RED SPINEL

M-35.

STRENGTHENING THE RULE OF LAW AS AN OUTCOME OF THE PANDEMIC CRISIS?

LUISS

WORKING PAPER

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LUISS

ABOUT THIS WORKING PAPER

This report is written within the framework of the Horizon-funded research program, ***Respond to Emerging Dissensus: SuPranational Instruments and Norms of Liberal European Democracy (RED-SPINEL)***. It investigates how mounting dissensus surrounding liberal democracy has shaped the social and political legitimacy of the EU's Rule of Law governance instruments.

The report is one of the Milestones within Work Package 2 on "EU Instruments defending the rule of law within the EU", which is lead by the Libera Università Internazionale Degli Studi Sociali "Guido Carli" University of Rome.

Work Package 2 explores how mounting dissensus surrounding liberal democracy has shaped the social and political legitimacy of the EU's rule of law governance instruments. Empirically, Work Package 2 focusses on analysing the "EU Rule of Law Toolbox".

FOREWORD

The Horizon Europe research project (2023-2025) RED-SPINEL (Respond to Emerging Dissensus: Supranational Instruments and Norms of European Democracy) seeks to shed light on the growing dissensus surrounding liberal democracy and the rule of law within and beyond the European Union (EU). RED-SPINEL examines how policy instruments and legal mechanisms at the EU level have evolved in response to dissensus surrounding liberal democracy and its constitutive dimensions. Bringing together academics and researchers from seven universities (Université libre de Bruxelles, University of Amsterdam, Libera Università Internazionale Degli Studi Sociali "Guido Carli" University of Rome, Babes-Bolyai University, University of Warwick, Uniwersytet Mikołaja Kopernika w Toruniu, and HEC Paris) and four nonacademic institutions (Peace Action Training and Research Institute in Romania, Milieu Consulting, Magyar Helsinki Bizottság / Hungarian Helsinki Committee and Stichting Nederlands Instituut voor Internationale Betrekkingen - Clingendael), the project addresses key transversal questions:

1.What is the nature of the current dissensus and how disruptive is it to the EU?
2. How have EU institutional actors and instruments contributed and responded to this increased dissensus?
3.What are the implications of this dissensus for policy instruments at EU and member state levels?

These are the main questions of the project that will be explored empirically in relation to the following topics:

-Instruments relating to the promotion of democracy and the rule of law within the EU (Work Package 2);
-Instruments relating to the promotion of democracy and the rule of law within the EU's neighbourhood (Work Package 3);
-Legal mechanisms and technocratic instruments fostering citizen participation, defending fundamental rights and promoting climate justice (Work Package 4); and
-Instruments relating to EU economic governance, notably the European Semester (Work Package 5).

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INTRODUCTION
The Way out from the Pandemic Triggering a New Method of Government,
Nicola Lupo and Giovanni Piccirilli

Curiously enough, the timeframe in which, after several years of debate, the EU reached the final agreement on a specific instrument to protect and promote the rule of law (the 'Rule of Law Regulation' no. 2020/2092), in addition to the too powerful and almost inapplicable mechanism provided by Article 7 TEU, coincided with the adoption of the main tools to react to the effects of the Covid-19 pandemic (the Next Generation EU package: Regulation no. 2020/2094): the former finally passed by the EP on 16 December 2020, and the latter by the Council on 14 December 2020.
Thus, the connection between the two actions might seem just a temporal coincidence, relevant just for the formation of the majorities within the Council. And there was indeed a causal relation between the postponement of the application Rule of Law Regulation and the removal of the veto by Hungary and Poland from the approval, on 17 December 2020, of the Multi-annual Financial Framework that was functional to the approval of the NGEU.
However, the research conducted within RED-SPINEL, and more specifically within this working paper, shows that the connection between this "new method of government" to achieve reform and investment policy coordination and the rule of law protection is much deeper than a product of logrolling. In other words, this combination helped the institutional systems of the EU and of its Member States to make a significant step in the direction of a democratic polity more compliant with the principles of the rule of law, at the beginning of the new decade.
Trying to summarize a long and a multi-factor evolution:

- the pandemic hit very strongly the same democratic legitimacy of EU Member States, calling them to react quickly and effectively, also adopting emergency legal measures which limited some fundamental rights of the citizens;
- EU Member States followed different approaches to fight the pandemic and to address its economic consequences, in some cases (such as Bulgaria and Romania) facing harsh contestations, also due to the difficulty to comply with high rule of law standards and to reach sufficiently clear democratic support for the measures adopted (also because of the closure of some parliaments);
- the EU was challenged by the pandemic and reacted strongly, also on the basis of a clear indication by the European Parliament - able to work also exclusively by remote - designing a new way to invest and allocate resources, through an advanced notion of conditionality, embedding the compliance with the rule of law;
- in particular, Art. 8 Regulation 2021/241 stated the principle of the implementation of the Recovery and Resilience Facility in compliance with the rules regulating the execution of the EU budget, so incorporating EU legal standards, including those related to the promotion of the rule of law, in order to obtain the funds included in the Recovery and Resilience Plan;
- a more general statement can be found in the "whereas clause" no. (7) of Regulation 2020/2092, according to which the "respect for the rule of law is an essential precondition" whenever Member States implement the Union budget, which has been widely recognized by the Court of Justice of the EU in its judgments in cases C-156/21 Hungary v Parliament and Council, C-157/21 Poland v Parliament and Council.

In the end, the connections between money and fundamental rights, on the one side, and between money and reforms, on the other side, may not sound that elegant, but seem to work in the end. At least, the former was decisive to find a proper legal basis for the Regulation 2020/2092; and the second to face multiple emergencies with reforms and investments aimed differently designed depending on the Member State, but aimed at reaching the same macro-objectives set at EU level. This new method of government had a very promising start, and thus it has been extended to other emergencies and policy fields. For instance, it was implemented in order to mitigate the effects of the energy crisis consequential to the war in Ukraine, with the REPowerEU package. Moreover, it constitutes a solid basis for more structural and permanent interventions, such as the reform of European economic governance, as Bartolucci argues in his chapter.

This collective working paper gathers different chapters all converging to a twofold aim: register the most recent novelties in this advanced understanding of conditionality, and tackle the question whether this new "method of government" can be stabilized and generalised further. As said, the pandemic has been a crucial factor in activating new processes and accelerating existing trends. The institutional reaction to it furtherly worked as a catalyzer, selecting specific targets to be reached and stimulating institutional processes to this end.

The overall result of this research seems to offer fruitful hints for further research. Rule of law is increasingly considered as a precondition and a matter for continuous assessment in the enactment of several policies.

After the pandemic, Cecchetti registered a spillover effect of the juridification of rule of law backsliding, with a progressive evolution in the infringement procedure targeting the different values of Article 2 TEU: not only the Commission used this tool in order to censure the endangerment of the rule of law, but it also interpreted it in a thicker way, inclusive of the democratic dimension. Similarly, Nato showed how between the protection of the financial interest of the Union and the promotion of the rule of law there is a mutual interdependence, and it has been growing with the expansion of the EU funds because of the NGEU.

A similar evolution is also witnessed in the relations with third countries. Conditionality, with specific reference to the rule of law, has traditionally been part of the enlargement policy with the Copenhagen criteria. However, each enlargement round involves new challenges and increasingly different legal traditions, representing a chance for the EU Institutions to adjust the EU law benchmark to be met by both Member States and the candidates' countries. Hence, the chapter by Fontanelli showed how the most recent agreement on free trade became a breeding ground and a workbench for novel rule-of-law disciplines, determining a significant "Brussels effect" in global trade relationships.

The evolution that can be seen in relation to academic freedom is even more diverse. The application of conditionality mechanisms with respect to the promotion of the rule of law ends up having ambivalent consequences, proving particularly effective on institutional aspects but risking compromising the freedom of expression of individuals.

Finally, challenges to traditional categories of constitutionalism of a more general and global nature seem to remain less sensitive to this trend. In particular, the AI revolution and the risks deriving from climate change reveal serious difficulties in being tackled by context-related measures. The chapter by Bifulco demonstrated indeed an interesting correlation between the pandemic crisis and the climate emergency, although by pointing out commonalities in the underestimation of the challenges to the rule of law. Golia added how the "rule of tech" emphasizes the limitation of traditional categories not only at State-level, but also at EU one, calling for investigating new approaches such as that of "digital constitutionalism".

PART I
INNOVATION AND CONTINUITY IN THE FUNCTIONING OF EU INSTITUTIONS

The New "Democratic Conditionality" in Infringement Proceedings,
Lorenzo Cecchetti

1. Introduction

The infringement proceeding (or action for failure to fulfil an obligation) is a tool enshrined in the Treaties since the 1950s, now in Articles 258–260 of the Treaty on the Functioning of the European Union (TFEU), with only limited amendments over the decades. However, the European Union (EU) institutions' approach to using this procedure has evolved significantly over time. As noted in the literature, this tool has passed from being a 'rarely used, opaque and policy-driven procedure' to one which is 'common, fairly transparent, and highly technical' (Prete & Smulders, 2010, 13). This evolution intensified with the entry into force of the Lisbon Treaty (Prete & Smulders, 2021, 285–6) allowing for the infringement procedure to also play a role in addressing the rule of law crisis in the EU, alongside other legal tools (see generally Fasone, Dirri, & Guerra, 2024).

While the 'complementary' role in relation to other EU legal instruments (Piccirilli, 2024, 42 ff.) should not come as a complete surprise, given that the infringement procedure is the primary mechanism for centralized enforcement of EU law within the Union's legal system, its use in this context was far from inevitable. Indeed, the use of this procedure to address rule of law backsliding would have hardly been possible without the 'juridification' of that crisis brought about by the well-known Court of Justice judgment in *Associação Sindical dos Juízes Portugueses* (Case C-64/16, hereinafter 'Portuguese Judges'). This case established (or clarified) the intrinsic link between the value of the rule of law under Article 2 of the Treaty on European Union (TEU), Article 19 (1), second subparagraph, TEU, and Article 47 of the Charter of Fundamental Rights of the EU (Charter) (see Cecchetti, 2024). Despite these developments, the use of the infringement procedure to tackle rule of law issues has not been without criticism. Scholars have raised concerns about its limited impact (Heliskoski, 2023) and proposed adjustments to its use, such as launching 'systemic infringement' actions (Scheppele, 2013; Scheppele, 2014; Scheppele, Kochenov, & Grabowska-Moroz, 2020, 20).

Against this background, this chapter aims to explore how the infringement procedure has been deployed in recent years to address the rule of law crisis, particularly in the aftermath of the COVID-19 pandemic. The ultimate aim is to assess whether new patterns have emerged in its use.

To this end, the chapter is organized as follows: Section 2 provides an overview of the key features of the infringement procedure. Section 3 examines the Commission's approach to the procedure, with a focus on its role in addressing the rule of law crisis. Section 4 considers the immediate impact of the COVID-19 outbreak on the use of the infringement procedure, analysing both quantitative and procedural dimensions. Section 5 shifts to the post-pandemic scenario, evaluating the EU institutions' practices from a qualitative perspective. Finally, the concluding remarks in Section 6 link the findings of the study to broader reflections on whether the pandemic has triggered a new approach to interinstitutional relations and policy promotion, particularly concerning the rule of law.

Before beginning the analysis, a few preliminary clarifications on the scope of this study are necessary. First, the focus is on recently opened procedures, and the analysis is primarily based on publicly available data from the Commission's infringement procedure repository, its press releases concerning ongoing cases, and its annual reports on 'Monitoring the Application of European Union Law'. Where applicable, cases that have reached the Court of Justice are also considered. However, instances of potential noncompliance with EU law resolved through informal dialogue between the

Commission and Member States (an approach known as the 'EU Pilot') fall outside the scope of this investigation.
Second, from a temporal perspective, the post-pandemic period is identified as beginning in the second half of 2020, following the outbreak of COVID-19 in the first half of that year. Specifically, the study examines the nearly four-year period between Fall 2020 and Fall 2024. This timeframe was selected to provide a sufficiently broad dataset for analysis. Although the World Health Organization officially declared the end of the COVID-19 emergency in May 2023, the disease, in various forms and labels, continues to circulate as of the time of writing.

2. Setting the scene: infringement procedure from theory…
To reflect upon the EU institutions' approach to the infringement procedure, it is necessary to provide an overview of Articles 258, 259, and 260 TFEU, which, although amended over the years, share the rationale, goal, and operating features as the corresponding provisions of the founding treaties (see Article 88 of the Treaty establishing the European Coal and Steel Community, Article 169 of the Treaty establishing the European Economic Community, and Article 141 of the Treaty establishing the European Atomic Energy Community). In a nutshell, it is mainly through this procedure that the Commission plays its role of 'guardian of the Treaties' under Article 17 TEU, overseeing the application of Union law by the Member States under the control of the Court of Justice of the EU. The procedure can also be initiated at the instigation of another Member State, but this second scenario appears to be quite rare in practice.
The main goal of the procedure is to ascertain whether a Member State has failed to fulfil its obligations under EU law, and, should that be the case, to put an end to the breach, ensuring the effectiveness of Union law and its uniform application in all Member States. The infringement of an EU legal obligation may concern the violation of any rule of Union law, of both primary and secondary law, and can be the result of any action or omission by the State considered as a whole (i.e. encompassing the legislative power, the executive power, the judiciary, and any public power, including regional and local authorities). The reasons for the State acting in a certain way are not relevant.
In regard to its main operating features, the infringement procedure is a two-phase procedure. In an initial 'pre-litigation' or 'administrative' phase, the Commission initiates an initial assessment of the potential violation(s) of EU law and contacts the State. This takes place, at first, within the context of an informal dialogue, which may lead to the activation of the so-called EU Pilot system. The formal commencement of the infringement procedure then occurs when the Commission sends the State a letter of formal notice. The purpose of such a communication is to inform the State of the allegations regarding its infringement of EU law, to request further information, and to allow the State to submit observations on the matter within a specified period. Even after issuance of the letter, the dialogue between the Commission and the State in question normally continues throughout the whole procedure. If the State gives an unsatisfactory reply or does not reply at all to the letter, the Commission *may* issue a reasoned opinion. This is a formal request to comply with EU law that details and 'crystallises' the allegations (as they cannot be changed later before the Court of Justice), providing the State to which the opinion is addressed with a period of time to remedy the infringements, normally two months.
If the Member State fails to remedy the alleged infringements within the specified timeframe, the Commission *may* refer the matter to the Court of Justice, thus initiating the second stage of the procedure, normally referred to as the 'judicial phase'. Here, the decision to bring the action before

the Court of Justice falls within the Commission's discretion. The Commission is not obligated to initiate this phase, even where the State concerned has ignored the reasoned opinion, and there is no time limit for doing so. The Commission may prefer, in some cases, the channel of dialogue and 'negotiation' with the State in order to bring the infringement of EU law to an end. Most cases are settled in this manner before being referred to the Court. The Commission thus enjoys broad discretion when deciding whether or not to open an infringement procedure, whether or not to refer the matter to the Court of Justice, and when to act and in what manner.

For the judicial phase before the Court of Justice, here, the Commission must prove the allegations about the infringement of EU law made against the State in the reasoned opinion. After the action has been lodged with the Court of Justice, the fact that the State were to cease the infringement has no consequence. As is well known, moreover, the judgment of the Court establishing a Member State's failure to fulfil its obligations is declaratory in nature, functioning merely to establish judicial ascertainment of the violation of EU law. Should this be the case, the State, under Article 260(1) TFEU, must adopt all necessary measures to comply with the judgment and cease the infringement. If the State fails to do so, the Commission, after allowing the national authorities to submit their observations, *may* initiate a second infringement procedure and request the Court of Justice to impose financial penalties on the State in question under Article 260(2) TFEU. Following the Lisbon Treaty, in some cases, the Commission *may* request the imposition of penalties already in the first procedure (see Article 260(2) TFEU). These penalties *may* take the form of a 'lump sum', primarily intended to sanction past infringement, and/or of a 'penalty payment', which involves a periodic sum to be paid in order to prevent the continuation of the infringement in the future. To determine the amount, the Commission makes a proposal to the Court of Justice, which, however, is not bound by such a request. How is the amount of the fine to be determined? It is once again the Commission itself that has developed a system for the quantification of the penalty based on three main criteria, namely the gravity of the infringement, the duration of the infringement, and the deterrent effect of a penalty on the State concerned (for instance, by linking it to the GDP of that State).

3. … To practice: focus on the Commission's approach and on its use in the context of the Rule-of-Law crisis

The preceding discussion illustrates the broad discretion granted to the Commission when deciding whether or not to open an infringement procedure, whether or not to refer the matter to the Court of Justice, and when to act and in what manner (generally, in this regard, see Burelli, 2024). In turn, such discretion explains why, in line with the considerations set out in the introduction, it is possible to talk about and single out different 'approaches' adopted by this institution over the decades, even in periods when there have been no treaty changes. Vesting the Commission with wide discretion has been deemed necessary on the basis of several considerations, such as the 'scarcity of resources', which rules out the possibility of prosecuting every infringement, however small, of any EU law rule (Cahier, 1974, 6), and the allegedly prominent 'political nature' of the procedure (Andersen, 2008, 152) in a multilevel system of governance like the Union. The Commission itself has long stressed that the infringement procedure must be understood as 'an instrument for the achievement of a policy, and not solely an essential legal instrument' (1988 Report on Monitoring the Application of Community Law, 6). Whatever one may think about this latter consideration, that the Commission enjoys discretion and thus pursues some priorities in performing its supervisory function appears to be reasonable as it responds to the ultimate goal of the infringement procedure—that is, to end the infringement of EU law. To use the 'stick' against the Member States in every situation and to bring

any tension between the two levels of governance before the EU's judiciary would not always be effective. This is especially the case when one considers that the occasions for such tensions and divergences are physiological and are expected to increase as the integration process progresses (Burelli, 2024, XV).

It is also on the basis of these considerations that the idea of 'prioritizing' certain infringements over others has gradually emerged in the activity of the Commission. Although already expressed in the 1990s, it was first explicitly affirmed in the Communication 'Better monitoring of the application of community law' adopted in December 2002, along with the idea of strengthening the cooperation with the Member States in order to prevent situations of noncompliance. In this communication, some priority criteria, reflecting the seriousness of the failure to comply with EU law, were identified. Notably, the three situations considered priorities were (a) infringements 'that undermine the foundations of the rule of law' and connected to the principle of primacy, the preliminary ruling procedure, or the protection of human rights and fundamental freedoms; (b) infringements 'that undermine the smooth functioning of the Community legal system', such as where Member States act in an area falling within the exclusive competence of the Union as well as where cross-border rights are at stake; and (c) infringements 'consisting in the failure to transpose or the incorrect transposal of directives'. In these situations, the Commission declared that infringement proceedings should 'be commenced immediately unless the situation can be remedied more rapidly by some other means' (2002 Communication, pp. 9–12). The 2002 Communication was the first of a series of acts of the same type adopted by the Commission in this respect. In 2007, for instance, the Commission essentially reiterated the priority criteria set in 2002, stating, *inter alia*, that '[p]riority should be attached to those infringements which present the greatest risks, widespread impact for citizens and businesses and the most persistent infringements confirmed by the Court' (2007 Communication).

In December 2016, in the context of the reflections on the future of Europe, the Juncker Commission adopted a new Communication, entitled 'EU law: Better results through better application'. The declared aim was to adopt a 'more strategic approach and efficient approach to enforcement', inspired by the logic of being 'bigger and more ambitious on big things, and smaller and more modest on small things'. Accordingly, the idea is thus to 'focus and prioritise its enforcement efforts on the most important breaches of EU law affecting the interests of its citizens and business', such as those 'infringements which obstruct the implementation of important EU policy objectives […], or which risk undermining the four fundamental freedoms' (p. 14).

What does this mean? In brief, the Commission is stressing that it will make full use of the discretionary power that it enjoys in deciding which cases to pursue. Notably, it will 'distinguish between cases according to the added value which can be achieved by an infringement procedure and will close cases when it considers [doing so] to be appropriate from a policy point of view' (p. 15). Further, 'certain categories of cases can often be satisfactorily dealt with by other, more appropriate mechanisms at [the] EU and national level[s]' (Ibid.). This is deemed to occur, particularly, where 'there is insufficient evidence of a general practice, of a problem of compliance of national legislation with EU law or of a systematic failure to comply with EU law' (Ibid.). From a strategic viewpoint, the Commission has also announced the intention of relying less on the structured problem-solving dialogue between the Commission and Member States, known as the EU Pilot, which will be used only if it 'is seen as useful in a given case' (p. 12).

Which are the Commission's priorities then? The Commission has identified several 'shades' of priority. First, it will investigate, 'as a matter of priority', cases (i) where Member States have failed to communicate transposition measures or where those measures have incorrectly transposed

directives; (ii) where Member States have failed to comply with a judgment of the Court of Justice as referred to in Article 260(2) TFEU; (iii) where they have caused serious damage to EU financial interests; or (iv) where they have violated EU exclusive competences (p. 14).

Second, 'high priority' is assigned to infringements that reveal systemic weaknesses which undermine the functioning of the EU's institutional framework, particularly where this affects the capacity of national judicial systems to contribute to the effective enforcement of EU law. The examples of cases to be 'pursue[d] rigorously', provided by the Commission itself, are situations where national rules or general practices impede the procedure for preliminary rulings, prevent national courts from acknowledging the primacy of EU law, provide no effective redress procedures for a breach of EU law, and are thus detrimental to the requirements of the rule of law and Article 47 of the Charter (p. 14).

As highlighted in the literature, the approach outlined in the 2016 Communication has been essentially followed by the Von der Leyen Commission (Prete & Smulders, 2021, 286; Burelli, 2024, 142–3), some nuances notwithstanding. Amongst these are the attention publicly declared to the protection of the rule of law (Prete & Smulders, 2021, 286), which was, and remains, part of President Von der Leyen's political guidelines (see, respectively, Political Guidelines 2019–2024, 14–15, and Political Guidelines 2024–2029, 23–24). The continuity between the 2017 Communication approach, described above, and the Von der Leyen Commission's approach has been acknowledged by the Commission itself in an additional Communication published in 2022 (2022 Communication).

It is in this context that, as of 2017, the Commission started using the infringement procedure against both Hungary and Poland to tackle the ongoing rule of law backsliding in those Member States, primarily with regard to the threats to judicial independence and to the consequent violation of the principle of effective judicial protection in those States. Such an approach has intensified following the Court's judgment in the *Portuguese Judges* case (Case C-64/16; Cecchetti, 2024), which the literature has defined as 'creative' (Bonelli & Claes, 2018, 640), a 'break-through' (Lenaerts, 2023, 71), and a 'spectacular innovation' (Kochenov & Bárd, 2020, 245). Here, the Grand Chamber explicitly established the inner link between Article 2 TEU, Article 19 (1), second subparagraph, TEU, and Article 47 of the Charter, stating that Article 19(1), second subparagraph, TEU, referring to the principle of the effective judicial protection of individuals' rights under EU law, '*gives concrete expression* to the value of the rule of law stated in Article 2 TEU' (para 32). The significance of this passage can be hardly underestimated, especially bearing in mind the 'fiasco' over the activation of Article 7 TEU occurred in the very same period (Coman & Thinus, 2024).

The 'juridification' of the rule of law crisis by the *Portuguese Judges* case had an impact on the use of infringement proceedings against Hungary and Poland, albeit in different ways and at different times. With regard to Hungary, as noted in the literature, the Commission's approach during the first period was characterized by the absence of a clear 'policy' aimed at addressing rule of law related issues, with a lack of any emphasis on the rule of law dimension of the cases and of any references to Article 2 TEU (Heliskoski, 2023, 143–4). Examples of such an approach are infringement actions brought before the Court of Justice regarding the deprivation of the rights of usufruct over agricultural and forestry land (Case C-235/17), the conditions for the supply of higher education services in Hungary (Case C-66/18), the transparency requirements imposed upon the financing of associations (Case C-78/18), the limitations on the procedures and conditions on the procedure for granting international protection in Hungary (C-808/18), and the criminalization of organising activities facilitating the lodging of asylum applications by persons who are not entitled to asylum under Hungarian law (aka 'Stop Soros Law'; Case C-821/19).

Partly different considerations hold true with regard to the early use of the infringement procedure against Poland in relation to the threats to the independence of the judiciary, an issue closely connected to the principles affirmed in *Portuguese Judges*. In this respect, indeed, the Commission, although not directly relying on Article 2 TEU, based its complaints on Article 19(1)(2) TEU. At issue were the procedures that led to the Court of Justice's declarations according to which the reforms of the Polish Supreme Court (Case C-791/18) and of the system of ordinary courts (Case C-192/18) were in breach of Article 19(1) TEU, as the amendments to the retirement age regimes of Polish judges had been coupled with the granting to the President of the Republic and the Minister for Justice, the discretion to extend the period of judicial activity. In more recent years, similar breaches of Article 19(1) TEU have been also identified in relation to the disciplinary regime applicable to Polish judges (Case C-791/19 and Case C-791/19 R).

4. Infringement proceedings after the outbreak of the COVID-19 pandemic in numbers and beyond

The outbreak of the COVID-19 pandemic affected the scenario described above in several ways. First of all, both the Commission and the Court soon adopted some procedural measures to mitigate the consequences of the COVID-19 pandemic and ease the burden on Member States in dealing with infringement procedures (Annual Report 2020, 3). For example, in March 2020, the Commission agreed, at the request of the Member States, to extend all formal deadlines for ongoing procedures until 15 June of that year (Prete, 2020). The Court of Justice also extended by one month the time limits for all pending cases, including infringement proceedings, postponed all hearings due to take place by the end of April, and simplified several technical and administrative aspects of the use of e-Curia, with the ultimate aim of not unduly slowing down the functioning of the EU judicial architecture (Prete, 2020). Nonetheless, the Commission firmly rejected the idea of suspending its enforcement activity altogether, arguing that the proper application of EU law is paramount even in times of crisis (Annual Report 2020, 3). The protectionist measures on medicines, personal protective equipment, and similar products adopted by several Member States in the aftermath of the pandemic demonstrated the importance of not suspending the Commission's enforcement activities.

The figures reveal that, in the end, the danger of obstructing the (public) enforcement of EU law was largely avoided. Looking at the *annus horribilis* data, the Commission opened more new procedures in that year, sending 903 letters of formal notice, than in any previous or subsequent year. For context, the Commission had opened 797 new procedures in 2019, 644 in 2018, and 716 in 2017 (see Annual Reports 2017, 2018, and 2019; note that the summary of these data in the Annual Report 2023 contains several inaccuracies). The new procedures amounted to 847 cases in 2021, 551 in 2022, and 529 in 2023 (see Annual Report 2023). Of course, the figures do not tell the whole story. If we look at the number of reasoned opinions issued in relation to newly opened infringements, 2020 seems to be in line with the previous practice of the Commission, which resulted in issuance of a reasoned opinion in around 30% of cases (33.89% in 2020, with the average for the previous three-year period being 35.14%). At the same time, 12 cases were referred to the Court of Justice, 11 under Article 258 TFEU and 1 under Article 260(2) TFEU. In this respect, the decrease in the number of new cases before the Court compared to the pre-pandemic years, when more than 40 cases per year were referred to the Court (i.e. 64 in 2017, 47 in 2018, and 51 in 2019), is evident. In the following years, the number of cases annually referred to the Court returned to the pre-2020 levels (33 referrals were made in 2021 and 35 in 2022) but then experienced a sharp increase in 2023, with 82 referrals. The ratio of new cases referred to the Court went from 1.33% in 2020 to 3.90% in 2021, 6.35% in 2022, and 15.50% in 2023.

Beyond the quantitative data, we can consider how the infringement procedure was used to address rule of law backsliding and, more generally, to protect the Union's values in 2020. Two measures taken by the Commission to protect the rule of law, the independence of judges, and the principle of effective judicial protection are worth examining. The first was the request for interim measures under Article 279 TFEU, submitted on 23 January 2020 in the context of the infringement proceedings against Poland already referred to the Court in 2019 (Case C-791/19), to suspend the activities of the Disciplinary Chamber of the Supreme Court in disciplinary proceedings against ordinary judges. The Court granted the request on 8 April 2020 (Case C-791/19 R). The independence of Polish ordinary judges was also at the centre of another infringement procedure opened by the Commission against Poland on 29 April 2020. This action concerned the disciplinary powers vested in the Disciplinary Chamber of the Polish Supreme Court, the independence and impartiality of which were not guaranteed; the restrictions imposed on national judges in regard to the examination of compliance with the EU law and the respect of the principle of primacy; and certain provisions requiring judges to make publicly available, prior to their appointment, information on their activities within associations and nonprofit foundations and on their political party membership. The case was referred to the Court of Justice on 31 March 2021 (Case C-204/21). In both cases, by judgments delivered on 15 July 2021 and 5 June 2023, respectively, the Court of Justice concluded that, by adopting—and maintaining in force—the disciplinary regime briefly outlined above, the Republic of Poland had failed to fulfil its obligations, *inter alia*, under Article 19(1), second subparagraph, TEU and Article 267 TFEU.

5. What happened in the post-pandemic period?

As mentioned above, from a quantitative perspective, the Commission's approach to the use of the infringement procedure appears to be essentially in line with the 'pre-pandemic era', with no significant changes in the number of new procedures opened per year or in the number of referrals to the Court of Justice (with the sole exception of 2023, when the number of referrals was double the average for the previous three-year period). However, the process of 'transformation' of this procedure, highlighted in the literature (Prete & Smulders, 2010; Prete & Smulders, 2021) and showcased by the different strategies adopted by the Commission over time (see Section 3 above), is evident when considering the qualitative use of the failure to fulfil an obligation procedure in the post-pandemic period. Such a 'transformation' does not amount to a paradigm shift, as a certain continuity is evident in the attention that the Commission has devoted to the protection of the rule of law, in line with what was reaffirmed by President Von der Leyen (see Political Guidelines 2024–2029, 23–24) and the 2022 Communication. This is illustrated by the fact that new proceedings have recently been opened for breaches by Member States of their obligations under Article 19(1), second subparagraph, TEU. An illustrative example is the infringement action launched against Poland on 22 December 2021 for breaches of EU law by the Constitutional Tribunal of this Member State (INF(2021)2261). The crux of the case, which was subsequently referred to the Court of Justice (where it is currently pending, see Case C-448/23), is the violation of EU law resulting from the Polish Constitutional Tribunal's jurisprudence, according to which some provisions of the EU Treaties were found to be incompatible with the Polish Constitution and should therefore be disapplied. Another infringement action that illustrates the continuity of the Commission's approach is the one opened in June 2021 under Article 260(2) TFEU, asserting that Hungary had not taken the necessary measures to comply with the 2020 *Commission v Hungary* judgment (Case C-808/18; referred to above). In its judgment of 13 June 2024, the Court of Justice underlined the extremely

serious nature of the infringement of EU law and ordered Hungary to pay an unprecedented lump sum of EUR 200 million and a penalty payment of EUR 1 million per day of delay from the date of the judgment.

Against this background, what has the Commission done *in the post-pandemic period*? To continue with Hungary as the example, an infringement procedure was opened on 15 July 2021 in relation to Law LXXIX of 15 June 2021 (INFR(2021)2130), which sought to impose a series of prohibitions and restrictions on media services, advertising, e-commerce, and educational content presenting gender identities not corresponding to the sex assigned at birth, gender reassignment, or homosexuality (known as the 'Hungarian Child Protection Act'). The readiness and rapidity with which the Commission formally initiated the procedure reflects its convictions that not only does such a measure constitute an infringement of EU law but also that there is no (or little) room for engaging in informal dialogue and applying the EU pilot system because of the serious violation of the Union's founding values. The country's response to the reasoned opinion was found to be unsatisfactory, and the case was referred to the Court of Justice on 15 July 2022; the Court declared that Hungary had failed to fulfil its obligations under EU law by adopting Law LXXIX/2021 (Case C-769/22). More precisely, the Commission cited several secondary law measures (i.e. Directive 2010/13/EU on audiovisual media services, Directive 2000/31/EC on electronic commerce, Directive 2006/123/EC on services in the internal market, Regulation (EU) 2016/679 on general data protection) as well as primary law provisions, namely Article 56 TFEU, Articles 1, 7, 8(2), 11 and 21 of the Charter, and Article 2 TEU. At the heart of this infringement procedure, therefore, is respect for a number of values, principles, and fundamental rights of the Union, which are intertwined with each other and with secondary legislation, including the principles of equality, human dignity and respect for human rights, freedom of expression, and democracy. The case is currently pending before the Court of Justice, and at the hearing in this case, which took place on 19 November 2024 before the plenary session of the Court (for an account see Kaiser, Knecht, & Spieker, 2024), its constitutional nature was further highlighted. Indeed, although it relates to breaches of a number of secondary law provisions, it fundamentally concerns the respect (and enforcement) of the very foundations of the EU legal order. Remarkably, the allegations in this case did not concern violations of the principle of effective judicial protection, which is an integral aspect of the rule of law, but rather violations of other values now enshrined in Article 2 TEU. The exceptional constitutional importance of the case explains the decision to refer it to the 'full Court' (see Article 16 of Protocol No 3 annexed to the Treaties).

It should be added that a similar infringement procedure was opened against Poland on the same day as the procedure against the Hungarian Child Protection Act (i.e. 15 July 2021). The case against Poland concerned the so-called 'LGBT-ideology free zones' set up by several Polish regions and municipalities and the failure of the Polish authorities to cooperate with the Commission's investigations in this regard. However, per a decision issued on 23 January 2023, the Commission decided to close the case. Yet, less than five months later, on 8 June 2023, the Commission launched another infringement procedure against Poland in relation to a new law, adopted by the Polish Parliament and entered into force on 31 March 2023, establishing the State Committee for the Examination of Russian influence on the internal security of Poland between 2007 and 2022, which was given broad and unbridled powers to investigate and scrutinize candidates in elections, with the capacity to limit the exercise of the political rights of investigated persons belonging to the political opposition (i.e. parties opposed to the then ruling Law and Justice Party), thereby unduly interfering with the democratic process. As this happened a few months before the Polish general elections

scheduled for October 2023, there was a real risk that this new law would be used as a means to disqualify *personae non gratae* candidates from participating in the elections. In particular, concerns were raised about the impact on the participation of Donald Tusk, the former Prime Minister of Poland, who also served as President of the European Council from 2014 to 2019. These concerns led to the new law being publicly dubbed 'lex Tusk' (Piccirilli, 2024, 46), and prompted the Commission to act swiftly, claiming that this law violated, first and foremost, the principle of democracy, as enshrined in Articles 2 and 10 TEU, as well as the principles of legality and nonretroactivity of sanctions (Article 49 Charter) and the general principles of legal certainty and *res judicata*, of the right to effective judicial protection (Article 47 Charter), *ne bis in idem* and the protection of professional secrecy (Article 7 Charter), and the requirements of EU law on data protection (GDPR and Article 8 Charter).

The opening of the procedure action prompted Poland to quickly amend 'lex Tusk', modifying the provisions that the Commission considered most problematic by the end of July 2023. These amendments to the law, combined with the fact that the political opposition won the elections in October 2023 (and Mr Tusk was reappointed as Prime Minister), explain why, although the infringement procedure in question has not yet been formally closed, it has not yet resulted in a reasoned opinion or a referral to the Court of Justice. As has been argued, the Commission's strategy of intervening at an early stage through an infringement procedure can be considered successful, at least in terms of its effects (Piccirilli, 2024, 46). From a legal perspective, however, Poland's decision to cooperate and swiftly amend lex Tusk has left open the question whether the value of democracy and, more generally, the other Union's founding values enshrined in Article 2 TEU can be protected before the Court of Justice through an infringement procedure. In other words, if we take the judgment in the *Portuguese Judges* case as a paradigmatic model, can a link between democracy (or other values) and other provisions of EU law then be established and enforced before the Court of Justice? The answer to this question, which is expected to have far-reaching implications for the vertical division of powers between the Union and the Member States and for the constitutional structure of the Union, is likely to be provided in relation to a Hungarian case. Indeed, in addition to Case C-769/22, which concerns the Hungarian Child Protection Act and is currently pending before the Court (see above), a further infringement proceeding was opened against Hungary on 7 February 2024 in relation to the new Hungarian Law on the Defence of National Sovereignty (INFR(2024)2001). The latter (aka, the 'Sovereignty Protection Law'), which was adopted on 12 December 2023 and entered into force on 22 December 2023, introduced restrictions on foreign funding of political parties and election campaigns and established the so-called Office for the Defence of Sovereignty, with the power to investigate certain activities carried out in the interest of another state or a foreign body, organisation, or natural person if they are likely to violate or endanger the sovereignty of Hungary. In this context, a new criminal offence entitled 'Illegal influence of the will of voters' was also introduced. The main concern underlying the Commission's action is the potential impact of the Sovereignty Protection Law on nongovernmental organizations, in particular those critical of the ruling government (Fidesz), thereby silencing dissent and weakening the role of civil society in democratic discourse. Therefore, as in the Polish case of lex Tusk, the Commission alleged the violation of several provisions of primary and secondary EU law, including the democratic values of the Union, the principle of democracy, and the electoral rights of EU citizens, as well as several fundamental rights enshrined in the Charter, such as the right to respect for private and family life, the right to protection of personal data, the freedom of expression and information, the freedom of association, the electoral rights of EU citizens, the right to an effective remedy and to a fair trial,

including the privilege against self-incrimination and the legal professional privilege. Breaches of the requirements of EU law relating to data protection rules and several internal market rules were also alleged.

What should watchers expect of the ongoing cases? If the future is inevitably uncertain, so too, in principle, is the jurisprudence of the Court of Justice of the EU on the enforceability of the value of democracy and the other founding values of the Union through infringement proceedings. Nonetheless, it should be highlighted that some shadows in this regard have been cast in recent weeks. In particular, two Grand Chamber judgments concerning domestic law restrictions on EU citizens' electoral rights were delivered on the same day (19 November 2024) in the context of infringement proceedings against the Czech Republic (Case C-808/21) and Poland (Case C-814/21). In brief, only Czech Republic and Polish nationals are allowed to join a national political party in their respective countries. As a result, citizens from other EU Member States residing in those countries cannot fully exercise their right to stand as a candidate in local elections and in elections to the European Parliament under the same conditions as nationals of these countries, as required by Articles 20(2)(b) and 22 TFEU. Although the Commission had been aware of these restrictions since the early 2010s (informal discussions with the Member States began in 2010, procedures were initiated in 2012 and 2013, respectively, and reasoned opinions were issued in April 2014 in both cases), these procedures remained dormant for nearly seven years. It was not until December 2020—after the Commission turned its attention to Cyprus' and Malta's investor citizenship schemes—that updates were sought from the Czech Republic and Poland on their domestic laws. Subsequently, in June 2021, the two cases were referred to the Court of Justice, with allegations of violations of Articles 20(2)(b) and 22 TFEU.

The timeline outlined so far in relation to the protection of EU citizenship and associated rights serves as further evidence of the evolving approach of the Commission towards infringement proceeding in the post-pandemic context. Regarding the Court's decisions in cases C-808/21 and C-814/21, it is significant to highlight the Grand Chamber's emphasis on the interrelationships between the value of democracy in Article 2 TEU, the principle of representative democracy under Article 10(1) TEU, which 'gives concrete expression' to the former, and the Member States' obligation to respect the rights of citizens from other EU Member States residing in their countries to stand as candidates in local elections and in elections to the European Parliament under the same conditions as nationals of those States under Article 22 TFEU. This latter provision, in turn, 'gives concrete expression' to Article 10(1) TEU (see, respectively, Case C-808/21, paras 114, 160–163, and Case C-814/21, paras 112 and 157–160).

The significance of the two judgments rendered in *Commission v Czech Republic* (Case C-808/21) and *Commission v Poland* (Case C-814/21) can hardly be overstated and undoubtedly goes beyond the specificities of the national legislation at issue in each case and the civil rights restricted thereby. The judgments equate roughly to a *Portuguese Judges* judgment 2.0. Indeed, the scheme of interaction between sources developed in that judgment has been applied for the first time to the value of democracy: the Court's reasoning has thus been 'transplanted' to a founding value of the Union other than the principle of effective judicial protection, which is an integral aspect of the value of the rule of law. Such an extension (or substitution), which has been advocated in the literature (von Bogdandy & Spieker, 2023), would pave the way for the enforcement of (other) Union values (Schuler, 2024) through infringement proceedings. The ongoing proceedings mentioned above, initiated by the Commission in the post-pandemic scenario, will prove to be a first testing ground for the practical implications of these two judgments. The fact that they were delivered on Thursday 19

November 2024, which is precisely the same day as the hearing before the Full Court in Case C-718/22 (concerning the Hungarian Child Protection Act), may or may not be considered a fortuitous coincidence.

6. Concluding remarks

What does the above analysis suggest? While not amounting to a paradigm shift, the developments analysed above should, at the very least, be understood as a 'spillover effect' of the juridification of rule of law backsliding. In this sense, the analysis validates the understanding of the infringement procedure as 'an instrument for the achievement of a policy, and not solely an essential legal instrument' (1988 Report on Monitoring the Application of Community Law, 6). In line with what was discussed in Section 3 above, the Commission's activity between 2020 and 2024 clearly reflects the approach of prioritising certain infringements over others, in particular those relating to the values enshrined in Article 2 TEU on which the Union is founded, with a particular focus on the value of democracy. The post-pandemic use of the infringement procedure, discussed in Section 4, points to a still emerging but not negligible trend to use this procedure to enforce Member States' obligations related to the democratic principles and the value of democracy that underpin the EU legal order.

Such an approach is likely to be further developed thanks to the 'assist' of the Court of Justice in *Commission v Czech Republic* (Case C-808/21) and *Commission v Poland* (Case C-814/21). These developments have arguably been made possible by the flexibility inherent in the infringement procedure (illustrated in Sections 2 and 3), which has facilitated its evolution over the decades in line with the progress of the European integration process and the consequent transformation of the EU legal order. In line with the 'cooperative' and 'dialogical' approach to the enforcement of EU law advocated by the Commission (see Annual Report 2020, 2 and Annual Report 2021, 3, respectively), the infringement procedure has become something more than the primary mechanism for centralized enforcement of EU law under Article 17 TFEU. In a multilevel system of governance such as that of the Union, it is better understood as a 'procedural framework' within which the Union can promote the values on which it is based, establishing a kind of dialogical conditionality regime, starting with the value of democracy (Piccirilli, 2024, 46–47). We are thus witnessing the emergence of a kind of desirable 'democratic conditionality' (Piccirilli, 2024, 47). These developments can be seen as indispensable legal advancements to protect the necessary preconditions for EU membership and the very existence (and resistance) of the European integration process as a whole (von Bogdandy & Spieker, 2023).

From a legal perspective, however, these developments are based on the scheme of interaction between sources developed in the *Portuguese Judges* case, according to which a provision of primary law (a treaty provision connected to a fundamental right of the Charter) 'gives concrete expression' to one of the founding values today enshrined in Article 2 TEU. In other words, it is this interaction of sources that renders it possible to grasp the enforceable legal content of the Union's founding values, thereby contributing to defining the Union's constitutional identity of which these values form an integral part (see, to this effect, Case C-157/21, *Poland v European Parliament and Council*, para 145). The linchpin of such a hermeneutical technique is the concept of 'concretization' and the consequent selection of the EU primary law provisions to which this concept is to be applied in relation to a founding value of EU law. While reaffirming the utmost importance of ensuring full compliance by Member States with the founding values enshrined in Article 2 TEU and the need to welcome the EU institutions' approach of using the infringement procedure to this end, such a hermeneutical operation is not free of risks. Indeed, this strategic, policy-oriented use of the

infringement procedure may have serious consequences for the vertical division of powers between the Union and the Member States and for the constitutional structure of the Union. It is therefore a truly highly turbulent sea to navigate. Indeed, the risk of being perceived by Member States as a sort of lever forcing them to open up an area of retained competence (and, in certain cases, constitutional identity) to the attentive scrutiny of the Court of Justice seems real. Welcoming the developments in the use of the infringement procedure outlined above, such as the emerging issue of what has been termed democratic conditionality, should not lead us to neglect these related issues.

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The Role of the Commission in Implementing the National Recovery and Resilience Plans, Between Confidentiality and Transparency,
Cristina Fasone, Nicola Lupo

1. Introduction

The adoption of the Recovery and Resilience Facility (RRF) under the Next Generation EU (NGEU) has marked an important discontinuity in terms of inter-institutional relationships compared to the mode of the EU's reaction to the financial crisis (2010–2014) (for its "transformative nature", see Panascì 2024). If the latter was featured by the rise of "new intergovernmentalism" (Bickerton, Hodson and Puetter 2015) – with the dominant position of the European Council, the Council, the Euro Summit and especially the Eurogroup – the response to the COVID-19 pandemic has paved the way to a more blended and innovative set-up. The decisive role of the European Council in forging and sealing the deal on the NGEU cannot be underestimated (Capati and Fabbrini 2023), but the input provided by the European Parliament is also crucial (Fasone 2022; Lupo and Manzella 2024). Most of all, in the management and daily implementation of the RRF, none can question the European Commission's leading role. Moreover, due to the policy areas affected by the NGEU response, unlike the previous financial crisis, it has been argued that "the Commission intervened early, framed the pandemic as a crisis, and set and then expanded the EU's agenda" (Kassim 2023, p. 612).

Since spring 2021, when most National Recovery and Resilience Plans (NRRPs) were duly submitted, the Commission has been the central institution assessing their contents and the fulfilments of reforms and investments, indicated by milestones and targets as the key achievement expected from member states in exchange for EU money. The Commission also reorganised itself early on. On 16 August 2020, months before the adoption of the RRF regulation (Regulation EU no. 2021/241), the Recovery and Resilience Task Force (RECOVER) was established within the Commission's Secretariat-General, an organisational choice that has also been confirmed under the second Von der Leyen Commission. The head of RECOVER reports directly to the president of the Commission's and is supported by a principal advisor and two directorates. Moreover, RECOVER, which is responsible for coordinating the European Semester in addition to the RRF, liaises with the Directorate-General (DG) for Economic and Financial Affairs.[1] The task force supports member states in the drafting of the NRRPs as well as in their modifications, making sure that the common EU priorities are properly reflected in these plans. Additionally, the task force is responsible for assessing its ongoing implementation in a constant bilateral dialogue with the competent national authorities and preparing the necessary actions for the execution and payments under the RRF.[2]

As argued by other scholars (Fasone and Lupo 2024), the RRF has shaped a new "method of government", whereby thanks to a creative interpretation of the legal bases (Articles 122 and 175(3) TFEU; see extensively De Witte 2021; Chamon 2024; Leino-Sandberg and Lindseth 2024) and to the issuance of common debt, performance-based medium-term plans promoting reforms and investments in line with supranational objectives and priorities are also financed by EU resources (see also Dermine 2024 and Fabbrini 2025). The ownership of the NRRPs is national, but the

[1] See the information available on the Commission's website: https://commission.europa.eu/about/departments-and-executive-agencies/recovery-and-resilience-task-force_en (accessed 30 January 2025).
[2] Arts. 10, on payment suspensions, 13, on pre-financing, 20, on the approval of the NRRPs, and 21, on the amendment of the NRRPs, Regulation EU no. 2021/241.

interpretation of milestones and targets is jointly conceived and fine-tuned together by the national governments and the Commission at the level of RECOVER and the relevant DG(s). This is conducted through a systematic exchange of communication and on-site missions to "operationalise" what the conditions and the various conditionality regimes attached to the RRF imply in practice.
Thus, the Commission is the main supranational driver of this new "method of government". How open and accountable is this institution under RRF implementation? This research will focus on the bilateral dialogue between the Commission and the member states in the execution of the NRRPs (Section 2) and on the management by the Commission of the performance-based spending conditionality attached to the RRF to offer an assessment of the level of transparency and confidentiality of these two essential elements (Section 4).

2. Limited procedural transparency: A continuous bilateral dialogue on framing, amending and implementing plans

The core of this new "method of government" is represented by its procedure. The framing of the plans, their modification and their implementation all rely on a constant, generalised and systematic bilateral dialogue, at both the technical and political levels, established between the European Commission, on the one hand, and the institutions and government of each member state, on the other hand.
The involvement of other EU institutions is indeed less central. The Council (in its ECOFIN configuration) is uniquely responsible for the final adoption and subsequent modifications of each plan. For the rest, the Council, through its Economic and Financial Committee, takes part in a consultative function in the assessment of each request for payment (i.e., overseeing the outcome of the activity of the Commission)[3] without having the final word.
The European Council is quoted only in the "whereas" of the RRF regulation (namely, in "whereas" no. 52), in order to specify that one or more member states might bring an issue regarding the implementation of the plans in front of the European Council, "if, exceptionally, one or more member states consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets", so suspending the disbursement for a maximum of three months.[4]
Lastly, the European Parliament, which significantly contributed to conceiving and regulating the mechanism (Fasone 2022; Lupo and Manzella 2024; Gianna 2025), is constantly informed about the whole implementation process, in particular through the "Recovery and Resilience Dialogues", held every two months by the joint BUDG and ECON committees and the European Commission, according to their structure and contents, as provided in detail by Article 26, Regulation no. 2021/241 (on the practice, see Bressanelli, Chelotti and Nebbiai 2023). These Recovery and Resilience Dialogues have regularly taken place during the mandate of the first Von der Leyen Commission, with hearings of the two responsible members of the European Commission for the RFF, Dombrovskis and Gentiloni. However, this is conducted without any involvement of the national parliaments, who are free to oversee and direct the actions of their own executives but tend to lack the vision of the overall implementation process.
This bilateral dialogue between each member state and the Commission is not a new concept, as it has been implemented several times in the past, such as in cases regarding state aid, infringement

[3] See Article 24 Regulation 2021/241. The Economic and Financial Committee is an advisory body to the Council composed of high-level officials from national finance ministries.
[4] Stresses the importance of this "emergency brake". S. Fabbrini 2025, p. 93.

procedures or, within fiscal policy, macroeconomic imbalance procedures. The EU polity consists of several "Euro-national procedures", in which both EU and national institutions are involved and their activity is regulated partly by EU law and partly by national (constitutional) law (Lupo and Manzella 2014; Fasone and Lupo 2016; Lupo and Piccirilli 2017).

The bilateral dialogue regarding RRF implementation is now conducted in a generalised and systematic way, with a high frequency of contact.[5] It directly concerns not, as in the other cases, issues related to EU law implementation or compliance, but national reform policies, including pieces of legislation, as well as national investments; thus, "national" measures, as all those included in the plans, have to be qualified.

As anticipated, bilateral dialogue is required in each phase of the RRF: First, in the framing of the plans, where the submission of the plan can be preceded, upon request of the member states, by an exchange of good practices and technical support under the Technical Support Instruments organised by the Commission and must happen via the Commission;[6] also the assessment of the plan should be carried out by the Commission "in close cooperation with the member state concerned",[7] before proposing it, as an implementing decision, to the Council. Second, in the modification of the plans, since in this case it is up to the member state to make "a reasoned request to the Commission to make a proposal to amend or replace the Council implementing decisions", possibly also here requesting a Technical Support Instrument;[8] in case of rejection on the part of the Commission, the member state has the possibility to present its observations within one month.[9] Third, in the implementation process, regulated in less detail but possibly – for the reasons that will be illustrated below – the most important phase: just a formalized reaction by the member state is foreseen, in case of negative assessment by the Commission, through the usual issuing of its observations within one month from the Commission's negative assessment, but indeed the implementation phase is actually managed by each member state in a close and constant cooperation with the Commission.

The protagonists of this dialogue are within the Commission, particularly within the already recalled RECOVER – the task force that works in close cooperation with the DG for Economic and Financial Affairs and who regularly involves the different DGs responsible for the single policies addressed by the NRRPs to manage the support and assess the activity of all member states.

On the member state's side, the choices have been varied, depending on the form of government and the political and inter-institutional balance in each of them, normally involving the Presidency of the Council of Ministers, the Ministry of Finance and the structure competent for EU affairs, and often establishing more dedicated and specialised units (Zeitlin, Bokhorst and Eihmanis 2024).

The contents of this bilateral dialogue are not made public, but it is easy to postulate that they contribute to co-determining the several legal acts (laws, regulations, administrative acts, directives and guidelines) adopted by national institutions to ensure the implementation of reforms and investments embedded in each plan. At the EU level, the fine-tuning of some elements of this new "method of government", through several documents (named "communication", "report" or

[5] For example, the dialogue at the technical level happens several times each week, and even daily, through online meetings and the exchange of written documents, as well as frequently at the political level, either formally or informally.
[6] Art. 18(5) Regulation 2021/241.
[7] Art. 19(1) Regulation 2021/241.
[8] Art. 21(1) Regulation 2021/241.
[9] Art. 21(3) Regulation 2021/241.

"guidance", often with several annexes each) issued by the Commission[10] and the amendments to Regulation no. 2021/241 by Regulation no. 2023/435 "REPowerEU",[11] took place when the dialogue was already ongoing, and possibly in light of the criticalities that emerged in its first phase.

Such reliance on dialogic and bilateral procedures with each member state certainly has its limits, first of all regarding the marginalisation of national parliaments and territorial governments. It is difficult to determine exactly the magnitude of these effects, essentially because they vary according to the legal order and political and institutional culture of each member state. However, it seems clear that it is extremely challenging for parliaments and regional and local authorities to participate in these dialogues and even to have a clear picture of what is happening, as there is no public account of what is dealt with during these inter-institutional exchanges and negotiations. The only public document is the assessment of the Commission on the satisfactory achievement of milestones and targets, which is published – though not particularly easy to retrieve – for consideration by the Economic and Financial Committee.

Second, another element that has often been presented as a flaw of this bilateral dialogue is the fact that the assessment of the Commission occasionally seems to depend on hidden political evaluations, more than on an objective and transparent analysis regarding compliance with the requirements provided for each milestone and target. Indeed, the relevance of some more discretionary and even political components in the assessment made by the Commission is rather normal, especially given the hybrid nature of this institution (Mendes 2019; see also Wille 2013). This stems from a dialogical procedure established with each member state, which inevitably tends to assume a negotiating aptitude (Verola 2020).

Evidently, in certain cases, especially during the initial steps of the implementation of a complex reform, the Commission may show some flexibility by considering declarations of intent, roadmaps, memorandums of understanding and similar documents. These documents should not be seen as proper substitutes for formal compliance with every element of the milestone – which is evidently required – but as auxiliary and complementary elements. They are used to measure and appreciate the efforts of national institutions to achieve the agreed upon measures and to accompany this effort in the next steps for the fulfilment of the final objectives of the plan. This approach is also permitted by the fact that, regarding the same measure, the Commission has further assessments available and may also make use of all the potentiality of the instrument of the so-called "reversal", which, in case of failure or partial achievement of a milestone/target, allows the Commission to suspend or reduce the payments originally agreed, or even to obtain back the funds already allocated to the concerned member state (Lupo 2023). This decision should also be accompanied by a specific dialogical phase between the Commission and the concerned member state.[12]

3. The search for a shared interpretation of milestones and targets

It is important to consider that the milestones and targets, as defined in the plans, must first be interpreted before implementation and require constant reinterpretation throughout the whole implementation process. This interpretative activity is indeed at the core of the bilateral dialogue,

[10] Among others, see Communication of 21 February 2023; Report of 19 September 2023; Guidance on recovery and resilience plans, 22 July 2024.

[11] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards to REPowerEU chapters in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755, and Directive 2003/87/EC.

[12] See Commission's report of 19 September 2023, Annex II.

with the member state normally asked to say the first word on how it would like to interpret and implement the conditional requirement. Immediately afterwards, it is up to the Commission to informally assess whether it considered this prospected implementation acceptable. In a negative case, the Commission is required to advise and possibly persuade the member state on how to better implement the plan to receive a positive assessment of the "satisfactory achievement" of the milestone or target concerned.

This bilateral dialogue normally brings about a shared interpretation or common understanding of how to implement each milestone and target. However, this is not always the case. In more critical scenarios, direct involvement at the political level – usually informed by the evolution of the bilateral dialogue at the technical level – becomes necessary to resolve disagreements and achieve a balance of the positives and negatives of implementing the different measures included in a single instalment. Wherever problems emerge and persist during the assessment of milestones and targets that possibly undermine the chances of a positive assessment by the Commission, the bilateral dialogue continues even after the submission of the request for payment. The member state is invited to remedy the problems pinpointed by the Commission by amending the reforms or integrating the measures already adopted to implement milestones and targets. A proof of this extra-time, and unforeseen,[13] persistence of the bilateral dialogue, continuing even after the member state has submitted a request for payment, so after it has stated that all the milestones and targets included in that instalment have been satisfactory fulfilled, is offered by the fact that the positive assessments issued by the Commission often quote as "evidence provided" also legal acts and documents issued in a date which is posterior to the date in which the payment request had been sent, and thus could not have been attached to the request for payment in order to support a positive assessment by the Commission.

4. The opaque assessment of performance-based plans: The use of conditionality

The spread of conditionality as a general instrument of EU internal governance is largely dependent on the input provided by the RRF (De Bellis 2024; Fasone and Simoncini 2024). Indeed, under the RRF, multiple conditionality regimes are intertwined (e.g., thematic, macroeconomic and rule of law conditionality mechanisms). The NRRPs are approved through the Council implementing decisions, upon the Commission's proposal, to be further specified in operational arrangements between the Commission and the national government in question to detail milestones and targets in relation to the timetable and until the end of 2026.[14] Milestones are typically related to reforms or complex investments, and targets are usually linked to specific investments or to a single quantitative step within a wider intervention.

According to Article 24(2) of the RRF Regulation, "[u]pon completion of the relevant agreed milestones and targets indicated in the recovery and resilience plan (…), the member state concerned shall submit to the Commission a duly justified request for payment of the financial contribution and, where relevant, of the loan".

If the Commission gives a negative assessment of a milestone or target, it should make a proposal to the Council to suspend all or part of the payments. The Commission specified the methodology for quantifying the partial suspension of the funds almost two years after the RRF regulation's entry into

[13] This "extra-time dialogue" during the phase of the assessment explains why the length of this phase has very often exceeded the timeframe originally provided, according to which the assessment of the Commission should be completed "within two months of the official submission" of the request of payment.

[14] Art. 20, Regulation EU no. 2021/241.

force,[15] which implied that no suspension could be easily determined beforehand. In theory, the unsatisfactory achievement of a single milestone/target should have determined the suspension of the entire instalment. This methodology was devised to calculate the unit values for each milestone and target in the plans and weight them by allocating different coefficients on the basis of their significance within the plans. For example, reforms are generally assigned higher coefficients than investments in what seems to be the political choice of the Commission.

The adoption of a pre-determined methodology for the calculation of suspended amounts, in principle, is able to infuse higher predictability in the procedure and in the review by the Commission. However, the European Parliament has identified significant margins of improvement. In 2023, in the discharge report for the financial year 2021, the CONT committee of the European Parliament commended the Commission's work in implementing this methodology but found that it should be better refined, as the Commission's discretion is too high in applying the correction coefficients and adjustments.[16]

As Rubio pointed out, while decisions to approve payments are subject to a comitology procedure – as they require the involvement of the Economic and Financial Committee[17] – suspension of payments, as well as the lift of suspension, are an exclusive competence of the Commission after hearing the member state concerned (Rubio 2022, p. 12). Such wide discretion is connected to the economic and political risks implicit in the functioning of the RRF. The suspension of payments brings the risk of reputational costs for the Commission, as it might be perceived as a sign of the RRF's shortcomings and affect the fiscal position of the relevant member state on the markets (Rubio 2022, p. 13). Similarly, a too lenient approach towards the member state under review by the Commission in ascertaining the fulfilment of a milestone or target can be risky in that the Commission can be accused of just "ticking the box" without checking that the expected outcome has effectively materialised. Thus, with great powers of the Commission also come considerable responsibilities, as this is the EU institution that can be blamed for the "failure" of the RRF as an EU vehicle to orient domestic reforms and investment for recovery. The European Court of Auditors repeatedly warned the Commission on the completion of national targeted measures and the achievement of RRF objectives.[18] For most member states, the percentage of reforms and investments or of both to be completed by 2026 is close to 50% (Annex IV) and the amount of disbursements carried out does not necessarily reflect the quantity and importance of milestones and targets foreseen in the plans.[19]

The first two cases of payment suspension concerning Lithuania and Romania were specific. First, on 28 February 2023, exactly one week after the publication of the methodology for the suspension of payments, the Commission issued a positive assessment of Lithuania's implementation of the NRRP, thereby giving the green light to the payment of the first instalment, with the exception of two milestones. The milestone concerning tax exemptions and the special tax regime for parliament (Milestone 142) and the one regarding the expansion of environmental taxation (Milestone 144) were

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[15] European Commission, Communication on the Recovery and Resilience Facility: Two years on A unique instrument at the heart of the EU's green and digital transformation, COM (2023) 99 final, 21.2.2023, Annex II.

[16] European Parliament, Committee on Budgetary Control, REPORT on discharge regarding the implementation of the general budget of the European Union for the financial year 2021, Section III – Commission and executive agencies, 3.4.2023.

[17] Art. 24 (4) Regulation 2021/241 cit.

[18] See, for example, European Court of Auditors, Absorption of funds from the Recovery and Resilience Facility Progressing with delays and risks remain regarding the completion of measures and therefore the achievement of RRF objectives, Special Report n. 13, 2024.

[19] Ivi, pp. 86–90.

not considered satisfactorily fulfilled because of the transmission of insufficient information for the positive and conclusive assessment by the Commission.[20] As a consequence, the Commission activated the procedure to suspend the relevant funds under Article 24 of the RRF regulation but did not detect any systemic deficiency and did not encompass any relevant reputational costs.

The second case involved Romania, which, on 16 December 2022, requested the payment of the second instalment for both grants and loans. The Commission found that two milestones (129 and 133)[21] were not satisfactorily fulfilled and, hence, suspended the relevant instalment of the loan on 29 September 2023.[22] Especially in the assessment of milestone 129, however, the Commission relied on the evaluation of the Romanian Audit Authority, which had publicly warned about the lack of accurate domestic control on the compliance of the bids received for construction of new electrolysers capacity with the requirements set by the call for tenders, leading to a breach of the principles of non-discrimination and equal treatment. As the same national authorities disclosed the problem on their own, the Commission only had to account for such an indication and allow the state to fix the problem.

Beyond these first two cases, the following partial suspensions of RRF payments were less straightforward regarding how they were officially reported. While partial payments provide more flexibility, according to the Commission,[23] the mechanism is inevitably subject to more uncertainty. Italy, Spain and Portugal, among the most active member states implementing the NRRPs, as well as Belgium, each received an implementing decision for partial suspension. In the case of Spain, the Commission suspended the payment for Target 201 on the grounds that no evidence was provided by the national authorities on the follow-up to the commitments to devote 30% of the budget (EUR 300 million) to small and medium enterprises in the "Agents of Change" programme.[24]

In the case of Italy, the target was not fulfilled under the payment request for the fifth instalment related to the "chapter" on public procurement, under which several milestones and targets are comprised. The "contested" Target M1C1-85 pertained to Reform 1.10, "Reform of the public procurement legislative framework", and required that "The average time between the contract award and the realisation of the infrastructure ('*fase esecutiva*') shall be reduced at least by 10%". As reported in the implementing decision partially suspending the payment, "the wording of the Council Implementing Decision approving the Italian recovery and resilience plan did not provide sufficient clarity on the methodology to apply for the assessment of the satisfactory fulfilment of this target".[25] Despite this acknowledgement, the Commission confirmed that on the basis of the information provided by the Italian authorities, it was not possible to assess the satisfactory fulfilment of the target, and at the same time, the Italian government communicated its intention to submit a reasoned request to the Commission to amend target M1C1-85 on the basis of Article 21 of Regulation (EU) 2021/241.

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[20] Preliminary assessment of the satisfactory fulfilment of milestones and targets related to the first payment request submitted by Lithuania on 30 November 2022, transmitted to the Economic and Financial Committee by the European Commission C(2023)1516 – 1, 28.2.2023.

[21] Milestone 129 concerns the signature of contracts for the construction of at least 100 MW of new electrolysers capacity, while milestone 133 concerns the signature of contracts for high-efficient gas cogeneration and district heating projects.

[22] Commission implementing decision of 21.9.2023 on the partial suspension of the disbursement of the second instalment of the loan support for Romania, C(2023) 6466 final.

[23] European Commission, Report from the Commission to the European Parliament and the Council on the implementation of the Recovery and Resilience Facility, COM (2024) 474 final, 10.10.2024, p. 8.

[24] Commission Implementing Decision of 19.7.2024 on the partial suspension of the disbursement of the fourth instalment of the nonrepayable support for Spain, C(2024) 5185 final, 19.7.2024, p. 2.

[25] Commission Implementing Decision of 26.7.2024 on the partial suspension of the disbursement of the fifth instalment of the nonrepayable support for Italy, C(2024)5547, 26.7.2024, par. 11.

From an external perspective, the premises and outcomes of the Commission's assessment remain obscure to the average citizen and can probably be justified by the request *ex post* of the national authorities to amend the NRRP on the missed target missed. It seems that a shared interpretation of the concerned target could not be achieved and so it was agreed, in the bilateral dialogue between the Commission and the member state, to amend it in order to frame it differently, through an amendment aimed at reaching a clearer formulation.

Not particularly transparent to the reader is the Commission's assessment of the request for payment of the third and fourth instalments by Portugal.[26] For two of the concerned milestones, in particular, which the Commission did not consider satisfactorily fulfilled, it is not entirely clear what the Commission's allegations were. To fulfil Milestone 1.12, Portugal published Decree Law No. 103/2023 to establish a new full dedication work regime in the national health service. As the decree law was published but had not yet entered into force, it was sufficient to conclude that the milestone was not fulfilled.[27] By the same token, Milestone 6.15, requiring entry into force of the law on regulated professions, was not considered fulfilled. Portugal had "amended Law No. 2/2013, of 10 January, which determines the establishment, organisation and functioning rules applicable across the 20 professional public associations (professional public associations framework law), and Law No. 53/2015, of 11 June, which establishes the rules on creation, organisation and functioning of business services firms that carry out the professional activities regulated by the professional public associations (business firms framework law)". However, the statutes of each professional public association were not changed, which was sufficient for the Commission to reach its conclusion.

Similarly, the preliminary assessment of the Commission on the lack of satisfactorily fulfilment of Milestone 157 of the Belgian NRRP is striking.[28] The milestone referred to Reform R-4.07, which required a proposal to be submitted for approval to the Council of Ministers of the federal government to reform and improve, among other things, the financial and social sustainability of the pension regime. Not only was the proposal submitted, but it was also approved by Parliament and published in the Official Journal. However, in contrast to Belgium's claims that the reform would have triggered a projected decline in pension expenditure by 2070, the Commission considered that the data showed an expected increase in pension expenditures. Perhaps the timing of the assessment did not help, as the bilateral dialogue took place with a resigned government, while the negotiation for the formation of the new Belgian government was ongoing.

The severity of the Commission's assessment of Portugal and Belgium in these cases runs in stark contrast to the way in which the request for payment of the first instalment to Poland was treated. On 29 February 2024, the Commission gave the green light to the first payment request submitted by Poland, whose plan had, as a pre-condition, the fulfilment of two "super milestones" meant to

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[26] Commission Implementing Decision of 22.12.2023 on the partial suspension of the disbursement of the third and fourth instalments of the non-repayable support for Portugal, C(2023) 9289 final, 22.12.2023. The suspension was subsequently lifted: see Commission Implementing Decision of 26.7.2024 amending Commission Implementing Decision (C2023) 9290 of 22.12.2023 on the authorisation of the disbursement of the third and fourth instalment of the nonrepayable support and the third and fourth instalment of the loan support for Portugal.

[27] Indeed, according to Art. 169, section 1 of the Portugues Constitution, save for those passed in the exercise of the Government's exclusive legislative competence, executive laws [i.e., decree laws] may, upon a motion made by 10 Members of the Assembleia da República within the 30 days following their publication, excluding periods in which the Assembleia da República's proceedings are suspended, be subjected to consideration by the Assembleia da República with a view to causing them to cease to be in force or amending them.

[28] Commission Implementing Decision of 16.9.2024 on the partial suspension of the disbursement of the first instalment of the nonrepayable support for Belgium, C(2024) 6557 final, 16.9.2024.

strengthen the independence of the judiciary, reforming the mechanism and procedures for disciplinary measures for judges. The satisfactory achievement of those "super milestones" was considered completed upon the presentation of an action plan by the new government on 20 February 2024 for the restoration of the rule of law in the country, without the effective implementation of any measures.[29] Evidently, the Commission's decision had a clear political value to support the efforts of the new government in office since December 2023, when the payment request was filed, to carry out a particularly troublesome "transition 2.0" (Bobek et al., eds., 2023) to constitutional democracy that could never be accomplished just in a few weeks. However, the doubt of the existence of a "double standard" is patent and would probably require the Commission to better and more clearly explain its position. In general, the arguments and reasoning of the Commission when assessing the implementation of milestones and targets are at times vague. Occasionally, the assessments seem to rely on the promise and assurance by the member state that the objective will be met in the near future rather than on the real fulfilment of the target. On other occasions, as the Belgian example shows, the adoption of the expected measure is not considered sufficient, and the Commission contests the figures put forward by the national authority in support of their claim.

Regarding the functioning of the RRF and the role of the Commission, it should be further stressed that the participation of the member state in the mechanism is voluntary. No member state was obliged to transmit an NRRP, implement the plan or ask for payments. Payment requests may be submitted by the member states to the Commission twice a year (i.e., not more frequently), but it is possible, and often the case, that a payment request is delayed. A payment request can be filed as per the Commission's methodology, even if not every milestone or target is satisfactorily fulfilled. In these circumstances, the Commission proceeds with a partial payment of the instalment and a six-month suspension procedure starts. The relevant member state has six months to take the necessary measures and address shortcomings to ensure satisfactory fulfilment. Article 24(8) of the RRF Regulation highlights that if the six-month suspension elapses without the state having remedied the lack of fulfilment of the target or milestone, the relevant resources assigned can be withdrawn. This has happened in at least two cases. After the suspension, the situation of Lithuania and Romania was reviewed, and the Commission found that both states had satisfactorily fulfilled one of the missing milestones but not the other. Consequently, the Commission reduced the financial allocation for Lithuania by EUR 8.7 million and the overall loan amount available to Romania by EUR 10.77 million. Moreover, on the occasion of the Commission's assessment of the third payment request by Romania, the Commission found that six milestones were not satisfactorily fulfilled for the time being and hence proceeded to the partial suspension once again.[30]

The strategy that a member state can use with payment requests can either be oriented to regularly ask for payments every six months, even though not every target or milestone is properly fulfilled while also considering the time horizon of 2026 (as was the case in Italy in 2024). Alternatively, due to the risk of seeing part of the funds withdrawn in the case of continuous unfulfilment of one or more conditions, many member states refrain from asking for payments every six months and/or in parallel request amendments to the NRRPs. This is particularly evident in the case of Austria, Finland,

[29] See Ministry of Justice of the Republic of Poland, European Commission unblocks funds for Poland from the National Recovery Plan, 1 March 2024, https://www.gov.pl/web/justice/european-commission-unblocks-funds-for-poland-from-the-national-recovery-plan

[30] European Commission, Commission endorses preliminary assessment of Romania's third payment request under the Recovery and Resilience Facility Press release, 15 October 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5242.

Germany and the Netherlands, which are still in the early stages of implementation (with just one instalment paid each at the end of 2024). However, the PNRRs have been amended by almost every member state well beyond the need to incorporate a REPowerEU chapter.
As has also occurred with other funds (e.g., cohesion funds), member states may prefer to resort to "self-suspension" mechanisms instead of asking for payments (or reimbursements) in order not to be blamed for the lack of fulfilment of milestones and targets (see Viță 2017 and 2024). Another trend is the stretching of the deadline for completing the assessment. The Commission often agrees with the concerned member state on a longer timeframe than the two months foreseen by Article 24.3 Regulation 2021/241, thus allowing the member state to complete and integrate the measures required by milestones and targets based on the first indications coming from the informal assessment started by the Commission.

5. Conclusion

As the system of "integration through funding" becomes more widespread following the RRF (De Witte 2023), questions arise regarding the discretion of the European Commission as the supranational key actor in the implementation of the facility and the openness and transparency of the procedures it conducts for this purpose.
The bilateral dialogue that oversees the implementation of the various milestones and targets of the NRRPs is inherently opaque. Representatives of national governments and officials of the Commission meet in camera for in-depth technical exchanges aimed at fostering a shared interpretation of the NRRPs' milestones and targets. Procedures open to the public would possibly never succeed in finding a compromise and a synthesis of the various interests at stake. On the one hand, member states hope to receive the resources to continue the implementation of reforms and investments; on the other hand, the Commission aims to support the responsible use of common resources throughout the EU.
The outcome of the Commission's assessment, however, could be better grounded and justified. First, it is challenging to find the actual legal acts underpinning the Commission's decisions, certainly not on the Recovery and Resilience Scoreboard website, which only publishes press releases. Second, when the implementing decision is retrieved, it is difficult to understand the actual reasons substantiating the Commission's conclusion. This is the case even when the Commission considers the assessment of a milestone not satisfactorily fulfilled. Third, beyond the payment suspension methodology, which orients the Commission's work in quantifying the amount of funds to be suspended or reduced, the qualitative dimension of the assessment is weak as to how it is reported.
As the way the procedure is managed is eminently political and also dependent on the peculiar situation of the member states, national governments may adjust their strategies accordingly, either opting to suspend themselves from asking for payments twice a year, to amend the NRRPs, or to abide by the timeline, regularly submitting payment requests even at the risk of the suspension or withdrawal of funds.
Given the limited role of the European Parliament in the implementation of the RRF and despite the Recovery and Resilience Dialogues (Fromage and Markakis 2022), there is little supranational democratic scrutiny that could shed light on the Commission's activity on the RRF and on the rationale for its decisions (De Bellis 2024). The way conditionality regimes are implemented in other fields has already been subject to criticism (Baraggia and Bonelli 2022; Fisicaro 2022). At the same time, the role of the European Court of Auditors, which subjects the Commission to intense scrutiny, is more directed towards accounting for the use of EU money and the clarity and pace of RRF

expenditures. However, especially because the NRRPs are financed through EU resources retrieved through common borrowing, citizens should know how these funds are used and why the Commission provides a certain assessment of the fulfilment of milestones and targets.

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The protection of the EU financial interests through the Rule of Law, or vice versa?,
Alessandro Nato

1. Introduction

The response to the pandemic introduced an innovative method of governance for dealing with crises by European Union (EU) institutions into the EU legal system (Fasone & Lupo, 2023, 3–25; Lupo, 2022, 729–755), which gave rise to the creation of a new useful instruments for financing new EU policies. These tools have a certain common characteristic; namely, they use common debt to finance supranational policies to implement so-called European public goods, such as those of a social, environmental, or digital nature.

First and foremost, this process may be traced in the facility used to cross-subsidize unemployment benefit schemes through common debt in the acute phase of the pandemic: the so-called Support to mitigate Unemployment Risks in an Emergency (SURE). However, the main example of change is the Next Generation EU (NGEU), a programme that exemplifies how the entire collective of European institutions is committed to promoting economic and social cohesion while averting the breakdown of European economies due to the pandemic (Panascì, 2024, 13–54; Fabrini, 2022, 2; Steinbach, 2022, 329–362; De Witte, 2022, 3–18; Leino Sandberg, & Ruffert, 433–472; Lupo, 2022, 729–755). The EU's new economic governance model has been developed through a complex set of regulations and decisions, among which Regulation (EU) No. 2020/2094, which determines the NGEU budget as well as the allocation of resources among the different funds that make up the programme, is particularly important. This regulation complements Regulation (EU) No. 2021/241, which created the so-called Recovery and Resilience Facility (RFF). The legal basis for the NGEU is Article 122(2) TFEU, and several instruments of sectoral legislation, particularly the RFF Regulation, govern the process by which Member States access new European funds.

Regulation (EU) No. 2021/241, establishing the RFF, was based on Article 175 TFEU, which highlights a broader trend in European economic policymaking aimed at leveraging cohesive policy expertise to finance European public goods.

Within this framework, the resources to finance EU policies have been considerably increased. Overall, NGEU interventions are budgeted at 750 billion euros, an amount that is in addition to the funds in the Union's multiyear budget; these funds are aimed at supporting recovery, making the Union's economy more resilient, and financing European public goods such as gender equality and a green and digital transition. The resources raised under the NGEU are not classifiable as 'own' resources and, as a result, are not entered into the EU's multiyear EU budget; rather, they fall under 'other revenue' and are thus 'off-budget'. The programme, divided between loans and grants, is fully financed through the issuance of bonds on the financial markets by the Commission, and the bonds constitute common European debt. The bonds are to be repaid starting in 2028 through the EU budget—essentially, through the introduction of new 'own' resources. How the debt is to be raised and paid has led to the identification of the implementation of the NGEU as a monumental development, capable of pushing the supranational order in a direction common to federal fiscal systems and overcoming the original asymmetry between the economic and monetary spheres (Fabbrini, 2022, 2). Through the NGEU, the Union has acquired the ability to stabilize the macroeconomic cycle by intervening with additional resources for sustainable economic growth (Schramm, Krotz, & De Witte, 2022, 114–121).

The increase in resources and the differentiation of financing instruments, including the production of substantial joint debt that has required considerable political effort, at the Union's disposal to finance supranational policies means that EU institutions and Member States are paying greater attention to the protection of the Union's financial interests (Article 325 TFEU). Moreover, the Union legal system is facing a decade-long crisis of the rule of law. Alongside the transformations triggered by the new economic governance model, the process of changing the relationship between institutions and the promotion of certain policies has been accelerated by the initiatives introduced by the EU to reverse rule of law backsliding. In fact, the pandemic crisis intersected with the crisis of values that has affected the rule of law, specifically in Poland and Hungary.

In this context, the proper functioning of the EU legal system is vital in order to strengthen the link between financial interest protection and rule of law protection. Indeed, in the postpandemic economic recovery phase, the link between principles and values is being strengthened. An examination of recent EU rules, NGEU conditionality criteria, and recent case law of the Court of Justice reveals increasingly close cooperation between the rule of law and EU financial interest protection, with said cooperation useful for safeguarding both principles. On the one hand, the protection of EU financial interests is a useful means of restoring the rule of law in the European supranational legal system. On the other hand, the rule of law is one of the main tools enabling the protection of EU financial interests.

It is thus appropriate, considering the foregoing discussion, to pose the following research question: *Are EU financial interests protected through the rule of law, or vice versa?* Starting from this question, this paper aims to assess whether it is possible for to be true. The paper assesses, in the second section, how the rule of law is used to protect EU financial interests, with this representing an end goal. In the third section, the essay focuses on how the protection of the financial interests of the Union can be a *means* to restore the rule of law in the EU and not just an end. Based on this analysis, the paper explicates the degree of relationship between these two founding principles of the European supranational order and how effective the relationship between the two is, with further assessment of whether one of the two is in danger of falling into the role of a servant principle over time. This study will be developed by examining, first and foremost, how and to what extent the rule of law is a means to the end of protecting the EU's financial interests. In this regard, the research focuses on the new EU economic governance model, namely that between the NGEU and conditionality, and Regulation 2020/2092. Second, the paper evaluates how and to what extent the protection of the EU's financial interests acts to enable the EU legal system to restore the rule of law in Member States affected by the process of rule of law backsliding. In this regard, the research focuses on the study of the European Public Prosecutor's Office (EPPO), how this supranational body relates to national legal systems, and the recent case law of the EU Court of Justice. The last section outlines the conclusions of the above analysis.

2. Protection of EU financial interests through the rule of law

The protection of the financial interests of the EU, as well as an important general principle of the Union's legal system under Article 325 TFEU, has become a central issue in the process of European integration since the creation of the NGEU. Indeed, the exponential increase in economic resources to finance European policies has prompted the Union's institutions to pay more attention to the protection of European funds.

Before examining the principle of EU financial interest protection, it is worth clarifying what EU law means by 'EU financial interests'. Supranational law uses a broad notion of the financial interests of

the Union, which includes—according to Article 2(1)(a) of Directive 2017/1371—all revenue, expenditures, and assets that are covered or acquired or due under, on the one hand, the Union budget. On the other hand, it includes all revenue, expenditures, and assets that are covered or acquired or due by virtue of the budgets of institutions, bodies, offices, and agencies of the Union established by virtue of the Treaties or budgets directly or indirectly managed and controlled by them. It follows from these provisions that the financial interests of the Union include both the resources managed by the European institutions and national authorities derived from the Union budget—that is, the instrument through which the EU transforms its policies into concrete actions (Laffan, 1997)—and those managed by the various supranational bodies and agencies.

The principle of protecting EU financial interests is codified in Article 325 TFEU. This provision stipulates that the Union and the Member States shall combat fraud and other illegal activities affecting the financial interests of the Union itself by adopting measures in accordance with this Article, which shall be dissuasive and implemented to afford effective protection in the Member States and in the institutions, bodies, and organs of the Union. Moreover, the protection of EU financial interests requires that Member States adopt the same measures to fight against fraud involving EU funds as they take to fight against fraud jeopardizing their own financial interests (Article 325(2) TFEU). Therefore, EU institutions and Member States must work together to protect the financial interests of the Union. Member States are to coordinate action to protect the Union's financial interests against fraud. To this end, they shall organize, together with the Commission, close and regular cooperation between the competent authorities (Article 325(3) TFEU). In addition, the European Parliament and Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of preventing and combating fraud affecting the Union's financial interests, with a view to achieving effective and equivalent protection in all the Member States and in the institutions, bodies, and organs of the Union (Article 325(3) TFEU).

The renewed framework of economic governance and the increase in EU financial resources prompted the EU institutions to increase the number of tools available to protect EU financial interests, especially in the face of the rule of law crisis in some Member States that were receiving substantial EU funds, with consideration given to the need to ensure greater effectiveness of the principle inscribed in Article 325 TFEU. In fact, the EU institutions consider the rule of law crisis as a major risk, with potential to undermine the EU's financial interests. This was emphasized by the Court of Justice in Case C-157/21 concerning Regulation 2020/2092, an essential instrument for protecting EU financial interests. In that case, specifically in paragraphs 137 and 138, the Court opined that the rules of Regulation 2020/2092 are adopted to protect the EU budget—thus, the EU's financial interests—from harm to the latter, where the harm would be sufficiently and directly the result of violations of the principles of the rule of law in a Member State; sanctioning such violations is not the principle aim. According to the Court of Justice, this purpose is consistent with the requirement that the EU budget be implemented in accordance with the principle of sound financial management, provided for in Article 310(5) TFEU and a requirement that is applicable to all the provisions of Title II of Part Six of the TFEU concerning the implementation of the EU budget and, therefore, to Article 322(1)(a) TFEU.

Considering the preceding point, the conditionality mechanisms included in the Recovery and Resilience Facility (RRF), and the adoption of Regulation 2020/2092, are among the tools that can ensure the protection of financial interests from the risks stemming from the rule of law crisis.

Associated with this mechanism is the system of conditionalities found in the RRF (Baraggia & Bonelli, 2022, 131–156). Two types of conditionalities relate to the rule of law and contribute to the protection of the EU's financial interests. The first is the so-called positive conditionality. Article 4 of the RRF provides EU funds in exchange for reforms by Member States that mitigate the consequences of the postpandemic economic crisis and develop policies related to green and digital transitions. Thus, based on Article 4 of the RRF regulation, one might argue that the rule of law dimension is not covered. However, the positive conditionality contained in the RRF links the value of rule of law with the protection of financial interests. The reforms called for by the European Semester for the granting of RRF funds include strengthening the resilience of national institutions through new reforms to combat corruption and improving the quality of the legislative process, judiciary, and public administration. National recovery and resilience plans (NRRPs), upon which the granting of EU funds is contingent, must be implemented in accordance with the principle of sound financial management (recital 40 and art. 22(1) of the RRF Regulation). This principle requires that NRRPs include a system to prevent, discover, and correct corruption, fraud, and conflicts of interest when national authorities use RRF funds. In addition, these plans are to include reforms and investments to increase the efficiency, quality, and independence of the judiciary. Other reforms are to include investments in more efficient anticorruption policies and fraud prevention measures by, for example, improving and strengthening the legal and institutional anticorruption frameworks, fighting money laundering, combating tax fraud, and limiting the use of cash in large transactions. In addition, macroeconomic interventions conducted through positive conditionality allow for the protection of EU financial interests to be impacted through the restoration of the rule of law (Fromont, 2024, 4). The European Commission highlighted how, in the context of the European Semester, European institutions can act preemptively. The Country Specific Recommendations (CSRs) promoted in this framework make it possible to implement measures related to the quality and transparency of the legislative process, the principle of legal certainty, and the efficiency and independence of judges—that is, all aspects related to the rule of law that are essential to the protection of the EU's financial interests.

Member States are also subject to negative conditionality measures, meaning that they are exposed to financial penalties if they violate the rule of law principle when using European funds. Specifically, sanctions are applied if a Member State fails to implement NRRPs and if they violate the principle of sound financial management. Regarding the first case, according to Article 24(6) and (8) of the NRRP, the European institutions can suspend or terminate the funding programme if the Member State fails to implement the promised reforms and investments. In fact, under Art. 24(6) RRF, if it appears, per the Commission's assessment, that the targets and objectives set out in the Council Implementing Decision approving the NRRP submitted by the Member State have not been satisfactorily met, payment of all or part of the financial contribution and, where applicable, of the loan shall be suspended. Such suspension shall be lifted only when the Member State concerned has implemented the necessary measures to ensure satisfactory achievement of the targets and objectives set out in the Council implementing decision. However, in accordance with paragraph 8 of Article 24, RFF, "if the Member State concerned has not implemented the necessary measures within a period of six months after the suspension, the Commission shall proportionately reduce the amount of the financial contribution and of the loan, where applicable, after having given the Member State concerned the opportunity to submit its rebuttal within a period of two months from the communication of its findings".

In the second case, we move to Regulation 2020/2092 (Kolling, 2022, 1–14; Fisicaro, 2022, 334–356; Baraggia, 2022, 41–56; Lacny, 2021, 79–105), which first notes how the notion of the rule of law in EU law is codified for the first time in an act of secondary legislation adopted to protect EU financial interests. According to Article 2 of Regulation 2020/2092, it is possible to define rule of law as follows:

> It includes the principles of rule of law, according to which the legislative process must be transparent, accountable, democratic and pluralistic; legal certainty; prohibition of arbitrariness of executive power; effective judicial protection, including access to justice, by independent and impartial courts, including about fundamental rights; separation of powers; nondiscrimination and equality before the law. The rule of law is to be understood in the light of the other values and principles of the Union enshrined in Article 2 TEU.

Violation of any of these constituent elements of the rule of law may result in the imposition of financial penalties according to the procedures set forth in the mechanism of Regulation 2020/2092. According to Article 4 of this regulation, sanctions may be imposed if at least one of the elements of the rule of law is violated in a Member State. In addition, the violation must be attributable to an authority of the Member State and seriously affect the protection of the financial interests in a 'sufficiently direct way'. According to Article 3 of Regulation 2020/2092, threats to the independence of the judiciary, or failure to prevent, rectify, or sanction arbitrary or unlawful decisions made by public authorities, including law enforcement agencies, failure to allocate financial and human resources to the detriment of their proper functioning, or failure to ensure the absence of conflicts of interest may be indicative of violations of the principles of the rule of law (Baraggia, 2022, 608). Among such violations, included in the rule under consideration, are limiting the availability and effectiveness of remedies by, for example, adopting restrictive procedural rules and failing to enforce judgments or limit the effectiveness of investigations, prosecutions, or sanctions for violations of law. If such violations are discovered, sanctions may include the freezing of EU funds provided from the EU budget to the Member State. This mechanism allows for procedurally swift adoption of these sanctions, and this is because the protection of financial interests requires swift action so that EU funds are not used for purposes other than those for which they are intended, for fraud, or to fuel corruption within the Member States (Staudinger, 2022, 721–737).

Analysis of the conditionality in the RRF and Regulation 2020/2092 suggests that these rules demonstrate the capture of the content of the rule of law within the gravitational field of the principle of protection of financial interests (Maffei, 2024, 4). In fact, rather than the rule of law being given an economic character (Fromont, 2024, 8), that is, as a principle supporting growth through investment protection, the conditionality mechanisms and Regulation 2020/2092 demonstrate the capture of the rule of law in the gravitational field of the principle of the protection of EU financial interests. Strengthening the judiciary, combating fraud, fighting corruption and conflicts of interest, and restoring the independence of judges are functional—and indispensable—elements of the protection of the EU's financial interests. Hence, the rule of law is the subordinate instrument—the means—for promoting the protection of the EU's financial interests, an aim which rises to the status of the main purpose of the described structure. That is, the protection of the financial interests takes place through the rule of law and not vice versa. This framework may lead to dissenting situations. The rule of law having an ancillary role to the protection of financial interests may lead to a resurgence of the phenomenon of dissent from the EU by the EU citizens and national authority.

Some evidence points to the fact that there is mutual support between the rule of law and the protection of financial interests. From this perspective, it is possible to answer the research question at the heart of the paper: The road goes both ways, with the rule of law and protection of financial interests being mutually supportive pillars. The next section addresses this further.

3. Protection of the rule of law through the principle of protecting the financial interests of the EU: mutual assistance between the two principles

There is a mutually supportive relationship between the rule of law and the protection of the EU's financial interests. In the previous section, we saw how the rule of law contributes to the protection of the EU's financial interests. In this section, we carefully study how the principle of protecting the financial interests contributes to the protection of the rule of law. Three arguments can be put forward in support of this thesis: These concern the impact of negative conditionality and the 2020/2092 mechanism on the process of rule of law backsliding; the effect on the rule of law of the Court of Justice's jurisprudence concerning the protection of the EU's financial interests; and the collaboration of the EPPO and national judiciaries as a prime indicator of the autonomy and independence of the judiciary of Member States. We turn to these three topics below.

Let us start by examining the first topic, which concerns the effects of negative conditionality under Article 24 of the RRF Regulation and the mechanism provided by Regulation 2020/2092. Criticisms have been raised in the literature regarding the effects of this type of negative conditionality (Hegedus & Christiansen, 2024, 235). Concerning aspects are evident in the Hungarian case. Concerns for judicial autonomy were central to the suspension of the Hungarian RRF and cohesion funds. Thus, reforms aimed at restoring judicial freedom were widely cited both among the 27 steps of the NRRP and among the Commission's demands to fulfil the horizontal enabling conditions listed in the Common Provisions Regulation.

The European Commission recently conducted a review that resulted in a significant fine of 10.2 billion EUR. During this process, it was acknowledged that Hungary had made progress in meeting two required criteria, although not entirely. However, what followed is particularly noteworthy: the Commission decided to unblock one of the funding channels allocated to Hungary, while withholding the other. This decision was made at the Commission's discretion, without clear guidance on the specific criteria that informed it This lack of transparency and the ambiguities surrounding the unblocking process, coupled with the suspicious timing of the decision's publication, raise doubts. Some might even argue that the Commission succumbed to political pressure or "blackmail" from Hungary or other involved parties. This highlights a broader issue: the rule of law conditionality mechanism under the Recovery and Resilience Facility (RRF) regulation appears unclear and highly influenced by political considerations. Its implementation is far less predictable than one might hope, as it seems to rely significantly on the political discretion of European institutions rather than on objective and transparent criteria (Hegedus & Christiansen, 2024, 235).

The Polish case, however, is more auspicious regarding the effective impact of the rule of law conditionality. The case of Poland after the outcome of the elections on 15 October 2023 is exemplary. In that case, a connection was found between the payment delays, the subsequent no implementation of the RRF, and the weakening of the government team led by Morawiecki and the Law and Justice party (PIS) The elections resulted in a relative majority of seats for the PIS, which was not enough to form a coalition supported by a majority of Members of Parliament and consequently a change in the leadership of Poland. Scholars have observed that voters in Poland, as well as in the other Member States, are generally much more sensitive to the actual receipt of financial resources than to criticism

or infringement proceedings concerning pure respect for the rule of law (Lupo, 2024, 257; Wójcik, 2023, 40).

In addition, considerations regarding the applications of the 2020/2092 Regulation support the argument regarding the positive effect that conditionality has on the rule of law. Compared to the unsuccessful application of the Article 7 TEU procedure, the 2020/2092 mechanism can be more easily triggered and serve as an intervention tool to protect the financial interests and push Member States to re-establish the rule of law within their own systems.

In regard to the second topic, the recent rulings of the Court of Justice of the EU are worth examining. In *Lin*, C- 107/23, PPU, which is the natural continuation of Saga Taricco, the Court's recent judgment held that, to combat fraud affecting the EU's financial interests effectively, it is necessary to apply national provisions on the limitation of criminal proceedings to make it possible to prevent and prosecute fraud effectively. The national courts are therefore under an obligation to disapply national rules or case law giving rise to a systemic risk of impunity for offenses of this kind. In this judgment, the Court of Justice addressed the question of the limits of the primacy of EU law at the interface between the protection of the EU's financial interests, the principle of the rule of law, and the principle of legality in criminal matters. Of particular interest for our examination is what the European courts have to say with respect to the principle of legality.

In this regard, both in the legal system of the Union and in national legal systems, the principle of the legality of crimes and punishments is of great importance, in terms of its requirements concerning foreseeability, determinacy, and the nonretroactivity of the applicable criminal law (C-107/23, para. 113. See also, in this sense, ECJ, 5 December 2017, M.A.S. and M.B., C42/17, para. 51).

These requirements of foreseeability, determinacy, and the nonretroactivity of criminal law constitute a particular expression of the principle of legal certainty. Indeed, the European courts affirm that this fundamental principle of Union law requires, on the one hand, that the rules of law be clear and precise and, on the other hand, that their application be foreseeable for the subjects of the system, particularly when they may have unfavourable consequences. This principle constitutes an essential element of the rule of law, which is identified in Article 2 TEU as both a founding value of the Union and a value common to the Member States (C-107/23, para. 114. See also, in this sense, ECJ, 28 March 2017, Rosneft, C-72/15, paras. 161 and 162, and 16 February 2022, *Hungary v Parliament and Council*, C-156/21, paras. 136 and 223).

In the *Lin* case, in initially ruling that the Romanian legislature had violated the constitutional principle of foreseeability and determinacy of criminal law by allowing procedural acts to interrupt the statute of limitations for criminal liability even in cases where such acts had not been communicated to the suspect or defendant, the Romanian Constitutional Court applied a national standard of fundamental rights protection intended to complement the protection against arbitrariness in criminal matters as offered by EU law, based on the principle of legal certainty. It also applied such a national standard of protection of fundamental rights when it later found, in essence, that the failure of the Romanian legislature to replace the provision of the Penal Code relating to the interruption of the term that had been declared unconstitutional had resulted in a new situation lacking clarity and predictability, in violation of that constitutional principle (C-107/23, para. 115).

The Court of Justice of the European Union (CJEU) emphasized the importance of protecting individuals from arbitrary legal measures, both within the EU's legal system and in the legal systems of its Member States. In its judgment of 5 December 2017 in the M.A.S. and M.B. case (C-42/17, EU:C:2017:936), the Court addressed this principle extensively, particularly in paragraphs 58 to 62.

In that ruling, the Court highlighted those certain fundamental legal principles—such as the foreseeability, clarity, and nonretroactivity of criminal law—are essential. These principles include respect for statutes of limitations, which define the time limits within which criminal offenses can be prosecuted. The Court ultimately decided that a national legal standard aimed at upholding these principles could, under specific circumstances, take precedence over EU law obligations. Specifically, in the M.A.S. and M.B. case, this meant that national courts were not required to disapply their national rules on limitation periods, even if doing so would undermine the EU obligation under Article 325(1) and (2) TFEU. That article requires Member States to ensure the imposition of effective and dissuasive penalties in cases of serious fraud affecting the Union's financial interests. This decision was significant because it acknowledged that national standards protecting fundamental legal principles, such as legal certainty and nonretroactivity, could sometimes outweigh the EU's objective of combating fraud. However, it also raised concerns because the application of national limitation rules meant that, in a considerable number of cases, serious fraud offenses might go unpunished (C-107/23, para. 116). In summary, the CJEU balanced the need for effective enforcement of EU financial interests with the need to respect fundamental rights and principles within national legal systems. This decision underscores the complexity of reconciling EU law with Member States' legal traditions and standards.

This shows how the Court of Justice, by intervening to protect the financial interests of the EU, strengthens and protects the founding elements of the principle of the rule of law. In so doing, the Court counteracts the process of rule of law backsliding by contributing to the preservation of the rule of law in the Member States and, consequently, in the EU legal system.

The third topic concerns the functioning of the EPPO. The protection of the EU’s financial interests has become a central issue in the pursuit of the European integration process. The protection of European financial interests is also an important tool for restoring proper respect for the rule of law in the EU’s multilevel governance system. Indeed, the European institutions aim to monitor the proper use of European funds and to intervene in cases of mismanagement. In the latter cases, the institutions provide for the recovery of the sums paid out. In so doing, however, they may also exert pressure on national governments to enforce the rule of law in national legal systems. In fact, such a system, by guaranteeing continuous monitoring of the internal mechanisms and actions of the national executives responsible for the management of European funds, allows for not only the proper functioning of the management of funds to be restored but also respect for fundamental values. In this regard, it is worth examining two key EU bodies for the protection of EU financial interests, which, considering the policy against rule of law backsliding promoted by the European institutions over the past decade, can play a first-order role in achieving this goal. Reference is made to the European Anti-Fraud Office (OLAF) and particularly the EPPO. Deferring the analysis on OLAF to what has been examined in the literature (Nato, 2024, 121; Groussot & Popov, 2010), we focus below on the EPPO.

The EPPO is an unusual example of increased EU collaboration (Bellacosa & De Bellis, 2023, 15). Indeed, 22 EU Member States currently participate. Hungary remains outside this enhanced cooperation. The EPPO is equipped and empowered to engage in an in-depth dialogue with the judicial systems of the Member States and to function, daily, as an independent and autonomous entity, separate from the managing bodies of funds and from internal managers. In this respect, the work of the EPPO can serve as an early warning signal of the erosion of the values enshrined in Article 2 TEU in national legal systems. Although there remain some tensions between the EPPO and rule of law–related questions pertaining to procedural acts intended to produce legal effects vis-à-vis third parties, the Court of Justice should provide clarification with its forthcoming ruling on Case C-

292/23, and the EPPO remains an important instrument for safeguarding the rule of law through the protection of the EU's financial interests. The creation of the EPPO is intended to overcome the previous level of integration, which was based on the need to apply judicial measures beyond the borders of the territory in which they were issued. Conversely, with the advent of the EPPO era, the identification, prosecution, and indictment of perpetrators and accomplices of crimes within a jurisdiction will be carried out on the basis of a single set of rules and by means of decisions with immediate effect, that are capable of direct enforcement, and that therefore are not subject to recognition by national authorities (Lopez, 2021, 703).

This is possible because Regulation 2017/1939 established the EPPO as an independent and indivisible body that operates as a single office with a decentralized structure. In fact, the EPPO is organized on two levels: one central, with an office based in Luxembourg, and one decentralized, which is composed of Deputy European Prosecutors (DPEs) integrated into the legal systems of the Member States. The DPEs are an integral part of the EPPO, on whose behalf they act, and are at the same time integrated into their national criminal justice systems at the operational level. They are responsible for conducting investigations and prosecutions and referring cases for trial, having both the powers directly conferred on them by the EPPO regulation and those they exercise as national prosecutors. It should be recalled that the EPPO carries out its task not only in close collaboration with the national authorities of Member States but also by relying extensively on national law. According to Article 5(3), Regulation 2017/1939 governs 'investigations and prosecutions on behalf of EPPO', while national law applies to aspects not covered by that regulation. It also states that, in principle, the applicable national law is that which applies to the DPE in charge of the case. Many provisions of the EPPO regulation, particularly those of a procedural nature, refer to national law to determine the applicable conditions and procedures. This testifies to the close level of integration between the EPPO and national judicial systems, enabling the EPPO to fulfil its task as sentinel of the health of the rule of law in the Member States.

The three topics examined so far demonstrate how the protection of the rule of law can be achieved through the protection of the EU's financial interests. Indeed, conditionality, the mechanism under Regulation 2020/2092, the jurisprudence of the Court of Justice on the protection of the EU's financial interests, and the work of the EPPO are of paramount importance in re-establishing the principle of the rule of law within the EU legal system.

4. Conclusions

In the legal system of the EU, the protection of the financial interests of the Union has acquired a central role in the process of European integration. This is due to the exponential increase in European funds following the launch of the NGEU. This dynamic is intertwined with the crisis of the rule of law, which in some Member States has been placed in serious peril by populist governments. Faced with these issues, European institutions have sought to enact measures that could both protect the EU's financial interests and restore the rule of law within Member States where it has been compromised. These new instruments have raised difficulties in understanding whether the rule of law is a useful means to achieve the goal of protecting the Union's financial interests or vice-versa.

The study carried out in the preceding paragraphs highlighted how, between the rule of law and the protection of the EU's financial interests, there is a mutually reinforcing relationship. The EU principle and the EU value can be both ends and means in relation to each other. On the one hand, the examination of the positive and negative conditionalities used under the RRF (see in particular Article 24 of the RRF Regulation) and the mechanism provided by Regulation 2020/2092 reveal how

the rule of law is a useful tool to ensure the protection of the Union's financial interests. On the other hand, the study of the jurisprudence of the Court of Justice, the effects of negative conditionality on Member States, and the establishment of the EPPO demonstrate how the protection of the EU's financial interests can be a useful means to achieving the restoration of the rule of law in Member States where it is endangered.

Hence, both aspects of the research question can be true. At present, one might lean towards saying that it is the rule of law that more effectively protects EU financial interests than does the principle contained in Article 325 TFEU vis-à-vis that contained in Article 2 TEU. This may frustrate European public opinion and European institutions, which are hoping for a quick recovery of the rule of law within Member States such as Poland and Hungary, causing dissent to arise. Reversing this trend is possible, but it will be necessary to make this assessment at the conclusion of the NGEU experience and to examine not only the application of positive and negative conditionalities but also the jurisprudence of the Court of Justice and whether the EPPO succeeds in integrating, interacting with, and cooperating with the judicial systems of the Member States

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The Coordination of Economic Policies in the new Stability and Growth Pact,
Luca Bartolucci

1. Introduction

The research question that this work attempts to answer is whether the economic reaction to the pandemic has triggered a new approach to addressing the coordination of economic policies between the European Union (EU) and Member States.

Answering this question requires examination of the changes in European economic governance that occurred in the period preceding the pandemic, when the institutions of the EU developed an increasingly intense coordination of economic policies, with results, however, not entirely satisfactory. In this context, the pandemic has offered an opportunity to forcefully develop the coordination of economic policies through the Next Generation EU (NGEU) and, above all, with National Recovery and Resilience Plans (NRRP).

As part of the broader reform of the Stability and Growth Pact, the opportunity has emerged to incorporate the new governance method created with the National Recovery and Resilience Plans into the domain of European economic governance, without succeeding to report it entirely. Moreover, some elements that characterized the first 30 years of economic governance in the EU have returned, such as the rigid and numerical safeguard clauses that were temporarily abandoned during the pandemic through the suspension of the Stability Pact.

2. Development of European economic governance during and after the sovereign debt crisis

The beginning of the move towards the coordination of economic policies can be traced back to the Maastricht Treaty, when, in the second phase of the creation of the Economic and Monetary Union, the States were supposed to guarantee the sustainability of the public finance situation in light of the 'celebrated' parameters set by the Treaty.

The fundamental instrument for the coordination and surveillance of budgetary policies later became the Stability and Growth Pact, introduced in 1997, which introduced innovative and more restrictive provisions compared to the parameters set in 1992 under the Maastricht Treaty. The concrete application of these rules, however, faced many difficulties, and the rules were applied inconsistently, as demonstrated, for example, by the events of the early 2000s, when the Economic and Financial Affairs Council (ECOFIN) failed to impose the sanctions provided for under the Pact against France and Germany.

With the economic/financial crisis that began in 2008, the inadequacies of the EU and the Economic and Monetary Union were exposed, making clear the ineffectiveness of the preventive and corrective mechanisms of the Stability and Growth Pact and the asymmetrical structure of the Euro area. In reaction to the sovereign debt crisis, the EU strengthened the framework of the Stability and Growth Pact; required States to include some of the rules established at the EU level, such as that requiring balanced budgets, in national laws; and introduced more complex discipline for the coordination of economic policies through the European Semester (Manzini, 2013, 41 s.).

Both through the so-called Six Pack and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ('Fiscal Compact'), the general framework of the Stability and Growth Pact was confirmed, and more stringent rules were introduced to safeguard the principle of balanced budgets and the sustainability of public debt, with these rules affecting both the preventive and corrective parts of the Pact (for example, by introducing a rule on debt and a rule on spending).

Furthermore, the Fiscal Compact provided, in art. 3, par. 2, that the balanced budget rule should enter into effect in national law at the latest within one year of the entry into force of the Treaty through provisions of a permanent nature – preferably constitutional – or whose faithful compliance would otherwise be guaranteed throughout the national budget process.

The reform of European economic governance in those years also laid the foundation for some subsequent developments. In particular, the place where numerical budget rules could have been protected and, in some ways, developed, through greater attention to the 'qualitative' economic policies of the Member States and not only to the quantitative constraints on the budget was identified in the Euro-national budget proceedings[31] and, above all, in the so-called European Semester.

The European Semester is an annual exercise that coordinates the EU's economic and social policies. During the Semester, EU Member States align their budgetary and economic policies with the objectives and rules agreed upon at EU level[32].

Pushes soon began to change the nature of the European Semester, taking it from a mere *ex ante* instrument aimed at respecting budgetary rules to a means of orienting the reforms and economic policies of the States, especially upon the realization that, alone, the fiscal rules would be unable to guarantee the quality of public spending. In this way, the European Semester changed its nature: Born as a place to check compliance with the numerical budget parameters, it transformed into the moment for negotiating the constraints to be respected in concrete terms, marking the transition from rules to political discretion in the application of the same.

From 2012 until the pandemic crisis, a pronounced 'flexibilization' of the rules of economic governance was observed, starting at least from the Communication of the European Commission[33] (Bartolucci, 2020, 296 s.). Some clauses were introduced, such as one concerning investments, to better take into account the specific situation of the States. Other clauses concerned structural reforms, providing that, in line with the rules of the Pact, States implementing structural reforms would be authorized to temporarily deviate from the medium-term objective or from the path towards it.

In this context, the efforts of the European institutions to intervene not only on the 'quantitative' side of spending, with the rules on debt and deficit, but also on the 'qualitative' side are evident, demonstrating an attempt to channel, through greater flexibility of budget, the national reforms towards what is contained in the Country-specific Recommendations – one of the main pieces of the European Semester – which contain language not only establishing the numerical rules but also recommending the reforms to be implemented within each State.

Budgetary flexibility, however, was used without managing to move forward the reforms envisaged in the Country-specific Recommendations. More generally, these recommendations, based on a procedure without actual binding effect, were subject to considerable variability in terms of timing and content and above all very limited follow-up (Lupo, 2023; on Country-specific Recommendations: Menegus, 2020, 1452 s.; Grigaite et al., 2022). After the sovereign debt crisis, the EU has therefore given budgetary flexibility to States (and especially to Italy) in order to incentivize the structural reforms indicated in the Country-specific Recommendations. This flexibility, however,

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[31] Those procedures that are governed by both European and national rules and in which institutions of the European Union and the Member State participate. On this point, see Manzella and Lupo, 2014.

[32] The Semester timetable follows a recurring cycle, starting in autumn with the presentation of economic and social priorities by the European Commission. It concludes in October of the subsequent year when EU Member States submit their draft budgetary plans. Following this, the cycle starts over again.

[33] European Commission, Making the best use of the flexibility within the existing rules of the Stability and Growth Pact, Strasbourg, 13/01 /2015, COM(2015) 12 final.

has not succeeded in making the resources 'well' spent or in achieving approval of the desired reforms at the European level.

3. Reaction to the pandemic and creation of the NGEU

The situation changed with the economic/financial responses of the EU and Member States to the COVID-19 emergency. A series of responses were set in motion that affected European integration on the economic/financial side: Some responses were of a fiscal nature, and others were of a monetary nature, led by the European Central Bank.

To avoid the risk of an increase in divergence within the Union, the EU introduced a series of tools, thereby considerably enriching its 'toolbox' and going well beyond what had been done during the sovereign debt crisis. With the pandemic, the EU faced with a unique opportunity to change the economic paradigm and invented a completely new tool that connects the provision of resources to concrete, *ex post* objectives in terms of reforms, investments, and results.

Here we will not retrace all the EU initiatives adopted in reaction to the pandemic (Bartolucci, 2021, 154 f.), but the NGEU deserves mention because it was one of the first times the issuance of common European debt occurred. After a series of events (including a letter from nine States to the President of the European Council, in view of the European Council of 26 March 2020, the Franco-German agreement and the proposal from the President of the European Commission), the decision of the European Council of 21 July 2020 (Fasone, 2020) established the Recovery and Resilience Facility.

Due to its intrinsic characteristics, the NGEU represents a paradigm shift in the functioning of the EU, as it brings – at least temporarily – the architecture of European economic governance into a typical model of federal systems. In this sense, the NGEU is an experiment in integration, in the European Semester, of a financing model for investment spending. On the one hand, it is a first step towards debt mutualization and a clear leap in quality in European solidarity due to its redistributive capacity; on the other hand, the resources are not to be distributed unconditionally, and the conditions are rather rigid (Fasone, 2022, 5). In fact, to have access to their share, national governments must present a 'National Recovery and Resilience Plan' in which they specify the reforms and investments they intend to finance, taking as a reference the matters contained in the Country-specific Recommendations for 2019 and for 2020, thus also integrating the NGEU procedures within the European Semester.

Defined in this manner, NRRPs are a development of the instruments created after the sovereign debt crisis: through this device, the EU 'forces' the Member States that want to use European funds to put those reforms into practice on the qualitative side, which had been requested for years as part of the European Semester. The NGEU is therefore an important step because it temporarily replaces the numerical constraint – suspended at the beginning of the pandemic together with the Stability and Growth Pact – with multiple indicators for achieving more defined goals within the NRRPs, such as those relating to milestones and targets. The operational agreements have therefore become the determinants of the self-constraints to which the States have opted to bind themselves within the NGEU.

4. Reform of the Stability and Growth Pact

With the end of the pandemic, the Stability and Growth Pact needed to be implemented again, but may feared that it would not be modified, although an update was needed with respect to the new reality that had emerged during the Pact's suspension, chiefly the emergence of the NGEU, which had contributed to fundamentally altering the characteristics of European economic governance.

The reform of the Stability and Growth Pact was one of the most debated topics during 2023, and the aim of some was to prevent the rules of the 'old' Pact from coming back into force. The debate and negotiations started from the European Commission Communication of 9 November 2022 (Guazzarotti, 2023; Salmoni, 2023; Carboni, 2023; Buti, Friis & Torre, 2023), the contents of which, however, were very different from the compromise that was finally reached at the end of the negotiations on 21 December 2023 (Bastasin, 2023; Majocchi, 2024; Tosato, 2024) during an online Ecofin meeting.

In the 2022 European Commission Communication, the creation of a fiscal capacity for the EU was a notable absence. Despite this shortcoming, important progress was still made in overcoming some critical issues of the old budget rules. The European Commission proposed to introduce a more transparent and risk-based surveillance framework, which would vary between countries, and which would take into account differences in national public debt. For this reason, the European Commission intended to abandon both the reference parameter for the speed of debt relief (reduction of 1/20 of the debt per year for those countries exceeding the threshold of 60% of the debt-to-GDP ratio) and the medium-term budgetary objective rule, although the 3% of GDP and 60% of GDP criteria established by the Maastricht Treaty would have remained valid.

The main changes would have centred on the process of approaching 60% of the debt-to-GDP ratio, which would have had to take into account the sustainability of the debt. The mechanism envisaged that the Union would have to adopt a common regulatory framework based on sustainable growth and risks for debt sustainability and design a fiscal adjustment path based on multiyear spending that would vary between countries and cover at least four years, anchored to a Debt Sustainability Analysis (DSA), produced through agreement with the Member States based on their classification as a country with high, moderate, or low public debt.

However, it was the proposal to introduce National medium-term fiscal-structural plans (MTPs), on the model of the NRRP, that would have definitively changed the characteristics of European economic governance. These new plans – to be agreed to between Member States and European institutions – were supposed to integrate budgetary objectives, reforms, and investments. States with high debt would have to ensure that, within the four to seven years envisaged by the Plan, the debt reduction trajectory under unchanged policies would remain downwards and that the deficit-to-GDP ratio would be below 3% over the same time frame. Furthermore, the European Commission proposed to focus only on the net primary expenditure rule, defined as total public expenditure net of some expenditures: The expenditure rule is subject to fewer variables and is more easily observable at European and national levels (Tosato, 2023, 2).

With plans for the reduction of the deficit and debt more spread out over time and by agreeing with the European institutions on reforms and investments, countries could have put a brake on that mechanism by which investment expenditure has decreased to achieve budget objectives. With the proposal of the European Commission, national ownership of economic policy decisions would have been strengthened, making it more complicated to attribute difficult or unpopular choices to the European institutions. It was, therefore, a real flexibilization of the numerical budget constraints and, as such, it was foreseeable that it would be opposed by those States having made numerical fiscal rules an identifying factor of their constitutionalism. The risk foreseen by those States was the further 'bad use' of flexibility, as in fact happened in the years following the sovereign debt crisis.

The 2022 European Commission Communication was followed, on 26 April 2023, by proposals to reform the rules of the Union's economic governance (Francescangeli, 2023). The negotiations on these European Commission proposals proceeded until the end of 2023 and were influenced not only

by the European elections of June 2024 but also by other factors, such as, for example, some German events (for example the decision of the *Bundesverfassungsgericht* concerning funds created by the government outside the budget; Musso, 2024).
As part of the negotiations, the 'frugal' countries, fearing an excess of discretion, asked for a numerical threshold for deficit and debt reduction and, in turn, France and Italy claimed greater space to finance public investments with debt through the separation of certain types of expenditures from the deficit. In this manner, in the transition from the European Commission's initial proposal to the text approved first by the Council and then agreed to within the trilogue, various clauses with numerical rules were introduced, with the aim of defining the minimum size of the fiscal effort required from the countries subject to the preventive arm. The restoration of these quantitative rules, the same for all countries, except for a few particular differences, reflects the compromise reached between the favourable approach of not completely abandoning the structure of the previous Stability and Growth Pact, based on rules involving predefined numerical numbers, and the innovative approach proposed in the European Commission's initial text, based on the identification of country-specific rules, determined according to the common methodology of debt sustainability analysis (Italian Chamber of Deputies, 2024).
With the introduction of new safeguard clauses, the flexibility of the numerical budget constraints that was evident in the European Commission's initial proposal was therefore attenuated. However, the compromise seems to be the overlap between two lines of thought: on the one hand, that according to which individual countries decide on debt relief through the multiyear plan, and on the other, that which, instead, requires a mechanical reduction of the debt.
The new clauses are as follows: Countries with debt greater than 90% of GDP must reduce it by at least 1% every year, while those with debt between 60% and 90% of GDP must reduce it by 0.5%. Further, the deficit must be brought to less than or equal to 1.5% of GDP. If the nominal deficit must be brought or maintained below the threshold of 3% of GDP, two different provisions introduce quantitative constraints on the structural deficit objective. In particular, in the event of the opening of an excessive deficit procedure, the reduction in the structural balance will be consistent with that envisaged for the corrective arm (i.e., not less than 0.5% per year). Furthermore, it is expected that a structural balance will be achieved that ensures a resilience margin of 1.5 percentage points of GDP compared to the structural balance corresponding to the deficit of 3%. If the 3% limit of the deficit-to-GDP ratio is exceeded, the country would be subject to an excessive deficit procedure and must reduce said deficit by 0.5% per year. When the ratio falls below 3%, the adjustment path that a country must follow to reach the new deficit target of 1.5% is indicated an improvement in the structural primary deficit of 0.4% per year on average in the case of a four-year plan and 0.25% per year on average in the case of a seven-year plan.
In regard to the debt-based excessive deficit procedure, it was agreed that, to initiate the process, the European Commission would produce a report when the government debt-to-GDP ratio exceeds the reference value, the headline deficit is not close to balance, or surplus and deviations recorded in the Member State's control account exceed 0.3 percentage points of GDP each year or 0.6 percentage points of GDP overall. The Council and the Commission are to carry out a balanced overall assessment by taking into account all significant factors affecting the assessment of compliance with the deficit and/or debt criteria for the Member State concerned. These factors include the level of the public debt problem, the extent of diversion, progress in implementing reforms and investments, and, where appropriate, increases in public defence spending.

The rules of the excessive deficit procedure have been maintained to the extent that, when the procedure itself is started on the basis of the deficit criterion, the corrective path of net expenditure must be consistent with a minimum annual structural adjustment equal to at least 0.5% of GDP. However, it was also decided that the European Commission may, for a transitional period comprising 2025, 2026, and 2027, consider the increase in interest payments for the purposes of calculating the adjustment effort under the excessive deficit procedure (Bordignon, 2023). Therefore, the political acceptability of the reform has been 'bought', pushing the application of discipline to future legislatures, considering that in 2024, presumably, Italy and other states will be subject to the procedure.

5. Conclusions: European economic governance between the 'NRRP method' and new numerical rules

Ultimately, the economic and financial reaction to the pandemic has triggered, at least in part, a new way of approaching the coordination of economic policies between the EU and Member States. The NRRP method has in fact been incorporated into European economic governance with the creation of medium-term national plans. However, important traces of the old way of understanding the coordination of economic policies, based on numerical budget rules, also remains in the new economic governance. Overall, therefore, the change remains partly incomplete (also because, in the new governance, the method of financing national reforms with European debt has not been replicated).

The European Commission's 2022 proposal was significantly worsened by the negotiations. However, the final agreement still seems better than the original Stability and Growth Pact because investment capacity and a certain amount of flexibility have been preserved and country-specific national plans have been introduced, taking account of net primary expenditures and specific national situations. The old Pact was much more rigid and was therefore not enforced, whereas the new Pact seems more realistic. It is hoped that its rules hold up when applied and manage to combine stability and growth while also incentivizing States to make reforms and investments, in exchange for having more time for fiscal adjustment.

The flexibility of the numerical budget constraints evident in the initial proposal has been strongly attenuated by the new safeguard clauses, and the system of fiscal rules that has emerged is much more complicated than that originally proposed by the Commission. Finally, the contours of the analysis of debt sustainability when rigid thresholds are reintroduced are not entirely clear, especially if such an analysis were to yield results conflicting with other rules. The problems linked to structural quantities remain, adjusted for the cycle, as they are based on the output gap, an unobservable variable whose estimation process is unstable and opaque. This does not mean that, despite these problems with the agreement reached, the criticisms of an allegedly renewed 'austerity' are unrealistic, considering that it would have been illusory to imagine that rules would not have been put in place, also aimed at reducing public debt, after a period – such as the pandemic period – during which extensive use of public debt was made.

The new economic governance contains within it the medium-term structural plans (although without European resources) that share some structural characteristics with the NRRP (Lupo, 2024, 172). What is really missing, compared to the NGEU experience, is a 'carrot', namely the finding of common resources suitable for building an autonomous budgetary capacity. A carrot would 'encourage the assumption of self-constraint by each Member State, to plan and implement a series

of reforms and investments in line with the macro-priorities indicated by the Union' (Lupo, 2024, 172).

The main path for the subsequent development of European integration, however, seems to be to replicate the financing system that has been operating with the NRRP and identifying common resources to finance the reforms contained in the multiannual plans. In fact, without the latter, transposition of the NRRP method into the Stability and Growth Pact risks being less impactful in the results achieved at national level. It is therefore necessary to replicate the common EU debt, avoid increasing national ones, and finance the expenses necessary for the challenges that the EU is facing, starting from the military ones, and including the environmental and technological transitions.

In short, it is a question of expanding the EU budget with central investments financed by debt and guaranteed by the budget itself, according to the methods of the NGEU, pairing central expansion with the reduction of national imbalances, and following the path indicated by Mario Draghi in the recent competitiveness report.

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PART II
POLICY DRIVERS IN STRENGTHENING THE RULE OF LAW

1. Introduction

Climate emergency is an increasingly common and widespread concept not only in the language of politics and information, but also in the language of science. In 2019, in fact, the *Oxford Dictionaries* chose 'climate emergency' as the word or expression of the year (Wilson, Orlove, 2019). There are associations and sites that refer to this phenomenon, with the obvious intention of informing but also of keeping the tension high on a phenomenon that increasingly impacts on everyone's life, whether in resounding (floods, droughts) or latent forms (increasingly high temperatures that cause great inconvenience to the population, especially the youngest and oldest).

But the climate change emergency has also penetrated the institutions. It is well known that the European Parliament has adopted a resolution in which climate change is categorised as an emergency[34] . The Recommendation of the Committee of Ministers to Member States dates back to 23 October 2024, which recognises that, in the light of growing scientific evidence, there is a climate and environmental emergency and that action by all actors is urgently needed to mitigate and adapt to climate change and the reduction of biodiversity .[35]

Nation-state governments have also been seriously engaged by the sometimes catastrophic changes related to climate change. They have done so by coping *ex post* facto with the natural events caused by the change, often resorting to actual emergency declarations (Stacey, 2022, 291 ff.).

As is well known, however, it is mainly the judicial function that has been involved in the problems of climate change and its emergency. Within the now massive climate litigation, some important judgments reason in terms of urgency or concern (Urgenda case, decision no. 19/00135 of 20 December 2019, para. 8.3.4.), others expressly refer to the "*...triple planetary crisis of pollution, climate change and loss of biodiversity*" (*Verein KlimaSeniorinnen Schweiz v. Switzerland* case - decision 53600/20, para. 200; see Hoffmann, 2024, 2). Such reasoning was developed on the basis of references to data and scientific institutions dealing specifically with the climate phenomenon (Fisher, Scotford, Barritt, 2017, 173 ff.).

There is, however, something unresolved in the relationship between emergency and climate change. On the one hand, climate change appears to be a structural, long-term phenomenon, linked as it is to the new and controversial concept of the Anthropocene (Chakrabarty, 2016, 383), to be understood as 'Anthropogenic climate change is therefore not a problem to be studied in isolation from the general complex of ecological problems that humans now face on various scales -from the local to the planetary- and that are creating new conflicts and exacerbating old ones between and within nations', and on the other hand, it would require exceptional and emergency instruments to be tackled (de Leonardis, 2023, 50 ff.).

Thus, the impression inevitably arises that, even behind an objective fact such as climate change, there is the political, the subjective factor that offers different visions and interpretations of the phenomenon. This is undoubtedly in line with the now acquired awareness that even the crisis, and therefore the emergency, is often a social, political and cultural phenomenon (Agamben 2018, 198).

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[34] European Parliament resolution of 28.11.2019 on the climate and environmental emergency (2019/2930(RSP)).

[35] *Recommendation CM/Rec(2024)6 of the Committee of Ministers to member states on young people and climate action*.

Awareness that is accentuated in the field of climate emergency, where it is difficult to dispute the role of communication in spreading knowledge about climate change (Wilson, Orlove, 2019, 1 ff.).
Climate change also challenges the very representation of time, its use, if one may say so: on the one hand, the urgency to provide (the reference to 2050 as a timeline within which to achieve climate neutrality, at least for the EU, is emblematic), on the other hand, the long, if not very long, timescales implicit in the concept of the Anthropocene and the protection of future generations (Wilson, Orlove, 2019, 4; Stacey, 2022, 307).
In the following pages, I would like to try to verify whether it is correct and appropriate to bring the phenomenon of climate change back to the category of emergency. The guide for this reasoning are the categories that constitutional law has developed to deal with emergency phenomena. Taking as assumptions notions, concepts, and categories explored in depth by Italian and foreign constitutionalist doctrine, I will try to compare the main characteristics of climate change with the most settled concepts and categories of constitutional emergency, with the 'doxa', in order to assess whether it is constitutionally correct to reason about climate emergency.

2. Relativity of the concepts of exception, emergency, crisis

In constitutional law, emergence is a very in-depth topic, with the consequence that the range of methodological options for dealing with the subject widens.
Already the distinction between exception, emergency, crisis can become a problem. Are they equivalent terms or is it possible to differentiate? A recurring distinction is that between crisis situations that threaten the existence of the state or the constitutional order and situations that, while affecting relevant interests of the state and its citizens, do not represent an existential threat (Azzariti, 2010, 164-182; Costa, 2012). The phrase state of exception should be reserved for the former category, while the phrase state of emergency is better suited to the latter (Belling, 2020, 47; Angiolini, 1986, 11). The first situation, of an existential character, is, without doubt, better contained in the German expression 'Ausnahmezustand' (literally, state of exception) than in the Anglo-Saxon expression 'emergency powers' (Belling, 2020, 48).
One can accept the thesis that the notion of a 'state of exception' refers to those situations that go to the heart of the state's existence, as is the case with war, and whose form is difficult to foresee (Belling, 2020, 50), whereas emergency or emergency powers concern moments or phases of crisis that -it is assumed- do not call into question the survival of the state (Depenhauer, 2020 30-1). In any case, all the concepts we possess to frame such critical phenomenology refer to and are constructed in relation to a constituted legal order. Even when they are capable of overturning it (as in the case of the sovereign dictatorship), the powers in question take their origin from, and refer to, the order of reference (P. Costa, 2012, 87-88). The institution of the Roman dictatorship was rooted in exactly this perspective (Agamben, 216; Ferejohn, Pasquino, 2004, 211).
Another characterising feature is the return or restoration of normality that recourse to emergency powers should allow. But even this profile has a tendential, not an absolute value (Galli, 2024, 31,). History teaches us that emergency powers are mostly designed for the return to normality; the crisis that causes the emergency calls for exceptional powers to re-establish the *status quo*. Dictatorship, understood as an institution to deal with an emergency, is also established to protect the established order (Schmitt, 2024 194-5). This is not always the case, however.
This is the case with economic crises. In contemporary times one thinks, for example, of Article 48 of the Weimar German constitution, which was used above all to counter economic crises (and which offered the right to C. Schmitt's reflection on the state of exception). Think again of the use of

emergency powers by the President of the United States of America, Franklin Delano Roosevelt, to implement the *New Deal* and thus combat the Great Depression. He explicitly called for '*broad executive power to wage a war against the* emergency' in his presidential inaugural address" (Greene, 2020, 151 ff.). And again, the economic crisis of 2008 allowed many states to introduce austerity regimes that had devastating effects on the lives of many individuals . [36]

In short, we are witnessing a first alteration of the classic causal scheme: normality-crisis-normality. If in fact emergency powers serve to restore the state of normality, economic crises are often the consequence of that *status quo*, so that the measures that are adopted are not intended to remain temporary but permanent and transformative (this was precisely the logic of the Roosevelt *New Deal* measures that the Supreme Court opposed) (Greene, 2020, 152)

Also in response to Covid-19, states took extraordinary economic measures that were unthinkable until the day before: economic compensation for those who could not perform their jobs, financial contributions to jump-start the economy once the *lockdown* was lifted, freezes on annuities...

This pattern also returns in the case of the climate emergency. In fact, at a more realistic glance it seems to be possible to say that even in the case of climate change the reference to the emergency, as it is understood in constitutional law, is out of focus because there is no order to restore, rather the danger is the *status quo*, that is where the crisis comes from.

Thus, defining what is normal and what is emergency is not a matter of course; there is no *one* interpretation of emergency, but much depends on adherence to the concrete situation (Schmitt, 2024, 192-193).

The only way to escape indeterminacy is to strive to merge our horizon with the past, following the hermeneutic lesson.

3. Rule of law and emergency

It is precisely the comparison with past crisis experiences that makes one say that the climate emergency does not seem to fall under the phenomenology of the state of exception: there is no existential threat to the state but rather a concrete danger to its inhabitants. We are outside the hypothesis of the immediate and concrete danger that threatens the very existence of the state and to which we must react in order to save the state. In short, we are faced with a completely new case (Murphy, 2020, 7).

Even if we narrow the field to emergency rather than state of exception, there are still difficulties in bringing climate emergency into the more settled categories of constitutional law. In fact, from this perspective, the state of emergency is characterised by two factors that recur with a certain regularity: derogations or suspensions to the effectiveness of fundamental rights and alterations to the relations between constitutional organs. [37]

As is well known, it is precisely these effects - one might say the temporary alteration of the rule of law - that make the emergency a problem, indeed the problem of constitutional democracies, because any establishment of a state of emergency entails or may entail a suspension or derogation of the

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[36] As also attested by the UN Human Rights Council, in the *Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights* (27 March 2014).

[37] Venice Commission, *Emergency Powers*, Science and technique of democracy n.12, Strasbourg, 1995, 3. Although not recent, it seems useful to refer to this document because it represents a lowest common denominator in emergency matters.

constitution as a whole (if it is true that the constitution regulates rights and the organisation of power), as a fundamental norm. I will say more: it is the problem of liberal thought and constitutionalism as a limitation of power. If power is to be limited, if the rights of citizens are to be guaranteed, how do we then regulate the violation of these constitutive rules of constitutionalism?
This is a *punctum dolens* for social coexistence to which modern and contemporary constitutionalism has provided different and very context-dependent answers.
It is possible, however, to start from a precise point, from one of the peaks of liberal thought, from Chapter XIV of Locke's *Second Treatise on Government*, the chapter on prerogative, because it has had considerable influence on the way the subject of emergence is dealt with (Locke, 1998; Schmitt, 2024, 92). In that chapter Locke removes emergency from the sphere of publicity. In a way, he brings a cone of shadow down on the monarch, sheltering him from the schemes of liberal governing principles and opening the way to a '*power to act according to discretion, for the public good, without the prescription of the law*'.
For modern constitutionalism, therefore, the main problem becomes going, so to speak, 'beyond Locke'. How can public power avoid losing legitimacy by undermining the tenets of the rule of law?
The most immediate answer for legal thought of liberal inspiration has been the inclusion of the state of emergency/exception in the legal and then constitutional order. Yes, but *how* and *where*? Here one encounters not a few difficulties
A not insignificant role in the difficulty of managing emergencies in liberal thought was due to the influence of legal positivism: if a constitution does not contain the discipline of powers for a state of emergency, then everything is resolved in a question of the normative force of the constitution, in the effective capacity of its organs to manage even complex and extraordinary situations (Böckenförde, 1978, 1884).
The inability of positivist legal thought to handle the exception with the instruments of law pushed towards more heterodox and radical framings, provoked also by particularly complex contexts such as that of post-World War I Germany.
Demonstrating all his scepticism towards positivist thought, C. Schmitt places the state of exception somewhere between law and non-law. The point for him is, famously, who decides the exception, the rest follows (Schmitt, 2024, 33; Schmitt, 2014, 68). He who decides, precisely because he decides, is removed from the shackles of political responsibility. A thought that is very close to Machiavelli's (despite Schmitt's different view), a thought that leaves the sovereign completely free to use rules or make decisions in emergency situations. Schmitt's was perhaps the most successful theoretical elaboration on the subject of exception, taken up not only in Europe but now also in the Anglo-Saxon world in the aftermath of the fall of the Berlin Wall to deal with crises. But, as I will say, it is not the most extreme
As I said in the introductory paragraph, this is certainly not the place to typologise constitutional solutions to the problem of emergency (Piergigli, 2023, 213 ff.).
Apart from the simplest solution (the provision of general clauses), which, however, often suffers from vagueness and generality[38] , it is of interest, instead, to highlight a regulatory alternative that appears to be of relevance in framing even the so-called climate emergency. This alternative - which is partly based on positive law, partly has a theoretical matrix - can be usefully derived from observing how the emergency has been regulated in the German constitutional system.

[38] Emblematic in this respect is Article 15 ECHR.

As is well known, the German Basic Law offers different remedies for emergency management through the formulation of multiple emergency cases (typification). This came about with the constitutional revision laws of 1968, which remedied the initial silence or laconicity of the Basic Law with regard to emergencies. Originally, the 1949 constitution in fact only provided for the state of legislative emergency (Art. 81), which is the parliamentary alternative to Art. 48 of the German Weimar Constitution and which comes into action in the event of an impediment in the functioning of the lower house (*Bundestag*). Hence the need to typify other emergency situations, also due to the context of the 1960s in which West Germany was affected by terrorist phenomena. Following constitutional revisions in 1968, today the Basic Law provides for the state of defence as a form of external defence (Art. 115a-115l, so-called *Verteidigungsfall*), while for internal emergencies at least three institutions are provided: the internal state of crisis, which serves as a defence against a danger that threatens the existence or the liberal and democratic fundamental order of the Federation or a *Land* (Art. 91); the threat to public safety or public order, regulated by Art. 35(2); the same provision, in its second part, regulates the hypothesis of a natural catastrophe or a particularly serious disaster affecting a single *Land* (in the case, on the other hand, in which several *Länder* are involved, the provision of the third paragraph of Art. 35 comes into play) (Klein, 2020*,* 132-6).
However, the detailed German typification has limitations, which the climatic emergency itself brings out. In fact, emergency situations also change, they are temporally characterised, so that their typification must be brought up to date if one is to avoid the risk of uselessness, of the difficulty of applying typifications to the concrete case.
In the face of such limitations, the procedural solution offered by Ernst-Wofgang Böckenförde seems the most attractive and conscious (Böckenförde, 1978, 1888-1890). The German constitutionalist's proposal was formulated in 1978, i.e. ten years after the emergency constitutional revisions, as if to testify to the existence of a persistent lacuna in the German constitution. The proposal consists of providing for a few norms capable of rapidly proceduralising the management of a state of emergency, separating those who declare such a state from those who actually manage the emergency, and providing for a time limit to the duration of the emergency itself. Above all, however, a clear distinction between normality and exception is deemed most appropriate, a distinction that must be emphasised by the provision of the express declaration.
It also follows from what has been said so far that it is difficult to place the climate emergency within the main solutions offered by constitutional law to deal with emergency situations. And this for a very simple reason, namely that the premise of such solutions is the need to justify the derogation/suspension of rights or the momentary alteration of relations between constitutional bodies. The incision of the *rule of law* does not seem to apply, however, in the case of the climate emergency.

4. The normalisation of the emergency

There is therefore a leap, a gap between the traditional constitutional categories of emergency and the phenomenon of climate emergency.
The closest years, however, offer a different scenario, which is that of the normalisation of the emergency. The context is different, it is that of terrorist attacks, to which states normally react with greater repressive powers or military approaches. All the difficulties of separating normality and exception emerge again.
In order to relieve itself of the intense burden of justifying a limitation of rights, in this new climate of especially terrorist emergency, a dominant thought, a kind of *mainstream*, has emerged, which

disregards the declaration of a state of emergency and moves towards a normalisation of the emergency (Frankenberg, 2017, 17). There are many interpretative options, especially following the attack on the Twin Towers in New York (Dyzenhaus, 2006/2007, 2016-2031).
In fact, compared to the theories that consider managing crisis situations with ordinary powers (*Business as Usual model*) and those that consider it necessary to make only a few, exceptional changes to the ordinary regulatory structure (*models of accommodation*) (Gross, 2003, 1021; Ferejohn, Pasquino, 217), there are others that, considering the first two models to be unnecessary, prefer security forces to operate 'clearly' outside the law and the constitution in emergency situations (*Extra-Legal Measures Model*) (Gross, 2003, 1023). Note that we are not dealing with authoritarian delusions (Gross, 2003, 1027)! These are positions that, based on a sense of responsibility capable of imposing itself after the state of necessity has been overcome, echo the Lockian approach (Gross, 2003, 1102-1104). According to these perspectives, at the end of the state of emergency, the floor must return to the people who will judge the action of those who have taken the necessary measures (Gross, 2003, 1099). Here, ethics seems to go beyond constitutional law, in the hope that transparency will prevail over secretive state action in crisis situations. In the same direction seem to go those who, while criticising extra-legal measures and displaying a shareable scepticism towards the management of states of exception through overly stringent legal rules, believe, perhaps too optimistically, that the greater the discretion left to the authorities, the stricter the compatibility of state action with the *rule of law* will be (Belling, 2020, 58 who states explicitly: "the greater the discretion of state authorities in triggering a state of exception and defining the powers for its implementation, the more compatible their action to preserve the state will be with the principles of the rule of law without having to venture into the realm of a suprapositive state or exception or extralegal measures outside of legal order").
However, Guantanamo and the electronic surveillance practices of the secret services lead us to doubt the effectiveness of these positions.
This recent plexus of constitutionalist reflection, which is certainly linked to liberal thought, in addition to legitimising situations of suspension of fundamental freedoms, triggers theoretical reactions that tend to place law and exception in an opposing position. Emblematic is the position of Giorgio Agamben, who places the state of exception in a space completely freed from law. More precisely, in such a theoretical perspective, the exception presupposes a suspension of law, which therefore remains alive but devoid of efficacy. Hence, a zone of anomie, in which power is present, even if it lacks legal cover. A device -Agamben affirms- that ultimately holds together the two sides of the legal-political apparatus and thus goes to the threshold of justifiability, between anomia and *nomos* (Agamben, 2018, 206, 216, 235-6, 247). Undoubtedly, however extreme and radical, this is a position that intercepts and intertwines with the one we have just summarised, according to which emergency situations are to be managed outside the law (Agamben, 2018, 248).
The recent experience of Covid-19 seems to validate the trend towards emergency normalisation.
Few states have proceeded with a declaration of a state of emergency[39] , few (among the member states) have notified the Council of Europe of their recourse to a derogation under Article 15 ECHR, others have resorted to ordinary emergency powers without derogating from international treaties (Italy, for example), and still others have deliberately avoided recourse to declarations of a state of emergency (the United Kingdom).

[39] A list is at https://verfassungsblog.de/introduction-list-of-country-reports/.

In other words, we have witnessed attempts to manage the pandemic according to the aforementioned *'business as usual*' model or, without going through the formal declaration of a state of emergency, by resorting to ordinary legislation. These approaches are very attractive to governments because new powers are introduced without formally suspending the constitutional order. The risk of these powers becoming normalised is even higher precisely because of their 'normality' (Greene, 2020, 20).
And so it is worth reflecting again on Böckenförde's insistence on the necessity/opportunity of keeping states of normality and states of emergency separate (Böckenförde,1978, 1888-1890; Isensee, 2020, 25), renouncing typifications but adhering to the concrete situation. And this is only possible through a proceduralisation of the declaration of the state of emergency, which also leads with it to a better framing of the difference between law and measure.
This seems to be the only path in conformity with the principle of the rule of law and a logic of justification, and not normalisation, of emergency (Ferejohn, Pasquino, 2004, 233; Greene, 2020, 45; Dyzenhaus, 2006/2007, 2038).

5. The normalisation of the climate emergency

The climate crisis also seems to be managed through normalisation techniques (Dyzenhaus, 2006/2007, 268-70). On closer inspection, even the legal terms used globally to encapsulate the climate emergency in law hint at a kind of normalisation of the emergency: mitigation and adaptation are in fact expressions that also seek to reassure. Mitigating and adapting to an emergency means living with it, normalising it. This really changes the parameters for establishing what is normal and what is extraordinary.
Another distinguishing feature concerns the instruments to cope with the climate emergency: they are all projected into the future rather than the here and now. Not only mitigation and adaptation are objectives *in progress* but also the most innovative instruments, such as the *carbon budget*, are oriented towards the future and the protection of future generations (Stacey, 2022, 311-2).
In this way, the liberal embarrassment at not being able to control extraordinary situations of danger with the normal instruments of the rule of law seems to return: the crisis disappears, it is sucked in by the internalisation of the emergency situation. The normalisation of the emergency thus becomes part of a broader semantics of trivialisation (Preterossi, 2022, 269).
Consider what happened on 24 February 2022: Putin did not make a declaration of war, but spoke of a special military operation. A sort of downplaying, which also serves the purpose of evading clear international obligations, in practice to evade the law. On the other hand, the technique had already been used by the United States, which, in facing the terrorist emergency at the beginning of the century, gradually abandoned the expression 'war on terror' in favour of 'overseas contingency operations'
Summarising what we have been saying so far, we can say that the climate emergency represents a new phenomenon, difficult to fit into the traditional constitutional categories of emergency. It appears as a phenomenon capable of jeopardising the living conditions of individuals and communities, already in the present and even more so in the immediate future. However, it does not exacerbate the regulatory order, except in a few extreme cases.
In other words, the environmental emergency does not seem to imply an existential threat to the system but to its subjects. Moreover, the crisis or emergency is not localised, but is global, planetary, and, as for its effects, it concerns the elements that allow the very survival of individuals. No order alone can cope. The characters of the imminence of danger are absent, and therefore the need for

immediate reaction is absent, except in the case of individual disasters or catastrophes caused by the climate

The difficult subsumability of climate change within the constitutional categories of emergency also emerges, from a positive law perspective, from the absence of constitutional emergency clauses to deal with climate emergencies. The regulatory formulas used by constitutions were not designed for the climate emergency. And yet the first constitutional amendments to account for climate change appear, all adopted outside the European continent (a review can be found in Fonbaustier, Charreire, 2023, 89 ff.). Although elaborated for other purposes, the new category of the permanent state of exception seems better suited to the phenomenon of climate emergency.

These characteristics also help to explain some peculiar features of climate change and its management, such as the relationship between action by public authorities and action by private individuals (J. Wolf, 2022, 4). Faced with the inaction, the omissions of the former in effectively tackling climate change, we see the reaction of the latter, of private individuals, especially in associated form. Individual or group action thus becomes a substitute or at least a stimulus to the government monopoly of emergencies. Think not only of the climate dispute but also of the return of civil disobedience as an extreme form of confrontation with the state of crisis. Disobedience has always been conceived as the ultimate remedy against the failure of public powers to repel the assault on the state, from within or without (Isensee, 2020, 20). Today it returns in new forms and acronyms (*Fridays for Future*, *Extinction Rebellion*, Last Generation, etc.).

Compared to these phenomena, the categories of constitutional law still appear unprepared.

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A new EU Approach to the protection of Academic freedom: the Intersection with the Rule of Law, Giovanni Piccirilli and Ylenia Guerra

1. Introduction

The legal concept of "*academic freedom*" is deeply intertwined with several branches of constitutional law, both in terms of its institutional dimension (i.e., the autonomy of universities as academic bodies, the conditionality between the allocation of resources and actual possibility to research on specific fields) and as a fundamental individual right (which is connected, although not completely overlapping, with the freedom of expression of the individuals involved in teaching and research activities).

The present political situation casted light on multiple long-standing issues, including the relationship between academic freedom and other constitutionally protected rights and interests, also in terms of balancing and proportionality. It is probably redundant to list the main international and geo-political events whose effects may have influenced the life of academic institutions in the most recent period. However, at least the Russian-Ukrainian conflict, as well as the Israeli-Palestinian crisis, have undoubtedly affected academic freedom in the European space.

As stressed by the Panel for the Future of Science and Technology (hereinafter, STOA)[40], although academic freedom is widely acknowledged as a cornerstone of higher education and a vital component of a well-functioning democratic society, recent evidence suggests that it is facing challenges at both the EU and global level (STOA 2024, 6). To this effect, one might theorize the emergence of a certain *dissensus* with regard to the constitutional protection of academic freedom; a *dissensus* that appears to pervade both dimensions of academic freedom: the institutional one, with attempts by political actions to undermine the neutrality and the freedom of academic institution, and a more general trend to a strategic use of limitations of freedom of expression in academic contexts for the purpose of supporting a specific political position.

In that intricate political and legal *milieu*, the scope of the chapter is to investigate the existence of links between academic freedom and the rule of law in the EU constitutional dimension. The aim of this study is, therefore, not to examine academic freedom as a fundamental right of the European Union and its Member States, but rather to examine its intersection with the rule of law, starting from a problematisation of the conceptual dimension of this freedom. The approach will be therefore twofold: on the one hand, to set out the theoretical foundations of this relationship and, on the other hand, more concretely, to examine the substantive implications, starting from the crossroads represented by the rule of law conditionality Regulation (no. 2020/2092).

This analysis aims to fix, firstly, whether there is a convergence between these two concepts and, secondly, to determine the specific legal nature of this genuine intersection. Additionally, the study seeks to determine whether certain EU tools designed to safeguard the rule of law may have a beneficial impact on the protection of academic freedom (O. Ceran 2024), while also taking into consideration those adverse effects of the application of rule of law instruments on academic freedom. Furthermore, this profile intertwines the methodological issue concerning the examination of the EU dimension of academic freedom. Without delving deeply into the matter, this paper adopts an approach that originates from constitutional theory and elucidates the material implications of

[40] See also the announcement of the new 2024 Report: www.europarl.europa.eu/RegData/etude (last access: 21.02.2025).

academic freedom within the European context. To this end, it first considers the conceptual issues pertaining to academic freedom from the standpoint of EU constitutional law, with a view to delineating the specific scope of academic freedom. As it is well known, there is not a universally accepted definition of the concept, due to the fact that it lacks a solid and coherent doctrine, also considering the incapacity of courts to identify a uniform reason justifying its constitutional protection (R. Post, 2015, 123).
Therefore, the attempt of this paper is to analyze the theoretical aspect of the constitutional concept of academic freedom in order to elucidate its extensive meaning and identify the constituent elements that comprise this value.
The analysis will consider the legal sources characterizing the EU context in which academic freedom is protected, clearly starting with Article 13 of the Charter. This specific reconstructive approach will represent the basic element of a study of academic freedom in relation to the rule of law.
The thesis is that the genuinely constitutional dimension of the rule of law also intertwines with the protection of academic freedom. How they concretely interact is at the heart of this study.

2. The legal concept of 'academic freedom' in the EU dimension: mainly a theoretical problem?
For a long time now, it has been made clear that academic freedom cannot be addressed only by using legal instruments, but it has a more general theoretical substance (E.L. Pincoffs 1975, vii). This is all the more true, with regard of setting the latitude of the notion. It is therefore on a specific theoretical level that the concept of academic freedom faces its main problems.
Before approaching the specificities of the EU context, it must be made clear that many uncertainties are independent from a given legal system, as they are inherent in the concept. Consequently, the overall picture becomes even more puzzling with the combination between those blurred general concepts and the specific legal framework within which it is defined and the particular historical moment under consideration. The concept of academic freedom has historically been understood as a right reserved for individuals engaged in academic pursuits. Only recently the legal notion has been extended to also, and clearly, encompass students and administrative staff at the higher education level (STOA-ERPS 2023 and M. Stachowiak- Kudła, S. Westa, C. Santos Botelho, I. Bartha 2023, 162).
Notwithstanding the difficulty of formulating an unambiguous definition of academic freedom (F. Machlup 1955), a reasonable extensive definition can be attempted as follows, breaking it down its different components. It could be understood as comprising, at least, three main aspects (Vrielink, Lemmens, Parmentier 2010, 3): *(i)* an individual rights to expressive freedoms for members of the academic community(whoever they might be) mainly as to conduct free enquirers, including the freedom to study, the freedom to teach, the freedom of research and information, the freedom of expression and publication (including the 'right to err'), and the right to undertake professional activities outside of academic employment; *(ii)* a collective or institutional autonomy for the academy in general and/or subsections thereof (faculties, research units, etc.). Said autonomy implies that departments, faculties and universities as a whole have the right (and obligation) to preserve and promote the principles of academic freedom in the conduct of their internal and external affairs); and *(iii)* an obligation for the public authorities (and, even in a wider sense, a general duty across the society) to respect and protect academic freedom and to take measures in order to ensure an effective enjoyment of this right and to promote it.
In this conceptualisation, academic freedom appears to encompass three distinct dimensions of the legal theory: a first, right-related, dimension (often theorized as only a negative dimension and

imputable to the notion of *freedom*); a second one that could be define as institutional in nature (having an organisational-financial character); finally a further and final dimension, that can be described both as a pre-condition and as a consequence of its comprehensive understanding: academic freedom as a general (let's say: constitutional) duty to protect knowledge and its instruments for the development of the society[41].

Table I: the *constitutional* dimensions of academic freedom[42]

	Elements of academic freedom
rights-related	Freedom to conduct scientific research Freedom to teach Freedom to study Freedom of academic expression
institutional	Fundraising International alliances Educational design
constitutional duty	General duty to protect knowledge and its development

The difficulty of defining academic freedom in clear theoretical terms has not prevented policymakers from establishing the protection of academic freedom as a fundamental principle of domestic and international law (STOA-ERPS 2023). There are, in fact, numerous legal systems that exemplify this commitment, also in the specific constitutional position, including the EU legal space (A. von Bogdandy 2016). As clearly highlighted by STOA, after the spread of democracy in Europe, academic freedom has evolved from a relatively nebulous concept to a truly legally enshrined and safeguarded liberty. This transformation is inextricably linked to the acknowledgement of academic freedom as a pivotal element in the sustenance of well-functioning, open, and democratic societies that adhere to the tenets of the rule of law (STOA-EPRS 2023, 4). In that sense, academic freedom (intended in its broad dimension) has a constitutional protection in most EU MSs, see for instance: Austria (Article 17 Constitution); Belgium (unwritten principle, see Judgment of the Belgian Constitutional Court n. 167/2000 and J. De Groof 2013, 153); Croatia (Article 67 Constitution); Estonia (Article 38.2 Constitution); Finland (Section 123); Germany (set forth by several regional Constitutions); Greece (Article 16 Constitution); Hungary (Article X Constitution); Italy (Article 33 Constitution); Latvia (Article 113 Constitution); Lithuania (Article 40 Constitution); Luxembourg (Article 23

[41] Nevertheless, North American literature from an earlier period conveyed a somewhat more restrictive concept of academic freedom (W.P. Murphy 1963, 451, footnote 11) or, in any case, a slightly different notion. See the definition elaborated by the America Association of University Professors (AAUP), here a synthesis: https://www.aaup.org/programs/academic-freedom/faqs-academic-freedom.

[42] Some of the information is taken from STOA 2023.

Constitution[43]); Poland (Article 70 Constitution); Portugal (Articles 42 and 43 Constitution); Romania (Article 32 Constitution); Slovenia (Article 58 Constitution); Spain (Article 20 Constitution).

In the context of EU legal space, academic freedom has been established as a fundamental right, with its protection explicitly enshrined in article 13 of the EU Charter of Fundamental Rights, a very general provision according to which "The arts and scientific research shall be free of constraint. Academic freedom shall be respected" (on the codification of academic freedom in the EU Charter, see K. Kovács 2024, 13). While the quoted provision clarifies the theoretical scope of academic freedom precisely as a right, it specific meaning remains vague. In that sense, the meaning remains quite vague since there is no clear normative definition of what this right means (i.e.: what does and does not fall under academic freedom).

In the well-known CEU university judgment (C-66/18, see V. Kosta, D. Piqani, 2022), the Court of Justice ruled that academic freedom has an expansive meaning, in the elaboration of which it draws on the findings of the European Court of Human Rights. In particular:

> "Academic freedom in research and in teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction, although it should be made clear that that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions (ECtHR, 27 May 2014, *Mustafa Erdoğan and Others v. Turkey*, § 40)".

In the ruling, the same paragraph also clarifies that academic freedom is characterised by an evident institutional dimension, essential to the understanding of its specific constitutional dimension ("This freedom, however, is not restricted to academic or scientific research, but also extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof").

However, apart from recognising its fundamental value and its qualification as a fundamental right of the EU, application and substantive problems seem to remain. The scope of application of that provision must in any case be interpreted in light of Article 51(1) of the Charter, meaning that "its provisions are addressed to EU institutions and to the Member States only when they act within the scope of EU law, which narrows the room for Commission-led infringement proceedings against a Member State" (V. Kosta, O. Ceran 2024) and in the light of the principle of subsidiarity.

3. The intersection with the rule of law principle as a new strategic methodology

In order to comprehend the methodology for safeguarding this value within the European legal framework (particularly in light of the initial data derived from practical applications), it is crucial to provide a concise overview of another "contested concept" (J. Waldron, 2021): the rule of law (see in general, on that specific intersection, O. Ceran 2024).

A lot of ink has been used in the attempt to clearly define the concept of rule of law, in its specific historical perspective and in the light of the different legal systems considered. The focus on this

[43] See also STOA 2025 (PE 765-776, February 2025).

principle ("value" for the EU) has a genuine transdisciplinary scope and philosophical and political studies have enriched the legal approach to the subject. These considerations naturally also apply when attempting a theoretical-conceptual approach to the rule of law in the European legal space, precisely starting with the types of meanings one wishes to attribute to this broad principle, including the well-known distinction between a narrow and broad concept of the rule of law. (thick/substantial *vs* thin/formal conceptions of the rule of law, see L. Pech 2022, 125 ff.; R. Coman 2022, N. Kirst 2021, 104). Notwithstanding the broadest and most substantial understanding of the rule of law, there might be reasons to question the idea that academic freedom can be regarded as a strictly necessary value for the rule of law. In a thin or formal conception of the rule of law, it may be questionable to extend the safeguards protecting legality in a stricter sense to the freedom of conducting academic activities.

Indeed, it would be preferable to argue, from the perspective of legal theory, that academic freedom is a fundamental right connected to the rule of law. These two concepts are interdependent, and the existence of one enhances the protection of the other and vice versa. This conclusion is supported by a number of arguments. Firstly, the EU legal space has now a specific notion of the rule of law value which is codified in secondary law (unlike the notion of academic freedom that still has not a specific legal explanation of what is it). Reference is made to Regulation EU 2020/2092, which, in article 2, letter (a), states that:

> "The rule of law refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU".

This concept was subsequently elaborated upon by the Court of Justice in the context of the well-known legal proceedings initiated by Hungary and Poland (C-156/21, §232-234 and C-157/21, §264-266) which challenged the aforementioned regulation. In these proceedings, the Court provided a comprehensive conceptualization of the rule of law as a constitutional value that define the common EU constitutional identity:

> "It must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States. Even though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of 'the rule of law' which they share, as a value common to

their own constitutional traditions, and which they have undertaken to respect at all times".

This interpretation of the principle-value of the rule of law as an identifying element of the constitutional dimension of the EU and in its broader scope confirms once more the possibility of highlighting its intertwining with academic freedom. Following this reconstruction, the protection of the rule of law has a functional role in the promotion of fundamental rights, so including at least the first (rights-related) dimension of the academic freedom. Hence, the thicker understanding of the rule of law emerging from the quoted passage of the judgment may be understood also to cover the institutional dimension of it, safeguarding the autonomy of universities as an integral part of a broader understanding of the separation of powers (O. Ceran 2024)

4. Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget as a case study

The aforementioned considerations have been found to be expressed in the first application of Regulation no. 2020/2092 (Rubio et al. 2023), a development which scholars has previously identified as a significant point of discussion. The objective of this section is not to provide an exhaustive review of the literature debate surrounding the rule of law conditionality regulation (Reg. no. 2020/2092), but rather to emphasise its advantages and disadvantages in the context of safeguarding academic freedom. In this regard, the perspective adopted herein is twofold, considering both a substantive approach and a regulatory policy perspective.

The Council implementing decision no. 2022/2506 constitutes the first (and, so far, the only) development of the conditionality regulation. In the framework of a general assessment of the Hungarian procedures in the use of EU resources, many flaws and inconsistencies have been found in the introduction of public interest trusts, leading to the application of severe sanctions such as: to suspend 55% of transfers in terms of cohesion funds (amounting to more than 6 billion euro) and to refrain from signing new financial commitment with Hungary.

This decision heavily affected also Hungarian universities, blocking the allocation of important grants. What it interesting for our purposes is to underline the overlap between managing EU funds and hampering universities' autonomy. The domestic political process of the contested reform, as described by influential commentators (G. Kováts et aal., 2023), started in 2018 and come to a conclusion with the adoption of Law IX in 2021. According to the latter, upon the proposal of the Ministry of Innovation and Technology (responsible also for higher education), a new type of institutional arrangement for academic institution was framed by introducing the so-called public interest trusts[44]. This novelty reshaped the governance of universities, allegedly facilitating their autonomy in the name of a (formal) separation from the State. In reality, it revealed to be a means to control sensitive decisions of universities concerning budget, organisation and even recruitment. It also implied the elusion of financial controls and the proper implementation of European budgetary

[44] https://eurydice.eacea.ec.europa.eu/national-education-systems/hungary/higher-education: "Between 2019 and 2021, the maintainers of institutions changed significantly, as a result of which the vast majority of previously state run higher educational institutions were transferred to the maintenance of trust funds performing public duties thus became private institutions. In this context, the law regulating the operation of these trust funds has also become an important legislation representing regulation of this sector".

rulings, together with public procurement procedures (that had been found as affected by "systemic irregularities, deficiencies and weaknesses") and anti-corruption controls.
With the implementing decision no. 2022/2506, the Council stresses the question related to the new public interest trusts (O. Ceran and Y. Guerra, 2023). In particular,

> "there are concerns regarding the non-application of public procurement and conflict of interest rules to 'public interest trusts' and the entities managed by them, and the lack of transparency with regard to the management of funds by those trusts. Those issues and their recurrence over time demonstrate a systemic inability, failure or unwillingness, on the part of the Hungarian authorities, to prevent decisions that are in breach of the applicable law, as regards public procurement and conflicts of interest, and thus to adequately tackle risks of corruption. They constitute breaches of the principles of the rule of law, in particular the principles of legal certainty and prohibition of arbitrariness of the executive powers and raise concerns as regards the separation of powers" (§11).

In the para-administrative procedure that characterises the structure of Regulation 2020/2092, it is evident that none of the few Hungarian initiatives have demonstrated a resolution to the prevailing issues of conflict of interest and public procurement (see §56 of the decision). In this regard, with the implementing decision the Council concludes (Art. 2.2) with the blocking of any financial relation with public interest trusts.

> "Where the Commission implements the Union budget in direct or indirect management pursuant to of Article 62(1) points (a) and (c), of Regulation (EU, Euratom) 2018/1046, no legal commitments shall be entered into with any public interest trust established on the basis of the Hungarian Act IX of 2021 or any entity maintained by such a public interest trust".

Also subsequent assessments (as for December 2024) showed the incapacity of Hungary to overcome this gridlock: with the Decision C(2024) 9140 of 16 December 2024 the Commission confirmed the sanctions set two years before, denouncing how the measures already taken had not been remedied. Specific attention was also devoted to the situation of higher education institutions, that would remain under the control of public interest trusts also in the light of the latest legislative reforms (see §25-26 of the Decision).
To provide some detailed info, the Hungarian universities maintained by such public interest trusts, and so addressed by the aforementioned measures, are 21. In the light of the Decision, they can still apply for EU funds, but in case of successful applications they are not eligible to receive any. As for the funds concerned, they include Horizon fund to Erasmus+, so the most common sources of financing for mobility, teaching and research.
The most sensitive point is to understand the impact of these measures, the consequences on individuals and the risk of even worsening the situation of the academic freedom in the country. The Decision addresses the Member State (and indirectly the academic institution therein) but evidently its consequences reach also academics, students and staff. Paradoxically, it may end to further weaking the educational system, not only in institutional terms, but also as the natural birthplace of critical thinking, something of outmost importance, especially in a country on the edge of an illiberal involution

It should also be noted that a number of cases are pending at the Tribunal regarding some specific measures for the application of conditionality, and developments are awaited (T-115/23 and T-138/23)[45].

5. Separate but related? The impact of the protection rule of law (and financial interests of the EU) on the academic freedom.

In conclusion, it is necessary to stress that none of the decisions taken in the Hungarian case (neither the 2022 Decision, nor the 2024 assessment) used Article 13 CFREU as a parameter. One could therefore argue that the effects of the application of Regulation 2020/2092 on academic freedom are only indirect and potential, or even that they end up restricting rather than protecting it.

Undoubtedly, both acts analyzed in the previous section are adopted in order to protect the financial interests of the Union, and in relation to the violation of the principles of transparency, impartiality and good management of European funds, with obvious connections to the promotion of the rule of law. However, it should not be forgotten that in the European perspective, the academic freedom referred to in Article 13 CFREU must be read in conjunction with the freedom of movement and establishment (referred to in Articles 3(2) TEU, 21 TFEU and 45 CFREU). And that in the balance between this and the protection of academic freedom, the founding values of Article 2 TEU, which are the basis of the rule of law and the regulation on conditionality, cannot be sacrificed. From the particular standpoint of that paper, which does not represent a legal theory study of EU academic freedom in general, certain elements appear to signal a novel constitutional approach to the safeguarding of research, thus warranting consideration within the academic debate. Primarily, there appears to be a divergence in the nexus with the rule of law, contingent upon the specific dimension of academic freedom under scrutiny. Regardless of the specific perspective adopted, both profiles of academic freedom (institutional dimension and academic freedom as a right) intersect with the protection of the rule of law when focusing on the EU positivised concept of the rule of law. Moreover, if the intersection between academic freedom and the rule of law is observed from the specific perspective of the aim of reg. 2020/2092, it would seem that further clarification would be required on the issues. The regulation is designed to safeguard the EU budget in the event of breaches of the rule of law within member states. Consequently, the primary concern is not the rule of law in its entirety, but rather the financial interests of the EU when those interests are jeopardised by the violation of the rule of law. This aspect has implications for the specific academic freedom dimension related to the application of the regulation 2020/2092, at least from a formal point of view. It is evident that the institutional dimension of academic freedom and its protection directly intersect with the EU's financial interests, and that therefore the measures for applying that conditionality fall on the specific institutional dimension. The specific dimension of freedom of research, (also) understood as negative freedom, which also possesses an individual character, is very different. For this specific dimension, direct connections with the Rule of Law Conditionality Regulation cannot be readily identified (although it can be asserted that academic freedom is a right that intersects with the value of the rule of law). Two further considerations can be developed from this topic. Firstly, a more political point of view reveals elements of connection in every case, as indirect consequences related to the application of that conditionality. Secondly, a general consideration suggests that

[45] See T-115/23 (action of annulment; for this case, the Tribunal rejected the Council's plea of inadmissibility, ECLI:EU:T:2024:209). The same for T-138/23 (ECLI:EU:T:2024:211). Other cases have been declared inadmissible.

paradoxically, protecting the institutional dimension of academic freedom through conditionality may in fact prevent the protection of academic research freedom mainly at the individual level. It is very clear that not all dimensions of academic freedom are fully connected to the specific instrument of conditionality, as has already been clearly emphasised by legal scholars. "Different 'versions' of academic freedom might therefore require different types of measures, and the EU's rule of law toolbox may not be suitable for all of them. For this reason, the design of new measures should be based on a more in-depth reflection, already underway[46], on the meaning and rationale of academic freedom in EU law, both in the context of the rule of law action and independently" (O. Ceran 2024).
It seems that on these aspects the direction expressed by the new STOA Report is agreeable, according to which "The requirements for institutional policies, procedures and support structures to safeguard academic freedom could be strengthened as a condition for obtaining EU research and/or education funding. However, any such conditions need to remain sensitive to the diversity of national frameworks" (STOA Options Brief 2025). One could therefore imagine mechanisms, procedures or criteria for the allocation of funds aimed at guaranteeing respect for academic freedom in its broadest sense.
It is imperative to emphasise that the primary objective is to consolidate the multifaceted nature of academic freedom, ensuring that the safeguarding of any component does not compromise the integrity of the others. The incorporation of specific procedural criteria for the allocation of research funds, based also on indicators that can assess the protection of academic freedom at the national level, has the potential to foster a comprehensive and inclusive understanding of all dimensions of academic freedom, both at the European level and also in the intricate nexus with the safeguarding of the EU financial interests.

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Pending cases

T-115/23

T-138/23

The Rule of Law Strategy in the new Enlargement Wave,
Adriano Dirri

1. Introduction.

This chapter aim at exploring the link between the rule of law protection in the new enlargement process, whose struggle, politically and legally speaking, are far complex than in the past. In the following pages the peculiarities of this accession process will be under the spotlight, considering the several novelties introduced by the European Union secondary law. It seems to stand in sharp contrast with the need to act swiftly to face the Russian invasion of Ukraine and the imperative to grant financial support to the latter. Therefore, once again, the *realpolitik* is threatening the procedural and substantive implementation of the EU rule of law. The chapter proceeds as follow: in the par. 2 the differences between the 2004/2007 enlargement with the ongoing accession process of Western Balkans and Ukraine will be highlighted, especially related to the jurisprudential and the doctrinal debate over the effectiveness of Article 2 TEU. In par. 3 the measures taken in supporting the candidate countries will be analysed by linking them with the post pandemic measures (the Recovery and Resilience Regulation (Regulation (EU) 2021/241)) and the new conditionality mechanism for protecting the EU financial interests. Therefore, the Ukraine Facility and the Reform and Growth Facility Plan for the Western Balkans will be compared. Despite some criticisms related to the (missing) substantive dimension of the rule of law, as well as the potential unclear assessment of the candidates' countries progresses, the EU seems firmly committed, more than in the past, to the full alignment of candidate countries with the rule of law standards. In the conclusive par. the need to a gradual and symmetric approach towards the enlargement will be proposed, differently from what has happened after the fall of the Berlin Wall. It is suggested that this approach will be a tool for legitimizing the EU Institutions to the rule of law, after years of discussion about the shortcomings and failures of the EU in enforcing the Union fundamental values.

2. Enlargement(s) and the European Union rule of law.

The territorial expansion of the European Union order poses several and significant challenges from time to time. On the one hand, the mandatory requirement to adhere to the EU legal framework is a burden for each candidate country in a diverse manner, given the different national constitutional implications of the EU membership. On the other hand, the deeper legal integration among the Member States implies an even more complex adaptation and process of enlargement. In addition, the territorial stretch of the EU law may interact with far more different constitutional traditions strictly connected to complex political and legal framework (the widening v deepening dilemma) (Kelemen, Daniel, Menon & Slapin, 2014). In this sense, it may be observed that each enlargement rounds may represent a chance for the EU Institutions to "adjust" the EU law benchmark to be met by both Member States and the candidates' countries. Thus, it may be also observed that the enlargement policy obliges the EU to be fully "aware" of the evolution rule of law, since the accession *Condictiones Sine Quibus Non* must be entirety met by the newcomers (Łazowski, 2024).

The candidates' countries from an enlargement round to another show different features among both them and in respect to previous countries which become members of the "club". It implies additional burden for the EU Institutions in managing different constitutional pathways with multiple legal exception to be made regarding the Treaties' discipline over accession process (Hillion, 2011). The purpose here is not to recall the enlargement rounds occurred in the history of the European

integration, but to show how the most recent approach has evolved considering the "EU conditionality law" and the new method of government experimented since the pandemic crisis (Fasone and Lupo, 2024). That means exploring how far and complex constitutional burdens within the new candidates' countries may cope with the most recent developments in EU secondary law, which are devoted to the rule of law protection.

Nevertheless, the supposed new enlargement wave should take place not in a short period of time for several reasons: firstly, the rule of law threats from the within the EU are lasting more than a decade and the so-called constitutional regression still represents the major challenge for the EU legal and political framework. Secondly, it implies that the effectiveness of the enlargement might be hampered by the "asymmetry" between the mandatory request for new countries to comply with rule of law standards, procedures and legislation and the challenging implementation of them in many EU countries. Thirdly, since the EU is being shocked from multiple directions, the territorial expansion of the EU legal framework is more than in doubt. In fact, it might be argued that, given the struggles of the EU, the new enlargement may be a tool for not losing ground as proactive European and Global actor. This last consideration drives directly into the topic of the (geo)political limits of ruling through the European rule of law.

Therefore, if compared with the 2004 enlargement current perspectives are far more complex than after the fall of the Berlin wall. Even at that time, when the trust in liberal constitutionalism and the rule of law was not in discussion, academic scholarship highlighted that "both the pre-accession process and membership conditionality also impose demands on the EU itself and its institutions" (Cremona, 2003; 3). Similarly, the "membership" conditionality, which was specified in 1993 with the Copenhagen criteria, represented a tool of foreign policy with a problematic consequence: for the EU it would be almost impossible to back away from promises made to countries which have the highest hope to become EU members for geopolitical reasons (Smith, 2003; 108, 139). Eminent scholarship questioned the big enlargement for its consequences also over the constitutional framework of the EU, mainly on the decision-making process as well as the challenges posed by the differentiation of rights and obligations between the Member States (De Witte, 2003; 241).

Thus, the EU must demonstrate that it is able to cope with the effects of another accession process, more than the enlargement itself. To this regard, the constitutional/legal perspective stands in sharp contrast to the policy of the "strategic" imperative of the enlargement, simply because it is considered better than the alternatives (Anghel & Jones, 2024; 1-5). The goal is, as Zielonka twenty years ago has argued, the establishment of peace, democracy and prosperity in a sort of "civilian" and not military mission. The problem is that, in sharp contrast with the latter, it means "exporting" institutions, norms and legal standards in a more competing universalistic claims, including that with the United States (Zielonka, 2005; 48, 156).

The Grenada Declaration of December 2023 (European Council, 2023) encapsulates the worrying perspective for the rule of law during the enlargement process. In fact, it is considered by the European Council a "geo-strategic investment in peace, security, stability and prosperity", as well as a driver for improving socio-economic conditions of both EU citizens and for reducing disparities between the Member States. Only afterwards, the "area" rule of law is considered, and the wording appears blurred and surrounded by specific political objectives such as "groundwork and reforms" needed by the EU.

Differently, the Commission stressed firmly that the accession "is and remains based on fair and rigorous conditionality" and, therefore, "a timeline or sequence of any future accession cannot be prejudiced". By the same token, the EC appears more prudent than the European Council since it

highlights the need for internal assessments towards a larger Union. Despite the Treaties' reform seems unlikely, the Commission is fully aware that the timing of the rule of law cannot meet those of politics. The EC is also aware the overwhelming implications of the (future) enlargement over values, policies, budget and governance. To this end, the willingness of the Commission is for a "gradual integration" because the enlargement policy must put the fundamentals, "such as democracy, rule of law and the protection of fundamental rights, even more at the core of the accession process" (European Commission, 2024a: 2-4). The Guardian of Treaty is mindful of the multiple procedures and instruments adopted by the EU to ensure that the rule of law is respected (Fasone, Dirri & Guerra, 2024), especially the Rule of Law Report cycle, recently extended to candidates' countries.

Despite the decision-making lies in the unanimity of the Council at the beginning and at the end of the accession process (art. 49 TUE) (Editorial Comments, 2024: 907-909), in the middle the rule of law related workload has become tougher than in the past. Thus, it has also been suggested to validate each negotiation chapter to a Qualified Majority Voting system (QMV), except for the final ratification (Schwarzer et. al., 2023: 21). In fact, once the process has started, the accession negotiations are legally "complex", given the fact that the values embodied in Art. 2 TEU have been mobilized by both the Court of Justice of the European Union (Spieker, 2024), by the legislature as well as through soft law tools. This has meant that the box has been filled with concrete legal requirements – case law and secondary acts - to be respected primarily by the Member States; at the same time, since art. 2 TEU represents the constitutional core of the EU, the new candidates are not exempted from the regulations introduced for giving life to Art. 2 TEU (Spieker, 2024: 291-292).

This foundational and fundamental provision is shaping the enlargement process, which is closely connected to the EU budget capacity. This is the objective of the Commission, according to which the enlargement "should be factored in the reflections leading to the next Multiannual Financial Framework (MFF), including by already providing the necessary legal basis to incorporate EU enlargement related expenditure and revenues as needed" (European Commission, 2024; 18). Therefore, the aim is to develop a closer link between future spending programmes and enlargement to make the pre-accession tools more efficient and better fine-tuned. At the same time, the enlargement calls for institutional reforms, with the primary objective to reduce the unanimity voting in the Council. The main lies into the blockage that the unanimity may provoke in a system which would entail more work for the EU in many areas (European Commission, 2024a: 19-20).

In practice, one the one side geopolitical imperative is prevailing but, on the other hand, it cannot be unpaired with the European interest and the rule of law. It stands in sharp contrast with the national interests of single member states which have been emerging from time to time, as happened with the implementation of the conditionality mechanism for Hungary in December 2023 (Schramm, 2024; 15-17). This means that the process should not be detrimental to the rule of law; the gradual integration of candidates' states should not focus only on the political association and economic integration. Therefore, the EU is obliged to put at the core of the enlargement the rule of law, as it appears to be the objective of the new methodology, according to which some reforms are required before granting the candidate status (European Commission, 2020; Lippert, 2024: 3). Thus, on the one hand the willingness is to (geopolitically) speed up the process but, on the other hand, to slow down it with the purpose to not make exceptions among the candidates' countries (Shahnini, 2024: 2).

3. The new strategy, the "conditionality method" and the enlargement: from Western Balkans to Ukraine.

An enhanced and more credible approach was developed by the Commission slightly before the COVID-19 crisis and its legal consequences (Fabbrini & Petit, 2024). In fact, in 2020, the EC called for a more serious commitment the Balkans governments in the implementation of fundamental reforms, considered "central in the accession negotiations". They included a roadmap for the rule of law chapters, on the functioning of democratic institutions and public administration reform and, lastly, a stronger link with the economic reform programme (European Commission, 2020: 3). Overall, the negotiation process was grounded more on values and democratic standards *per se*, than on the market-oriented integration. It has implied a stronger commitment to the predictability of the enlargement countries, with positive and negative consequences. The Commission called for a more coherent and clearer conditions from the outset: benchmarks and conditions must be set as well as the firm willingness to proportionally sanctioning stagnation and backsliding in the path towards the EU accession. This is the novelty of the strategy, since the EC may put on hold negotiations and even suspended in certain areas. Similarly, chapters previously closed may be re-opened in case of regression in the observance of the measures taken, mainly related to the rule of law. More notably, the funding may be cut or halted, with exception to civil society: it seems that the EU started to be more oriented in shaping the constitutional culture of the latter than of public institutions, given the constitutional backsliding in key Member States countries of the Eastern Europe.

Some preliminary observations may be drawn from the 2020 EC communication. Firstly, it shed lights on the new (constitutional) values-oriented attitude of the EC towards the EU current and future member States. Secondly, the EC admitted that the progress towards democracy and the rule of law might not be irreversible (Grabowska-Moroz & Grogan, 2024: 29): this is a key feature, since the predictability of the enlargement is closely linked to this possibility, i.e. that the process may be backfired or halted. Thirdly, the EU assessment process turned to be more symmetric and without exception as it was for Romania and Bulgaria with the Cooperation and Verification Mechanism (Ștefan, 2024; Kadlec & Kosar, 2022; Dirri, 2024; Vassileva, 2020).

Against this perspective stands a legal and constitutional background which states the opposite. The reality is that every enlargement has brought asymmetry and diversity, such as opt-outs, permanent derogations and transitional arrangements. Therefore, the issue of constitutional rank is the choice between the mandatory of the full membership ex art. 49 TUE and the likelihood that the accession treaties – primary EU law – may consent derogations to the constitutional requirement of the same art. 49. While derogations specifically related to territorial issues and peculiarities does not represent a problem, different is the evaluation of transitional arrangements, which serve to mitigate political concerns from the EU, the Member States and the candidates' countries. To make transitional periods "acceptable" stand temporary derogations, which have grown despite being relegated to extreme cases. Among them, may be found some which do not raise issues related to the rule of law; others, instead, are countered by safeguards clauses in the accession treaties, as happened for the 2004 and 2007 enlargements. This means that to various degrees the newcomers were not able to meet the EU legal standards even in critical fields such as justice and home affairs (Łazowski, 2024: 136, 158). Thus, the evaluation falls not on the enlargement, but whether this kind of flexibility in the accession process is still present in the next – not exactly foreseeable – wave. More importantly, the objective is to examine the enforced conditionality related to the rule of law, constitutional and legal issues which might not be left away by the future members at the time of the accession.

To this regard, it has been rightly stressed that *finally* the "rule of law" became the dominant narrative of action and reaction towards the periphery. Both soft law tools, such as rule of law dialogue and reports, and hard law tools, such the Regulation 2020/2092, have reformulated "procedural forms,

standards, normative and policy representations constructed/tested vis-à-vis the periphery, via Copenhagen or CVM monitoring (Iancu, 2024: 467). Therefore, the new test is toward the enlargement process in a more critical stage of the European Union lifespan.

The "fresh momentum" of the enlargement may not last long, since it should proceed hand by hand with tangible results, without downsizing the rule of law. Beyond the Western Balkans, Ukraine, Georgia and Moldova were granted the path of the accession. It is planned to go through the progressive integration into the EU market, as a facilitator capable to lead significative improvements in the living conditions of the candidates' states citizens. It is interesting that it is stressed the need to align the foreign policy to that of the EU, implicitly recalling the normative provisions embodied in Art. 21(1) TEU, according to which the EU must be guided by the principles of democracy and rule of law. Similarly (art. 21(2a) TEU), the EU has the duty to safeguard its values, fundamental interests, security, independence and integrity (Hillion, 2023). Therefore, making the rule of law at the core of the accession process means follow the logic of the Next Generation EU and the Recovery and Resilience Facility. In turn, the new methodology encompasses new and additional funds for such a purpose: the results have been the Ukraine Facility (Regulation (EU) 2024/792) and the Reform and Growth Facility Plan for the Western Balkans (Regulation (EU) 2024/1449), the as well as the Growth Plan for Moldova (European Commission, 2024b: 2). These Regulations will not be addressed here, but some insights may be drawn by a comparison between the tools adopted for the Western Balkans and for Ukraine.

Regarding the Western Balkan, several scholars have pointed out the lack of predictability of the process hand by hand its ineffectiveness. Despite some improvements in transparency, the fight against corruption remains still a hard work, as well as the path toward the independence of the judiciary. Some criticisms were directed to the formal assessment of the rule of law, discharging the substantive or socio-economic dimension. In addition, more attention has been given to the judiciary and the executive branches, without considering the empowerment of the parliamentary oversight and law-making power. The Growth Plan is directed to the economic integration of the Western Balkans and the allocation of 6 billion of Euro, divided in 2 billion in grants and 4 billion in loans, represent the same amount of money for these countries if member of the EU. The preconditions are the alignment of the economic policies, while the disbursement linked to rule of law related reforms. Still, the problem remains how to dismantle the ownership of the main state-enterprises, often in the hands of the elite. In addition, key policy areas are not properly considered in the Plan, such as education, culture and healthcare: it has been argued that this approach may hinder the expected progress because the formal conception of the rule of law is still prevailing (Hogic, 2024: 698-708).

The relevance of such a strategy is linked to its legal basis, Articles 212 and 322(1) TFEU and because it has implied the revision of the 2021-2027 MFF and the amendment of the MFF Regulation (Regulation (EU, Euratom) 2020/2093)86). To this regard, the funds allocated represents an increase of 40% of resources for pre-accession countries for the 2021-2027 period. This approach has been welcomed by the Court of Auditors, above all because if a country does not meet the payment conditions, the funds may be redistributed to other beneficiary countries of the Facility (art. 21(2) of the Regulation 2024/1449). The problem remains the administrative capacity of the Western Balkans and a clearer assessment by the Commission related to the payment conditions defined in the Reform Agendas (European Court of Auditors, 2024: 10, 15, 16). The enactment of this tool appears in contrast to the option of a differentiated integration through the opening of funds and programmes normally reserved for Member States (Milenković, 2024: 273-290). This argumentation may fall short considering the Conditionality Regulation (Regulation (EU, Euratom) 2020/2092) and the

methodology embodied in the Recovery and Resilience Facility: it would be hard to justify the release of funds without a clear commitment to the rule of law related reforms. Overall, this is the path envisaged by the Growth and Facility Plan, which was drafted and enacted in parallel with the broader financial support for Ukraine.

The Russian invasion of Ukraine boosted the geostrategic imperative for the EU act in support of Ukraine; the decision of the European Council to grant the candidate status to Ukraine was the symbol of the desire to support the country, despite the Commission's assessment of the association agreement have not been properly positive. It is the most relevant example of accession through war, considering that EU is tasked to defend the common values enshrined in Articles 2 and 21 TEU. Similarly to what said above, it seems unlikely a different accession formula than a long and gradual integration toward the full membership. No exception as fast-track accession are on table, since no special procedure is available in the treaties as well as because it would harm the relationship with Western Balkans' countries (Petrov & Hillion, 2022; 1289-1300; Petrov, 2024: 23-26).

The approach of the EU started to be firmly anchored rule of law conditionality to begin with the first two financial measures in support of Ukraine: the Macro-Financial Assistance (MFA) and the Macro-Financial Assistance+ (MFA+). Once again, the operationalization of the rule of law goes through the assessment of progress mainly in matter of anticorruption and judicial independence, while the socio-economic foundation of the rule of law remains in the background (Rabinovych, 2024: 7, 11, 12, 15-21). The evaluation of Ukraine towards the EU acquis, despite the obvious specificities, is quite like those of the Balkans' countries. Therefore, the conditionality mechanism, new financial resources and similar procedures for the accession process are mutually reinforcing the configuration of a new path with its core in the rule of law reform and, it shall be acknowledged, more democratic control over future memberships, with the involvement of the European Parliament (Dirri, 2024).

The Ukraine Facility was adopted for granting a far-reaching support to Ukraine (from 2024 to 2027) and it replaced the macro-assistance tool. The allotment amounts to €50 billion, €17 billion in grants guaranteed by a new tool, the Ukraine Reserve, within the MFF, and €33 billion in loans by the EU budget "headroom". In the same vein of the Growth and Facility Plan for the Western Balkans, the Ukraine Facility was adopted by amending the MFF Regulation, because of the expansion of the financial capacity of the EU (Fabbrini, 2024: 179-180). There are several similarities with the RFF, to begin with the task for Ukraine, which must submit a plan to the EC (art. 16), afterwards assessed by implementing a Decision by the Council. More interesting is the provision which sets the precondition for the support to Ukraine: it is mandatory for the country to uphold and respect the values of Article 2 TEU, especially democratic mechanisms, i.e. multi-party parliamentary system and the rule of law, respect for human rights, including those of minorities (art. 5). Therefore, the Ukraine Plan must respect high level of protection of financial interests of the Union, despite the meaning of the wording "high level" is not properly clarified.

Criticisms have been raised towards the Commission as well as it has been questioned the capacity of the Ukraine in the implementation stage. Regarding the latter, the European Court of Auditors stressed the vagueness of the preconditions and the possibility, according to Article 13(1), to allow for exceptional financing in "justified exceptional circumstances" through a Council implementation decision after a proposal by the Commission. For Ukraine, instead, is mandatory to respect the preconditions (in time of war) as well as indirectly to respect the financial interests of the EU, without having an adequate bureaucracy and legal tools at its disposal (European Court of Auditors, 2024: 9).

The Ukraine Facility hardly may be considered a fast accession track, for the peculiar condition of the country as well as the practical difficulties in the implementation of the Plan. It may be argued

that it represents the best way to "attract" Ukraine to the European values and rule of law, paving the way for a gradual integration through rebuilding the country more aligned to EU legal standards. Nonetheless, the Ukraine Facility, more than the measures taken for the Western Balkan, represents a step forward for the Union as a whole, given the new own resources raised on financial market.

4. Conclusions: symmetrical and gradual accession process and the rule of law.

From the analysis of the evolution of the EU approach toward the enlargement one insight may be drawn. The Union's attempt – primarily of the EC – to not allow any future exception to the rule of law. Stating the opposite would harm not only the limping legitimacy of the new enlargement process, in sharp continuity with the fallacies of the 2004 and 2007 "big bang" but, above all, the procedural rules as well as the objective to protect the financial interests connected to the rule of law. In addition, given the need to strengthen the EU as a rule of law global actor, a missing alignment to constitutional liberal democracy, fundamental rights protection and the improvement of socio-economic conditions would shake – from an additional direction – the foundation of the Union or the "European constitutional core" (Bast & Von Bogdandy, 2024).

The EU, given the persistent opposition of many Member States toward a deeper integration and to a sound implementation of the rule of law, especially Hungary, may not embark an additional struggle such as newcomers without full membership. Moreover, it will amplify the discontent within the EU as well as the criticisms towards the politics of the rule of law (Scheppele, 2023; Pech, 2022).

Therefore, the next enlargement wave mirrors an attempt to reconcile the need to implement the rule of law in and outside the European Union with the geostrategic imperative to not lose ground as actor promoting a specific constitutional tradition. The Russian invasion of Ukraine gave new impetus to the enlargement and provoked a major EU effort in supporting Ukraine; it forced the EU to raise new financial resources strictly connected to the rule of law and the protection of its financial interests.

The procedures were refined with tools devoted to the protection to the rule of law for internal purposes (the RRF and the conditionality Regulation) and are currently applied, necessarily for its "constitutional" rank, for future accessions. It has implied, at least formally, a serious commitment of the EU in influencing the European constitutional paths of several countries, from Western Balkans to Ukraine, Moldova and Georgia. It would not have been as such without the disbursement a large quantity of resources in what appears to be the first step towards the Europeanization of the constitutional culture of countries crossed by deeper cultural and territorial cleavages. Therefore, it is argued that the only way to enforce the rule of law both internally and externally (Burlyuk, Dandashly, & Noutcheva, G., 2023). is to proceed with a gradual and symmetric enlargement without making any exception which would, once again, foster the debate over the façade of the European Union rule of law.

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1. Introduction

Artificial intelligence (AI) systems are increasingly central to decision-making processes in public and private domains. These technologies are now used to make a variety of (automated) decisions to handle tasks such as moderating online content (Gongane, Munot, & Anuse, 2022; Nahmias & Perel, 2021), assessing employee performance (Aguinis, Beltran, & Cope, 2024; Aloisi & De Stefano, 2022; Haidar & Keune, 2021), determining credit scores (Todupunuri, 2024), predicting crime and even migration flows (Castets-Renard, 2022; Micklitz et al., 2022; Narayanan & Kapoor, 2024; Palmiotto, 2024). Beyond merely following predetermined rules, AI systems – especially those based on machine learning technologies (Porębski, 2023)– are capable of self-generating norms, creating an additional layer of regulation or at least normative influence in society (Diver, 2021; Lessig, 1999; Perez & Wimer, 2023).

The capacity for AI to autonomously evolve challenges the traditional tenets of law-making and rule of law, as these technologies operate in opaque spaces beyond traditional forms of political and legal oversight and/or accountability (Dawson, 2022; Kouroutakis, 2024; Kusche, 2024; Rodrigues, 2020; Tasioulas, 2023; Zalnieriute, 2023; Zalnieriute, Bennett Moses, & Williams, 2019). For instance, decisions about hate speech online or digital surveillance are often informed by algorithms that continuously adapt and redefine their operational standards (Perez & Wimer, 2023). This phenomenon, termed the "rule of tech", introduces a new form of governance where technological systems establish norms that may escape public or private accountability (De Gregorio, 2023).

The implications are profound for constitutional democracies and the rule of law, which are already grappling with regulating the normative powers of online platforms and private actors as well as the socio-political effects deriving from the economic concentration triggered by the digital revolution (Durand, 2020; Martens, 2020).

European regulatory initiatives such as the General Data Protection Regulation (GDPR); the Digital Services Act (DSA); and, most importantly, the Artificial Intelligence Act (AI Act) attempt to reassert the rule of law by addressing these technological challenges (De Gregorio, 2022; Dunn & De Gregorio, 2023; Hildebrandt, 2020a). However, their approach is not without its limitations, as it raises questions about the effectiveness and adaptability of regulatory frameworks in managing rapidly evolving AI systems (Hildebrandt, 2020b; Koulu, Sankari, Hirvonen, & Heikkinen, 2023; Ranchordas, 2021) as well as in constitutional values and the rule of law (De Gregorio & Dunn, 2022; Griffin, 2024).

The growing tension between the rule of law and the normative power of AI highlights the need for a digital constitutionalism, emphasizing the importance of protecting democratic values in the algorithmic society as well as the most "human" features of social regulation (Celeste, 2019; De Abreu Duarte, De Gregorio, & Golia, 2023; Gill, Redeker, & Gasser, 2018; Suzor, 2018; Teubner & Golia, 2023; Tusseau, 2023) while considering the qualitatively different nature of AI-related normativities. While digital constitutionalism has been the object of analytical and normative criticisms (Costello, 2023; Terzis, 2024), understanding how to limit the unchecked influence of AI systems and, more generally, the impact of digital technologies and their effects on individual and collective autonomy while ensuring accountability and transparency is paramount for current regulatory initiatives (Busuioc, Curtin, & Almada, 2022; Dawson, 2022; Felzmann, Fosch-

Villaronga, Lutz, & Tamo-Larrieux, 2020), especially if they aim at preserving the values of modern constitutionalism (Teubner & Golia, 2023).
At a deeper level, when it comes to the protection of the rule of law, the socio-economic disruption caused by the AI revolution – or rather, its incorporation/ embeddedness into social and economic processes – makes it necessary to take into consideration the complexity and different understandings of the "rule of law", both analytically and normatively (Faedda, 2021). Indeed, the "rule of law" itself is a contested concept, understood and applied differently in different contexts and cultures. In particular, distinct conceptions of the "rule of law" have been linked to different constitutional experiences, in turn linked to distinct legal traditions and understandings of "political", "civil", and "social" rights (Faedda, 2021; Griffin, 2023; Sajó, 2019).
Against this background, this short contribution aims at offering a mapping of current issues in order to better locate the analytical and normative implications of regulatory choices of law- and policy-makers.

2. From Territory to Spaces

The rise of digital technologies and AI systems has shifted the focus from territorial laws to global norms shaped by diverse – public, private, hybrid – actors (De Gregorio & Radu, 2022; Radu, Kettemann, Meyer, & Shahin, 2021). Historically, the state-centric model of governance tied laws to specific territories, but globalization and digital connectivity have eroded this paradigm (Catanzariti, 2024). Digital platforms, by establishing their own standards and rules, now act as de facto regulators with significant influence over global norms (Tiedeke & Fertmann, 2024; Vallejo, 2021). The concept of cyberspace further challenges traditional frameworks, as it operates beyond the constraints of national borders and sovereign authority (Kettemann, 2020). This phenomenon exemplifies the growing plurality of normative sources that interact and compete on a global scale (De Gregorio & Radu, 2022).
Constitutions, traditionally tied to territorial jurisdictions, now face the challenge of addressing norms generated by (transnational) non-state actors and technological systems. These shifts necessitate a reimagining of governance frameworks that consider the interplay between territorial laws and emerging spaces of digital influence (De Abreu Duarte et al., 2023). Legal pluralism, whereby multiple normative systems coexist and influence each other (Griffiths, 1986; Teubner, 1997), has become a more and more tangible reality in the algorithmic society, increasingly difficult to ignore for scholars and lawmakers. For example, algorithmic systems embed technical standards that may conflict with national legal frameworks, highlighting the need for harmonized oversight and/or legal conflict-management techniques (Fosch-Villaronga & Golia, 2019; Prifti & Fosch-Villaronga, 2024; Vallejo, 2021). Additionally, the dynamic nature of digital norms requires adaptive governance models that can respond to the evolution of technologies and their societal impacts (Ranchordas, 2021). The interaction between law, technology, and market forces further complicates the normative landscape, as each system exerts influence over the others (Cohen, 2019). Recognizing these interdependencies is crucial to understanding how norms are created, contested, and enforced in the digital age (Radu et al., 2021). This evolving relationship between norms and spaces underscores the importance of redefining legal principles to address the complexities of a globalized, digital society. This is even more important in the light of the need for global coordination for any AI regulation that aims at being 1) effective and 2) respectful of (a given notion of) rule of law (Bradford, 2023; Johns & Compton, 2022).

3. The Rule of Tech

AI technologies derive their normative power – what we referred to as "rule of tech" (De Gregorio, 2023) – from 1) their capacity for autonomous decision-making; and 2) once embedded into societal processes, their capacity to de facto constrain social (both individual and collective) social actors (J. Cohen, 2012; Cohen, 2019; Johns, 2021; Teubner & Golia, 2023). While these systems are often perceived as neutral, their design and implementation reflect biases and values of their creators (Zalnieriute, 2023). For instance, automated content moderation algorithms may prioritize certain types of speech over others, subtly shaping public discourse (Narayanan & Kapoor, 2024). But the "rule of tech" is not problematic "only" for the actual content of its norms. AI-generated norms and constraints often lack an essential and often-overlooked feature of modern (rule of) law as a *specific* form of societal regulation, i.e., the inner (micro)variations and (micro)violations allowed by its linguistic form and the degree of uncertainty/flexibility/adaptability that comes with it. Put otherwise, the "rule of tech" – focusing on the stability and foreseeability of normative expectations – often annuls the uncertainty that characterises *legal* normativity. While high levels of regulatory uncertainty open to power abuses and run contrary to (a substantive notion of) the rule of law, "acceptable" levels of uncertainty are crucial to the performance of law's societal functions. Such degree of uncertainty/flexibility allows the (rule of) law to adapt to societal change and to claims to justice in individual cases (Markou & Deakin, 2020; Schafer, 2023; Teubner, 2004) and is even more important as contemporary societies become increasingly complex. Furthermore, the human(istic and humanising) features of legal and judicial reasoning (Supiot, 2007 [2005]) – as a *specific* form of reason-giving typical of the (substantive notion of the) rule of law (Coan & Surden, 2024) – are lost in AI-generated decision-making (Golia, 2023) and this aspect is more and more relevant as AI systems are increasingly used in legal practice (Sourdin, 2023; Custers & Fosch-Villaronga, 2022). The "rule of tech" is not just a more efficient way to regulate society but rather a qualitatively different technique of social regulation, putting into question the possibility to let law and society co-evolve through disobedience and evolutive interpretation/implementation.

Furthermore, AI systems' opacity and complexity make it challenging to ensure accountability, as their decision-making processes are often inscrutable even to their developers (Bathaee, 2018; Palmiotto, 2023; Pasquale, 2015). The dynamic, evolving nature of AI further complicates oversight, as these technologies adapt over time in ways that may not align with their original design. Traditional legal frameworks, rooted in principles of causality and predictability, struggle to address the probabilistic logic underpinning AI decision-making (Diver, 2021). This shift from deterministic to probabilistic reasoning represents a fundamental challenge to the rule of law, however one might conceive of it. Moreover, the deployment of AI in sensitive areas such as healthcare (Fosch-Villaronga & Drukarch, 2022) and criminal justice raises ethical concerns about fairness, bias, and the protection of individual rights. Addressing these issues requires a comprehensive approach that combines technical expertise with robust legal and ethical safeguards. The "rule of tech", characterized by the increasing influence of algorithmic norms, highlights the need for governance models prioritizing transparency, accountability, democratic values, and, most importantly, the preservation of the humanising features of law as a specific technique of societal regulation.

4. Overlapping Normative Powers in the Algorithmic Society and Digital Colonialism

The normative power of AI highlights a growing competition between traditional legal systems and emerging forms of governance. Social media platforms, for example, operate as private regulators, setting and enforcing rules that shape public discourse and societal values (Klonick, 2018). This

dynamic creates tensions between public and private actors, as well as between conflicting legal standards across jurisdictions (De Gregorio & Radu, 2022). The lack of transparency and accountability in private regulatory frameworks exacerbates these tensions, raising concerns about the erosion of democratic principles. Additionally, AI systems themselves generate norms that may conflict with established legal frameworks, further complicating the regulatory landscape. The "black box" of AI decision-making, combined with the scalability of these technologies, defies oversight and accountability. Addressing these issues requires cooperation between governments and civil society to develop governance models that balance innovation with the protection of fundamental rights (Bradford, 2023). Moreover, ensuring that AI complements the rule of law necessitates adaptive and inclusive regulatory frameworks. These frameworks must consider the diverse sources of normative power in the algorithmic society, recognizing the interplay between state-based laws, (private) standards, and algorithmic norms. Ultimately, fostering a more equitable and inclusive digital society depends on the ability to harmonize these competing normative systems while safeguarding democratic values. Most importantly, these regulatory goals cannot overlook the deep economic and structural inequalities and power unbalances between the Global North and Global South, with their different contexts, needs and conceptions of the rule of law (Fisher & Streinz, 2022; Gurumurthy & Chami, 2021; Kwet, 2019).

5. Technological Delegation

The delegation of decision-making to AI systems raises complex constitutional and ethical questions. Striking a balance between leveraging AI's capabilities and maintaining accountability is critical to preserving democratic governance. Historical examples of delegation, such as public-private partnerships, offer some lessons for managing the complexities of AI governance. These arrangements underscore the importance of clearly defining roles and responsibilities to ensure effective oversight and prevent conflicts of interest. Risk-based regulatory instruments, such as the EU AI Act, provide a framework for categorizing AI systems based on their potential impact (Dunn & De Gregorio, 2023). By imposing safeguards to the risks associated with different AI applications, these approaches aim to balance innovation with the protection of rights. However, the success of such frameworks depends on their adaptability and the extent to which they involve diverse stakeholders in policymaking. Strengthening the role of public institutions in overseeing AI systems and the business actors promoting their use is essential to addressing power asymmetries and ensuring accountability (Narayanan & Kapoor, 2024). Additionally, fostering collaboration between governments, corporations, and civil society can help bridge the gaps between technical expertise and policymaking. Designing technological delegation requires comprehensive approaches prioritizing transparency, accountability, and the protection of individual and collective rights. This approach must recognize the transformative potential of AI while addressing its inherent risks.

6. Conclusions

The consolidation of the algorithmic society underscores the increasing influence of AI in mediating rights and powers. These technologies challenge traditional legal frameworks by introducing self-generated norms that operate beyond the scope of public and private oversight. This phenomenon, referred to as the "rule of tech", highlights the need for digital constitutionalism to address the ethical and constitutional implications of AI. Regulatory initiatives, such as the EU's AI Act, represent an important step toward limiting the unchecked influence of AI systems. However, these measures must be complemented by broader efforts to address the disruptive effects of such technology. Ensuring

that AI serves the public interest requires robust frameworks that prioritize accountability, transparency, and the protection of fundamental rights. The interplay between the rule of law and the "rule of tech" will ultimately define the future of democratic governance in the digital age and, most importantly, whether or not (digital) constitutionalism as an ideology (Celeste, 2019; Golia, 2022) will be able to perform the normative functions it has had in modernity (Maluf, 2024). Achieving this balance necessitates sustained effort, innovation, and a commitment to aligning technological development with societal values.

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Trade Agreements as a Further Field for the Promotion of the Rule of Law?,
Filippo Fontanelli

1. Introduction

It is not easy to be a free trade agreement (FTA) in a world where free trade is increasingly unpopular. Gone are the days when States eagerly competed to conclude as many FTAs as possible, at a pace that seemed to threaten the centrality of the World Trade Organization (WTO). By 2025, enthusiasm for global economic integration has largely waned, and most economies have shifted their stance on trade liberalization, favouring alternative policies driven by security concerns, resilience-building, industrial policy, tribalism, and nationalism. The WTO is effectively moribund, and the primary purpose of FTAs – removing trade barriers – ranks low in most countries' agenda. This moment invites reflection on how FTAs, over the past two decades, have regulated a range of issues beyond trade – or issues only tangentially related to trade – with creativity and foresight.

This chapter aims to examine FTAs through this lens and highlight their regulatory versatility. Under the banner of trade integration, many FTAs have introduced complex regulatory frameworks, establishing new rules and standards for participating countries. First, the chapter discusses the context in which FTAs have expanded their regulatory scope beyond trade liberalization (Section 2). It then selects several "rule-of-law adjacent" provisions in recent FTAs to illustrate their potential as incubators and laboratories for state commitments in many areas of public action (Section 3). Specific focus is given to the "level-playing-field" provisions of the Trade and Cooperation Agreement between the United Kingdom (UK) and the European Union (EU) (Section 4) and the sustainable development obligations linked to trade sanctions in the FTAs between the EU and the UK, on the one hand, and New Zealand and Australia, on the other (Section 5).

This survey argues that the global consensus on trade liberalization between 2005 and 2024 provided cover for FTAs to incorporate advanced rule-of-law provisions that did not necessarily have a trade focus. At a time when the trade-focused elements of FTAs are increasingly seen as unworthy of the effort involved in negotiating them – due to limited benefits and growing resistance to unchecked liberalization – these ancillary provisions may prove decisive (or fatal) in current and future FTA negotiations (Section 6).

2. The surge and content of "Deep trade agreements"

All 166 members of the WTO benefit from its guarantees in trade relations, including capped tariffs, non-discrimination, and protection against unnecessary regulatory barriers. However, WTO members are also permitted to conclude preferential agreements (or FTAs) with one or more other members, under certain conditions outlined in Article XXIV of the General Agreement on Tariffs and Trade (GATT). Under a typical FTA, participating countries eliminate or significantly reduce tariffs that would otherwise apply to trade between them, thereby creating market access conditions not extended to imports from non-FTA countries. Historically, FTAs were designed to provide contracting parties with preferential access to each other's markets, enhancing the baseline liberalisation guarantees offered by WTO law.

Between 2010 and 2015, commentators noted not only a significant increase in the number of FTAs but also an expansion in their regulatory scope (Hofmann et al., 2019, 367). Predictably, this expansion deepened integration between participating economies in areas governed by WTO law, such as improved market access through the removal of tariffs and regulatory barriers. However,

many FTAs also introduced commitments outside the scope of WTO rules, addressing issues such as competition, investment protection, environmental sustainability, and anti-corruption measures. These provisions were categorised, respectively, as WTO-*plus* (enhancing commitments under WTO law) and WTO-*extra* (extending commitments beyond WTO law) (Horn et al., 2010). This chapter focuses exclusively on the WTO-*extra* sections of FTAs, to gauge their rule-of-law potential.

3. The widening regulatory scope of FTAs

WTO-*extra* provisions in FTAs address a wide range of issues (Fontanelli 2019; Hofmann et al., 2019, 368–370). In many cases, these provisions align with principles and values typically associated with the rule of law, such as the protection of human rights, environmental preservation, and combating transnational criminal activities. In other instances, they aim to mitigate the negative externalities of trade liberalization by requiring states to cooperate – such as through the exchange of information on migratory flows – or by ensuring mutual respect for social, labour, and environmental standards. This latter concept is often referred to as the principle of the "level playing field." Rule-of-law provisions are typically included in the chapters of FTAs dedicated to trade and sustainable development (TSD).

The introduction of WTO-extra provisions does not follow a single pattern. Sometimes, their function is clear. For example, association agreements between the EU and States aiming to join the EU are predictably designed to cover a wide range of subjects beyond trade regulation. These agreements serve as stepping stones toward EU accession and regulatory alignment. In this case, rule-of-law commitments aim to push the non-EU party towards a desired level of rule-of-law compliance, using the EU as benchmark.

Other times, FTAs provide an opportunity for negotiating parties to include ancillary or lateral topics. The expanded scope of these agreements can sometimes be attributed to a path-dependent trend, where parties build upon prior agreements, leading over time to the irreversible growth of these agreements in length and coverage. In other cases, the contracting parties introduce obligations reflecting principles shared by all of them – principles that are relatively easy to observe and for which the compliance cost is low. This performative strategy cements their shared identity, sends a signal to the outside world and, in turn, may serve as a template for subsequent agreements. Additionally, a stronger participant may use the package deal – and its trade-related benefits – to impose costly obligations on its partners, reflecting values it seeks to export (or interests it wants to pursue.

Examples illustrate these different scenarios. The association agreement between the EU and Serbia includes provisions on human rights, international law (such as cooperation with the International Criminal Tribunal for the former Yugoslavia), countering the proliferation of weapons of mass destruction, combating terrorism, and commitments to strengthen the rule of law in domestic institutions. In this case, the rule-of-law "conditionality" of the agreement is not ancillary to trade liberalization but serves as a policy tool in the accession process, using the prospect of EU membership as an incentive for Serbia to agree to several commitments (Stahl, 2011, 470).

In its trade agreements with Korea and Japan, the EU introduced commitments to worker protection based on instruments adopted by the International Labour Organization (ILO). These agreements require the parties to incorporate the standards of the four core ILO Conventions (on forced labour, child labour, discrimination, and the freedom of association and collective bargaining) into their laws and practices, while also making efforts to ratify other ILO conventions. Notably, at the time of these agreements, Korea had yet to ratify the ILO Conventions on freedom of association and forced/child

labour, and it delayed doing so for years. In 2019, the EU sued Korea under the agreement and secured a decision that prompted Korea to ratify these conventions and amend its laws (Han, 2021, 537-538). In the case of the agreement between the US and the Dominican Republic and Central American States (CAFTA), there was no doubt that introducing similar commitments primarily served US interests. The US sought to prevent its partners from maintaining or tolerating low labour protection standards, which could enable them to export cheap goods to the US. CAFTA, therefore, includes a commitment for parties to effectively enforce their labour laws. However, when it became apparent that Guatemala was not implementing its trade union laws, the US initiated a case before a CAFTA arbitral panel. The panel found that, while Guatemala's failure was ascertained, there was insufficient evidence to prove that this failure affected trade between the US and Guatemala, a condition necessary for the panel to exercise its jurisdiction. Following this decision, the US included a Rapid Response Labour Mechanism in its renewed agreement with Canada and Mexico (the USMCA) to monitor Mexico's adherence to union rights (Bown and Claussen, 2024, 345). Under this mechanism, if the US suspects a violation of labour rights in a Mexican factory, it can deny duty-free access for the factory's exports to the US.

The brief discussion of labour provisions reveals another ambiguity of the introduction of rule of law commitments in trade agreements. While these norms ostensibly relate to public interests, it appears that their inclusion – or at least their enforcement – is linked primarily to their effects on trade. In other words, it is possible to argue that, at least in part, rule-of-law commitments are instrumental to economic interests (and not pursued as autonomous goals).

4. Level playing field obligations and processes

The 2021 Trade and Cooperation Agreement (TCA) between the EU and the UK introduced a set of rules that extend beyond the standard provisions typically included in TSD chapters (Fontanelli, 2020, 16-25). These rules are designed to ensure fair competition in trade between the two partners, focusing on how domestic standards influence production costs (Leonelli, 2021; Fontanelli, 2023, pp. 17–19). The EU's insistence on this novel set of obligations, labelled as "level playing field" (LPF) can be attributed to the unprecedented nature of the trade relationship between these two major economies. Despite their geographic proximity, the two economies are not obligated to adhere to regulatory alignment or mutual recognition of standards. In this context, the introduction of duty-free trade between the UK and the EU could have created opportunities for either partner to implement measures designed to lower production costs for domestic producers, thereby boosting their competitiveness in the other's market in ways that are perceived to be distortive.

For example, the UK might have granted subsidies to certain producers or reduced the environmental standards governing their operations. These actions would enable such producers to lower their production costs, allowing them to offer products at more competitive prices in EU markets. This could undermine local competitors, not due to superior product quality, but because of the unfair advantage conferred by relaxed regulations or direct financial benefits provided within the producer's home jurisdiction.

The TCA parties agreed not to lower standards from the level in force at the time of the treaty's conclusion (LPFS.6.2(1)) and also expressed their intention to pursue more protective standards over time. To ensure compliance with these commitments, the TCA established the Partnership Council, a body responsible for determining whether one party has undermined the other's interests by weakening its domestic standards. Notably, if a breach is found, the aggrieved party may be authorized to retaliate, including by imposing higher tariffs on the other's goods. This "rebalancing"

mechanism (Fontanelli, 2023, 18; Collins, 2021, 620) illustrates that, while the parties uphold shared values – such as labour protection, environmental preservation, and animal welfare – they are primarily introducing related rules to manage trade interests rather than to strengthen each other's rule-of-law standards.

5. Sustainable development: obligations and enforcement

Typically, TSD provisions are not strictly enforceable. They are often framed in aspirational rather than binding language, and even when they do impose legal obligations, they are frequently excluded from the treaty's compulsory dispute settlement mechanisms (Carrillo, 2024, 19). Finally, even when litigation over TSD provisions is possible, enforcement remains weak. In most EU agreements, for example, the panel responsible for determining compliance can only issue recommendations for the losing party to restore adherence to its obligations. In other words, FTAs generally do not allow for sanctions in response to breaches of TSD provisions (Marín Durán, 2020, 1042) – though a notable exception, as discussed earlier, is the LPF system under the TCA.

Recent treaties concluded by New Zealand and Australia are notable for accepting that the treaty's enforcement system also applies to compliance with its chapters on non-trade issues.

The agreements between the UK and, respectively, Australia (2021) and New Zealand (2022) take a minimal yet incremental approach (Katsaroumpas, 2023). Specifically, they allow disputes concerning alleged breaches of rule-of-law obligations, like those on environmental and labour protection, to be brought before the treaty's dispute settlement system, without requiring proof of "trade harm" (unlike in the US-Guatemala case discussed above). This means that, at the end of the process, the innocent party may be authorized to impose trade restrictions against the losing party, thus giving economic weight and teeth to social obligations. However, not all obligations are subject to enforcement; for instance, the agreements exclude chapters on "Trade and Gender" and "Animal Welfare" from the dispute settlement mechanism.

The recent treaty between the EU and New Zealand (signed in 2023, entered into force in 2024) follows a similar approach by allowing unilateral trade sanctions in response to breaches of any rule-of-law provisions in the TSD chapter. This marks a significant shift, as it is the first time the TSD chapter of an EU free trade agreement is subject to the same dispute settlement system as the rest of the agreement, including the possibility of authorizing retaliatory trade measures (Carrillo, 2024, pp. 22-23). Notably, the dispute settlement system does not apply to the chapter on "Māori Trade and Economic Cooperation" (Article 20.7), a carve-out that shows how within the same FTA different rule-of-law sections might reflect a varying degree of enforcement.

These developments strengthen the rule-of-law provisions of FTAs, but their impact must be viewed in context. Given the parties involved (EU, New Zealand, Australia, and the UK), it is unlikely that any of them expects to be accused of violating TSD standards. Instead, these provisions serve two key purposes: they reinforce the rule-of-law credentials of the FTA parties—deterring any backsliding while imposing little additional compliance cost—and they send a clear signal of shared priorities, which are likely to shape future trade agreements. In this light, the ongoing EU-Mercosur negotiations (see next section) offer an illustrative case.

6. FTAs as incubators of rule-of-law disciplines

The aim of this chapter is not to suggest that rule-of-law provisions have become the *raison d'être* of FTAs, even if the trade-specific importance of these "deep" agreements is declining. Likewise, it would be misguided to overstate the significance of these norms, given their scattered occurrence and

varying degrees of bindingness and enforcement. However, it is important to recognize that FTAs – perhaps unnoticed by many observers – have become both a breeding ground and a workbench for novel rule-of-law disciplines. As explained above, the reasons for including these provisions in FTAs vary, but their widespread existence and operation are undeniable.

It is worth considering whether some of these rule-of-law disciplines would be better placed in instruments other than FTAs. For instance, when it comes to measures aimed at promoting respect for international law, human and labour rights, or environmental standards, it might be tempting for a State to codify them in domestic legislation rather than in treaties negotiated with economic partners. The recent flurry of sanctions against Russia demonstrates that effectiveness sometimes requires unilateral action rather than reliance on an enforcement system established within a bilateral agreement. Similarly, the EU has introduced a series of trade-related measures, all driven by a combination of "level playing field" considerations and the tendency to export values globally leveraging the "Brussles effect". These include the Deforestation Regulation, the EU Supply Chain Due Diligence Directive, the Forced Labour Regulation, the Carbon Border Adjustment Mechanism (CBAM), and the Anti-Coercion Regulation, all adopted between 2023 and 2024.

These unilateral measures, on the one hand, build on the experience gained during the 20-year regulatory workshop of FTAs. On the other hand, they risk duplicating disciplines found in existing or future treaties and, more broadly, may undermine some of the market access that FTAs are intended to provide to the EU's partners. This dynamic has been on full display in the EU's recent negotiations with India and Mercosur.

India has challenged the introduction of the CBAM, a mechanism that would impose a significant tariff (roughly at 20-35%) on Indian goods exported to the EU, based on the estimated emissions generated during production. Unsurprisingly, this prospect has negatively affected FTA negotiations, which may resume in earnest only if the parties can agree on a CBAM exemption for India. Similarly, Mercosur officials, particularly from Brazil, have raised concerns about the costs imposed by the Deforestation and Due Diligence measures, which could restrict access to the EU market for their goods. At present, the EU finds itself under pressure, engaging in what has been described as "negotiating in the shadow of unilateralism" (Lehmen and Vidigal, 2025). Some observers argue that the EU's unilateral measures are insufficient and advocate for more stringent standards in the FTA with Mercosur (Fuchs et al., 2024). Others contend that, regardless of their completeness, these unilateral measures risk discouraging partners from negotiating new FTAs altogether (Lehmen and Vidigal, 2025, 112).

When FTAs reflect rule-of-law values that are clearly shared by both parties, their inclusion is largely uncontroversial. However, when these clauses reflect one party's dominance over the other, they can be contentious, and alternative avenues for law-making may be more appropriate.

The overall impact of FTAs on rule-of-law innovation is complex and nuanced. FTAs have introduced a meaningful range of new disciplines, exceeding what their trade-driven mandate might suggest. These regimes vary in frequency, binding force, reciprocity, and enforcement – though a full comparative analysis is beyond the scope of this study. Nevertheless, scholars of global rule-of-law should pay close attention to these provisions, often buried within thousands of pages of trade agreements. At times, the trade ecosystem has served as fertile ground for loftier values, contributing to their entrenchment in legal instruments.

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