397; for a broader discussion, see F Pocar, 'Legal Value of the Human Rights' Committees Views' (1991-1992) Canadian Human Rights Yearbook 119.

> the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.
> The term used in article 5, paragraph 4 of the Optional Protocol to describe the decisions of the Committee is "views". These decisions state the Committee's findings on the violations alleged by the author of a communication and, where a violation has been found, state a remedy for that violation.
> The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol".[17]

The HRC based its position on two different arguments.

For the first, it cited art. 2(3) of the ICCPR, which binds States to "ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by a person acting in an official capacity".[18]

The second argument derives from general international law, as the HRC referred to the duty to apply international treaties in good faith, implying a duty to cooperate with the Committee itself.[19]

A discussion on the legal significance of pronouncements of human rights treaty bodies in international law was held in the context of the International Law Commission (ILC)'s works on subsequent agreements and subsequent practice in relation to the interpretation of treaties. The Special Rapporteur Georg Nolte investigated the matter to ascertain if and to what extent such pronouncements could be considered akin to subsequent practice.[20]

Prior to this, in 2004, the International Law Association (ILA) issued a report on the subject following the Berlin conference,[21] and in 2014 the issue of the impact of human

[17] Human Rights Committee of 5 November 2008 General Comment n. 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights CCPR/C/GC/33 para. 11-13.

[18] *Ibid*. para. 14. See art. 2(3) ICCPR cit.

[19] *Ibid*. art. 15. Good faith is derived from art. 26 of the Vienna Convention on the Law of Treaties [1969] 1155 UNTS 331: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith".

[20] International Law Commission, Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties of 7 March 2016 UN Doc. A/CN.4/694.

[21] International Law Association, Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (ILA Report), in Report of the Seventy-First Conference of the International Law Association of 2004.

rights monitoring bodies – including judicial courts – in domestic legal orders was the subject of a report by the Venice Commission of the Council of Europe.[22]

The above-mentioned reports, considered together with the most relevant literature on the topic,[23] give rise to some considerations which set the stage for future thoughts on the legal value of ECSR decisions.

All documents and views are coherent in considering that the first important element to be examined is the actual wording of the treaties or protocols that establish the monitoring bodies. Indeed, it can be confirmed that terms such as "views", "recommendations", and "suggestions" are evidence that pronouncements of human rights treaties' monitoring bodies do not have legally binding effect.[24] In addition, the terms used must be interpreted in light of the context of the treaty itself.[25] For example, human rights treaties establishing judicial organs leave no doubt as to the binding force of their final decision. Importantly, art. 46 of the ECHR binds the States Parties to the Convention to abide by the judgment of the European Court of Human Rights.[26]

If the term used in human rights treaties is not that of a proper judgment and/or if there are no provisions equivalent to that enshrined in art. 46 of the ECHR, the formal binding nature of final pronouncements of expert bodies should be excluded.

Similar conclusions can be reached on urgent measures, which, as stated previously, are not even foreseen in the establishing treaties.

However, in the case of urgent measures, the rules of procedure at least cite an obligation to respect in good faith the individual complaint procedure.[27] In this regard, the

[22] European Commission for Democracy through Law (Venice Commission), Report on the implementation of international human rights treaties in domestic law and the role of courts of 8 December 2014 CDL-AD(2014)036.

[23] See *ex multis* R Van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in H Keller and L Grover (eds), *UN Human Rights Treaty Bodies* cit. 356 ff., and G Ulfstein, 'Individual Complaints' in H Keller and L Grover (eds), *UN Human Rights Treaty Bodies* cit. 73 ff.; C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2014 third edition); N Rodley, 'The Role and Impact of Treaty Bodies' in D Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 622 ff.; M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' (2017) ICLQ 201 ff.

[24] See Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. para. 15; ILA Report cit. paras 15-27; Venice Commission Report cit. para. 48; N Rodley, 'The Role and Impact of Treaty Bodies' cit. 639; C Tomuschat, 'Human Rights: Between Idealism and Realism' cit. 267.

[25] Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. Indeed, this is precisely the case of the ECSR, which uses the term "decision" to refer to its pronouncements. This will be investigated further in section IV.2.

[26] See art. 46 of the European Convention of Human Rights.

[27] See, for instance, and again, art. 94 of the rules of procedure of the HRC: "Failure to implement such measures is incompatible with the obligation to respect in good faith the procedure of individual communications established under the Optional Protocol".

practice of human rights treaty bodies is consistent.[28] It must be stressed that General Comment no. 33 reiterated this position.[29]

In light of this preliminary assumption, legal scholars have identified two extreme hypotheses. According to a minority approach, the absence of legal binding force deprives the final pronouncement of the expert bodies of any significant legal value.[30] Conversely, other scholars argue that notwithstanding the textual element, such acts do possess qualities that transform them into legally binding obligations.[31] This latter position builds on the circumstance that monitoring bodies merely decide on already existing treaty obligations and reproach General Comment no. 33.[32]

Extreme positions do not, however, provide a perfect fit for the real situation in terms of States' practice. The first position does not entirely reflect States' convergence towards giving at least "considerable importance" to the pronouncements of the monitoring bodies.[33] The second position also goes too far, as attributing legal binding force to the pronouncements of expert bodies openly contradicts with the States Parties' consent to the treaty in question.[34]

Some scholars therefore took an intermediate position. While formal binding force is untenable, States Parties nevertheless have a duty to consider or, rather, an obligation to take into account the findings of the monitoring bodies.[35]

This position is laudable as it gives appropriate value to the entire process of implementing the pronouncements of the monitoring bodies. In this regard, the follow-up procedures established under human rights treaties' monitoring systems or complaint mechanisms require constant engagement by States to demonstrate that they are complying with and implementing the obligations established in human rights treaties and

[28] See M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' cit. 204.

[29] Human Rights Committee, General Comment n. 33 cit. para. 19.

[30] See, for instance, MJ Dennis and DP Stewart, 'Justiciability of Economic, Social and Cultural Rights: Should there be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing and Health?' (2004) AJIL 462, 493-495; N Ando, 'L'avenir des organes de supervision: limites et possibilités du Comité des droits de l'homme' (1991-1992) Annuaire Canadien des droits de la personne 183, 186.

[31] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Verlag 2005 2nd edn) 893. See also Y Kerbrat, 'Aspects de droit international général dans la pratique des comités établis au sein des Nations Unies dans le domaine des droits de l'homme' (2008-2009) AFDI 559, 561-563.

[32] See JT Moller and A de Zayas, *United Nations Human Rights Committee Case Law 1977-2008: A Handbook* (Verlag 2008) 8.

[33] Cf. ILA Report cit. para. 16; see, also and in support, Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. para. 23-24.

[34] See, for instance, R Van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' cit. 385; M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' cit. 219-220.

[35] R Van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' cit.

the findings of the expert or monitoring bodies. This implies that States at least have a duty to provide justification if they depart from those findings.[36]

Such a conclusion is also justifiable from the perspective of general international law for two reasons.

Firstly, it appears that this position is meritorious in giving value to the obligation to respect treaty obligations in good faith. There is some convergence in literature towards admitting that when States adopt *soft law* instruments, they agree to act in accordance with them when applying the principle of good faith.[37] This argument can be applied *a fortiori* to non-binding pronouncements of treaty bodies, as they are based upon binding treaty provisions.

The second reason focuses on the law of State responsibility. Indeed, if it is accepted that the pronouncements of human rights treaty bodies have at least declaratory value,[38] this means that the State which committed the violation has first and foremost a duty to cease its illicit conduct.[39]

It remains to be seen if and to what extent the duty to take account of the pronouncements of human rights treaty bodies also applies to national judges of all States Parties, called upon to implement the provisions of those human rights treaties as interpreted by their monitoring bodies. This question requires a brief preliminary discussion on the *res interpretata* value of the pronouncements of human rights treaty bodies.

Firstly, it should be noted that human rights treaties are subject to the rules on the interpretation of treaties. The general rule enshrined in art. 31 of the Vienna Convention on the Law of Treaties (VCLT) lists among the interpretive means the 'subsequent practice' in the application of treaties. The ILC – which, as mentioned above, has debated the issue – reached the conclusion that the pronouncements of human rights treaty bodies are not *per se* subsequent practice, as the term "practice" can only be used with regard to the conduct of States Parties to a treaty.[40] Accordingly, such pronouncements are neither listed among the interpretive means foreseen in art. 31(3)(b) of the VCLT nor included in

[36] Importantly, the follow-up procedures of human rights treaty bodies must not create new obligations (see General Assembly of 9 April 2014 Resolution 68/268 Strengthening and enhancing the effective functioning of the human rights treaty body system para. 9). For a discussion, see G Ulfstein, 'The Human Rights Treaty Bodies and Legitimacy Challenges' cit. 298.

[37] M Kotzur, 'Good Faith' (2009) Max Planck Encyclopedia of Public International Law paras 25-26; R Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit* (Graduate Institute Publication 2000) 83; O Schachter, 'Non-Conventional Concerted Acts' in M Bedjaoui (ed.), *International Law: Achievements and Prospects* (Brill 1992) 267.

[38] See, accordingly, O Delas, M Thouvenot and V Bergeron-Boutin, 'Quelques considérations entourant la portée des décisions du Comité des droits de l'Homme' (2017) Revue québécoise de droit international 1, 37; D Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2005) 267.

[39] International Law Commission, Responsibility of State for Internationally Wrongful Acts of 2001 UN Doc A/56/49(Vol. I)/Corr. 4, art. 30; see, again, D Shelton, *Remedies in International Human Rights Law* cit.

[40] International Law Commission, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties of 2018 UN Doc A/73/10 para. 51, Conclusion 4, paras 2 and 3.

the supplementary means of art. 32 of the same convention. Even the Human Rights Committee, in drafting General Comment no. 33, did not pursue this path, after severe criticism from States.[41] The pronouncements of human rights treaty bodies are nevertheless considered potential generators of subsequent practice by States.[42]

Consequently, according to the ILC, the interpreter is not required to make recourse to the jurisprudence of human rights treaty bodies for interpretation purposes.

The ILC's conclusion on this point appears to accord with the relevant domestic practice reviewed by the ILA, which confirms that national judges do not feel that they are bound by the monitoring bodies' pronouncements in the interpretation of the treaty, despite recognising their considerable importance.[43]

According to this practice, international law merely authorises, but does not bind, the national courts to apply international human rights treaties *as interpreted* by the related expert body.[44]

Albeit not a domestic court, the International Court of Justice (ICJ) took a different position on the legal value of the HRC's views. In the *Diallo* case, the ICJ held that:

> "Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled".[45]

With particular regard to its position on the views of the HRC, it concluded that it has a duty to consider them: "When the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question".[46]

Although the first paragraph quoted above explains the reasons why the ICJ does not align with the practice of the domestic courts, namely to guarantee coherence in

[41] See Comments of the United States on the Human Rights Committee's 'Draft general comment 33' of 17 October 2008, quoted in Fourth Report on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit. paras 18-19 footnote 57.

[42] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties cit., conclusion 13.

[43] ILA Report cit. 43 para. 175.

[44] M Kanetake, 'Human Rights Treaty Monitoring Bodies Before Domestic Courts' cit. 220-221.

[45] ICJ *Amhadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Merits) [30 November 2010] 639, para. 67.

[46] *Ibid*. para. 68.

international law, it is interesting to note that two recent domestic decisions appear to uphold the duty to consider the HRC's views.

In 2018 the Spanish Supreme Court, ruling in a case concerning the death of a woman's daughter at the hands of her husband, held that the pronouncements of the CEDAW Committee are legally binding in the Spanish legal order.[47] The Court based this argument on two CEDAW provisions and on the Spanish Constitution. It cited art. 24 of CEDAW, which binds States to "adopt all necessary measures at national level aimed at achieving the full realisation of the rights granted", and art. 7 of the Protocol establishing the CEDAW Committee according to which States "shall give due considerations to the views of the Committee". As for domestic law, the Spanish Supreme Court based its decision on arts 96 and 10, para. 2 of the Spanish Constitution, which respectively require the constitutional bill of rights to be interpreted in accordance with international human rights law and position international treaties among the constitutional sources.[48]

In 2021, the Supreme Court of Mexico issued a similar judgment, concerning a different human rights treaty.[49] The Supreme Court affirmed that Mexican authorities are under a legal obligation to implement demands for urgent action and the corresponding measures requested by the Committee on Enforced Disappearance (CED) on the basis that the latter is the sole mechanism authorised to interpret the Convention for the Protection of all Persons against Enforced Disappearance (ICPED) and is mandated to ask the States Parties to undertake all necessary actions to search for and locate a missing person. It should be acknowledged, however, that nothing in the CED gives the ICPED such a monopoly. Indeed, the Supreme Court developed this argument independently.

Interestingly, the Supreme Court broadly discussed the application of the principle of *effet utile* in the interpretation of the ICPED, recalling an advisory opinion of the Inter-American Court of Human Rights according to which human rights treaties must be interpreted *pro persona*, as this is the only way to respect the subject and purpose of those treaties. Accordingly, denying binding nature to urgent actions would ultimately deprive the entire ICPED of any *effet utile*.[50]

The two judgments cited above appear once again to question the findings of the ILC. While it is clear that two domestic cases cannot immediately overturn the practice reviewed by the ILA and by the ILC itself, it may be the case that the approaches of the two Supreme Courts, seen also in light of ICJ case law, might reinforce the idea that a duty to take account of the pronouncements of human rights treaty bodies is justifiable under

[47] Spanish Supreme Court judgment of 17 July 2018 n. 1263/2018.

[48] For two comments on this case, see K Casla, 'Supreme Court of Spain: UN Treaty Body Individual Decisions are Legally Binding' (1 August 2018) EJIL: Talk! www.ejiltalk.org; V Engstrom, 'Spanish Supreme Court Bringing UN Treaty Bodies One Step Closer to International Courts?' (22 August 2018) I-CONnect blog www.iconnectblog.com.

[49] For a comment, see G Citroni, 'Supreme Court of Justice of Mexico: The Urgent Actions of the Committee on Enforced Disappearances Are Legally Binding' (17 August 2021) OpinioJuris opiniojuris.org.

[50] Mexican Supreme Court of Justice judgment of 16 June 2021 n. 1077.

international law as it is a reasonable compromise based upon the duty to respect treaties' obligations in good faith.

IV. The role of the European Committee of Social Rights in monitoring compliance with the European Social Charter

The ECSR, originally named "Committee of Independent Experts (CIE)", is the main monitoring body of the European Social Charter; the other body involved is the Governmental Committee, whose role has been largely downsized in practice from the original configuration of the reporting procedure, which has no role in reviewing collective complaints. The ECSR's legal bases are found in arts 24 and 25 of the 1961 Charter itself.[51] According to those legal provisions, its original mandate was limited to examining States Parties' reports on the application of the provisions they accepted under Part II of the Charter.[52]

According to its original regulation, the CIE, pursuant to art. 24 of the 1961 Charter, had no more than seven members, appointed by the Committee of Ministers of the Council of Europe. However, arts 24 and 25 of the ESC were amended by the 1991 Protocol, known as the Turin Protocol.[53] While the Turin Protocol has not yet entered into force, the Committee of Ministers asked the States Parties to the European Social Charter to apply some of the measures envisaged by the Protocol itself, prior to its entry into force.[54] According to the 1991 Protocol, the body of independent experts has a minimum of nine members, to be elected by the Parliamentary Assembly of the Council of Europe. The latter provision on election is the only amendment of the 1991 Protocol that has not been implemented in practice. In accordance with a decision of the Committee of Ministers and its own rules of procedure, the ECSR is now composed of 15 members.[55]

IV.1. Reporting system

As anticipated, from the adoption of the European Social Charter, the ECSR was tasked with the activity of monitoring compliance by the Member States of the obligations

[51] European Social Charter 529 UNTS 89, ETS No. 35.

[52] *Ibid*. art. 20(1)(b).

[53] See Protocol amending the European Social Charter [1991] (not yet in force) art. 3, amending art. 25 of the European Social Charter.

[54] See Committee of Ministers of the Council of Europe Decision of 11 December 1991 CM/AS(91)Rec1168-final.

[55] European Committee on Social Rights, Rules of 6 July 2022 rule 1; the number of Committee Members was increased by the Committee of Ministers during its 751st session, see Committee of Ministers of the Council of Europe, Increase in the number of members of the European Committee of Social Rights, Decision of 7 May 2001 CM/Del/Dec(2001)751/4.2 let A. ECSR.

assumed under the Charter. Arts 21 to 29 of the Charter still formally govern the reporting system; more specifically, arts 24 and 25 refer to the competence of the ECSR.[56]

Arts 21 and 22 of the 1961 Charter respectively bind the States Parties to submit a report, every two years, on the implementation of the Charter provisions accepted by them[57] and of the provisions they have not accepted, at appropriate intervals established by the CoE Committee of Ministers.[58]

The ECSR accordingly examines the reports submitted; according to the 1991 Protocol, the ECSR assesses from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned. At the outcome of this decision process, the ECSR adopts conclusions which are published every year on its website.[59] When the Committee concludes that a reported situation is not compliant, it usually requires the State Party concerned to adopt the necessary measures to comply with the European Social Charter.

The conclusions of the European Committee of Social Rights are sent to the Committee of Ministers of the Council of Europe, which intervenes in the final stage of the reporting procedure. The work of this statutory body is prepared by the Governmental Committee of the European Social Charter and the European Code of Social Security, currently comprising representatives of the States Parties to the Charter and assisted by observers representing European employers' organisations and trade unions.

With regard to the proposals made by the Governmental Committee, the Committee of Ministers adopts a Resolution closing each supervision cycle which may contain individual recommendations to the States Parties concerned. If a State takes no action, the Committee of Ministers, after a proposal by the Governmental Committee, may address a Recommendation to that State, asking it to change the situation in law and/or in practice.

IV.2. Collective complaints procedure

The ECSR's current mandate differs greatly from its original one. This is a result of the reform process of the European Social Charter system as a whole, which took place from 1990 to 1994. At that time, the Committee of Ministers of the Council of Europe convened

[56] On the reporting system under the European Social Charter, see D Harris, 'Lessons from the Reporting System of the European Social Charter' in P Alston and J Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press 2009) 347; R Brillat, 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact' in G de Búrca and B de Witte, *Social Rights in Europe* (Oxford University Press 2005) 31.

[57] Art. 21 of the European Social Charter.

[58] *Ibid*. art. 22.

[59] Protocol amending the European Social Charter, art. 2, amending art. 24 of the European Social Charter cit.; see also European Committee of Social Rights, Rules cit. rule 22.

an *ad hoc* committee – the Charte-Rel Committee – to make proposals for improving the effectiveness of the Charter and particularly its supervision system.[60]

One of the proposals put forward by the Charte-Rel Committee concerned the mandate of the ECSR and led to the adoption of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints in 1995.[61] The 1995 Additional Protocol made the ECSR responsible for examining these collective complaints.

The 1995 Protocol entered into force in 1998, after five ratifications. Currently, only thirteen CoE's members and ESC's contracting parties are also bound to the collective complaints system and thus under this type of scrutiny by the ECSR.[62]

Art. 1 of the 1995 Additional Protocol immediately clarifies the meaning of collective complaints. They are complaints submitted to the Secretary General of the CoE by organisations from the categories listed in art. 1 of the Additional Protocol itself, namely international organisations of employers and trade unions, other international non-governmental organisations, and representative national organisations of employers and trade unions.[63]

Once the Secretary General sends a complaint to the ECSR, the latter is responsible for examining it, together with the explanation and information requested (as a mandatory step) from both the complainants and the Contracting Party concerned.[64] Upon completing the examination, the ECSR draws up a report illustrating the steps that the Committee has taken to review the complaint and containing its conclusions on whether the Contracting Party has satisfactorily applied the ESC obligation referred to in the complaint.[65]

At this stage of the analysis, the interpretation of the Additional Protocol must be complemented with that of the ECSR's rules of procedures. The rules clarify that when the ECSR concludes the examination of a collective complaint under this procedure it delivers a "decision". This terminological distinction is necessary as it separates this process from the conclusions delivered by the same Committee under the reporting procedure.[66]

[60] See Council of Europe, *Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* www.coe.int.

[61] See Additional Protocol to the European Social Charter Providing for a System of Collective Complaints [1995] ETS No. 158. On this collective complaints system, see G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* (Anthem Press 2022); M Jaeger, 'The Additional Protocol to the European Social Charter Providing for a System for Collective Complaints' (1997) LJIL 69; F Sudre, 'Le protocole additionnel à la Charte Sociale européenne prévoyant un systéme de reclamations collectives' (1996) RGDIP 715; P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G de Búrca and B de Witte, *Social Rights in Europe* cit. 45; RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) EJIL 417.

[62] Six countries have signed the 1995 Additional Protocol, but they have not yet ratified it.

[63] Art. 1 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

[64] *Ibid*. art. 7.

[65] *Ibid*. art. 8(1).

[66] European Committee of Social Rights, Rules cit. rule 2.

The ECSR then sends its report, together with its decision, to the Committee of Ministers and to the Parliamentary Assembly of the CoE.[67] However, this is not the final step in the whole process. Based upon the ECSR report, the Committee of Ministers adopts a resolution or, by a two-thirds majority of voters, a recommendation to invite the respondent State to comply with a negative decision of the Committee.[68] It should be noted that according to the Explanatory Report of the 1995 Additional Protocol, the Committee of Ministers "[...] cannot reverse the legal assessment made by the Committee of Independent Experts. However, its decision (resolution or recommendation) may be based on social and economic policy considerations".[69]

Once the Committee of Ministers adopts its resolution, the ECSR's decision is made public.[70]

A closer look at the procedure reveals some interesting aspects for the purposes of this analysis.

The procedure involves an admissibility phase prior to the examination of the merits. The ECSR issues a decision both when the complaint is admissible and when it considers that it is not. The decision on admissibility must be reasoned and is immediately made public and notified to the litigating parties and to the Contracting Parties.

The examination of each complaint is overseen closely in both phases by a Special Rapporteur appointed by the President from the members of the ECSR.[71] The Special Rapporteur is responsible for overseeing the proceedings and preparing the draft decisions on both the admissibility and on the merits.[72]

If the complaint is considered to be admissible, the ECSR examines its merits. The decision on the merits in a given complaint follows an exchange of written briefs between the complaining organisations and the respondent States; the Committee may also decide to hold a public hearing.[73] At this stage, third parties may also have the opportunity to intervene.[74]

[67] Art. 8 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

[68] *Ibid*. art. 9.

[69] *Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints* cit. para. 46.

[70] Art. 8 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. The same article envisages the possibility of the decision being made public, even in the absence of a resolution, four months after being sent to the Committee of Ministers.

[71] European Committee of Social Rights, Rules cit. rule 27.

[72] *Ibid*. rule 30.

[73] *Ibid*. rules 31 and 33.

[74] *Ibid*. rule 32. According to this rule, intervention is limited to the following categories of subjects: "The States Parties to the Protocol as well as the States having ratified the Revised Charter and having made a declaration under Article D paragraph 2 [...]" and "The international organisations of employers and trade unions referred to in Article 27 para. 2 of the Charter" in relation to "complaints lodged by national organisations of employers and trade unions or by non-governmental organisations". According to rule 32(A),

At any stage of the procedure, the ECSR may, at the request of a party or at its own initiative, adopt immediate measures to avoid irreparable injury or harm to the persons concerned.[75] Neither the 1995 Additional Protocol nor the rules of procedure clarify whether or not those immediate measures are binding upon the Parties. However, the rules clarify that "the Committee's decision on immediate measures shall be accompanied by reasons and be signed by the President, the Rapporteur and the Executive Secretary. It shall be notified to the parties. In the decision, the Committee shall fix a deadline for the respondent State to provide comprehensive information on the implementation of the immediate measures".[76]

The final decisions of the ECSR on collective complaints may be accompanied by concurring or dissenting opinions submitted by the individual members of the ECSR.[77]

At that stage, a follow-up procedure begins. Art. 10 of the 1995 Additional Protocol states that "The Contracting Party concerned shall provide information on the measures it has taken to give effect to the Committee of Ministers' recommendation, in the next report which it submits to the Secretary General under Article 21 of the Charter".[78]

Although art. 10 refers to Committee of Ministers' *recommendation*, in practice, this duty is interpreted as also referring to *resolutions* adopted by the Committee,[79] thus covering all cases where the ECSR identifies a violation of the Charter and the Committee endorses it.[80]

Furthermore, a Committee of Ministers' decision of 2014 amended the reporting system regarding the States Parties to the 1995 Additional Protocol, namely those that accepted the collective complaints procedure. In that decision, the Committee established that those States' two-year report submitted under art. 21 of the Charter must focus on the measures they have adopted to comply with (any) decisions of the ECSR under the collective complaints procedure.[81]

Such a simplified procedure allows the ECSR to monitor compliance with its decisions by the Parties involved also through its competence to review national reports. The ECSR concludes its examination of the implementation measures only when it considers that the

"Upon a proposal by the Rapporteur, the President may invite any organisation, institution or person to submit observations".

[75] European Committee of Social Rights, Rules cit. rule 36.

[76] *Ibid*.

[77] *Ibid*. rule 365.

[78] Art. 10 of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

[79] See G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* cit. 45.

[80] *Ibid*.

[81] Governmental Committee of the European Social Charter and the European Code of Social Security of the Committee of Ministers of the Council of Europe, decision of 19 March 2014, Ways of streamlining and improving the reporting and monitoring system of the European Social Charter CM(2014)26 Part II.

States Parties involved have finally complied with the decision. Interestingly, the conclusions adopted by the ECSR on the reports submitted by States are now called "Findings".[82]

V. The legal value of decisions of the European Committee of Social Rights

This *Article* will now focus on the legal nature of the decisions of the ECSR and, in particular, on the relationship between the Committee and the Committee of Ministers when it comes to guaranteeing compliance with the same.

V.1. The (non)binding force of decisions of the European Committee of Social Rights

As anticipated, the term "decision" was coined in the ECSR's rules of procedure.

The fact that the pronouncements of the ECSR were not labelled as decisions in the European Social Charter's texts or in the 1995 Additional Protocol perhaps reflects the signatory States' intention not to confer legally binding value on the conclusions and on the decisions of the ECSR. Indeed, there are no provisions in the Charter – or in any other subsequent additional protocols – which bind the States to comply with the pronouncements of the ECSR.[83]

As explained previously, it must be acknowledged that in the context of human rights monitoring bodies, when States decide to give legally binding value to the decisions or judgments of those bodies, they do so explicitly.

Consequently, there is no doubt that from a formalistic point of view the decisions of the ECSR are not legally binding on the States Parties. According to one Author, this conclusion implies first and foremost that States Parties are not bound to respect the decisions of the ECSR in their *inter partes* relationships. More specifically, they are not committing an internationally wrongful act if they fail to comply with those decisions. Therefore, States Parties in theory cannot adopt countermeasures against a State that is not complying with a decision of the ECSR and it appears that the Council of Europe may also not adopt any sanction against it.[84] Indeed, the absence of an inter-States complaint mechanism appears to confirm this view.

However, as already stated, the decision issued by the ECSR on a collective complaint is sent to the Committee of Ministers of the Council of Europe. The latter adopts a resolution by a majority of the attendees, or a recommendation by a two-thirds majority of the voters. The Committee of Ministers cannot reverse the decisions of the ECSR, except

[82] See, again, G Palmisano, *Collective Complaints as a Means for Protecting Social Rights in Europe* cit. 45-46.
[83] *Ibid*. 47.
[84] *Ibid*. 48.

in the presence of pressing economic and social reasons.[85] The Committee of Ministers may, however, decide not to act or to protract its intervention over time.

On paper, the Committee of Ministers should adopt a recommendation if the State concerned is found to have violated the Charter. In practice, this has happened twice.[86] In many cases, the Committee of Ministers has limited itself to adopting a resolution through which it takes note of the State's/States' willingness to return to a situation of compliance. In some other cases, it has merely acknowledged the respondent States' concerns over the ECSR decision.

Despite this, the involvement of the Committee of Ministers triggers a follow-up mechanism which, on one side, binds the States to report the measures implemented by them to comply with the ECSR decision and, on the other side, it allows the ECSR to verify this compliance.

Whereas this follow-up procedure does not alter the non-binding nature of the ECSR decision, it does confirm that the decisions at least generate an expectation that their outcomes will be respected and implemented at national level. [87]

A quick perusal of some of the ECSR's findings on the implementation of decisions ascertaining a violation of the Charter on the part of States reveals that this expectation requires the adoption of legal measures in domestic systems and the mobilisation of economic resources.

An interesting case is represented by the follow-up findings on the implementation of a 2005 decision against Italy on inadequate living conditions in camps or similar settlements for the Roma community who choose to follow an itinerant lifestyle or are forced to do so, on the adequacy of the eviction procedure and on the lack of permanent dwellings.[88] The ECSR, in its last-in-time findings, found that the Government did not invest sufficient economic resources and that the guidelines adopted by the State to regulate evictions were not sufficiently clear in terms of legal remedies available to prevent and to dispute them.[89]

The interplay between the ECSR and the Committee of Ministers of the Council of Europe was criticised; more specifically, the fact that the latter could overturn a decision made by the former on economic and social grounds was seen as a weakness of the

[85] See *supra* section IV.

[86] Recommendation RecChs(2001) 1 of the Committee of Ministers to member states on social workers of 31 January 2011 and Resolution CM/ResChS(2015)4 *European Federation of National Organisations working with the Homeless (FEANTSA) v the Netherlands* of 11 February 2015.

[87] In this regard, it can be seen that the merging of the two different monitoring procedures – reporting and collective complaints systems – might reflect the fact that these procedures are complementary and they share many common features. Accordingly, see RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter' cit. 451.

[88] Complaint n. 27/2004 of the European Committee of Social Rights of 7 December 2005 *European Roma Rights Centre (ERRC) v Italy*.

[89] Findings of the European Committee of Social Rights of 6 December 2018 Second Assessment of follow up: *European Roma Rights Center (ERRC) v Italy*, see, in particular, para. 3.

whole system.[90] However, in practice, it is important to understand the meaning of this caveat.[91] Indeed, as this has never happened, the system appears fit for purpose in generating compliance by the States Parties.[92]

V.2. On the *res interpretata* value of decisions of the European Committee of Social Rights: A contextual interpretation of recent case-law of the Italian Constitutional Court

It remains to be seen if and to what extent the aforementioned expectation of the ECSR's decisions being respected at national level translates into a duty by national judges to consider those pronouncements.

Firstly, it should be stressed that the ECSR itself requires the national courts to follow the interpretations provided by the ECSR. In a decision against Sweden, it stated that: "the Committee considers therefore that it is for the national courts to decide the matter in the light of the principles the Committee has laid down on this subject or, as the case may be, for the legislator to enable the courts to draw the consequences as regards the conformity with the Charter and the legality of the provisions at issue".[93]

Two recent judgments of the Italian Constitutional Court contribute to shedding some light on this issue, although they also attracted severe critiques. Judgments no. 120[94] and 194,[95] both decided in 2018, for the first time concerned the provisions of the European Social Charter, as interpreted by the ECSR, as a parameter for constitutional review in the Italian domestic legal system.[96] They respectively dealt with the right of

[90] Cf F Sudre, 'Le Protocole additionnel à la Charte Sociale européenne prévoyant un système de réclamations collectives' cit. 737.

[91] This was held by M Jaeger, 'The Additional Protocol to the European Social Charter Providing for a System for Collective Complaints' cit. 79.

[92] In this regard, see D Harris, 'Lessons from the Reporting System of the European Social Charter' cit. 359: "States take their reporting obligations seriously".

[93] Complaint n. 12/2002 of the European Committee of Social Rights, Decision of 15 May 2003 *Confederation of Swedish Enterprise v Sweden* para. 42. Cf R Brillat, 'The Supervisory Machinery of the European Social Charter' cit. 42.

[94] Italian Constitutional Court Judgment of 13 June 2018 n. 120.

[95] Italian Constitutional Court Judgment of 3 November 2018 n. 194.

[96] The judgments were analysed widely in Italian literature. For comments in English, see L Mola, 'The European Social Charter as a Parameter for Constitutional Review of Legislation' (2019) IYIL 493. For comments in Italian, see A Tancredi, 'La Carta sociale europea come parametro interposto nella recente giurisprudenza costituzionale: novità e questioni aperte' (2019) RDI 491; D Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 81; L Borlini and L Crema, 'Il valore delle pronunce del Comitato europeo dei diritti sociali ai fini dell'interpretazione della Carta Sociale Europea nel diritto internazionale' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 86; L Mola, 'Brevissime osservazioni sull'interpretazione della carta sociale europea. A margine della sentenza n. 120/2018 della Corte costituzionale in prospettiva di una prossima pronuncia' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 119; D Russo, 'La definizione del parametro di costituzionalità

members of the army to form and/or join trade unions[97] and the right of workers to obtain compensation in the event of the termination of their employment.[98]

While it is impossible to cover all substantial aspects emerging from the two judgments, it should nevertheless be highlighted that the Constitutional Court presented the legal value of ECSR decisions in the Italian domestic legal system.

Firstly, the Constitutional Court stated that the European Social Charter can constitute a constitutional parameter as it is a 'special treaty' which can be assimilated to the ECHR, already considered by the Court as constituting such a parameter.[99] Furthermore, the Court held that the provisions of the European Social Charter are precise, imposing specific duties on the States Parties.[100]

However, with regard to ECSR decisions, the Court confirmed that they do not have *res iudicata* authority.[101] The Court compared the ECSR's outcomes with the ECHR's judgments, highlighting the absence, in the European Social Charter, of provisions such as arts 32 and 46 of the ECHR, which have already been discussed above.[102] Accordingly, in the most critical (and criticised) part of judgment no. 120, the Court stated that national judges are not bound by the interpretation of the European Social Charter provided by the ECSR. As a consequence, the Court did not follow a decision of the ECSR on a similar matter.[103]

Although the Constitutional Court did not elaborate further on the legal value of ECSR decisions at large,[104] the final part of judgment no. 120 attracted severe criticism and stimulated further reflections. The Court was firstly criticised for having downgraded ECSR decisions, as it had failed to recognise that the ECSR is the only body competent to interpret the European Social Charter, and that it does so following a (quasi) judicial path and judging based upon law.[105] According to another critique, the Constitutional Court missed the opportunity to give to ECSR decisions the authority of a supplementary means of interpretation, as per art. 32 of the Vienna Convention on the Law of Treaties.[106]

fondato sulla Carta sociale europea: il valore delle pronunce del Comitato europeo dei diritti sociali' (2018) Forum di Quaderni Costituzionali www.forumcostituzionale.it 128.

[97] Enshrined in art. 5 of the European Social Charter (Revised).

[98] Enshrined in art. 24 of the European Social Charter (Revised).

[99] Italian Constitutional Court Judgment of 11 April 2018 n. 120/2018 para. 10(1); the Italian Constitutional Court qualified the ECHR as a constitutional parameter in judgments of 22 October 2007 n. 348 and 349.

[100] Italian Constitutional Court Judgment n. 120/2018 cit. para. 10(2).

[101] *Ibid*. para. 13; Italian Constitutional Court Judgment of 26 September 2018 n. 194/2018 para. 14.

[102] See *supra* section III.

[103] Complaint n. 101/2013 of the European Committee of Social Rights, Judgment of 27 January 2016 *European Council of Police Trade Unions (CESP) v France*.

[104] See A Tancredi, 'La Carta sociale europea come parametro interposto nella recente giurisprudenza costituzionale: novità e questioni aperte' cit. 499.

[105] Cf D Russo, 'La definizione del parametro di costituzionalità fondato sulla Carta sociale europea' cit. 131.

[106] Cf L Mola, Brevissime osservazioni sull'interpretazione della carta sociale europea' cit. 122; L Borlini and L Crema, 'Il valore delle pronunce del Comitato europeo dei diritti sociali ai fini dell'interpretazione della Carta Sociale Europea nel diritto internazionale' cit. 104.

Another author, however, highlighted an interesting part of judgment no. 120.[107] Indeed, while the Constitutional Court did not follow the interpretation of the ECSR, it provided a "reasoned" justification for not doing so, arguing that the ECSR findings were not compatible with supreme constitutional principles.[108]

According to this view, the duty of States Parties to take account of the ECSR's decision is strengthened, albeit indirectly, by the Italian Constitutional Court.[109]

Although a comparative analysis lies beyond the scope of this *Article*, it is interesting to note that there are indications from other national courts that this might be the way forward. Although past judicial practice presented an incoherent framework,[110] more recent judgments from the Spanish lower courts and from the Spanish Constitutional Court itself confirm that the non-binding nature of ECSR decisions does not alter their authority, which cannot simply be set aside.[111]

In the field of social, economic and cultural rights, the duty to take into account was also mentioned in General Comment no. 9 of the Committee on Economic, Social and Cultural Rights (CESCR) on the domestic application of the ICESCR. Although the CESCR could specifically address the legal value of its decision,[112] it nonetheless affirmed that "within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations".[113]

VI. Concluding remarks

The aim of this *Article* was to analyse the decisions of the ECSR in the broader context of the debate on the legal value of pronouncements of human rights treaty bodies, to ascertain the grounds on which States "must respect" those decisions. Some concluding remarks are now offered.

[107] D Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali' cit. 84.

[108] Italian Constitutional Court judgment n. 120/2018 cit. paras 13(2) and 13(4).

[109] See, again, D Amoroso, 'Sull'obbligo della Corte Costituzionale italiana di "prendere in considerazione" le decisioni del Comitato europeo dei diritti sociali' cit. 85.

[110] Cf accordingly, and for an overview of past cases, G Gori, 'Domestic Implementation of the European Social Charter' cit. 80.

[111] C Salcedo Beltran, 'La Charte Sociale Européenne: une arme face aux reformes anti-crise mises en place en Espagne' (2018) Lex Social. Revista juridica de los Derechos Sociales 351, 360.

[112] The complaint procedure was established in 2013, see General Assembly of 10 December 2008 Resolution A/RES/63/117 on Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR).

[113] UN Committee on Economic, Social and Cultural Rights of 3 December 1998 E/C.12/1998/24 General *Comment No. 9: The Domestic Application of the Covenant* para. 14.

The composition of the ECSR, its procedure, and the main features of the follow-up procedure allow for it to be concluded that ECSR decisions are assimilated to pronouncements of human rights treaty bodies. Accordingly, the entire debate surrounding those pronouncements is helpful for reflecting on the legal value of ECSR decisions.

On the merits, the first conclusion reached is that the ECSR can be approved from the perspective of the duty to take account of its decisions, which is confirmed in the most recent practice concerning the domestic implementation of pronouncements of human rights treaty bodies.

In this regard, it must be noted that judgments no. 120 and 194 (particularly judgment no. 120) of the Italian Constitutional Court apparently appear to reinforce the view that domestic courts must provide justification when they disregard ECSR decisions, thus confirming the existence of a duty to take account of the pronouncements of human rights treaties bodies, even if they are not binding in themselves, or, to use the words on the ECSR's website, even if they are not directly enforceable.

ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

Edited by Giovanni Boggero, Francesco Costamagna *and* Lorenza Mola

FROM THE PRINCIPLE OF SYSTEMIC INTEGRATION TO THE INTEGRATED APPROACH: THE PATHWAY TO THE INTEGRATION OF THE EUROPEAN SOCIAL CHARTER FOR THE INTERPRETATION OF THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS

PÉNÉLOPE HARDY*

ABSTRACT: The Europe of human rights is characterised by the duality of the legal orders of the Council of Europe and of the EU. Their instruments must coexist peacefully, and a coherent interpretation of social human rights is essential to this end, as EU Member States belong to both legal orders. In this sense, it is worth considering whether the integration of the European Social Charter into the interpretation of the EU Charter of Fundamental Rights could reinforce the protection of social rights. More specifically, would a shift from the application of the principle of systemic integration to the theory of integrated approach foster such a change? To answer these questions, two main hypotheses are developed, by focussing on the right to social security. The first one affirms that following the principle of systemic integration would lead to a stronger interpretation of social rights in the EU legal order. To explore such a hypothesis, the effects of the application of this principle to the interpretation of EU law are considered, in light of the customary nature of this principle and its codification. The second affirms that the impact of applying the theory of integrated approach would go beyond the simple pursuit of systemic coherence. By advancing the method of referring to instruments from other legal orders when interpreting provisions that are applicable to a given

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/624

situation, this theory has a double objective: ensuring consistent interpretation and strengthening the protection of rights.

KEYWORDS: European Social Charter – systemic integration – *integrated approach* – European Union Charter of Fundamental Rights – right to social security – human social rights.

I. INTRODUCTION

Social human rights are recognised and protected in Europe, within the two coexistent legal orders that are the Council of Europe and the European Union. The Council of Europe adopted the European Social Charter (ESC) to complement the European Convention of Human Rights which mainly recognizes civil and political rights. In its turn, the European Union adopted the Charter of fundamental rights of the European Union (CFREU or EU Charter) following the 1989 Community Charter of Fundamental Social Rights for Workers. This *Article* build on this parallel trajectory of recognition of social fundamental rights in Europe to explore the following question: Could the integration of the European Social Charter into the interpretation of the EU Charter of Fundamental Rights reinforce the protection of social rights?

The starting point of this *Article* is the coexistence of the European Union and the Council of Europe, both involved in the protection of human rights (including fundamental social rights). Both are independent human rights systems with their own instruments, supervisory bodies, systematic monitoring, and mechanisms to respond to crises.[1] At the same time, such a coexistence makes it so that a coherent interpretation of social human rights across the respective legal orders is essential due to belonging of EU Member States to both legal orders despite their systemic divergence.[2] In this context, this *Article* will focus on social human rights under ESC and the CFREU.

In order to analyse the interactions between these instruments, I will focus on a particular right: the right to social security. Under the definition of the International Labour Office, "Social protection, or social security, is a human right and is defined as the set of policies and programmes designed to reduce and prevent poverty, vulnerability and social exclusion throughout the life cycle".[3] Firstly this right is recognised in both instruments (art. 12 ESC and art. 34 CFREU). Furthermore, the uncertainty surrounding the

[1] Concerning features of human rights systems see G De Búrca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the EU' in O De Schutter and SF Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant 2005) 247-248.

[2] On these divergences, K Lukas, 'The Fundamental rights charter of the European Union and the European Social Charter of the Council of Europe: Partners or Rivals?' in G Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument* (Brill 2014) 222-244.

[3] International Labour Organization, *World Social Protection Report 2020-22: Social Protection at The Crossroads – in Pursuit of a Better Future*, www.ilo.org.

protection of the right to social security[4] and its justiciability within the EU legal order offers an opportunity to explore the potential added value of relying on the ESC[5] when interpreting the CFREU, and in particular its "Solidarity" chapter. The respect of this right, which is recognized and protected by the CFREU and by the European Pillar of Social Rights.[6] is controlled by the Court of Justice of the European Union (CJEU)[7] and, to some extent, in the European Semester's periodical monitoring.[8] However, art. 34 of the EU Charter has a limited justiciability, only playing a role in guiding the interpretation of EU law. This particular justiciability is due to the general requirement for invoking provisions of the CFREU, namely that EU law must be applicable to the situation.[9] Moreover, the right to social security is mainly referred to as a "principle".[10] Therefore, its justiciability is limited by the EU Charter to the "interpretation of legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and acts of Member States when they are implementing Union law in the ruling of their legitimacy".[11] The latter limitation means that the justiciability is only normative in scope.[12] Those reasons lead to a limited protection of the right to social security within the EU. The fact that this right is recognized and protected not only by the ESC, but also by other international law instruments, seems to suggest the there is a necessity for a better protection by the EU legal order.

Hence, two main hypotheses will be developed in the present *Article*. First, following the principle of systemic integration would lead to a reinforcement of the interpretation of social rights in the EU legal order. Second, applying the theory of integrated approach would have an impact going beyond the simple improvement of systemic coherence.

[4] On the right to social security within EU, A Crescenzi, 'Social Security, Social Assistance and Health Care in the Charter of Fundamental Rights' in G Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument* cit. 145-164.

[5] "It seems apparent that in some areas, the EU system lacks a certain level of protection that the European Social Charter can provide". K Lukas, 'The Fundamental Rights Charter of the European Union and the European Social Charter of the Council of Europe' cit. 239.

[6] Art. 34 of the Charter of Fundamental Rights of European Union [2012]; art. 12 of the European Pillars of Social Rights (EPSR) of 16 November 2017.

[7] See *e.g.* case C-571/10 *Kamberaj* ECLI:EU:C:2012:233.

[8] See *e.g.* Country Report France 2020 SWD(2020) 509 final from the Commission of 26 February 2020, p. 54, 91.

[9] D Dumont, 'Article 34: Sécurité Sociale et Aide Sociale' in F Picod, C Rizcallah and S Van Drooghenbroek (eds), *Charte Des Droits Fondamentaux de l'Union Européenne* (Bruylant 2019) 857-860; C Nivard, 'Les conditions d'application de la Charte des droits fondamentaux' in A Biad and V Louvel-Parisot (eds), *La Charte des droits fondamentaux de l'Union européenne: bilan d'application* (Anthemis 2018) 31; R White, 'Article 34' in S Peers and others, *The EU Charter of Fundamental Rights: A Commentary* (Hart publishing 2014) 937-940.

[10] Explication ad 52, Explications relating to the Charter of fundamental rights 2007/C 303/02; see also, D Dumont, 'Article 34' cit. 869–870; R White 'Article 34' cit. 936-937.

[11] Art. 52(2) of the Charter cit.

[12] About "normative justiciability", see C Nivard, *La justiciabilité des droits sociaux: étude de droit conventionnel européen* (Bruylant 2012) 21.

The first part of the *Article* will be devoted to the analysis of the principle of systemic integration and of its applicability to the interpretation of CFREU. The goal of this principle is to improve the coherence between instruments. Legal scholarship noted how the consistent interpretation of rights would reduce the risks of conflicts and divergent interpretations of the two major European social human rights instruments,[13] as well as prevent these contradictions in institutional settings.[14] An illustration of this conflict can be found in the *Laval* case and the subsequent decision by the European Committee of Social Rights (ECSR).[15] On one hand, the CJEU recognized that the right to collective action is fundamental, but also found that a collective action can represent a restriction to the fundamental freedoms of the internal market and, therefore, should be assessed through a proportionality test. On the other hand, the ECSR has decided that "Lex Laval", the law adopted to bring the Swedish legal system in line with the CJEU ruling, violates the right to bargain collectively. In the eyes of the ECSR, the CJEU has put the freedom of movement above the fundamental right to take collective action, whereas economic freedoms "cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights".[16] The ECSR also stated that "the fact that the provisions are based on a European Union directive does not remove them from the ambit of the Charter".[17]

In light of this yet unresolved conflict, it is worth considering how the application of the principle of systemic integration within the EU legal order could improve the coherence in the field of the protection of (fundamental) social rights. In exploring this option, it will be necessary to address the very possibility of taking into account an instrument adopted in the context of a given legal order (such as the ESC) when interpreting a second

[13] O De Schutter, 'L'adhésion de l'Union Européenne à la Charte Sociale Européenne' (2015) RTDH 256; O De Schutter, *The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights* (European Parliament – Committee on Constitutional Affairs Study 2016) www.europarl.europa.eu 24-32.

[14] T Jagland, *Situation de la démocratie, des droits de l'homme et de l'état de droit en Europe* (Rapport du Conseil de l'Europe 2014) 41.

[15] Case C-341/05 *Laval un Partneri* ECLI:EU:C:2007:809; ECSR decision of 3 July 2013 complaint n. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* ("Lex Laval"); S Laulom, 'Le comité européen des droits sociaux condamne la jurisprudence Laval' (2014) Semaine sociale Lamy 5-7; K Lukas, 'The Fundamental Rights Charter of the European Union and the European Social Charter of the Council of Europe' cit. 240-242; M Rocca 'A Clash of Kings: The European Committee of Social Rights on the "Lex Laval" ... and on the EU Framework for the Posting of Workers' (2013) EJSL 217-232. This case concerns the right to collective action of Swedish Unions. Following decision of CJEU, Swedish law has been modified by a law called "Lex Laval". Following this reform, a Swedish Union has filed a collective complaint before the ECSR.

[16] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit. para. 122.

[17] ECSR decision of 23 June 2010 complaint n. 55/2009 *Confédération Générale du Travail (CGT) v France* para. 32; reminded in *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit. para. 72.

instrument belonging to a different one (*in casu*, the CFREU), with the goal of pursuing not just the goal of "systemic coherence", but the better protection of social human rights. To this end, I will examine the specific right to social security.

The second part of this *Article* explores the potential of an integrated approach to tackle the various issues and uncertainties related to application of the principle of systemic integration for the interpretation of social human rights, particularly within the EU legal order. This second theory proposes cross-systemic references as a tool to improve the protection of social rights. In this context, I will briefly address the divergences with the theory of fragmentation, according to which the expansion of international law produces a diversity of sources by subject-matter and by region that threatens the unity of international law and so the consistency of the system.[18]

II. The principle of systemic integration and the consistent interpretation of social rights

The "principle of systemic integration" addresses the fragmentation of international law by providing that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account for the interpretation of a treaty.[19] If applicable to a given situation, such an approach has the potential to foster a consistent interpretation of human and fundamental rights, as well as to strengthen the interpretation of social rights under regional legal orders.

II.1. Questioning the application of art. 31(3)(c) of VCLT to ESC and CFREU

The principle of systemic integration stems from art. 31(3)(c) of the Vienna Convention on the law of treaties (VCLT or the Convention), and results from an evolution of international customary law that has been progressively codified during the twentieth century.[20] Since the principle of systemic integration is rooted in international customary law, "the rules laid down in Arts 31–33 [...] can in principle be applied to all treaties outside the

[18] AJ Colangelo, 'A Systems Theory of Fragmentation and Harmonization' (2016) NYUJIntlL&Pol 7; H Grant Cohen, 'Fragmentation' in J D'Aspremont and S Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2019) 316; S Moundounga Ntsigou, *La fragmentation du droit international public: l'œuvre de codification à la lumière de la fragmentation du droit international* (Thesis University of Strasbourg 2013) 19-22.

[19] Art. 31(3)(c) VCLT and P Merkouris, 'The Principle of Systemic Integration' in *Max Planck Encyclopedias of International Law* (Oxford University Press 2020) paras 1-3.

[20] On the "codification" see P Merkouris, 'The Principle of Systemic Integration' cit. paras 6-19; and A Pellet, 'Canons of Interpretation under the Vienna Convention' in J Klinger, Y Parkhomenko and C Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 2-4. See also, RK Gardiner, *Treaty Interpretation* (Oxford University Press 2015 second edition) 295-296.

scope of the [Vienna] Convention".[21] This has also been addressed by the International Court of Justice, when it stated that "[the] principles [...] reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties [...] may in many respects be considered as a codification of existing customary international law on the point".[22]

a) Addressing the conditions of application of the provision.

The application of this principle requires that three conditions are fulfilled: first, the instruments at issue must be "rules of international law"; second, they must be relevant; and, third, they must be applicable in the relation between the parties.[23]

Firstly, ESC and CFREU are "rules of international law" under art. 31(3)(c). "Rules" might be defined as "binding rules of international law, emanating from an accepted source of international law, i.e. treaties, custom and/or general principles of law, recognized by civilized nations".[24] "Rules of international law" should be understood broadly as any "sources of law (treaties, customary law, general principles, and, as subsidiary sources, judicial decisions and academic writing)".[25] From the prospective of the ECtHR, ESC and CFREU are "rules of international law". Indeed, guided by VCLT provisions, the ECtHR took the ESC and the EU Charter into account (together with the International Covenant on Economic, Social and Cultural Rights and ILO conventions) to interpret the right to form a trade union under article 11 ECHR.[26]

Secondly, one has to determine whether ESC and CFREU as rules of international law are relevant, on the basis of their subject matter and temporality.[27] The *subject matter* criterion refers to rules that relate to the same subject matter as the provision interpreted.[28] Human rights instruments relate to the same subject matter.[29] The subject matter relevance criterion should be satisfied when a same right is protected by both instruments even if there is a terminological difference among provisions. That same is true for social human rights instruments. In that sense, the right to social security is recognised

[21] O Dörr, 'Article 31: General Rule of Interpretation' in O Dörr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018 second edition) 563.

[22] ICJ *Guinea-Bissau v Senegal* (Judgment) [12 November 1991] para. 48.

[23] P Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (Brill, Nijhof 2015); RK Gardiner, *Treaty Interpretation* cit.

[24] P Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* cit. 14.

[25] RK Gardiner, *Treaty Interpretation* cit. 300.

[26] ECtHR *Demir and Baykara v Turkey* App n. 34503/97 [12 November 2008] paras 96 ff.

[27] On the "relevance" criterion of the principle of systemic integration see RK Gardiner, *Treaty Interpretation* cit. 299. Two other meanings of relevance have been put forward: *linguistic proximity* and *actor proximity*. P Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* cit. 36-78 (for a full development on the "proximity criterion", see *ibid*. 65). Ultimately, the question of relevance requires answering the "how", "what", "who" and "when" questions.

[28] O Dörr, 'Article 31' cit. 609-610; A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) ICLQ.

[29] M Fitzmaurice, 'Interpretation of Human Rights Treaties' cit. 754.

and protected by the International Labour Organisation (ILO) Constitution and conventions, the International Covenant on Economic, Social and Cultural Rights (ICESC), the Universal Declaration of Human rights, the European Social Charter and the EU Charter of Fundamental Rights. To be more specific, the right to social security is expressly mentioned in both parts[30] of the ESC. Art. 12 of Part I reads: "All workers and their dependents have the right to social security". Art. 12 of Part II adds:

> "With a view to ensuring the effective exercise of the right to social security, the Parties undertake:
> 1. to establish or maintain a system of social security;
> 2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
> 3. to endeavour to raise progressively the system of social security to a higher level;
> 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
> a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
> b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties".

Art. 34 of the EU Charter recognise the right to social security within EU[31]. It provides that:

> "1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
> 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
> 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices".

Reading these texts shows how both instruments have the same subject matter, both provisions concern the right to social security, despite their differences. Whereas art. 12

[30] The first part of the Charter enumerates the various rights recognized; the second part specifies the content of those rights.

[31] On the recognition of the right to social security see R White, 'Article 34' cit.; D Dumont, 'Article 34' cit.

ESC affirms the right to social security and seeks to ensure its effectiveness, art. 34 CFREU pertains to the entitlement to social security benefits and recognises the right to social assistance. Because of this, the protection of the right to social security is more limited in art. 34 that in art. 12. Nonetheless both recognize and aim to protect this right.

Because of their dynamic interpretation, those instruments are temporally relevant. Indeed, the *temporality*[32] *relevance* requirement raises the question of the time under consideration for the interpretation.[33] This refers to the debate of static interpretation versus dynamic interpretation.[34] In this sense, "the applicable rules are those in force at the time of the interpretation of the treaty".[35] Hence, art. 31(3) VCLT is compatible with a dynamic interpretation.[36] This dynamic approach "has mainly developed through the interpretation of human rights treaties". [37] Besides, the European Court of Human Rights (ECtHR) usually interprets European Convention of Human Rights (ECHR) provisions in a dynamic (evolutive) approach, as the ESCR does with the ESC.[38]

Nevertheless, ESC and CFREU might not be "applicable between parties". Indeed, there is uncertainty surrounding which States are to be understood as "parties": all parties to the treaty or only those involved in the given situation.[39] This is a particularly important question when it comes to the role of the ESC for the interpretation of the EU Charter. The ESC was revised in 1996 but the first version of 1961 is still in force. All EU Member States have ratified one of the European social charters (original or revised), but neither of the two Charters has been ratified by *all* Member States. Another question related to this issue is: should both European social charters be understood as a single continuum instrument and, therefore, should we consider that all EU Member States have ratified the latter?[40] Conversely, not all parties to the (R)ESC are EU Member States.

[32] About the evolution of temporality under art. 31(3) VCLT see: C Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) ICLQ 316.

[33] O Dörr, 'Article 31' cit. 612.

[34] *Ibid*. 572-574.

[35] ME Villiger, 'The Rules on Interpretation' cit. 112.

[36] J Christoffersen, 'Impact on General Principles of Treaty Interpretation' in MT Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 47-50.

[37] M Fitzmaurice, 'Interpretation of Human Rights Treaties' cit. 750.

[38] J Christoffersen,'Impact on General Principles of Treaty Interpretation' cit. 47-50; O De Schutter, 'The Two Lives of the European Social Charter' in O De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe / La Charte sociale européenne: une constitution sociale pour l'Europe* (Bruylant 2010) 29; S Theil, 'Is the "Living Instrument" Approach of the European Court of Human Rights Compatible with the ECHR and International Law?' (2017) EPL 587.

[39] O Dörr, 'Article 31' cit. 610-611; RK Gardiner, *Treaty Interpretation* cit. 303-304, 310-318; C Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' cit. 313-315.

[40] On this question, Olivier de Schutter seems favourable to considering the European Social Charter as one global instrument including the 1961 version and the revised one, see O De Schutter, 'L'adhésion de l'Union Européenne à la Charte Sociale Européenne' cit. 42.

Campbell McLachlan has suggested four possible interpretations of the meaning of "parties".[41] First, the provision "requires that all parties to the treaty under interpretation also be parties to any treaties relied upon".[42] This is the narrowest option since it would greatly limit the potential international sources of interpretation. The second interpretation requires "that the treaty parties in dispute are also parties to the other treaty".[43] This is the broadest option, which would increase the number of sources of inspiration since only the parties to the dispute must be part of the given instrument. The third solution represents the intermediate option: "Insofar as the treaty were not in force between all members to the treaty under interpretation, the rule contained in it [is] treated as being a rule of customary international law".[44] Therefore, this is "an intermediate test which does not require complete identity of treaty parties, but does require that the other rule relied upon can be said to be implicitly accepted or tolerated by all parties to the treaty under interpretation".[45] Campbell McLachlan favours the first and third options; the ECtHR's practice seems to be consistent with the third option.[46]

Coming back to the issue here at stake, the condition that might prove problematic regarding the application of the principle of systemic integration to the interpretation of the CFREU in light of the ESC, is the requirement of "being applicable between parties".

b) Addressing the application of the principle by supervisory bodies.

Despite this difficulty, the principle of systemic integration has been applied between legal orders of Council of Europe and of European Union.

Firstly, the ECtHR applies the principle of systemic integration when interpreting the ECHR.[47] This was fully developed in the *Demir and Baykara* case, concerning the freedom of trade union association.[48] As for the specific relationship with the EU legal order, the ECtHR has stated, in the *Bosphorus* case, that the protection of fundamental rights under EU law should be considered as equivalent to the one provided by the ECHR,[49] leading to the

[41] C Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' cit. 314-315. Even if the ECHR does not recognize the right to social security, an indirect protection of this right may be attained through ECtHR's interpretation of ECHR's provisions (through art. 2 ECHR: ECtHR, *Dodov v Bulgarie* App n. 59548/00 [17 January 2008] paras 80 ff.; through arts 6 and 14 ECHR and art. 1 1st additional Protocol: ECtHR *Koua Poirrez v France* App n. 40892/98 [30 September 2003]; through art. 3 ECHR: ECtHR *Larioshina v Russia* App n. 56869/00 [23 April 2002]).

[42] C Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' cit. 314-315.

[43] *Ibid*.

[44] *Ibid*.

[45] *Ibid*.

[46] *Demir and Baykara* cit. para. 72.

[47] C Mclachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' cit. 294.

[48] *Demir and Baykara* cit. paras 65–86.

[49] ECtHR *Bosphorus* App n. 45036/98 [30 June 2005] para. 165; R Lawson, 'Protecting and Promoting Fundamental Rights in the "European Legal Space": The Role of the European Court of Human Rights' in O

establishment of a (rebuttable) presumption of conformity to the ECHR.[50] From this prospective, the dual system of human rights seems consistent. However, the situation is different on the side of the ESC. Indeed, the ECSR has made it clear that no such presumption of conformity can be afforded to EU law when it comes to the respect of the ESC. [51]

Secondly, the ECSR stated that "when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties", with an explicit reference to art. 31(3).[52] Hence, the principle of systemic integration is applicable to the interpretation of the ESC. Accordingly, the ECSR draws inspiration from the body of decisions of concerning social human rights delivered by other supervisory bodies.[53] On this basis it is worth considering whether this includes EU law, notably the Charter of Fundamental Rights of the European Union (CFREU or EU Charter hereafter), and the case law of the CJEU. The answer to such a question is that, while the ECSR does not refer to EU Charter in its decisions, it does mention it among relevant provisions.[54] Therefore, the CFREU should be considered among the documents which can be taken into account for the interpretation of ESC under the principle of systemic integration.

Thirdly, this principle might be applicable, to some extent, to the interpretation of the EU Charter. The main obstacle along this path is the exclusive competence of the CJEU when it comes to the interpretation of EU treaties.[55] In *Costa/ENEL*, the CJEU argued that "by contrast with ordinary international treaties, the EEC treaty has created its own legal system".[56] In other words, the CJEU considers EU treaties to be fundamentally different

De Schutter and V Moreno Lax (eds), *Human Rights in the Web of Governance: Towards a Learning-Based Fundamental Rights Policy for the European Union* (Bruylant 2010) 82–84.

[50] V Constantinesco, 'C'est comme si c'était fait? Observations à propos de l'arrêt de la cour européenne des droits de l'homme, Grande Chambre, Bosphorus Airlines du 30 juin 2005' (2006) Cahiers de Droit Européen 363.

[51] *Confédération Générale du Travail (CGT) v France* cit. para. 35: "the Committee considers that neither the situation of social rights in the European Union legal order nor the process of elaboration of secondary legislation would justify a similar presumption[of conformity] – even rebuttable – of conformity of legal texts of the European Union with the European Social Charter"; *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit. para. 74: "the Committee considers that neither the current status of social rights in the EU legal order nor the substance of EU legislation and the process by which it is generated would justify a general presumption of conformity of legal acts and rules of the EU with the European Social Charter".

[52] ECSR decision of 8 September 2004 complaint n. 14/2003 *International Federation of Human Rights Leagues (FIDH) v France* para. 26. See also, K Lörcher, 'Interpretation' in N Bruun and others (eds), *The European Social Charter and the Employment Relation* (Hart Publishing 2017) 52.

[53] O De Schutter, 'The Two Lives of the European Social Charter' cit. 32-33.

[54] ECSR decision of 9 September 2014 complaint n. 88/2012 *Finnish Society of Social Rights v Finland* paras 22-25.

[55] Case C-26/62 *Van Gend and Loos v Administratie der Belastingen* ECLI:EU:C:1963:1; JHH Weiler, 'Rewriting Van Gend & Loos: Towards a Normative Theory of ECJ Hermeneutics' in O Wiklund (ed.), *Judicial Discretion in European Perspective* (Norstedts Juridik 2003) 150.

[56] Case C-6/64 *Costa v E.N.E.L* ECLI:EU:C:1964:66.

from other international treaties. Nonetheless, Olivier de Schutter considers that the principle of autonomy does not preclude external control.[57] According to Olivier Dörr, the general rule of interpretation applies to the European Union with some modifications such as the principle of *effet utile* and the constitutional principle of autonomous interpretations.[58] Others propose to use the general rule of interpretation as a "methodological guidance", which would preclude its strict application.[59] Moreover, the principle of systemic interpretation, "can in principle be applied to all treaties outside the scope of the [Vienna] Convention".[60] Henceforth, the principle of systemic integration could be applicable to the interpretation of EU Charter, and notably, for what matters here, lead to its interpretation in light of the ESC.

II.2. Seeking a consistent interpretation of the right to social security

The objective pursued by the principle of systemic integration is to maintain and guarantee a systemic coherence of the international legal order,[61] thus avoiding conflicts of interpretation between various international provisions. As Rachovitsa puts it, "[s]ystemic integration is being presented not only as a means of avoiding dissonant interpretations and/or judgments, but also as a remedy for the 'piecemeal' judicial functioning of international courts".[62]

Such a principle has the potential of increasing the coherence in the interpretation of fundamental social right between the legal orders of the EU and of the Council of Europe. Indeed, a commitment to systemic integration might have prevented contradictory outcomes, such as in the context of the *Laval* cases.[63] Even if they do not concern the right to social security, these cases are the perfect illustration of the real danger of dissonant interpretations between the two European legal orders. In the context of this *Article*, it is worth considering whether the principle of systemic integration could lead to strengthening the protection of the right to social security by ensuring its coherent interpretation in the two legal orders at stake, the EU and the ESC.

The principle of systematic interpretation has three main aims: supporting the activity of interpretation, filling gaps, and preventing and resolving conflicts of obligations.[64]

[57] O De Schutter, 'L'Europe des droits de l'homme: Un concerto à plusieurs mains' in E Bribosia, L Scheeck and A Ubeda de Torres (eds), *L'Europe des cours: Loyautés et résistances* (Bruylant 2010) 272.

[58] O Dörr, 'Article 31' cit. 576.

[59] F Dorssemont, K Lörcher and M Schmitt, 'On the Duty to Implement European Framework Agreements: Lessons to Be Learned from the Hairdressers Case' (2019) ILJ 571. In this paper, authors refer to the VCLT but without addressing the issue of its application to EU law interpretation.

[60] O Dörr, 'Article 31' cit. 563.

[61] P Merkouris, 'The Principle of Systemic Integration' cit.

[62] A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' cit. 559.

[63] *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Swede* cit.

[64] RK Gardiner, *Treaty Interpretation* cit. 328, 331.

Considering how the right to social security seems to benefit from a stronger and more detailed protection under the ESC, interpreting art. 34 CFREU in light of art. 12 ESC (and the relevant decisions of the ESCR) might provide a more solid foundation for the development and protection of the right to social security in the European space. It is important to stress that the outcome of such an approach would be limited to the use of art. 12 ESC to assist the interpretation of art. 34 CFREU.[65]

III. The theory of the "integrated approach" and the strengthening of the protection of social rights

Following this short analysis of the uncertainties and limitations surrounding the application of art. 31(3) VCLT to the interpretation of social human rights in the context of the EU legal order, I will now turn to a different option, notably the development of an "integrated approach" theory.

III.1. Developing the theory of an integrated approach

The idea of an integrated approach has been developed by legal theorists and scholars.[66] This approach involves taking into account one or more provisions from other legal orders for "a comprehensive approach to the sources of human rights law".[67] Some authors have specifically called the practice of the ECtHR and the ECSR an integrated approach "founded upon the ideas of cross-fertilization between and convergence among different treaties".[68] Others have claimed that "a common and integrated system of human rights screening of the policies undertaken both by the Union and by the Member States will, indeed, provide a way to relate policy efforts with outcome and enhance the transparency of the results of policies".[69]

[65] ME Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crudible" Intended by the International Law Commission' in E Cannizzaro, MH Arsanjani and G Gaja (eds), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 111.

[66] M Baumgärtel, D Staes and FJ Mena Parras, 'Hierarchy, Coordination, or Conflict? Global Law Theories and the Question of Human Rights Integration' (2014) Journal Européen des Droits de l'homme / European Journal of Human Right 326; E Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) Journal Européen des Droits de l'homme / European Journal of Human Right 451-458; D Dumont, 'Le "droit à la sécurité sociale" consacré par l'article 23 de la Constitution: quelle signification, quelle justiciabilité?' in D Dumont (ed.), *Questions transversales en matière de sécurité sociale* (Larcier 2017) 15.

[67] E Brems, 'Should Pluriform Human Rights Become One?' cit. 452.

[68] A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' cit. 566. Also, V Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) HRLRev 529.

[69] V Wagner and M Nowak, 'Monitoring the Protection of Human Rights in the European Union: An Evaluation of Mechanisms and Tools' in O De Schutter and V Moreno Lax (eds), *Human Rights in the Web of Governance* cit. 204.

Following such an approach, Courts and other (quasi-judicial or systemic) supervisory bodies should take into account other instruments and their interpretation by the relevant supervisory bodies in the interpretation of provisions from their own legal order. Hence, the concept of "integration" entails the reference to documents stemming from other legal orders, in order to use the rights recognised by these legal orders for the interpretation of similar rights protected by the supervisory body's own order. This theory is grounded on human rights instruments and the practices of their supervisory bodies. Indeed, "the development of this common ground involves, among other things, adoption by treaty bodies of relatively similar approaches to the VCLT provisions relating to interpretation".[70] As such, it appears that the integrated approach cannot be traced back to a single legal basis, such as in the case of art. 31(3)(c) of the VCLT for the principle of systemic integration. Instead, an integrated approach can be identified by looking at the instrument to be interpreted and/or at the instrument(s) which provide the control mechanism(s) of a given instrument and/or to the practice of the supervisory bodies of a given instrument.

Addressing the foundation of this approach, a distinction must be introduced between a *formal integrated approach* (provided by the instrument organizing the control) and a *material integrated approach* (resulting from the practices of supervisory bodies). A typical case of *formal integrated approach* can be found in the supervision of fundamental rights by the Committee on Economic, Social and Cultural Rights (CESCR). Art. 8(3) of the protocol organizing communication procedures provides for consultation of any relevant documents during the procedure.[71] This procedural provision opens for the examination of communication to use of external sources. Because of this openness, I analyse it as a formal ground for an integrated approach. Conversely, a supervisory body might adopt a *material integrated approach* even though this is not specifically mandated by the relevant treaty. It goes without saying that this is not an absolute dichotomy. There might be grey areas where the instrument provides for a formal integrated approach and the supervisory body applies a material integrated approach without making any reference to the relevant provisions. That being said, one can identify the foundation of a *material integrated approach* in the insight proposed by Malgosia Fitzmaurice, stating that "a

[70] M Fitzmaurice, 'Interpretation of Human Rights Treaties' cit. 753-754 (on the development on the common ground in human rights treaties interpretation and its relations with VCLT).

[71] General Assembly, resolution 8/2, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 18 June 2008 A/RES/63/117, art. 8(3). See also, P Naskou-Perraki, 'The International Convenant on Economic, Social and Cultural Rights and the Monitoring of its Enforcement' in N Aliprantis and I Papageorgiou (eds), *Social Rights: Challenges at European, Regional and International Level* (Bruylant 2010) 209; Ph Texier, 'Le comité des droits économiques sociaux et culturels: vers un véritable indivisibilité des droits de l'homme ?' in D Roman (ed.), *La justiciabilité des droits sociaux: vecteurs et résistances; actes du colloque tenu au Collège de France, Paris, 25 et 26 mai 2011* (Pedone 2012) 185. For an illustration of the CESCR approach see CESCR Decision 7 March 2019 Communication 022/2017 *S.C. and G.P. v Italy*; CESCR Decision of 11 October 2019 Communication 037/2018 *Maribel Viviana López Albán v Spain*; CESCR Decision of 5 March 2020. Communication 052/2018 *Rosario Gómez-Limón Pardo v Spain*.

potent basis for widening the ambit of interpretation", and concluding that human rights bodies were moving "towards a broadly similar methodology in interpreting human rights treaties".[72]

III.2. Identifying an integrated approach for the interpretation of the ESC and the CFREU

An integrated approach, whether *formal or material*, can be identified in rulings and documents from supervisory bodies from EU and Council of Europe.

Firstly, within the Council of Europe legal order, Article 53 ECHR may be understood as the foundation of the formal integrated approach. Indeed, by providing that "nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedom which may be ensured under the law of any High Contracting Party or any other agreement to which it is a party", this provision requires that the Court take into account instruments from other legal order in the interpretation of the rights covered by the Convention. [73] The ECtHR's integrated approach is confirmed by its case law.[74]

Secondly, the ECSR has a material integrated approach concerning the supervision of the ESC.[75] Indeed, the Committee refers to external instruments when it assesses the conformity to the Charter, including the CFREU.[76] An integrated approach is also adopted during periodical monitoring, as concluding reports contain references to EU law or to the International Covenant on economic, social and cultural rights.[77]

Thirdly, a formal integrated approach can also be identified when it comes to the interpretation of CFREU. Notably, art. 53 CFREU provides that: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all

[72] M Fitzmaurice, 'Interpretation of Human Rights Treaties' cit. 757, 769.

[73] In that sense: L Clements and A Simmons, 'European Court of Human Rights' in M Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 411-412.

[74] See *e.g.* the ECtHR decision in *Streletz, Kessler and Krenz v Germany* App n. 34044/96, 35532/97, 44801/98 [22 March 2001]; ECtHR *Lopes de Sousa Fernandes v Portugal* App n. 56080/13 [19 December 2017].

[75] *Finnish Society of Social Rights v Finland* cit.; ECSR decision of 24 January 2018 complaint n. 113/2014 *Unione Italiana del Lavoro U.I.L. Scuola-Sicilia v Italia*. See also: U Khaliq and R Churchill, 'The European Committee of Social Rights' in M Langford (ed.), *Social Rights Jurisprudence* cit. 433–434.

[76] In *Finnish Society of Social Rights v Finland* cit. art. 34 CFREU was mentioned among relevant provision.

[77] For an illustration, see ECSR, European social charter, conclusions 2017 of January 2018, p. 267, 271, 401, 875, 905, 1164; see also: CEACR, Report of the Committee of Experts on the Application of Conventions and Recommendations (arts 19, 22, 23 and 35 of the Constitution) of 13 February 2020 ILC.109/III(A), p. 506-508 (Spain) p. 543 (Greece).

the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".

The abovementioned Article should be read in combination with the preamble of the EU Charter: "this Charter reaffirms [...] the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights".

This has been interpreted as a basis for the interpretation of the Charter's provisions in light of other instruments.[78] Nevertheless, there is one major obstacle to that approach, since instruments covered by this provision are only those to which all Members States are parties. This bring up questions about the relation of art. 53 with the ESC in the same way as the application of art. 31(3)(c) VCLT which I presented before.[79] According to Klaus Lörcher, the ESC (and revised charter) and other international law instrument (and also their interpretation by supervisory bodies) "have to be taken into account" for the interpretation of CFREU.[80] Concerning the ESC (and RESC), his main argument is that the CFREU refers several times to (R)ESC. However, these references are not found in art. 53 itself, nor in CJEU rulings. Such an argument does not fully address one of the obstacles to the application of the principle of systemic integration, so that the formal integrated approach appears severely hindered. Therefore, one should consider whether a material approach might be better suited to the interpretation of the CFREU.

A material integrated approach is implemented in the practice and case law of the CJEU[81] and of the European Semester regarding the supervision of social rights. Concerning social human rights, CJEU's decisions include references to instruments from other legal systems.[82] In this regard, cross-systemic references are made for interpreting EU provisions.[83] However, for what it matters here, this approach cannot be found in decisions concerning the interpretation of art. 34 of the EU Charter, which protects the right

[78] Ph Alston, 'The Contribution of the EU Fundamental Rights Agency at the Realization of Economic and Social Rights' in Ph Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005) 171-172; F Dorssemont, K Lörcher and M Schmitt, 'On the Duty to Implement European Framework Agreements' cit. 590–591; K Lörcher, 'Interpretation and Minimum Level of Protection' in F Dorssemont and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) 154-156.

[79] O De Schutter, 'L'adhésion de l'Union Européenne à la Charte Sociale Européenne' cit. 42.

[80] K Lörcher, 'Interpretation and Minimum Level of Protection' cit. 142 and 155-157.

[81] Concerning references by CJEU to ESC as source of interpretation see: O De Schutter, 'The Accession of the European Union to the European Social Charter: A Fresh Start' (2019) Journal Européen des Droits de l'homme 165-167

[82] On maternity protection, case C-5/12 *Marc Betriu Montull v INSS* ECLI:EU:C:2013:571 para. 3; on paid annual leave, case C-684/16 *Max-Planck* ECLI:EU:C:2018:874 paras 52 and 70; on fair remuneration cases C-395/08 and C-396/08 *Bruno and Others* ECLI:EU:C:2010:329 para. 31; on old age pension case C-465/14 *Wieland and Rothwangl* ECLI:EU:C:2016:820 para. 40.

[83] See *e.g. Bruno and Others* cit. para. 31.

to social security. In this sense, the CJEU does not appear to use the integrated approach in a systematic way.

One can also take into account the role of the European Semester, in light of the possible role of its tools in the monitoring of situations covered by (social) human rights. The European Semester is a four-phases process involving the European Parliament, the European Council, the Council and the European Commission. It starts with the Commission's Annual Sustainable Growth Strategy and ends with the national draft budgetary plans. At the midway point, the progress made by States is evaluated and recommendations are formulated to each of them. The Semester also represents the instrument to implement the principles included in the European Pillar of Social Rights (EPSR). Due to its periodical nature and to the existence of social indicators, introduced with the EPSR, which refer to situations covered by (social) human rights, I conclude that the European Semester can be analysed as a potential monitoring mechanism for human rights. In this context, it is possible to identify an integrated approach by looking at the references to Sustainable Development Objectives,[84] and occasional allusions to other systems' instruments throughout the process of evaluating national situations.[85] Hence, the integrated approach shall be considered as present in European Semester documents, although to a limited extent.

III.3. The contribution of an integrated approach to the protection of the right to social security within EU

a) The double effect of the integrated approach.

In recent times, gaps and insufficiencies of access to social security and of systems of social security have been painfully highlighted by the Covid-19 crisis[86]. These shortcomings lead to a potential infringement of art. 34 CFREU, which protects the "entitlement to social benefits". Therefore, it is appropriate to look for a better protection of this right within EU.

Both the CJEU and the European Semester offer potential pathways to ensure the effective protection of this right. In this context, and in light of the previous analysis, an integrated approach could represent a powerful tool to increase the visibility of the right to social security and the need to protect it. It is important to note that the absence of CJEU case law developing an integrated approach for the interpretation of art. 34 CFREU does not preclude an evolution in this sense, considering how the Court followed such an approach in the

[84] Communication COM/2020/575 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 19 September 2020 on Annual Sustainable Growth Strategy 2021, p. 3; Communication COM/2019/650 final from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 17 December 2019 on Annual Sustainable Growth Strategy 2020, p. 1-17.

[85] Country Report France 2020 SWD(2020) 509 final cit.

[86] S Spasova and others, *Non-Standard Workers and the Self-Employed in the EU: Social Protection during the Covid-19 Pandemic* (ETUI Report 2021) 43–45.

context of other social rights.[87] Furthermore, explanation on art. 34 expressly refers to the ESC[88]. Hence, the ESC is central for the interpretation of the ECFR and particularly art. 34. In its turn, the monitoring process which takes place under the European Semester opens a different path for the integration of instruments from other legal systems. The integration of social consideration in the European Semester, visible in the proclamation of the European Pillar of Social Rights, might ultimately lead to taking into account the right to social security in the monitoring of Member States' social policies. This could happen through the use of indicators and/or recommendations addressing social security.[89]

That being said, in advocating for the development of an integrated approach one should not be blind to its potential shortcomings. In this sense, the main criticism regarding this approach pertains to the difficulty for supervisory bodies to fully appreciate the specific context of instruments adopted in legal orders other than the one in which they operate.[90] This could be addressed with a clear and systematic analysis of each legal order (or human rights system) and through better cooperation between human rights institutions.

Nonetheless, the previous analysis has hopefully shown how an integrated approach could provide a tool of interpretation which may strengthen the awareness and protection of the (fundamental) right to social security and, more broadly, of social human rights. This is, to some extent, observable in certain Opinions by some of the advocate generals (AGs) to the CJEU.[91] In this context, the AGs refer to European social charters when dealing with fundamental social rights. These references, which are not included on the basis of the VCLT, demonstrate the interpretative potential of the integrated approach.

Moreover, this approach would allow the EU system to take into account, in a timely fashion, evolutions happening in other systems, and, as such, contribute to the prevention of conflicts of interpretation between different human rights systems. The European Semester's openness to the integrated approach is indicative of the permeability of EU law to other international legal orders. Lastly, mutual influences exist between legal orders (as well as between their specific institutions), particularly between the EU and the Council of Europe.[92] All of this results in an increase in cross-references and, therefore,

[87] On maternity protection, *Marc Betriu Montull v INSS* cit. para. 3; on paid annual leave *Max-Planck* cit. paras 52 and 70; on fair remuneration, see *Bruno and Others* para. 31;*Wieland and Rothwangl* cit. para. 40.

[88] Explanation on art. 34, Explications relating to the Charter of fundamental rights 2007/C 303/02 cit.

[89] Communication COM/2021/740 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank of 24 November 2021 on Annual Sustainable Growth Survey 2022, p. 6, 11.

[90] A Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' cit. 566.

[91] *E.g.* case C-742/19 *Ministrstvo za obrambo* ECLI:EU:C:2021:77, opinion AG Saugmandsgaard, para. 62 fn 63; case C-709/20 *CG v The Department for Communities in Northern Ireland* ECLI:EU:C:2021:515, opinion AG de la Tour, para. 103 fn 89.

[92] O De Schutter, 'Le rôle de la Charte sociale européenne dans le développement du droit de l'Union européenne' in O De Schutter (ed.), *The European Social Charter* cit. 135; O De Schutter, 'L'Europe des Droits

increasing permeability of the EU system to other human rights systems. Ultimately, the right to social security may be presented as a *network right*, meaning that the right and its protection is linked to various legal orders, each connected to each other. In a similar sense, Professor Olivier de Schutter has argued that a better consideration of the ESC within the EU legal order would lead to greater protection of social human rights.[93] To that regard, he suggested "the systematisation of references to ESC in the development of EU law and policies".[94]

b) Reconciling with other theories.

The risk of conflicts of interpretation between rights under the ESC and rights under the EU Charter has been highlighted in the introduction of this paper. It goes without saying that the development of a systemic approach is not the only approach to address this risk. Other theories which fall outside the scope of the present articles might be considered as potential alternatives. Without going into further details, these deserve to be shortly mentioned for completeness. Notably, Olivier de Schutter has proposed four solutions to the conflict of interpretation.[95] The first is close to the theory of integrated approach: he suggests considering the "ESC as a source of EU law" but without indicating a theoretical or practical means to do so. The fourth solution goes one step further and proposes the EU's accession to the ESC.[96] The two other suggested solutions are *i)* "improving impact assessments" through the actions of EU institutions, *ii)* "defining a common approach" in response to the difficulties related to the "à la carte" acceptation of various rights in Member States. The development of an integrated approach could easily complement these solutions.

A further alternative is represented by the theory of fragmentation which react to the diversification of international law. It seems favourable to cross-systemic reference. Indeed, it could produce better coherence between self-contained legal regimes and foster the use of the various sources of law.[97] In that sense, it could provide an alternative pathway to achieve the development we are proposing in this paper. Nonetheless, it diverges from the integrated approach and from the purpose of this *Article*. The theory of fragmentation seeks harmonization, and some of its proponents have argued that "the general competence to

de l'Homme' cit. 276-277; S Hennion and others, *Droit social européen et international* (Themis 2017 third edition) 68; V Wagner and M Nowak, 'Monitoring the Protection of Human Rights in the European Union' cit. 174-175.

[93] O De Schutter, 'Le rôle de la Charte sociale européenne dans le développement du droit de l'Union européenne' cit. 144-145.

[94] *Ibid*. 146.

[95] O De Schutter 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 40-49.

[96] See also, O De Schutter, 'L'adhésion de l'Union européenne à la Charte sociale européenne' cit. and O De Schutter, 'The Accession of the European Union to the European Social Charter' cit.

[97] AJ Colangelo, 'A Systems Theory of Fragmentation and Harmonization' cit. 7, 10, 33-56.

determine issues of customary international law or to interpret treaties should be vested only, at least principally, to the ICJ".[98] In that sense, the theory seems mainly applicable to ICJ practice. Whereas the theory of integrated approach, as stated, seeks, mainly, the strengthening of rights and could be applied by any supervisory body.

A last theory is also close from the content of the integrated approach theory. According to the theory of "dialogic approach", "foreign jurisprudence should be treated as a mere source of inspiration" and should "be seen as establishing a rebuttable presumption of interpretation" shaping a "human right *jus commune*".[99] Once again, the theory seeks "the integrity of the human right system"[100] not the strengthening of the protection of human and fundamental rights.

IV. Concluding remarks

The right to social security is a fundamental right recognized in the ESC (art. 12) and the CFREU (art. 34). Despites its recognition, uncertainties remain about its protection and its justiciability within the EU legal order. Furthermore, gaps in access to social security and in social security systems have been highlighted by the Covid crisis. This points to the necessity for a better protection of this right. Furthermore, the duality of human rights system in Europe entails the risk of a lack of coherence. Hence, guaranteeing the consistent interpretation and the effective protection of the right to social security are the challenges that this paper aimed to address.

A first partial response to these challenges is the principle of systemic integration. It refers to the use of the content from other rules in order to interpret provisions that are applicable to the conflict at stake. This principle concerns the "relevant rules of international law applicable in the relation between the parties" (art. 31(3)(c) VCLT). While the requirement of "applicability in relation between the parties" is an obstacle to this response, the main drawback of this solution is that it would only affect the interpretation of the rights at stake. Therefore, the potential to strengthen the awareness and effective protection of the right in question seems to be weak.

A second response which I analysed in this *Article* is the theory of integrated approach. A *material integrated approach* is visible in the decisions of the ECSR in which the European committee of social rights refers to the CFREU when interpreting ESC. The same can be said for the CJEU case law and European Semester documents which refer to documents from other legal orders. Thus, an integrated approach appears as a more effective way to influence the interpretation of social human rights in the EU legal order.

[98] S Cassese, *When Legal Orders Collide: The Role of Courts* (Global Law 2010) 19-20; AJ Colangelo, 'A Systems Theory of Fragmentation and Harmonization' cit. 14.

[99] O De Schutter, 'The Formation of a Common Law of Human Rights' in E Bribosia, I Rorive and AM Corrêa (eds), *Human Rights Tectonics: Global Dynamics on Integration and Fragmentation* (Intersentia 2018) 35-39.

[100] *Ibid*. 35.

Importantly the integrated approach does not aim to achieve the direct applicability of external instruments in the EU legal order, nor to bring about a uniform interpretation of the right to social security. Instead, the aim of this principle is to improve systemic coherence. However, its application could have broader effects than the principle of systemic integration, by strengthening the protection of social human rights.

At the end of this analysis, the answer to the question "Could the integration of the European Social Charter into the interpretation of the EU Charter of Fundamental Rights reinforce the protection of the right to social security?" can only be partially affirmative. As it has been highlighted before, the integration of ESC into the interpretation of the CFREU is already possible through the principle of systemic integration or the integrated approach. However, the fact that this would only stem from the willingness of the CJEU (or of the European Commission in the context of the European semester) means that moving forward with the protection of fundamental social right would request a change in political view of the EU's institutions. Secondly, it appears that an integrated approach would have a greater potential to strengthen the right to social security. In conclusion, the integration of the ESC into the interpretation of CFREU by means of the integrated approach might strengthen the right to social security.

ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS
Edited by Giovanni Boggero, Francesco Costamagna *and* Lorenza Mola

MIND THE GAP: EMERGING STANDARDS OF PROTECTION OF THE RIGHT TO EQUAL PAY UNDER THE EUROPEAN SOCIAL CHARTER AND EU LAW

KALINA ARABADJIEVA* AND MARIA KOTSONI**

ABSTRACT: The legal frameworks protecting the right to equal pay at European level are being reshaped. This reshaping is taking place in parallel within the European Social Charter (ESC) system, through the case-law of the European Committee of Social Rights, and in EU law, through a proposal for a Directive on pay transparency and enforcement mechanisms. In this *Article*, we revisit the interaction between the ESC and EU law, in the context of the right to equal pay between men and women for equal work or work of equal value. Emerging equal pay standards are detailed and address long-standing enforcement problems that have deprived legal frameworks of their full potential as an avenue for the effective realisation of the right to equal pay. We show, however, that there are some differences between the ESC and the EU instrument underway. The ESC seems to set more progressive standards in certain respects and has the potential of accommodating workers' interests with fewer restrictions. This is particularly evident in relation to employers' wage reporting obligation and positive obligations to promote equal pay. With regard to the interaction of EU law with the ESC system, we argue that recent equal pay developments do not suggest a major break from existing critical accounts of the stance of the EU legal order towards more progressive social rights standards found in the ESC.

KEYWORDS: equal pay – transparency – social rights – Europe – gender equality – enforcement.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/625

I. Introduction

The European Social Charter (ESC) is the primary Council of Europe treaty in the field of social rights, the latter broadly defined to include a long list of rights referring to labour, social protection, health, social security, housing, and education. The original version of the treaty was adopted in 1961,[1] and then subjected to a series of reforms during the 90s to update and modernize the system,[2] leading up to a revised version.[3] The Revised ESC incorporates the rights contained in the original 1961 ESC and the 1988 Additional Protocol and establishes new rights.[4] Apart from a number of core provisions, States parties to the (Revised) ESC do not have to accept as binding the instrument as a whole. They can choose between rights and paragraphs of the (Revised) ESC articles.[5]

All EU Member States (MS) are States parties to the ESC (1961 or Revised) and fifteen of them are signatories to the protocol providing for a system of collective complaints.[6] That is, EU MS are bound by ESC and EU law standards, which raises questions pertaining to the relationship and interaction between the two systems. While the ESC's interpretive body, the European Committee of Social Rights (ECSR), takes EU sources into account, it has explicitly refrained from establishing a presumption of conformity of EU law with the ESC.[7] EU MS have to observe commitments under the ESC when agreeing on the content of Directives and when they transpose them into national legal systems.[8] In turn, reference to the ESC can be found in some EU law sources,[9] but the place of the ESC in adjudication and law-making appears marginal.[10] Although the ESC was a source of

[1] European Social Charter [1961].

[2] Additional Protocol of 1988 extending the social and economic rights of the 1961 Charter, Amending Protocol of 1991 reforming the supervisory mechanism, Additional Protocol of 1995 providing for a system of collective complaints. On this point see also O De Schutter, 'The Two Lives of the European Social Charter' in JY Carlier, O De Schutter and M Verdussen (eds), *La Charte sociale europeenne: une constitution sociale pour l'Europe* (Bruylant 2010) 12.

[3] Revised European Social Charter [1996]. See also O De Schutter, 'The Two Lives of the European Social Charter' cit. 11-14; K Lukas, 'The European Social Charter: Its History, Application, Procedures and Impact' in K Lukas, *The Revised European Social Charter* (Edward Elgar Publishing 2021) 3-5.

[4] "New" rights are for instance the right to protection from poverty and social exclusion and the right to housing.

[5] Art. 20 of 1961 ESC prescribed that States should be bound by at least five of arts 1, 5, 6, 12, 13, 16 and 19 and by at least 10 more articles or 45 numbered paragraphs from the rest of the text. The same system is also followed in the Revised ESC, where States are required to accept at least six arts from arts 1, 5, 6, 7, 12, 13, 16, 19 and 20 and by at least 16 articles or 63 paragraphs from the rest of the text (Part III – art. A).

[6] See European Social Charter, Signatures and Ratifications, available at www.coe.int.

[7] See European Committee of Social Rights (ECSR) decision of 23 June 2010 complaint n. 55/2009 *Confédération Générale du Travail (CGT) v France* para. 31-42.

[8] *Ibid*. para. 33.

[9] *E.g*. art. 151 TFEU, Preamble of the Charter of Fundamental Rights of the European Union [2012].

[10] C O'Cinneide, 'The European Social Charter and EU Labour Law' in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar Publishing 2016) 191-192.

inspiration for the social provisions of the EU Charter of Fundamental Rights (CFREU),[11] the latter does not secure interpretative convergence with the treaty in the same way that it does with the European Convention on Human Rights (ECHR).[12]

The recent history of the interaction between the European Social Charter (ESC) and EU law, or more broadly, legal sources formulated with the involvement of EU institutions, has had moments of tension.[13] This has taken the form of direct conflict of standards, such as in the case of *Laval*[14] or in the case of financial assistance conditionality in the context of the sovereign debt crisis in Europe.[15] Another form in which tensions have manifested is not through conflicting, but through diverging standards that create gaps between the protection provided by the two systems,[16] such as in the case of maternity leave,[17] protection

[11] N Jääskinen, 'Fundamental Social Rights in the Charter: Are They Rights? Are They Fundamental?' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021) 1858; O De Schutter 'The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order' (Council of Europe 2018) 14.

[12] Art. 52(3) of the EU Charter of Fundamental Rights.

[13] C Kilpatrick, 'The Human Rights Puzzle of the Euro-Crisis: Why Massive Breaches of Human Rights but None of the EU Charter of Fundamental Rights?' in M González Pascual and A Torres Pérez (eds), *Social Rights and the European Monetary Union* (Edward Elgar Publishing 2022); O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' (AFCO Committee 2016) www.europarl.europa.eu; M Rocca, 'Enemy at the (Flood) Gates: EU "Exceptionalism" in Recent Tensions with the International Protection of Social Rights' (2016) European Labour Law Journal 52; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit.; S Garben, 'The Problematic Interaction Between EU and International Law in the Area of Social Rights' (2018) Cambridge International Law Journal 77; K Lukas, 'The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?' (2014) Legal Issues of Economic Integration 275; S Robin-Olivier, 'The Relationship Between International Law and European Labour Legislation and its Impact on the Development of International and European Social Law' (2020) IntlLabRev 483, 495; A Aranguiz, 'Bringing the EU up to Speed in the Protection of Living Standards Through Fundamental Social Rights: Drawing Positive Lessons from the Experience of the Council of Europe' (2021) Maastricht Journal of European and Comparative Law 601; U Khaliq, 'The EU and the European Social Charter: Never the Twain Shall Meet?' (2013) CYELS 169.

[14] ECSR decision of 3 July 2013 complaint n. 85/2012 *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*.

[15] ECSR decision of 7 December 2012 complaint n. 76/2012 *Federation of employed pensioners of Greece (IKA-ETAM) v Greece*; ECSR decision of 7 December 2012 complaint n. 77/2012 *Panhellenic Federation of Public Service Pensioners v Greece*; ECSR decision of 7 December 2012 complaint n. 78/2012 *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece*; ECSR decision of 7 December 2012 complaint n. 79/2012 *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v Greece*; ECSR decision of 7 December 2012 complaint n. 80/2012 *Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece*; ECSR decision of 23 March 2017 complaint n. 111/2014 *Greek General Confederation of Labour (GSEE) v Greece.*

[16] S Garben, 'The Problematic Interaction Between EU and International Law in the Area of Social Rights' cit. 83-84; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit. 207.

[17] Conclusions XV-2 of the United Kingdom of 31 December 2001, art. 8(1), available at hudoc.esc.coe.int; U Khaliq, 'The EU and the European Social Charter' cit. 188-189.

of Roma minorities,[18] and working time arrangements.[19] Commentators have raised concerns regarding the risks of deviating standards, in particular where the reluctance of the EU legislature to engage and comply with ESC standards leads to levelling down of standards of social protection and diverging degrees of labour and social rights' commitments and obligations among EU MS.[20]

In this *Article*, we revisit the interaction between the ESC and EU law, in the particular context of the right to equal pay between men and women for equal work or work of equal or comparable value. The right to equal pay has featured in both systems since their very beginning. Unlike social rights, the principle of equal pay has been part of the EU *acquis* since the Treaty of Rome of 1957, providing a legal basis for secondary legislation, and has been strongly developed in EU law through the case-law of the Court of Justice of the EU (CJEU) and secondary legislation. In the ESC, art. 4(3) of the (Revised) ESC[21] and art. 1 of Additional Protocol of 1988, now corresponding to art. 20(c) of the RESC,[22] prohibit discrimination in pay for work on the basis of gender.

Equal pay has gained renewed attention recently in both the ESC and EU law, with additional standards of protection emerging in both systems in parallel within a short period of time. The reason for this is that women across Europe still earn less than men, despite the fact that the right to equal pay has long been recognised by multiple legal sources.[23] In 2020, the gender pay gap in the EU27 stood at approximately 13 per cent,

[18] ECSR decision of 24 January 2012 complaint n. 64/2011 *European Roma and Travellers Forum (ERTF) v France*; ECSR decision of 11 September 2012 complaint n. 67/2011 *Médecins du Monde – International v France*; K Lukas, 'The Collective Complaint Procedure of the European Social Charter' cit. 282-283; U Khaliq, 'The EU and the European Social Charter' cit. 188.

[19] *Confédération Générale du Travail (CGT) v France* cit.; O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 44; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit. 207.

[20] U Khaliq, 'The EU and the European Social Charter' cit. 183; A Aranguiz, 'Bringing the EU up to Speed in the Protection of Living Standards Through Fundamental Social Rights' cit. 622; S Robin-Olivier, 'The Relationship Between International Law and European Labour Legislation and its Impact on the Development of International and European Social Law' cit. 495; O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 44.

[21] Art. 4(3) of the (Revised)ESC states that "with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake: [...] to recognise the right of men and women workers to equal pay for work of equal value".

[22] Art. 20 of the Revised ESC states that "with a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields: [...] c. terms of employment and working conditions, including remuneration; [...]".

[23] In national law see *e.g.* Discrimination Act (2008:567), Chapter 3 in Swedish law; arts 23-28 and 30-32 of Portuguese Labour Code; art. 37 of the Italian Constitution; art. 22(1) of the Greek Constitution. At an international level, International Labour Organization, Equal Remuneration Convention of 29 June 1951, No. 100 art. 4(3) of the European Social Charter and 20(c) of the Revised European Social Charter and art.

having closed by less than two percentage points over the last decade.[24] There are many factors that contribute to this gap, including vertical and horizontal occupational segregation, women's engagement in part-time or temporary work, direct and indirect pay discrimination based on gender, as well as the systemic undervaluation of work performed predominantly by women.[25] Among the multiple reasons for the lack of significant progress in closing the gender pay gap over the last years is the fact that legal frameworks prohibiting pay discrimination on the grounds of gender face long-standing problems of implementation and enforcement.[26]

In the ESC system equal pay standards were revisited in 15 decisions of the ECSR on the conformity of States parties with the ESC provisions protecting equal pay, published in July 2020.[27] The ECSR addressed equal pay for the first time within the context of the collective complaints procedure. With its extensive and relatively detailed interpretation, it set comprehensive standards regarding the right to equal pay under the ESC.[28] Since the ECSR

1 of its Additional Protocol [1988] all protect the right to equal pay. At an EU level, see art. 23 of the Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (Gender Equality Directive); Principle 2 of the European Pillar of Social Rights [2017].

[24] See Eurostat data, available at appsso.eurostat.ec.europa.eu. The unadjusted gender pay gap is defined as "the difference between average gross hourly earnings of male paid employees and of female paid employees as a percentage of average gross hourly earnings of male paid employees", see Eurostat data description, available at ec.europa.eu/eurostat.

[25] European Institute for Gender Equality, 'Tackling the Gender Pay Gap: Not Without a Better Work-Life Balance' (29 May 2019) Publications Office of the European Union. These factors contribute to the unexplained part of the gender pay gap, which is estimated to constitute around two thirds of the gap; see European Institute for Gender Equality, 'Gender Inequalities in Care and Consequences on the Labour Market' (20 January 2021) Publications Office of the European Union 26.

[26] P Foubert, 'The Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value: A Legal Analysis of the Situation in the EU Member States, Iceland, Liechtenstein and Norway, Luxembourg' (2017) Publications Office of the European Union.

[27] ECSR decision of 6 December 2019 complaint n. 124/2016 *University Women of Europe (UWE) v Belgium*; ECSR decision of 6 December 2019 complaint n. 125/2016 *UWE v Bulgaria*; ECSR decision of 5 December 2019 complaint n. 126/2016 *UWE v Croatia*; ECSR decision of 5 December 2019 complaint n. 127/2019 *UWE v Cyprus*; ECSR decision of 5 December 2019 complaint n. 128/2019 *UWE v Czech Republic*; ECSR decision of 5 December 2019 complaint n. 129/2016 *UWE v Finland*; ECSR decision 5 December 2019 complaint n. 130/2016 *UWE v France*; ECSR decision of 5 December 2019 complaint n. 131/2016 *UWE v Greece*; ECSR decision of 5 December 2019 complaint n. 132/2016 *UWE v Ireland*; ECSR decision of 6 December 2019 complaint n. 133/2016 *UWE v Italy*; ECSR decision of 6 December 2019 complaint n. 134/2016 *UWE v the Netherlands*; ECSR decision of 5 December 2019 complaint n. 135/2016 *UWE v Norway*; ECSR decision of 5 December 2019 complaint n. 136/2016 *UWE v Portugal*; ECSR decision of 5 December 2019 complaint n. 137/2016 *UWE v Slovenia*; ECSR decision of 6 December 2019 complaint n. 138/2016 *UWE v Sweden*. See also of the European Committee of Social Rights, *Realising Equal Pay and Equal Opportunities for Women in Employment: Criteria Developed by the European Committee of Social Rights* (17 November 2020) rm.coe.int.

[28] M Kotsoni, 'Placing Gender Equality in the Workplace at the Forefront of Social Rights in Europe: Equal Pay and Equal Opportunities under the Scrutiny of the European Committee of Social Rights' (5 October 2020) Strasbourg Observers strasbourgobservers.com; B Kresal, 'Gender Pay Gap and Under-

decisions were handed down, the European Commission proposal for new binding measures on pay transparency and enforcement mechanisms has emerged, which seeks to expand significantly obligations relating to the principle of equal pay under EU law. The topic attracted attention from the EU legislature for various reasons, including the impact of the Covid-19 pandemic on frontline workers – the majority of whom are women – and on gender equality more generally.[29] The European Commission's proposal was published in March 2021 and is still making its way through the legislative procedure.[30] It addresses issues relating to the implementation and enforcement of the existing EU equal pay framework, set out in the 2006 EU Gender Equality Directive. With new standards of protection developing in parallel, the right to equal pay offers a new testing ground for existing accounts of the interaction between standards of protection set by the ESC and EU regulation on social protection and equality in the field of employment.

The aim of this *Article* is to explore these legal developments in the sphere of equal pay and some of the issues that arise from the emergence of parallel standards under both systems, and how these reflect on the relationship and dynamics between the EU and the ESC. To this end, we first look at the standards of protection under the (Revised) ESC, as developed and enhanced through the ECSR's recent case-law, highlighting the key role of EU law in this case-law (section II). For reasons of space, the extensive body of EU case-law on equal pay is mentioned in outline, with the remainder of the *Article* focusing more specifically on the European Commission proposal for a new Directive on pay transparency. We then examine this proposal and its potential contribution to promoting equal pay in the EU (section III). By contrast to the treatment of EU materials by the ECSR, this initiative makes no mention of ESC standards at all.

This *Article* moves on with a discussion on convergences and divergences between equal pay standards that seem to be arising under the ESC and EU law respectively (section IV). We show that, even though EU law has been shaping legal frameworks implementing the principle of equal pay for decades, the ESC has taken the lead in raising relevant standards on this occasion, in particular with respect to pay transparency and obligations to actively promote equality in pay. Although the relevant case-law takes inspiration from EU law, we argue that protection under the ESC goes further than the Commission proposal in some important respects, at least in part because the two systems have different normative

Representation of Women in Decision-Making Positions: UWE Decisions of the European Committee of Social Rights' (2021) ERA Forum 311.

[29] European Institute for Gender Equality, *Gender Equality and the Socio-Economic Impact of the COVID-19 Pandemic* (26 May 2021) Publications Office of the European Union.

[30] Proposal for a Directive COM(2021) 93 final of the European Parliament and of the Council of 4 March 2021 for a Directive to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, ec.europa.eu (hereafter, Proposal for a Directive on Pay Transparency). It has so far been welcomed in the Opinion SOC/678-EESC-2021 of the European Economic and Social Committee (EESC) of 9 June 2021 on binding pay transparency measures.

foundations. Finally, we argue that even though the context of equal pay offered good opportunities for exchange and mutual reinforcement between the ESC and EU systems, there was no engagement on the part of the EU legislature with the ESC that contradicts existing accounts of the interaction of the two systems on this particular topic (section V). Deviating standards and lack of engagement on the EU side again give rise to concern about levelling down and asymmetries in protection between Member States.

II. Equal pay standards under the European Social Charter

With the ECSR being the main supervisory body, the supervisory machinery of the ESC consists of two processes: the reporting system, a regular monitoring process based primarily on State reporting,[31] and the collective complaints procedure. Under the latter, trade unions and (international) non-governmental organizations can bring collective claims challenging the conformity of national law and practice with the ESC.[32] The in-depth examination that takes place in the context of the collective complaints procedure allows the ECSR to develop its interpretation of the treaty and protective standards with a focus on specific issues that feature in the submitted complaints and relying on information provided by various sources.[33] The ECSR also issues statements of interpretation setting out the interpretation of rights.

Following complaints lodged by University Women of Europe, an international NGO, against all fifteen (at the time) States that were part of the collective complaints procedure, the ECSR had the opportunity to further develop its equal pay standards.[34] The complainant organization alleged the violation of the ESC based on two main arguments. The first argument referred to States' failure to realize the principle of equal pay, as a gender pay gap persists despite the existing national and international legal framework.[35] The second argument related to the underrepresentation of women in decision-making positions in the private sector.[36] For the purpose of this *Article* we focus only on the review of the complaints concerning the right to equal pay. All except for one State party were found to be in violation of the ESC in relation to the right to equal pay (see Table 1).

[31] Arts 21-24 of the European Social Charter.

[32] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (ETS n. 158) of 1 July 1998 www.coe.int.

[33] K Lukas, 'The European Social Charter' in C Binder and others (eds), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020) 133; C O'Cinneide, 'Social Rights and the European Social Charter: New Challenges and Fresh Opportunities' in O De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe – La Charte européenne: Une Constitution sociale pour l'Europe* (Editions Bruylant 2010) 170-171; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit. 198.

[34] *UWE v Belgium* cit.; *UWE v Bulgaria* cit.; *UWE v Croatia* cit.; *UWE v Cyprus* cit.; *UWE v Czech Republic* cit.; *UWE v Finland* cit.; *UWE v France* cit.; *UWE v Greece* cit.; *UWE v Ireland* cit.; *UWE v Italy* cit.; *UWE v the Netherlands* cit.; *UWE v Norway* cit.; *UWE v Portugal* cit.; *UWE v Slovenia* cit.; *UWE v Sweden* cit.

[35] *UWE v Belgium* cit. para. 13.

[36] *Ibid*.

State party	Protection and enforcement	Promotion
Belgium	violation	conformity
Bulgaria	violation	violation
Croatia	violation	violation
Cyprus	violation	conformity
Czech Republic	violation	violation
Finland	violation	violation
France	conformity	violation
Greece	violation	violation
Ireland	violation	violation
Italy	violation	violation
Netherlands	violation	violation
Norway	violation	violation
Portugal	conformity	violation
Slovenia	violation	violation
Sweden	conformity	conformity

TABLE 1. Findings of the ECSR on CC 124-138/2016.

II.1. OBLIGATIONS DERIVING FROM THE PROTECTION OF EQUAL PAY UNDER THE EUROPEAN SOCIAL CHARTER

The ECSR began unfolding its reasoning and interpretation by stressing that equal pay is central to the achievement of decent working conditions and alleviation of poverty and social exclusion.[37] Under the ESC, the right to equal pay is an aspect of the right to a fair remuneration guaranteed by art. 4, as well as art. 20(c) (R)ESC. The obligations deriving from equal pay provisions may be divided into two broad categories: first, the obligations attached to the *respect* of the right of equal pay, namely its recognition and enforcement, and, second, the obligations attached to its *promotion*.[38]

The first set of obligations, referring to recognition and enforcement of the right to equal pay, includes its explicit protection in the national legal order, which should be

[37] *Ibid*. para. 105.

[38] *Ibid*. para. 11. See also M Kotsoni, 'Placing Gender Equality in the Workplace at the Forefront of Social Rights in Europe' cit.; B Kresal, 'Gender Pay Gap and Under-Representation of Women in Decision-Making Positions' cit.

grounded on a specific domestic legal framework.[39] Equal pay is understood as covering not only wages, but also benefits and all kinds of remuneration.[40] Any legislation, regulation or other administrative measure that fails to comply with the principle of equal pay must be repealed or revoked.[41]

As the ESC aspires to the protection of social rights not only in text, but also in practice, the ECSR also looked at the availability of effective remedies to victims of pay discrimination. It concluded that access to effective remedies in cases of pay discrimination includes 'affordable and timely' proceedings.[42] In addition, victims of pay discrimination should be entitled to adequate compensation, which should not be restricted by ceilings.[43] Where someone claims to have suffered pay discrimination on the basis of their gender and can establish facts making it reasonable to suppose that discrimination has occurred, the burden of proof must be shifted to the defendant.[44] Victims of alleged pay discrimination must be protected from retaliatory dismissals, having the right to reinstatement and compensation.[45]

Most aspects of the ECSR's approach on effective remedies were already part of existing standards. The shift of the burden of proof, the lack of ceilings in compensation and protection from retaliatory dismissals are issues to which the ECSR already paid attention in the reporting procedure. However, it had not previously discussed barriers to access justice, such as costs and duration of proceedings ("affordable and timely"). For example, in *UWE v Greece*, the ECSR for the first time found Greece to have violated the ESC, *inter alia*, on the basis of the high cost of litigation, which in combination with the low minimum wage posed a serious obstacle for workers to access justice.[46]

Pay transparency is another important element that appeared in the ECSR's review. The ECSR stressed that "pay transparency is instrumental in the effective application of the principle of equal pay for work of equal value", because it enables workers, employers and their respective representatives, and relevant authorities to uncover and take corrective action against pay discrimination.[47] Relevant obligations related to pay transparency include the clarification in domestic legislation of the notion of equal work or work of equal or comparable value.[48] They also include measures that enhance the application of equal pay, such as the introduction of employers' obligation to report on wages and to

[39] *UWE v Belgium* cit. paras 139-140.
[40] *Ibid*. para. 139.
[41] *Ibid*. para. 131.
[42] *Ibid*. para. 145.
[43] *Ibid*. para. 146.
[44] *Ibid*. para. 147.
[45] *Ibid*. para. 148.
[46] *Ibid*. paras 176-181.
[47] *Ibid*. para. 154.
[48] *Ibid*. para. 156.

provide relevant data broken down by gender to States authorities.[49] In addition, workers have a right to request and receive information on "pay levels broken down by gender, including on complementary and/or variable components of the pay package", while victims of alleged discrimination should be granted access to information regarding the remuneration of fellow workers, "while dully respecting applicable rules on personal data protection and commercial and industrial secrecy".[50] National law should provide the possibility of comparisons of pay and jobs beyond one company.[51]

The novelty in this interpretation is two-fold. First, the reference to employers' pay reporting obligations is a novel element. The ECSR had not previously referred to the introduction of such measures by States parties. It had noted relevant information provided by States in the reporting process, but this does not seem to have been decisive for the outcome.[52] Generally speaking, in past interpretations, the nature of measures undertaken by States to strengthen the enforcement of equal pay was understood to be a matter falling within the discretion of national authorities. While the wording of the decisions does not indicate that the introduction of employers' obligation to report on wages is necessary or the only measure that could be implemented, this is strongly suggested.[53] The second novel element is that the ECSR explicitly recognizes a right of workers to information on pay levels and more specific data when bringing a pay discrimination claim. In its statements of interpretation and recent Conclusions, the ECSR had not explicitly recognized these rights, nor asked States parties specifically for this information. Where such information was provided, it was not decisive for the finding of the ECSR.[54]

Another element on the side of the protection of the rights, refers to equality bodies. The ECSR held that establishing equality bodies is an obligation of States parties in respect to their broader commitment to address discrimination.[55] These bodies should have monitoring powers with respect to the implementation of the principle of equal pay and promote the application of the right through awareness-raising;[56] their mandate should include decision-making powers, as well as assistance to victims of pay

[49] *Ibid*. para. 155.

[50] *Ibid*. para. 157.

[51] *Ibid*. para. 158.

[52] See *e.g*. Conclusions 2018 of Austria of the European Committee of Social Rights of 24 January 2019, art. 4(3), available at hudoc.esc.coe.int.

[53] See also Conclusions 2020 of the European Committee of Social Rights of 29 January 2021, art. 20.

[54] See *e.g*. Conclusions XXI-3 of Spain of the European Committee of Social Rights of 24 January 2019, art. 4(3), available at hudoc.esc.coe.int; Conclusions XX-3 of Spain of the European Committee of Social Rights on 5 December 2014, art. 4(3), available at hudoc.esc.coe.int. Spain was found to be in conformity with the ESC, despite restrictions to information on out-of-company pay comparisons available to workers and despite concerns voiced by the *Confederación Sindical de Comisiones Obreras* that legislation did not ensure workers' access to information regarding the gender pay gap.

[55] *UWE v Belgium* cit. para. 167.

[56] *Ibid*. para. 168.

discrimination.[57] States are obliged to allocate to equality bodies the resources and infrastructure necessary for the fulfilment of their purposes.[58] The ECSR had in the past looked into the availability of recourse equality to bodies and independent authorities,[59] but it had not previously inquired into their funding, resources and effectiveness, as it did in the examination of the collective complaints.[60] For example, Bulgaria was found to have violated the ESC on this point, partly because of the inadequate funding of the Commission for Protection against Discrimination.[61]

The second set of obligations refers to States' obligation to promote the right to equal pay through measuring disparities in pay and adopting measures that *actively* promote equality in pay.[62] States are obliged to collect data disaggregated by gender, to analyse the causes of existing inequality in pay, to measure the progress of measures adopted to combat inequality in pay and to assess the impact of gender segregation in employment.[63] The ECSR did not list specific measures to remove *de facto* inequalities,[64] but it suggested gender mainstreaming in employment policies as a suitable strategy.[65] It also referred to other measures as relevant to assessing compliance with the ESC, including the adoption of national action plans to promote gender equality and equal pay; requiring employers to draw up action plans to secure equal pay; encouraging collective bargaining on equal pay; and raising awareness of the equal pay principle.[66] The indicator that the ECSR considered as suggesting compliance with the ESC was the gender pay gap as indicated by Eurostat data.[67] The ECSR did not rely only on the relevant data, but rather on the State's effort reflected in the data. For example, the data for Sweden showed that disparities in pay have not been eliminated, [68] but the gender pay gap is lower than the EU average with a downward trend. The ECSR found the situation to be in conformity.[69]

In a nutshell, this ECSR case-law established a comprehensive set of obligations relating to the right to equal pay, in relation to the recognition, enforcement and promotion of that right. The standards that emerge through the examination of the collective complaints do not only apply to the States under scrutiny, but extend to all States parties that have ratified

[57] *Ibid*.
[58] *Ibid*. para. 169.
[59] See Conclusions 2014 of the European Committee of Social Rights of 5 December 2014, art. 4(3).
[60] *UWE v Belgium* cit. paras 168-170.
[61] *UWE v Bulgaria* cit. para. 162.
[62] *UWE v Belgium* cit. para. 115.
[63] *Ibid*. paras 202-203.
[64] *Ibid*. para. 204.
[65] *Ibid*. para. 206.
[66] *Ibid*. para. 208.
[67] *Ibid*. paras 201-202.
[68] *Ibid*. para. 180.
[69] *Ibid*. para. 193.

the provisions protecting equal pay and, more broadly, gender equality in employment.[70] This is the first time that many of the obligations set out above – aside from those that are already enshrined in EU law – emerge as *binding* standards at the European level, although pay transparency legislation in different forms exists in some States parties.[71]

Throughout the years, in its statements of interpretation[72] and through its Conclusions,[73] the ECSR had already outlined some important features of the right to equal pay. However, statements of interpretation have been issued years apart and the development of the content of the right to equal pay appeared fragmented. In addition, the reporting process does not allow for in-depth review of the situation in each State and it relies primarily on States' reporting. The interpretation of the ECSR under the collective complaints procedure – which allows for information to be provided through multiple actors and closer scrutiny of national situation by the ECSR –, brought together the *acquis* of previous interpretations in a concise way, and added new aspects of the right to equal pay. It allowed for a better mapping of the implementation of the right within different domestic contexts, and a more comprehensive and precise definition of its content.[74] Compared with statements of interpretation and the most recent reporting cycles before the decisions,[75] this case-law is more developed in respect of effective remedies and pay transparency. Pay transparency surfaces as a central element of the effective protection of equal pay, and failure to ensure it – including owing to a lack of a pay transparency legal framework – was the most common

[70] In its latest reporting cycle on art. 20, the ECSR incorporated the novel elements of its interpretation under the collective complaints procedure, see Conclusions 2020 of the European Committee of Social Rights of 29 January 2021, art. 20. See also B Kresal, 'Gender Pay Gap and Under-Representation of Women in Decision-Making Positions' cit.

[71] *E.g*. Sweden, France and Belgium have relevant frameworks.

[72] Conclusions I Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusion II Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions III Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions V Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions VIII Statement of interpretation of the European Committee of Social Rights, art. 4(3), available at hudoc.esc.coe.int; Conclusions XIII-3 Statement of interpretation of the European Committee of Social Rights, art. 1 Additional Protocol, available at hudoc.esc.coe.int; Conclusions XII-5 Statement of interpretation of the European Committee of Social Rights, arts 1(2), 4(3), 1 Additional Protocol, available at hudoc.esc.coe.int; Conclusions 2012 Statement of interpretation of the European Committee of Social Rights, art. 20, available at hudoc.esc.coe.int.

[73] *E.g*. Conclusions 2014 of the European Committee of Social Rights of 5 December 2014, art. 4(3); Conclusions 2016 of the European Committee of Social Rights of 9 December 2016, art. 20; Conclusions 2018 of the European Committee of Social Rights of 24 January 2021, art. 4(3).

[74] *UWE v Belgium* cit. para. 119-121.

[75] Conclusions 2016 of the European Committee of Social Rights of 9 December 2016, art. 20; Conclusions 2018 of the European Committee of Social Rights of 24 January 2021, art. 4(3).

violation of obligations related to the enforcement of the right to equal pay.[76] A notable omission of the decisions, on the other hand, is that the ECSR did not reiterate a previous suggestion to States parties to introduce a right of trade unions to take legal action in cases of gender discrimination in employment and to intervene in individual litigation, as well as to enable class action in such cases.[77]

II.2. What place for EU law?

The ECSR relied on multiple legal sources to develop its interpretation. Among them are legal sources that are part of the Council of Europe system, ILO Convention no. 100, and UN treaties.[78] While the ECSR regularly takes EU requirements into account in setting ESC standards,[79] EU law sources had a particularly prominent role in the ECSR's consideration of the existing equal pay legal framework in these cases.[80] A simple comparison between the place that CJEU case-law has in the decision with that of European Court of Human Rights (ECtHR) is telling. While the ECSR considered numerous decisions issued by the CJEU,[81] it only cited one ECtHR judgement concerning gender equality in employment, even though there were also other cases that could be considered as relevant.[82]

This asymmetry is perhaps justified by the fact that, unlike the ECtHR, the CJEU has a significant and innovative body of case-law on equal pay, that has been key to the

[76] *UWE v Belgium* cit.; *UWE v Bulgaria* cit.; *UWE v Croatia* cit.; *UWE v Cyprus* cit.; *UWE v Czech Republic* cit.; *UWE v Finland* cit.; *UWE v France* cit.; *UWE v Greece* cit.; *UWE v Ireland* cit.; *UWE v Italy* cit.; *UWE v the Netherlands* cit.; *UWE v Norway* cit.; *UWE v Portugal* cit.; *UWE v Slovenia* cit.; *UWE v Sweden* cit.

[77] Conclusions XII-5 Statement of interpretation of the European Committee of Social Rights, arts 1(2) and 4(3), 1 Additional Protocol, available at hudoc.esc.coe.int.

[78] *UWE v Belgium* cit. para. 65-79.

[79] U Khaliq, 'The EU and the European Social Charter' cit. 185-186.

[80] The ECSR considered art. 2 of the Treaty of the European Union [2007], arts 8 and 157 of the Treaty of the Functioning of the European Union [2009], arts 21 and 23 of the EU Charter of Fundamental Rights Directive 2006/54/EC cit.; Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work; 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, Principle 2 of the European Pillar of Social Rights cit.; Recommendation 2014/124/EU of the Commission of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency; Report COM(2013) 861 final from the Commission to the European Parliament and the Council of 6 December 2013 on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast). See *UWE v Belgium* cit. 81-104.

[81] *UWE v Belgium* cit. paras 93-104.

[82] See *e.g.* ECtHR *Emel Boyraz v Turkey* App n. 61960/08 [2 December 2014], a case concerning gender discrimination in employment. Also, ECtHR *di Trizio v Switzerland* App n. 7186/09 [2 February 2016] could be seen as relevant, insofar as it concerns gender discrimination in social policy and, most importantly, it highlights the importance of statistical data in establishing discrimination.

development of the specific content of this principle and ensuring its effectiveness.[83] There is a long-standing EU legal framework implementing that principle – and related case-law – which prohibits direct and indirect sex discrimination with respect to pay and requires that job evaluation and classification systems, where they are used, are not discriminatory. The central provision in this regard is now art. 4 of the Gender Equality Directive 2006. In addition, in 2014 the European Commission published a non-binding Recommendation on pay transparency, which suggests measures that MS could adopt to improve the effectiveness of the EU equal pay framework, including information, pay reporting and audit obligations.[84]

Elements of the ECSR's interpretation of the right to equal pay, some of them long-established under the ESC before the 2019 decisions,[85] are also found in the EU equal pay *acquis*. The Gender Equality Directive 2006 consolidates some of the EU *acquis* on equal pay and discrimination based on sex – including principles established in earlier CJEU case-law, such as on the burden of proof[86] – and there is a rich body of case-law elaborating on, for example, "pay" (defined in art. 2(1)(e) of the Gender Equality Directive),[87] "same work" and "work of equal value",[88] the concept of "indirect" discrimination,[89] effective remedies,[90] and so on. The ECSR cited this body of case-law extensively, and many of the principles (pre-existing and new) set out in the *UWE* decisions align with EU obligations. For example, ESC requirements relating to the shift of the burden of proof

[83] *E.g.* case C-43-75 *Defrenne v Sabena* ECLI:EU:C:1976:56; case C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri 'Royal Copenhagen'* ECLI:EU:C:1995:155; case C-320/00 *Lawrence and Others* ECLI:EU:C:2002:498; case C-427/11 *Margaret Kenny and Others* ECLI:EU:C:2013:122. For an overview of the CJEU's extensive equal pay case-law, see European Commission, 'Equal Pay: Overview of Landmark Case-Law of the Court of Justice of the European Union' (2019) Publications Office of the European Union; C Barnard, *EU Employment Law* (Oxford University Press 2012 fourth edition) ch. 6.

[84] Recommendation 2014/124/EU cit.

[85] Conclusions XII-5 Statement of interpretation of the European Committee of Social Rights, arts 1(2), 4(3) and 1 Additional Protocol, available at hudoc.esc.coe.int.

[86] Case C-381/99 *Brunnhofer* ECLI:EU:C:2001:358 para. 53; case C-17/05 *Cadman* ECLI:EU:C:2006:633 para. 31.

[87] See *e.g.* case C-12/81 *Garland v British Rail Engneering* ECLI:EU:C:1982:44; case C-109/88 *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)* ECLI:EU:C:1989:383; case 171/88 *Rinner-Kuhn v FWW Spezialgebäudereinigung* ECLI:EU:C:1989:328; case C-184/89 *Nimz v Freie und Hansestadt Hamburg* ECLI:EU:C:1991:50; *Specialarbejderforbundet i Danmark v Dansk Industri 'Royal Copenhagen'* cit., among many others.

[88] See *e.g.* case C-129/79 *McCarthys v Smith* ECLI:EU:C:1980:103; *Specialarbejderforbundet i Danmark v Dansk Industri 'Royal Copenhagen'* cit.; *Lawrence and Others* cit.

[89] See *e.g.* case C-170/84 *Bilka v Weber von Hartz* ECLI:EU:C:1986:204; case C-96/80 *Jenkins v Kingsgate* ECLI:EU:C:1981:80.

[90] See *e.g.* case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* ECLI:EU:C:1984:153 and case C-271/91 *Marshall v Southampton and South West Hampshire Area Health Authority* ECLI:EU:C:1993:335 on compensation; case C-63/08 *Pontin* ECLI:EU:C:2009:666 on principle of effectiveness.

are effectively identical to art. 19(1) of the Gender Equality Directive and CJEU case-law.[91] Art. 18 of the Gender Equality Directive provides for effective compensation that is not subject to ceilings, except in limited circumstances; and art. 24 requires protection against retaliatory dismissal or adverse treatment. The CJEU has also established that comparisons need not be limited to the same company, if differences are attributable to a "single source", such as a holding company.[92]

There is also procedural significance to the equal pay cases of the ESC that touched upon its relationship with EU law. Following the invitation from the President of the ECSR,[93] the European Commission submitted its observations on the cases.[94] The Commission had only intervened once before in the examination of a collective complaint throughout the history of the collective complaints procedure. That was the case of the *Greek General Confederation of Labour v Greece*,[95] stemming from financial assistance conditionality agreed with the European Commission, European Central Bank and the International Monetary Fund. In this case, the European Commission had challenged the claims made by the complainant, whereas in the cases of equal pay it remained neutral in respect of the complaint and simply summarised the relevant EU law.[96]

In other words, this case-law is an example of the dynamic development of ESC standards informed by EU sources. Of course, the fact that these sources shaped to some degree the interpretation of the equal pay provisions of the ESC does not necessarily mean that the standards emerging from the ESC are identical to those existing in EU law, nor that the ECSR is constrained by EU law in developing a more advanced protection of the right to equal pay. In particular, the second pillar of ECSR case-law, the obligation to *promote* the right to equal pay through various measures, is much less prominent in EU standards. We will return to this point in section IV below. A more specific example is, for instance, that ECSR case-law requires reinstatement in case of retaliatory dismissal, whereas EU law currently does not necessarily require this.

Furthermore, many of the pay transparency obligations formulated in the UWE decisions were not at the time *mandated* by EU law. While the concept of transparency has been stressed by the CJEU in the context of determining relevant elements of pay[97] and burden

[91] See *e.g.* case C-381/99 *Brunnhofer* ECLI:EU:C:2001:358 para. 53; *Cadman* cit. para. 31.

[92] *Lawrence and Others* cit. para. 17.

[93] Art. 32(A) of Rules of the ECSR.

[94] European Union observations of 25 May 2018 regarding complaints n. 124-138/2016 *University Women of Europe (UWE) v Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden*.

[95] *GSEE v Greece* cit. para. 12. On this point see also C Kilpatrick, 'The Human Rights Puzzle of the Euro-Crisis: Why Massive Breaches of Human Rights but None of the EU Charter of Fundamental Rights?' in M González Pascual and A Torres Pérez (eds), *Social Rights and the European Monetary Union* (Edward Elgar Publishing 2022) 130-131.

[96] *GSEE v Greece* cit.

[97] Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* ECLI:EU:C:1990:209 paras 34-35.

of proof,[98] EU law did not require reporting on wages or the regular provision of data and information on pay. Certain pay transparency measures, such as reporting on pay levels, pay audits and a right to request information on pay, were instead included in the non-binding Commission Recommendation. In establishing obligations under the ESC, the ECSR referred to the Recommendation stating that States should take measures such as those set out in the Recommendation to ensure adequate pay transparency in practice.[99] With this statement, the ESC in effect made the Recommendation – which has had only limited effect in EU MS to date – a benchmark for compliance with *binding* obligations under the ESC.

ESC standards established in this case-law thus draw inspiration and reinforce EU standards on equal pay and go beyond current EU obligations in some respects, such as in respect of pay transparency. We discuss the Commission proposal on binding pay transparency measures in the next section, before comparing these emerging EU standards to those provided for under the ESC.

III. The European Commission's proposal on binding measures regarding pay transparency

As highlighted above, the principle of equal pay between men and women is found in various EU legal sources and the European Pillar of Social Rights. However, significant barriers still remain to the effectiveness of the EU equal pay framework, and the persistent gender pay gap raises questions about the EU's strategy to address inequalities in pay based on gender.[100] Such barriers include a lack of clarity over the concept of "work of equal value" and the objective criteria for the assessment of the value of work; the difficulty of finding an actual comparator of the opposite gender in sectors, occupations or workplaces that are highly gender-segregated; the lack of (access to) information that is pivotal in bringing equal pay claims, such as information on pay levels, broken down by gender; and overall lack of transparency in pay structures.[101] The lack of awareness of their rights and the cost and the length of proceedings pose serious obstacles to workers in bringing equal pay claims, especially to low-paid ones, as does fear of retaliation by employers.[102] The 2014

[98] *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)* cit. para. 11.

[99] *UWE v Belgium* cit. para. 155.

[100] M Smith, 'Social Regulation of the Gender Pay Gap in the EU' (2012) European Journal of Industrial Relations 365, 367-369.

[101] Report COM(2013) 861 final from the Commission to the European Parliament and the Council on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast); Staff Working Document SWD(2020) 50 final from the Commission of 5 March 2020, Evaluation of the relevant provisions in the Directive 2006/54/EC implementing the Treaty principle of "equal pay for equal work or work of equal value"; P Foubert, 'The Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value' cit.

[102] P Foubert, 'The Enforcement of the Principle of Equal Pay for Equal Work or Work of Equal Value' cit.

Recommendation on pay transparency was intended to address some of these issues without resorting to binding measures, but with very limited success.[103]

In March 2021, a long-awaited proposal on binding pay transparency measures was finally published. Since then, the European Parliament has published its position based on the report drawn up by the Committee on Employment and Social Affairs and Committee on Women's Rights and Gender Equality,[104] and the Council of the EU has published its General Approach.[105] At the time of writing, trilogues – that is, negotiations between the Commission, Parliament and Council with a view to reaching a compromise between their respective positions – are still on-going. At this stage, a final compromise is still some months away. While the text of the Directive has not yet been finalised, however, it is possible to determine what are likely to be the main features of the new legislation and to reflect on the regulatory options proposed by the three institutions, where they diverge, as discussed below.

The proposed Directive on the implementation of the principle of equal pay is a comprehensive and complex piece of legislation, which focuses on pay transparency and enforcement mechanisms. The Commission proposal includes clarifications of legal concepts, rights for workers and job applicants, employer obligations, as well as many important provisions relating to remedies and enforcement. It incorporates some already existing elements of EU law, such as the requirement that discrimination must be attributable to a single source,[106] but also a wide range of new obligations. With respect to the clarification of concepts, the proposal sheds some light on the objective criteria to be used to determine the value of work, in line with existing CJEU case-law, and obliges MS to take steps to ensure that employers have pay structures ensuring that men and women are paid equally and to develop tools and methodologies for assessing the value of work.[107] It also provides that, where no actual comparator can be established, there is a possibility to use a hypothetical comparator or to advance other evidence that allows for discrimination to be presumed.[108]

[103] Report from the Commission COM(2017) 671 final to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation on strengthening the principle of equal pay between men and women though transparency.

[104] Report COM(2021) 93 on the proposal for a Directive of the European Parliament and of the Council of 22 March 2022 to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms (EMPL and FEMM Committees) www.europarl.europa.eu (hereafter, Report of the European Parliament COM(2021) 93).

[105] Council of the European Union Proposal for a Directive of the European Parliament and of the Council to strengthen the application of the principle of equal pay for equal work or work of equal value between men and women through pay transparency and enforcement mechanisms, General Approach, Document 2021/0050(COD), available at data.consilium.europa.eu (hereafter, Council General Approach).

[106] Proposal for a Directive on Pay Transparency cit. art. 4(4).

[107] *Ibid*. art. 4.

[108] *Ibid*.

On the side of workers' rights, the proposal includes a right of job applicants to receive information about the initial pay level or its range for a given position,[109] and a right of workers to receive information on their individual pay level and average pay levels, broken down by gender, for categories of workers doing equal work or work of equal value.[110] This latter provision should make it easier for workers to obtain information necessary to identify discrimination and bring an equal pay claim.

An important feature of the proposed Directive is a provision on employers' obligation to report on pay gaps, though not on actual pay levels, and to conduct joint pay assessments with workers' representatives. More specifically, it introduces the obligation of employers with more than 250 workers to provide different types of information on a regular basis, including the pay gap between men and women workers across the organisation and the pay gap for different categories of workers.[111] Where a gap of more than five per cent is identified in any category of workers that cannot be justified by objective factors, employers must conduct a joint pay assessment.[112] These provisions are crucial to ensuring that workers, unions, and other interested parties are able to detect discrimination and gender bias in pay structures, and to encouraging employers to reflect on and address gender disparities in pay within their organisation.

The proposed Directive attempts to address many of the challenges that victims face in enforcing their rights outlined above through proposals on remedies and enforcement. For example, it seeks to ensure that equality bodies and workers' representatives can act on behalf or in support of victims of pay discrimination.[113] It adds that full back pay should be an element of real and effective compensation.[114] In addition, the burden of proof is to shift to the defendant/employer where they have not complied with their reporting and joint assessment obligations.[115] The proposal also includes rules on limitations periods[116] and legal and judicial costs[117] that are favourable to claimants. Member States will be obliged to take measures to ensure that equality bodies – which must be established under the Gender Equality Directive – have adequate resources to carry out

[109] *Ibid*. art. 5.

[110] *Ibid*. art. 7.

[111] *Ibid*. art. 8. The information on gaps across the organisation must be made publicly available, whereas the information on gaps by categories of workers must be provided to workers, workers' representatives and the proposed monitoring body.

[112] *Ibid*. art. 9.

[113] *Ibid*. art. 13.

[114] *Ibid*. art. 14.

[115] *Ibid*. art. 16.

[116] *Ibid*. art. 18.

[117] *Ibid*. art. 19.

their functions.[118] Member States will also be subject to obligations related to monitoring and awareness-raising, including the designation of a "monitoring body".[119]

Overall, the proposal puts more weight on enforcement, particularly through equal pay claims, than on pay transparency, as well as pay reporting and action to address pay disparities by employers themselves.[120] For example, the exemption of employers with fewer than 250 workers from reporting and assessment requirements leaves out all small and medium-sized enterprises, which constitute almost all enterprises and account for *two thirds* of employment in the EU.[121] Furthermore, unlike the 2014 Recommendation, the Directive proposal does not include a requirement to discuss the issue of equal pay in collective bargaining.[122] Collective bargaining is an important means to ensuring transparency in pay structures and equality in pay, with potentially much more far-reaching, structural effects than enforcement through equal pay claims.[123]

The proposal will, of course, undergo changes as it makes its way through the legislative procedure and the Directive is finalised, reflecting some compromise between the positions of the three institutions. For the most part, the positions of the Parliament and the Council do not radically depart from the Commission's proposal. The report of the European Parliament, however, overall seeks to strengthen the Directive and includes important proposals for amendments that are generally in the interest of workers. These include a possibility for cross-sector comparison[124] a lowering of the threshold for reporting and assessment obligations to employers with 50 workers or more,[125] as well as an obligation to strengthen social dialogue and ensure that trade unions can collectively bargain on equal pay.[126]

On the other hand, the Council of the EU's General Approach seeks to introduce fewer changes to the Commission proposal, and certainly to maintain the threshold of 250 workers. The Council also proposed to introduce special rules for micro and small enterprises from some of the other obligations,[127] to replace the proposed 'monitoring body' with a 'control body' with more restricted functions,[128] and water down some of the enforcement

[118] *Ibid*. art. 25.

[119] *Ibid*. art. 26.

[120] K Arabadjieva, 'A Small Step Towards Gender Equality in Pay' (26 March 2021) Social Europe socialeurope.eu.

[121] *Ibid*.

[122] Recommendation 2014/124/EU cit. recommendation 6.

[123] J Pillinger, 'Bargaining for Equality: How Collective Bargaining Contributes to Eliminating Pay Discrimination Between Women and Men Performing the Same Job or Job of Equal Value' (2014) European Trade Union Confederation; K Arabadjieva, 'A Small Step Towards Gender Equality in Pay' cit.

[124] Report COM(2021) 93 cit. art. 4(4).

[125] *Ibid*. art. 8(1).

[126] *Ibid*. art. 11.

[127] General Approach 2021/0050(COD) cit. *e.g*. arts 6(2) and 7(2)(a).

[128] *Ibid*. art. 26.

provisions such as those on costs and penalties.[129] The trilogue process has been criticised for often favouring the Council over the democratically elected Parliament.[130] It is therefore, at this stage, reasonable to assume that many of the more generous provisions proposed by the Parliament will probably not be fully transposed into the final text.

III.1. What role for ESC standards?

Unlike the ECSR, which referred extensively to EU law, the European Commission proposal does not refer to the ESC and its recent case-law, neither in the background section of the document nor in the proposed Preamble. Although the ESC does not occupy the special position that the ECHR does under the CRFEU,[131] it is to be expected that the Commission is familiar with the relevant ESC standards. According to art. 151 TFEU, the "Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter [...] shall have as their objectives the promotion of employment, improved living and working conditions". Furthermore, art. 23 CFREU on equality between men and women – cited in the proposal – draws on art. 20 (R)ESC.[132]

Indeed, some, but not all, of the elements of ECSR case-law that go beyond the existing EU framework and case-law and the Recommendation on pay transparency outlined above feature in the proposal, though it is not possible to establish a causal connection there. For example, the provisions regarding resources of equality bodies and the designation and tasks of a monitoring body did not feature as such in the Recommendation, but were emphasized in ECSR case-law. The ECSR case-law also strongly emphasized the importance of effective remedies, including affordable and timely proceedings – a dimension that has been further developed by the Directive proposal as compared to the 2014 Recommendation, stretching beyond the existing requirements of the Gender Equality Directive and CJEU case-law that touch on the question of effective remedies.

Unfortunately, without explicit reference to the ESC, the role of ECSR case-law in the drafting of the proposal is a matter of speculation. While it is not unreasonable to suggest that the norms set by another European-level body have been one source of inspiration for the Commission, it is impossible to determine whether and to what extent these norms have been taken into account by consulting legal sources and preparatory documents. That is, whereas the role of EU standards in shaping ECSR case-law is clear, the same is not true the other way around. This lack of engagement is a well-known issue that has been subject to commentary in various corners, and some of the dangers in this approach are discussed

[129] *Ibid*. arts 19 and 21.

[130] See *e.g*. C Collombet and A Math, 'La nouvelle directive "équilibre" sur les congés parentaux, de paternité at d'aidant: une avancée de l'Europe sociale?' (2019) Chronique internationale de l'IRES 3.

[131] See *e.g*. art. 52(3) CFREU that guarantees interpretative convergence with regard to the rights laid down in the CFREU and those laid down in the ECHR.

[132] Explanations relating to the Charter of Fundamental Rights of the European Union [2007].

in section V below. The opinion of the European Economic and Social Committee on the proposal, by contrast, includes a reference to the ECSR's case-law discussed here.[133] A reference also appeared in a model Directive proposal published by the European Trade Union Confederation in its campaign for pay transparency measures.[134]

IV. How does the proposal compare to the ESC standards?

In this part we compare the ESC equal pay standards with those of the Commission proposal. We argue that, even though similar standards emerge from the two instruments, their different normative underpinnings and approaches on certain matters suggest that the ESC may offer a less detailed, yet broader protection in certain respects.

There are common standards set by the two instruments on certain aspects of the principle of equal pay. In both instruments, the principle of equal pay is broken down in elements that are more or less the same. These aspects include, for instance the definition of legal concepts, provisions relating to gender-neutral pay systems, employers' obligations to report on wages, effective remedies, the shift of the burden of proof and protection from dismissal, as well as provisions relating to equality and monitoring bodies. However, this common understanding of *what* should be protected does not necessarily mean that there is a shared understanding of *how* and *how much* it should be protected.

A first important difference is, of course, the level of precision of the proposed EU norms compared to those of the ESC. This is not surprising, since the ECSR case-law interprets a relatively vaguely formulated treaty text, whereas the proposed Directive, like the existing framework laid down in the Gender Equality Directive, is a secondary law act. Obligations under the ESC are formulated in a way that leaves much more room for discretion to States parties as regards implementation. That is not to say that Directives do not leave any room for discretion. In the case of the proposed Directive, MS are free to provide a higher level of protection. As they are more concrete, however, EU standards might be more demanding on MS than obligations under the ESC. One example here is the requirement to provide for a possibility of a hypothetical comparator under the proposal, compared to an obligation to ensure that comparisons can be made beyond one company, which does not *necessarily* imply hypothetical comparisons. Similarly, whereas ECSR case-law requires that proceedings must be affordable in general terms, the Commission proposes concrete measures to reduce costs for workers, such as the possibility for workers' representatives and equality bodies to make claims on behalf of workers, or a limitation on the circumstances in which an employer can recover legal and judicial costs.[135]

[133] Opinion SOC/678-EESC-2021 cit.

[134] ETUC, *Model Proposal for a Directive on Strengthening the Principle of Equal Pay Between Women and Men Through Pay Transparency* www.etuc.org.

[135] Commission Proposal for a Directive on Pay Transparency cit. arts 13 and 19.

The proposed Directive also goes further than some of the requirements set out in ECSR case-law in its substance. For example, there is nothing in this case-law on the provision of information on salary to job applicants or on equal pay matters in public contracts.[136] The Commission proposal contains also an additional provision on the shift of the burden of proof where employers have not complied with information and reporting obligations set out in the Directive.[137] Of course, it is yet to be seen whether these elements will make it into the final text of the Directive.

There are also aspects of ECSR standards that go beyond those set out in the proposed Directive, or that have not been incorporated into the proposal. The main example in the first category are the provisions on reporting, which under the proposal are limited to employers with at least 250 workers. The ECSR referred to adoption of measures on employers' wage reporting as an indication of conformity with the ESC, citing the Recommendation of 2014, which excludes only employers with fewer than 50 workers from the reporting obligations.[138] The ECSR did not itself set any explicit limit regarding the size of an enterprise applicable to the scope of this measure, so it is not entirely clear whether it accepts this threshold. It does seem to accept some thresholds applicable at a national level: for instance, in Sweden, which held to be in conformity with the ESC, the national framework establishes certain wage reporting obligations for employers that employ more than 10 workers.[139] The considerably higher threshold of 250 workers, however, will exclude two thirds of the workforce from the benefit of the provision. It may benefit an even lower proportion of women workers, since women tend to work in smaller enterprises.[140] Given that rights under the ESC must be protected *effectively*, a threshold that excludes the great majority of workers is likely to fall short of ESC standards.

The reason underlying the threshold of 250 workers that has been advanced is that reporting and assessment obligations would impose additional burdens on businesses in the aftermath of the Covid-19 pandemic,[141] but this high threshold has been hotly disputed.[142] As noted above, the proposal places much more emphasis on removing procedural barriers and improving monitoring and State enforcement than it does on employers' obligations to report on wage differences and take steps to address them. Another example here is the fact that the proposal requires reporting on pay gaps rather than actual average pay levels in companies – which would make it easier for workers to assess

[136] *Ibid*. art. 21.

[137] *Ibid*. art. 16(2).

[138] *UWE v Belgium* cit. para. 155; Recommendation 2014/124/EU cit. recommendation 4.

[139] *UWE v Belgium* cit. para. 146.

[140] EIGE, 'Tackling the Gender Pay Gap: Not Without a Better Work-Life Balance' (2019) Publications Office of the European Union 11.

[141] Proposal for a Directive on Pay Transparency cit.; K Arabadjieva, 'A Small Step Towards Gender Equality in Pay' cit.

[142] See *e.g*. Opinion SOC/678-EESC-2021 cit.

whether to bring a claim – and it does not require full pay audits, but only a "joint assessment". That is, it still places the onus primarily on workers and those acting on their behalf, as well as on the State, to take action against pay discrimination. Particularly given the context of the Covid-19 pandemic, this is a clear attempt to accommodate the concerns of employers – which strongly oppose the proposed Directive[143] – over additional costs and administrative burdens. Such considerations do not feature, *prima facie*, in the ECSR standard-setting.

This is a reminder of the fact that these two instruments are constructed on different, at least to some extent, normative underpinnings. Market-related incentives are creeping into the European Commission's initiative. The explanatory memorandum accompanying the proposal does not leave any doubt: "the fact that national pay transparency measures are fragmented and scarce increases the risk of competition being distorted by having different levels of social standards. There is a risk of businesses competing on an uneven playing field, which would hamper the operation of the internal market. Action at EU level is needed in order to ensure a similar level of protection for workers across the EU and a level playing field for operators in the internal market".[144]

This is in line with the well-known CJEU statement in *Defrenne II*, a case on the application of the principle of equal pay, that the union has social objectives as well as being an economic union.[145] It also reflects the EU's original single-market objectives. The justifications for the proposal highlight not only the social, but also the business case for the new measures. The part of the explanatory memorandum that discusses the proportionality of the measures introduced with the directive, among others, states: "[...] the main benefit is the full protection of a fundamental EU value. In addition, it contributes to the EU's wider social ambitions as set out in the European Pillar of Social Rights. Moreover, further benefits may come from more secure employment, workforce retention and more productive workers and firms. Therefore, it will have a positive impact on business profitability and the functioning of the internal market".[146]

Social and economic objectives often conflict, however. This is a tension that comes up in other areas of EU law, too.[147] The ECSR, on the other hand, being a human rights body, is not constrained by economic, competition or market-oriented considerations to justify the promotion of gender equality in employment. Under the ESC, workers should

[143] BusinessEurope, 'EU Action Plan on Tackling the Gender Pay Gap' (Position Paper May 2018); V Guerra, 'Binding Pay Transparency Measures Have to Fully Take into Account the Reality of SMEs' (20 June 2020) SMEunited www.smeunited.eu.

[144] Explanatory memorandum to Proposal for a Directive on Pay Transparency cit. 4.

[145] *Defrenne v Sabena* cit.

[146] Explanatory memorandum to Proposal for a Directive on Pay Transparency cit. 5.

[147] For example, see ACL Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ' (2008) ILJ 126; KA Polomarkakis, 'A Tale of Two Approaches to Social Europe: The CJEU and the Advocate General Drifting Apart in Case C-201/15 AGET Iraklis' (2017) Maastricht Journal of European and Comparative Law 424; A Gerbrandy, W Janssen and L Thomsin, 'Shaping the Social Market Economy After the Lisbon Treaty: How "Social" is Public Economic Law?' (2019) Utrecht Law Review 32.

be treated equally just because they are workers and because they are human beings, not because equal treatment makes them more productive or increases business profit. The implementation of gender equality in employment does not have to be justified by reasons pertaining to the free-market economy. The ECSR therefore did not balance the strengthening of the implementation of the right to equal pay against potential "costs" for employers or for the market overall.

This normative underpinning, namely the egalitarian understanding behind the ECSR approach to equal pay, is what makes it different from the EU's approach to this topic. In this respect the ESC, concerned primarily with the protection of social rights – and not with the impact of this implementation in the free-market European economy – is an instrument more open to evolution in response to challenges that workers face, putting social rights at the centre of its considerations. This does not mean that the ESC standards are the highest attainable – still in some respects the treaty sets minima. However, being free from employing free-market economy as a lens or motive, the ECSR leaves room for further development towards a direction that is more protective for workers. These different underpinnings of the two instruments, when it comes to their relationship with competition and economy, perhaps explain why the proposed Directive does not put pressure on SMEs to report on pay gaps, despite the fact that the cost of reporting is very modest.[148] There are also other aspects of the proposal that seek to accommodate employer interests at the expense of pay transparency in the interest of workers. For example, employers are still able to require employees not to disclose their pay or information obtained under the Directive, aside from where they are specifically seeking to enforce the principle of equal pay.[149] It is to be seen whether the final form of the Directive will contain further compromises between worker and business interests, such as the exemption of smaller businesses from some provisions, as suggested by the Council.[150]

It is also the case that ESC obligations go further in their positive dimension, namely obligations to *promote* the right to equal pay, and in this respect the Commission proposal does not incorporate many of the elements contained in the ECSR case-law. Unlike ECSR case-law, the proposal contains nothing on collective bargaining – only that the provisions under the Directive should be "discussed" with the social partners[151] – nor on State or employer action plans to close the pay gap. Yet, such provisions are important elements of a strategy to promote the right to equal pay through encouraging deeper *systemic* changes that stem from the action of governments and social partners. These actions have the potential to address the phenomenon of pay inequality in a more holistic and far-reaching manner than the more piece-meal enforcement through equal pay claims advanced by workers or by trade unions and equality bodies. Equal pay claims

[148] K Arabadjieva, 'A Small Step Towards Gender Equality in Pay' cit.
[149] Proposal for a Directive on Pay Transparency cit. arts 7(5) and (6).
[150] General Approach 2021/0050(COD) cit.
[151] Proposal for a Directive on Pay Transparency cit. art. 11.

generally address instances of pay discrimination affecting the claimant(s) in the case, and at most the particular employer or "single source" responsible for discrimination. Collective agreements, especially at sectoral or even national level, on questions pertaining to equal pay – such as gender-neutral job evaluation and classification systems or low pay in female-dominated occupations – cover a significantly higher proportion of workers and seek to eliminate discrimination and undervaluation of work typically performed by women from the outset, rather than placing the onus on workers to uncover and challenge these issues ex post.[152] The same goes for proactive steps by employers or State authorities to uncover discrimination and gender bias in pay structures. These approaches shift the burden of enforcing the principle of equal pay from potential victims to those actors that are able to address pay discrimination and other causes underpinning gender pay inequalities more effectively.

Existing provisions in the Gender Equality Directive on the creation of equality bodies, which the Commission proposal reinforces, reflect this positive dimension to some extent. The proposal also includes some new elements. The joint pay assessment must include measures to address pay differences that are not objectively justified. This is reminiscent of an action plan to close pay gaps, but the language used is – quite likely, deliberately – different from "action plan" or "audit", and it is unclear how extensive these assessments will be. The provision also only applies to employers with more than 250 workers. Another proposal is the designation of a monitoring body that would effectively contribute to fulfilling some positive obligations, including awareness-raising and tackling the causes of the gender pay gap.[153] The Council's general approach, however, sets out to remove the reference to a specific body and only requires States to analyse, but not tackle the causes of the gap. The final text of the Directive may constitute a compromise on this point, reflecting a reluctance to impose additional legal obligations on States.

It is not surprising that this positive dimension is less developed in EU law. The emphasis of existing EU secondary law on equal pay and discrimination is on individual redress, rather than tackling structural issues. Systemic problems are the subject of policy, rather than legal solutions at the EU level – the Gender Equality Strategy 2020–2025 and action plan on Tackling the gender pay gap 2017–2019 do refer to the need for policies to address other causes of the gap, though they do not mention action plans or collective bargaining.[154] By contrast, it is the ECSR's main task to assess systemic issues and to recommend systemic changes that are to be implemented by States, to which ESC obligations are addressed. The ESC response thus recognizes to a greater extent the responsibility of the State, but also other actors to address structural challenges that are at the root of pay

[152] On the role of collective bargaining in promoting equal pay, see J Pillinger, 'Bargaining for Equality' cit.

[153] Proposal for a Directive on Pay Transparency cit. art. 26.

[154] Communication COM(2020) 152 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 5 March 2020, A Union of Equality: Gender Equality Strategy 2020-2025.

inequalities; and it appears to be more informed by background social justice issues. This reflects, again, some fundamental differences between the EU and ESC frameworks.

V. Opportunities and challenges

The interaction between the instruments, as well as the ultimate divergence in standards, illustrate the added value of the ESC system and its position *vis-à-vis* the EU system. Although the ECSR built on EU law and the non-binding Commission Recommendation, it was the first to emphasize and elaborate on *binding* European-level standards regarding pay transparency, and the need for even further strengthening of enforcement mechanisms. In doing so, it sent a strong signal regarding the measures that must be put in place to realise the right to equal pay, asserting its place as Europe's primary standard-setting body in the sphere of social rights. As such, it has an important complementary function *vis-à-vis* EU law, which for the time being subordinates social objectives to economic and market objectives.[155] Since the ECSR is not limited by the need to balance a broader range of interests and considerations, including economic ones, ESC standards – where they apply to States parties – can complement EU standards by requiring that States put in place measures that go beyond EU law.

Absent a presumption of conformity of EU law to the ESC, the ESC system in this context ensures that State obligations to guarantee the right to equal pay do not stop at compliance with EU legislation. This is particularly significant when it comes to the positive dimension of State obligations, which underscores the need for deeper systemic changes through actions by a broader range of actors. Of course, a crucial issue here is the extent to which States parties actually comply with ESC obligations over and above the requirements of EU law, with which they must comply in accordance with the EU doctrine of supremacy. At the same time, ESC standards constitute a *benchmark*, against which existing or planned EU measures – and the extent to which they truly promote the protection of certain social rights, or indeed infringe them – can be assessed, by the EU institutions themselves, MS or other actors.

Since the ECSR is a specialist body with long-standing expertise in the sphere of social rights, its case-law is also a rich resource regarding both the definition of the content of particular rights and the assessment of compliance of State (in)action with such rights.[156] In this respect, ESC standards provide a potential source of inspiration for EU policy and

[155] See *e.g.* KA Polomarkakis, 'The European Pillar of Social Rights and the Quest for EU Social Sustainability' cit.; D Schiek, 'Towards More Resilience for a Social EU: The Constitutionally Conditioned Internal Market' (2017) European Constitutional Law Review 611; FW Scharpf, 'The Asymmetry of European Integration, or Why the EU Cannot Be a "Social Market Economy"' (2010) Socio-Economic Review 211; K Ewing, 'The Death of Social Europe' (2015) King's Law Journal 76.

[156] A Aranguiz, 'Bringing the EU Up to Speed in the Protection of Living Standards Through Fundamental Social Rights' cit. 623; O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit.

lawmakers, as well as the CJEU, particularly because the ESC is a European instrument that has been the inspiration for a number of provisions now contained in the CFREU, such as art. 23 on gender equality in employment, and the earlier Charter of the Fundamental Social Rights of Workers. The CJEU has, at times, also noted the fact that EU MS are parties to the ESC as a reason to draw on ESC – alongside other sources – in formulating general principles of EU law, such as in the *Viking* case.[157] The ECSR provides an authoritative interpretation of social rights standards at the European level, which pays attention to constitutional and other national legal sources. While other international instruments, such as the ILO Conventions and UN Covenants, are also important sources of inspiration for EU law, these existing linkages strengthen the case for paying particular regard to the ESC. Indeed, many of the reasons for the special place of the ECHR in the EU legal order – for example, divergence in the interpretation of the same or similar rights and rights' standards that might lead to conflicting transnational obligations and to the undermining of non-EU human rights systems by the development of EU law[158] – apply also in the case of the ESC, particularly now that the EU social legislation is expanding and covering new areas, including, for example, minimum wages.[159]

In the case of equal pay, the ESC collective complaints resulted in comprehensive analysis of relevant obligations and of compliance issues in a significant number of States parties, almost all of which are EU MS. The fact that the ECSR engaged extensively with EU law sources and incorporated them into its analysis strengthens both the linkages and parallels between the two systems, at least where the right to equal pay is concerned, highlighting the scope for fruitful exchange and judicial dialogue. To the extent that the detailed ECSR decisions go further than current EU standards, they provide a reference point for the future development of EU legislation and case-law. Given the various links outlined above, it would have been possible for the European Commission to mention and engage more explicitly with the relevant standards emerging in ECSR case-law in its proposal for pay transparency measures. In view of the different underpinnings of the two systems discussed in the previous sections, some differences in standards are to be expected. However, explicit mention of ESC standards (including in the preamble) and some explanation in the background to the proposal of how these relate to the proposed EU measures would have been desirable. This would acknowledge the position of the ESC as a European norm-setting body in the field of social rights and that EU MS have obligations under this system – that is, recognizing the authority of the social rights counterpart to the ECHR – and it could provide an opportunity to clarify relevant differences.

[157] Case C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* ECLI:EU:C:2007:772 para. 43.

[158] M Kuijer, 'The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2020) IJHR 998.

[159] See the recent Directive of the European Parliament and of the Council on adequate minimum wages in the European Union, not yet published in the OJ.

It remains to be seen whether the CJEU will engage with ESC in the interpretation and application of existing law or the new Directive. Its track record on this front has been relatively poor so far and criticised by a number of commentators.[160] At the very least, both these and any future collective complaints, as well as cyclical reports on compliance with the now much more detailed ESC requirements, will be useful materials to put before the Court. Again, the CJEU is not bound to follow the case-law of the ECSR, and there is currently no formal basis in the treaties or the CFREU for doing so, unlike in the case of the ECHR. However, the CJEU can, as it has done before,[161] draw on the ESC in the interpretation of CFREU provisions that are based on or correspond to ESC rights, as well as in their application to a particular case.

The right to equal pay is therefore an area in which there is scope for dialogue and productive synergies between the two systems, and opportunities for EU and ESC standards to be mutually reinforcing. Given that EU law formed part of ECSR analysis and that ESC and EU standards on pay transparency and enforcement mechanisms are emerging at more or less the same time, it is also an area that provides particularly salient opportunities for interaction. These can only bear fruit, however, if there is engagement from both sides. Unfortunately, the issue of equal pay is yet another example of the reluctance of EU bodies, be it legislative or judicial, to engage substantially with the ESC. The lack of any reference to the ESC in the text of the proposed Directive – which may have also given a basis for the CJEU to refer to the ESC in future equal pay case-law – is a missed opportunity to create interfaces between parallel standards on equal pay. This reluctance is not new, and has been identified by commentators in different contexts, too. Certain problems might arise from it regarding the effective implementation of the equal pay principle.

The first one is the development of inconsistent obligations of EU MS that have ratified the ESC and are also bound by ESC obligations regarding equal pay. This is perhaps not so problematic in the present case, since emerging standards at least do not appear in direct *conflict*, and EU MS are permitted to introduce measures more protective than those set out in the proposed Directive, to comply with ESC obligations. This was different, of course, in the cases of economic assistance conditionality,[162] as well as Swedish

[160] *E.g.* O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit.; M Rocca, 'Enemy at the (Flood) Gates: EU "Exceptionalism" in Some Recent Tensions with the International Protection of Social Rights' cit.; C O'Cinneide, 'The European Social Charter and EU Labour Law' cit.; and others, cited in the introduction to this *Article*.

[161] Case C-116/06 *Kiiski* ECLI:EU:C:2007:536 para. 48; case C-268/06 *Impact* ECLI:EU:C:2008:223 paras 113-114; see also O De Schutter, 'The European Pillar of Social Rights and the Role of the European Social Charter in the EU Legal Order' cit. 15-16.

[162] *Federation of employed pensioners of Greece (IKA-ETAM) v Greece* cit.; *Panhellenic Federation of Public Service Pensioners v Greece* cit.; *Pensioners' Union of the Athens-Piraeus Electric Railways (I.S.A.P.) v Greece* cit.; *Panhellenic Federation of pensioners of the public electricity corporation (POS-DEI) v Greece* cit.; *Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece* cit.; *Greek General Confederation of Labour (GSEE) v Greece* cit.

lex Laval case.[163] Still, given the asymmetry between the force of EU law and that of ESC standards at national level, EU MS are likely to limit themselves to EU standards or invoke their conformity with EU law when scrutinized by the ECSR. What we mean here by "asymmetry" is the fact that EU law prevails over national law and has direct effect, whereas the ESC is binding in international law and its implementation depends on the States parties. This has some positive implications: the system of enforcement of the ESC allows for the setting of more ambitious standards that can be progressively realised, which may not be politically feasible under the EU system. However, as the EU legal order is increasingly dealing with social issues that fall within the domain of the ESC, a lack of explicit engagement with already existing ESC standards and justification of differences risks displacing ESC standards, rather than ensuring complementarity between the two.

Indeed, scholarly accounts have raised concerns about the potential levelling down of social rights standards, due to the disregard of the ESC and other international law sources on the part of the EU. For instance, Khaliq, Garben, Aranguiz and Robin-Olivier, in their accounts of the relationship between the EU and the ESC or international law more broadly, have argued that where diverging standards between the ESC and EU law conflict, despite being at least equally binding from a legal point of view, EU MS will prioritize their obligations under EU law.[164] In an early account of the collective complaints procedure, Churchill and Khaliq argued that the ECSR should seek to ensure compatibility with deviating EU law standards and diverging/conflicting obligations, warning, however, that such an undertaking might end up lowering the standards of obligations stemming from the ESC.[165] That is, the existence of multiple norms of different scope and diverging standards, in combination with the limited outreach of the ESC in general, but particularly compared to the legal effect of EU law sources in national law,[166] could ultimately lead to a "levelling down" of standards.[167]

In the present context, this could for instance mean that States putting in place pay reporting and assessment requirements will be inclined to limit those to the employer size threshold set by EU law, and to assume, or at least to argue, that this is sufficient to comply with their obligations under the ESC. This kind of argument was advanced in the

[163] *Swedish Trade Union Confederation v Sweden* cit.

[164] U Khaliq, 'The EU and the European Social Charter' cit. 183; S Garben, 'The Problematic Interaction Between EU and International Law in the Area of Social Rights' cit. 85; A Aranguiz, 'Bringing the EU Up to Speed in the Protection of Living Standards Through Fundamental Social Rights' cit. 622; S Robin-Olivier, 'The Relationship Between International Law and European Labour Legislation and its Impact on the Development of International and European Social Law' cit. 495.

[165] RR Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) EJIL 417, 456.

[166] C O'Cinneide, 'The European Social Charter and the UK: Why it Matters' (2018) King's Law Journal 275.

[167] Schlachter makes this argument in respect of EU and ESC standards on the right to strike, see M Schlachter, 'The Right to Strike: A Need to Align Different Interpretations?' in *Ensuring Coherence in Fundamental Labor Rights Case Law: Challenges and Opportunities* (Leiden University 2016) 19.

other cases of diverging standards mentioned earlier. In the case of maternity leave for instance, the UK government invoked the transposition of the Pregnant Workers Directive, in order to argue conformity with the ESC under art. 8(2).[168] Similarly, in the case of *CGT v France*, where the ECSR delineated the relationship of the ESC with EU law, the French government argued that the transposition of the Working Time Directive ensured conformity with the ESC.[169]

The second issue, which has been already pointed out by De Schutter in the context of EU and ESC working time standards, is the different level of commitment and content of obligations between EU MS that are also party to the ESC.[170] The *à la carte* system of ratification the ESC permits States parties, with the exception of some core provisions, to commit to the ESC system in varying degrees.[171] By contrast, EU regulation on matters touching upon social protection or employment set out minimum common standards to be implemented across EU MS. This means that if a matter regulated by EU law falls within the ambit of an ESC provision, then EU MS that have not ratified the said provision have limited social rights obligations compared to those MS that are also bound more extensively by the ESC. This risk of asymmetry of obligations also exists in the case of equal pay, as some States parties have not ratified some of the equal pay provisions.[172]

As mentioned earlier, there is no engagement with ESC standards on the part of EU legislature that indicates that these risks of levelling down or circumventing higher social rights standards do not also apply in the case of equal pay. This is far from a theoretical problem, which could lead to disparities in the protection of the right to equal pay between States parties. It also means that, unless there is already robust national legislation in place, the onus is on EU standards to provide the adequate level of protection. These issues, as well as the potential gains from a positive relationship between the EU and ESC systems, speak for a deeper and more explicit engagement with ESC standards on the part of EU institutions in the field of equal pay. The cost of the refusal to do so will be endured by (women) workers.

VI. Conclusions

The legal framework protecting equal pay in Europe is being reshaped. By coincidence or not, this reshaping is driven in parallel by the ESC system and the EU legislature. The new ESC standards in the field of equal pay are the result of a dynamic interpretation by the

[168] U Khaliq, 'The EU and the European Social Charter' cit. 188-189.

[169] *CGT v France* cit.

[170] O De Schutter, 'The European Social Charter in the Context of Implementation of the EU Charter of Fundamental Rights' cit. 44.

[171] *Ibid*.

[172] Cyprus, Croatia and Hungary have not ratified art. 4(3) ESC, but have ratified the Additional Protocol of 1988 to the 1961 ESC or art. 20 (R)ESC employed in this case, while Luxembourg and Poland have not ratified the Additional Protocol of 1988 to the 1961 ESC.

ECSR, taking into account all existing standards in international human rights law and EU law, but going even further in some important respects. New EU minimum standards are, on the other hand, the result of a legislative initiative for a Directive on pay transparency by the European Commission. By contrast, the Commission proposal makes no mention of the ESC – or indeed any other non-EU international standards on equal pay – and an explicit acknowledgement of legal pluralism is absent from the proposed Directive.

The emerging standards in the ESC system and EU law are overlapping to some extent. The content of the principle of equal pay that is surfacing through the recent developments is overall more detailed than in the past. It pays attention to the long-standing enforcement problems that have deprived the legal framework of its full potential as an avenue for the effective realisation of the right to equal pay. However, some divergencies exist between the ESC and the EU instrument underway. Notwithstanding that its States parties' welfare States and gender equality law and practice are much more diverse than those of EU MS, the ESC seems to set more progressive standards in certain respects and has the potential to accommodate workers' interests with fewer restrictions. This is particularly evident in relation to employers' wage reporting obligation and positive obligations to promote equal pay.

Though one may question the "balance" struck between worker protection and other interests in certain aspects of the Commission proposal as such, some differences in the scope and content of emerging standards are certainly to be expected given the different normative foundations of the ESC and the EU. Indeed, in this can also lie opportunities for productive synergies and complementarity between the two systems, but these require that they both engage in dialogue. Given the proximity in time and degree of overlap between ECSR case-law and the Commission initiative, reference to the ESC in the proposal would have been particularly pertinent. The lack of any mention of the ESC and other international social rights standards is therefore also particularly disappointing in this case. In that sense, the equal pay developments do not suggest a major break from existing critical accounts of the stance of the EU legal order towards more progressive social rights standards found in the ESC. This is not to say that the proposed Directive is not a very significant step towards strengthening legal obligations in the area of equal pay. More explicit engagement with the ESC could, however, further enrich and reinforce emerging EU standards.

ARTICLES

THE EUROPEAN SOCIAL CHARTER TURNS 60: ADVANCING ECONOMIC AND SOCIAL RIGHTS ACROSS JURISDICTIONS

Edited by Lorenza Mola, Giovanni Boggero, *and* Francesco Costamagna

ASSESSING THE EFFECTIVENESS OF THE EUROPEAN SOCIAL CHARTER: A CASE STUDY ON DISMISSAL REFORMS

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ABSTRACT: In the aftermath of the Eurozone crisis, several states in Europe carried out structural reforms targeting existing laws on dismissals, thus weakening employee protection. In that context, the Revised European Social Charter, as interpreted by the European Committee of Social Rights, established itself as a reliable legal instrument protecting employees against certain types of unfair (unjustified) dismissal in Europe. This *Article* follows a case study design to undertake a comparative examination of the impact of the Revised Charter's perspective vis-à-vis unfair dismissals in some European jurisdictions (Italy, France, and Greece), with a particular focus on the reasoning of their domestic courts in recent relevant decisions. In light of the findings, it provides a discussion of the Charter's renewed potential to advance economic and social rights, especially the right to protection in cases of termination of employment, across domestic jurisdictions in Europe.

KEYWORDS: economic and social rights – unfair dismissals – art. 24 Revised European Social Charter – European Committee of Social Rights – collective complaints procedure – domestic courts.

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www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/628

I. Introduction

To respond to the challenges precipitated by the Eurozone crisis, several European states followed the "recipe" of austerity, implementing structural labour market reforms, either within "bailout" programmes or under the EU economic governance framework. A similar focal point of these reforms was that they targeted existing laws on dismissals,[1] within the framework of the neoliberal dogma of labour market flexibilisation and liberalisation,[2] thus weakening specific aspects of employee protection.[3]

One particular feature of the reforms was that they relaxed the requirement for the employer to justify the dismissal of an employee under specific circumstances, by narrowing its scope, limiting its control by judges, or by weakening the sanctions that may be imposed on the employer.[4] For a long time, such a justification requirement, in most European countries, such as Italy and France, has entailed the obligation of the employer to reinstate or compensate the dismissed employee. Its goal has been to dissuade employers from dismissing employees (except as a last resort measure), control the abuse of managerial power, and secure employment positions. Greece, on the other hand, is a prominent example among a few European countries having developed a liberal concept of dismissal,[5] according to which the requirement for justification is absent.[6] The underlying objective of the reforms was to give precedence to the certainty and security of employers, as well as to limit the control of an impartial judge over economic and organisational choices of employers in relation to the preservation of the employees' position.

In Italy, the introduction in 2015 of the so-called Jobs Act (Legislative Decree n. 23/2015) marked the beginning of a new era in Italian labour law.[7] The reform introduced *inter alia* an automatic arithmetic system (a "scale" or "benchmark") to calculate financial compensation for unfair (*i.e*. unjustified and, therefore, unlawful) dismissal (without just

[1] E Kovács, 'Individual Dismissal Law and the Financial Crisis: An Evaluation of Recent Developments' (2016) European Labour Law Journal 368.

[2] M Yannakourou and C Tsimpoukis, 'Flexibility Without Security and Deconstruction of Collective Bargaining: The New Paradigm of Labor Law in Greece' (2014) Comparative Labor Law & Policy Journal 331, 333.

[3] See, for an overview, I Schömann, 'Labour Law Reforms in Europe: Adjusting Employment Protection Legislation for the Worse?' (ETUI Working Papers 02-2014).

[4] B Palli, 'Les réformes nationales de la justification du licenciement au prisme des standards européens et internationaux' (2018) Revue de droit du travail 618.

[5] B Palli, 'La place du "barème" dans certains pays européens' (2019) Droit social 310.

[6] This freedom of the employer was compensated for in Greece through comparatively long notice periods and high severance payments, which were however drastically reduced during the Eurozone Crisis. See M Aleksynska and A Schmidt, *A Chronology of Employment Protection Legislation in Some Selected European Countries* (International Labour Office 2014) 11-12.

[7] For an overview see, among many, MT Carinci, '"In the Spirit of Flexibility": An Overview of Renzi's Reforms (the so-called Jobs Act) to "Improve" the Italian Labour Market' (CSDLE "Massimo D'Antona" Working Papers 285-2015); C Cester, 'I licenziamenti nel Jobs Act' (CSDLE "Massimo D'Antona" Working Papers 273-2015).

cause – *giusta causa*),[8] based solely on the criterion of the employee's seniority of service.[9] The objective of introducing such a technical instrument of governance as a scale was to make compensation for unfair dismissal – in companies with more than 15 employees – perfectly calculable and predictable in advance.[10] It thus excludes the possibility that judges make subjective decisions about the amount of compensation to be given to an employee who has been dismissed (for economic reasons) without justification.

In particular, the standard amount of compensation that the Italian judge may (automatically) grant to employees hired after the entry into force of the Jobs Act (7 March 2015) is set at two monthly lump-sum instalments of the last remuneration per year of seniority in the company. The compensation "floor" (minimum or lower limit) is set at four months' salary and its "ceiling" (maximum or upper limit) at 24 months' salary. Notably, in 2018, the floor of four months' wages and the ceiling of 24 months' wages were raised (by Legislative Decree n. 87/2018) to six and 36 months respectively, but the calculation system did not change.

Remarkably, after three years of applying this system, the lump-summing of compensation for unfair dismissal, based solely on the criterion of seniority, was found by the Italian Constitutional Court (*Corte costituzionale* – hereafter ItCC) to be contrary to the Italian Constitution in relation to art. 24 of the Revised European Social Charter (hereafter RevESC) (among a few constitutional principles).[11] In its judgment n. 194/2018 of 26 September 2018, the ItCC found – giving due consideration to the basic lines of the "jurisprudence" of the European Committee of Social Rights (hereafter ECSR or Committee) – that the automatic character of the Italian scale does not provide adequate compensation for the damage suffered by the employee unjustly dismissed, nor does it deter the employer from proceeding with a dismissal.[12]

In a similar fashion to the Italian reforms, in 2017 the French government introduced a mandatory reference system of compensation for dismissals without real and serious cause (*cause réelle et sérieuse*),[13] amending art. L. 1235-3 of the French Labour Code.[14] This scale – known as *barème Macron* – sets a floor (*plancher*) and a ceiling (*plafond*) for the compensation of damage (in months of gross salary) that the judge may grant to an employee dismissed

[8] Law n. 604 of 15 July 1966 (Italian Official Gazette n. 195, 6 August 1966) subjects the validity of dismissal to a just cause, as well as to a justified objective or subjective reason.

[9] E Ales and MC Degoli, 'Le licenciement et la réforme du droit italien' (2015) Revue de droit du travail 771; P Ichino and F Martelloni, 'Le *Jobs Act* italien: quelles inspirations?' (2015) Revue de droit du travail 299.

[10] T Boccon-Gibod, 'La "barémisation" comme technique de gouvernement' (2019) Droit social 285.

[11] European Social Charter (Revised) [1996].

[12] See *e.g.* S Giubboni, 'Il contratto di lavoro "a tutele crescenti" (parzialmente) conformato a Costituzione' (2019) LavoroDirittiEuropa 1.

[13] See French Labour Code – *Code du Travail* art. L. 1232-1, as modified by Law n. 2008-596 of 25 June 2008.

[14] Through Ordinance n. 2017-1387 of 22 September 2017 art. 2. See J Mouly, 'Le plafonnement des indemnités de licenciement injustifié devant le Comité européen des droits sociaux' (2017) Droit social 745.

without real and serious cause, according to the sole legal criterion of the employee's seniority in the company – in companies employing more than eleven employees.

As a result, the employee is no longer guaranteed "full compensation" for the damage suffered. One of the cardinal principles of the law of civil liability under French law is therefore set aside in the field of dismissals without real and serious cause.[15] The objective of this reform is the same as that of the Italian reform: a reduction of uncertainty for employers, predictability (particularly for small and medium-sized enterprises), and the circumscription of the judges' discretionary power in that respect. Evidently, the Jobs Act and the *barème Macron* have brought the Italian and French dismissal mechanisms closer together, although differences remain.[16]

Notwithstanding, despite the fierce criticism that the *barème Macron* provoked – and in contrast to the relevant judgment of the ItCC – the French Council of State (*Conseil d'État*),[17] having the competence to conduct a treaty-based review of legislation (*contrôle de conventionnalité*), found no contradiction with art. 24 RevESC and art. 10 of International Labour Organization (ILO) Convention n. 158.[18] A few months later, the French Constitutional Council (*Conseil constitutionnel*), which only carries out a constitutional review of legislation, found no contradiction with the Constitution and validated the scale.[19] However, the French Constitutional Council does not carry out a treaty-based review of legislation, while both the Council of State and the Constitutional Council confined themselves to a mere superficial scrutiny of the provisions in dispute. These facts have sparked a huge debate in the French legal doctrine and the judicial practice of labour courts (*conseils de prud'hommes*) *vis-à-vis* the compatibility of the new dismissal provisions with the RevESC and ILO Convention n. 158.

Against this background, this *Article* analyses the perspective of the European Social Charter (hereafter: Charter) on the right to protection in cases of unfair (unjustified) dismissals, as part of the wider European and international socio-economic rights protection framework. Thereafter, the *Article* undertakes a comparative exploration of the impact of the (Revised) Charter on Italian and French courts' reasoning in relevant cases of unfair dismissals under the newly adopted compensation regimes. Following that, the analysis turns to Greece, a country that has recently forcefully witnessed the impact of the Charter's perspective on the right to protection in cases of unfair dismissals, despite traditionally having a structurally different dismissal regime. It concludes by synthesising the findings and

[15] J Mouly, 'La barémisation des indemnités prud'homales: un premier pas vers l'inconventionnalité?' (2019) Droit social 122.

[16] Before the introduction of the lump-summing mechanisms, the Italian and French systems were different in that the former favoured the reinstatement of the employee unjustly dismissed, which had a reparative and dissuasive function. The latter, on the other hand, favoured the full compensation of the employee's loss, having a reparative and dissuasive character that was accomplished through the existence of compensation floors in certain circumstances. See C Alessi and T Sachs, 'La fin annoncée du plafonnement de l'indemnisation du licenciement injustifié: l'Italie montre-t-elle la voie?' (2018) Revue de droit du travail 802.

[17] French Council of State (summary proceedings) decision of 7 December 2017 n. 415243.

[18] International Labour Organization of 1982 C158 – Termination of Employment Convention www.ilo.org.

[19] French Constitutional Council decision of 21 March 2018 2018-761 DC.

discussing the Charter's renewed potential to advance economic and social rights, especially the right to protection in cases of termination of employment, across domestic jurisdictions in Europe.

II. The Charter's perspective on the right to protection in cases of termination of employment

II.1. The scope and significance of art. 24 RevESC

Envisaged as a bulwark against employers' arbitrary dismissal decisions, art. 24 RevESC enshrines the right of all workers, who have signed an employment contract,[20] to protection in cases of termination of employment. According to para. 84 of the Explanatory Report to the RevESC, art. 24 sets out in particular two general principles: *i)* the right of workers not to be dismissed, on the initiative of the employer,[21] unless there are valid reasons[22] "connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service",[23] and *ii)* the right to the remedy of "adequate compensation or other appropriate relief" in cases of unfair dismissal,[24] as well as a right to appeal to an impartial body in such cases.[25]

It should be noted that art. 24 RevESC is one of the new provisions inserted in the revised Charter, which had not been included in the original Charter[26] or the 1988 Protocol.[27] A similar provision – albeit very broadly formulated[28] – can also be found in art. 30 of the EU Charter of Fundamental Rights (EUCFR),[29] which, according to the Explanation

[20] The Appendix to the RevESC regarding art. 24 lists "exhaustively" (Conclusions n. 2012/def/IRL/24/EN of the European Committee of Social Rights of 7 December 2012 on Ireland) three categories of employed persons that a state may exclude from some or all of its protection.

[21] See Explanatory Report to the European Social Charter (Revised) [1996] para. 87; Appendix to the European Social Charter (Revised) [1996].

[22] The notion of "valid reasons" is to be considered an autonomous legal notion, authentically interpreted as such by the ECSR. See D Vassiliou, 'Limitations on the Abusive Termination of the Employment Contract on the Employer's Initiative and Protection Against Abusive Dismissals' (2017) Epitheoresis Ergatikou Dikeou 535 (translated from Greek).

[23] Para. 3 of the Appendix to the RevESC concerning art. 24 lays down a non-exhaustive – according to para. 89 of the Explanatory Report to the RevESC – list of non-valid grounds for termination of employment.

[24] The remedies "adequate compensation or other appropriate relief", shall, according to the Appendix to the RevESC, "be determined by national laws or regulations, collective agreements or other means appropriate to national conditions".

[25] The right to appeal to an impartial body is verbatim reproduced in the RevESC as enshrined in art. 8(1) of ILO Convention n. 158.

[26] European Social Charter [1961].

[27] Additional Protocol to the European Social Charter [1988].

[28] M Schmitt, 'Article 30: Protection in the Event of Unjustified Dismissal' in M Schmitt and others (eds), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart Publishing 2019) 506.

[29] Charter of Fundamental Rights of the European Union [2012].

on the latter, draws inspiration from art. 24 RevESC. This means in substance that art. 30 EUCFR is also to be interpreted in light of the "jurisprudence" of the ECSR.[30] Notwithstanding, as is clear, under art. 51(1) EUCFR, the EU Charter is addressed to the Member States only when they are implementing Union law. Furthermore, the EU, in practice, has not exercised the competence conferred on it by art. 153(2)(d) of the TFEU in the area of "protection of workers in the event of termination of their employment contract" by adopting a specialised Directive on the consequences of unjustified dismissals.[31] As a result, the scope of protection of art. 30 EUCFR is restricted. In addition to that, the Court of Justice of the EU (CJEU) maintains a rather irreconcilable position, by denying the applicability of art. 30 EUCFR – at the admissibility stage – in cases where litigants challenge national austerity measures on dismissals.[32]

On the other hand, another similar provision to art. 24 RevESC is enshrined in art. 10 of ILO Convention n. 158, which has in fact been the source of inspiration for the former.[33] Remarkably, most of the provisions of art. 24 (and its Appendix) have been either taken *verbatim* from provisions of ILO Convention n. 158 or are consistent with the latter.[34] Consequently, it could be argued that art. 24 must be interpreted in accordance with ILO Convention n. 158,[35] even if a contracting party to the RevESC has not ratified the ILO Convention (see *e.g.* Italy or Greece). This is particularly important, since only 36 countries around the globe have ratified this ILO Convention, of which only 10 are EU Member States (including France), whereas art. 24 RevESC is binding on 31 European countries, of which 17 are EU Member States.[36] Furthermore, the International Covenant

[30] See G Heerma van Voss and B ter Haar, 'Common Ground in European Dismissal Law' (2012) European Labour Law Journal 215, 221; N Bruun, 'Protection Against Unjustified Dismissal (Article 30)' in B Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights* (Nomos Verlag 2006) 337. For the potential obstacles and shortcomings in that respect see G Orlandini, 'L'art. 24 della Carta sociale europea e i possibili effetti della decisione del Comitato europeo dei diritti sociali "Cgil v. Italy" sulla disciplina del licenziamento' (2021) Diritti Lavori Mercati 83.

[31] On the reasons for the EU's omission in that regard see J Kenner, 'Article 30: Protection in the Event of Unjustified Dismissal' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 146. The Union has legislated only partially on dismissals. Directives cover the procedure in collective redundancies, discriminatory dismissals, and dismissals in specific situations concerning, *e.g.* transfer of undertakings or maternity. Consequently, it is mainly national rules that apply – with considerable variations – in respect of the consequences of unfair dismissals.

[32] See case C-361/07 *Polier* ECLI:EU:C:2008:16; case C-117/14 *Nisttahuz Poclava* ECLI:EU:C:2015:60; joined cases C-488/12, C-491/12 and C-526/12 *Nagy and others* ECLI:EU:C:2013:703; case C-323/08 *Rodríguez Mayor and others* ECLI:EU:C:2009:770.

[33] See para. 86 of the Explanatory Report to the RevESC.

[34] See *e.g.* arts 2, 3, 4, 5, 6, 8, 9, and 10 of ILO Convention n. 158.

[35] M Schmitt, 'Article 24: The Right to Protection in Cases of Termination of Employment' in N Bruun and others (eds), *The European Social Charter and the Employment Relation* (Hart Publishing 2017) 416.

[36] 35 Council of Europe Member States have ratified the RevESC, including 22 EU Member States. However, Austria, Belgium, Hungary, Germany, and Sweden have opted not to be bound by art. 24 RevESC, in

on Economic, Social and Cultural Rights (ICESCR)[37] does not enshrine the right to protection in cases of termination of employment, albeit the UN Committee on Economic, Social and Cultural Rights (CESCR) has considered that such protection could be derived from the right to work, as enshrined in art. 6 of the Covenant.[38] Finally, it should be noted that many constitutions of European states do not explicitly recognise the right to protection in cases of termination of employment.

Since the objective of art. 24 is to preserve the stability and security of employment relations,[39] its importance for the protection of employees becomes even more manifest in the context of an economic crisis and the measures implemented therein. Furthermore, it is worth noting that art. 24 RevESC resembles more the structure of a classic civil right such as those enshrined in the European Convention on Human Rights (ECHR)[40], rather than that of a social (welfare) right dependent on state intervention. In addition, it is a clear-cut case of a set of clear and precise provisions, containing both substantive and procedural obligations (including the right to a judge), which have been even further interpretively substantiated by the Charter's monitoring body.

These assertions have been confirmed on many recent occasions by domestic courts, which have been increasingly granting direct effect to the provisions of art. 24, while at the same time giving significant weight to their interpretation by the ECSR, as delineated below. As a result, in light of the above considerations, it can be concluded that art. 24 RevESC is *prima facie* the most reliable treaty provision that could provide a solid standpoint of a justiciable and effective socio-economic right at the domestic level, protecting employees against certain types of dismissal in Europe, especially in times of crisis.

II.2. The interpretive approach of the European Committee of Social Rights

The ECSR has had the opportunity to provide a rich interpretation of art. 24 RevESC in its "conclusions" under the reporting procedure.[41] Concerning the rather vague principle of

accordance with Part III, art. A of the RevESC establishing an *à la carte* system of acceptance of Charter provisions. Seven Member States to the Council of Europe have so far only ratified the 1961 Charter.

[37] International Covenant on Economic, Social and Cultural Rights [1966].

[38] CESCR General Comment n. 18 of 24 November 2005 (The Right to Work), paras 11 and 35 cited in M Schmitt, 'Article 30' cit. 517.

[39] M Schmitt, 'Article 24' cit. 413.

[40] European Convention for the Protection of Human Rights and Fundamental Freedoms [1950]. Several ECHR provisions, as interpreted by the European Court of Human Rights ("ECtHR"), have been deemed as applicable by the latter in cases of termination of employment, namely, arts 6(1), 8(1), 9, 10, and 11. Remarkably, in ECtHR *KMC v Hungary* App n. 19554/11 [10 July 2012], the Strasbourg Court made explicit reference to art. 24 RevESC. See, generally, H Collins, 'An Emerging Human Right to Protection against Unjustified Dismissal' (2021) Industrial Law Journal 36.

[41] For a detailed analysis see Council of Europe, 'Digest of the case law of the European Committee of Social Rights' (2022) 182 ff. See generally on the ECSR, O de Schutter and M Sant'Ana, 'The European Committee of Social Rights (the ECSR)' in G de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of*

"adequate compensation or other appropriate relief", the Committee has stressed that: "compensation systems are considered appropriate if they include: a) reimbursement of financial losses incurred between the date of dismissal and the decision of the appeal body ruling on the lawfulness of the dismissal,[42] b) the possibility of reinstatement [which the ECSR has deemed a form of *other appropriate relief*],[43] and/or c) compensation of a high enough level to dissuade the employer and make good the damage suffered by the employee".[44]

With respect in particular to "ceilings" (*i.e*. upper limits) on compensation, the Committee asserted that:

> "any such ceiling on compensation that may preclude damages from being commensurate with the loss suffered and sufficiently dissuasive, is proscribed. If there is such a ceiling on compensation for pecuniary damage, the victim must be able to seek compensation for non-pecuniary damage through other legal avenues (*e.g*. anti-discrimination legislation). In that context, the courts competent for awarding compensation for pecuniary and non-pecuniary damage must decide within a reasonable time".[45]

Despite its analytical interpretive work on art. 24 through the reporting procedure, the ECSR was given the opportunity to enrich its content and further substantiate the "adequate compensation or other appropriate relief" notion in a series of collective

Europe (Routledge 2012) 71; J-F Akandji-Kombé, 'The Material Impact of the Jurisprudence of the European Committee of Social Rights' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 89.

[42] Conclusions n. 2012/def/SVK/24/EN of the European Committee of Social Rights of 7 December 2012 on Slovak Republic; Conclusions n. 2003/def/BGR/24//EN of the European Committee of Social Rights of 30 June 2003 on Bulgaria.

[43] Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights of 7 December 2012 on Finland. Reinstatement is not mentioned in art. 24 RevESC (in contrast to art. 10 of ILO Convention n. 158). However, the ECSR regards reinstatement a primary sanction in case a worker is dismissed without valid reason, and considers that it should be provided for by national law or practice (Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights of 7 December 2012 on Finland; Conclusions n. 2012/def/ALB/24/EN of the European Committee of Social Rights of 7 December 2012 on Albania), but on condition that the employee wishes to be reinstated (Cf. Conclusions n. XIII-5_Ob_-1/Ob/EN of the European Committee of Social Rights – Statement of interpretation – arts 1-2, 4-3, 1 Additional Protocol of 1997) or that reinstatement is objectively impossible.

[44] Conclusions n. 2012/def/TUR/24/EN of the European Committee of Social Rights of 7 December 2012 on Turkey. According to the ECSR, the amount of compensation is always determined individually, based on consideration of all the circumstances pertaining to the case.

[45] Conclusions n. 2012/def/SVN/24/EN of the European Committee of Social Rights of 7 December 2012 on Slovenia; Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights on Finland; Conclusions n. 2012_163_10/Ob/EN of the European Committee of Social Rights – Statement of interpretation – art. 24 of 2012; Conclusions n. 2012/def/NLD/24/EN of the European Committee of Social Rights of 7 December 2012 on the Netherlands.

complaints decisions analysed below. This "quasi-case law"[46] raises important novel questions, which are directly linked to and of great significance for the Italian and French dismissal reforms discussed above, while reflecting a settled position on the interpretation of art. 24 RevESC.

a) Finnish Society of Social Rights v Finland (complaint n. 106/2014).
In its decision on the merits delivered on 8 September 2016, the Committee repeated its adherence to the "principle of full and dissuasive compensation", subject to alternative legal remedies, when there is a ceiling on dismissal compensation. It did so to reprimand Finland for having a compensation mechanism in force similar to those mechanisms introduced by Italy and France respectively in 2015 and 2017. In particular, although Finnish law does not introduce a scale based on the employee's seniority (as Italian and French law do), it does establish a floor of three months' salary and a ceiling of 24 months' salary to the compensation owed due to unfair dismissal. Furthermore, the law only gives parameters that the judge must take into account when setting the compensation between the two legal limits, considering the particular situation of each employee.

The Committee considered that "in some cases of unfair dismissal, an award of compensation of 24 months as provided for under the Finnish Employment Contracts Act may not be sufficient to make good the loss and damage suffered".[47] It then noted that employees, who have been unfairly dismissed, may also seek compensation under the Finnish Tort Liability Act, but only in restricted situations. Consequently, the Committee found a violation of art. 24 RevESC, since the upper limit to compensation provided for by the Employment Contracts Act may result in situations where the compensation awarded is not commensurate with the loss suffered. In addition, adequate alternatives or other legal avenues could not be regarded as available to provide a remedy in such cases.

Having delineated the ECSR's stance on the existence of ceilings on compensation due to unfair dismissal, an attempt to apply it analogically *mutatis mutandis* to the Italian and French situations could hardly lead to a different conclusion than that reached with respect to Finnish law. Italy and France are among the 14 (out of the 16 in total) states that have ratified the (optional) Collective Complaints Protocol[48] and are bound by the RevESC. In addition, an important feature of this Protocol is that it does not require the complainant organisations to have exhausted domestic remedies before lodging a collective complaint with the ECSR. These facts most probably prompted the Italian General Confederation of

[46] On the quasi-judicial character of the Collective Complaints Procedure see *e.g.* H Cullen, 'The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights' (2009) HRLRev 61; P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G de Búrca and B de Witte (eds), *Social Rights in Europe* cit. 45-67.

[47] See Complaint n. 106/2014 of the European Committee of Social Rights decision on admissibility and the merits of 8 September 2016 *Finnish Society of Social Rights v Finland* para. 49.

[48] Additional Protocol to the European Social Charter Providing for a System of Collective Complaints [1995]. 16 states in total have ratified the Collective Complaints Protocol as of November 2022; however, Croatia and Czech Republic have ratified only the original Charter.

Labour (*CGIL*), as well as three major French trade union organisations (*CGT-FO*, *CGT*, and *Syndicat CFDT de la métallurgie de la Meuse*) to submit collective complaints (n. 158/2018, 160/2018, 171/2018, and 175/2019, respectively) to the ECSR for decisions on the (non)conformity of the compensation ceilings of their own dismissal systems with art. 24 RevESC. Remarkably, the government of France intervened in the proceedings of the complaint lodged by the Italian confederation, taking advantage of the adversarial character of the Collective Complaints Procedure to pre-empt a condemnation of the French compensation ceiling, after having pointed out its similarity to the Italian one.

b) Confederazione Generale Italiana del Lavoro (CGIL) v Italy (complaint n. 158/2017)

In its decision on the merits of 11 September 2019, the Committee straightforwardly repeated its settled adherence to the "principle of full and dissuasive compensation". Nevertheless, the Committee seems to have reinforced its requirements by being even more demanding on the adequacy of the dismissal compensation owed.[49] In this case, it found that "not only do the contested measures not allow for reinstatement, but they also provide for a compensation which does not cover the reimbursement of financial losses actually incurred".[50] This is because the amount of compensation "is subject to an upper limit of 6, 12, 24 or 36 times the reference monthly remuneration, as the case may be".[51] Notably, the Committee seems to have implied the incompatibility of the Italian system with art. 24 RevESC from the mere existence of compensation ceilings, without any real consideration of the level of compensation provided for by them, as it did in the Finnish case, and although the Italian maximum ceiling is even higher than the Finnish one condemned in 2017. Notwithstanding, the Committee did not include this parameter in its reasoning.

Subsequently, the Committee considered that the alternative legal remedies offer victims of dismissal the possibility of compensation exceeding the upper limit set by the law in force. However, such remedies do not make it possible in all cases of dismissal without a valid reason to obtain appropriate redress proportionate to the damage suffered or to discourage employers from resorting to dismissal. Consequently, the Committee held that there is a violation of art. 24 RevESC.

It is pertinent to point out that, although the Committee largely followed its approach as delineated in the Finnish case, it did not shy away from making a few clarifications that further strengthen its mistrust of systems that set floors and ceilings of compensation owed to unfairly dismissed workers. In particular, it was not enough for the Committee

[49] See J Mouly, 'Une nouvelle condamnation du plafonnement des indemnités prud'homales par le CEDS' (2020) Droit social 533; F Perrone, 'La forza vincolante delle decisioni del Comitato Europeo dei Diritti Sociali: riflessioni critiche alla luce della decisione CGIL v. Italia dell'11 febbraio 2020 sul Jobs Act sulle tutela crescenti' (2020) LavoroDirittiEuropa 1; G Orlandini, 'L'art. 24 della Carta sociale europea e i possibili effetti della decisione del Comitato europeo dei diritti sociali "Cgil v. Italy" sulla disciplina del licenziamento' cit.

[50] See Complaint n. 158/2017 of the European Committee of Social Rights decision on the merits of 11 September 2019 *Confederazione Generale Italiana del Lavoro (CGIL) v Italy* para. 92.

[51] *Ibid*. para. 92.

that, overall, such a compensation system provides "adequate" compensation for the damage. It should rather guarantee such compensation in all possible cases,[52] whereas in the Finnish case, the Committee considered that the granting of compensation up to the ceiling might not be sufficient "in certain cases".

c) CGT-FO v France and CGT v France (complaints n. 160/2018 and 171/2018).

In its decision on the merits of 23 March 2022,[53] the ECSR focused on ascertaining whether the reformed art. L. 1235-3 of the French Labour Code (introducing the *barème Macron*)[54] satisfies the requirement of adequate compensation, under art. 24(b) RevESC, by providing for the compensation of a high enough level to dissuade the employer and make good the damage suffered by the victim. The ECSR explicitly referred to and built on the established interpretation of this requirement, as elaborated in the Finnish and Italian cases discussed above, while also taking note of ItCC judgment n. 194/2018 and several dismissal decisions of French courts, analysed in the next section.

The Committee noted, in particular, that in French legislation the maximum ceiling of compensation for unjustified dismissal does not exceed 20 months and only applies for 29 years of seniority. The scale is lower for workers with low seniority and working for companies with fewer than 11 workers. As a result, the Committee asserted that, for these workers, both minimum and maximum amounts of compensation that they can receive are low and sometimes close together, which makes the compensation range not wide enough.[55] Therefore, the ceilings set by the *barème Macron* are not sufficiently high to make good the damage suffered by the victim and be dissuasive for the employer. Furthermore, according to the Committee, the fact that the established compensation ceiling aims at providing greater predictability of the costs of the legal proceedings might rather serve as an incentive for the employer to unlawfully dismiss workers in some situations, following a pragmatic estimation of the financial burden of an unjustified dismissal on the basis of cost-benefit analysis.

Additionally, the ceiling of the French compensation scale does not allow, in the view of the Committee, the award of higher compensation on the basis of the personal and individual situation of the worker, thus leaving courts with only a narrow margin of manoeuvre. Besides, there is no possibility to seek compensation for non-pecuniary damages through the general law of civil liability or other avenues in all cases of unjustified dismissals. In light of the above, the ECSR concluded unanimously that the right to

[52] See J Mouly, 'Une nouvelle condamnation du plafonnement des indemnités prud'homales par le CEDS' cit.

[53] See also, for a comment, K Chatzilaou and C Nivard, 'Controverse: la condamnation de la France par le Comité européen des droits sociaux: un coup d'épée dans l'eau?' (2022) Revue de droit du travail 483.

[54] French Labour Code art. L. 1235-3, as modified by Law n. 2018-217 of 29 March 2018 art. 11.

[55] See Complaints n. 160/2018 and 171/2018 of the European Committee of Social Rights decision on the merits of 23 March 2022 *Confédération Générale du Travail Force Ouvrière (CGT-FO) v France and Confédération générale du travail (CGT) v France* paras 159 ff.

adequate compensation or other appropriate relief, within the meaning of art. 24(b) RevESC, is not guaranteed by the contested provisions, and therefore France violates art. 24(b).

d) Syndicat CFDT de la métallurgie de la Meuse v France (complaint n. 175/2019).
Finally, in its latest decision (on the merits of 5 July 2022) against France, the ECSR followed its reasoning in *CGT-FO v France and CGT v France* with respect to the requirement of adequate compensation. However, unlike its prior decision, the Committee focused first on ascertaining whether the French compensation system satisfies the requirement of reinstatement. In that respect, the ECSR found that the situation is compatible with art. 24(b) RevESC, given that, according to the Committee, reinstatement of a worker (in the same or a similar post) is one of the possible remedies provided for in French law in case of a dismissal without real and serious cause.[56]

Returning to the requirement of adequate compensation, it is remarkable that the ECSR provided an unprecedented line of argumentation concerning the right to adequate compensation under art. 24(b) RevESC, but also, more generally, concerning the judicial enforcement of the Charter, as interpreted by the Committee. It should be recalled that the ECSR had not thus far explicitly required national courts to recognise the direct effect of the Charter. It had, however, considered that such recognition is necessary to ensure that the rights enshrined therein are effectively protected,[57] especially where legislation is not effectively applied and rigorously supervised.[58]

In particular, in this case, the Committee noted the approach taken by the French Court of Cassation (*Cour de Cassation*) in two recent decisions relating to the French compensation ceilings, which were published in May 2022 (discussed in detail in the next section).[59] According to the French Court of Cassation: *i)* the Charter is based on a "programmatic logic", *ii)* art. 24 RevESC has no direct effect in French law, and *iii)* the decisions of the ECSR are not of a judicial nature and thus not binding on the States Parties. Consequently, art. 24 RevESC cannot be relied upon by workers or employers in disputes before the court. Against this background, the Committee provided a forceful response to the restrictive approach of the French Court of Cassation *vis-à-vis* the enforceability of the Charter and the legal value of the ECSR's decisions, while breaking new ground in emphasising – in a rather straightforward manner – that:

[56] See Complaint n. 175/2019 of the European Committee of Social Rights decision on the merits of 5 July 2022 *Syndicat CFDT de la Métallurgie de la Meuse v France* paras 85-87.

[57] See Complaint n. 12/2002 of the European Committee of Social Rights decision on the merits of 22 May 2003 *Confederation of Swedish Enterprise v Sweden* paras 28 and 43.

[58] See Complaint n. 119/2015 of the European Committee of Social Rights decision on the merits of 5 December 2017 *European Roma and Travellers Forum (ERTF) v France* para. 66.

[59] See section III.2.

> "the Charter sets out international law obligations which are legally binding on the States Parties and that the Committee as a treaty body is vested with the responsibility of making legal assessments of whether the Charter's provisions have been satisfactorily applied. The Committee considers that it is for the national jurisdictions to rule on the issue at stake (*in casu*, adequate compensation) in the light of the principles it has laid down in this regard or, as the case may be, it is for the French legislator to provide the national jurisdictions with the means to draw the appropriate consequences as regards the conformity with the Charter of the domestic provisions in question".[60]

In light of the above, the ECSR unanimously concluded that the right to adequate compensation within the meaning of art. 24(b) RevESC is not guaranteed in France, given the compensation ceilings set by art. L.1235-3 of the French Labour Code.[61] This is in particular due to the fact that – considering the approach of the French Court of Cassation – in the French domestic legal order, art. 24 RevESC cannot be directly applied by national courts to guarantee adequate compensation to workers dismissed without valid reasons. The Committee here seems to be confirming that the right to protection in cases of termination of employment under art. 24 RevESC is an individual right, which includes the right to a judge, and which should be recognised as invocable by workers or employers in disputes before the court and as directly applicable by domestic courts.

III. The impact of the Charter on Italian and French courts' dismissal decisions

III.1. The stance of the Italian Constitutional Court: Judgment n. 194/2018 in perspective

Responding to a referral order by the Court of Rome,[62] in judgment n. 194/2018 – delivered one year before the ECSR's decision on the merits of complaint n. 158/2017 (*CGIL v Italy*) – the ItCC quickly dismissed the applicability of art. 10 of ILO Convention n. 158, as well as art. 30 EUCFR in this case. This is because, on the one hand, the ILO Convention has not been ratified by Italy and, on the other hand, because the EU has not, as discussed, exercised the competence conferred on it by art. 153(2)(d) TFEU with respect to unjustified dismissals.

Therefore, the ItCC, which focused solely on art. 3(1) of the Jobs Act,[63] considered that the latter provision, insofar as "it fixes compensation in an amount equal to two times

[60] See Complaint n. 175/2019 cit. para. 91.

[61] French Labour Code art. L. 1235-3, as modified by Law n. 2018-217 of 29 March 2018 art. 11.

[62] Court of Rome decision of 26 July 2017 n. 195.

[63] Legislative Decree n. 23 of 4 March 2015 art. 3(1): "Without prejudice to the provisions of para. 2, where it is established that there is no justification for dismissal on the grounds of objective or subjective justification or just cause, the judge shall declare the employment relationship terminated at the date of dismissal and order the employer to pay compensation not subject to social security contributions amounting to two

the last qualifying monthly salary for the purposes of calculating the end-of-service allowance for each year of service", violates arts 76 and 117(1) of the Constitution[64] in relation to art. 24 RevESC that Italy has ratified.[65] In fact, in annulling this passage and with due regard for the minimum and maximum compensation to be paid to employees in cases of unfair dismissal, the ItCC stated that the courts must take into account the length of service in addition to other factors (*e.g*. number of employees or circumstances of the parties). As a result, the amount of the compensation due on the basis of seniority for unfair dismissal – after the ItCC's judgment – is no longer automatically pre-determined nor can it now be considered a "scale" *per se*.

In support of this conclusion, the ItCC paid significant attention to the ECSR's decision in the Finnish case. It, therefore, recognised that "[t]he line of argumentation followed by the Committee involves an assessment of the system of compensation in terms of its dissuasive effect and of its giving due consideration to the loss suffered".[66] The ItCC then confirmed – as held for the first time in a previous ground-breaking judgment[67] – that the Charter is an "intermediate standard of review" (*parametro interposto*) of the constitutionality of ordinary legislation, thus being "capable of supplementing art. 117(1) of the Constitution". Furthermore, according to the ItCC, "the decisions of the Committee have authoritative status, although they are not binding on national courts".[68]

As a result, by "constitutionalising" the Charter and assigning great weight to the basic lines of the Committee's interpretation in its collective complaints decision against Finland (complaint n. 106/2014), the ItCC has enhanced the Committee's authoritativeness and the value of its collective complaints decisions. The judgment may, therefore, also be considered an important step towards the direction of enhancing the relevance of the Charter system for Italian law, thus strengthening the multi-level protection of socio-economic rights within that jurisdiction.[69]

months' salary of the last salary used as a reference for calculating the severance pay for each year of service, but in any event not less than 6 and not more than 36 months' salary" (unofficial translation).

[64] Art. 117(1) of the Italian Constitution: "Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the [European] community's legal order and international obligations".

[65] See Italian Constitutional Court judgment of 26 September 2018 n. 194/2018 para. 14.

[66] *Ibid*. para. 14.

[67] Italian Constitutional Court judgment of 11 April 2018 n. 120/2018. See on this, among many, C Panzera, 'La libertà sindacale dei militari in un'atipica sentenza sostitutiva della Corte costituzionale' (2019) federalismi.it 1, 15.

[68] Italian Constitutional Court judgment n. 194/2018 cit. para. 14.

[69] See also the subsequent case law of the ItCC on the compatibility of the "Jobs Act" with the Italian Constitution in light of art. 24 RevESC: Italian Constitutional Court judgment of 4 November 2020 n. 254/2020; Italian Constitutional Court judgment of 27 February 2021 n. 59/2021; Italian Constitutional Court judgment of 7 April 2022 n. 125/2022, and Italian Constitutional Court judgment of 23 June 2022 n. 183/2022.

III.2. The assertive stance of French labour courts

Although the relevant decisions of the French Council of State and the Constitutional Council, but also a (non-binding) "Opinion" of the Court of Cassation,[70] pointed towards the opposite conclusion, the majority[71] of the French labour courts have been considering – since December 2018[72] – the French scale as incompatible with the RevESC and ILO Convention n. 158 (either jointly[73] or separately[74]). A major driving force behind this significant development has undoubtedly been the constructive criticism of the French legal doctrine,[75] as well as strategic litigation by labour lawyers.[76] Following the coming into force of the *barème Macron* provisions, an internal working group within the French Lawyers' Trade Union (*SAF*), in collaboration with university professors, developed a very well-articulated "argument" against the upper limits of compensation for dismissal without real and serious cause, based on the RevESC and ILO Convention n. 158.[77] They thus openly invited anyone interested to "draw inspiration from this argument, or even to reproduce it in their writings in order to continue the judicial fight against this iniquitous provision".[78] As many more labour courts were handing down decisions on the subject at the time, the argument was modified several times to take them into account.

Remarkably, several labour courts were receptive to the "argument" and set aside the relevant Labour Code provisions on many occasions, by assigning unprecedented importance to the Charter. According to the reasoning of the labour courts, while the Constitutional Council is competent to control the conformity of laws with the French Constitution, the (diffused) control of the conformity of laws in relation to international treaties belongs to ordinary courts. In addition, in view of art. 55 of the French Constitution, treaties duly ratified or approved have an authority superior to that of ordinary legislation as soon as they are published.

[70] French Court of Cassation joined opinions of 17 July 2019 n. 15012 and 15013. For a critique, see, as indicative, T Sachs, 'La conventionnalité du plafonnement des indemnités de licenciement injustifié: des avis peu convaincants' (2019) Recueil Dalloz 1916; C Nivard, 'L'obscure clarté du rejet de l'effet direct de l'article 24 de la Charte sociale européenne révisée' (2019) Droit social 792.

[71] See T Coustet, 'Barème Macron: environ 38% des décisions de première instance ont validé le plafonnement' (2020) Dalloz Actualité.

[72] Troyes Labour Court decision of 13 December 2018 n. 18/00036.

[73] See *e.g.* Grenoble Labour Court decision of 18 January 2019 n. 18/00989.

[74] See *e.g.* Angers Labour Court decision of 17 January 2019 n. 18/00046; Amiens Labour Court decision of 19 December 2018 n. 18/00040.

[75] See also J Icard, 'Avis relatifs au barème Macron: la stratégie du flou' (2019) Semaine Sociale Lamy 1871.

[76] See N Moizard, 'La Charte sociale valorisée par les juges nationaux: le rôle perturbateur des syndicats' (2020) Europe des Droits & Libertés 79.

[77] The different versions of this argument have been put online on the SAF, *Le Syndicat des avocats de France* lesaf.org, and published in the journal "*Droit Ouvrier*", the legal journal of CGT.

[78] SAF, 'Argumentaire du SAF contre le plafonnement des indemnités de licenciement sans cause réelle et sérieuse: 4e version mise à jour – 15 novembre 2019' (2020) Le Droit Ouvrier 22.

Following these preliminary observations, the receptive labour courts noted that the Court of Cassation has established that arts 5 (right to organise) and 6 (right to bargain collectively) RevESC as well as the provisions of ILO Convention n. 158 are directly applicable[79] and that the Council of State has explicitly granted direct effect to art. 24 RevESC.[80] Consequently, they recognised that art. 24 RevESC is similar in wording to the provisions of ILO Convention n. 158; it confers subjective rights on individuals and, therefore, produces direct horizontal effect.[81]

Concerning the ECSR's interpretation of the notion "adequate compensation or other appropriate relief", French labour courts paid great attention to the Committee's reasoning in the Finnish case to argue, in that light, that the losses of the plaintiff worker must be *fully compensated*. Remarkably, a number of labour courts recognised that the ECSR is not a judicial body and that its decisions are not directly enforceable in the domestic legal order. However, they asserted that: "since the ECSR is a body interpreting an international treaty, and since the Council of Europe has indicated that the Committee's decisions and conclusions must be respected by the states concerned, its interpretation should be taken into account as a guide in determining the conformity of legislation with the Charter".[82]

Against that background, the conclusion to the majority of the cases was rather straightforward. The scale laid down in art. L. 1235-3 of the Labour Code[83] does not allow judges to assess the individual situations of employees unfairly dismissed as a whole and to give fair compensation for the damage they have suffered. Moreover, the compensation rates are not dissuasive for employers who wish to dismiss an employee without real and serious cause; they provide more security to the employers than to the workers and are therefore unfair. Additionally, under French law, there is no alternative legal remedy for the employee to obtain additional compensation in the event of unfair dismissal. As a result, since the dismissal ceiling does not commensurate the damage suffered and is not sufficiently dissuasive – an objective emphasised by the ECSR – the scale does not comply with art. 24 RevESC and ILO Convention n. 158.

Nevertheless, in contrast to most of the labour courts, the great majority of the French courts of appeal (*cours d'appel*) denied – rather inexplicably – the direct effect of art. 24 RevESC and the applicability of the ECSR's "jurisprudence", showing their adherence to the strong political message delivered by the plenum of the French Court of Cassation in its above-mentioned "Opinion". At the same time, it is rather peculiar that the appellate courts accepted the direct effect of art. 10 of ILO Convention n. 158 but,

[79] French Court of Cassation (social chamber) decision of 1 July 2008 n. 07-44124.
[80] French Council of State decision of 10 February 2014 n. 359892.
[81] See *e.g.* Longjumeau Labour Court decision of 14 June 2019 n. 18/00391.
[82] See *e.g.* Troyes Labour Court decision of 29 July 2019 n. 18/00169.
[83] French Labour Code art. L. 1235-3, as modified by Law n. 2018-217 of 29 March 2018 art. 11.

nonetheless, recognised the conformity of the scale with the latter.[84] They thus validated the application of the scale, without however excluding the possibility of derogating from it "on a case-by-case basis".[85]

As mentioned, in May 2022, the social chamber of the French Court of Cassation delivered two highly anticipated decisions, which were expected to eventually provide a definitive (judicial) solution to this important debate. The social chamber of the Court of Cassation confirmed the position taken by the plenum of the Court in its above-mentioned Opinion;[86] the *barème Macron* is compatible with art. 10 of ILO Convention n. 158, which produces direct effect,[87] whereas art. 24 RevESC (although it contains similar provisions to those of ILO Convention n. 158) does not produce direct effect.[88] However, while the Court of Cassation stressed that there is no possibility – not even on a case-by-case basis – for labour courts to derogate from the application of the scale when the owed compensation is not considered adequate, the matter should be considered far from over.

The French trade union confederations that also lodged the collective complaints on the matter before the ECSR have declared that they will continue to contest the compatibility of the scale with the RevESC and ILO Convention n. 158 before labour courts.[89] Furthermore, French judges of first and second instance are not required to transpose the solutions reached by the Court of Cassation, except in the event of a judgment handed down by the Plenary Assembly on a second appeal. In fact, very recently, in October 2022, a French court of appeal derogated from the application of the scale, in view of the exceptional circumstances of the dispute, by making express reference to the ECSR's decision on the merits of complaints n. 160/2018 and 171/2018.[90] Therefore, the *barème Macron* saga could eventually reach the plenum of the French Court of Cassation for a possibly definitive solution. The findings of the ECSR in its recently published decisions on the merits of the complaints lodged by the French trade unions may also serve as an important tool in the hands of the organisations to litigate or advocate for a change in law and policy through political means.

[84] See, among many, Paris Court of Appeal decision of 18 September 2019 n. 17/06676; Chambéry Court of Appeal decision of 15 September 2020 n. 18/02305.

[85] T Coustet, 'Barème Macron' cit.

[86] For a critique of the (very questionable) reasoning of the French Court of Cassation with respect to the direct effect of the Charter, see C Nivard, 'De l'aube au crépuscule: le rejet de l'effet direct de la Charte sociale européenne par la chambre sociale de la Cour de Cassation' (2022) Revue des droits et libertés fondamentaux 1; J Icard, 'Barème: une fin de saga bâclée' (2022) Semaine Sociale Lamy.

[87] French Court of Cassation (social chamber) decision of 11 May 2022 n. 21-14490.

[88] French Court of Cassation (social chamber) decision of 11 May 2022 n. 21-15247.

[89] CGT, 'Communiqué de Presse. La Cour de cassation au secours du barème Macron' (11 May 2022) La Cgt cgt.fr.

[90] Douai Court of Appeal decision of 21 October 2022 n. 20/01124.

IV. The impact of the Charter's perspective on the Greek law of dismissals

As already discussed, by contrast to Italy, France, and most European countries, Greece never adopted legislation making the validity of a dismissal conditional on the existence of a real and just cause.[91] Therefore, Greek labour law never enshrined provisions protecting employees against the unjustified termination of their open-ended contract on the initiative of the employer.[92] It rather laid down some substantive and procedural formalities upon which the validity of the dismissal is conditioned.

As a result of this structural choice, and as established by the case law of the Supreme Civil and Criminal Court of Greece (*Areios Pagos*) dating from the 1940s, employees could only invoke art. 281 of the Greek Civil Code in court, prohibiting the abusive exercise of rights, to protect themselves against abusive dismissals. When the judge establishes the abusive nature of a dismissal, the worker is granted a reinstatement to his/her job and compensation equal to the wages that were foregone before the reinstatement. However, the evidentiary regime was traditionally less favourable in Greek law, since it was the worker who had to prove the abuse by the employer upon dismissal, while in legal systems that require a just cause for dismissal, it is in principle up to the employer to prove the alleged grounds.[93]

Greece is not a party to ILO Convention n. 158, but it ratified the RevESC, including art. 24 thereof, in 2016. According to a considerable part of Greek labour law theory,[94] this development has had a significant impact on the physiognomy of the Greek law of dismissal. By its introduction in the Greek legal order, the RevESC – being an international treaty duly ratified – prevails over Greek legislation, in view of the supremacy clause of art. 28(1) of the Constitution. In addition, art. 24 RevESC is to be considered self-executing, thus rendering the judicial application of the existing system of dismissals incompatible with the right to protection against dismissal without a valid reason, as enshrined in art. 24 RevESC.

Consequently, the RevESC has been deemed to have had a significant effect in that, by its mere ratification, it has transformed Greek labour law of dismissal into a system of

[91] See D Zerdelis, 'Protection Against Dismissal after Law 4611/2019' (2019) Epitheoresis Ergatikou Dikeou 369 (translated from Greek).

[92] Except with regard to some categories of employees who are in need of enhanced protection, such as female employees during maternity or staff of trade unions.

[93] B Palli, 'La justificación del despido en derecho comparado europeo e internacional' (2019) Revista de la Facultad de Derecho de México 704, 711. In Italy, it is up to the employer to prove the alleged grounds, while in France, the employer shares with the employee the burden of proof.

[94] See, among others, N Gavalas, 'What Changes in Labour Law after the Ratification of the RevESC' (2016) Epitheoresis Ergatikou Dikeou 129 (translated from Greek); D Vassiliou, 'Limitations on the Abusive Termination of the Employment Contract on the Employer's Initiative and Protection Against Abusive Dismissals' cit. 535; C Tsimpoukis, 'Some Brief Notes on Decision Nº 3220/2017 of Piraeus' Single-Member Court of First Instance' (2018) Lex Social: Revista de Derechos Sociales 18.

protection against unjustified dismissals, which resembles, in principle, that of *e.g*. Italy or France. Henceforth, a dismissal on the initiative of the employer is valid only when it is based on a valid reason, within the meaning of art. 24 RevESC. Furthermore, according to the same view, the burden of proof that the dismissal was based on a valid reason is now reversed and is in the hands of the employer.[95]

This position was explicitly followed by a few Greek Single-Member Civil Courts of First Instance[96] starting in 2017.[97] In their decisions, the courts based their reasoning on the RevESC as the main legal basis to reverse the long-established foundational position of Greek case law on this matter. The judges stated emphatically that, following the ratification of the RevESC, the existing system of dismissals is not compatible with the principle of protection against dismissal without a valid reason guaranteed by art. 24 RevESC, which introduces "a self-standing right to protection of employees against dismissal". According to the judges, this derives either directly from art. 24 RevESC, given that it is precise, explicit, and unconditional, or from art. 281 of the Civil Code interpreted in light of art. 24 RevESC.

In addition, the judges also referred to the interpretive work of the ECSR on art. 24, actually describing it as "jurisprudence", while recognising the Committee's interpretive authority, as well as the reversal of the burden of proof. It seems, however, that the reference to the ECSR's interpretation by the Greek judges does not play a crucial role in their reasoning, since the provisions of art. 24 are presented as being clear enough by themselves and capable of introducing the principle of protection against dismissal without a valid reason in the Greek legal order, without the need to turn to the Committee's work to draw such a conclusion.

Nonetheless, it is important to point out that the "precedent" produced in the above-discussed decisions has not been followed so far by other first instance or appellate civil courts and by the *Areios Pagos*.[98] The latter courts adjudicate the cases on the basis of the regime that was applicable before the ratification of the RevESC. The justification for this lies, according to the courts, in the fact that the pre-existing regime on dismissals did not change after the ratification of the RevESC, since the protection offered by art. 24 RevESC was fully ensured under the legislation in force before the Treaty's ratification. In particular, in their view, even if there is no valid reason for a dismissal, its validity is not affected, given that the obligation of the employer to compensate the employee remains even when the employer could prove a valid reason for the dismissal.

[95] On the ECSR's position concerning the burden of proof see Conclusions n. 2012/def/FIN/24/EN of the European Committee of Social Rights of 7 December 2012 on Finland.

[96] In Greece there are no labour courts. Issues arising between employees and employers are resolved by civil courts, in accordance with the specialised procedure for labour disputes.

[97] Single-Member First Instance Civil Court of Piraeus decision n. 3220/2017; Single-Member First Instance Civil Court of Lasithi decision n. 17/2019.

[98] See *e.g*. Single-Member First Instance Civil Court of Thessaloniki decision n. 19510/2017; Single-Member Civil Court of Appeal of Athens decision n. 6375/2019; *Areios Pagos* decision n. 1512/2018.

This position has also been endorsed by several opposing labour law scholars in Greece, who argue that the Greek dismissal regime remains compensatory, in the sense that employees are sufficiently protected by high rates of severance allowances (still after the reductions put forward through the implementation of austerity measures) and can claim an abusive exercise of rights under art. 281 of the Civil Code before the court to contest the validity of a dismissal.[99]

The whole debate held out for some time, while reaching the news and serving as a topic for extensive political debate. In May 2019, the Ministry of Labour of the Cabinet of the centre-left SYRIZA, proposed a draft legislative act which – among many other subjects – contained a single provision specifying Greece's international obligations under art. 24 RevESC. The purpose of the provision was merely to add the "valid reason" for dismissal as an essential condition for the validity of dismissal, next to the already existing formal conditions for its validity. According to the Explanatory Memorandum to the bill, full consideration must be given to the ECSR's interpretation of art. 24 to avoid the risk of misinterpreting its provisions. Notably, the bill was approved by a considerable majority of the Greek parliament (including the votes of the MPs of the centre-right New Democracy party) and became law of the state.[100]

Nevertheless, three months later, the newly elected government of New Democracy, having a majority in the parliament and giving in to the pressure of employers' associations, surprisingly abolished the above legislative provision retroactively and without any warning.[101] While a potential response by the ECSR would be more than welcome, no collective complaint has been lodged (so far) addressing this situation, nor has the matter yet reached the Committee under the reporting system.

V. Concluding remarks

As this *Article* has shown, all three examined jurisdictions (Italy, France, and Greece) are bound both by art. 24 RevESC and the Collective Complaints Protocol. This has further facilitated the intensity of the Charter's influence on litigants and domestic courts. In the case of Italy, rather than exercising judicial restraint – as many other constitutional, supreme, or international courts did in the face of anti-crisis reforms –[102] the ItCC played

[99] See, among others, I Lixouriotis, *Individual Labour Relations* (Nomiki Bibliothiki 2017 fifth edition) 761 ff (translated from Greek); G Theodosis, 'The Justified Termination of the Open-ended Employment Contract' (2017) Epitheoresis Ergatikou Dikeou 527 (translated from Greek). For a very analytical critique see B Palli, 'The Consequences of the Obligations under Article 24 RevESC on the Law of Dismissal from a Comparative Perspective' (2020) Epitheoresis Ergatikou Dikeou 1299 (translated from Greek).

[100] See Law n. 4611 of 17 May 2019 art. 48.

[101] See Law n. 4623 of 9 August 2019.

[102] See *e.g.* L Mola, 'The Margin of Appreciation Accorded to States in Times of Economic Crisis: An Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures' (2015) Lex Social: Revista de Derechos Sociales 174; C Fasone,

an active part in the legislative process, by laying down a ruling with significant policy implications and urging the legislature to pay more attention to constitutional principles.[103] It cannot be denied that, due to the major role the Charter had in the ruling, in conjunction with the fundamental rights provisions of the Italian Constitution, it contributed to achieving a rebalancing, at least partially, of the dismissal regime in Italy.[104]

In France, workers' litigation before French labour courts has had, as shown, significant effects on the reasoning of the courts, which now engage directly and in multiple ways with the Charter system. In addition, it has provoked extensive legal debate and has exerted considerable pressure on the political arena. Remarkably, several labour courts set aside the relevant Labour Code provisions on many occasions, by assigning unprecedented importance to the Charter, in conjunction with ILO Convention n. 158. They were thus "emancipating themselves from the straitjacket" imposed by the 2017 dismissal reforms,[105] which have been considered as emblematic for the Macron administration.

What the Greek situation illustrates are, first and foremost, the significant effects that the mere ratification of the RevESC and in particular art. 24 thereof, as interpreted by the ECSR, may have on domestic law and judicial practice, as well as on the policy agenda. In the case of Greece, and regardless of the above-described debate in the legal doctrine, the Charter system has made it more than evident that the current law on dismissals, which dates back to 1920, must be amended in a comprehensive manner that responds to the current societal needs, in accordance with the applicable socio-economic rights protection standards.[106] In addition, the RevESC's ratification and its impact on Greek legislation and judicial practice, have stimulated renewed interest in the Charter system in the country.

Similarly, it should be mentioned that, already within the first months following the ratification of the RevESC and the Collective Complaints Protocol by Spain, art. 24 RevESC, as interpreted by the ECSR, as well as the relevant discussion in Italy and France on the establishment of compensation scales, prompted one of the most prominent trade unions in Spain to lodge a collective complaint to the ECSR addressing a similar situation. In particular, in its complaint registered on 24 March 2022, *Unión General de Trabajadores* (UGT) alleged that the Spanish legislation on individual dismissal without just cause is in

'Constitutional Courts Facing the Euro Crisis: Italy, Portugal and Spain in a Comparative Perspective' (EUI Working Papers 25-2014).

[103] F Laus, 'Il rapporto tra Corte costituzionale e legislatore, alla luce delle pronunce sul caso Cappato e sulle tutele crescenti nel Jobs Act' (2020) Rivista Associazione Italiana dei Costituzionalisti 65, 84.

[104] G Fontana, 'La Corte costituzionale e il decreto n. 23/2015: *one step forward two steps back*' (CSDLE "Massimo D'Antona" Working Papers 382-2018) 19.

[105] T Sachs, 'La conventionnalité du plafonnement des indemnités de licenciement injustifié' cit.

[106] Notably, the Greek legislature recently attempted a radical revision of the Greek law on dismissal. However, according to Gavalas, the recently adopted legislation on dismissals (Law n. 4808 of 19 June 2021 (Greek Official Gazette n. A' 101, 19 June 2021) not only ignored art. 24 RevESC, but also introduced provisions that are in direct breach of its content. NK Gavalas, 'The Misadventures of the European Social Charter in Greece' (2022) Lex Social: Revista de Derechos Sociales 1, 21 ff.

breach of art. 24 RevESC in that it provides for "a legally predetermined system of calculation which does not allow for the legally foreseen or assessed compensation to be modulated to reflect the full damage suffered, nor does it guarantee its dissuasive effect".[107] In November 2022, a second collective complaint was lodged against Spain (complaint n. 218/2022) by another major Spanish trade union, *Confederación Sindical de Comisiones Obreras* (CCOO), addressing the same matter.[108]

Having said that, as the above show, compliance with the Charter may eventually prove to be principally more of a matter of political will and orientation, rather than a matter of respect for international human rights obligations or judicial "activism". The effectiveness of some of the economic and social rights guaranteed by the Charter may therefore only be *fully* realised if they draw upon a political project. In that context, it cannot be overlooked that there is always the risk that a government with a pro-employer agenda ignores or misinterprets the Charter's content and resists the ECSR's authority, without any particular fear of repercussions for breaches of state obligations. As regards in particular the right to protection in cases of termination of employment under art. 24 RevESC and the ECSR's interpretation thereof, states may raise compliance barriers due to their urge to retain the freedom to regulate their respective system of dismissals.

In any case, based on the objectives of "improving the effective enforcement of the social rights guaranteed by the Charter" as well as "strengthening the participation of social partners and NGOs",[109] the Collective Complaints Procedure seems to have fulfilled its purpose in the cases discussed in this study. On the one hand, the mobilisation of NGOs and trade unions before the ECSR and domestic courts has brought to the surface – in a detailed and specific manner – a very important topical discussion concerning the law of dismissals across several European jurisdictions, which has not been sufficiently taken into account under national law or even through the Charter's reporting system.[110] On the other hand, the Collective Complaints Procedure has enabled individuals, trade unions, and NGOs to participate, at the international and national levels, in the

[107] Complaint n. 207/2022 of the European Committee of Social Rights decision on admissibility of 14 September 2022 *Unión General de Trabajadores (UGT) v Spain*.

[108] CCOO, 'La legislación española no aplica las garantías de protección frente al despido improcedente establecidas en la Carta Social Europea' (22 November 2022) ccoo.es www.ccoo.es.

[109] See the second and third recitals of the preamble to the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints cit.; See, also, NA Papadopoulos, 'Revisiting the Preamble of the European Social Charter: Paper Tiger or Blessing in Disguise?' (2022) HRLRev 1; J Peuch, '"Participer" à la Charte sociale à travers une épreuve quasi judiciaire: enjeux, intérêts et limites du système de réclamations collectives' (2017) Journal européen des droits de l'homme 202.

[110] See JM Belorgey, 'La Charte sociale du Conseil de l'Europe et son organe de régulation (1961-2011), le Comité européen des droits sociaux: esquisse d'un bilan' (2011) Revue trimestrelle des droits de l'homme 787, 798. On the deficiencies of the reporting system see C O'Cinneide, 'The European System' in J Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020) 63 ff.

elaboration of the content of economic and social rights in light of the Charter – in particular the right to protection in cases of termination of employment – especially in an area where the protection offered by the ECHR or EU law is minimal. Regardless of the final outcome of the *barème Macron* saga, it is clear that the Collective Complaints Procedure serves as a unique platform to deliberate about social policy in Europe, the potential of which has not yet been fully appreciated.

On a slightly different note, as this case study on dismissal reforms has demonstrated, the Charter, as authentically interpreted by the ECSR in its conclusions and collective complaints decisions, has established itself in recent years as a "living instrument"[111] of economic and social rights protection in Europe that can have significant effects across national jurisdictions. Either on its own or through its interaction with national sources (constitutional or legislative) and other international treaties, such as ILO Conventions, the application of the Charter, *qua* international treaty, in domestic legal orders can significantly shape the scope and content of fundamental socio-economic rights and prompt policy change.

Furthermore, various actors (*e.g.* lawyers, academics, trade unions, NGOs, policy-makers) at the domestic level have recently become aware of the Charter's protective mechanism and develop their arguments on the basis of its provisions and the Committee's jurisprudence to advance their claims, especially in the field of labour law. Litigants are also more and more strategically and proactively invoking and relying on the Charter and the Committee's collective complaints decisions, even when concerning other countries. As also confirmed by the findings of this study, the analytical and well-articulated interpretive approach of the ECSR on the Charter has undoubtedly been an important contributing factor in these developments. Based on the quality and persuasiveness of its monitoring work – despite not being directly enforceable at the domestic level as such – the ECSR has managed to enhance its visibility and the recognition of its interpretive authority in recent years. The Committee is thus honouring the label "guardian of the welfare state in Europe" that is often attached to it,[112] especially in the face of regressive austerity measures.[113]

Finally, as was made clear in this study, progressively and culminating since the outbreak of the Eurozone crisis, domestic courts changed their stance towards the Charter; they have become more responsive and aware of its protective mechanism when

[111] See Complaint n. 14/2003 of the European Committee of Social Rights decision on the merits of 8 September 2004 *FIDH v France* para. 27.

[112] See *e.g.* C Nivard, 'Le comité européen des droits sociaux, gardien de l'état social en Europe?' (2014) Civitas Europa 95.

[113] See *e.g.* C Deliyanni-Dimitrakou, 'La Charte sociale européenne et les mesures d'austérité grecques: à propos décisions n° 65 et 66/2012 du Comité européen des droits sociaux fondamentaux' (2013) Revue de droit du travail 457.

conducting a constitutional review or treaty-based review of domestic legislation.[114] Judges base their decisions on the Charter and the ECSR's jurisprudence, as the main legal basis, or in conjunction with other human rights treaties and constitutional provisions. Furthermore, they are not reluctant to recognise that several Charter provisions confer subjective rights to individuals – rather than merely state obligations – and are capable of producing direct effect (*e.g.* in France and Greece) or serving as tools of consistent interpretation of national law (*e.g.* in Italy). As a result, the analysis provides a practical example of the renewed prospects of the Charter in relation to its justiciability and effective enforcement by domestic courts.[115]

In view of the foregoing, it can only be concluded that the right to protection in cases of termination of employment under art. 24 RevESC, as interpreted by the ECSR – while remaining close to the provisions' wording and spirit – is to be regarded as a very reliable treaty provision. It could thus provide a solid standpoint of a justiciable and effective socio-economic right at the domestic level, protecting employees against certain types of unfair dismissal and serving as a cornerstone of the evolution of labour law systems. Through this example, it could be argued that, despite the rather slow start, the dynamics of the Charter in effectively advancing economic and social rights protection across European jurisdictions show significant prospects for the future. It is, nevertheless, imperative that the contracting parties reinforce and honour their commitments to the Charter system if it is to be allowed to reach its full potential in advancing economic and social rights protection in Europe. Domestic political pressure from civil society, academics, trade unions and NGOs towards ratification and further acceptance of the RevESC provisions and the Collective Complaints Protocol, as well as towards stronger engagement with the Charter system is a key factor in accomplishing that objective.

[114] See also L Jimena Quesada, 'El control de convencionalidad y los derechos sociales: nuevos desafíos en España y en el ámbito comparado europeo (Francia, Italia y Portugal)' (2018) Anuario Iberoamericano de Justicia Constitucional 31.

[115] See also NA Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' in C Boost and others (eds), *Myth or Lived Reality: On the (In)Effectiveness of Human Rights* (TMC Asser Press 2021) 99.

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ISSN 2499-8249
doi: 10.15166/2499-8249/...

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