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Building Europe's Autonomy: Law, Institutions, Cooperation

ECB Legal Conference 2025

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Building Europe's Autonomy:
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Introduction

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1 The challenge of autonomy

Over the past decade, the ECB Legal Conference has become something of a regular presence in the EU's broader legal and constitutional discourses. Each annual edition has reflected key turning points in the Union's development – from the uncertainties of the sovereign debt crisis to the establishment of the Banking Union and the reforms of budgetary governance. In this respect, the ECB Legal Conference has often functioned like a seismograph, registering where the law stands in the shifting political and economic realities, indicating where new rifts are opening, and what challenges lie ahead. By reflecting on the challenges of its time, and the impact on the law of central banking, the conference also made it apparent that the central bank is never isolated from the broader constitutional and political challenges of the Union.

As we were preparing the 2025 edition of the conference, it became clear that many of the issues occupying academics and practitioners alike centred around two themes: the pursuit of European autonomy and the rule of law. Autonomy, once considered a background principle of European development, now occupies centre stage, driving debates across policy areas, from the digital euro and the strategic use of trade instruments to the resilience of payment infrastructures and to defence. European autonomy has become a practical imperative demanding immediate attention. And as is often the case with matters of urgency, this renewed focus raises fundamental questions about the role of law. What does autonomy mean in a Union founded on cooperation and diversity? Can a legal order designed to transcend national borders embrace autonomy without compromising its normative commitments? And crucially, can the EU act decisively in a fractured global order while remaining faithful to one of its foundational values, the rule of law?

2 The making of autonomy into a constitutional principle

Autonomy has long been something like the Holy Grail of European integration. For Europe to be autonomous means to be able to pursue European values and interests. And that requires independence both vis-à-vis Member States and the wider world. This is a long process, unfolding in many phases.

Autonomy, as feature of the EU legal order, had already been a cornerstone of the Court of Justice of the European Union's (CJEU) jurisprudence doctrine that set the

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EU's legal order apart from both national law and ordinary international law.[1] A line of landmark judgments – from the seminal cases of *Van Gend en Loos* and *Costa* v *ENEL*, through *Commission* v *Council* (ERTA) and *Opinion 1/91*, to more recent decisions such as *Achmea* – reflect "autonomy" as a core constitutional tenet of the Union.

In the early era, the Court's focus was primarily inward-looking, aimed at establishing the self-sufficiency of the European legal order vis-à-vis the laws of the Member States. In *Van Gend en Loos*,[2] the Court asserted the direct effect of European Community law within national legal systems, and in *Costa* v *ENEL*[3] it affirmed the supremacy of European law over conflicting national law. Together, these principles laid the groundwork for a European rule of law that could operate independently of – and above – national laws. These were not merely doctrinal constructions but declarations of constitutional independence, laying the groundwork for a distinct legal system governed by its own principles and hierarchies.

As integration deepened, the CJEU also safeguarded the EU legal order from external interference. The principle of autonomy took on an outward-looking dimension. In *Opinion 1/91*, the Court famously rejected the proposed European Economic Area (EEA) judicial system on the basis that it would compromise the autonomy and integrity of the EU legal order.[4] Following a similar line of thinking, in *Achmea*, the Court held that investor-state arbitration within the EU violates the principle of autonomy, reinforcing the requirement that the interpretation of EU law must remain within the exclusive competence of Union institutions.[5] In the Court's reasoning, preserving the rule of law within the EU required protecting the EU legal order from being bound by external adjudicators – a clear assertion of autonomy to ensure the uniformity and integrity of EU law.[6] Through this body of jurisprudence, including later rulings such as *Opinion 2/13* on the EU's accession to the ECHR,[7] the CJEU reinforced this "external" aspect of autonomy, limiting the ability of Member States to make international commitments that would circumvent the EU's legal

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1 For detailed analysis of the case law, see Lenaerts, K, (2018), "The autonomy of European Union Law", *I Post AISDUE*, 1; Eckes, C. (2020), "The autonomy of the EU legal order", *Europe and the World: A law review*, Vol. 4(1), 1; Lenaerts, K., Gutiérrez-Fons, J., Stanislas, A. (2021), "Exploring the Autonomy of the European Union Legal Order", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 81, 47 Lionello, L. (2025), "The Concept of the 'Autonomy of EU Law' in the Case Law of the European Court of Justice", *European Public Law*, Vol. 31(2), 213.

2 Judgment of the Court of 5 February 1963, *NV Algemene Transport - en Expeditie Onderneming van Gend & Loos* v *Netherlands Inland Revenue Administration*, C-26/62, ECLI:EU:C:1963:1.

3 Judgment of the Court of 15 July 1964, *Flaminio Costa* v *E.N.E.L*, 6-64, ECLI:EU:C:1964:66.

4 Opinion of the Court of 14 December 1991, delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinion 1/91, ECLI:EU:C:1991:490.

5 Judgment of the Court of 6 March 2018, *Slowakische Republik* v *Achmea* BV, C-284/16, ECLI:EU:C:2018:158.

6 Dimopoulos A. (2018), "Achmea: The principle of autonomy and its implications for intra and extra-EU BITs", EJIL:talk.

7 Opinion of the Court (Full Court) of 18 December 2014, delivered pursuant to Art. 218(11) TFEU, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/13, ECLI:EU:C:2014:2454.

system. *Kadi II* famously set limits on international commitments stemming from EU fundamental rights.[8]

Today, the principle of autonomy stands for the idea that the EU legal order is both supreme internally and independent externally. It enables the Union to operate as a self-governing entity: EU law is made and interpreted by the Union's own institutions, and while the EU engages with international law, it does so on the premise that its core constitutional framework cannot be prejudiced by external rules. This evolution of autonomy jurisprudence has significant implications, as it raises fundamental questions about sovereignty, the relationship between EU law and international law, and the balance between unity and diversity in the European project. As Koen Lenaerts has noted, autonomy serves both as a foundation and as a constraint, enabling to strike the right balance "between the need to preserve the values that we Europeans cherish and wish to preserve for future generations and the 'esprit d'ouverture' that inspired the authors of the Treaties when learning vital lessons from the past and more particularly from the ravages of World War II".[9]

3 Strategic autonomy in a changing global context

Today, autonomy has taken an additional dimension. The world has become more unpredictable, less cooperative, and, at times, openly hostile. The geopolitical landscape of the 2020s – marked by intensifying rivalry between the United States and China, a major war on European soil with Russia's invasion of Ukraine, and new strains of protectionism in global trade – has reinforced the importance of Europe not being dependent on others for its security and prosperity.

In this context, autonomy means something very concrete and urgent: Europe's capacity to assert its own voice on the international stage, making decisions independently while taking into account its own interests and values, rather than simply adapt to the strategies of others.[10] This can be seen as a next stage in the pursuit of European self-determination.[11] Practically, pursuing autonomy involves measures such as lessening reliance on imported energy and foreign technology inputs, and building up Europe's own capabilities in key sectors. For example, the EU has sought to develop domestic capacity in semiconductors (through initiatives like the European Chips Act) to avoid vulnerabilities in supply chains.[12] In the realm of defence, while NATO remains central, the EU has initiated joint programs to build

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[8] Judgment of the Court of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 (Kadi I),;Judgment of the Court of 18 July 2013, *European Commission and others* v *Yassin Abdullah Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518 (Kadi II).

[9] Lenaerts, K, (2018), "The autonomy of European Union Law", I Post AISDUE, 1, 10.

[10] See passim, European Council, *A New Strategic Agenda 2019–2024*.

[11] In detail on the legal dimensions of this new phase, see Steinbach, A., (2023), "The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict", *European Journal of International Law*, Vol. 34(4), 973.

[12] See the contribution of Emanuele Rebasti in this volume.

up its own defence capacity, including cooperative defence investments[13] and new funding mechanisms for military assistance.[14] These additional steps, with their stronger geopolitical dimension, might have looked improbable some years ago. But today's geopolitical context has made them a necessity, and even a unique opportunity, as President Christine Lagarde has noted, to foster a step forward in European integration and autonomy.[15]

Yet autonomy may also have a darker side. In many places we see it invoked as isolation, suspicion and mistrust, power concentrated in the hands of strongmen – for these are usually men – unchecked by institutions or the law. We see several versions of this kind of "autonomy", which is better qualified as "autocracy",[16] around us. These versions also call themselves sovereignty, or nationalism ("we first"), but what they often mask is authoritarianism, mistrust to diversity, sometimes even outright racism and dangerous flirtations with totalitarianism. "Dependency" is used by these versions of "autonomy" as a strawman to challenge international cooperation, open trade, and financial interconnectedness. In such cases, autonomy becomes the enemy of the rule of law, rather than its companion.

And so the question before us is a very real and pressing one: *can there be a European way of pursuing autonomy that remains faithful to the rule of law and to international cooperation*? Or is autonomy always purchased at the price of bending law to political necessity, treating international rules as a nuisance – or at best, strategic tools? My own conviction is that there can be a European path. Autonomy, the rule of law, and multilateralism are not competing projects. They belong together. They are, in fact, all part of what Europe is.

The rule of law stands at the very beginning of our constitutional order, in Article 2 and Article 3(5) of the Treaty on European Union, forming part of its constitutional core.[17] The EU Treaties make it clear that in its external actions the Union shall uphold international law and the principles of the United Nations Charter. It obliges us to remain a rule of law polity even in the most difficult battles and against the most malicious adversaries. A good example is the EU's use of economic tools: the Union has become assertive in deploying measures like sanctions and trade instruments to protect its interests and values. It has also used a "blocking statute" to shield European companies from the extraterritorial reach of certain non-EU sanctions, signalling that the EU will push back against external legal pressures when necessary.[18] Crucially, however, the EU endeavours to exercise these powers in a law-governed way: for instance, parties targeted by EU sanctions have avenues to challenge those measures in court, and EU trade measures are crafted to comply

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13 See, for example, the engagement of the European Investment Bank (EIB) in the field of defence industry, EIB, *Strengthening Europe's security and defence industry: Investing in our safety*.

14 See the contribution of Paul Dermine in this volume.

15 See, e.g., Lagarde, C., Interview with La Tribune Dimanche on 8 May 2025.

16 See Applebaum, A., *Autocracy, Inc.*, Penguin, 2024.

17 Bast J., von Bogdandy, A. (2024), "The constitutional core of the Union: On the CJEU's new, principled constitutionalism", *Common Market Law Review*, Vol. 61(6), 1471.

18 See the contribution of Frank Hoffmeister in this volume.

with international law.[19] Respect for core principles of international law, such as sovereign immunities, also defines the boundaries of what the Union can do.

Combining autonomy with the rule of law and international cooperation is not only a legal imperative, but also a matter of prudence. Just think of it: what chance would a digital euro have if trust in the ECB's independence were questioned? How could the euro play a meaningful role in the international system if Europe did not project respect for international law? How could we expect foreign investors to contribute their wealth into European projects and citizens to trust their institutions, if they were not reassured that independent courts will protect them, fairly and impartially?

4 European central banking and autonomy

The pursuit of European autonomy can and must occur with due regard to, and with the support of, the rule of law. This exercise is not less true for the ECB than for the Union as a whole. ECB independence, guaranteed by EU law, is itself an expression of Europe's commitment to rules-based autonomy: certain crucial policy areas, like maintaining price stability, are entrusted to a supranational institution that can act free from short-term political pressures.[20] An independent central bank safeguards for the citizens the value of Europe's money and enables the Union to respond collectively to financial crises. During the Eurozone debt crisis, the ECB's interventions were pivotal in preserving the integrity of the euro area. The subsequent Banking Union reforms – including the pooling of supervisory and resolution authority at the European level – further demonstrate how strengthening autonomy in the financial sector has involved deeper integration and shared sovereignty.

ECB's independence within a rule of law paradigm reinforces Europe's broader autonomy. In recent discussions, the ECB and EU leaders have highlighted the international role of the euro as a component of Europe's strategic autonomy. In mid-2025, President Christine Lagarde advocated a greater global role for the euro, linking this to bolstering the EU's foreign policy independence.[21] The rationale is that if the euro is more widely used worldwide, Europe will be less vulnerable to external financial pressures or the dominance of other currencies in international transactions. A stronger international role for the euro would allow the EU to pursue its values and its policy priorities with less reliance on decisions made in Washington or other foreign capitals.

Similarly, the push for a digital euro is often framed in terms of maintaining monetary sovereignty and autonomy in the digital age. The idea is to ensure that Europeans can rely on a form of digital money issued by their own central bank, rather than becoming dependent on private digital currencies or foreign-controlled payment systems. As the ECB itself has noted, a digital euro would be an effective tool to limit

[19] See the contribution of Leila Medina in this volume.

[20] On the ECB and the rule of law, see Elderson F. (2025), The rule of law as a constitutional pillar of European central banking, Keynote speech at the Italian constitutional court., Rome, 9 June 2025.

[21] See Lagarde, C. (2025), Europe's 'global euro' moment, *The ECB Blog*.

the dominance of foreign digital currencies and to mitigate the monetary sovereignty risks posed by widely-adopted private "stablecoins".[22]

Projects like the internationalization of the euro and the development of a digital euro are only possible within the paradigm of the ECB operating under a system based on the rule of law. The ECB can support the broader objective of European autonomy precisely because of the overall credibility of the Union as a legal order grounded in the rule of law. Neither the strengthening of the international role of the euro nor the development of its digital form would have been possible in a legal order that does not fully guarantee the independence of its central bank, as well as the overall respect for the rules governing the use of the euro and fundamental rights, such as the right to property. At the same time, the ECB's engagement is bound by the EU's legal framework: its actions are prescribed by the treaties, subject to review by the CJEU, and accountable to the European Parliament and EU citizens.

5 Overview of the book

Pursuing autonomy means to accept responsibility: to build the power to act and the discipline to act lawfully; to cultivate strategic independence without forsaking cooperation; to speak with a European voice while remaining attentive to the diversity that gives that voice depth and credibility. The Chapters that follow sketch a path toward such a Europe – confident, principled, and capable of shaping its future without abandoning the legal and moral commitments that made the Union possible in the first place.

We have selected seven areas where we believe these questions come more obviously to the forefront and asked our contributors to reflect on the basic themes of autonomy, rule of law, and cooperation from their area of experience and expertise. The ideas contained herein as threads in a tapestry. Each part explores a vital area each with its own distinct colour and texture. Taken together, these threads form a vivid narrative of the European Union's evolving pursuit of autonomy and unity in an ever-changing world.

ECB President Christine Lagarde sets the scene, with a contribution discussing the basic themes of this volume. A lawyer by training, she brings acute sensitivity to the legal dimensions of our discussions, alongside practical insight into how these ideas are weighed at the highest levels of decision-making. President Lagarde highlights that Europe's model of autonomy is distinct, balancing decisiveness with multilateral cooperation and international legal obligations. She also brings into the picture central bank independence, a cornerstone of an autonomy based on the rule of law and trust to institutions. I think that her call for Europe to remain bold yet collaborative, independent yet interconnected, is a powerful reminder what Europe stands for and the red thread of the contributions that follow.

Part 1 addresses the evolving dynamics of the EU's budgetary autonomy and governance. Bruno de Witte's intervention emphasises the need to rethink the EU's

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[22] Lane, P., The digital euro: maintaining the autonomy of the monetary system, 2025.

budgetary framework as a governance tool, describing it as “governing by financing.” Alberto de Gregorio Merino examines the legal challenges of transforming ad hoc solutions into permanent structures, particularly in the context of raising EU taxes, which he identified as the “next big question in EMU law”. Paul Dermine explores the “dual-edged” nature of common debt, highlighting that while it strengthens financial autonomy, it also exposes vulnerabilities in the absence of direct EU taxing powers. Thereafter, Cristina Fasone examines the evolving interpretation of EU Treaties, focusing on how this evolution might enhance solidarity and budgetary autonomy; she also raises critical questions of accountability within this shifting framework.

A key takeaway is that the EU’s objectives increasingly require European public resources, not just regulatory tools. Financial autonomy, however, brings with it both legal and political responsibilities. Joint borrowing offers substantial potential but also raises risks. To move forward, the authors suggest the need for a balanced, evolutive interpretation of EU Treaties that integrates centralization, solidarity, and accountability.

Part 2 focuses on the internal market, a cornerstone of European integration. The contributions here highlight the strategic importance of the internal market in times of crisis, emphasising its role not only as a mechanism for efficient resource allocation but also as a tool for fostering strategic autonomy. Catherine Barnard explores the delicate balance between the single market, legal autonomy, and fundamental rights, cautioning against derogations that could undermine these pillars. She emphasises the need for evidence-based decision-making to limit the margin of appreciation in such cases. Emanuele Rebasti analyses the shift in emergency law from liberalization to interventionism, arguing that crises have embedded strategic autonomy into the internal market as both a legal and operational objective. Finally, Larisa Dragomir makes a compelling case for deeper financial integration through initiatives like the Savings and Investments Union (SIU), demonstrating how the internal market has evolved to become a promoter of EU strategic autonomy.

The narrative that emerges here is one of adaptability and evolution. The internal market is no longer merely an economic instrument; it is now also a key driver of the EU’s strategic autonomy. It must be capable of shifting from liberalization to targeted Union interventionism when necessary. At the same time, persistent barriers between Member States must be dismantled to unlock its full potential. Indeed, still-existing barriers to the provision of services continue to equate to multiple times the cost of customs duties and underscore the urgency of reducing them.

Part 3 delves into the intersection of technology, finance, and law, focusing on payment systems and the EU’s autonomy in this critical domain. Piero Cipollone outlines the ECB’s three priorities: the digital euro, strengthening the internal market, and supporting cross-border payment innovations under the G20 agenda. Ruth Wandhöfer discusses the EU’s efforts to reduce fragmentation in payment systems through initiatives like SEPA, EPI, and open banking, while emphasizing the importance of cybersecurity and public-private collaboration. Dessi Guetcheva-Cheytanova explains BIS initiatives such as Project Nexus, which aimed to enhance cross-border payment systems through interoperability.

What emerges from this Part is a vision of autonomy through payments. Initiatives like the digital euro, SEPA, and EPI are not merely technical projects; they are strategic moves to reduce Europe's reliance on non-European infrastructures while strengthening the internal market and fostering international cooperation. A critical observation emerged: technology is no longer the primary hurdle in this area. Instead, regulatory inconsistencies and legal feasibility dominate the discussion. The role of law, therefore, is at the centre of this conversation.

Part 4 focuses on three key concepts that structure the engagement of the EU with the outside world: extraterritoriality, equivalence, and mutual recognition. Matthias Lehmann examines the inevitability of extraterritoriality in an interconnected world and advocates for equivalence as the "sweet spot" for balancing open markets with stability. Raffaella Assetta considers equivalence as a flexible, policy-oriented tool for managing risks and fostering resilient markets, while George Johnston focuses on cross-border resolution regimes and the need for international cooperation to manage complex crises effectively.

A unifying theme in this Part is that equivalence is more than a regulatory mechanism; it is a strategic and political instrument. While its application must be flexible, it must also remain rule-bound and guided by the principles of the rule of law.

Part 5 addresses two significant disruptors of the international economic order: sanctions and tariffs. Often presented as "war instruments" they pose fundamental challenges for the rule of law. Christoph Herrmann provides a sobering analysis of the current international economic system, describing it as one of rivalry, with trade wars replacing cooperation. He argues for interpretations of EU law that adapt to these conflicts while preserving the rule of law. Frank Hoffmeister examines the EU's evolving sanctions regime, particularly its efforts to address Russian aggression, while Laila Medina affirms the role of the CJEU in ensuring compliance with proportionality and fundamental rights.

This Part underscores the importance of adopting decisive responses to global economic challenges with a steadfast commitment to the rule of law, including international law and efficient judicial oversight.

Part 6 addresses a pressing challenge in modern governance: the growing mistrust to non-majoritarian institutions such as courts, agencies, and central banks. To discuss the challenges of this theme, the contributors adopt a comparative approach particularly between the EU and the US. Frank Elderson sets the scene by suggesting that there are two opposing perspectives on independent administrative discretion and its review, which reflect very different worldviews. The first perspective argues that independent administrative discretion should be tightly controlled or even eliminated altogether. Conversely, the second perspective embraces independent discretion not only as compatible with the rule of law but as an essential part of it. From this viewpoint, independent bodies are fundamental to good constitutional governance. Europe's constitutional order embraces the second tradition. Nicholas Emiliou authoritatively presents the stance of the CJEU in calibrating a standard of review that respects administrative discretion. Pedro Machado, coming from the practice of banking supervision, and also looking at recent judicial US developments, explains why placing trust to the administration is key for an effective and rule-of-law based system. Mariolina Eliantonio and Oren Tamir delve deeper into the comparison between the US and the EU, placing recent judicial decisions in their constitutional context.

The discussion highlights the two approaches to independent discretion highlighted by Frank Elderson. On one hand, the US trend towards tighter control over agencies, exemplified by the Supreme Court's rejection of Chevron deference in *Loper Bright Enterprises* v *Raimondo*. On the other hand, the EU adoption of a more deferential stance, especially when it comes to banking supervision, as seen in the CJEU's *Crédit lyonnais* ruling, valuing institutional balance and administrative discretion. These diverging paths reflect broader cultural and political differences. While the US currently demonstrates growing scepticism toward a robust administrative state, the EU continues to value discretion as essential for addressing complex issues, such as banking supervision and crisis management.

Part 7 examines the critical role of Legal Services within EU institutions in safeguarding the rule of law and supporting EU autonomy, shedding light on how Legal Services operate as the custodians of institutional principles, particularly under political pressure. Four dimensions are particularly relevant in this analysis: the role of Legal Services as guardians of legality beyond adjudication; the delicate balance between confidentiality and transparency of legal advice; the independence of legal advice under conditions of political urgency; and the importance of international public law in the work of legal services. Daniel Calleja Crespo highlights the role of the European Commission's Legal Service as the front line in the role of guardian of the EU Treaties, while Freddy Drexler emphasises the European Parliament's Legal Service's role in providing impartial advice amidst political tensions. Lucía Arranz explores the dual role of national central bank Legal Services in ensuring the application of the rule of law in both national and EU legal systems, reinforcing systemic resilience. Yan Liu offers a very valuable perspective from the IMF, an organisation established by an international treaty and for which the preservation of the rule of law in the international legal framework is particularly relevant, underscoring the importance of flexibility, independence, and credibility in adapting legal frameworks to geopolitical and economic challenges. This Part essentially highlights that Legal Services are not merely administrative functions. Their role as guardians of the rule of law often places them in a challenging position in time of crisis and transformation – but that is exactly when they are most needed.

The book concludes with a keynote essay by Professor Susanne Baer on "The Rule of Law in 2025." Professor Baer's voice, at a moment when these values are challenged in many places, signals clearly where the ECB stands in this debate. In a world where autocrats manipulate legal frameworks to consolidate power, where influential actors bypass or undermine legal systems, and where even the language of democracy is often distorted and misused, the rule of law emerges as a critical safeguard.

This book, which makes its appearance each year at this time, belongs to a rather unique genre. Its purpose is to extend the discussions we engage in every

September in Frankfurt to a wider audience, while these conversations remain fresh and topical. It gathers a broad community of experts not to deliver a final verdict, but to open conversations and spark dialogue. Our contributors – whom I thank sincerely for their time, insight, and commitment – set the stage. An even greater value lies in the questions their ideas will prompt and the exchanges they will inspire among readers, practitioners, and policymakers.

Final thanks are owed to Michael Ioannidis, whose contribution has been invaluable in preparing the concept of this conference and who has taken up the role of editor of this book. He has been supported by Monica Bermudez and Vittorio Pedone. Without them, this book would not have seen the light.

We wish you – indeed, all of us – an inspiring and fruitful journey through these chapters.


Christine Lagarde
President of European Central Bank

Building European autonomy: cooperation and the rule of law

Christine Lagarde*

1 Introduction

This book raises one of the defining questions of our time: how can Europe advance its autonomy while remaining committed to multilateral cooperation and the rule of law? Its seven Parts discuss the many ways in which Europe is trying to build its capacity to respond to the major challenges of our era – whether in the area of defence, (the) economy or technology. Yet behind these specific issues lie deeper questions that cut across them all.

Three key questions stand out. First, how is "European autonomy" defined in EU law in particular? Second, how can the EU's pursuit of geopolitical and geoeconomic autonomy coexist with its commitment to multilateral cooperation? And third, how does the principle of the rule of law relate to the independence of central banks in today's world?

2 A definition of European autonomy

Autonomy can mean many different things, and people use the term in different ways. Most would agree, however, that autonomy is about Europe's ability to act collectively, guided by its own values and interests. We are at a global juncture where autonomy – or sovereignty, to use another term that conveys similar meaning – is making a comeback as a central organising principle of international affairs. Yet the European model of autonomy seems to me to be distinct from others in two important respects.

First, European autonomy is collective autonomy. It is not the autonomy of a single sovereign state, but of a group of Member States that have pooled some of their powers and exercise certain public functions together through common institutions. In other words, European autonomy is autonomy without a conventional state-type sovereign. Autonomy exercised through EU institutions under EU law is a form of shared sovereignty projected onto the world stage.

This, of course, poses challenges. In the EU, action on a global scale requires unanimity, or at least broad agreement, in the form of majority voting, which can sometimes be slow and cumbersome. And for some, this might appear to be a weakness. But Europe's constitutional order is based on checks and balances, and

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* Christine Lagarde has been the President of the European Central Bank (ECB) since November 2019.

this also applies to autonomy-building. European autonomy is based upon competence-sharing under the Treaties, compromise and a commitment to follow rules that include and balance different perspectives.

Second, the EU – more so than other major powers – has tied its autonomy to commitments made under international law. The Treaty on European Union makes this abundantly clear, stating that in its relations with the wider world, the EU must contribute to "the strict observance and the development of international law."[1] Even in creating space for themselves to make autonomous choices on the international scene, the EU and its Member States remain bound to their international legal commitments. In financial and trade matters, this translates into respecting international agreements – whether International Monetary Fund (IMF) programmes or Basel Committee standards – and seeking out cooperative multilateral solutions within established legal frameworks, such as the World Trade Organization (WTO).

3 Squaring European autonomy with multilateralism

But this brings us to the second question: is this definition of European autonomy not increasingly contradictory?

At first sight, reconciling autonomy with international law and multilateral cooperation looks like a paradox. On the one hand, the EU, like other major powers, wants to defend its interests and act decisively. On the other, it wants to remain integrated with an international rules-based system. But law can align these two central notions, autonomy and cooperation, without compromising either.

First, autonomy can be exercised in a way that is both flexible and bounded. Autonomy-building inevitably involves high-level political judgements. Law in these areas is not always black and white. Rules have exceptions, and their interpretation requires careful attention to their purpose. Legal advisers know this well: law provides for discretion to policymakers but also sets outer limits. Respecting those limits – the "red lines" set by EU and international law – is essential if autonomy is to remain anchored in the rule of law.

Second, international law is itself co-determined. In shaping and exercising its autonomy, Europe – or any other jurisdiction – cannot unilaterally define what international law means and expect others to follow. But, where necessary, we can advocate for reforms that reflect new global realities. The key point is that our interpretations must be part of a global conversation. Engaging with other perspectives is a necessary part of building a truly multilateral order – even one that gives countries more space to pursue "sovereign" economic policies.

[1] Art. 3(5) TEU.

4 International rule of law, cooperation, and central bank independence

Central bank independence perfectly illustrates the model of autonomy outlined above. Autonomy does not mean unbound power. Independent courts, specialised agencies, a free press – these all belong to the infrastructure of constitutional democracy as the essential checks and balances of public authority. And so do independent central banks.

Independence is, at its core, a rule-of-law guarantee. By committing to independence in law, countries around the world secure credibility for their monetary policy. And as we have seen on several occasions, that credibility ultimately affords greater autonomy to central banks – allowing, for example, policy tools to be adopted during crises without de-anchoring inflation expectations.[2]

In Europe, the EU Treaty explicitly protects the ECB and national central banks from political instructions. Beyond the EU, the IMF promotes central bank independence, sometimes making it an explicit component of financial programmes. Independence thus becomes not only a domestic legal rule, but also a feature of the international financial rule of law – a condition for trust among states, markets and institutions. And this trust is also the basis of cooperation between central banks themselves. Central banks work together on the assumption that each one of them remains mandate-driven and protected from undue political interference.

Of course, independence does not mean immunity from accountability. The rule of law demands transparency, responsibility and clear mandates. In Europe, the Treaties provide mechanisms to ensure that independence goes hand in hand with accountability.

5 Conclusion

The topics discussed in this book are closely interwoven. European autonomy means acting decisively and collectively on the world stage to uphold our values and interests. Multilateralism means doing so in concert with others, under shared rules and through trusted institutions. Far from being opposed, the two reinforce one another. Back in 1989, at another critical juncture, Jacques Delors called for Europe to be "powerful enough to command respect and to promote our values of freedom and solidarity."[3]

The rule of law is not the enemy of autonomy; it is its foundation. The backbone of autonomy in a civilised world is the rule of law.

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2 For a discussion on the interaction between instrument effectiveness and credibility see Nakamura, E., Riblier, V., Steinsson, J., *Beyond the Taylor Rule*, Federal Reserve Bank of Kansas City, 2025.

3 "Soyons assez puissants pour nous faire respecter et pour promouvoir nos valeurs de liberté et de solidarité." See Delors, J., Speech at the opening session of the 40th academic year of the College of Europe, Bruges, 1989.

Consider the ECB: its independence, grounded in treaty law, gives Europe and its currency credibility and strength. More broadly, the EU can pursue its policy choices effectively precisely because they are framed by legal commitments that others recognise and respect.

The success of European autonomy should not be judged by how much Europe can do alone, but by how much and how well it can build and sustain the multilateral order. If the EU can stand on its own feet – technologically, militarily and economically – it will be a stronger partner. And its commitment to law and cooperation will enhance its legitimacy and impact.

Our laws are bridges, not walls. Their purpose is not to isolate, but to bind Member States together internally and bind Europe to the wider world externally. The challenge before us is to remain bold yet collaborative, independent yet interdependent. And if we see it like this, the challenge may serve as an opportunity for Europe to grow stronger and more united.


Introduction
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Part I

Building budgetary autonomy

Building budgetary autonomy: an introduction

Bruno de Witte*

The current institutional landscape of the European Union is marked by the increased concern of the European institutions to use EU funding in a strategic way so as to advance Europe-wide policy objectives rather than, or in addition to, redistribution among the Member States. There is a growing realization that the EU's capacity to act in the face of many new challenges requires the use of "more money". Indeed, the achievement of some of the EU's main policy objectives cannot be achieved through rule-making (which is the EU's traditional policy instrument) but require the use of funding. This concern was very vivid during the euro crisis and during the pandemic crisis, but it also characterizes the Union's recent policies of climate transition, common defence, and support for Ukraine.

However, the EU's budget itself has not changed much, in recent years, in terms of its overall size and of its allocation. The new challenges had therefore to be met by tapping other sources of funding leading to the development of what has appropriately been called a "budgetary galaxy". Thus, the European Stability Mechanism (ESM) was set up as a separate international organisation, even though it serves the stability of the EU's currency union. NextGenerationEU was funded by means of a massive (but temporary "second budget" created through massive borrowings by the EU on the financial markets. The European Peace Facility (EPF) was scaled up to provide military assistance to Ukraine, but the financial contributions for this CFSP initiative had to come from the Member States rather than from the EU budget. Also, the EU set up a number of hybrid financial mechanisms, in which EU budget contributions are combined with private funds and third country contributions, like in the InvestEU programme and the European Fund for Strategic Development.

The resulting picture is not satisfactory. The development of new European funding streams has been accompanied by a fragmentation of the budgetary landscape. Hence, the need to build a more coherent and stable budgetary system to support the EU's capacity to act and to better deliver the European public goods. The preparation of the next Multiannual Financial Framework offers an opportunity for further reflection on the way forward.

In the following pages, three contributions explore the recent evolution of the EU's budgetary autonomy. Paul Dermine discusses the challenges on the revenue side, particularly the controversial question of whether borrowing on the financial markets can serve as a major additional source of revenue for the Union. Alberto de Gregorio Merino explores the limits of the EU's power to tax and the institutional development of the Union's budgetary organization. Cristina Fasone focuses on the autonomy of

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the EU's spending power, discussing how the multiannual financial framework and the principle of conferral constrain that spending power, and how the NextGenerationEU mechanism managed to introduce greater flexibility.

The financial autonomy of the Union

Alberto de Gregorio Merino*

1 Introduction

Since 2009, with the succession of crises, the law of the Union has been transformed, evolving also in emergency law or in the law of crisis. The Union has had to address unprecedented challenges using the same Treaties, leading to the creation of crisis mechanisms through their evolutive reading.

What next? In my view, Union action – and, consequently, the law of the Union – is called to progress towards autonomy or independence. In a situation of geopolitical volatility, where reliance on past alliances can no longer be guaranteed, an independent EU is imperative: the Union must develop the capacity to rely on its own means in areas of existential importance. The challenge, therefore, lies in transforming junctural solutions developed during crises into structural instruments, that ensure the independence of the Union.

This highlights the wisdom of choosing autonomy as the central subject of the 2025 ECB conference and of this volume. The requirement of independence will largely shape the fate of EU law the years to come. EU lawyers, particularly those working for the institutions of the Union, will be called upon to prioritize options that best address independence and to contribute creative efforts proportionate to the challenges of independence ahead.

The President of the Commission expressed this sentiment in her speech in Aachen on 29 May, when receiving the Charlemagne price from the King of Spain. I quote:

“Thus, I believe that our next great era – the next great unifying project – is about building an independent Europe. We cannot allow ourselves to be thrown off course by the seismic changes that we are facing. Or once again fall for the fallacy that the storm will pass…. No, [it] will not. Because the geopolitical crosscurrents are strong.”[1]

The requirement of independence spans many areas of policy and of law, such as defence; competitiveness – including the security of supply chains and the removal of obstacles to the internal market; digital, pharmaceutical, energy, and clean transition industries; State aid and competition policy; trade; the introduction of the digital euro and strengthening the international role of the euro (projects that are so dear to the ECB); the reunification of the continent through enlargement; and safeguarding the constitutional identity of the Union as the foundation of its constitutional independence by protecting the values enshrined in Article 2 TEU,

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[1] Speech by President Ursula von der Leyen at the award ceremony of the International Charlemagne Prize, 29 May 2025.

including the rule of law and democracy; and of course, budgetary or financial independence.

In this chapter, I intend to explore the constitutional limits to the budgetary and financial autonomy of the Union by revolving around three main questions: first, whether it is possible to create a European Treasury; second, whether the EU can directly raise contributions or taxes from individuals or companies; and third, how values – such as the rule of law – and the budget function as imperatives for autonomy.

A preliminary remark in relation to the first two issues: the budget of the Union is not a typical budget of a nation-state. States finance themselves primarily through raising taxes and issuing debt. Up to now, the budget of the Union has not developed an autonomous capacity to raise taxes, nor can it finance expenditure through the issuance of bonds. Instead, it is financed through the so-called system of own resources, under which Member States are required to transfer revenue to the Union, up to a maximum limit determined by the Own Resources Decision (ORD) itself.

2 Is it possible to create a European Treasury?

The question of whether the Union can issue bonds to finance expenditure through a Treasury was raised during the negotiations on the NGEU. At that time, Member States expressed numerous concerns and hesitations, as the creation of an EU Treasury could signify a new level of EU financial autonomy, going beyond the existing system of own resources with a potential federalisation strength. Such a development could ultimately raise significant questions regarding democratic legitimacy.

Thus, the issue of borrowing for spending within the framework of the Treaties, and particularly in light of their budgetary principles, is not merely a matter of budgetary technique. It is, above all, a question of fundamental constitutional importance. These questions are once again under discussion today. The Draghi report, for instance, advocates for adopting the borrowing-for-spending model to address the enormous financial requirements needed to close the technological gap across the Union, which the report estimates at around 5% of the EU's annual GDP. Draghi himself recently reiterated the importance of debt mutualisation during a conference in Rimini.[2] Similarly, some have suggested that mutualising debt could serve as a means to meet the significant financing needs in the area of defense in the coming years. For example, the Spanish Prime Minister made such a proposal on the margins of recent European Council meetings.

The creation of a European Treasury finds two fundamental limits in the Treaties, the principle of budgetary balance and the integrity of the own resources system.

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2 Address by Mario Draghi, delivered at the meeting "What Horizon for Europe?" on Friday, 22 August 2025.

2.1 The principle of budgetary balance

Article 310(1) TFEU establishes the principle of budgetary balance by stating: “The revenue and expenditure shown in the budget shall be in balance.” This principle, together with the principle of budgetary discipline, lies at the core of the EU’s budgetary and financing system. Unlike national budgets, which can run deficits (albeit within the limits set by the Stability and Growth Pact and national debt brakes), the EU budget must remain balanced at the end of each year. The Union is expressly prohibited from adopting a budget in deficit. According to the ORD, any deficits must be carried over to the following year and financed through the Union’s own resources, rather than through public debt.

How was this addressed in the context of the NGEU? Under the ORD, there is a yearly increase in the ceiling of 0.6% of EU GNI, which functions as a closed compartment exclusively allocated to the repayment of NGEU borrowings. This mechanism represents a credible and robust asset – a definitive, irrevocable, and enforceable commitment by Member States to make payments. It ensures the budget neutrality of the operation and guarantees that no operating deficit will arise. Note that this closed compartment earmarked for debt repayment represents a fundamental difference when compared to national debt issuance. Unlike Member States, which do not create such upfront payment guarantees for the markets, the EU’s repayment mechanism provides a distinct safeguard. In the case of Member States, the guarantee of payment relies solely on the creditworthiness of each individual state. In the case of Member States, the guarantee of payment lies in the creditworthiness of each of them.

2.2 The integrity of the own resources system

Article 311 TFEU (first and second subparagraphs) sets out that "without prejudice to other revenue, the budget shall be financed wholly from own resources". The proceeds of borrowings are not own resources of the Union (understood as irrevocable, definitive and enforceable payments rights to the benefit of the Union) but other revenue from the markets which constitute a liability. By establishing a mechanism of financing through the markets on such a large scale, does NGEU jeopardize the integrity of the Union’s own resources system, which, as stipulated by Article 311 TFEU, must remain the preponderant source of financing for the EU budget?

Again, this is not simply a matter of budgetary technique but a constitutional question that strikes at the core of the Union’s financing system. That system is built on the preponderance of own resources as the quasi-exclusive source of EU financing. The Union cannot unilaterally decide how to finance its actions as it sees fit without prior acceptance from each Member State. The ORD can only enter into force after approval by all Member States in accordance with their national constitutional requirements. This principle is rooted in national budget sovereignty. Notably, the ORD is one of the few acts of secondary law whose entry into force requires further approval by Member States, underscoring its quasi-constitutional nature.

The principles of additionality and complementarity are critical when examining this question. While the Treaties recognize the existence of “other revenue” outside the own resources system, such revenue must not undermine the preponderance of own resources. Consequently, revenues generated under NGEU must remain supplementary to the Union’s normal own resources financing system.

This is not a question to be assessed only from a purely quantitative perspective (are € 750 billion a top up in relation to the € 1.3 trillion of the normal MFF financing for 2021-28?). Instead, a qualitative examination of the specific economic circumstances, needs, and context of the mechanism, as well as the safeguards established to preserve the integrity of the Union’s own resources system, is essential.

NGEU arised in a particularly critical context: the Covid-19 crisis. It is accompanied by numerous guarantees that underscore its complementary nature and its respect for the integrity of the own resources system. Article 5 of the ORD strictly limits the use of funds borrowed through NGEU to addressing the consequences of the pandemic. NGEU is a temporary, one-off mechanism, with borrowing limited in time (until 2026 at the latest), and legal commitments under NGEU must be entered into within a maximum of three years. Its size and duration are restricted to what is necessary to achieve this purpose.

In summary, borrowing for spending under NGEU is accompanied by numerous safeguards that ensure its compatibility with the Treaties, including the principle of budgetary balance and the integrity of the own resources system.

If we take NGEU as a footprint where the limits of the budgetary autonomy of the Union have been tested, one must conclude that borrowing for spending, the establishment of an EU Treasury, cannot become a permanent feature of the EU budget to finance regular EU policies.

What about the future? The margin of manoeuvre for the EU legislator is limited. Even though NGEU has not been contested before the Court of Justice of the European Union, it has undergone national constitutional scrutiny, most notably in Finland (before its Parliamentary Constitutional Committee) and Germany (before the Federal Constitutional Court). In December 2022, the German Constitutional Court (BVerfG) confirmed NGEU’s compatibility with the German Constitution, ruling that it does not constitute an ultra vires act and respects the principle of budgetary sovereignty. Importantly, the Court relied on many of the arguments of exceptionality outlined above: (1) the authorization to borrow was given in the ORD; (2) there is a sufficient link between the pandemic and the measures financed by NGEU; and (3) the borrowing is limited in duration and volume.

The new MFF proposals adopted by the Commission on 16 July do not, in fact, include any borrowing for spending. The ORD proposal provides for a crisis instrument to enable extraordinary borrowing to address severe crises, severe hardship, or serious threats thereof in the next budgetary cycle. However, this mechanism is, in principle, designed for back-to-back loans rather than borrowing for spending.

3 Is it possible for the EU to directly raise contributions or taxes?

This leads me to the following question, which I will briefly address. I mentioned earlier that the Union's financing and budgetary system differs from that of nation-states in that it does not possess the autonomy to establish a fully-fledged Treasury, nor has it developed an autonomous capacity to raise taxes directly from individuals or entities. In the past, contributions such as sugar levies or bank contributions to the Single Resolution Fund (SRF) have been introduced by market operators to regulate the functioning of specific markets, based on sectorial policy legal frameworks. However, outside this strict regulatory context, no fiscal contribution directly owed to the Union by individuals or companies has ever been established.

At the end of the day, the Union's own resources are not truly "own" in the sense that they are financial contributions from Member States, transferred from their national budgets to the Union. One might argue that for these resources to be genuinely "owned" by the Union, and for the system to evolve towards a higher degree of budgetary autonomy, a direct link should be established between the persons liable and the Union itself, without transfer through national budgets.

Would such a development be possible? Is there a legal basis in the Treaties for such a system?

I believe that this possibility is not excluded. The first paragraph of Article 311 TFEU, which governs the system of own resources, provides that "The Union shall provide itself with the means necessary to attain its objectives and carry through its policies." It further states that the own resources decision may "establish new categories of own resources or abolish an existing category."

This provision imposes an obligation on the Union to ensure its own budgetary autonomy, which can be achieved through the introduction of new categories of own resources. These resources could theoretically apply directly to individuals or companies, provided that: i) they are introduced within areas that fall under the objectives and policies of the Union, and ii) they are proportionate and do not exceed what is necessary to achieve the Union's objectives and carry out its policies.

This consideration is particularly relevant in the current context of significant budgetary pressures, as the Union faces the need to repay the NGEU debt, which amounts to approximately €20 to €25 billion annually. The urgency of providing new own resources is therefore acutely felt. In this framework, the Union has recently proposed an annual contribution from companies with annual net turnovers exceeding €100 million, which could amount to as much as €750,000 for companies with a net turnover of €750 million or more).

4 Values, rule of law, and the budget as an imperative for autonomy

I stated at the beginning of my contribution that safeguarding the values enshrined in Article 2 TEU is an imperative for the autonomy and independence of the EU. As the ECJ emphasized in the seminal cases on rule of law conditionality,[3] these values form part of the constitutional identity of the Union. This constitutional identity serves as the foundation of the EU's constitutional autonomy. The values enshrined in Article 2 TEU provide the Union with an identity that enables it to stand independent and autonomous, both from the identities of its Member States and from third countries.

The ECJ has also highlighted the normative force of Article 2 TEU, stressing that compliance with these values is mandatory for Member States. This normative force necessitates the operationalization of the values. Today, I will not delve into the judicial avenues available to achieve this – an area enriched by extensive case law on the rule of law. Rather, I will focus on the legislative mechanisms that render these values operational.

The values enshrined in Article 2 TEU have a structuring function and, as such, they are expected to permeate legislative action. One of the most illustrative examples of these values influencing legislation is the Rule of Law Conditionality Regulation, which, as you are all aware, is based on the principle that EU funds cannot be effectively or properly utilized by Member States that fail to uphold the rule of law. In addition, the new MFF proposals aim to strengthen the link between the EU budget and the rule of law by making respect for these values a condition for the release of funds under the new National and Regional Partnership Plans Fund (which essentially consolidates cohesion and CAP funding).

Let me overfly on other legislative acts that are impregnated by the values of the Union:

The Media Freedom Act[4] seeks to establish common rules for the proper functioning of the internal market for media services. It is based on the premise that the internal market for media services can only be sustained if media pluralism is upheld.

The Regulation on the transparency of political advertising[5] is another example. Its aim is to safeguard electoral integrity and foster a democratic and open debate by

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3 Judgment of the Court of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97; Judgment of the Court of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, ECLI:EU:C:2022:98

4 Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083, 17.4.2024.

5 Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, OJ L, 2024/900, 20.3.2024.

establishing rules for the provision of advertising services in electoral and political matters.

Finally, the Digital Services Act (DSA)[6] seeks to contribute to the proper functioning of the internal market for intermediary digital services. It establishes rules for content moderation, user data management, and the liability of digital service providers. In doing so, it effectively protects fundamental rights under the Charter, including freedom of expression, access to information, and media freedom and pluralism.

6 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1.

Common debt and the EU budget: between autonomy and vulnerability

Paul Dermine*

1 Introduction

The EU budget suffers from a number of chronic limitations.[1] Despite its ever-increasing responsibilities, the EU remains a budgetary dwarf, with a budget historically capped at around 1% of EU GDP. The EU budget is a complex and rigid tool, with about 90% of its funds pre-allocated from the start, inhibiting responsiveness to changing circumstances and priorities. Even more fundamentally, the EU budget reflects only a limited degree of financial autonomy. The EU, as a supranational polity, does exhibit an unprecedented level of political and legal integration. But its budget very much remains a budget of States, governed by an intergovernmental logic, and in the end not so different from that of more traditional international organizations. On the "expenditures" side, the dominance of the juste retour logic has favoured inter-State bargaining and prevented the articulation of EU public finances around genuine European public goods. On the "resources" side, the EU's system of revenues remains desperately under-developed, and fundamentally dependent on national transfers and most notably the so-called "GNI-based" contribution, which still amounts to roughly 70% of the EU budget. This lack of genuine budgetary autonomy is an enduring pattern of the EU, and sits uneasily with the promise of Article 311 TFEU, that "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies". As a result of these constraints, the EU budget only plays a limited macroeconomic stabilizing effect, contributing to the structural imbalance between the economic and the monetary pillar of the Economic and Monetary Union (EMU). EU public finances more generally have furthermore only played a secondary role in the integration project, historically dominated by a regulatory model and the "integration through law" paradigm.

Over the past few years, confronted with several existential challenges, and an unprecedented succession of crises, the Union has largely revisited its budgetary system and opened new avenues for financial action. Common European debt, raised through joint borrowings, has played a central role in enabling the EU to overcome the status quo and financially rise to the challenge. A couple of figures can help us grasp the magnitude of this shift. Under the current budgetary cycle (2021-

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[1] On the EU budget, its architecture and limitations, see Laffan, B., *The Finances of the European Union*, Palgrave, 1997; Crowe, R. (2024), "The European Union's Public Finances in Times of Crisis – Fragmentation, Innovation and Consolidation", in Kilpatrick, C., Scott, J. (eds), *New Frontiers in EU Funding – Law, Policy, Politics*, Oxford University Press, 23; Fasone, C., Lupo, N., "The Union Budget and the Budgetary Procedure", in Schütze, R., Tridimas, T. (eds), *Oxford Principles of European Union Law*, Oxford University Press, 2018, 809.

2027), two fifth of the EU's financial firepower, roughly €800 billion out of 2 trillion, is based on common debt. Since 2021 and the adoption of the recovery plan NextGenerationEU (NGEU), the EU has each year raised on the capital markets between 100 and 150 billion euro,[2] borrowing levels comparable to those of major European sovereign issuers such as France, Germany or Italy.

This contribution seeks to offer some reflections on the potential and the challenges of common debt for the EU polity and its budget. In a nutshell, it argues that common debt constitutes a double-edged sword for the Union and the future of its public finances. On the one hand, debt stands as a crucial vector of financial and political autonomy and flexibility, which enhances the relevance and impact of EU action. On the other hand, debt raises challenges and difficulties of its own which, if not properly managed, could turn it into a source of vulnerability on the longer term. Most notably, debt must be serviced and necessarily calls for commensurate, stable source of fiscal revenues, thereby inevitably linking the issue of common debt to that of the Union's taxing power.

2 Common debt as a source of autonomy: the rise and normalisation of joint borrowings in the EU polity

Public debt, as an immediate, external and market-based source of funding, enables political authorities to access financial resources which outgrow their existing revenue streams and thereby increases their ability to financially meet their needs and priorities. It is a genuine vector of financial autonomy and flexibility, which in turn bolsters political autonomy and the relevance and impact of public action. Public indebtedness also constitutes an inherent act of trust and solidarity between the constitutive units of a polity. It projects this polity in a longer-term perspective and gives it a deeper meaning and purpose. Economic historians have long shown that public debt acts as a crucial factor of state-building.[3]

The Union's power to issue debt is quite paradoxical. While it has been repeatedly exercised, the current EU Treaties, unlike many national constitutions,[4] nowhere expressly confer this power upon the Union. Interestingly, the European Coal and Steel Community Treaty[5] and the Euratom Treaty[6] explicitly consecrated a power to incur debt, but such a clause did not find its way into the Rome Treaty in 1957. This lack of explicit conferral has generated doubts as to the Union's constitutional ability to borrow.[7] Most notably in its 2022 Own Resources Decision ruling, the German

2 See the funding plans of the EU, European Commission, *Funding plans*.

3 Stasavage, D., *Public Debt and the Birth of the Democratic State*, Cambridge, Cambridge University Press, 2003; Stasavage, D., *States of Credit – Size, Power and the Development of European Polities*, Princeton University Press, 2011.

4 As a paradigmatic example, see Art. I, Section 8, of the US Constitution, under which "The Congress shall have Power (…) to Borrow Money on the Credit of the United States".

5 "The High Authority is empowered to procure the funds necessary for the accomplishment of its mission: (…) by borrowing" (Art. 49, first indent, of the ECSC Treaty).

6 Art. 172(4) of the Euratom Treaty.

7 See, for example, Leino-Sandberg, P., Ruffert, M. (2022), "Next Generation EU and its Constitutional Ramifications – a Critical Assessment"', *Common Market Law Review*, Vol. 59(2), 456.

Bundesverfassungsgericht has given credit to the view that the Union would be prohibited from assuming debt.[8] It is our view that the lack of an express legal basis for an autonomous power to borrow is not decisive, far from it. First, a number of primary and secondary law provisions tend to indicate that such power must, as a matter of principle, necessarily exist. Most notably, Article 318 TFEU requires the Commission to forward to the Parliament and to the Council "a financial statement of the assets and liabilities of the Union", thus implying that the EU can indeed incur liabilities. Along similar lines, the main legislative instrument organizing the Union's public finances, the so-called "Financial Regulation",[9] clearly assumes that the Union can borrow. For instance, its Article 17(2), which forbids that loans be raised by the Union "within the framework of the budget", would be devoid of any added value in case of a general prohibition on EU borrowings.[10]

More fundamentally, as already explored elsewhere,[11] we consider that the power to borrow would find even clearer and firmer constitutional grounding if it were to be derived from the doctrine of implied competences.[12] Although not expressly consecrated in primary law, this power forms a necessary accessory of the EU's conferred powers, and a condition for their effective and autonomous exercise. The doctrine could thus be relied upon to justify supranational borrowing operations to finance initiatives in its fields of attributed competences. This approach is corroborated by a systemic reading of Article 311 TFEU, which indicates that in order to "provide itself with the means necessary to attain its objectives and carry through its policies", the EU shall be endowed with a budget which, in principle, is to be "financed wholly from own resources", without prejudice to "other revenue". From this perspective, common debt would be further justified by its contribution to the Union's (financial) autonomy. Furthermore, the Union's institutional practice, although not decisive in and of itself, tends to consolidate the view that the EU is constitutionally endowed with the power to borrow.

The EU has indeed long been present on international capital markets. However, this presence had until recently remained quite discreet. Under instruments such as the Community Loan Mechanism,[13] the Balance of Payment Assistance Facility[14] or later the European Financial Stabilisation Mechanism,[15] EU borrowings were limited

8 BVerfG, 6 December 2022, 2 BvR 547/21, 2 BvR 798/21, paragraphs 150-154.

9 For the latest applicable version, see Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast), OJ L239, 26.9.2024, p. 1.

10 The same would a fortiori hold for Arts 213, 214, 223 and 224 of the Financial Regulation, respectively dealing with the financial liability of the Union, rules and implementation of financial assistance and the Union's diversified funding strategy.

11 Bobić, A., Dermine, P. (2024), "Of winners and losers: a commentary of the BVerfG's ORD judgment of 6 December 2022", *European Constitutional Law Review*, Vol. 20(1), 171.

12 See, seminally, Judgment of the Court of 31 March 1971, *Commission* v *Council*, C-22/70, ECLI:EU:C:1971:32.

13 Regulation (EEC) No 397/75 of the Council of 17 February 1975 concerning Community loans, OJ L46, 20.2.1975, p. 1.

14 Art. 143 TFEU; Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ L 53, 23.2.2002, p. 1.

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

in size, focused on country-specific crisis management, and exclusively intended for "back-to-back lending" purposes.[16]

The Covid-19 pandemic constituted a real turning point, some might say a critical juncture,[17] for EU debt and joint borrowings.[18] In purely quantitative terms, the Union's borrowing activities entered, with the combined effect of SURE[19] (€100 billion) and NGEU[20] (€800 billion), a new dimension. The financial logic of EU borrowings also dramatically evolved. For the first time, borrowing was not only mobilised for lending, but also for spending, to directly finance expenditures by Member States under dedicated EU budgetary programmes. Most notably, more than half of NGEU funds have been distributed as grants instead of loans. This naturally gives EU debt a deeper redistributive effect and assigns (inter-State and interpersonal) financial solidarity in Europe a whole new meaning.[21] It also contributes to strengthening the economic pillar of the EMU, by complementing it with a (nascent) fiscal capacity, thereby reducing its historical asymmetry.[22] Last but not least, the broader political purpose served by EU debt was also reshaped along the way. Pandemic-related borrowings were still framed as a crisis management tool, mobilized to offer an immediate, short-term macroeconomic reaction to a sudden shock. This crisis narrative was key in the political and legal construction of SURE and NGEU, which were packaged as macroeconomic stabilisation mechanisms, serving a shock-absorbing function. Along these lines, Article 122 TFEU, the provision which comes closest to an "emergency clause" in the EU Treaties, was a keystone of the legal architecture of both mechanisms.[23] Yet, with SURE and even more so, with NGEU, debt took on, next to its short-term, stabilizing function, another

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16 For an overview of the early borrowing activities of the EU, see Vitsentzatos, M., "Loans and guarantees in the European Union budget", ERA Forum, 2014, 131; Grund, S., Waibel, M., "EU Borrowings and Safe Assets", in Hinarejos, A., Schütze, R. (eds), *EU Fiscal Federalism*, Oxford, Oxford University Press, 2023, 205.

17 E.g. Schelkle, W. (2021), "Fiscal Integration in an Experimental Union – How Path-Breaking was the EU's Response to the COVID-19 Pandemic?", *Journal of European Public Policy*, Vol. 59(1), 44.

18 In general, on the EU's economic reaction to the pandemic, and on the recovery plan NGEU, see De Witte, B. (2021), "The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift", *Common Market Law Review*, Vol. 58(3), 635; Leino-Sandberg, P., Ruffert, M. (2022), "Next Generation EU and its Constitutional Ramifications: a Critical Assessment", *Common Market Law Review*, Vol. 59(2), 433; Dermine, P. (2020), "The EU's response to the COVID-19 Crisis and the Trajestory of Fiscal Integration in Europe: Between Continuity and Rupture", *Legal Issues of Economic Integration* , Vol. 47(4), 337; Dermine, P., *Le plan de relance 'Next Generation EU' de l'Union européenne – Analyse constitutionnelle d'une initiative historique*, Bruylant, 2023; Fabbrini, F., *EU Fiscal Capacity: Legal Integration after COVID-19 and the War in Ukraine*, Oxford University Press, 2022.

19 Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument for temporary support to mitigate unemployment risks in an emergency (SURE) following the COVID-19 outbreak, OJ L 159, 20.5.2020, p. 1.

20 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L433I, 22.12.2020, p. 23; Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L424, 15.12.2020, p. 1; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L57, 18.2.2021, p. 17.

21 Panasci, M.A. (2024), "Unravelling Next Generation EU as a Transformative Moment – From Market Integration to Redistribution", *Common Market Law Review*, Vol. 61(1), 13.

22 Fabbrini, F. (2022), "The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic", *Journal of Common Market Studies*, Vol. 60(1), 186.

23 The Union's extensive reliance on Art. 122 TFEU has triggered heated academic and institutional debates. The latest use of the provision, in the context of the SAFE regulation (see infra), is subject to pending litigation before the Court of Justice of the European Union, see *European Parliament* v *Council*, C-560/25.

longer-term, transformative role, as a powerful lever for change to act on the socio-economic structures of the EU and, in the case of NGEU, fund reforms and investments to accelerate the green and digital transition on the continent.

NGEU, and its debt-based architecture, were officially conceived as a one-off initiative, justified by the exceptionality of the pandemic, but also limited to that specific sequence. It was not meant to be reproduced nor made permanent. But the EU is an inherently path-dependent polity[24] and more often than not, economic, political and legal constructions born out of crisis tend to sediment, outliving the specific set of events which brought them about, and becoming entrenched in the EU system.[25] The experience of the past few years indicates that this is precisely what is happening in the case of EU borrowings.

In 2023, just two years after NGEU had started operating, the EU adopted the RePowerEU initiative in reaction to the war of aggression in Ukraine and authorized the reallocation of a substantial portion of NGEU borrowings (€220 billion) to fund projects and investments enhancing the resilience, security, and sustainability of the Union's energy system.[26] The emergency on the Eastern front has also called for direct economic support to Ukraine. Under the Macro-Financial Assistance Mechanism first,[27] then under the new Ukraine Facility established in 2024,[28] the EU has authorized joint borrowings of up to €80 billion to provide financial assistance to Ukrainian authorities, to fund recovery and reconstruction investments and prepare the country for accession. In the midst of geopolitical turmoil and confronted to an unprecedented challenge to its defence and security architecture, the EU adopted, in May 2025, the SAFE instrument.[29] Endowed with €150 billion to be borrowed by the Commission, SAFE is to support Member States with loans backed by the EU budget to be invested in critical defence products and infrastructures. Last but not least, in its July package on the 2028-2034 multi-annual financial framework (MFF), the Commission has proposed to set up a new permanent "extraordinary crisis tool" endowed with a borrowing capacity of up to € 400 billion, to provide loans to Member States.[30] The tool, directly enshrined in the next own resources decision, would be activated by the Council, upon the consent of the European Parliament, through an Implementing Regulation adopted under Article 311(4) TFEU.

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24 Pierson, P. (1996), "The path to European integration", *Comparative Political Studies*, Vol. 29(2), 123.

25 White, J., *Politics of Last Resort: Governing by Emergency in the European Union,* Oxford University Press, 2019.

26 Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards 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, OJ L63, 28.2.2023, p. 1.

27 Decision (EU) 2022/1201 of the European Parliament and of the Council of 12 July 2022 providing exceptional macro-financial assistance to Ukraine, OJ L186, 13.7.2022, p. 1; Decision (EU) 2022/1628 of the European Parliament and of the Council of 20 September 2022 providing exceptional macro-financial assistance to Ukraine, reinforcing the common provisioning fund by guarantees by Member States and by specific provisioning for some financial liabilities related to Ukraine guaranteed under Decision No 466/2014/EU, and amending Decision (EU) 2022/1201, OJ L245, 22.9.2022, p. 1.

28 Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility, OJ L47, 29.2.2024, p. 1.

29 Council Regulation (EU) 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the Reinforcement of the European Defence Industry Instrument, OJ L18, 28.5.2025, p. 1.

30 European Commission, Proposal for a Council Decision on the system of own resources of the European Union and repealing Decision 2020/2053, COM(2025)574, Arts 6-8.

Each of these instruments has its own features and specificities, and none perfectly replicates the template of NGEU. However, these developments, and the broader policy discussions prompted, among others, by the Letta and Draghi reports,[31] signal that common debt has gained a new centrality and normality in the EU polity as a vector of public action. Borrowings now form an essential component of the EU's policy toolbox and of its public finances system. And recent events show the EU has decisively relied on EU debt, to the fullest extent possible under its financial constitution, to fund key policy initiatives.

3 Common debt as a source of vulnerability: the challenge of debt repayment and the path towards EU taxes

If common debt constitutes a new vector of budgetary and political autonomy, it also presents its own challenges and pitfalls, and thereby also stands as a potential source of vulnerability. This vulnerability takes on many forms.

It is in part legal, as the treatment of common debt under EU budgetary law remains subject to debate and disagreement in institutional and academic circles.[32] Most notably, it is widely acknowledged that, as "other revenue" under Article 311, second indent, TFEU, common debt should remain an accessory, marginal source of financing, in order to preserve the integrity of the system of own resources. But the approach – whether purely quantitative or qualitative – through which the marginality of borrowings is assessed in relation to own resources remains contested. Along similar lines, the compatibility of common debt with key principles of EU public finances law has been hotly debated. For example, while formally placed off-budget, as "external assigned revenue",[33] and therefore falling outside its material scope, it has been argued that common debt is not reconcilable with the principle of budgetary balance (Art. 310(1) TFEU), considering the absence of genuine assets that immediately counterbalance it.

This vulnerability is also institutional. Because of its specificities, EU debt partly bypasses the ordinary budgetary procedures and has a disruptive effect on the institutional equilibria and compromises which underlie these procedures. Most notably, the qualification of a large portion of NGEU borrowings as "external assigned revenue", and the limited involvement of the European Parliament in their monitoring, has raised concerns.[34] Similarly, the rise of EU debt has come together with the development of institutional arrangements, strategies and practices within

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31 Letta, E., *Much more than a Market*, 2024; Draghi, M., *The Future of European Competitiveness*, 2024. Both reports have supported the regular issuance of common debt instruments by the EU to fund joint investment projects (see esp. Letta, 36; Draghi, 66).

32 See, e.g., Grund, S., Steinbach, A. (2024), "Debt-financing the EU", *Common Market Law Review*, Vol. 61(4), 993; Porras-Gomez, A. (2023), "The EU Recovery Instrument and the Constitutional Implications of its Expenditure", *European Constitutional Law Review*, Vol. 19(1), 1.

33 Art. 3(1) of the EURI Regulation.

34 See, e.g., Leino-Sandberg, P., Raunio, T. (2025), "From Bad to Worse: The Continuous Dilemma Facing Parliaments in European Economic and Fiscal Governance", *Government & Opposition*, Vol. 60(1), 86.

the Commission,[35] which altogether are constitutive of an "EU Treasury in the making", and which raises their own issues in terms of accountability, transparency, and effectiveness.[36]

But first and foremost, the vulnerability generated by EU debt is financial. Like any other, EU debt will need to be repaid. The ability of the EU to service its debt will be a major challenge for the years to come. This is not only a matter of contractual commitment. Market confidence, the liquidity and safety of EU debt instruments, and ultimately, the long-term political viability of EU debt as a policy tool hang in the balance.[37] Under the next MFF cycle, the EU will start repaying NGEU debt, by €24 billion a year on average.[38] This roughly represents one eighth of the EU's annual budget for 2025.[39] If the EU does not manage to find new financial means to service its debt, other budgetary items and programs will need to be reduced accordingly, and EU debt will end up, quite paradoxically, harming EU budgetary autonomy on the long term.

Under the founding compromise struck in the July 2020 European Council, NGEU debt is in principle to be repaid through new own resources.[40] The December 2020 ORD introduced a new own resource on non-recycled plastic packaging waste,[41] and the Parliament, the Council and the Commission adopted an interinstitutional agreement setting out an ambitious roadmap towards the introduction of new own resources, such as a digital levy or a financial transaction tax.[42] The hope then, both in institutional and academic circles, was that EU debt would "unlock" the long-standing debates on own resources by giving it a new sense of political and financial urgency.[43] Five years later, these expectations appear rather disappointed. Overall, progress has been limited and, on key files, negotiations have, by the Commission's own admission,[44] stalled.

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35 For an overview, see Maluskova, Z. (2023), "Implementation of NGEU borrowing, debt management and lending operations", *ERA Forum*, Vol. 23(4), 463.

36 Hodson, D., Howarth, D. (2025), "Accountability in pan-European Borrowing: Mind the Gap", *West European Politics*, Vol. 48(3), 696.

37 For an early study of the evolution of the Union's borrowing costs and how markets perceive EU bonds, see Claeys, G., McCaffrey, C., Welslau, L., *The rising cost of European Union borrowing and what to do about it*, Bruegel Policy Briefs, 2023.

38 European Commission, Communication – A dynamic EU Budget for the priorities of the future: the MFF 2028-2034, 16.7.2025, COM(2025)570, p. 30.

39 Definitive adoption (EU, Euratom) 2025/31 of the European Union's annual budget for the financial year 2025, OJ L2434, 27.2.2025, p. 1.

40 European Council, July 2020 Conclusions, point 129 and points 144-150; recitals 6-8, 18 and 19 of the 2020 ORD Decision. The ORD Decision however foresees that, should these resources not be made available on time, national GNI-based contributions will be raised accordingly (Art. 9, paras 4-6, of the 2020 ORD Decision).

41 Art. 2(1)(c) of the 2020 ORD; Council Regulation (EU, Euratom) 2021/770 of 30 April 2021 on the calculation of the own resource based on plastic packaging waste that is not recycled, on the methods and procedure for making available that own resource, on the measures to meet cash requirements, and on certain aspects of the own resource based on gross national income, OJ L 165, 11.5.2021, p. 15.

42 Interinstitutional agreement of 16 December 2020, Annex II.

43 E.g. Dermine, P., *Le plan de relance 'Next Generation EU' de l'Union européenne – Analyse constitutionnelle d'une initiative historique*, Bruylant, 2023, 87; Kendrick, M. (2023), "NextGenerationEU – Will the Debt be Repaid by Own Resources or Member State Taxpayers", *European Law Review*, Vol. 48(1), 29.

44 European Commission, Communication – A dynamic EU Budget for the priorities of the future: the MFF 2028-2034, COM(2025)570, p. 27.

With the start of debt repayment just around the corner (2028), the EU has its back against the wall and must consider future avenues. A substantial increase of GNI-based contributions is at this stage a political no-go. Rolling over part of the EU's debt would be legally feasible, but would require unanimity to amend the Own Resources Decision. It is thus politically costly, and this option is not seriously considered for the time being. The European Commission is currently seeking to give new impetus to the discussion on new own resources and hopes to make a breakthrough in the context of the ongoing 2028-2034 MFF negotiations. Its July proposal offers to diversify the mix and proposes three new own resources.[45] The first would be based on non-collected e-waste. The second, labelled the Tobacco Excise Duty Own Resources (TEDOR) would consist in applying a call rate to the revenues generated by national taxes on tobacco consumption. The last, known as the Corporate Resource for Europe (CORE), would be based on annual lump-sum contributions from companies reaching certain levels of annual net turnover.[46]

These are ambitious proposals, which signal a bold and far-reaching use of Article 311 TFEU as a legal basis, and a more political and strategic approach to own resources.[47] They raise a number of important questions. First, they will certainly reopen the difficult debate of the limits of Article 311 TFEU. Can the provision form the basis of genuine taxing powers? Is there any limit between the concept of "own resource" and that of a "tax"?[48] What seems to be crucial to the discussion, especially in the case of CORE, is whether these proposed new own resources would establish a genuine and automatic link between the EU and the private legal subjects concerned by said resources. In the case of CORE, would the Member States be under an obligation to levy the contribution from the companies which come under its material scope of application, or could they draw the amounts at stake from other sources or from their general budget, in practice departing from the levy's intended goal?[49] Technically, the ORD is solely addressed to the Member States and limits itself to distributing a financial burden among them.[50] But the Commission's intention seems to be limiting the discretion enjoyed by the Member States and confining them to the role of collecting a contribution directly callable from companies.[51] Second the proposals also beg the question of the relationship between Article 311 TFEU, the EU's fiscal harmonization powers enshrined in Articles 113 and 115 TFEU and the broader regulatory competences of the EU, and

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45 See European Commission, Proposal for a Council Decision on the system of own resources of the European Union and repealing Decision 2020/2053, COM(2025)574, esp. Art. 3(1)(b)(d)(f).

46 On CORE, see van der Vlugt, S. (2025), "The CORE contribution as a new EU own resource and its legal consequences", *EULawLive WeekEnd Edition*.

47 See Neumeier, C. (2023), "Political own resources: towards a legal framework", *Common Market Law Review*, Vol. 60(2), 319.

48 On this issue, see Caziero, M. (2024), "What legal basis for an EU tax ?", *Common Market Law Review*, Vol. 61(6), 1527.

49 As it has for example been the case, in some Member States, for the so-called "plastic tax" created by the 2020 ORD. See Steinbach, A. (2023), "Tax and Debt Financing the EU", *Intereconomics*, Vol. 58(6), 311. See also European Court of Auditors, Special Report 2024/16.

50 See Art. 11(4) of the proposed new ORD, on the making available of own resources.

51 Following Art. 12 of the proposed new ORD, implementing measures adopted under Art. 311(4) TFEU would specify "rules regarding the obligations of companies with regard to the contribution", and rules necessary "for the practical functioning of the collection of the contribution by the Member States from the companies, including those related to administrative procedures, forms, late payment interests, control measures and any relevant measures regarding recovery, and sanctions and administrative penalties in cases of non-compliance by the companies".

the extent to which Article 311 should be used on its own, or in combination with other Treaty provisions. Last, these developments also raise institutional reflections. As we are witnessing a bold and far-reaching mobilisation of Article 311 TFEU, one should keep in mind that the procedure by Article 311(3) TFEU largely marginalizes the European Parliament, and is strongly dominated by Member States, first through unanimity in the Council and then via national ratification. The rise of the EU's power to borrow now calls for a commensurate development of the Union's fiscal powers. That is a financial and political evidence and constitutes the next challenge ahead for the Union. But one might legitimately wonder if Article 311 TFEU, with all its institutional limits, constitutes the ideal basis for such development.

4 Conclusion

In 1781, Alexander Hamilton, then still one of the aides-de-camp of George Washington, wrote to Robert Morris, Superintendent of Finances: "A national debt if it is not excessive will be to us a national blessing; it will be powerful cement of our union".[52] Over the past few years, we have witnessed both a quantitative and qualitative transformation of the Union's borrowing activities. This contribution has argued that common debt constitutes a vector of financial and political autonomy. For the EU too, debt could be a cement, and substantially boost the cohesion of the Union and its ability to project itself in the future as a polity. But debt is also a potential source of vulnerability. Common debt can only be a blessing for the EU if properly serviced through newly established fiscal resources. Over the past five years, the EU has built a strong and credible power to borrow. Now it must make equivalent progress on its ability to raise revenues. Here lies the key challenge for the coming months and years. But just like for the development of EU debt, this quest for new fiscal revenues must imperatively be pursued within the confines of the EU Treaty system. For the EU is a Union of law, where autonomy and the rule of law must necessarily go hand in hand.

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[52] Alexander Hamilton to Robert Morris, 30 April 1781 in Syrett, H. (ed.), *The Papers of Alexander Hamilton*, Columbia University Press, Vol. 2, 604.

The autonomy of the EU spending powers: legal constraints and challenges

Cristina Fasone*

1 Introduction

The objectives pursued by the EU have expanded significantly over the decades, particularly since the Maastricht Treaty. Article 3 TEU now lists, among other things, objectives such as “a highly competitive social market economy, aiming at full employment and social progress”, the promotion of peace and of the well-being of its peoples, the “improvement of the quality of the environment”, the establishment of “an area of freedom, security and justice without internal frontiers” for its citizens, the safeguarding and enhancement of Europe’s cultural heritage, the promotion of scientific and territorial advancement, as well as economic, social, and territorial cohesion. Article 3(6) TEU concludes by emphasizing that the EU pursues “its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.” This specification has to be paired with Article 311 TFEU’s call for the EU’s capacity to “provide itself with the means necessary to attain its objectives and carry through its policies.” The question then arises: to what extent is the EU able to achieve these ambitious objectives through its own budget?

The topic of the EU’s spending autonomy[1] directly addresses these questions and opens up further paths of investigation. For example, from whom is the EU expected to be autonomous in terms of spending? From third countries and the international community – a theme that is often framed under the term of the EU’s strategic autonomy – or also from its Member States? Moreover, should we assess the EU’s spending autonomy primarily in procedural or in substantive terms?

Indeed, at least prima facie, the procedures governing EU spending – from the Multiannual Financial Framework (MFF) to the annual budget and the legal acts authorizing the appropriations from the EU budget – all take place at supranational level. This contrasts, for example, with the revenue cycle, where the adoption of the Own Resources Decision requires approval at the domestic level as well (Article 311 TFEU). Yet, in terms of the EU’s ability to unilaterally determine the level and allocation of its expenditures, significant constraints become apparent. After all, the EU and the national budgets are deeply intertwined, also on the expenditure side,

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1 By autonomy we refer to the capacity of self-determination, self-governance, and self-rule, free from coercion and domination. Here, by spending autonomy we will deal with the EU’s ability to direct and control its own expenditures.

particularly within the Economic and Monetary Union (EMU), as the sovereign debt crisis of 2010-2014 clearly demonstrated.

In its basic terms, the EU's expenditure cycle was established in the 1980s, particularly, under the leadership of Jacques Delors, with the introduction of multi-year programming and the adoption of the MFF in 1988. Initially spanning five years, the MFF was later extended to a seven-year period. Negotiations over the MFF, and, to a lesser extent, the adoption of the annual budgets, are very cumbersome, "baroque", procedures. These procedures mirror the challenges of reaching a compromise on EU spending: between EU institutions, between the institutions and the Member States, and among the Member States themselves. The rigidity of the MFF, particularly in an era of "poly-crisis", has prompted a reflection on whether the EU's expenditure cycle is really fit for purpose.[2]

On a substantive level, the "emergency governance" that has characterized EU decision-making for more than a decade has further highlighted the insufficiency of EU expenditure mechanisms, necessitating unprecedented interpretative approached to achieve greater flexibility. This context explains not only the broad interpretation of the legal bases to provide financial assistance during and beyond the pandemic (as it will be analysed), but also the unconventional monetary operations put in place by the European Central Bank (ECB), particularly since 2011. While it could be questionable to qualify the various programmes launched by the ECB to support Euro area countries as "EU spending", they have nonetheless de facto contributed to "rescuing" or strengthening national economies within the EMU.

This contribution is organized as follows. It first reviews the evolution of the EU's spending powers over time; second, it analyses the legal constraints on EU spending; third, it delves into the EU's response to the Covid-19 pandemic as a potential "game changer" for EU spending autonomy; fourth, the contribution evaluates the main legal bases for EU spending and their evolutive interpretation. Finally, it offers some concluding reflections on the legitimacy and autonomy of the arrangements governing EU expenditures.

2 Evolution of the EU spending powers: continuity and discontinuity

While the gap between increasingly ambitious EU objectives and limited spending autonomy has not been addressed by the Treaties,[3] the adoption of the MFF was meant to ensure greater predictability in the allocation of expenditures across a progressively broader range of EU policies (cohesion and common agricultural policies as well as in the area of freedom, security and justice and the EU's engagement in the external action). To a large extent, the MFF has succeeded in

[2] Padoan, P. C., "The MFF Process and Global Challenges", in Laffan, B. and De Feo, A. (eds), *EU Financing for Next Decade. Beyond the MFF 2021-2027 and the Next Generation EU*, European University Institute, 2020, 43.

[3] Laffan, B., *The Finances of the European Union*, Springer, 1997, 15; Fasone, C., "EU Budget and Spending Power", in Hinarejos, A. and Schütze, R. (eds), *EU Fiscal Federalism: Past, Present, Future*, Oxford University Press, 2023, 233.

providing greater certainty and effective programming of EU expenditures, albeit at the cost of increased rigidity and inter-institutional conflicts. Once expenditure ceilings are set, they are extremely difficult to revise, and this is especially so since the Lisbon Treaty. The adoption of the MFF, under Article 312(2) TFEU, requires not only the conclusion of an inter-institutional agreement but also the approval of a Regulation by unanimity in the Council, with the consent of the European Parliament, by a majority of its component members. This process now precedes the sealing of the inter-institutional agreement. Moreover, the Lisbon Treaty eliminated the previous de facto distinction between compulsory and non-compulsory expenditures, which had historically given the European Parliament significant leverage over spending not directly mandated by EU law.[4]

EU budgetary procedures have long been marked by a degree of inter-institutional conflict, occasionally requiring resolution by the Court of Justice.[5] Over time, the European Parliament has struggled to expand its powers in this domain, achieving some success. With the post-Lisbon obligation for the Council and the Parliament to agree on any single item of the expenditures, however, the compromise has been much more difficult to reach, also on the annual budget, which indeed, once approved is then frequently amended in the course of the financial year. The Commission, which traditionally acts as "honest broker", has found this role increasingly difficult. Meanwhile, despite being nominally equal as budgetary authorities under Articles 14 and 16 TEU, the roles of the Parliament and the Council in EU spending have become increasingly asymmetrical.

The euro area crisis exposed these asymmetries and highlighted the limitations of EU spending autonomy. The EU's response to the asymmetric shocks relied, at least in part, on instruments outside the European Parliament's direct purview, such as the ECB's Securities Market Programme and the Outright Monetary Transactions (the latter merely announced). Furthermore, significant crisis-response mechanisms such as the bilateral loan programmes, the European Financial Stability Facility and, notably, the European Stability Mechanism (ESM) were established outside the framework of EU law and did not envisage any role for the European Parliament.[6] Even in the adoption and governance of the only fund established under EU law (Article 122(2) TFEU) back in 2010, the European Financial Stabilization Mechanism (EFSM),[7] the European Parliament was excluded. Conversely, the European

4 Vitrey, A., "The First Multiannual Financial Framework after the Lisbon Treaty: The Dynamics in the European Parliament from the Perspective of an Insider", in Becker, S., Bauer, M.W., and De Feo, A. (eds), *The New Politics of the European Union Budget*, Nomos, 2017, 133.

5 Fasone, C., Lupo, N., "The Union Budget and the Budgetary Procedure", in Schütze, R., Tridimas, T. (eds), *Oxford Principles of European Union Law*, Oxford University Press, 2018, 820.

6 See, amongst many, Beukers, T, de Witte, B., Kilpatrick, C., "Constitutional Change through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead", in Beukers T, de Witte B, Kilpatrick C. (eds), *Constitutional Change through Euro-Crisis Law*, Cambridge University Press, 2017, 1. By the same token, EU norms regulating the procedures for the coordination of national economic policies, like those enshrined in the so-called "six-pack" and "two-pack", provides for a very marginal role of the European Parliament, see Bressanelli, E., Chelotti, N. (2018), "The European Parliament and Economic Governance: Explaining a Case of Limited Influence", *The Journal of Legislative Studies*, Vol. 28(1), 72.

7 Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010, p. 1., whose Art. 3(5), just requires that the Parliament and the Council are informed by the Commission of the Memoranda of Understanding concluded. Likewise, under Art. 122 TFEU the Parliament is just informed by the President of the Council of the decision taken.

Council, along with the Euro Summit and the Eurogroup – has de facto expanded its authority over EU spending, shaping the supranational response to the crisis.[8]

The euro area crisis and the response to it have exposed the limits of the EU spending autonomy. Of the three traditional functions a public budget is expected to fulfil – allocation, stabilisation, and redistribution – the EU budget was unable to "score high" on any of them. Allocation is largely supported by the functioning of the internal market, stabilization relies, with all its constraints, on the governance of the EMU, and redistribution depends on the implementation of the cohesion policy (and the related funds) and the relatively small European Social Fund. During the crisis, neither stabilization nor redistribution, under strict conditionality,[9] was guaranteed through the EU's standard political decision-making procedures. Instead, support came mainly through the ECB and national budgets. The "no bailout clause", Article 125(1) TFEU, in that context has certainly limited the capacity of the EU budget to deliver in this respect.[10]

Despite these procedural and substantive constraints, the EU budget has managed to grow and adjust to the needs and to address emerging crises, often operating outside the typical routes and requirements established by supranational rules. Besides the funds that are not covered outside EU law, such as the ESM, the proliferation of EU-regulated but extra-budgetary funds, from the European Development Fund to the Recovery and Resilience Facility (RRF) and to the European Peace Facility (EPF), reflects the need to expand the capacity of the EU budget and adopt an evolutionary interpretation of EU rules. However, the creation of a "budgetary galaxy"[11] of funds, financed through external assigned revenues and operating alongside the EU budget, calls for the rationalization and fine-tuning of EU spending mechanisms to ensure control and accountability.[12]

3 Constraints on the EU expenditures

As anticipated, EU law poses several limits to supranational spending. Article 310 TFEU sets principles governing the EU budget: the principle of balanced budget, the principles of universality and unity of the budget, the principles of sound financial management and budgetary discipline. Whether budgetary discipline actually prohibits the debt financing of EU expenditures is contested and the practice,

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8 Bickerton, C.J., Hodson, D. and Puetter, U. (eds), *The New Intergovernmentalism. States and Supranational Actors in the Post-Maastricht Era*, Oxford University Press, 2015, 165.

9 Judgment of the Court of Justice of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756.

10 According to Art. 125(1) TFEU, "The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project."

11 Crowe, R. (2017), "The European Budgetary Galaxy", *European Constitutional Law Review*, Vol. 13(3), 428; Crowe, R., "The European Union's Public Finances in Times of Crisis Fragmentation, Innovation, and Consolidation", in Kilpatrick, C., Scott, J. (eds), *New Frontiers of EU Funding. Law, Policy, Politics*, Oxford University Press, 2024, 25.

12 Indeed, in the case of "external assigned revenue" the corresponding expenditure is not counted within the MFF ceilings.

especially since the pandemic crisis, has moved toward overcoming a strict interpretation of Articles 310 and 311 when read together.[13]

Moreover, "[t]he implementation of expenditure shown in the budget shall require the prior adoption of a legally binding Union act providing a legal basis for its action and for the implementation of the corresponding expenditure" (Article 310(3) TFEU), in accordance with the Financial Regulation. Adopted under Article 322 TFEU,[14] this Regulation is thus "constitutionally necessary" under the Treaties and serves as the standard for the legality of the EU spending. Per Article 2 of the Financial Regulation currently in force, for example, "a legal act, other than a recommendation or an opinion, (…) provides a legal basis for an action and for the implementation of the corresponding expenditure entered in the budget."[15] This requirement is in addition to the obligation to respect the expenditure ceilings defined in the MFF Regulation and the provisions of the Common Provisions Regulation, including conditionality mechanisms such as the horizontal enabling conditions that underpin the disbursement of EU money.[16]

The basic act required for appropriating EU resources "must have a legal basis in the Treaties, that is, it must fall within the scope of a competence conferred on the EU."[17] This requirement, many have argued, distinguishes the ground of EU's spending capacity from other composite constitutional systems. Indeed, for the EU, in principle, spending autonomy ends where the conferral of competences ends, lacking sovereign authority. This would justify, in turn, a textual interpretation of the legal bases for spending, which should not be used to directly or indirectly expand EU's authority.

A common comparison is made with the US Constitution, which is said to provide a general and wide constitutional basis for federal spending. In other words, the existence of a "general welfare" clause under Article I, Section 8 of the US Constitution substantially differentiates the autonomy of the federal spending in the US from the selective and ad hoc bases for the EU expenditures.[18] However, this argument underestimates the evolution of the interpretation of the US "general welfare" clause. Although the clause has been part of the US Constitution since

13 See, amongst many, Paul Dermine in this volume. Arts 310(4) and 311(1) TFEU in principle point to the ability for the EU to finance its expenditures exclusively through its own resources.

14 That is the general legal basis to implement the budget.

15 Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast), OJ L, 2024/2509, p. 1. Therefore a dual legal basis is needed save for the funding of non-significant actions, i.e. pilot projects or preparatory actions designed to assess the pros and cons of a proposal for a basic measure (see also Judgment of the Court of 12 May 1998, *United Kingdom* v *Commission*, C-106/96, ECLI:EU:C:1998:21, paragraph 19), for which the legal basis is provided by the Commission's power of initiative directly grounded in the Treaties.

16 See, e.g. Art. 15 and Annex III, Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, p. 159.

17 De Witte, B., "Integration Through Funding. The Union's Finances as a Policy Instrument", in Weber, R. (ed.), *The Financial Constitution of European Integration: Follow the Money?*, Hart Publishing, 2023, 221 (222).

18 Leino-Sandberg, P., Lindseth, P. L. (2024), "Crisis, Reinterpretation, and the Rule of Law: Repurposing 'Cohesion' as a General EU Spending Power", *The Hague Journal on the Rule of Law*, 587 (591).

1787, its actual meaning was contested. Notably, James Madison and Alexander Hamilton disagreed on its interpretation: the former argued that federal revenues could be spent only to cover measures falling under the enumerated federal powers; by contrast, the latter claimed that extra-jurisdictional spending was allowed.[19] In fact, until the Sixteenth Amendment entered into force in 1913, federal revenues were so limited that this debate remained theoretical. It was due to the combined impact of the adoption of the Sixteenth Amendment, of the US Supreme Court's jurisprudence in favour of federal revenue powers, of the Great Depression (1929), and the later start of the New Deal that the general welfare clause and its implications for federal conditional spending became significant legal issues. While a Madisonian interpretation of the general welfare clause initially prevailed, in 1936-1937 the Supreme Court shifted toward the Hamiltonian reading. In *United States* v *Butler*,[20] the Court invalidated the payments to the farmers foreseen under the 1933 Agricultural Adjustment Act. It did so under the Tenth Amendment while recognizing that the general welfare clause established an autonomous federal power distinct from the division of legislative competences.

The US federal experience demonstrates how an autonomous federal spending capacity can be derived from an evolutive, purposive interpretation of constitutional text that departs from a literal and "originalist" reading of the general welfare clause. Thus, it remains unclear why a similar interpretative approach could not be applied to the EU Treaties,[21] if not to second the argument supporting the ontologically different or *sui generis* nature of the EU. Furthermore, a purposive interpretation of the EU Treaties' legal basis to grant spending autonomy would also be consistent with what has been described as the dominant constitutional interpretative approach at the Court of Justice, namely teleological interpretation.[22]

Therefore, there is space for constitutional interpretation to be used to expand the EU's spending capacity, provided that robust mechanisms for review and accountability are in place, especially given the extreme rigidity of the Treaty revision procedures and the lack of political feasibility of any formal "constitutional change". As will be shown, the practice of the last five years abundantly confirms that it is precisely such a purposive and systematic interpretation of EU primary law that has been used to build and strengthen EU's spending autonomy, beyond a formalistic reading of the nexus between legal bases and competences conferred.[23] Without such interpretative flexibility, the ambitious objectives set out in the Treaties for EU action risk becoming largely unattainable.

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19 Tushnet, M. (2015), *The Constitution of the United States of America: A Contextual Analysis*, Hart Publishing, 2015, 176.

20 297 U.S. 1 (1936).

21 Along the same line see de Gregorio Merino, A. (2021), "The recovery plan: solidarity and the living constitution", *EU law live*.

22 See, notably, Poiares Maduro, N. (2007), "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", *European Journal of Legal Studies*, Vol. 1(2), 137 (139).

23 Fabbrini, F. (2024), "From the Pandemic to the War: The EU Fiscal Response to Russia's Aggression of Ukraine, the Legacy of NGEU, and the Challenge to 'Promote the General Welfare'", *AJIL Unbound*, Vol. 118, 177.

Depending on how it is conceived,[24] conditional spending can be seen as an instrument fostering EU spending autonomy, rebalancing the logic of the juste retour – i.e. you get the money back based on what you paid for – that for decades has dominated the budgetary negotiations in the EU.[25] The addressees of the spending conditions are typically Member States, so the use of this leverage implies that the EU and national budgets become even more interdependent. At the same time, conditional spending is an instrument to direct EU resources towards shared and uniform goals, thereby prompting a more effective use of the supranational budget, particularly if performance-based conditionality works properly.[26] In other words, spending conditionality can be turned into a tool of homogenisation and coordination between national policies toward EU expenditures' priorities. As proven by the recent experience of the RRF and, to a lesser extent, of the Rule of Law Conditionality Regulation,[27] as already occurred in many other federalizing processes – the case of the US, again, offers a good illustration – conditionality tends to trump the division of competences and to expand the scope of action of the supranational/federal level of government.[28]

4 The Covid-19 crisis as a game changer?

A shift in the pursuit of greater EU spending autonomy became evident in the response to the Covid-19 pandemic. A significant learning process had been set in motion following the Euro area crisis, once the limits of strict conditionality and of the measures largely adopted outside the EU legal framework became clear.[29]

Indeed, already under the Juncker Commission a series of initiatives, mainly instrumental to the Euro area, were taken to stimulate growth, investments and structural reforms in the Member States through EU spending and entailing an extensive interpretation of the Treaty bases, notably of Article 175(3) TFEU alone or in combination with other legal bases. Of them, only the Structural Reform Support

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24 On the different types of conditionality, see Viță, V. (2018), "Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality", *Cambridge Yearbook of European Legal Studies*, Vol.19, 116.

25 Citi, M., "EU Budgetary Politics and the Paradox of Juste Retour", in Becker, S., Bauer, M.W., De Feo, A. (eds), *The New Politics of the European Union Budget*, Nomos, 2017, 83.

26 That has been questioned in several reports of the European Court of Auditors, see, e.g. European Court of Auditors, *Performance-orientation, accountability and transparency – lessons to be learned from the weaknesses of the RRF*, Review 02, 2025, 24.

27 See Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, OJ L 57, 18.2.2021, p. 17., and Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1., respectively.

28 Viță, V. (2017), "The Rise of Spending Conditionality in the EU: What Can EU Learn from the US Conditional Spending Doctrine and Policies?", *EUI LAW Working Paper*, 2017/16, 1; Fasone, C., Simoncini, M., "Conditional Spending as an Instrument of Government", in Lindseth P. L et al. (eds), *Comparative Administrative Law. New Voices, New Perspectives*, 3rd ed., Edward Elgar Publishing, 2026 (forthcoming).

29 Ioannidis, M. (2016), "Europe's new transformations: How the EU economic constitution changed during the Eurozone crisis", *Common Market Law Review*, Vol. 53(5), 1237.

Programme (2017-2020),[30] with a limited budget of €142 million, was effectively mobilized. More ambitious proposals, in terms of scope and resources, such as the European Investment Stabilisation Function (2017) and the Budgetary Instrument for Convergence and Competitiveness (BICC, 2019) ultimately failed to materialize.

Yet, these proposals and envisioned instruments marked a shift in the EU's approach toward the use of the EU expenditures to direct domestic priorities and decision-making, moving beyond the remit strictly confined to an orthodox interpretation of EU competences.[31]

Through a sophisticated operation of constitutional engineering,[32] the Next Generation EU (NGEU) and its main component, the RRF, with its massive envelope of €750 billion (in 2018 prices), have temporarily "changed the game" of the EU spending capacity, at least until the end of 2026. Financing ex post the (satisfactory) achievement of domestic milestones and targets, corresponding to reforms and investments envisaged by the Member States in the National Recovery and Resilience Plans (NRRPs), through the disbursement of instalments no more than twice a year, the EU spending, once again under external assigned revenues, has been oriented to stimulate the resilience and growth of national economies following the pandemic crisis.

From a legal perspective, the RRF has attracted both praise and criticism. On the first "front", the RRF has been viewed as bringing forward a "constitutional transformation", promoting a shift in the traditional interpretation of the no bailout clause (Article 125 TFEU) against too rigid constraints on spending.[33] In other words, the RRF has paved the way to a "transformative moment" for the EU budget functions, in favour of redistribution.[34] The second "front", instead, highlights the too fragile legal foundations of the RRF as being grounded on an interpretative "overstretching" of the Treaties' legal bases (on this point, see the next Section).[35] Moreover, the scope of the RRF was considered as broad as to cover spending on all possible policy areas save for security and defence and financial markets' regulation.[36]

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30 Regulation (EU) 2017/825 of the European Parliament and of the Council of 17 May 2017 on the establishment of the Structural Reform Support Programme for the period 2017 to 2020 and amending Regulations (EU) No 1303/2013 and (EU) No 1305/2013, OJ L 129, 19.5.2017, p. 1.

31 For different positions, see De Witte, B. (2021), "The European Union's covid-19 recovery plan: the legal engineering of an economic policy shift", *Common Market Law Review*, Vol. 58(3), 635; Leino-Sandberg, P., Ruffert, M. (2022), "Next Generation EU and its constitutional ramifications: a critical assessment", *Common Market Law Review*, Vol. 59(2), 433.

32 See De Witte, B. (2021), "The European Union's covid-19 recovery plan: the legal engineering of an economic policy shift", *Common Market Law Review*, Vol. 58(3), 635 (652); Fabbrini, F. (2022), "Next Generation EU: Legal Structure and Constitutional Consequences", *Cambridge Yearbook of European Legal Studies*, Vol. 24, 45 (50).

33 Panascì, M.A. (2024), "Unravelling Next Generation EU as a Transformative Moment: From Market Integration to Redistribution", *Common Market Law Review*, Vol. 61(1), 13.

34 Ibid., 20.

35 Leino-Sandberg, P., Ruffert, M. (2022), "Next Generation EU and its constitutional ramifications: a critical assessment", *Common Market Law Review*, Vol. 59(2), 433 (439).

36 Leino-Sandberg, P., Raunio, T. (2025), "From Bad to Worse: The Continuous Dilemma Facing Parliaments in European Economic and Fiscal Governance", *Government & Opposition*, Vol. 60, 86 (94).

Since 2021, the RRF has served as a model for EU spending, with its "method of government"[37] spreading to other policy sectors. Five main features define this new "method": 1) a performance-based approach, anchored to 2) multi-year programming at domestic level based on EU common priorities and 3) instrumental to support structural reforms and investments, 4) to stimulate national ownership, 5) through procedures that are essentially based on a bilateral dialogue between the Commission and the national government shaping the interpretation and the implementation of the various conditions.

The RRF "method", also referred to as the "planning method" due to its focus on domestic multi-annual programming,[38] has been "transplanted" with a series of adaptations to policy areas or instruments such as the Common Agricultural Policy,[39] the Social Climate Fund,[40] defence industry and, in prospect, cohesion policy.[41] However, none of these adaptations involve resources on the same scale as the RRF.[42] This has entailed an unprecedented rise of EU conditional spending over national public policies at first glance, a mode of operation that has been labelled as "integration through funding".[43] In other terms, once famous for its regulatory capacity, the EU is now exploiting also the financial leverage to influence domestic decision-making, including in areas sensitive to national sovereignty, such as defence, fiscal policy, and the protection of the rule of law.

Does this move boost the EU spending autonomy, i.e. in these circumstances the ability of the EU budget, through conditionality, to direct and steer domestic policies according to the supranational agenda and targets? After all, such possibility seems consistent with what has been argued before, notably that conditional spending can be framed as a "centralizing force" with the "centre" being in this case the EU vis-à-vis the Member States.

Yet, this conclusion is not straightforward when examining the functioning of this euro-national "method of government". After all, the EU budget is financing national plans, investments and reforms, which are strongly linked to the domestic context,

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37 See Fasone, C., Lupo, N. (2024), "Learning from the Eurocrisis. A new method of government for the European Union's economic policy coordination after the pandemic", *International Journal of Constitutional Law*, Vol. 3, 882.

38 Dermine, P. (2024), "The Planning Method: An Inquiry into the Constitutional Ramifications of a New EU Governance Technique", *Common Market Law Review*, Vol. 61(4), 959.

39 Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for strategic plans to be drawn up by Member States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013, OJ L 435, 6.12.2021, p. 1.

40 Regulation (EU) 2023/955 of the European Parliament and of the Council of 10 May 2023 establishing a Social Climate Fund and amending Regulation (EU) 2021/1060, OJ L 130, 16.5.2023, p. 1.

41 More questionable is the use of the RRF under the Stability and Growth Pact as reformed in 2024. Indeed, the revised rules emphasise the performance-based approach for reforms and investments linked to national medium-term fiscal structural plans, but the leverage of the EU resources is much less visible than under the RRF. Indeed, there are not funds granted to the Member States for compliance with the fiscal rules, rather the opposite. Under the Common Provisions Regulation structural funds can be suspended and withdrawn for lack of respect of those rules.

42 RePowerEU, instead, is somehow organic to the RRF, using its resources and taking advantages of the NRRPs by inserting an *ad hoc* RePowerEU chapter.

43 De Witte, B., "Integration Through Funding. The Union's Finances as a Policy Instrument", in Weber, R. (ed.), *The Financial Constitution of European Integration: Follow the Money?*, Hart Publishing, 2023, 221 (221).

also to strengthen the national ownership of EU strategic decisions. This dynamic introduces a countervailing trend: the nationalization of EU expenditures.[44] Although the resources are European, rather than being used to guarantee supranational public goods, their management and effectiveness rely on the Member States, which contrasts with the idea of enhanced EU spending autonomy.

This underlying tension is quite evident when looking at the potential reform of cohesion policy under the proposal for the MFF 2028-2034. The Commission's proposal for the new MFF, published in July 2025,[45] if approved as it is, is going to trigger a comprehensive restructuring of the EU budget, shifting from programmes to priorities and from cost-based to performance-based payments. Notably, Heading 1 of the multi-year budget (1 out of 4 headings only, summing up 53.7% of the MFF resources) would consolidate funds for "Economic, social, territorial cohesion, CAP, fisheries and maritime affairs, prosperity and security". This consolidation would require each Member State to submit a mandatory "national and regional partnership plan" encompassing all these policy areas. The pooling of resources into such plans – to increase synergies and flexibility in the national spending of EU resources across policy areas – is supposed to support domestic investments and reforms to achieve EU priorities, i.e. each plan has to respect an EU social target set at 14%, with funding conditional on their implementation.

While the shared management system would remain in place for structural funds, the significance of cohesion policy vis-à-vis the EU budget is decreased in proportion. Already in the first assessments of the new MFF proposal doubts were casted on the desirability of integrating several successful programmes, with different aims, into one national plan per Member State and to use a "cash for reform" approach.[46] Concerns were also expressed on the potential re-nationalisation and centralization of the resources' management at the level of the central government, with a much more marginal role of stakeholders and regional and local authorities.[47]

Subsumed into comprehensive national and regional partnership plans, structural funds will be subject to a performance-based measurement rather than on reimbursements based on the costs effectively incurred, and, thus to an assessment methodology that is inevitably more context-dependent – looking at the practice developed under the implementation of the RRF – as its concrete interpretation is influenced by the bilateral negotiations between the Commission and the national authorities. If not streamlined and focused on the actual outcomes of reforms and

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44 Leino-Sandberg, P., Raunio, T. (2025), "From Bad to Worse: The Continuous Dilemma Facing Parliaments in European Economic and Fiscal Governance", *Government & Opposition*, Vol. 60, 86 (94).

45 European Commission, Communication on A dynamic EU Budget for the priorities of the future - The Multiannual Financial Framework 2028-2034, COM (2025) 570 final/2, and Proposal for a COUNCIL REGULATION laying down the multiannual financial framework for the years 2028 to 2034, COM (2025) 571 final, both published on 16 July 2025.

46 See Pari, M., Predier, S. (2025), *EU Budget 2028-2034 – Overview of the Commission's Proposal*, European Parliament, EPRS, PE 775.885, 7.

47 See Zeitlin, J., Bockhorst, D. and Eihmanis, E., *Rethinking the Governance and Delivery of the Cohesion Policy Funds: Is the Recovery and Resilience Facility (RRF) a Model? Final report*, October, 2023; Committee of the Regions, *EU long-term budget 2028-34: CoR President denounces massive renationalisation and undermining of Cohesion Policy through "Monster National Plans"*, Press Release, 16.07.2025.

investments,[48] the extension of the performance-based approach to other funds, can entail a more discretionary and nationally-driven understanding and a case by case appreciation of the fulfilments of the targets promised.

5 Assessing the (main) legal bases on the EU spending and their evolutive interpretation

The practice of EU institutions, particularly the Commission and the European Parliament, engaging in an evolutive interpretation of budgetary rules to expand the Union's spending capacity is not new. Back in the 1970s and 1980s, pilot projects were promoted by the European Parliament and the Commission beyond the competences conferred upon the Community by the Treaties.[49] The practice was subsequently considered in breach of the Treaties insofar as the dual legal basis requirement of EU spending was not fulfilled. In *UK* v *Commission*, the Court of Justice annulled the Commission's decisions announced in an institutional press release in 1995 and providing grants to finance projects to overcome social exclusion, as they had paved the way to "significant actions" without a legislative entitlement.[50] Notably, the decisions were not invalided for breach of the principle of conferral, falling beyond the then Community competence remit, as the Council had also supported, but rather for violation of the requirement for a legislative basic act authorizing the expenditures. Such an approach is typical of many federalizing processes whereby the central/federal authorities are implicitly authorized, via interpretation, to trump the competence divide through federal spending.[51]

Since the pandemic, the number of funds and instruments created outside the EU budget has increased exponentially. Examples, include the European instrument for Temporary Support to mitigate Unemployment Risks in an Emergency (SURE),[52] the RRF, the EPF,[53] the Social Climate Fund, and the Security Action for Europe (SAFE).[54] In parallel, the evolutive interpretation of the legal bases, in particular of Articles 122 and 175(3) TFEU has become somewhat mainstream.

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48 Beetsma, R., Buti, M. (2024), "Designing conditionality in the supply of European public goods", *Working Paper 20/2024*, Bruegel; European Court of Auditors, Performance-orientation, accountability and transparency – lessons to be learned from the weaknesses of the RRF, Review 02, 2025, 24.

49 De Witte, B., "Integration Through Funding. The Union's Finances as a Policy Instrument", in Weber, R. (ed.), *The Financial Constitution of European Integration: Follow the Money?*, Hart Publishing, 2023, 221 (222).

50 Judgment of the Court of 12 May 1998, *United Kingdom* v *Commission*, C-106/96, ECLI:EU:C:1998:218.

51 Palermo, F., Kössler, K., *Comparative federalism. Constitutional arrangements and case law,* Hart Publishing, 2017, 230.

52 Council Regulation (EU) 2020/672 on the European instrument for Temporary Support to mitigate Unemployment Risks in an Emergency, OJ L 159, 20.5.2020, p. 1.

53 As the EPF refers to expenditures under the CFSP.

54 Council Regulation 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the reinforcement of the European Defence Industry Instrument, OJ L, 2025/1106, 28.5.2025, p. 1.

For years, Articles 122 and 175(3) TFEU have been "dormant clauses",[55] re-discovered in the aftermath of the Euro area crisis.[56] They both refer to "purposive competences, used to define broad policy objectives rather than a well-defined policy domain".[57]

Article 122 TFEU is seen as a counterweight or a complement to the no bailout clause,[58] but its two paragraphs, often used in combination as a legal basis, are in principle meant to address different issues.[59] Article 122(1) TFEU, which served as the legal basis for SURE Regulation, is an exceptional provision, a rather generic clause, with a solidaristic intent,[60] while Article 122(2) TFEU is a genuine emergency clause. The latter, for good or for bad, has become instrumental to provide temporary financial assistance to Member States, including both grants and loans.

Article 122(2) TFEU is a more specific legal basis with a narrower focus, in principle. It refers to a Member State that "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control", paving the way to Union financial assistance to the Member State concerned under "certain conditions". Beyond the EFSM during the Euro area Crisis, this clause has never been used as stand-alone legal basis.

Recent measures such as the European Union Recovery Instrument (EURI), which finances the RRF, and SAFE have relied on a generic reference to Article 122, exploiting the fact that the decision-making procedure for both paragraphs is the same: a non-legislative procedure, where the Council decides on a Commission proposal and subsequently informs the European Parliament. Also following the disclosure of the opinion of the Council's legal service,[61] a lot has been written on

55 De Witte, B. (2021), "The European Union's covid-19 recovery plan: the legal engineering of an economic policy shift", *Common Market Law Review*, Vol. 58(3), 635 (653).

56 For example, the European Financial Stabilisation Mechanism (EFSM), worth 60 billion euro, and its Regulation (Council Regulation (EU) No 407/2010 of 11 May 2010), were based on Art. 122(2) TFEU; the already mentioned Structural Reform Support Programme was grounded on Art. 175(3) TFEU as well as Art. 197(2) TFEU.

57 De Witte, B. (2021), "The European Union's covid-19 recovery plan: the legal engineering of an economic policy shift", *Common Market Law Review*, Vol. 58(3), 635 (653).

58 Louis, J. V. (2010), "Guest Editorial: The no-bail-out clause and rescue packages", *Common Market Law Review*, Vol. 47(4), 971 (983).

59 This is particularly emphasised by De Witte, B. (2022), "Guest Editorial. EU emergency law and its impact on the EU legal order", *Common Market Law Review*, Vol. 59(1), 3 (8); Chamon, M., *The use of Article 122 TFEU: Institutional implications and impact on democratic accountability, Study commissioned by the AFCO Committee*, European Parliament, 2023, 19.

60 It should be recalled that in *Pringle*, the Court of Justice affirmed that "Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the European Union to Member States who are experiencing, or are threatened by, severe financing problems. (para 116)". In 2016 it was used to establish a permanent EU program for emergency financial support to EU countries hit by natural or human disasters: Council Regulation (EU) 2016/369 on the provision of emergency support within the Union [2016] OJ L70/1. According to the clause, "Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, *in a spirit of solidarity between Member States*, upon the measures appropriate to the economic situation, in particular *if severe difficulties arise in the supply of certain products, notably in the area of energy* (emphasis added)". See Chamon, M. (2024), "The non-emergency economic policy competence in Article 122(1) TFEU", *Common Market Law Review*, Vol. 61(6), 1501, stressing the non-emergential nature of the clause.

61 Legal Service of the Council of the EU (CLS), Opinion of the Legal Service on Proposals on Next Generation EU, 9062/20, 2020.

the choice for a generic reference to Article 122 TFEU.[62] It appears as a pragmatic determination by the Commission (and the Council) to endorse a purposive reading of the Union financial assistance capacity, also beyond the crisis and targeting all EU Member States, with important procedural and democratic implications. The European Parliament is completely excluded from decision-making, being informed only ex post, and national parliaments, if not involved by their own government or through the political dialogue with the Commission, are equally sidelined, as the early warning mechanism is only activated in relation to draft legislative acts.

This extensive interpretation of Article 122 TFEU requires justification on two key grounds, particularly under the terms of paragraph 2. First, the existence of exceptional occurrences beyond the Member States' control has to be proven as the trigger for the difficulties experienced or threatened by the EU countries. Second, clear and operative conditions have to be provided in the legal act for granting financial assistance.

For instance, looking at the SAFE instrument, the fulfilment of the first justification has been questioned. In the action for annulment against the SAFE Regulation,[63] the European Parliament pleaded that the measure deals with boosting defence industry across the Union,[64] so it would have required Article 173 TFEU (industrial policy) as its legal basis and an ordinary legislative procedure. While the war between Russia and Ukraine is an exceptional occurrence beyond the Member States' control, it is less clear that it has caused severe or immediate difficulties for their defence capacities. Notably, the common procurement procedures on defence products financed by SAFE can also involve third countries.[65]

Moreover, although this is not highlighted in the Parliament's action, the SAFE Regulation, especially its Article 4, remains very vague regarding the conditions for loans to Member States, and the operationalization of the conditions will be only provided in relation to each country through the European defence industry investment plans, thus potentially with significant variations across the States on the level of details and precisions and on the Commission's assessments, as already experienced with the NRRPs.

[62] The same German Constitutional Court showed "suspicion" toward the use of Art. 122 TFEU for the EURI Regulation in the Judgment of the Second Senate of 6 Dec. 2022 – 2 BvR 547/21, paragraphs 182-185. See Grund, S., Steinbach, A. (2024), "Debt-financing the EU", *Common Market Law Review*, Vol. 61(4), 993 (1002).

[63] The management of another fund related to defense, but unlike the SAFE Regulation, grounded on CFSP/CDSP provisions (Arts 30(1) and 41(2) TEU), the EPF, instrumental to conflict prevention and to preserve peace and international security, has become the object of controversy: not the Council Decision (CFSP) 2021/509 of 22 March 2021 establishing the Facility and its legal basis, but Decisions adopted by the European Peace Facility Committee, respectively, on the allocation of the amounts to assistance measures for the supply of military support to the Ukrainian Armed Forces and to the amounts granted to the Facility due to the exclusion of Hungary from the voting. See *Hungary* v *Council and European Peace Facility*, T-452/25 and T-605/25, actions brought on 6 May and 4 September 2025, pending.

[64] *European Parliament* v *Council of the European Union*, C-560/25, action brought on 20 August 2025, pending.

[65] First of all, Ukraine as well as EU candidate or potential candidate countries; Iceland, Liechtenstein, Norway (the three EEA-ETA countries); Canada, Japan, Moldova, North Macedonia, Norway, South Korea, and the United Kingdom, which have concluded Security and Defence Partnerships.

In principle, Article 175(3) TFEU is less problematic from a democratic and procedural standpoint, as it provides for the use of the ordinary legislative procedure. It is commonly described as the "flexibility clause" under the cohesion policy chapter[66] and it was envisioned to re-balance the asymmetry and the incompleteness of the EMU's economic leg.[67] The provision is framed as a residual power clause, to be activated "[i]f *specific actions* prove necessary outside the [Structural] Funds and without prejudice to the measures decided upon within the framework of the other Union policies (emphasis added)".

Article 175(3) TFEU, as well as its predecessor pre-Lisbon, Article 159(3) TEC, were used, alone or together with other Treaty provisions, in a number of instances ranging from the European Solidarity Fund in 2002, the European Globalisation Adjustment Fund in 2006, the Fund for the European Aid to the Most Deprived in 2014, the Reform Support Programme in 2017, the BICC in 2019, the Just Transition Fund, and the RRF in 2021, amongst others. From the opinions of the Council's legal service on the Reform Support Programme and the BICC,[68] we can get an understanding of the reasoning behind the extensive interpretation of this legal basis, which has reached its apex with the RRF so far: structural reforms in the Member States through the RRF and the other funds will improve the performance of their national economies, which in turn will favour economic and social convergence.

While the textual reference to "specific actions" has been emphasized to argue that Article 175(3) is misplaced as the legal basis for the RRF, which is a very broad and cross-sectional policy instrument, thus lacking specificity, this interpretation draws on the only case decided by the Court of Justice, in 2009, dealing with then Article 159(3) TEC. In *International Fund for Ireland (IFI)*, the Court excluded that the Community contribution to an international fund established between the Republic of Ireland and the UK could be based exclusively on the cohesion policy's flexibility clause because adherence to the economic and social objectives specific for this policy was not guaranteed and were rather connected to action that exceeded the scope of cohesion policy.[69]

It is hard to infer clear interpretative guidance by the Court on this legal basis based on the *IFI* ruling. Indeed, there, the Court concluded that the contested Regulation had to be annulled, that Article 308 TEC, the general flexibility clause, alone was not sufficient to ground the measure, and that Articles 159(3) and 308 TEC combined should have provided the correct legal basis. The case in itself was quite peculiar in that it referred to an intergovernmental fund established between two Member States at the time of the 1985 Anglo-Irish Agreement, instrumental to the pacification

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66 Leino-Sandberg, P., Lindseth, P. L. (2024), "Crisis, Reinterpretation, and the Rule of Law: Repurposing 'Cohesion' as a General EU Spending Power", *The Hague Journal on the Rule of Law*, 587 (587).

67 Flynn, L., "Greater convergence, more resilience? - Cohesion policy and the deepening of the economic and monetary Union", in Fromage, D., De Witte, B. (eds), *Recent evolutions in the economic and monetary union and the European banking union: a reflection*, Maastricht Law Faculty of Law Working Paper Series 2019/03, 60.

68 See Council Legal Service, Opinion on the Proposal for a Regulation of the European Parliament and of the Council on the establishment of the Reform Support Programme, 6582/19, 19 February 2019 and Opinion on the BICC – compatibility of the proposed allocation method with the cohesion legal basis (Art. 175(3) TFEU), 5483/20, 23 January 2020.

69 Judgment of the Court of Justice of 3 September 2009, *European Parliament* v *Council*, C-166/07, ECLI:EU:C:2009:499.

process in Northern Ireland and “to encourage contact, dialogue and reconciliation between nationalists and unionists throughout Ireland.”[70]

For sure, as already occurred for some measures,[71] in the future, other legal bases can better “accompany” Article 175(3) TFEU to ground the creation and management of EU funds providing assistance to Member States, starting from the EU budget’s general implementation clause, Article 322(1) TFEU. Spending programmes dealing with environmental policy can be based on Article 192 TFEU; those affecting the industrial policy can refer to Article 173 TFEU; “the financing of transnational infrastructure could be based on Article 171 TFEU; trans-European research by invoking Articles 179 and 173(3) TFEU”.[72] There are certainly other legal bases to exploit, depending on the primary or ancillary nature of the objectives pursued by the measure.

Yet, these options by no means rule out the path of an extensive reading of Article 175(3) TFEU for the sole reason that it would make it more difficult to disentangle, on a conceptual and practical level, the divide between cohesion policy and economic policy.[73] After all, as convincingly argued, under the cohesion policy flexibility clause, financial assistance “is not specifically mentioned but is not excluded either”,[74] so the interpretative route endorsed by the EU institutions is a possible one, applying a teleological interpretation. Following the vocabulary used by courts elsewhere, where fundamental rights not explicitly stated are recognized as existing in the "penumbra" of constitutional provisions,[75] financial assistance can similarly be understood as belonging to the “penumbra” of Article 175(3) TFEU.

6 Conclusion: how legitimate and autonomous is the arrangement for the EU expenditures?

The evolution of EU spending has highlighted considerable limits, both procedurally – due to the extremely rigid decision-making framework, especially in the context of the MFF – and substantively, as spending remains heavily influenced by the national "juste retour" logic. At times, as it was during the euro area crisis, Member States

[70] Ibid., paragraph 5.

[71] See Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards 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, OJ L 63, 28.2.2023, p. 1., which lists next to Arts 175(3) and 322(1) TFEU, also Art. 177(1), Art. 192(1), and Art. 194(2) TFEU.

[72] Grund, S., Steinbach, A. (2024), “Debt-financing the EU”, *Common Market Law Review*, Vol. 61(4), 993 (1007).

[73] Leino-Sandberg, P., Lindseth, P. L. (2024), “Crisis, Reinterpretation, and the Rule of Law: Repurposing ‘Cohesion’ as a General EU Spending Power”, The Hague Journal on the Rule of Law, 587 (603).

[74] De Witte, B., “Integration Through Funding. The Union’s Finances as a Policy Instrument”, in Weber, R. (ed.), *The Financial Constitution of European Integration: Follow the Money?*, Hart Publishing, 2023, 221 (232).

[75] See US Supreme Court, *Griswold* v *Connecticut*, 381 U.S. 479 (1965).

"have exercised their budgetary competences collectively to compensate for shortcomings in the EU's own spending capacity".[76]

Nevertheless, the EU has also shown a significant level of adaptation, resilience, and gradual strengthening of its spending autonomy, especially in the aftermath of the pandemic crisis, viewed here as a "game changer". The risk of witnessing the collapse of the European project, with a series of crises unfolding since 2010, has led to an expansive reading of the relevant Treaty provisions. In front of a "Constitution" extremely difficult, if not (politically) impossible, to amend, the teleological interpretation, in line with the main interpretative approach followed by the Court of Justice for decades, has offered a crucial avenue for the fine-tuning of the EU legal response with the economic and societal needs. The "living Constitution"[77] that has emerged enabled the EU to mobilise its budget in support of sustaining integration.

"Integration through funding", as labelled, has been accused by some of triggering a competence creep. Indeed, where regulatory harmonization is in principle forbidden, the EU's steering of (national) public policies through spending conditionality, for the fulfilment of common transnational objectives in exchange for EU money, is expected to prompt convergence and homogeneity across the Union. However, the post-pandemic era has seen a departure from the Euro area crisis's model of strict conditionality. Since the NGEU, conditional spending has lacked a uniform enforcement methodology, has become highly context-dependent, relying more on outputs than outcomes.[78] At times it is highly discretionary, anchored to bilateral negotiations between the Commission and the domestic government and to national multi-years plans – akin to the NRRPs' experience – now required by EU legislation in several fields. This has led to question the capacity of the EU budget to guarantee truly supranational public goods.[79] While the RRF has generated considerable redistributive effects, favouring countries with lower GDP per capita and enabling substantial grant allocation, the entire RRF envelope and the new extra-budgetary funds have been used to finance Member States' individual plans rather than supranational projects.

The tension and dilemma between centralization and re-nationalization of EU spending remains a central issue in the new 2028-2034 MFF proposal.[80] While the proposal allows for more flexibility in the use of the EU budget, it also insists further

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[76] Crowe, R., "The European Union's Public Finances in Times of Crisis Fragmentation, Innovation, and Consolidation", in Kilpatrick, C. and Scott, J. (eds), *New Frontiers of EU Funding. Law, Policy, Politics*, Oxford University Press, 2024, 25.

[77] On the use of this terminology see de Gregorio Merino, A. (2024), "The EU Treaties as a Living Constitution of the Union in Times of Crisis", *AJIL Unbound*, Vol. 118, 162.

[78] For this difference, see Fabbrini, F. (2025), "The recovery and resilience facility as a new legal technology of European governance", *Journal of European Integration*, Vol. 47(1), 85 (86).

[79] Beetsma, R., Buti, M. (2024), "Designing conditionality in the supply of European public goods", *Working Paper 20/2024*, Bruegel.

[80] Also the recent idea of "pragmatic federalism" envisaged by Mario Draghi, Speech on the occasion of the Princess of Asturias Award for International Cooperation ceremony, Oviedo, 24 October 2025, hinting to further differentiated integration, relying on coalitions of willing between Member States, seems to run in contrast to increasing the EU autonomous spending capacity.

on national programming of EU expenditures – a departure from the traditional idea of fiscal federalism and autonomous "federal" spending.

This approach, aiming to build an autonomous spending capacity, but subject to a questionable enforcement of conditionality and largely connected to the fulfilment of domestic plans and projects to ensure their national ownership, would call, especially when from emergency we shift to ordinary times, for a more robust and effective system of monitoring and control: technical, democratic, and judicial. The European Court of Auditors has been very clear in highlighting the pitfalls of the RRF spending model.[81] In its reports, the Court of Auditors noted that if not coupled with an evaluation of the effective costs incurred, the performance-based approach to assess the implementation of the national spending plans leads to an evaluation that risks being inaccurate. The same holds for the lack of a consistently applied supranational methodology in the assessments of milestones and targets, diverted from an appreciation of the actual immediate and medium-term outcomes. It remains difficult to evaluate the European added value of EU spending, fragmented across projects of the 27 Member States. The call for a revision of this approach, as supported by the European Court of Auditors, has not be taken seriously into account yet by the 2028-2034 MFF proposal, which aims to extend many features of the RRF model to traditional categories of EU funds like structural funds.[82]

Moreover, especially in light of the pivotal role played by the European Council and the Commission on the EU budget, the democratic control should also be reinforced. The seven-year duration of the MFF is misaligned with the five-year European electoral cycle, which disconnects the development of an autonomous EU spending capacity from the mandate of elected representatives in the European Parliament. This comes in addition to the fact that, as well-known, whenever Article 122 TFEU is used, the European Parliament is formally excluded from decision-making despite being, in theory, a budgetary authority on an equal footing with the Council. Furthermore, a "shadow budget" effectively operates alongside the MFF: for the expenditures financed by external assigned revenues, the Parliament is sidelined as it does not need to authorize the relevant appropriation from the EU budget. Thus, increased spending capacity and autonomy should not come at the expense of transparency, accountability and bottom-up participation by regional and local authorities and stakeholders.

Finally, the rise in the EU spending autonomy must remain subject to rigorous (European) judicial scrutiny. With the first legal challenges to post-pandemic budgetary measures, such as SAFE and the EPF, now reaching the Court of Justice, there is an opportunity to clarify the choice of legal bases and decision-making processes underpinning these funds. This will also test whether teleological and

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81 Amongst many, see European Court of Auditors, *The Recovery and Resilience Facility's performance monitoring framework. Measuring implementation progress but not sufficient to capture performance*, Special Report no. 26, 2023, p. 22.

82 Although it has been echoed in several studies already, see, e.g. Corti, F., *Performance-based Programmes under the post-2027 MFF, EP Briefing requested by the BUDG Committee*, Directorate-General for Internal Policies, PE 766.275, 2024., and some fine-tuning in advanced in the Proposal for a Regulation of the European Parliament and of the Council establishing a budget expenditure tracking and performance framework and other horizontal rules for the Union programmes and activities, COM (2025) 545 final, 2025.

systematic interpretations prevail over literal interpretation. However, judicial review of spending measures faces inherent challenges, particularly when assessing conditions and implementation ex post, after funds have already been disbursed. The Court of Justice’s rulings on these cases will be critical not only for resolving legal ambiguities but also for shaping the future trajectory of EU spending autonomy under the rule of law.

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Part II

Autonomy through the Internal Market and the Capital Markets Union

Introduction

By integrating the economies of Member States into a “home market” of 450 million people, the internal market has been celebrated for driving prosperity, protecting citizens and workers, and anchoring Union’s economy in an increasingly uncertain world.[1] Traditionally, this integration was viewed chiefly as an economic project – a means to increase competition, achieve economies of scale, and allocate resources more optimally. Recent years, however, have cast the internal market in a new light. A series of crises and geopolitical shocks – from the Covid-19 pandemic to the war in Ukraine, and from Brexit to the protectionist trade policies of the Trump administration[2] – have underscored that the single market is not just about economic efficiency. It has also become a cornerstone of European autonomy: the EU’s capacity to act independently and assert its interests on the global stage increasingly rests on the integrity and depth of its internal market.[3] The internal market, together with initiatives like the capital markets union, now plays a pivotal role in safeguarding Europe’s economic sovereignty and resilience.

Part 2 of this volume explores some of the connections between the EU’s internal market and the objective of European autonomy. Catherine Barnard begins by unpacking the various links between the principle of autonomy, the rule of law, and the single market. She explains that the creation and successful operation of the single market depend on the principle of autonomy, and that underpinning the operation of the single market are the EU’s values, as set out in Article 2 TEU, including the protection of fundamental rights. These values bind the Member States together and form the foundation of mutual trust, which, in turn, underpins the principle of mutual recognition – a cornerstone of the single market. Indeed, ultimately, the internal market is a rule-of-law project. In times of global turmoil or protectionist backlash, unfettered access to a continental market of 27 countries provides European companies not only with scale but also a predictable investment and business environment, rooted in the rule of law.[4]

Another critical dimension of the internal market’s link to autonomy is its role in crisis preparedness and securing strategic supplies. Recent events have prompted the EU to develop tools to ensure that when a crisis hits, essential goods and services will continue to circulate within Europe – thereby reducing dependence on external actors and preventing any one Member State from going it alone. The Internal Market Emergency and Resilience Act (IMERA) exemplifies this approach. Inspired by crises such as the Covid-19 pandemic and Russia’s invasion of Ukraine and adopted in 2024, IMERA aims to ensure the uninterrupted movement of essential

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1 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 21.5.2025, COM(2025) 500 final.

2 Tordoir, S., Vallee, S., Reiter, O. and Stehrer, R., “Europe’s policy options in the face of Trump’s global economic reordering”, *European Parliament Monetary Dialogues Papers*, 2025.

3 Enrico Letta, *Much More than a Market: Speed, Security, Solidarity*, 2024.

4 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 21.5.2025, COM(2025) 500 final, 1.

goods, services and persons across the EU during a crisis. Under this framework, the Union can enter an “emergency mode” in which extraordinary measures kick in to safeguard the single market’s functioning.[5] As Emmanuel Rebasti explains in detail in his contribution, under this framework, the Union can enter an “emergency mode” in which extraordinary measures kick in to safeguard the single market’s functioning. In addition to emergency mechanisms, the EU has started to pursue a more strategic approach in certain critical sectors within the single market framework. For example, the recently enacted European Chips Act[6] is aimed at bolstering Europe’s semiconductor capacity – a move explicitly linked to reducing dependence on foreign chip suppliers and ensuring Europe’s ‘strategic autonomy’ by enabling a secure supply of a critical resource. Of course, once more, the delicate balance is to avoid the “darker side” of autonomy, that of unilateral protectionism, and instead pursue what President Christine Lagarde calls in her contribution “a European way”: autonomy grounded in cooperation, rule of law, and multilateralism, true to the EU’s values.[7]

The third dimension of autonomy linked to the internal market is financial. This is primarily pursued through the long-running project of the Capital Markets Union (CMU). The free movement of capital – one of the four freedoms – was meant to integrate Europe’s financial markets, but progress has historically lagged behind goods and services integration. Now, completing the CMU is vital also for Europe’s autonomy. The basic idea is straightforward: Europe is a capital-rich continent that paradoxically underinvests in itself. Today, EU leaders explicitly link capital markets development with autonomy.[8] In mid-2023, the European Commission even rebranded the effort as part of a broader “Savings and Investment Union,” emphasizing actionable steps to strengthen the financial pillar of Europe’s quest for autonomy, as explained in detail in the contribution of Larisa Dragomir, later in this Part.

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[5] Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98 (Internal Market Emergency and Resilience Act), OJ L 2024/2747, 8.11.2024, p. 1.

[6] Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe’s semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act), OJ L 229, 18.9.2023, p. 1.

[7] See the contribution of Christine Lagarde in this volume.

[8] European Council Conclusions of 20 March 2025, EUCO 1/25.

The implications of the principle of autonomy for the single market

Catherine Barnard[*]

1 Introduction

The word sovereignty has greater or lesser resonance in the different Member States. For Trump, tariffs might be a beautiful word; for Brexiters, it is sovereignty. For the EU, that beautiful word is increasingly becoming autonomy: legal, economic, and strategic.

At national level, sovereignty is about the ability for a country to govern itself: to set its own laws and control its own borders – essentially to take its own decisions without outside interference.[1] The advent of EU membership has cut across both elements. States voluntarily signed up to EU membership but with this came their acceptance of the autonomy of EU law.

For the EU, legal autonomy has an internal and an external element: the autonomy enjoyed by EU law in relation to the Member States (internal) and in relation to international law (external). In this short contribution, I would like to argue that the Court of Justice's somewhat disparate notion of legal autonomy has implications for the single market, the jewel in the crown of the EU project. Autonomy is both constitutive of the single market, and protective of its integrity. However, I wish to argue that, without due care and sensitivity, elements of the principle of autonomy risk undermining the very project it currently sustains.

The argument is structured as follows. First, I consider what autonomy means in EU law (Section 2) and how the principle is both constitutive of and protective of the single market (Section 3). I then look at how facets of the principle of autonomy might provide challenges to the single market, using mutual trust (Section 4) and fundamental rights (Section 5) as examples. Section 6 concludes.

2 What is legal autonomy of the EU?

The fullest – and most ambitious – explanation of the internal dimension of the EU's legal autonomy is given in *Opinion 2/13*[2] where the Court presented a complex, somewhat unwieldly, description of the term. It has three main dimensions.

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[1] There is an enormous literature but see e.g. H.W.R Wade. (1955), "The Basis of Legal Sovereignty", *The Cambridge Law Journal*, Vol. 13(2), 172.

[2] Opinion of the Court of 18 December 2014*, Adhésion de l'Union à la CEDH*, Avis 2/13, ECLI:EU:C:2014:2454.

First, the constitutional structure of the EU. This is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU.[3]

Second, specific characteristics. These arise from the very nature of EU law: EU law is characterised by the fact that it stems from an independent source of law, the Treaties; by its primacy over the laws of the Member States;[4] and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[5] At the heart of that legal structure are the fundamental rights recognised by the Charter, respect for those rights being a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not permitted in the EU.[6] Not only are the institutions, bodies, offices and agencies of the EU required to respect the Charter but so too are the Member States when they are implementing EU law.[7]

Third, the remedial system. The Court said that “to ensure that the specific characteristics and the autonomy of that legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law”.[8] This comprises the national courts and tribunals and the Court of Justice ensuring both the full application of EU law in all Member States and judicial protection of an individual’s rights under that law. The preliminary ruling procedure under Article 267 is the “keystone” of the system which, “by setting up a dialogue between … between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law … thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties”.[9]

These “essential characteristics of EU law”[10] are the glue which both create and sustain the autonomous EU legal order. They have given rise to a “structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged … in a process of creating an ever closer union among the peoples of Europe”.[11] This legal structure is based on “the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”.[12] That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[13] Further, the Member

3 Ibid., 165.
4 Ibid., 166.
5 Ibid., 157.
6 Ibid., 169.
7 Ibid., 171.
8 Ibid., 174.
9 Ibid., 176.
10 Ibid., 167.
11 Ibid.,167, citing Art. 1 TEU.
12 Ibid., 168.
13 Ibid., 168.

States are obliged by the principle of sincere cooperation (Article 4(3) TEU), to ensure the application of and respect for EU law.[14]

The term "autonomy" is thus both descriptive and constitutive. It identifies the key elements of the EU's legal order. The word "autonomy" is the descriptive label or wrapping to contain those principles. It also constitutes the EU legal order: without autonomy and its elements there would be no legal order.

Nested in this protective wrapping is the single market: "The pursuit of the EU's objectives, as set out in Article 3 TEU, is entrusted to a series of fundamental provisions, such as those providing for the free movement of goods, services, capital and persons (the four freedoms), citizenship of the Union, the area of freedom, security and justice, and competition policy. Those provisions, which are part of the framework of a system that is specific to the EU, are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the raison d'être of the EU itself."[15]

So what does the principle of autonomy mean for the single market? I would like to make three points. First, that the single market's creation and successful operation is dependent on the principle of autonomy (Section 3.1). The principle is used to protect the single market, ensuring it is an exclusive club, which non-members cannot join (Section 3.2). It is here that the internal and external dimension can meet.

Second, underpinning the operation of the single market are the EU's values, set out in Article 2 TEU. These values bind the Member States together and form the basis of mutual trust which, in turn, underpins the principle of mutual recognition, the cornerstone of some significant judgments of the Court of Justice and also EU legislation. However, I will argue that too much faith in mutual recognition may risk undermining the trust the EU citizens have in the single market (Section 4).

Third, fundamental rights, again so central to the EU's identity, constrain action taken by the EU and the Member States but also have the potential, if not handled with care and sensitivity, to erode trust in the single market (Section 5).

3 Single market and its location within the autonomy principle

I begin with my first point: the single market's creation and successful operation is dependent on the principle of autonomy.

[14] Ibid., 173.

[15] Ibid., 172.

3.1 Autonomy and the creation of the single market

Like a series of Russian dolls, the creation of the single market lies at the core of the EU's constitution. Its existence is dependent on the autonomy principle, as is its successful operation.

The success of the four freedoms[16] – and specifically the removal of barriers to trade (negative integration) – is dependent on the key attributes of the EU's autonomous legal system: direct effect and supremacy.[17] Individuals can enforce their directly effective rights under, say, Article 34 TFEU on free movement of goods, in the national system. They can do this offensively, challenging the rules of Member States, regulatory bodies and trade unions,[18] but also defensively when sued or prosecuted for a breach of EU law.[19]

This is complemented by the supremacy principle guaranteeing the uniform application of EU law. The importance of this was underlined by the Court in *RS.* It said that compliance with "the obligation to apply in full any provision of EU law with direct effect must be regarded as essential in order to ensure the full application of EU law in all Member States, as is required by Article 19(1) TEU".[20] It continued:

"Compliance with that obligation is also necessary in order to ensure respect for the equality of Member States before the Treaties, which precludes the possibility of relying on, as against the EU legal order, a unilateral measure, whatever its nature".[21]

RS also emphasised that the uniform application of single market rules was dependent on a functioning judicial system in the Member States (independent national courts enforcing EU law, with the possibility/obligation of making a reference to the Court of Justice under Article 267 TFEU).[22] These constitutional principles help to create a resilient and operational single market.

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16 Art. 26 TFEU provides: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

17 De Witte, B., "Direct effect, primacy and the nature of the legal order" in Craig, P., de Búrca, G. (eds), *The Evolution of EU Law*, 3rd ed., Oxford University Press, 2021.

18 See e.g. Judgment of the Court of 5 February 1963, *Van Gend en Loos*, C-26/62, ECLI:EU:C:1963:1; Judgment of the Court of 11 December 2007, *The international Transport Workers' Federation and Finnish Seamen's Union* v *Viking Line ABP and OÜ Viking Line Eesti*, C-438/05, ECLI:EU:C:2007:772; Judgment of the Court of 15 December 1995, *Union royale belge des sociétés de football association ASBL* v *Jean-Marc Bosman*, *Royal club liégeois SA* v *Jean-Marc Bosman and others and Union des associations européennes de football (UEFA)* v *Jean-Marc Bosman,* C-415/93, ECLI:EU:C:1995:463.

19 Judgment of the Court of 30 April 1996, C-194/94, *CIA Security International* v *Signalson and Securitel*, ECLI:EU:C:1996:172.

20 Judgment of the Court of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, ECLI:EU:C:2022:99, paragraph 54.

21 Ibid., paragraph 55.

22 As the Court said in Judgment of the Court of 24 June 2019, *Commission* v *Poland*, C-619/18, EU:C:2019:531, paragraph 44, in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law. Paragraph 45 notes, in particular: "the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing that consistency and that uniformity in the interpretation of EU law, thereby serving to ensure its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties."

The functioning of the single market is, of course, also dependent on an intricate web of legislation (positive integration), which must be adopted under the powers conferred on the EU, most notably Article 114 TFEU,[23] and then implemented by the Member States. The legislation must also by enforced, again relying on the principles of supremacy and direct effect (if the EU measure is not correctly implemented) and an effective judicial system. Excess intervention by the EU in national systems can be challenged as contrary to the general principles of law and the Charter;[24] excess action by Member States in implementing and applying EU law can also be challenged as contrary to general principles and the Charter.[25]

3.2 Autonomy and the protection of the single market

The intimate connection between the EU's constitutional framework and the single market, underpinned by the EU's values, explains why non-member states of the EU cannot enjoy access to the single market on the same terms as member states. This is because they are not signed up to the multiple facets of the EU's autonomy principle, as laid out in *Opinion 2/13*. Thus, the principle of autonomy is seen not just as a tool to ensure the operation of the single market but also to protect it. It is here that the external and internal dimension of the autonomy principle meet.

The UK was forced to confront this reality when it left the EU;[26] it no longer had full access to the single market but only the more qualified access provided by the Trade and Cooperation Agreement.[27] And even in respect of Northern Ireland Protocol and the Windsor Framework,[28] access to the customs union and the single market for goods is still embedded in the structures of EU law (direct effect, supremacy, fundamental rights and EU remedies), as laid down in the Withdrawal Agreement.[29]

4 Single market and mutual trust

Having looked at how the single market's creation and successful operation is dependent on the principle of autonomy, I turn now to my second point. I wish to argue that the mutual trust between the Member States underpins the principle of

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[23] See e.g. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277, 27.10.2022, p. 1.

[24] Judgment of the Court of 8 April 2014, *Digital Rights Ireland Ltd* v *Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[25] Judgment of the Court of 18 June 1991, *ERT* v *DEP,* C-260/89, ECLI:EU:C:1991:254.

[26] Reuters, EU's Barnier firmly rules out British 'cherry-picking' on Brexit, 27.2.2018; Statement following Informal meeting at 27, Brussels, 29 June 2016, paragraph 4; Editorial comments, (2019), "Is the "indivisibility" of the four freedoms a principle of EU law?", *Common Market Law Review*, Vol. 56(5), 1.

[27] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, OJ L149/10, 30.4.2021, p. 10.

[28] EUR-lex, The Windsor Framework.

[29] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01, OJ C 384I, 12.11.2019, p. 1.

mutual recognition but that too much faith in mutual recognition may risk undermining the trust the EU citizens have in the single market.

All Member States are signed up to the EU's values in Article 2 TEU, including respect for the rule of law. As Lenaerts and others say,[30] autonomy requires the Member States to share the same degree of commitment towards the values on which the EU is founded. Autonomy thus defines "what it means to be Member State of the EU". They continue:

"From a transnational perspective, autonomy is given concrete expression by the principle of mutual trust and the principle of equality of the Member States before the law … In the light of that reciprocal commitment, old rivalries and mistrust no longer have a raison d'être and must be replaced by mutual respect and mutual trust. "[31]

They say that mutual trust makes possible the establishment and development of an area without internal frontiers where citizens make circulate freely and securely.

Mutual trust also underpins the principle of mutual recognition,[32] the foundational idea in *Cassis de Dijon*,[33] and then rolled out as the basis for key EU legislation, including the Mutual Recognition of the Professional Qualifications Directive 2005/36[34] and the E-Commerce Directive 2001/31.[35] Both are premised on the principle of home state control and the mutual recognition of home state standards by the host state.

In the case of the E-Commerce Directive, Article 3(1) provides "Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field." (i.e. home state control). The corollary of this is that host "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State" (Article 3(2)).

The Directive then lays down a tightly drawn exception to the principle of home state control (Article 3(4)). This has a substantive dimension (the host state must invoke one of the grounds of: public policy, the protection of public health, public security and the protection of consumers) and a procedural dimension (there must be a

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30 Lenaerts, K., José A. Gutiérrez-Fons, J, A. and Adam, S. (2021), "*Exploring the Autonomy of the European Union Legal Order*", *Heidelberg Journal of International Law*, Vol. 81(1), 47 (69).

31 Ibid., 70.

32 Judgment of the Court of 29 April 2025, *Commission* v *Malta*, C-181/23, ECLI: EU:C:2025:283, paragraph 85.

33 Judgment of the Court of 20 February 1979, *Rewe* v *Bundesmonopolverwaltung für Branntwein*, C-120/78, ECLI:EU:C:1979:42, paragraph 14 "There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules". For further details, see Albors-Llorens, A., Barnard, C. and Leucht, B. (eds), *Cassis de Dijon*: *Forty years On*, Hart Publishing, 2021.

34 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22.

35 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178, 17.7.2000, p. 1.

request by the host state to the home state to take action, and notification by the host state to the Commission and home state of the action it is planning to take).

The principle of home state control was confirmed by the Court in *AirBnB Ireland*.[36] It said the Directive is “based on the application of the principles of control in the home Member State and mutual recognition, so that, within the coordinated field defined in Article 2(h) of that directive, information society services are regulated solely in the Member State on whose territory the providers of those services are established”.[37] It then said:

“Moreover, in accordance with the principle of mutual recognition, it is for each Member State, as the Member State of destination of information society services, not to restrict the free movement of those services by requiring compliance with additional obligations, falling within the coordinated field, which it has adopted.”[38]

In other words, host states cannot interfere with the provision of services from a home state (unless the host state complies to the letter with the Article 3(4)).

As the *AirBnB* case shows, mutual trust and thus mutual recognition are not only premised on shared values but also backed up by a robust system of enforcement (Italy, the host state, had tried to interfere with the activities of AirBnB established in Ireland).[39]

However, mutual trust can only be stretched so far. What if there are distinct winners and losers? Take the case of housing. AirBnB, based in Ireland, has been phenomenally successful in precipitating the opening up of the business and tourism accommodation market right across the EU.[40] However, its operations have had profound effects on the availability of housing for locals in many popular tourist destinations, such as Barcelona, prompting a significant local backlash.[41]

The single market answer to this is cavalier: “This is the result of the successful operation of the single market. If you cannot find housing in your locality you should take advantage of you EU rights and move somewhere else.” However, this attitude risks undermining not only citizens’ trust in the single market but also in their faith in mainstream politicians’ ability to deliver on the essentials of a good life: housing in

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36 Judgement of the Court of 30 May 2024, *Airbnb Ireland*, C-662/22, ECLI:EU:C:2024:432.

37 Ibid., paragraph 56.

38 Ibid., paragraph 57.

39 Ibid., paragraph 90, the Court ruled: “Article 3 of Directive 2000/31/EC …must be interpreted as precluding measures adopted by a Member State, with the stated aim of ensuring the adequate and effective enforcement of Regulation (EU) 2019/1150 … on promoting fairness and transparency for business users of online intermediation services, under which, on pain of penalties, providers of online intermediation services established in another Member State are subject, with a view to providing their services in the first Member State, to the obligation to be entered in a register maintained by an authority of that Member State, to communicate to that authority certain detailed information about their organisation and to pay a financial contribution to that authority”.

40 For a full discussion, see e.g. the special issue Hall, C. M., Prayag, G., Safonov, A., Coles, T., Gössling, S., and Naderi Koupaei, S. (2022), “Airbnb and the sharing economy”, *Current Issues in Tourism*, Vol. 25(19), 3057.

41 BBC News, Spain clamps down on Airbnb as tourism backlash returns for summer, 20.5.2025.

their locality. There are signs that the position is shifting. The Letta report talks about the need to protect the freedom to stay.[42]

5 Single market and fundamental rights

This brings me to my third point. Not only does mutual recognition risk undermining trust in the single market if not handled with care but so do fundamental rights.

Fundamental rights are a central pillar of the autonomy of EU law. As the Court said in *Opinion 2/13*, "at the heart of [the EU] legal structure are the fundamental rights recognised by the Charter (which, under Article 6(1) TEU, has the same legal value as the Treaties)". It continued that respect for those rights are "a condition of the lawfulness of EU acts, so that measures incompatible with those rights are not acceptable".[43]

The interplay between the single market and fundamental rights is key. EU single market legislative and non-legislative acts must comply with the Charter,[44] and have been struck down for non-compliance,[45] but so must national acts[46] when the Member States are implementing (which includes derogating from)[47] EU law. In the past the EU drew on national fundamental rights to inform the creation of EU rights. It now has its own muscular Charter which must "be interpreted and applied within the EU in accordance with the constitutional framework".[48] This shows a shift, not only in the expanded competence of the EU but also to seeing how national actions are now subject to challenge according to EU standards of human rights, not just domestic ones. Nothing so surprising in this. That is what happens with the European Court of Human Rights (ECHR) too: national law is subject to challenge according to European wide standards.[49]

Where Member States invoke human rights to protect the interests of their public, this is largely uncontroversial (although rare). Take the case of *Familiapress*[50] concerning an Austrian law banning the offering of free gifts in newspapers and magazines. This had been done because, after the liberalisation of the law on the organization of prize competitions, "fierce competition set in between periodicals publishers, as a result of their offering larger and larger gifts, in particular the chance to take part in prize competitions".[51] Fearing that small publishers might not be able

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[42] European Union, Freedom to stay: how to tackle demographic challenge from a regional perspective, European Week of Regions and Cities; Letta, E., Implementing the freedom to stay - Foundation for European Progressive Studies, The Progressive Post, 2024.

[43] Opinion of the Court of 18 December 2014, *Avis* 2/13, ECLI:EU:C:2014:2454, paragraph 169.

[44] Art. 51(1) of the Charter.

[45] Judgment of the Court of 8 April 2014, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, C-293/12 and C-594/12, ECLI:EU:C:2014:238.

[46] Ibid.

[47] Judgment of the Court of 18 June 1991, C-260/89, *ERT* v *DEP,* ECLI:EU:C:1991:254, paragraph 43.

[48] Ibid., paragraph 177.

[49] Note, however, that there is no equivalent to Art. 51 of the Charter in the ECHR.

[50] Judgment of the Court of 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH* v *Heinrich Bauer Verlag*, C-368/95, ECLI:EU:C:1997:325.

[51] Ibid., paragraph 14.

to resist that cut-throat competition in the long term, in 1993, the Austrian legislature excluded the press from the application of the deregulation law; prizes could not be offered. This particularly affected German magazines sold in Austria which continued to offer prizes. The Court found that the Austrian rule breached Article 34 TFEU but could be justified:

"Maintenance of press diversity may constitute an overriding requirement justifying a restriction on free movement of goods. Such diversity helps to safeguard freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which is one of the fundamental rights guaranteed by the Community legal order."[52]

However, the state's interest in promoting diversity had to be balanced against the publisher's interest in freedom of expression.[53] It was left to the national court to decide if the Austrian rule was proportionate but the Court indicated that the collective interest of the Austrian people in having a diverse press prevailed over the (economic) interests of the publisher. Putting it another way, the effect of the decision was to favour the state's interests in ensuring a pluralistic press to the detriment of the EU's interest in a functioning of the internal market.

The more common case is where an *individual* raises fundamental human rights to constrain the action of the state when, for example, derogating from EU law. Take the familiar case of *Carpenter*.[54] Mrs Carpenter, a Filipino national, who, having overstayed her entry permit to the UK, married a British national. Faced with the threat of deportation, the Court accepted that this would restrict her husband's ability to carry on business as a service provider in other Member States under Article 56 TFEU since she looked after his children while he was away.[55]

However, the Court said that a Member State could "invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures".[56] On the question of fundamental rights, the Court said that the decision to deport Mrs Carpenter constituted:

"an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the [ECHR] … which is among the fundamental rights which, according to the Court's settled case-law, restated by the

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52 Citing Judgment of the Court of 25 July 1991, *Commission* v *Netherlands*, C-353/89, ECLI:EU:C:1991:325, paragraph 30 and Judgment of the Court of 3 February 1993, *Vereiniging Veronica Omroep Organisatie* v *Commissariaat voor de Media*, C-148/91, ECLI:EU:C:1993:45, paragraph 10.

53 Ibid., paragraphs 24-25.

54 Judgment of the Court of 11 July 2002, *Carpenter,* C-60/00, ECLI:EU:C:2002:434.

55 Ibid., paragraph 17.

56 Ibid., paragraph 40, citing Judgment of the Court of 18 June 1991, *ERT* v *DEP*, C-260/89, ECLI:EU:C:1991:254, paragraph 43, and Judgment of the Court of 26 June 1997, *Familiapress*, C-368/95, ECLI:EU:C:1997:325, paragraph 24.

Preamble to the Single European Act and by Article 6(2) EU, are protected in [Union] law”.[57]

Drawing on the case law of the ECHR, the Court then said that even though no right of an alien to enter or to reside in a particular country was guaranteed by the Convention, “the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention”. It continued that such an interference would infringe the Convention if it did not meet the requirements of Article 8(2) ECHR, namely that the deportation had to be in accordance with the law, motivated by one or more of the legitimate aims under Article 8(2) and “necessary in a democratic society” (justified by a pressing social need and proportionate).[58] The Court concluded that the decision to deport Mrs Carpenter did not “strike a fair balance” between the competing interests of the right of Mr Carpenter to respect for his family life on the one hand and the maintenance of public order and public safety, on the other.[59] Even though Mrs Carpenter had infringed UK immigration laws by overstaying her visa she did not constitute a danger to public order and safety. Therefore, the decision to deport her was not proportionate.

The effect of the decision was to favour the EU’s interest in the functioning of the internal market (Mr Carpenter could continue to provide services) to the detriment of the state’s interests in controlling its borders. Many progressives would endorse the Court’s embrace of human rights to protect the Carpenter family unit; the Charter is an important way of controlling the behaviour of a defendant Member State. However, while applying EU standards of human rights to EU acts makes logical sense, it is more difficult when EU standards are being applied in the field of national law where national decision makers are acting in the area delimited for their freedom to act, i.e. when they are derogating from the free movement of persons provisions in an area of considerable sensitivity, namely immigration policy.

The counter argument is that Member States are permitted to derogate from EU law because EU law allows it, and so long as Member States are acting in the field of EU law, there should be EU control: Member States signed up to this when they joined the EU. However, for the EU’s critics there is an argument of overreach. Derogations are broadly an area of Member State activity. One way of squaring this circle would be to say that if Member States can provide evidence-based reasons for what they are doing, as permitted by EU law, and the steps are proportionate (evidence of good decision making), the human rights review and proportionality review should be deferential, and with a significant margin of appreciation to the Member States.

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[57] Judgment of the Court of 11 July 2002, *Carpenter*, C-60/00, ECLI:EU:C:2002:434, paragraph 41. See also Judgment of the Court of 27 September 2001, *Gloszczuk*, C-63/99, ECLI:EU:C:2001:488, paragraph 85; Judgment of the Court of 27 September 2001, *Kondova,* C-235/99, ECLI:EU:C:2001:, paragraph 90; Judgment of the Court of 17 September 2002, *Baumbast and R,* C-413/99, ECLI:EU:C:2002:493, paragraph 72; Judgment of the Court of 23 September 2003, *Akrich*, C-109/01, ECLI:EU:C:2003:491, paragraphs 58-59.

[58] Judgment of the Court of 11 July 2002, *Carpenter*, C-60/00, ECLI:EU:C:2002:434, paragraph 42, citing *Boultif* v *Switzerland*, Application no. 54273/00, ECHR 2001, 2 August 2001, paragraphs 39, 41, and 46.

[59] Ibid., paragraph 43.

In fact, the opposite is currently the case: the standards of proportionality review of Member States applied by the Court are stricter than those applied to the acts of the EU institutions. As Sauter succinctly puts it, "The application of proportionality in the EU differs based on whether legal acts of the EU or of its Member States are concerned. In the former case, a manifestly disproportionate test is usually applied, while in the latter case, a least restrictive means test (LRM) is normally used."[60]

Why does this need to be considered? The backlash against rights is growing, especially in respect of migration. At the moment the focus is on the ECHR.[61] The principled position might be for the Court of Justice to carry on regardless. But, as Brexit has shown, these things can take on a life of their own. The Overton window (what is acceptable to discuss in public debate) is opening ever wider and not in a good way for those supportive of human rights. To ensure that EU autonomy and, in particular, the respect for fundamental rights, does not undermine the single market, care must be exercised in how the tool of fundamental rights is being used. A more procedural, deferential approach might be the way forward.

6 Conclusions

The principle of autonomy of EU law is both descriptive and constitutive. It *describes* the key element of the EU legal order: the institutions, the principle of conferral, direct effect, supremacy and fundamental rights, reinforced by a system of remedies delivered by independent judges who in turn have developed the principles of supremacy, direct effect and respect for fundamental rights. These elements *constitute* "the basic constitutional charter of the European Union".[62] They also create a supportive and protective infrastructure for the single market. Supportive because without the principle of conferral there would be no power for the EU to legislate; and without direct effect, supremacy, and remedies any EU rules would be created but unenforced and therefore not respected.

At the core of the principle of autonomy are shared values "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights". These values take the EU beyond a market. But they have also served as the basis for saying that they there is mutual trust between states. This has been the basis for developing the key principle of mutual recognition which underpins case law interpreting the four freedoms and has inspired single market legislation. The shared constitutional principles and shared values also create a protective shield around the single market. States which are not signed up to the principle of autonomy of EU law and the EU values do not enjoy full access to the EU's single market. Access yes, but not on the same generous terms as the Member States. The UK has learned this the hard way.

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60 Sauter, W. (2013), "Proportionality in EU Law: A Balancing Act?", *Cambridge Yearbook of European Legal Studies*, Vol. 15, 439.

61 ECHR Blog, Nine States Call for 'Open-Minded Conversation' on ECHR and Migration, 2025.

62 See e.g. Judgment of the Court of 10 December 2018, Wightman and Others, C-621/18, ECLI:EU:C:2018:999, paragraph 44.

However, this contribution has suggested that there is a fragility to the system. Threats from recalcitrant Member States which appear to renounce some of the EU values are well known.[63] But other challenges are more pernicious but still damaging to the single market: legitimate concerns about the implications of mutual trust and how to manage them, as in the case of *AirBnB* and the E-Commerce Directive 2000/31, and the eroding of fundamental rights. Robust endorsement of both mutual trust/mutual recognition and fundamental rights are essential to respect of the autonomy of EU law and the functioning of the single market. However, without care they become the pulled thread which could lead to the unravelling of the single market, undermining the very project the autonomy principle was designed to create and protect.

[63] Opinion of the Court of 5 June 2025, *European Commission* v *Hungary*, C-769/22, ECLI:EU:C:2025:408.

Autonomy as an objective of the internal market

Emanuele Rebasti*

1 Introduction

The series of crises and new geopolitical realities that have characterised the recent years have directly impacted the functioning of the internal market and put strains on the capacity to deliver on its promises to the European citizens. If the first response to these external challenges has taken place through the law of emergency, in the aftermath of the crises the EU legislator has actively engaged in reshaping the internal market legislation so to incorporate a number of crisis instruments in ordinary law. The pursuit of autonomy has become a new and specific objective of internal market instruments, marking a shift from the law of emergency to the law of autonomy.

This chapter aims at providing a first assessment of the phenomenon. Section 2 aims at providing an overview of how emergency measures adopted under recent crises have served as a blueprint for a wave of new regulatory frameworks that, in the aftermath of the crises, have incorporated the objective of autonomy in internal market instruments. These frameworks have been introduced in a number of different domains but yet present a number of common features that are shaping the law of autonomy in the area of the internal market. Section 3 looks critically at these developments and explore the challenges that the new focus on autonomy pose for the internal market: the inherent limitations of the internal market legal bases and their consequences for the shaping of the regulatory framework, the impact on the role of the EU institutions and finally the policy shifts that the new focus on autonomy entails. In this context, and as a matter of conclusions, the chapter will conclude with some reflexions on the role of the institutional lawyer in a context of “crisisification” of the internal market.[1]

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[1] This chapter is based on and constitutes a further elaboration of some of the ideas and reflexions that the author has developed in the institutional Report on EU Emergency Law for the XXXI FIDE Congress. See Pacula, K. (ed.), *EU Emergency Law. XXXI FIDE Congress*, Katowice 2025 Congress Publication Vol.1, 2025.

2 From the law of emergency to the law of autonomy

2.1 An emergency driven phenomenon

The development of a new law of strategic autonomy and its consequential reshaping of internal market instruments can be seen as a consequence of the external crises that in recent years have impacted the Union and global supply chains. These crises have exposed significant weaknesses in the functioning of the internal market (Subsection 2.1.1) and prompted a first emergency reaction which has identified the pursuit of the Union autonomy as the key priority (Subsection 2.1.2).

2.1.1 Recent crises and the challenges to the internal market

The repeated crises that the Union had to face in the recent years have exposed a number of vulnerabilities in the functioning of the internal market and its dependence to external actors.

The first weeks of the Covid-19 pandemic rapidly led to a global surge in demand for personal protective equipment, medical products, and therapeutics used in intensive care units. Their availability became scarce, as Member States were often unprepared and short of stocks. This situation exposed at the same time the vulnerability of European supply chains and their dependency to external manufacturers. The same problems were confirmed later on in relation to the manufacturing and procurement of vaccines, when a global race to procure the drugs erupted and further exposed a serious challenge for the continent strategic autonomy. Lack of interoperability, structural deficiencies in the industry and lack of information on the existence of stocks, production capacities and their use, all affected the capacity of the public authorities to act timely to react to the crisis.

In similar terms, Russia’s war of aggression against Ukraine exposed the weaknesses of the Union energy market and laid bare the vulnerabilities of the Union resulting from having relied too heavily on energy supplies from one large supplier. These events triggered an unprecedented energy crisis which saw energy prices skyrocket and threatened the security of supply in the Union and the stability of the Union economy as a whole.

In both cases, Member States played the first and primary role in reacting to the situation of emergency, be it by rapidly adopting measures to restrict freedom of movement at the outset of the Covid-19 crises or by adopting measures of economic support to tackle the rise in gas and electricity prices during the energy crisis. However, it soon became clear that uncoordinated actions by Member States risked undermining Union policies and common good, and in particular leading to the fragmentation of the common market.

In reaction to such a risk, the Union initially intervened to coordinate national responses or to facilitate them in an orderly way, notably by promoting coordination via soft law instruments or by triggering derogations in escape clauses, often associated with specific conditions and limitations.

Still soft law tools offer no possibility to derogate from existing provisions and no guarantee that the recommended approach will be respected (by Member States or by economic operators); there is also no guarantee of uniform implementation. The latter problem remains very much true for the recourse to escape clauses, derogations or flexibilities which under primary or secondary EU law allow Member State to take national measures, but at the same time multiply the risk of fragmentation of the internal market.

This ultimately led to the triggering of Union measures, and notably emergency measures, to address the situations of crisis and the challenges that such crises entailed for the strategic autonomy of the Union.

2.1.2 Emergency response and the pursuit of autonomy

Without having the possibility in the present context to be exhaustive,[2] a few examples illustrate how the emergency response at the Union level was aimed at derogating from existing rules so to allow intervention market measures in the pursuit of strategic autonomy.

In the case of medical equipment and countermeasures, a number of ad hoc measures were adopted in the early days of the Covid-19 pandemic to allow the Commission to support the procurement efforts of the Member States, in derogation of existing procurement and financial regulation rules.

This was followed by the adoption of a framework of temporary measures on the basis of Article 122(1) TFEU, which provides the possibility for the Council to adopt a number of market measures in the event of a public health emergency at Union level.[3] These measures aim to ensure the supply of crisis-relevant medical countermeasures which range from inventories of production facilities to measures ensuring the efficient reorganisation of supply chains and production lines if a risk of shortage arises. The actual activation of one or several of these measures remains temporary and is to be decided upon by the Council, on the basis of Article 122(1) TFEU, following a proposal by the Commission.[4]

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2 See for a more detailed analysis Chapter I of the Institutional Report on EU Emergency Law for the XXXI FIDE Congress, which provide an exhaustive analysis of the various emergency measures adopted in the context of the recent crises.

3 Council Regulation (EU) 2022/2372 of 24 October 2022 on a framework of measures for ensuring the supply of crisis-relevant medical countermeasures in the event of a public health emergency at Union level, ST 6569/22, OJ L 314, 6.12.2022, p. 64.

4 Ibid., Art. 3 and recital 3.

In the case of the energy crisis induced by the war of aggression against Ukraine, the pursuit of Union autonomy took in particular the form of temporary market intervention measures adopted on the basis of Article 122 TFEU.

One of the most relevant measures was the introduction of a cap on revenue from certain electricity generation and a so-called solidarity contribution based on excess profits from the fossil fuel sector.[5] This would allow Member States to mitigate the impact of the high energy prices by generating additional income from windfall profits earned as a direct consequence of the crisis. The revenues from those measures were to be redistributed to energy consumers or used for other specific purposes to mitigate the economic impacts of the crisis.

Another emergency package consisted in a basket of measures,[6] first, to enhance solidarity through better coordination of gas purchases, exchanges of gas across borders and reliable price benchmarks (Facilitation of joint gas purchases), second, to establish a market correction mechanism (MCM) and third, to deploy renewable energy as a matter of urgency. One major component of the package was a clear structure and framework for the joint gas purchasing platform, enabling the aggregation of demand, possible coordinated gas purchasing and an obligation to include at least 15% of the needs to comply with the mandatory gas storage obligation in the platform, however, without an obligation to take off any quantity of gas. A more controversial aspect was the market correction mechanism which would cap the price of gas, and which many feared would therefore deter deliveries of gas into the Union at a time where it was still dependent on gas.

The Council also adopted an emergency measure[7] aimed at accelerating the deployment of renewable energy by speeding up and streamlining permitting procedures which act as a major bottleneck for the swift roll-out of renewable energy installations and grids (Deployment of renewables emergency measure). Provisions included a presumption that the planning, construction and operations of plants and installations for the production of energy from renewable sources are in the overriding public interest at least in certain areas. The Regulation also included maximum durations for granting permits for renewables and certain exemptions from various environmental impact assessments.

These very disparate set of measures worked globally well to address the emergencies that had prompted them, but also revealed shortcomings.

First, their nature as emergency instruments entailed a great flexibility and variety in the choice of measures and a necessary temporary nature. They were all conceived

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5 Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, OJ L 261I, 7.10.2022, p. 1. The Commission submitted its proposal on 14 September 2022, and the Council adopted the Regulation on 6 October 2022.

6 See in particular Council Regulation (EU) 2022/2576 of 19 December 2022 enhancing solidarity through better coordination of gas purchases, reliable price benchmarks and exchanges of gas across borders, OJ L 335, 29.12.2022, p. 1. The Commission submitted the proposal on 18 October 2022 and the Regulation was adopted by the Council on 19 December 2022. The measures were prolonged until 31 December 2024 by Council Regulation (EU) 2023/2919 of 21 December 2023 amending Regulation (EU) 2022/2576 as regards the prolongation of its period of application, OJ L, 2023/2919, 29.12.2023, p.1.

7 Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy, OJ L 335, 29.12.2022, p. 36.

as ad hoc measures meant to address specific circumstances. However, their utility proved in many cases to be greater than the specific situation they were meant to tackle and thus their duration was extended or a debate was launched on how to adapt the existing regulatory frameworks on a permanent way.

Second, the focus on tackling the emergency (and the limitation proper of emergency legal bases) limited the approach to a reactive one, addressing the contingent needs of the crisis, but not tackling its root causes or ensuring the preparedness of the economy and inter internal market for similar occurrences in the future.

2.2 The pursuit of autonomy through new internal market instruments

In the aftermath of the recent sequence of crises, the emergency measures deployed to tackle the shortages, crisis of supply and other flaws in the efficient production and allocation of resources have not remained isolated normative events but have provided a blueprint for the development of ordinary legislation.

Prompted by the call of the European Council for lessons to be drawn from the Covid-19 pandemic, the Commission has presented a number of legislative initiatives in the area of the internal market.[8] These initiatives aimed explicitly at addressing the remaining fragmentation, barriers and weaknesses that the emergency situations had exposed in the functioning of the Single Market. In so doing, the Commission has explicitly responded to the political call for achieving the objective of European strategic autonomy,[9] in particular by mitigating economic dependence on foreign supply chains in certain key sectors.

This has led to a multiplication of proposal aimed at the establishment of crisis response frameworks legislative instruments concerning various sectors of the internal market, with negotiations still ongoing in some cases. The proposed frameworks are built on and further develop many of the innovations introduced as ad hoc emergency measures during the recent crises. In certain cases, the emergency measures adopted in a given domain were wholly or partially “repatriated” in ordinary legislative instruments in the same domain, to make them available in future crises. In other cases, the solutions adopted as emergency measures in relation to specific domains have been mainstreamed and exported to other sectors which may face similar challenges (e.g., supply crisis of medical products).

In a significant normative development, which underlines the role of crises as a vector of change in the EU legal order, the law of emergency has led to the permanent reshaping of internal market instruments. From the law of emergency, the

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8 For a detailed list of the initiatives brought forward by the Commission see Commission Staff Working Document of 19 September 2022, Impact Assessment Report accompanying the proposal for a Single Market Emergency Instrument and related proposals, SWD/2022/289 final.

9 Conclusions of the European Council of 1-2 October 2020, paragraphs 3 and 4, EUCO 13/20. See also more recently Conclusions of the European Council of 18 April 2024, paragraph 16, EUCO 12/24.

Union has moved to a new permanent law of strategic autonomy, which is reshaping the internal market.

2.2.1 A variety of new internal market instruments

The new internal market instruments that the legislator has recently introduced (or that are still under discussion) concern specific sectors that have been deemed particularly crucial for the strategic autonomy of the Union in light of the weaknesses of existing supply chains or the condition of dependency from external supplier.

This is the case of semiconductors (Chips Act – based on Articles 114 and 173 TFEU),[10] of technologies and products that are key in supporting the Union efforts towards clean energy transition and the achievement of a net-zero carbon economy (Net Zero Industry Act – NZIA – based on Article 114 TFEU),[11] of critical raw materials (Critical Raw Materials Act – based on Article 114 TFEU),[12] and of defence products (European Defence Industry Programme – EDIP Regulation, based on Article 114(1) and 173(3) TFEU and currently in negotiations between the co-legislators).[13]

These sectorial instruments combine measures of market and industry support to facilitate manufacturing and strategic projects, including via Union funding and derogations to existing requirements, with preparedness crisis frameworks designed to monitor and respond to shortages in the supply of critical products through dedicated emergency toolboxes of market intervention measures.

The sectorial instruments are then supplemented by the Internal Market Emergency and Resilience Act (IMERA),[14] which is a horizontal Regulation adopted on the basis of Articles 21, 46, and 114 TFEU (free movement of persons, workers and internal market) in order to establish a framework to anticipate for and respond to the impact of crises on the internal market.

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10 Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (Chips Act), OJ L 229, 18.9.2023, p. 1.

11 Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724, OJ L, 2024/1735, 28.6.2024, p. 1.

12 Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials, OJ L, 2024/1252, 3.5.2024, p. 1.

13 Proposal for a regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP'), COM(2024) 150 final.

14 Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No. 2679/98 (Internal Market Emergency and Resilience Act), OJ L, 2024/2747, 8.11.2024.

In the event of a crisis,[15] the framework aims to safeguard the continued free movement of goods, services and persons, to ensure the availability of goods and services of critical importance and ultimately to prevent the creation of obstacles to the proper functioning of the internal market.[16] It does so by establishing measures for contingency planning (e.g., an early warning system, training, stress tests),[17] a vigilance mode which entails the monitoring of the supply of strategic goods and services which are under threat of a crisis,[18] and finally an internal market emergency mode.[19]

The internal market emergency mode can be activated when a crisis creates obstacles to the free movement of goods, services or persons, having an impact on at least one sector of vital societal or economic importance. In the case of disruption of supply chains, it should be additionally assessed whether the goods, services or workers concerned can be diversified or substituted. The existence of a crisis needs to be assessed by the Commission and then the Council on the basis of a set of quantitative and qualitative indicators;[20] the internal market emergency mode is activated by means of a Council implementing act on the basis of a Commission proposal.[21] The Council implementing act must specify the duration of the activation, which in any event cannot be longer than six months.[22] The Council act may also lay down a list of crisis-relevant goods and services, as a condition for the further adoption of emergency response measures concerning them.[23]

The activation of the internal market emergency mode entails specific obligations for the Member States aimed at framing their recourse to national measures in reaction to a market crisis, when this is allowed under EU law.[24] In particular, national measures restricting free movement need to satisfy requirements concerning their limited duration, their lifting and the prior information to be provided to affected stakeholders,[25] and Member States are under an obligation to communicate the

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[15] According to Art. 3(1) of IMERA, "crisis" is intended to refer to an exceptional, unexpected and sudden, natural or man-made event of extraordinary nature and scale that takes place within or outside of the Union, that has or may have a severe negative impact on the functioning of the internal market and that disrupts the free movement of goods, services and persons or disrupts the functioning of its supply chains.

[16] Ibid., Art. 1(1) and (2).

[17] Ibid., Title II arts from 9 to 13.

[18] Ibid., Title III, arts from 14 to 16.

[19] Ibid., Title IV arts from 17 to 36.

[20] Ibid., Art. 17, laying down the criteria for activation of the internal market emergency mode.

[21] Ibid., Art. 18.

[22] Ibid., according to Art. 19, if the Commission considers that the reasons for activating the emergency mode remain valid, it can propose to the Council an extension of the emergency mode for additional six months. If the Commission considers that the reasons no longer exist, it shall propose to the Council, without delay, the deactivation of the internal market emergency mode.

[23] Ibid., Arts 18 and 26. Emergency response measures can only be adopted in relation to specific crisis-relevant goods and crisis-relevant services among those identified in the Council implementing act activating the emergency mode.

[24] See, for instance, Chapter VI of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30.4.2004, p. 77. Recitals 39 and 40 make it clear that IMERA does not purport to provide additional grounds for the limitation of the right to free movement beyond those provided in sectorial instruments.

[25] Art. 20 of IMERA.

measures at stake, once adopted, to the Commission, to the other Member States and to the public.[26] Certain types of restrictions on the right to free movement are expressly prohibited as they are deemed manifestly disproportionate.[27] The Commission is also empowered to adopt mitigation measures for the free movement of persons, such as providing digital tools and templates to facilitate the identification of categories of persons and the verification of relevant facts.[28]

The activation of the internal market emergency mode also allows the Commission to adopt specific emergency response measures in relation to the crisis-relevant goods and services identified by the Council in the activation decision. The Commission can request information from economic operators concerning the production capacities and possible existing stocks of the crisis-relevant goods as well as expected production output and relevant disruptions.[29] It can further activate the emergency procedures included in sectorial instruments relating to specific products subject to an EU harmonised regime which entails various derogations from the harmonised rules with the aim of accelerating the placing on the market of those products.[30] The Commission can finally issue non-binding priority-rated requests asking economic operators to prioritise the production or supply of crisis-relevant goods in cases of severe and persistent shortage.[31] If the economic operator accepts the request for a priority-rated order, the Commission implementing act issuing the order will provide for a waiver of the operator's liability under prior contractual obligations. In the event of non-compliance with the information requests or accepted priority-rated orders, the Commission can impose fines on economic operators.[32]

Moreover, in the event of shortages the Commission can coordinate the distribution of crisis-relevant goods or services in a spirit of solidarity among Member States, by issuing recommendations. In the same vein, it can recommend to Member States measures to ensure the availability of crisis-relevant goods or services across the Union by the efficient reorganisation of supply chains, production lines and the use of existing stocks, as well as the acceleration of authorisation and product approval procedures.[33] Finally, when the internal market vigilance mode or emergency mode is active, the Commission can be requested by Member States to procure crisis-relevant goods and services on their behalf or can carry out a joint procurement procedure with the relevant authorities of the Member States. When Member States

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26 Art. 23 of IMERA laying down specific transparency obligations on national emergency measures.

27 Art. 21 and recital 43 and following of IMERA.

28 For example, the Commission can establish templates in order to identify the categories of persons involved in the production or supply of crisis-relevant goods and services for which it is necessary to facilitate free movement. See Art. 22 of IMERA.

29 Art. 27 of IMERA.

30 Art. 28 of IMERA, the emergency procedures allow, in the event of activation of a single market emergency, authorisation of the placing on the market of products that have not undergone the conformity assessment procedures required by EU legislation.

31 Art. 29 of IMERA.

32 Arts 30 to 33 of IMERA.

33 Arts 34 and 35 of IMERA.

procure crisis-relevant goods and services autonomously, they are subject to obligations of information, consultation and coordination in a spirit of solidarity.[34]

2.2.2 A common regulatory approach to autonomy

With all their specificities and differences, the new permanent internal market instruments show a common regulatory approach.

First, they introduce a strong focus on market and industry support through both regulatory and financial measures. In particular, the sectorial instruments facilitate strategic projects and the scaling up of market capacities by allowing derogations to existing requirements. In so doing they entail a different composition of the public interests underpinning the various regulatory regimes and give relevance to the pursuit of strategic autonomy of the Union as one of those objectives.

Second, they include a strong preparedness dimension aimed at avoiding or mitigating future crises. This requires the setting up of priorities of action and benchmarks for domestic capacity in the various critical sectors but also the introduction of specific market operators' obligations, notably information obligation, which would allow public authorities at the national and EU level to follow up the evolution of market conditions (surveillance market modes) and notably the level of strategic stock and capacities.

Third, a common element of the new regulatory frameworks is the inclusion of "emergency modes" which are designed around a similar regulatory model. In case of a specific "crisis", the activation of an "emergency mode" in the relevant domain allows for the adoption of emergency measures at the European level, to be chosen among those pre-defined by the legislator as part of the emergency toolbox.

The toolbox generally includes market intervention measures often associated with financial penalties in the event of non-compliance by operators. These include enhanced information obligations and joint purchase mechanisms but also more invasive priority-rate requests and priority-rate orders, which allow public authorities to ensure priority of access to certain category of critical emergency goods.

The triggering of the emergency mode is also associated with an enhanced coordination role for the Commission and with corresponding obligations for the Member States. This may include a specific framework for adopting unilateral emergency measures (or outright prohibition to do so).

Finally, the emergency mode is based on a specific governance mechanism that, as we have seen in the case of IMERA, gives to the Council a central role, by conferring on it the power to activate the recourse to the emergency toolbox. The centrality of the Council in the governance arrangement of the new instruments emerges as a central feature of the law of autonomy and will be specifically addressed in the next section.

34 Arts 36 to 41 of IMERA.

3 The challenges of autonomy as an objective of the internal market

The development of a new law of autonomy, which reshapes the objectives and the instruments of the internal market, raises a number of legal and policy challenges and create new institutional dynamics. In Section 3 of this chapter we will focus on the challenges posed by the use of internal market legal bases to pursue the objective of strategic autonomy (3.1), before turning to the impact that the new regulatory models have on the reciprocal role of Commission and Council (3.2). We will finally focus on the policy shifts that those models entail, including the implication that they have for the role that the institutional lawyer called to navigate the change.

3.1 The constraints of the legal basis

The internal market instruments analysed in the previous section are all based on Article 114 TFEU, which remains the principal legal basis even when combined with other more specific provision (notably article 173 TFEU on industry).

Article 114 TFEU is the central Treaty provision for harmonising or approximating the laws and administrative actions of the Member States with the aim of ensuring the establishment and functioning of the internal market, as set out in Article 26 TFEU. In so doing, this provision introduces an alternative to mutual recognition, which constituted the primary means for EU market integration before the Single European Act. Since then, harmonisation has progressively grown in importance to become the driving force in pursuing the objective of the internal market. As harmonising measures progressively impacted policy areas in which the EU has no or only complementary legislative competence, Article 114 TFEU has led to a significant amount of case-law and has been subject to increasing controversy as to whether it leads to a creeping expansion of the competence of the Union.

These trends have further accelerated in recent times, and the recourse to Article 114 TFEU to establish regulatory frameworks in the pursuit of the Union autonomy in situation of crises is a good, but not isolated example. [35]

This expansive use of Article 114 TFEU finds its limits, however, in the conditions defined by the Court of Justice as to the possibility to have recourse to that legal basis. The Court has in fact made clear that Article 114 TFEU does not confer upon

[35] During the 9th Parliamentary term, a number of acts were adopted under Art. 114 TFEU which pursue particularly prominent general interest objectives not strictly related to the internal market, such as the protection of democracy and media freedom. See, for instance, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising, OJ L, 2024/900, 20.3.2024; Regulation (EU) 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (European Media Freedom Act), OJ L, 2024/1083, 17.4.2024; Proposal for a Directive of the European Parliament and of the Council establishing harmonised requirements in the internal market on transparency of interest representation carried out on behalf of third countries, COM/2023/637 final, which is still being discussed by the co-legislators.

the Union legislature a general power to regulate the internal market.[36] Rather, in order to rely upon Article 114 TFEU as a legal basis, a Union measure needs to satisfy three conditions:

– Disparities exist or are likely to emerge between national laws which are such as to obstruct the fundamental freedoms or cause significant distortion of competition and thus have a direct effect on the functioning of the internal market;

– The genuine purpose of the measure must be to eliminate these obstacles and thus to improve the conditions for the establishment and functioning of the internal market by harmonising national rules;[37]

– No other legal basis under the Treaties is appropriate for the adoption of the measures.

For the sake of our analysis, it is important to stress that the Court has accepted that the legal basis can be used to prevent the emergence of future obstacles to trade resulting from divergent national provisions, provided that the risk is not just an abstract one. The Court has also held that the expression "measures of approximation" intends to confer on the Union legislature a discretion as regards the method of approximation most appropriate for achieving the desired result and this may include empowering institutions to take decisions directed at market operators in the framework of an appropriate harmonised mechanism so as to counter specific threats to the orderly functioning and integrity of the market in question.[38] Thus, the choice of Article 114 TFEU appears in principle appropriate to set up regulatory frameworks for the adoption of individual monitoring and intervention market measures such as the ones we have described in the previous section, provided that the other conditions identified in the case-law are satisfied.

In that regard, however, a tension may exist between the objective of addressing malfunctions of the market in a situation of crisis (e.g., shortages or disruption in the supply chain) and the scope of Article 114 TFEU as defined by the case-law.

As a matter of example, the emergence of crisis-induced shortages or disruption of supply chains, which are the focus of IMERA, the Chips Act or the EDIP proposal cannot as such be considered obstacles to the free movement of goods in the internal market that would justify recourse to Article 114 TFEU as confirmed by the Court. Indeed, when the Court refers to the elimination of obstacles to the free movement of goods, it has so far referred to the removal of disparities between national rules that products must otherwise satisfy and not just to objective market conditions. Similarly, measures aimed at securing the production or the procurement of goods (e.g., priority-rated orders, joint procurement, stockpiling measures) may

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36 See Judgment of the Court of 5 October 2000, *Germany* v *Parliament and Council (Tobacco advertisement)*, C-376/98, ECLI:EU:C:2000:544, paragraph 83.

37 See Ibid., paragraph 84; Judgment of the Court of 8 June 2010, *Vodafone and others*, C-58/08, ECLI:EU:C:2010:321, paragraph 32 and case-law cited; Judgment of the Court of 2 May 2006, *UK* v *Parliament and Council (ENISA)*, C-217/04, ECLI:EU:C:2006:279, paragraph 42; Judgment of the Court 10 December 2022, *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, ECLI:EU:C:2002:741, paragraph 60.

38 Judgment of the Court of 22 January 2014, UK v Parliament and Council (ESMA), C-270/12, ECLI:EU:C:2002:741, paragraphs 97-117.

not at first sight appear relevant for cross-border trade or pertinent in relation to the risk of divergence between national rules, unless further conditions are specified. Lacking those conditions, such measures have a broader focus on ensuring the availability of goods in the internal market in a situation of scarcity rather than solely on ensuring their free movement. More generally, an emergency response to market crises based on the adoption at EU level of restrictions to the freedom of economic operators would appear to create obstacles to the free movement of goods rather than remove them, and needs therefore to be adequately justified and qualified in order to be compatible with Articles 114 and 26(2) TFEU.

The above considerations were very well in the mind of the co-legislators during the negotiations of the legislative instruments mentioned in paragraph 1.2 above. They explain a number of changes that were introduced in the final texts if compared to the proposals as originally submitted by the Commission, in order to refocus the proposed emergency frameworks on an internal market rationale based on divergence of national provisions, which could justify their adoption on the basis of Article 114 TFEU.

A good example of such redrafting is provided by IMERA, which also illustrates the contribution of the Legal Services to the legislative work of the Institutions. Following the presentation of the Commission's proposal, the Council working party in charge of the proposal requested an opinion from the Council Legal Service as to the appropriateness of the legal bases proposed by the Commission for the adoption of the act. The opinion of the CLS identified a number of shortcomings in the Commission's proposal and guided work to re-focus and redraft certain elements of the proposal. This in particular concerned:

– The objective of the proposal (Article 1), which was clarified and tied more closely to ensuring the proper functioning of the internal market, by preventing the creation of obstacles to the proper functioning of the Market and by preventing the application of divergent measures by Member States;

– The definitions, and notably the definition of crisis and internal market emergency mode (Article 3), which were made more specific by adding a reference to their impact on the functioning of the internal market and freedom movement as well as the risk of divergent national measures which may impact the functioning of supply chains;

– The conditions for the triggering of the internal market emergency mode (Article 17) were clarified and further framed, so as to include an assessment by the Commission and the Council of the fact that the crisis creates obstacles to the free movement, having an impact on a vital sector in the internal market, in line with Article 114 TFEU;

– The provision on prior rated requests was further framed (Article 29) while the provision on strategic reserves was dropped altogether;

– The rationale and objective of the instrument, which was recentred around the risk that disruption of supply chains and shortages of goods and services may pose for the proper functioning of the internal market, notably through a careful redrafting of the recitals.[39]

While the strengthening of the internal market rationale provides a more solid justification for the choice of Article 114 TFEU,[40] it comes at a cost linked to the inherent limitations of this legal basis.

Apart for the reframing of the instrument through the lens of the internal market and redefinition of the parameters of its activation as explained above, this is particularly relevant in relation to the solidarity dimension of regulatory frameworks aimed at pursuing the autonomy of the Union. As a matter of fact, solidarity is not among the objectives of the internal market as defined in Article 26 TFEU and operationalised in Article 114 TFEU.

This does not exclude the possibility that harmonisation measures under Article 114 TFEU can additionally pursue an objective of autonomy and solidarity among the Member States. The Court of Justice has indeed confirmed that measures adopted under Article 114 TFEU can pursue general interest objectives in addition to internal market ones, even when those other policy objectives are a “decisive factor” in the choices to be made.[41] Although this case-law has been developed in relation to the general interests explicitly mentioned in Article 114(3) TFEU (high level of health, environmental or consumer protection), it is inherent in the logic of Article 114 TFEU that harmonisation is not an end in itself but is meant to respect the specific public interest objectives pursued in the policy area concerned. This requires considering that the very rationale of handling crisis situations at the EU level – rather than leaving to Member States the responsibility to act unilaterally – is to promote solidarity.

Finally, solidarity is recognised as an essential attribute of society in Article 2 TEU, which sets out the values on which the Union is founded. In that regard, the Court of Justice in its landmark judgment on the rule of law conditionality regulation has ruled that “the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.”[42] Thus the co-legislators are empowered to

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39 Compare recital 6 of the Commission proposal, which did not link the situation of shortages and supply chain disruption with obstacles in the free movement in the internal market, with the new drafting of recital 8: “The impact of a crisis on the internal market can hinder the functioning of the internal market in two ways. It can give rise to obstacles to free movement or it can cause disruptions to supply chains. Disruptions to supply chains can exacerbate shortages of goods and services in the internal market and hinder production, which leads to additional barriers to trade and to the distortion of competition between Member States and between private operators, thereby disrupting the proper functioning of the internal market. Disruptions to supply chains can also lead to the emergence or likely emergence of diverging national measures to address those supply chain issues, leading to the activation of an internal market emergency mode. This Regulation should address these types of impacts on the internal market and introduce measures to avoid obstacles to free movement or supply chain disruptions that create shortages of crisis-relevant goods or services.”

40 A similar reframing of the instrument also took place during the legislative negotiations on the Chips Act.

41 See Judgment of the Court of 4 May 2016, *Philip Morris Brands and Others*, C-547/14, ECLI:EU:C:2016:325, paragraph 60 and case-law quoted there; Judgment of the Court of 8 June 2010, *Vodafone and Others*, C-58/08, ECLI:EU:C:2010:321, paragraph 36.

42 Judgment of the Court of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, paragraph 127.

ensure the protection of the values mentioned in Article 2 TEU wherever they have an appropriate legal basis for taking legislative action.

It remains, however, that the pursuit of autonomy should not undermine the pursuit of the internal market objective, which needs to remain genuine and underpin the whole regulatory framework. Moreover, since the pursuit of solidarity is not a requirement under Article 114 TFEU, the extent to which the emergency frameworks established under that legal basis pursue a solidarity rationale will depend very much on the choice of the co-legislators in the exercise of their wide margin of discretion.

It results therefore that the choice of Article 114 TFEU as a legal basis entails a possible reduction of the level of solidarity pursued by the emergency framework. This is indeed reflected by the final outcome of the legislative work on IMERA,[43] which has weakened the solidarity dimension of the original proposal of the Commission, for instance, by ditching the possibility for the Commission to issue mandatory priority orders to economic operators[44] and mandatory requests to Member States to build up strategic reserves for goods of strategic importance.[45]

3.2 The impact on institutional balance

In the system of the Treaties, implementation is a matter left first and foremost to the Member States and, where uniform conditions for implementation are needed, to the Commission. Only in duly justified and specific cases, can implementing powers be conferred on the Council by the legislator (Article 291(1) and (2) TFEU). This possibility has been used in the past, but has remained generally confined to domains which, albeit progressively falling under Union competence, touch the core of Member States' sovereignty[46] or to matters where the Council has specific responsibilities under the Treaties.[47] In the area of the internal market the main recent innovation to this institutional set up has been the growing role of specialised agencies in the implementation of EU law, as a compromise which provides a greater regulatory capacity without transferring more executive power to the European Commission.

43 Similar considerations apply to the Chips Act.

44 According to Art. 27(4) of the proposal, economic operators could refuse to comply with priority-rated orders only by invoking "duly justified reasons", failing which they would face fines according to Art. 28(1)(b). In the final text of IMERA the measure in question becomes voluntary and is therefore renamed "priority-rated requests."

45 See: Art. 12(6) of the proposal. Both elements are aimed at operationalising the principle of solidarity in practice, by conferring on the Commission the power to operate mandatory reallocation of scarce resources. Without those elements, the regulatory framework shifts towards a cooperative model, based on the voluntary acceptance of measures by Member States (use of reserves) and economic operators (priority-rated requests).

46 This is typically the case of areas falling within the former third pillar and now covered by Title V of TFEU (the area of freedom, security and justice), and notably in relation to border controls and visas. Another area where implementing powers are traditionally conferred on the Council is taxation.

47 This is, for instance, the case of the coordination of economic policies, where the implementing role of the Council is defined in Arts 121, 126 and 136 TFEU. See, for instance, the specific role conferred on the Council within the various instruments of the Stability and Growth Pact.

The recent incorporation of crisis frameworks in internal market instruments introduce a new institutional dynamic, as the conferral of implementing powers on the Council emerges as a central feature of the law of autonomy.

In some instances, the role of the Council in implementing a permanent framework mirrors the role that the institution was already playing in the context of emergency measures. This is for instance the case of the gas package and the electricity market act, which have generalised and made permanent the regime of regulated prices in the event of an electricity or gas price crisis that was originally introduced by the emergency measures adopted under Article 122 TFEU.[48] The role of the Council can here be explained in light of the normative drag resulting from the confirmation of the pre-existence emergency measures in ordinary legislation.

However, the conferral on the Council of implementing powers is also a constant feature in new crisis response frameworks introduced by the ordinary legislator in areas where no emergency measures had been previously adopted (and therefore where the Council had never played a role on the basis of emergency powers under the Treaties). It is interesting to note that, even when the Commission's original proposal did not originally envisage a role for the Council in implementing the instrument (as in the case of IMERA), such a role was then introduced or expanded at the request of the Council in the legislative discussions.[49] This pattern is all the more remarkable given that the instruments at stake are subject to the ordinary legislative procedure, and thus require the simultaneous agreement of the European Parliament.

In the recent internal market instruments incorporating a crisis framework (IMERA, Chips Act, proposal for EDIP), the chosen governance model leaves to the Council the power to determine the existence of a crisis situation and to activate the crisis mode on a proposal from the Commission. Following such a decision, the Commission is then empowered to adopt the specific emergency response measures appropriate to the situation among those identified in a specific toolbox.

The recognition of a specific role for the Council in implementing crisis frameworks can be explained in light of the rationale underpinning the Council's role in the Union emergency competences.[50] In areas where integration is advanced, such as in the

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[48] This is the case of Art. 5 of Directive (EU) 2024/1788 of the European Parliament and of the Council of 13 June 2024 on common rules for the internal markets for renewable gas, natural gas and hydrogen, which introduces a regime of regulated prices in the event of a natural gas price crisis, on the model of the emergency measure already introduced by Council Regulation 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

[49] Some of the instruments analysed in this article were initially proposed with a governance system exclusively based on the Commission's implementing role, which however was reconsidered during legislative negotiations. See for instance the original proposal for the Chips Act (for the activation of the Crisis Mode), IMERA (for the activation of the internal market vigilance mode), the *RRF* (for the adoption of Recovery and Resilience Plans), the Emergency Support Instrument (no Council decision originally envisaged for the activation of the instrument).

[50] As Member States are traditionally vested with the primary responsibility for dealing with emergency situations, any limitation on such a role would be accepted only if accompanied by the guarantee of preserving sufficient control. This explains the central importance of the Council in cases where emergency competences are exceptionally centralised at Union level. In fact, the conferral of emergency competence on the institution which represents the Member States offers the best institutional design for ensuring (a certain degree of) control by Member States over Union emergency measures, and as such it is the trade-off typically required by the Council during legislative negotiations for accepting the establishment of crisis instruments at the EU level.

internal market, the role of the Council is the one of a gatekeeper, establishing the existence of a crisis situation, while the Commission ultimately retains the control on the adoption of the appropriate emergency measures.

Thus, despite the increased role of the Council, there is no real setback for the Commission in the implementation of the internal market. On the one hand, even when implementing powers are conferred on the Council, the Commission remains the key actor through its power of initiative and the reluctance of the Council to depart from Commission´s proposals. On the other hand, the multiplication of "emergency boards" to assist the Commission in implementing crisis frameworks can be seen as an inversion of the trend towards greater "agencification" – the proliferation of EU agencies to undertake specific regulatory tasks. In fact, as the example of HERA shows,[51] the crisis situation seems to have given the Commission the opportunity to re-centralise the Union administration, to the detriment of independent bodies and with the effect of increasing the influence and powers of the central authority.

Finally, the pressing needs and sense of urgency associated with the unprecedented crises that the Union has been facing have created the conditions to expand the action of the Union in areas that in the past were left to the Member States. In political terms, as the downsides and the risks of uncoordinated unilateral national emergency measures became increasingly apparent, support for EU-wide solutions has gained decisive weight. This has allowed the Commission to push through several innovative EU instruments that confer powers upon the Commission in previously uncharted domains.

An example is provided by the role that the Commission has acquired in the procurement of vaccines and other crisis-relevant medical countermeasures. Initially coordinating demand and public purchases by Member States, the Commission later procured Covid-19 vaccines directly on behalf of Member States and other countries that joined the joint procurements. In the aftermath of the Covid-19 emergency crisis, joint procurement schemes have multiplied in sectorial ordinary legislation, together with a number of other crisis-relevant measures. While those give the Council a special role in activating the emergency mode, the fact remains that the Commission plays the central role in their implementation. The shift towards a legislative model of emergency regulation has thus entailed the consolidation and expansion of the Commission's role as emergency manager.

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51 The Health Emergency Preparedness and Response Authority (HERA) was established as a Commission service under the authority of the Head of HERA – ranked as a Commission's Director-General and the political steering of a Coordination Committee composed of the competent Commissioners. The HERA Board, composed of representatives from the Member States, assist and advise the Commission in the formulation of strategic decisions concerning HERA. The nature of HERA was controversial, with the Parliament insisting on its establishment as an independent Union agency. Ultimately, the Commission decision establishing HERA provides for a review that requires the Commission to assess by 2025 the implementation of HERA's operations, including its structure and governance. See: Commission Decision of 16/9/2021 establishing the Health Emergency Preparedness and Response Authority, C(2021) 6712 final.

3.3 Policy shifts and the role of the institutional lawyer in a context of crisisfication of the internal market

It is perhaps in the realm of policy where autonomy, as an objective of the internal market instruments, has its most significant impact. The pursuit of autonomy entails a paradigm shift if compared to the traditional guiding principles of the internal market. This paradigm shift has both and internal and external dimension.

Internally, it requires the setting up of specific regulatory regimes that move away from the principles of liberalisation and competition, which have not been able to adequately provide for an effective allocation of resources in times of crisis. On the contrary, building on the lessons learnt from the emergency measures adopted during the Covid-19 pandemic and in the context of the Ukraine war, the new permanent crisis frameworks are based on market intervention measures which significantly interfere with the market freedoms. While the ultimate aim of these frameworks is indeed to ensure the long-term viability and sustainability of the internal market, it nonetheless remains evident that a shift in paradigm is apparent.

Externally, the pursuit of autonomy requires taking note of the new geopolitical realities and the change in the aptitude of competitors and historical partners. This entails navigating the possibilities offered by international agreements to promote the strategic autonomy of the Union, while reasserting the necessary commitment to multilateralism and international institutions.

A good example in that regard is the multiplication of “buy European clauses” in internal market legislation, e.g. clauses that aim at favouring, directly or indirectly, goods manufactured in the Union, European producers or services performed by persons established in the Union, over goods, producers or services manufactured in/provided by persons established in third countries. While potentially problematic in light of WTO rules, “buy European clauses” need to be carefully drafted and designed so that they can fall withing the set of exceptions envisaged under the relevant WTO agreement (namely Article XX GATT and Article XIV GATS) or be deemed essential in the context of Free Trade Agreements, and in so doing avoiding instances of international liability for non-compliance with WTO rules.

Finally, the regulatory developments analysed in this chapter show that a “crisis approach” simultaneously shapes the agenda, the process and the content of policy-making.[52] Crisis-based solutions are taken as a blueprint for the design of ordinary regulatory frameworks, while crisis modes become generalised and multiply.

This approach is associated with an expansion of the notion of crisis which goes well beyond the specific and limited situations covered by the emergency provisions of the Treaties. Secondary legislation multiplies the type of crises which trigger emergency regimes to include situations that – far from being exceptional – are inherent in the (mal)functioning of the market, such as the disruption of supply

[52] Rhinard, M. (2019), “The Crisisification of Policy-Making in the European Union,” *Journal of Common Market Studies*, Vol. 57 (3), 616; White, J. (2023), “Constitutionalizing the EU in an Age of Emergencies,” *Journal of Common Market Studies*, Vol. 61(3), 781.

chains, shortages and obstacles in trade (as in IMERA, the EDIP proposal or the Chips Act).

All this results in a progressive "crisisification" of substantive EU law, which introduces into the logic of ordinary regulation the exceptionalism which characterises recourse to emergency measures. The presentation of certain events as "crises" justifies recourse to extraordinary regimes that suspend or supplement the application of the ordinary legal framework in relation to a targeted situation or a targeted group of individuals upon the occurrence of certain situations. So, a form of "permanent exceptionalism" takes shape, which is integrated in ordinary law, altering its scope and becoming the new normal.[53]

This dynamic is particularly problematic in relation to areas, like the internal market, where the upholding of individual rights and freedoms is at stake: as the number of crisis frameworks multiplies, the scope of ordinary rules is eroded and the restriction of rights and freedoms becomes a permanent feature of the regulatory regime.[54] This entails the risk of moving from one emergency regime to another and precluding any possibility to restore in full and rapidly the rights and freedoms that have been restricted.

Here again, the institutional lawyer is called upon to play a crucial role in ensuring that the necessary guarantees are in place so that the multiplication of crisis regimes across legislative instruments remains compatible with the Charter. This explains the particular attention paid by the legal advisors of the institutions to frame and provide sufficient justification for any envisaged interference with fundamental rights in situations of crisis as part of their advisory role during the legislative process. In particular, the advice of the institutional lawyer will be particularly important to ensure that the legislators assess with due care whether the limitations of rights and freedoms by the measures to be adopted under the permanent crisis framework are appropriate for ensuring the protection of a relevant public interest, do not exceed what is necessary to attain that objective, and do not affect the essence of the right or freedom in question.

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53 Houghton, T. (2016), "Is Crisis the New Normal? The European Union in 2015," *Journal of Common Market Studies*, Vol. 54, 5.

54 In relation to the area of migration, Moreno-Lax critically underlines how "crisis" has become a mode of governance enabling new policy dynamics and decision-making processes, and ultimately leading to the normalisation of fundamental rights limitations via a permanent reshaping of ordinary legislation via crisis framework modes. Moreno-Lax, V., "The "Crisification" of Migration Law: Insights from the EU External Border," in Burch Elias, S., Cope, K. and Goldenziel, J. (eds), *The Oxford Handbook of Comparative Immigration Law*, Oxford University Press, 2023.

The Savings and Investments Union: advancing the internal market for financial services

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1 Introduction

Choosing autonomy and rule of law as the central topics for the 2025 ECB Legal conference and this book could not have been timelier, given the current geopolitical juncture, where traditional roles on the international arena are being questioned. This represents both an opportunity and a challenge for Europe to assert its position. Focusing on the elements that constitute the European Union's strength is key to its successful affirmation.

The internal market has been, since its inception, a central piece and a distinctive feature of the EU's economy. It focused first and foremost on the added value and internal growth potential for all Member States, stemming from a common market without internal barriers. In parallel, the EU's internal market contributed to asserting the place and strength of the EU's economy at global level. Over time, it has become one of EU's greatest assets, a stable and reliable foundation and a tool to exercise the EU's strategic autonomy.

Yet, the internal market is not a given. It requires constant maintenance and adaptation. It has evolved over time, influenced by developing technologies, changing preferences, and new geo-economic realities. It relies on and is underpinned by an ever-growing body of harmonised rules. To be able to serve its purpose of building steady capacity and growth in the EU, the internal market needs to respond to new challenges. Its regulatory and institutional framework needs to be sufficiently flexible to allow the internal market to reach and maintain its full potential under changing circumstances.

This contribution focuses on a specific area of the internal market, namely financial services. This is an area in which the EU has been active since the 1970s, with a view to create a common regulatory foundation to encourage intra-EU cross-border activity. Efforts intensified in the late 1980s and 1990s, when legislation has been substantially beefed up to implement the renewed approach based on minimum harmonisation and mutual recognition with a view to remove barriers and increase cross-border competition. It is an area where the financial and euro crises of 2008-2010 have revealed strong global interconnections and associated risks, which

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triggered extensive regulatory and institutional reforms. These reforms focused on financial stability, prevention, and crisis management. Financial services is an internal market area that, despite its constant evolution, continues to face significant shortcomings. One of the flagship initiatives of the 2024-2029 European Commission is to develop the Savings and Investments Union (SIU) with a view to make the best out of the internal market for financial services and help it reach its full potential.

This contribution focuses on why the SIU matters, notably from an autonomy perspective. It will then highlight some of the remaining challenges to achieving a fully functional internal market for financial services and will proceed by explaining how the SIU intends to address them.

2 Financing needs and SIU as a tool for building financial autonomy

Over the past years, the EU has faced a series of unprecedented challenges. Our economy has been underperforming compared to our global partners, the green and digital transitions are underway, defence needs came to the forefront, and the geopolitical situation has changed radically, bringing instability, uncertainty, mistrust amongst traditional global partners, and unconventional trading policies. In this new global environment, the EU is confronted with both the challenge and the opportunity to assert itself. The necessity of a strong autonomous EU has grown, and this requires Member States to act united. As highlighted in the political guidelines for the 2024-2029 European Commission, “Our threats are too great to tackle individually. Our opportunities too big to grasp alone”.[1]

The economic and competitiveness challenges facing the EU have been extensively documented in the Draghi[2] and Letta reports[3] already one year ago. Since then, these challenges have become even more acute. For the EU economy to be able to serve the needs of its citizens and businesses and to stay relevant globally, it has to regain competitiveness and do so quickly. The first major initiative of the new European Commission, the Competitive Compass,[4] has set the principles and a roadmap for action to strengthen Europe’s competitiveness in the world.[5] It identifies three imperatives for the EU: closing the innovation gap, decarbonising our economy, and reducing dependencies. In light of recent geopolitical developments, defence readiness has also been added.[6]

1 Von der Leyen, U., Political Guidelines For The Next European Commission 2024−2029, 2024, 4.4.

2 Draghi, M., The Future of European Competitiveness, 2025.

3 Letta, E., Much more than a market – Speed, Security, Solidarity. Empowering the Single Market to deliver a sustainable future and prosperity for all EU Citizens, 2025.

4 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions A Competitiveness Compass for the EU, COM(2025) 30 final.

5 European Commission, A competitiveness compass for the EU, 2025.

6 European Commission, White Paper for European Defence and the ReArm Europe Plan – Readiness 2030, 2025.

Addressing these imperatives requires massive investment in sectors identified as political priorities in the Competitiveness Compass and in numerous policy documents adopted by the European Commission, European Parliament, and the Council.[7] Innovation, the green transition, digital and tech diffusion across economic sectors, the scaling-up of common goods such as infrastructure across the continent, and finally defence capacity all need substantial financing to succeed. Making such investments is essential for our economic autonomy, as well as for our competitiveness and ultimately our resilience and relevance globally.

The Draghi report estimated in 2024 the combined additional investment needs in Europe at €750-800 billion per year by 2030. More recent calculations by the ECB, counting also defence needs, project annual investment requirements between 2025 and 2031at nearly €1,200 billion.[8] Although the public share is significant, public money is not sufficient for covering the large-scale efforts required. Mobilizing private capital is essential to bridge the investment gap.

Private savings, estimated at ca €10 trillion, are abundantly available in Europe.[9] However, a substantial portion of these funds remain locked in secure but low-yielding bank deposits, whereas other substantial amounts are invested to third countries, where better opportunities and higher returns are more likely. This mismatch, preventing available capital from meeting acute financing needs in the EU, is partly due to the incomplete and largely fragmented internal market for financial services, which limits opportunities and increases costs.

To address this mismatch, we need a deep, dynamic, and interconnected capital market at the core of our economy. Such a market would act as an engine, mobilising savings and channelling them into productive investments. The SIU represents the Commission's response to the call for more efficient financing, delivering on the vision of an EU financial market that is functional and efficient, able to drive innovation, sustain growth, and build resilience against external shocks. It focuses on improving the internal market's capacity to match savings and investments to the benefit of European growth and security. The SIU is about building our financial autonomy and our financial resilience. This is essential for EU's economic independence.

3 Internal market for financial services – remaining challenges

The financial sector is probably one of the most regulated areas of the internal market. However, creating a common regulatory and institutional framework has not yielded all the results expected. Whilst our EU framework has succeeded in bolstering financial stability and establishing the groundwork for the free movement

7 See for instance European Parliament, Facilitating the financing of investments and reforms to boost European competitiveness and creating a Capital Markets Union (Draghi Report), 2024; European Council, Conclusions of 20 March 2025, EUCO 1/25.

8 Bouabdallah, O., Dorrucci, E., Hoendervangers, L. and Nerlich, C. (2025), "Time to be strategic: how public money could power Europe's green, digital and defence transitions", *The ECB Blog*, 2025.

9 Eurostat, Financial balance sheets – annual data, 2025.

of financial services and providers, we are still far away from a smoothly functioning internal market for financial services, where capital and services flow seamless. This prevents us from being “financially autonomous” and makes too many EU companies – in particular innovative firm – seek better opportunities outside the EU, whilst others often incur higher costs for financing than their international competitors.

Despite progress on the Banking Union – where we have a largely harmonised rulebook, and single supervisory and resolution mechanisms – and the numerous regulatory reforms delivered pursuant to two action plans on establishing a Capital Markets Union,[10] our internal market for financial services lacks sufficient depth and scale, competition across borders is still limited, and domestic specificities remain prominent. Although our financial entities enjoy passporting rights, these are too often incomplete. Regulated entities remain subject to additional sets of rules, sometimes explicitly permitted by the common EU framework, other times gold-plated by Member States. Moreover, even maximum harmonised rules are often applied or enforced differently, and cross-border activities are still treated inconsistently, fragmented into silos, with cross-cutting synergies and risks likely to be disregarded. The European Securities Markets Authority (ESMA)’s capacity to address fragmentation is constrained by its limited powers as an agency, with empowerments still largely limited in the name of the Meroni doctrine.[11]

This fragmentation inevitably results in higher costs, limited opportunities, reduced risk-taking capacity, duplications, limited synergies, which all impinge on the competitiveness of both our financial sector and our economy at large. The cost of barriers in the EU’s financial market have been estimated by the IMF as being equivalent to a 100% tariff.[12]

Consequently, EU citizens – who are amongst the biggest savers in the world – too often forgo opportunities to increase their financial wealth through financial markets participation or favour investment in third countries with larger and more efficient markets. At the same time, EU businesses frequently struggle to secure sufficient financing in the EU to grow and therefore relocate in third countries with more friendly and complete financial ecosystems. Key infrastructure investments – essential for innovation and the dynamics of the EU economy – lag behind, and this risks affecting Europe’s front seat in the global economy.

The reasons for these important inefficiencies and persisting financial fragmentation along national borders are multiple and complex. This contribution highlights those aspects that impinge on the effectiveness of the EU’s financial regulatory framework.

Whereas financial market regulation, as part of the internal market is a shared competence under the TFEU, the quest for building an integrated EU financial

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[10] European Commission, “Action Plan on Building a Capital Markets Union”, COM (2015) 468 final, 30 September 2015 and “A Capital Markets Union for People and Businesses – New Action Plan”, COM(2020) 590 final, 24 September 2020.

[11] Judgment of the Court of 13 June 1958, *Meroni* v *High Authority*, C-9/56, ECLI:EU:C:1958:7, and C-10/56, ECLI:EU:C:1958:8.

[12] IMF, Regional Economic Outlook, Europe’s Declining Productivity Growth: Diagnoses and Remedies, October 2024, 19.

market has been regularly affected by tensions. On the one hand, policymakers recognise the benefits of achieving scale in the EU and hence the necessity of building a common framework. On the other hand, there are fears at national level of losing control and the capacity to defend local interests and specificities, resulting in reluctance to transfer extensive powers or competences. This reflects insufficient trust amongst Member States and scepticism as regards the capacity to find a good balance that reassures stakeholders that both benefits and risks will be shared fairly. Tensions resulted in building common rules that cater too often for diversity and specificities, whilst losing the focus on the primary objective of building a common market supporting healthy competition between financial services providers and the free flow of capital across all Member States.

Addressing persisting fragmentation in EU's capital markets implies dealing with several institutional and legal challenges. Some of these challenges are also relevant for the implementation of the rule of law in the internal financial market, given that it is generally recognised that the rule of law is a key ingredient to economic growth.[13] Indeed the law's accessibility, clarity, predictability, and its fair and consistent application and enforcement are essential for creating a stable legal environment, where stakeholders' rights and obligations are transparent and safeguarded. These rule-of-law principles are important for building the necessary trust in financial markets that underpins investment decisions.

First, it should be recalled that EU financial services regulation is the output of a complex multi-layered regulatory process. This consists of EU legislation (Level 1), its further specification through so-called Level 2 acts (delegated and implementing acts, including technical standards), and Level 3 measures (guidelines, Q&As, recommendations), supervisory measures, national transposition measures. Application and enforcement represent an additional layer (Level 4). Multiple players are involved: the Commission, co-legislators, European supervisory authorities (ESMA, EBA, EIOPA) and national supervisors (which may be integrated or multiple), the ECB, a plethora of committees and expert groups. This architecture reflects the complexity of the financial services domain, where numerous technical aspects need to be addressed. The regulatory set up reflects the so-called Lamfalussy process[14] as it evolved following the post-crisis reform.[15] It was aimed to structure regulatory intervention at the most efficient level whilst ensuring accountability, expertise and celerity. Level 1, which entails a fully-fledged legislative process was intended to set out the framework principles, whereas technical details were expected to be adopted via non-legislative procedure – ever more under the form of technical standards (Level 2), whereas further implementation rules were left for more flexible instruments (Level 3).

To give legitimacy to the regulatory framework it is imperative to follow democratic decision-making processes, and it is particularly helpful to combine political and

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13 Bingham, T., *The Rule of Law*, Penguin Books, 2011.

14 See Regulatory process in financial services - Finance - European Commission, and European Commission, "Report of the Committee of Wise Men on the Regulation of European Securities Markets" (2001) COM(01) 311, European Commission: Lamfalussy Report, European Securities Markets, 15 February 2001 (Lamfalussy report).

15 The High-Level Group on financial supervision in the EU, Brussels, 2009.

technical expertise in an area dominated by technicalities. A key feature of the rule of law and a source of trust for financial market players is indeed ensuring that regulation is created through established processes, in a predictable way. Moreover, to be accessible and predictable, rules need to be understandable, clear, consistent and coherent. Yet, without full commitment to the guiding principles underpinning this framework, without some self-discipline in applying its objectives and mandates, the multi-layered process allows an exponential growth of rules that become ever harder to manage and apply. This increases the risk of inconsistencies and the hereto linked regulatory and administrative burden and may ultimately take a very long time to deliver. Moreover, failure to focus only on key issues or to identify clear principles at the Level 1 may render the nature of the various layers confused, making it often difficult to distinguish between political aspects and technical ones. This results in cases where Level 1 becomes extremely lengthy and complex, embedding often in a rigid way technical aspects that would need more flexibility to cater for practical situations. It may also constrain supervisors to use tools that may not be the most adequate. In cases where Level 1 is insufficiently well defined by co-legislators, it allows for technical details to be adopted at Level 2 in ways that ultimately determine the policy direction.

These situations occur often when the rule-making process focuses on building compromises that are not necessarily tested for their effectiveness, leading too often to inconsistent outcomes from an internal market perspective. It may also lead to vague language or deliberate proliferation of options and discretions, which – unless responding to a structural specificity – are fuelling divergent application of the rules. Difficult political negotiations also often result in solutions that simply postpone decisions on key points to the expert level, through mandates given at Level 2 or Level 3. These are subsequently criticised for containing political choices whose legitimacy is frequently challenged.

Rules devised in detail do not necessarily contain the flexibility needed to adapt to new situations or certain specificities and to allow for innovation. The very purpose of Level 2 and 3 measures was to allow for flexible and quick adaptation of technical aspects based on lessons learned or to address new situations. Yet, with many technicalities being enshrined in Level 1, subsequent revisions become much more demanding and politically negotiated, creating opportunities to rediscuss frequently also framework principles. This gives rise to regulatory instability and additional administrative burden for all stakeholders concerned. Moreover, due to the lengthy processes, when adopted, rules too often address problems of the past and are not always future proof.

Although the EU has legislated extensively and there remains little room for Member States to set rules, there are still many instances when EU regulation is topped up at national level. Where EU regulation is conceived as maximum harmonisation via directly applicable Regulations, often such top-up is done via administrative or supervisory measures during the implementation and application stages. When harmonisation is done via directives or EU rules confer options and discretions, the national transposition rules sometimes add constraints or exploit loopholes. Such national add-ons reflect sometimes different pre-existing practices and respond to genuine needs to address national or local specificities. However, they are also often used to implement more conservative or laxer approaches than the ones commonly agreed. This often creates new barriers and obstacles to cross-border provision of financial services. It leads to large parts of the financial sector being still subject to very different constraints despite a common regulatory framework and prevents them from exercising fully their Treaty freedoms.

Whereas financial services legislation is built on the principles of mutual recognition and home country control[16] and occasionally provides for joint decision-making in certain situations entailing a cross-border dimension, there are still many instances of blurred responsibilities between home and host jurisdictions. This may lead to duplications of requirements or supervision, or on the contrary to loopholes or conflicts between home and host approaches. Despite cooperation obligations and various mediation tools under the European System of Financial Supervision, overlaps, disagreements, inaction in cross-border situations persist, representing yet another source of fragmentation and mistrust in the internal market.

Exclusive national competences for supervision in capital markets and insufficient capacity of ESMA to fuel convergence and to promote a genuine internal market supervisory perspective perpetrate divergent application of common rules and a plethora of national practices. The prevalence of limited domestic focus means there is little consideration of the cross-border dimension (synergies and risks), insufficient information exchange and cooperation, no joint decision-making, supervisory arbitrage. This also means that the EU regulatory framework is not always implemented in the same way across Member States, raising questions whether EU financial law is applied fairly and consistently.

Finally, in practice financial services regulation is intrinsically interwoven with other areas that are far less “Europeanised” and remain largely or exclusively under national competence. For capital markets there are close links with securities law, tax law, company law, insolvency law, social security law. As the dividing line is blurred, developments in these areas are likely to be used to justify specificities and further contribute to fragmentation.

Whilst fragmentation impedes EU financial services users, beneficiaries, and providers from fully realizing the potential of the internal market, with high economic costs, it also affects the fairness of how common rules are applied and enforced. This makes it even more costly to operate across Member States.

4 SIU: a new approach to deal with persistent fragmentation in the internal market

The SIU aims to provide fresh impetus to the integration of EU’s capital markets by adopting a holistic approach to policymaking. The SIU is a horizontal enabler, underpinning all political priorities of the EU that rely on mobilising private capital.

16 As developed since 1985, see European Commission, Completing the Internal Market: White Paper from the Commission to the European Council COM(85) 310, 1985.

The SIU requires a change in mindset and a substantial joint effort from both public and private actors. The SIU acknowledges that progress cannot be based only on purely legalistic harmonisation efforts; instead, it must focus on effectively delivering the objective of the single market for financial services: creating financial wealth for European citizens and financing the European economy.

The SIU aims to take the internal market for financial services to the next level. It builds on the progress achieved so far in the internal market and on existing successful domestic financial markets, but acknowledges that none of these markets is sufficiently large to independently finance the current collective investment needs in the EU or to compete effectively at the international level. Furthermore, in a context where market shocks are global, the shock absorption capacity at national market level may be insufficient, and the benefits of larger shock absorption at EU level are widely acknowledged.

Before highlighting the innovative aspect of the SIU approach, it is worth briefly describing the constitutive elements of the SIU.[17]

The SIU covers financial markets in their entirety – recognising that banking and capital markets are closely linked, and that EU banks have a key role in building more efficient capital markets. The SIU strategy, therefore, not only focuses on achieving a Capital Markets Union but also on completing the Banking Union, viewing the two as interconnected. SIU actions covering the banking sector will focus on enhancing the capacity of the sector to support the competitiveness of the EU economy and compete at global level. In 2026, the Commission will deliver an extensive analysis of the state of the EU banking sector, including a competitiveness review of the regulatory framework in the context of implementing the international Basel standards.

As regards the integration of capital markets, the SIU strategy envisages actions along four pillars. The first pillar focuses on citizens and savings. The SIU prioritizes giving them possibilities to grow their financial wealth by making sure they acquire knowledge and have choices and opportunities to engage in capital markets. Under this pillar, the SIU adopted a financial literacy strategy[18] and issued a recommendation with best practices on savings and investment accounts. It also seeks to promote the uptake of supplementary pensions through both non-legislative and legislative actions. The second pillar focuses on fostering investment and financing of EU businesses. Actions envisage incentives for institutional investors to play an important role in financing, particularly for innovative firms. The role of public funding projects, notably via the European Investment bank (EIB) and national promotional banks will also be recognised and encouraged. A key third pillar of the SIU aims to achieve greater integration and scale in capital markets. By the end of 2025, an ambitious legislative initiative will be prepared to tackle remaining regulatory barriers in capital markets in the areas of trading, post-trading, and asset management. The focus will be on rendering market infrastructures more efficient

17 Communication from the European Commission, Savings and investments union strategy to enhance financial opportunities for EU citizens and businesses, 2025.

18 Communication from the European Commission, EU to boost financial literacy and investment opportunities for citizens, 2025.

and reinforcing Treaty freedoms. Finally, in relation to capital markets, the SIU will look at ways to improve supervision. It will consider areas where the implementation of the common framework, as well as the oversight of cross-border activities of supervised entities, could be more effectively addressed through supervision exercised at EU level.

Against this background, several aspects defining the SIU stand out and could help reinforce the rule of law in relation to the single market for financial services.

4.1 Joint responsibility

First, the SIU takes a holistic approach, acknowledging that no single action is likely to be a game changer, but several aspects and dysfunctionalities will need to be tackled in parallel. It is inclusive in nature, aiming to benefit all EU citizens and EU businesses. The SIU acknowledges that achieving its objectives requires the active involvement and accountability of all relevant stakeholders, including policymakers at both EU and national levels, supervisory authorities, the financial industry, financial services users, and social partners. Progress in the internal market is contingent on joint action by these stakeholders, with shared responsibility for success. Therefore, securing buy-in to the joint common objective of creating a fully functional single market for financial services is essential for assuming such joint responsibility. Clear communication is key to foster understanding on where common interests lie.

4.2 Increased recourse to non-legislative measures

The SIU adopts a pragmatic approach, prioritizing tangible change and results. While legislative proposals are an inevitable component and their successful finalisation will be central to the success of the SIU, it is acknowledged that not all issues can be resolved through EU law alone. The SIU envisages a greater reliance on non-legislative instruments, such as recommendations, strategies, guidance, and interpretations to incentivise action. This approach respects the principles of subsidiarity and proportionality, ensuring that all relevant actors take responsibility for turning policy objectives into reality.

Non-legislative measures may prove more effective than legislation in areas where internal market rules are already clear, and incentives and best practices are needed to build upon those rules and create new opportunities. An example is the Recommendation for a blueprint for savings and investment accounts, which encourages Member States to act based on successful models, including the introduction of appropriate tax incentives. Non-legislative measures are also valuable in areas where Member States are in the front seat for acting. For example, in financial literacy, coordination and implementation of best practices can further strengthen existing national initiatives. Similarly, in the area of supplementary pensions, which are not only important institutional investors in capital markets but also integral to multilayered pension systems that fall under Member State competences, best practices on auto-enrolment, tracking systems, and dashboards are intended to promote and guide essential Member State action to encourage the uptake of supplementary pensions.

Finally, non-legislative measures would be useful in areas where there is already substantial legislation that leaves room for interpretation, potentially leading to divergent interpretation or interpretation contrary to the intent of the rule. This is for instance the case of the favourable prudential treatment in the Capital Requirements Regulation[19] applicable to banks' exposures to equity under legislative programmes, or of the prudent person principle under the IORP II Directive.[20]

The advantage of non-legislative tools lies in their quicker adoption and flexibility. Depending on the issue at hand, they may be highly focused (in case of interpretations of specific provisions) or stay sufficiently flexible to allow for adaptation to the specificities of Member States. They also provide a means to address interactions with key aspects on taxation or pensions, which cannot legally be covered by binding EU measures. In such cases, coordination through non-legislative actions can be both more effective and proportionate. Their preparation still relies on the better regulation toolset, but their finalisation is quicker.

Non-legislative tools may also be better aligned with the distribution of competences or provide for more effective practical implementation and application of common rules. They may also constitute a quicker way to achieve policy objectives when these are shared and responsibility for delivering them is assumed. These features may contribute to the predictability and effectiveness of the common financial rulebook and ultimately reinforce the rule of law.

While there are legal limitations to the enforceability of non-legislative tools, and they leave room for divergent implementation, this may still be preferable to no implementation at all. Priority must be given to action. Therefore, the choice of using non-legislative measures ultimately depends on the specific problem that needs to be addressed. Recourse to non-legislative measures also reinforces Member States' political responsibility and accountability. Instruments such as the European Semester and country reports are also intended to play an increasingly significant role in building the internal market for financial services. These tools will enable the assessment of the implementation of non-legislative SIU measures and the issuance of necessary recommendations, where needed. In addition, Member States have established different monitoring fora in the context of the Economic and Financial Committee, or the Financial Services Committee, where they have committed to reporting and exchanging best practices. These fora will facilitate greater convergence in the application phase.

Last but not least, under the SIU there is a strong commitment to ensure implementation and use enforcement to promote the internal market. This means there is a renewed impetus for intensifying dialogues with Member States where

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[19] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p. 1.

[20] Directive (EU) 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (recast), OJ L 354, 23.12.2016, p. 37.

potential breaches of Union law have been identified, as well as increased likelihood of using the infringement toolset where dialogue does not lead to remedying identified breaches. Strengthening enforcement of financial services law will likely fuel trust that rules are applied evenly across the Union.

4.3 Coalition of the willing

The SIU acknowledges the different starting points of different Member States,[21] as well as the challenges involved in reaching agreement on joint initiatives amongst all Member States. In this context, whilst EU-level measures are clearly warranted in key areas where all Member States can and should act in unison to address EU-wide shortcomings, there are also areas where Member States can act individually or in groups.

Where making joint progress is particularly difficult – especially due to the close link to national competences, such as taxation or social security law – and given that it is preferable that at least some Member States move forward, the SIU accepts that in areas where the EU did not act, some of the Member States may move forward with projects in what some call "the coalition of the willing". One such initiative has been launched by several Member States as the Competitiveness Laboratory,[22] which has agreed on a first joint project to establish a European long-term savings label.[23]

The Commission may accompany concerted initiatives by groups of Member States where such initiatives aim to go further and faster in achieving the objectives of the SIU. Constitutional safeguards are in place, and conditions apply to ensure that such initiatives respect the division of competences and do not result in additional fragmentation within the EU. Thus, these initiatives should promote the deepening of capital markets in the EU, support the broader objectives of the SIU, and must not impinge on the Commission's right of initiative or otherwise undermine EU competences. Furthermore, these initiatives must remain open to participation by all interested Member States, including the possibility to join at a later stage, and should not circumvent existing cooperation mechanisms.

Such projects may act as sandboxes, fostering the development of best practices and providing valuable learning opportunities that could eventually inspire common rules, where needed. They may prove particularly useful to implement jointly some of the recommendations issued under the SIU. Additionally, these initiatives may contribute to better mutual understanding between Member States and lead to innovative solutions, particularly in areas involving collaboration on tax matters.

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21 The degree of development and the characteristics of national capital markets have notable differences.

22 Ministerio de Asuntos Económicos y Transformación Digital, Integration into the Single Market 2024, 2024.

23 "Financer l'économie européenne avec le label européen Finance Europe", Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique, 2025.

4.4 Simplification

Simplification and competitiveness concerns will be inherent to every SIU action, along with ensuring resilience and financial stability. Importantly, simplification does not mean deregulation. Simplification is not meant to impinge on the regulatory or policy objectives but focuses on reducing administrative burdens in the application of rules. It is an opportunity to eliminate redundancies, clarify obligations, and make the rules easier to understand, apply, and enforce. Simplification reinforces accessibility and transparency, facilitating predictability of the regulatory framework in respect of the rule of law.

Whilst complex topics may not always lend themselves to simple rules, the SIU endeavours to keep regulation simple in the sense of clear, coherent, proportionate, and fit for purpose. It is important that both regulated entities and supervisors fully understand the rules to apply them appropriately. Efforts towards simplification will require a shift in focus during implementation on achieving political objectives and move away from a predominantly compliance-based approach. This means also reviving the initial purpose behind the Lamfalussy architecture: refocusing legislation (Level 1) on a clear and complete design of the policy objectives and the key features of the policy framework, in a principle-based way, without regulating all details. While technical aspects are key to financial regulation and its coherent and harmonised application, they should be addressed at Levels 2 and 3 (depending whether less or more flexibility is needed), without interfering with policy choices and focusing on delivering objectives. Supervisors should not be able to alter policy choices made by co-legislators as this would affect the stability and predictability of the legal environment. At the same time supervisors should have sufficient room for supervisory judgment and choice of action to identify the best solutions for individual cases, thus ensuring fair application of the rules.

Achieving this would require a change in mindset and a joint commitment from all stakeholders to keep the rules simple throughout the negotiation process and allocate political and technical content to the appropriate layer. It also requires regulated entities to take responsibility for implementing the agreed objectives.

4.5 Tackling fragmentation of the financial regulatory and supervisory framework

As regards legislative work, which will still be needed under the SIU, the focus will be on addressing persisting fragmentation in our internal market. Whilst a lot has been done to put in place a solid regulatory framework, reforms in recent years have been primarily driven by concerns related to financial stability, looking less at the state of integration and the ways to overcome fragmentation.[24] The current emphasis on Europe’s competitiveness in the world creates a strong momentum for focusing on tackling remaining fragmentation. Such work is inevitable and needs to cover some

[24] See for instance reforms undertaken in the aftermath of the great financial crisis in relation to the regulatory framework for banking, securities markets, asset management.

core integration aspects to achieve the objective of creating an efficient financial market.

Many of the remaining instances of fragmentation have been previously discussed, including in the context of some recently closed legislative reviews. Yet too often, discussions failed to reach satisfactory outcomes that would benefit the EU. Reopening legislation at short intervals affects legal certainty, yet fundamental aspects, particularly those pertaining to the distribution of competences can only be tackled via legislation. Thus, a balancing act is needed between building EU financial autonomy and ensuring legal certainty. Upcoming legislative proposals will therefore be purposeful and targeted. They will focus in particular on upgrading the regulatory framework to better support market integration and the exercise of fundamental freedoms, by eliminating barriers, limiting unwarranted discretions and options, clarifying rules and principles in capital markets regulation, creating the premises for enhancing the efficiency of trading and post-trading infrastructure, and improving market interoperability and cross border activity so much needed to achieve the scale and depth for EU financial markets to be fully efficient.

Furthermore, legislation will be required to reinforce the EU dimension of capital market supervision, including by centralising supervisory functions where warranted and by improving ESMA’s supervisory convergence tools. This is key to ensure that EU financial services regulation is fairly applied and enforced, with comparable outcomes across the Union, and that the cross-border dimension of financial services is properly accounted for.

5 Conclusion

The SIU project aims to advance the integration of the EU’s financial markets to enhance the EU’s competitiveness, economic growth, and thereby its strategic autonomy. At the same time, it promotes innovative methods and a holistic approach to improve both rulemaking and rule application in the context of financial markets. While some legislation will be necessary, the SIU will substantially rely on shared responsibility and joint action. It will tackle simultaneously many issues that still prevent us from fully reaping the benefits of the internal market. It will use a diversity of tools considered most appropriate to achieve the intended objectives in an efficient way. This would also strengthen the rule of law in the financial services sector by fostering accessibility, transparency, enforceability, as well as the overall predictability and stability of the EU’s legal framework. A mid-term review in 2027 will take stock of the first achievements and will shed light on the efficiency of this new approach.


Monday, 1 September 2025
European Central Bank
Douglas Arner

Part III

Resilience, autonomy, and cooperation in payments and clearing systems

The Eurosystem's response to the digital transformation in payments and finance

Piero Cipollone*

1 Introduction

Issuing money is a key part of the mandate of the Eurosystem as monetary authority for the euro area.[1] In fact, issuing money is historically the main reason for having central banks in the first place.

Central banks issue sovereign money – money backed by the sovereign. This money serves as an anchor for the payments and financial system because it is accepted everywhere, bears no credit risk, and all other forms of money can be converted into it at par. This ensures the singleness of money, which is key for trust in the currency and provides an important basis for the smooth conduct of monetary policy.

Today, the Eurosystem issues money for both retail and wholesale transactions. It issues cash, i.e. central bank money in physical form, for day-to-day transactions. And it offers central bank money settlement of wholesale transactions – transactions between financial institutions – through TARGET Services.

But two key factors require to modernise the provision of central bank money.

The first factor is digitalisation.

Digitalisation is reducing the role of cash. For instance, it is not possible to pay online with cash. In 2024, over one-third of all day-to-day retail transactions in terms of value took place online. Moreover, digitalisation increases the euro area's dependencies on non-European digital payment service providers. For instance, international card schemes settle two-thirds of card-based transactions in the euro area.

Digitalisation is also disrupting finance, as distributed ledger technology (DLT) and the digital representation of assets on programmable platforms (a process referred to as "tokenisation") could transform financial transactions. In a survey of EU banks,

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1 The Eurosystem comprises the European Central Bank (ECB) and the national central banks of euro area Member States. In line with the Treaty on the Functioning of the European Union (TFEU) and the Statute of the European System of Central Banks and of the European Central Bank, the Eurosystem notably has responsibility for monetary policy and promoting the smooth operation of payment systems. Art. 282 TFEU foresees that the ECB alone may authorise the issue of the euro.

over 60% of respondents indicated that they are actively exploring, experimenting with, or implementing DLT solutions.

The second factor is fragmentation.

25 years after the launch of the euro, the euro area still does not have a European payments solution that makes it possible to pay digitally throughout the euro area for day-to-day payments. The fragmentation of the payments market means the euro area depends on the "kindness of strangers" for retail digital transactions. At present 15 out of 20 euro area countries do not even have a domestic solution for digital payments in shops and 13 do not have a domestic solution for e-commerce payments.[2] Even in euro area countries that have domestic card schemes, these schemes rely on non-European card schemes for cross-border transactions within the euro area. The dominance of a few players also means merchants pay high fees that are passed on to consumers, while banks lose fees and data to mobile wallet payment solutions – also often offered by non-European providers.

This is a case in point of the Draghi report:[3] because European payment solutions are fragmented along national lines, they struggle to achieve the economies of scale and the network effects necessary to compete at European level, let alone globally. As a result, Europe is dependent on non-European solutions for services that are critical to the functioning of its economy, creating risks for economic security and resilience.

Fragmentation is also a risk in digital finance. If the Eurosystem does not offer central bank money for settlement of transactions based on decentralised ledger technology (DLT), other settlement assets (such as stablecoins) will be used, reintroducing credit risk and fragmenting liquidity. The expansion of US dollar stablecoins – which account for some 99% of total stablecoin market capitalisation – may also lead to currency substitution in these transactions.

Finally, geopolitical tensions are creating further risks of fragmentation in the global financial system. Cross-border payments are already slow and expensive. And geopolitical rifts have resulted in initiatives by several countries to create alternatives to existing global infrastructure.

This contribution outlines the Eurosystem's response to these challenges.

2 A digital euro for retail payments

The Eurosystem has continuously encouraged initiatives to address fragmentation in digital payments: the Single Euro Payments Area (SEPA), which has been fully implemented in the euro area since 2014, was a great success for credit transfer and direct debit. For these two uses, there is no more geographical fragmentation in Europe. Yet SEPA did not deliver for in-store, mobile and e-commerce payments. To

2 See Table 1 in European Central Bank, Progress on the preparation phase of a digital euro – Closing progress report, 2025.

3 Draghi, M., The future of European competitiveness, 2024.

remedy this, the Eurosystem has supported the development of privately operated, European-governed, pan-European payment solutions. So far, initiatives to develop a European card scheme covering the entire euro area have unfortunately not succeeded.

In recent years, the Eurosystem has welcomed the few regional initiatives that have emerged, which for now only cover a subset of countries and mostly remain limited to person-to-person payments and, in some cases, e-commerce. These initiatives face difficult challenges because of the financial and operational challenges involved in deploying their own private acceptance infrastructure. They are also confronted with the strong market position of the established players that control access to key features such as contactless payments.

Moreover, digitalisation reduces the use of cash, disrupting the healthy equilibrium between private and public money that has served us so well. In an increasingly digital world exposed to new geopolitical and operational risks, the Eurosystem must protect Europeans' ability to pay with their money – sovereign, central bank money – at all times.

Thus, the Eurosystem aims to bring retail central bank money into the digital age. This is why it is preparing to complement physical cash with its digital equivalent, a digital euro. It seems like a small step, but it would be transformative.

First, a digital euro would preserve the freedom to use cash in the digital era. Because the digital euro would be legal tender, it would be accepted wherever one can pay digitally.

Second, a digital euro would provide an open acceptance network and standards that European private initiatives could leverage to reach pan-European scale.[4] This would create instant network effects, enabling banks to compete at scale by offering their clients a single payment experience across all use cases (person-to-person, online, in-store, including contactless payments) and across the entire euro area, without having to rely on foreign players.

Third, a digital euro would also support innovation: alongside nearly 70 market participants the ECB has explored innovative payment functionalities for a digital euro.[5] Conditional payments, i.e. payments that are triggered automatically when predefined conditions are met, were identified as a possible key driver of innovation and an example of how the digital euro could improve the day-to-day lives of European citizens. Functionalities such as the reservation of funds, in conjunction with the harmonised standards established by the digital euro rulebook, would allow payment service providers to develop the additional technical layer needed to enable conditional payments. In online shopping transactions, for example, funds could be released to the seller only after the buyer confirms that the item has been delivered, ensuring greater consumer protection. Insurance reimbursements could be

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4 See European Central Bank, Fit of the digital euro in the payment ecosystem – Report on the dedicated Euro Retail Payments Board (ERPB) technical workstream, 2025.

5 European Central Bank, Digital euro innovation platform – Outcome report: pioneers and visionaries workstreams, 2025.

automated and, in the case of delayed services, refunds could be streamlined. For shared mobility services and public transport, conditional payments could enable tap-and-go transactions and automatically calculate the best available fare. Conditional payments were also tested in the context of business-to-business (B2B) payments. It was found that a digital euro would contribute to reducing fragmentation and costs for B2B payments, while bringing increased standardisation and liquidity.

Third, a digital euro would enhance strategic autonomy and resilience, with a solution under European governance and running on a European infrastructure. Today, physical cash is the only true fallback, and the Eurosystem is strongly committed to ensuring that it remains available, accessible, and accepted throughout the euro area. But as society increasingly moves away from physical cash, and as cash distribution networks may be disrupted in emergencies, it needs to be complemented with a digital version. In terms of resilience, two features of the digital euro stand out. First, the technical infrastructure for processing transactions will be distributed across at least three different regions, each equipped with multiple servers. Second, the offline functionality will provide an extra layer of security by allowing payments to be made even when internet connectivity is disrupted or cash is hard to access – for example, during a power outage or a natural disaster.

At the same time, the digital euro would not disrupt financial intermediation. Banks would play a key role in the distribution of a digital euro. They would be compensated for their services and would actually face lower transaction costs, as the Eurosystem will not charge scheme fees. The design of a digital euro also makes sure to safeguard financial stability: first, digital euro holdings would not be remunerated; second, users could pay with digital euro without prefunding their wallets; third, corporates will not be able to hold digital euro; fourth, digital euro holdings of individuals would be subject to carefully calibrated limits.

In October 2025, the Governing Council of the European Central Bank (ECB) has decided to move to the current phase of the digital euro project. This decision followed the completion of the preparation phase, launched by the Eurosystem in November 2023, which laid the foundations for issuing a digital euro. The Governing Council's decision reflects the need to continue developing a digital euro that will complement physical cash, ensuring that everyone in the euro area can keep using a public, trusted, and universally accepted means of payment for day-to-day payments – both online and offline. A digital euro will preserve Europeans' freedom of choice and privacy and protect Europe's monetary sovereignty and economic security. It will foster innovation in payments and help make European payments competitive, resilient and inclusive. The Eurosystem will implement its preparations flexibly, in line with calls from euro area leaders for the Eurosystem to be ready for potential issuance as soon as possible,[6] while also recognising that the legislative process has not yet been completed.

The ECB aims to be ready for a potential first issuance of the digital euro in the course of 2029 if the digital euro Regulation is adopted by European co-legislators by 2026. A pilot to prepare for formal launch could start as soon as mid-2027. In any event, a possible decision by the Governing Council of the ECB to issue a digital euro would only be considered after the legislative act is adopted. The ECB will continue to follow the legislative debate closely and implement any appropriate adjustments to the digital euro development that may result from legislative deliberations.

3 Enabling central bank money settlement of wholesale transactions using new technologies

The Eurosystem is also supporting the emergence of new technologies for wholesale transactions.

DLT has the potential to enhance efficiency by allowing market participants to handle trading, settlement, and custody on a single ledger, 24 hours a day, 7 days a week, 365 days a year. By deploying smart contracts, DLT reduces credit risk, transaction failures, and reconciliation needs. A shared DLT platform could also lower barriers to market entry, enabling small and medium-sized enterprises to access capital markets. For these reasons, there is significant interest in the market for this technology. In parallel, there is strong market demand for settling digital asset transactions in central bank money to minimise risks.

To address market demand, the Eurosystem successfully conducted exploratory work in 2024. The Eurosystem used three different solutions to ensure interoperability between its infrastructures and market DLT platforms. Some 60 industry participants were involved in real and mock transactions. A wide range of securities and payments use cases were covered, including the first issuance of an EU sovereign bond using DLT. A total of €1.6 billion was settled over a six-month period, exceeding values settled in comparable initiatives in other parts of the world. A report on the key findings of this exploratory work was published in June 2024.[7]

Building on the experience gained with the exploratory work, the Eurosystem is now taking a two-track approach. The first track, Pontes, will provide a solution to settle DLT-based transactions in central bank money in the short term. The second track, Appia, explores a more integrated, longer-term solution. Through this initiative, the

6 In their Euro Summit Statement of 23 October 2025, the Heads of State and Government of euro area Member States declared: “In an increasingly digital world, the digital euro offers a strategic opportunity for supporting a competitive and resilient European payment system, contributing to Europe’s strategic autonomy and economic security, and strengthening the international role of the euro. We welcome the recent progress achieved in advancing the digital euro project, and stress the importance of swiftly completing legislative work and accelerating other preparatory steps. We will review progress at our next meeting.”

7 European Central Bank, Bridging innovation and stability: the Eurosystem’s exploratory work on new technologies for wholesale central bank money settlement, 2024.

Eurosystem is contributing to enhancing European financial market efficiency through innovation. In fact, as DLT adoption continues, there is an opportunity to create an integrated European digital ecosystem from the outset, in other words, a digital capital markets union.[8]

The roadmap for Pontes foresees the start of a pilot phase by the end of the third quarter of 2026. It will offer a Eurosystem DLT-based solution, linking market DLT platforms and TARGET Services to settle transactions in central bank money. The Pontes project envisages future enhancements to enable better integration with TARGET Services.

With Appia, the Eurosystem is exploring approaches for more efficient and integrated capital markets in Europe by leveraging DLT technologies in the longer term. The work on Appia seeks to enhance competition and address existing fragmentation along the entire financial market value chain (issuance, trading, clearing settlement, asset servicing). It will proceed in parallel to Pontes. In Appia, the Eurosystem will explore three options: (i) a shared ledger integrating central bank money, commercial bank money, and other assets for market services; (ii) interoperability between DLT platforms to reduce market frictions and foster innovation; and (iii) combinations of these approaches.

The Eurosystem's work also considers international developments, such as emerging private and public DLT initiatives globally – including BIS Innovation Hub Projects –, as well as legislative and regulatory changes such as the review of the DLT Pilot Regime Regulation and developments related to stablecoins.

4 Interlinking fast payments systems to enhance cross-border payments

The Eurosystem's strategy also has an external dimension.

Rising geopolitical tensions have spurred initiatives to create alternatives to existing global payments infrastructure. This could lead to fragmentation of the global financial system into multiple, non-communicating blocs, which would further hamper the efficiency of cross-border payments and contribute to the refragmentation of trade and investment. In parallel, the expansion of stablecoins brings its own risks, including for currency substitution. 99% of stablecoins are currently denominated in US dollars.

The Eurosystem is responding proactively to these challenges. The Eurosystem is harnessing the potential of fast payment systems to enhance the efficiency of cross-border payments and deliver tangible improvements in speed and cost. This approach respects the sovereignty and stability of international partners by building lasting connections that are rooted in trade openness and balanced relationships.

8 Cipollone, P., Towards a digital capital markets union, keynote speech at the Bundesbank Symposium on the Future of Payments, 2024.

The Eurosystem's work rests on two pillars.

First, the Eurosystem's fast payment system (TIPS) is expanding. TIPS already settles instant payments in multiple currencies: in euro, in Swedish kronor, since February 2024, and more recently, since April 2025, also in Danish krone. In October 2025, a cross-currency settlement service has been implemented within TIPS to make it possible for instant payments originating in one TIPS currency to be settled in another. This will allow payments to be sent in one currency and received in another.

Second, the Eurosystem is working to interlink TIPS with the fast payment systems of other countries to improve cross-border payments globally. In particular, this entails connecting TIPS to a multilateral network of instant payment systems through Project Nexus, led by the Bank for International Settlements (BIS).[9] At the same time, the Eurosystem has been assessing the feasibility of creating bilateral links, starting with India's Unified Payments Interface, which has the highest instant payment transaction volumes in the world, and Switzerland's fast payment system. The Eurosystem has also received expressions of interest from several other countries.

5 Conclusion

The Eurosystem sees an increasingly urgent need to address the transformations resulting from digitalisation and fragmentation. In response, the Eurosystem is modernising central bank money. This will protect Europe's monetary sovereignty, support efficiency, competitiveness, and strategic autonomy, and enhance resilience to the risks of our times.

[9] See in detail the contribution of Dessislava Guetcheva-Cheytanova in this volume.

Enhancing cross-border payments. Reconciling technological innovation and legal requirements: the model of BIS Innovation Hub Project "Nexus"

Dessislava Guetcheva-Cheytanova*

1 Introduction

The development and adoption of domestic fast payment systems started already prior to 2000 and has significantly accelerated over the past decade. Today, more than 120 countries around the world have access to fast payments systems, although in some countries, these systems remain in the early stages of adoption. This growth is driven by the clear economic benefits such systems offer, including improved payment efficiency, enhanced financial inclusion, stimulated innovation, and increased competition.[1]

At the same time, cross-border payments have been also increasing, driven by the globalisation of trade and investment, as well as migration flows. While domestic fast payments are increasingly becoming available across jurisdictions, the adoption of efficient cross-border fast payment systems continues to be a challenge due to high costs, slower processing speeds, limited accessibility, and insufficient transparency when compared to domestic payments. Indeed, cross-border payments are inherently more complex than domestic ones because they involve multiple systems, currencies, and legal frameworks.

Recent technological advancements have accelerated innovation in payment systems, offering opportunities to address some of the challenges associated with cross-border payments. However, a notable barrier to leveraging these technologies for improving cross-border payment systems is the divergence in legal and regulatory frameworks across jurisdictions.

Such divergence can lead to potential conflicts of law and regulation between sending and receiving jurisdictions, leading to legal uncertainty and disputes. Key areas of difference in legal and regulatory frameworks include settlement finality, anti-money laundering and counter-terrorism financing (AML/CTF), sanctions screening and fraud prevention requirements, access rules, data protection and privacy, restrictions on foreign investments and currency holdings for residents,

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[1] Aurazo, J., Banka, H., Galicia, G., Ramteke, N., Shreeti., V and Tanaka K. (2025), "Pricing in fast payments: a practical and theoretical overview", *BIS Working Papers*, No. 1295.

banking supervision requirements, security and resilience requirements, and dispute resolution. The lack of clear and universally adopted rules establishing a hierarchy of differing laws and regulations, as well as, diverging legal interpretations across jurisdictions add additional complexity.

Rulebooks for domestic fast payment systems generally do not address legal issues related to cross-border payments. For example, when failed payments or other problems occur within domestic fast payment systems, the final settlement and the dispute resolution processes are governed by the fast payment system's rules, which are specifically designed in accordance with the domestic legal system under which the payment is executed. Similarly, compliance and reporting requirements for all parties involved in the transaction are also based on the domestic legal system.

2 International cooperation as key parameter

International collaboration to align domestic legal and regulatory frameworks is essential for realising the economic benefits of improved cross-border payment systems, which modern technology has the potential to facilitate. In line with its mandate, the Bank for International Settlements (BIS) fosters collaboration between central banks, regulatory bodies, and supervisory authorities to explore solutions that address disparities in national legal and regulatory frameworks.[2]

In 2020, the G20 acknowledged that "faster, cheaper, more transparent and more inclusive cross-border payment services, including remittances, would have widespread benefits for citizens and economies worldwide, supporting economic growth, international trade, global development and financial inclusion". As a result, the G20 prioritised the enhancement of cross border payments across four key dimensions: cost, speed, access and transparency, while maintaining their safety and security.

To achieve this goal, the Financial Stability Board (FSB) was tasked with coordinating the development of a comprehensive roadmap to improve cross-border payments. In April 2020, the FSB conducted an evaluation of the existing arrangements and challenges in global cross-border payments.[3] In July 2020, the Committee on Payments and Market Infrastructures (CPMI) of the BIS issued its report titled "Enhancing cross-border payments: building blocks of a global roadmap".[4] On the basis of the two reports, the FSB, in coordination with the CPMI and other international standard setting bodies, developed and submitted the Roadmap for Enhancing Cross-Border Payments[5] (the "Roadmap"), which the G20 officially endorsed in November 2020.

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2 For example, through the work of the BIS Committee on Payments and Market Infrastructures (CPMI) and the BIS Innovation Hub (BISIH), as well as other BIS committees, meetings, and research.

3 Financial Stability Board, *Enhancing Cross-Border Payments, Stage 1 report to the G20*, 2020.

4 Bank of International Settlements, *Enhancing cross-border payments: building blocks of a global roadmap*, Stage 2 report to the G20 – technical background report, 2020.

5 Financial Stability Board, *Enhancing Cross-border Payments, Stage 3 roadmap*, 2020.

During the first two years of the Roadmap's implementation, foundational work was conducted through stocktakes and analyses. This included examining a broad spectrum of issues, technologies, and arrangements, both current and future. Dedicated workstreams developed specific proposals and best practices, updated guidance, and explored ways to improve existing, as well as establish new multilateral arrangements for cross-border payments.

In October 2022, the FSB published a prioritisation plan and engagement model for taking the Roadmap forward (the "Plan").[6] The Plan marked a turning point, emphasising the need to transition from preparatory work to the implementation of practical projects aimed at enhancing cross-border payment arrangements. The ultimate goal is to achieve the quantitative targets set for cross-border payments by the end of 2027.

The Plan identified three interconnected themes (which included alignment of legal, regulatory and supervisory frameworks) for orientating and focusing the next phase of the Roadmap:

1. Payment system interoperability and extension;
2. Legal, regulatory and supervisory frameworks; and
3. Cross-border data exchange and message standards.

Based on previous analyses and stakeholder feedback, the FSB, the CPMI, and partner organizations identified specific actions to be carried out under these three themes to drive the implementation of the Roadmap and meet the 2027 targets.[7] One such action was the completion of the BIS Innovation Hub (BISIH) Project "Nexus".[8]

3 BISIH Project Nexus

Nexus was a project carried out by the BISIH in collaboration with the central banks and payment system operators of Indonesia, Malaysia, Singapore, the Philippines, and Thailand. The objective of Nexus was to explore the interlinking of national fast

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6 Financial Stability Board, *G20 Roadmap for Enhancing Cross-border payments, Priorities for the next phase of work*, 2022.

7 Financial Stability Board, *G20 Roadmap for Enhancing Cross-border Payments*, 2023.

8 Project Nexus is one example of how technological innovation can be reconciled with legal requirements for enhancing cross-border payments. However, there are also other BISIH projects relevant to cross-border payments: Project Agorá – while Nexus is a bridge platform interlinking existing national systems ("network of networks" approach), Agorá explores how tokenisation of central bank money and commercial bank deposits on a so called, "unified ledger" programmable platform can enhance cross border payments and improve the correspondent banking model; Project Meridian FX explored interoperability of wholesale payment infrastructures for settlement of FX transactions across different jurisdictions and types of infrastructures; Project Rialto explores solutions for addressing frictions in retail cross-border payments related to settlement of transactions involving different currencies.

payment systems,[9] including the governance, risk management, and oversight considerations involved.

In 2022, the Nexus team, working with the Bank of Italy, Central Bank of Malaysia, Monetary Authority of Singapore, Banking Computer Services (BCS) in Singapore and PayNet in Malaysia, built a working prototype to connect test versions of three established instant payment systems in the Eurosystem, Malaysia, and Singapore. This proof of concept confirmed the technical viability of the Nexus model.

In 2023-24, the Nexus team worked closely with the central banks of Indonesia, Malaysia, the Philippines, Singapore, and Thailand, which expressed interest in using the Nexus blueprint[10] as a framework to achieve their public commitment to interlink their domestic instant payment systems (IPS(s)). The team tested the Nexus model against the operational realities of these payment systems and consulted with central banks, standard-setting bodies, IPS operators, and commercial banks around the world to ensure Nexus was scalable and interoperable with IPSs beyond the five countries.

Nexus simplifies IPS interlinking by standardising how IPSs connect to one another. It consists of a payment scheme supported by software (Nexus Gateways), which enables IPSs to communicate using application programming interfaces (APIs) and ISO 20022 messaging standards. In essence, instead of requiring each IPS to create bespoke links with others, Nexus provides a standardised “bridge” platform. Each IPS connects once to Nexus and gains access to all other participating systems. This approach facilitates cross-border payments for individuals and businesses that hold accounts with banks or non-bank payment service providers (PSPs) eligible to join their domestic IPS.

Unlike a typical domestic IPS, Nexus does not maintain a ledger of balances or obligations between financial institutions, nor does it hold funds or accounts for PSPs. Instead, Nexus serves as the coordinator of two separate but linked instant payments across two separate IPS. These two separate payments are processed independently by each IPS in almost the same way as regular domestic payments.

Nexus adheres to domestic regulatory requirements and respects each country’s sovereign monetary and financial stability policies. It incorporates a robust governance solution to address potential discrepancies between legal provisions in different jurisdictions, covering areas such as payment finality, AML/CTF, sanctions and fraud screening rules, including treatment of fraudulent transactions and rectifications of errors, as well as, access, data protection and privacy, banking reporting and supervision requirements, and dispute resolution. Each participant remains responsible for compliance with the laws and regulations of their jurisdiction, including real-time AML/CTF, sanctions, and fraud screening, as Nexus itself does

[9] Interlinking arrangements for cross border payments can be defined as a set of contractual arrangements, technical links and standards, and operating components between payment systems of different jurisdictions, allowing their respective payment service providers (PSPs) to transact with one another as if they were in the same system, Bank of International Settlements, *Interlinking payment systems and the role of application programming interfaces: a framework for cross-border payments*, BIS CPMI Report to G20, 2022.

[10] Bank of International Settlements, Project Nexus: enabling instant cross-border payments, 2025.

not perform such screenings – again, retaining sovereignty of each jurisdiction in these critical areas.

The experimentation phases of Nexus having proved its viability. In March 2025, the Nexus Global Payments (NGP) entity was established by the central banks and IPS operators of India, Malaysia, the Philippines, Singapore, and Thailand. NGP, a not-for-profit company limited by guarantee, incorporated in Singapore, was established to operationalise Nexus for facilitating cross-border payment between participating countries while scaling the platform to welcome additional participants. With the establishment of NGP, Nexus transitioned from a BISIH experimental project to a real-world collaborative effort for enhancing cross-border payments.

NGP is tasked with governing and managing the Nexus scheme, and for producing and managing the Nexus rulebook. The rulebook will define the eligibility requirements, rights, and obligations of participants in the scheme, as well as the processes, rules, and technical standards governing payments through Nexus. The Nexus rulebook will not override but will complement domestic payment systems rulebooks.

As indicated above, a significant legal challenge for cross-border payments are the differences in the rules for clearing and settlement across different jurisdictions. Nexus addresses this by processing payments sequentially through the IPS of the sender's country and the IPS of the recipient's country. In other words, Nexus acts as the coordinator of two separate, but interconnected payments across two distinct IPSs. Each IPS processes these payments on the same way as any other domestic payment. Importantly, Nexus does not require changes to the domestic clearing and settlement processes of participating IPSs. If a payment is rejected for any reason, Nexus ensures it is reversed, and the funds are returned to the sender. This design allows Nexus to operate without altering the clearing and settlement processes of domestic IPSs, resolving legal questions around payment finality in the same way as domestic transactions.

Regarding compliance with domestic legal requirements related to AML/CTF, sanctions, and prevention of fraud screenings, Nexus places responsibility on each participant to adhere to the laws and regulations of their respective jurisdictions. Both the sending and receiving payment service providers are required to perform AML/CFT/sanctions/fraud screening in real time. Nexus itself does not perform such screenings. Also from this perspective, the autonomy of domestic jurisdictions remains untouched.

In terms of data protection, participants in Nexus are responsible for complying with the data protection and privacy regulations that are applicable to them. The Nexus rulebook will require that participants secure adequate consent or another legal basis for collecting and processing data. For cross-border data transfers, participants must enter into data-sharing agreements, pursuant to which they undertake to comply with the data protection, data sovereignty and data residency obligations (if any) that would be applicable to them as a data importer or exporter, respectively.

4 Conclusion

Nexus demonstrates the potential of international collaboration and technological innovation for transforming cross-border payments. Through addressing legal, regulatory, and operational challenges, Nexus aims to make cross-border payments as seamless and efficient as domestic transactions. By respecting sovereign legal and regulatory frameworks for ensuring payment finality; access to, resilience and security of domestic payment systems; AML/CTF, sanctions screening and data rules; and, at the same time, enabling interoperability of payment systems across borders, Nexus demonstrates how through international collaboration, cross-border payments can be enhanced, while preserving sovereign control over monetary and financial stability policies. As we move closer to the G20 roadmap's 2027 target, continued international collaboration, in particular for aligning legal, regulatory and supervisory requirements, will be essential to scale and expand the initiatives for enhancing cross-border payments, so that cross-border payments can become faster, cheaper, more transparent, and more inclusive for everyone, while ensuring their safety and security.

European payments resilience

Ruth Wandhöfer *

1 Introduction

The European payment ecosystem strives to enhance resilience and sovereignty amid rising global geopolitical and technological challenges. Europe is focused on reducing dependence on non-European payment platforms to safeguard financial autonomy. Key initiatives include the development of the digital euro, the expansion of Open Banking reach and the potential for creating a more substantial euro denominated stablecoin market. Combined with strong regulatory measures, harmonised infrastructure and cooperation, these efforts safeguard economic sovereignty, reinforce the stability of critical payment infrastructures, increase opportunities in the cross-border payments space and support Europe's digital and financial future.

2 European payments integration thus far

A cornerstone of this transformation has been the delivery of the Single Euro Payments Area (SEPA), which, since its inception in 2002, has continuously improved cross-border payments across Europe. The creation of harmonised processes and procedures for euro denominated credit transfers and direct debits travelling across the European Union (EU) and the European Economic Area (EEA) and certain additional territories has been a huge step towards the creation of the Single Market itself.

With SEPA Credit Transfers (SCT), introduced in 2008, and SEPA Direct Debits (SDD), arriving by 2009, transaction volumes have seen a continuous increase across the Euro area and the Single Market more broadly. The impact of SEPA has been monumental. The Eurosystem's introduction of the Target Instant Payment Settlement system (TIPS) in 2018 had a significant role to play in this growth. SEPA's work has culminated in a payments ecosystem that is not only efficient and secure but also drives economic integration by making it as simple to pay across borders as within national boundaries.

However, SEPA would not have been a success without the Payment Services Directive (PSD), the regulatory regime that would open the floodgates for FinTech and revolutionise payments across Europe and globally. The first iteration of the PSD – PSD1 – adopted in 2007 and implemented by 2009, introduced Payment Institutions as a new category of non-bank payment service providers. From then on

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non-banks were able to offer digital payment services across the European market and start competing with the banking sector, which, up until then monopolised the offering of payment services. This new regime encouraged FinTech innovations, which were particularly embraced by users following the financial crisis. In parallel, PSD1 also harmonised the conduct of business rules for all payment service providers, banks, e-money institutions and Payment Institutions when it came to transparency, execution times, refund rules and more. In this way PSD1 formed the basis for SEPA to be rolled out across the Single Market.

The next iteration of the Payment Services Directive – PSD2 – in force since 2016, represented a further attempt of the EU to encourage the growth of FinTech in the European economy. PSD2 was all about introducing Open Banking and, with it, a more robust level playing field for FinTechs in the European payment space.

More specifically PSD2 introduced a new category of so-called third-party providers (TPPs) that were permitted to access the payment account information of customers (subject to customer consent) that hold their accounts at Account Servicing Payment Service Providers (ASPSP), i.e. a credit institution or an e-money institution (ASPSPs can also act as TPPs). In doing so, the PSD2 enabled new services – payment initiation (PIS) and account information (AIS) – where TPPs were able to embed themselves into the broader digital payment economy. Application Programming Interfaces (APIs) became a key technological tool to facilitate account-related data transfers between ASPSPs and third parties. This opening up of payment account data unlocked the opportunity to develop new services around payments going far beyond the payment itself, supporting the concept of Open Banking and ushering in the prospect of Open Finance as the next step in what increasingly became a data-driven economy; e.g. data services that could automate mortgage applications, improve credit scoring of individuals, facilitate instant consumer loans, SME lending, foreign exchange (FX) transactions and more.

However, PSD2 is not without its critics. Several barriers for TPP activities, both PISPs and AISPs, have arisen since the implementation of PSD2, ranging from poor bank APIs to forced customer redirection, and additional bank-triggered SCA requirements to name a few, which ultimately resulted in significant failure rates of customers trying to use PIS. These challenges for the TPP FinTech market would need to be addressed by the next iteration of PSD and in June 2023 the European Commission published a revision of PSD2, which came in the form of a package, i.e. a proposal for the third Payment Services Directive 3[1] (PSD3) and a proposal for a Payment Services Regulation[2] (PSR). Working towards the final adoption of these two regulatory instruments some last-minute changes to the text are still creating unnecessary frictions, where the delivery of adequate API functionalities and contingency measures for unavailable dedicated interfaces in banks, amongst other elements, are critical for the success of TPP FinTechs in the market.

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1 Proposal for a Directive of the European Parliament and of the Council on payment services and electronic money services in the Internal Market amending Directive 98/26/EC and repealing Directives 2015/2366/EU and 2009/110/EC, COM/2023/366 final.

2 Proposal for a Regulation of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010, COM/2023/367 final.

On the positive side, the creation and implementation of SEPA Instant Credit Transfers (SEPA Inst) has proven to be a vital driver of Open Banking, enabling real-time payments that respond to the demands of a digital-first economy. This effort was further supported by the introduction of the SEPA Instant Payments Regulation (2024/886), which required PSPs to be able to receive SEPA Instant Credit Transfers from January 2025 and will oblige providers to be able to send SEPA Inst transactions by October 2025.

Recognizing the value of pan-European solutions, the European Payments Initiative (EPI) launched, in July 2024, “Wero,” a new digital payment platform that directly challenges established global players by offering a secure, Europe-centric alternative. According to the EPI, the Wero digital wallet is expected to reach 8 million transactions by November 2025, with initial adoption focused on Germany, France, and Belgium. This rapid uptake demonstrates the appetite for European-led innovation and signals a pivotal step toward regional payment sovereignty, providing viable alternatives to the existing dominant global card schemes.

In summary, Europe’s concerted efforts in harmonizing digital payments, supporting Open Banking and rolling out pan-European alternatives like Wero are fundamentally changing the landscape, reducing fragmentation, and positioning the continent as a global leader in payment innovation. The drive toward harmonization, combined with relentless innovation in payment solutions and Open Banking, represents Europe’s bid to secure its financial future and foster a robust, digitally resilient payments ecosystem. The trajectory is clear: a unified, dynamic, and competitive European financial sector prepared to meet the demands of tomorrow.

3 The role of the central bank

Independent central banks have long served as the anchor of trust within Europe’s financial system, ensuring monetary stability and acting as the infrastructure of last resort during periods of crisis. Their traditional mandate revolves around safeguarding the value of money, maintaining confidence in payment systems and supporting the smooth functioning of financial markets. As technology in the monetary sphere accelerates, central banks are now confronting new opportunities and challenges involving digital currencies and innovative payment infrastructures.

The anchor function exerted by central bank money is central to Europe’s monetary architecture. This money, whether in physical or digital form, provides a stable baseline for the entire financial ecosystem, offering a guarantee of value and liquidity even in times of volatility. Historically, central bank reserves and cash have underpinned everyday transactions, interbank payments, and settlement operations, reinforcing public confidence in the system. As digitalization transforms commerce and finance, the mechanisms through which central banks anchor trust are undergoing a profound evolution.

3.1 Retail Central Bank Digital Currency (CBDC): opportunities and concerns

One major development is the exploration of retail central bank digital currencies (CBDCs). A retail CBDC, such as a Digital Euro, under active investigation by the ECB at the time of writing, represents digital cash issued by the central bank and made available to the public, functioning alongside private sector digital payment solutions as well as physical notes and coins. The prospect of the issuance of retail CBDCs offers significant advantages, particularly the potential to strengthen monetary sovereignty by ensuring that the public has ongoing access to risk-free central bank money, irrespective of changes in private banking or payment infrastructure. This capability gains importance as cash usage continues to decline across much of Europe, which has seen accelerated decline in recent years particularly after the pandemic. For example, in the eurozone in 2024, just over half of all transactions (52%) were paid in cash, down from higher levels previously, and the value share of cash transactions was 39%.[3]

Retail CBDCs holds the promise of transforming the financial landscape in Europe, but it is imperative that its implementation does not erode bank deposits, create narrow banking ecosystems, or stifle the burgeoning market of third-party payment service providers. Rather, retail CBDC initiatives should reflect a public-private partnership model that fosters innovation and collaboration across the financial sector.

3.1.1 Safeguarding bank deposits and the broader banking model

One of the central concerns with the eventual introduction of a retail CBDC is the potential for substantial outflows of deposits from commercial banks to digital euro accounts. Bank deposits form the foundation of credit creation and underpin the stability and profitability of the banking sector. Abrupt or large-scale deposit outflows in favour of risk-free central bank holdings could weaken banks' ability to lend, drive up funding costs, and ultimately prompt restructuring toward "narrow banking," where institutions merely hold and transmit central bank money rather than actively providing credit and financial services.

To address these risks, European policy-makers and the ECB are considering placing firm caps on individual CBDC holdings – figures between €1,000 and €3,000 have been discussed, although there is no certainty, at the time of writing, as to what those caps might eventually be – which are designed to prevent the use of digital euro as a primary store of value and to minimize the risk of rapid disintermediation. Models indicate that such measures could limit deposit outflows to approximately ten percent of the household deposit base, helping to contain the impact on banks' liquidity and lending capacity.

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3 Clipal, R., Zamora-Perez, A. (2025), "Cash is alive… and somewhat young? Decoupling age, period and cohort from euro cash use", *ECB Economic Bulleting*, 2025.

It is also crucial to develop CBDCs in a way that preserves privacy while complying with anti-money laundering and counter-terrorism standards, further enhancing public trust in the system.

3.1.2 Preserving diversity in third-party payment services

Europe's market for TPPs has witnessed notable expansion in recent years, bringing competition, consumer choice, and technological innovation. It is critical that retail CBDCs do not inadvertently undermine these vital market participants. A hasty or overly broad rollout of digital central bank money for retail use could crowd out private sector solutions and diminish incentives for TPP investment and development.

Ensuring the continued vibrancy of this ecosystem means making interoperability a cornerstone of CBDC design. A Public digital currency should complement - not compete with - private payment platforms, facilitating seamless integration and healthy competition. Regulatory frameworks should be designed to provide clear standards for access and innovation, inviting established and new PSPs to connect to the CBDC infrastructure via open APIs and other collaborative technologies.

3.1.3 Public-Private partnerships as engines of innovation

Optimal CBDC architecture in Europe must be built atop a foundation of genuine public-private partnership. Rather than operating as a monolithic solution, digital central bank money for retail use should draw upon the expertise, agility and imagination of private market actors, alongside the trust and stability assured by central banks. Joint innovation sandboxes, co-development mechanisms, and continual feedback loops should be established to adapt CBDC offerings in response to evolving consumer, business, and regulatory needs.

The ECB is very cognisant of these aspects as part of the Digital Euro initiative and is commended for its approach of inclusive engagement with all stakeholders in the broader pursuit of a Digital Euro – ultimately both for retail and wholesale usage – that would be serving as both a resiliency and innovation platform, bringing central bank money into the digital age.

In sum, a collaborative approach serves two essential purposes: first, it protects traditional banking functions and the dynamism of the payment services market; and second, it supports Europe's strategic ambitions for digital competitiveness, resilience, and sovereignty. The future of the European financial system will be best secured not through isolation, but through partnership, inclusivity, and targeted incentives that promote progress without sacrificing stability.

3.2 Wholesale CBDC innovation

While retail CBDC captures significant public attention, wholesale CBDC potentially holds even greater promise for efficiency and resilience within financial markets. Wholesale CBDC refers to digital central bank money restricted to use by financial institutions and market infrastructure providers for interbank payments and settlement of large-value transactions over securities and derivatives. By leveraging blockchain or distributed ledger technology, wholesale CBDC could drastically streamline settlement processes, eliminate counterparty risk, and unlock cost savings across a wide array of financial operations.

When considering the cross-border dimension, interoperability between emerging wholesale CBDCs could usher in a new era of optimised wholesale payments in central bank money, reducing the current reliance on the challenging correspondent banking model and significantly improving the economic efficiency of cross-border payments, due to the deployment of central bank money as High Quality Liquid Assets (HQLA) under the Basel framework.

3.3 Cyber risks and security: a central focus

With both retail and wholesale CBDC relying heavily on novel digital technologies, cyber risks loom large as a fundamental concern. Central banks, which have always prioritized strong security practices, now face a rapidly changing threat landscape characterized by sophisticated attacks, added vulnerabilities, and the potential for systemic contagion. As a result, cyber resilience must be woven into every aspect of CBDC design, implementation, and operation. For example, any significant cyber-attack on the Digital Euro could risk a collapse of trust, leading to potentially devastating impacts on the overall initiative, associated investments and ultimately impacting the reputation of the ECB.

Key elements of effective risk management include multi-layered encryption, rigorous authentication protocols, continuous monitoring, and transparent recovery plans. Central banks are also collaborating with law enforcement, cybersecurity agencies, and private technology providers to stay ahead of threats and build collective resilience. Cyber technology innovators that provide evidence-based Direct Threat Intelligence with the ability of automatic orchestration of this specific threat intelligence into a central bank’s security stack, will become essential to central banks’ cyber resilience in an era of Artificial Intelligence driven cyberattacks.

In conclusion, central banks need to embrace innovation while remaining steadfast in their mission to anchor trust and stability in the financial system. Whether through retail CBDC, wholesale infrastructure reform, or robust cybersecurity frameworks, the institution’s fundamental role is being reimagined for the digital age, with a clear commitment to both public welfare and market vitality. Central Banks will not only continue to play the role of “Lender of Last Resort”, but also need to ensure to be the “Infrastructure of Last Resort” if other systems fail.

4 Stablecoins enter the scene

Stablecoins have become central to the crypto economy. As of H3 2025, on-chain stablecoin transaction volume exceeded $151 billion globally, while total market capitalization stood at more than $312 billion, led by USDT (Tether) with over $177 billion and USDC (Circle) at more than $75 billion.[4] The majority of stablecoins are deployed on the Ethereum network.

Stablecoins are expected to play an increasingly important role in international remittances, and especially in digital asset trading - over 80% of crypto trades on centralised exchanges use stablecoin pairs. Emerging markets, notably in Southeast Asia and Latin America, are strong adopters, often using USD-backed stablecoins to hedge against fiat volatility and facilitate rapid, low-cost transfers.

From a traditional cross-border retail payments perspective the share of stablecoin transactions settled in stablecoins is currently estimated at around 3% of the total global cross-border payments volume. When isolating payments use cases, stablecoins accounted for about $6 trillion in transactions, representing roughly 3% of the estimated $195 trillion in global cross-border payments volume.[5]

This share is expected to grow substantially in the next five years, with projections suggesting stablecoins could capture up to 20% of global cross-border payments by 2030, potentially creating a $60 trillion payments market opportunity.[6] The growth is driven by increasing adoption of blockchain-enabled payment solutions by both fintech disruptors and traditional financial institutions, particularly in emerging markets with high payment costs and slow settlement speeds.

Despite their utility, stablecoins face mounting scrutiny over their abuse in sanctions evasion and the violation of AML/KYC/CTF rules. Pseudonymous transactions, weak issuer controls, and rapid cross-border movement enable actors to conceal illicit flows, breach sanctions, and evade compliance frameworks. DeFi platforms further complicate enforcement, as decentralized trading and lending protocols facilitate private, unregulated transfers of stablecoins, broadening opportunities for criminal misuse.

4.1 Why Stablecoins fall short of Europe’s resilience and sovereignty objectives

Stablecoins fall short of Europe’s resilience and sovereignty objectives for several interconnected reasons. With the current level of USD denominated stablecoins in the market, their tendency to reinforce US dollar dominance undermine euro-based monetary autonomy, introduce new financial instability risks and conflict with Europe’s regulatory standards.

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4 Coin Market Cap, Top Stablecoin Tokens by Market Capitalization.

5 FCX Intelligence, The state of stablecoins in cross-border payments: The 2025 industry primer, 2025.

6 Ibid.

The current stablecoin market is dominated by USD-pegged tokens, with approximately 99% of capitalization in this category. Widespread adoption of these stablecoins in Europe risks increasing “digital dollarisation” – the shift of payments and financial flows from euro to dollar. It is thus very helpful to remember the ECB’s veto power under the Markets in Crypto Assets (MiCA) Regulation, which can be exercised in case a threat to monetary sovereignty, smooth operation of payment system and monetary policy transmission were to be identified.

Stablecoins can increase financial stability risks if asset backing or redemption rules are opaque, insufficient, or poorly regulated. Redemption risk, systemic risk from large issuers, and the prospect of sudden bank-like runs threaten Europe’s payment stability. Unlike bank deposits, stablecoins may be outside the purview of deposit insurance, resolution regimes and crisis management frameworks.

European regulations, such as the MiCA Regulation, impose strict prudential requirements, capital buffers, and operational rules for stablecoin issuers to ring-fence the EU financial system. In contrast, recent US regulation under the GENIUS Act favours rapid private sector innovation with lighter regimes for some issuers, increasing pressure on Europe and risking regulatory arbitrage. The US framework is less focused on domestic stability, and more on international adoption, which can conflict with European interests. However, MiCA imposes limits on non-euro stablecoins offered within Europe, ensuring oversight and risk containment. EU authorities can halt issuance of foreign-currency stablecoins if risks become systemic.

Stablecoins also face scrutiny over compliance with AML/KYC/CTF rules, exposing Europe to elevated risks of money laundering, terrorist financing, and sanctions breaches if offshore or poorly regulated stablecoins are used. Their rapid and pseudonymous nature further challenges European authorities in supervision and enforcement.

For the EU, the proliferation and adoption of USD stablecoins pose significant monetary and strategic risks. With 99% of stablecoin capitalization currently denominated in dollars and leading US card networks (Visa, Mastercard) integrating stablecoins into their infrastructures, there is a credible threat of “dollarisation” in cross-border payments and even some domestic contexts. Merchants, platforms, and end-users may increasingly settle in USD tokens, eroding euro usage, weakening the ECB’s monetary sovereignty, and raising funding costs for euro area governments as demand for euro-denominated debt declines.

Stablecoins also facilitate capital mobility outside conventional banking channels, increasing the vulnerability of the European financial system to shocks and speculative flows. If unchecked, a digital “euro shortage” could mirror historic episodes of dollarisation in emerging markets, impeding the effectiveness of European monetary policy and undermining financial stability.

Without robust euro-denominated alternatives, European payment systems risk reliance on US platforms, reducing strategic autonomy in times of geopolitical tension or crisis.

In summary, stablecoins as currently structured do not align with Europe's resilience and sovereignty objectives due to dollar dominance, financial stability risks, regulatory inconsistency, and strategic dependence.

4.2 Opportunities and challenges of stablecoins

The rapid rise of USD-denominated stablecoins, now further underpinned by United States regulation through the GENIUS Act, is reshaping global finance and reinforcing the supremacy of the dollar in digital and traditional markets. This phenomenon not only extends the reach of the dollar but also has significant fiscal and strategic implications for the United States, while presenting policy and systemic risks for the European Union.

4.2.1 The GENIUS Act

Two years after the adoption of MiCAR in the European Union, the United States have recently adopted the Guiding and Establishing National Innovation for US Stablecoins Act, also called the GENIUS Act, in July 2025. This act provides firm regulatory guardrails for issuers, mandating 1:1 reserves held in safe assets like US Treasury debt, strict disclosure, and comprehensive oversight by US authorities. Issuers must be insured depository institutions or approved non-banks, report on reserves, and comply with robust anti-money laundering rules.

These measures have catalysed the further proliferation of USD-denominated stablecoins, making them even more attractive as a digital dollar instrument and instilling market confidence in their safety, liquidity, and regulatory soundness. Global projections suggest the stablecoin market could surge from $230 billion to $2 trillion by 2028, massively increasing digital dollar liquidity worldwide.

4.2.2 Strengthening the US dollar and the US budget

A key effect of this growth is to bolster US economic and strategic interests. Because each dollar stablecoin must be fully backed by reserves - predominantly short-term US Treasuries - stablecoin demand translates directly into persistent, large-scale investment in US debt. Stablecoin issuers are now among the largest holders of US Treasuries, surpassing many sovereign nations. As foreign central banks reduce their Treasury holdings, stablecoins increasingly fill this gap, creating sustained demand for US government borrowing and indirectly lowering funding costs for the US Treasury.

In effect, USD stablecoins operate as a novel, market-driven channel of indirect debt issuance. This dynamic allows the US to expand its digital and fiscal reach, increasing global reliance on dollar-denominated assets while exporting financial stability risks to other economies. On the flipside, a potential crisis of a major USD stablecoin issuers could have an immediate adverse impact on US Treasuries, a risk that will need to be considered more as this market segment scales.

4.2.3 European policy options: Euro stablecoins, budgetary containers, and the Digital Euro

Europe faces a number of pivotal choices in responding to this challenge.

Support for Euro-denominated Stablecoins: The ECB and the European institutions could promote a robust regulatory environment for euro-pegged stablecoins, ensuring high transparency, strong oversight, and systemic integration. A diversified stablecoin ecosystem, pairing private issuers with regulatory credibility, can serve legitimate market needs while reinforcing the international role of the euro. At the end of September 2025 nine European banks have announced a collaboration to issue a euro denominated stablecoin under the MiCA regime, to accompany the provision of further digital value-added services such as stablecoins wallets and custody. With USD-backed stablecoins dominating the global stablecoin issuance market, the euro denominated market capitalisation is still very small, but could see a significant boost through this initiative, which is expected to receive the approval by European policy makers

Euro area Budgetary Container for Debt Issuance: The EU could consider establishing a policy framework – or “budgetary container” – facilitating the purchase of euro area sovereign debt by stablecoin providers. This approach would link private digital euro liquidity directly to public sector financing, helping to mirror the US model while supporting the euro area’s fiscal position.

Focusing on the Digital Euro and Open Banking: A credible digital euro, designed for both retail and wholesale use, can serve as a resilient model for intra-Single Market euro transactions, limiting the need for USD stablecoins in payments and settlement across that region. Additionally, Europe’s strong push toward Open Banking and account-to-account (A2A) payment networks helps diversify payment rails, reducing reliance on US-centred systems (Visa, Mastercard, and USD stablecoins). By combining these strategies, Europe can promote sovereignty, consumer choice, and market resilience.

In summary, the US, through regulatory clarity and strategic support, is leveraging stablecoins to fortify its currency’s global dominance and maintain practical fiscal advantages. For Europe, the path forward requires a coordinated, multi-pronged response – support for euro stablecoins, investment in the Digital Euro, integration of Open Banking solutions, and potentially new fiscal structures for linking digital liquidity to euro area debt.

5 A future for cross-border payments

Cross-border payments remain a fundamental element of global commerce, but are still plagued by perennial problems: they are slow, in-transparent, risky, and expensive. For both retail and institutional users, legacy payment networks and correspondent banking arrangements struggle to keep pace with customer and market needs, prompting a surge in innovation and reform within the sector.

Retail cross-border payments are especially problematic. Challenges include delayed settlements – often taking days – opaque fee structures, lack of universal access, and limited transparency that makes it hard for end-users to track transactions or recourse errors. These inefficiencies hit migrant workers, SMEs, and consumers hardest, leading to high costs and often unpredictable outcomes.

Recognizing these issues, the G20 published, in 2020, an ambitious cross-border payments roadmap, setting concrete targets for speed, cost, access, and transparency across wholesale, retail, and remittance segments by 2027. These include improving system interoperability, strengthening of legal and regulatory frameworks, enhancing data exchange, reducing average remittance costs to below 3%, increasing transparency and improving user access.

Correspondent banking, the backbone of cross-border payments, is under pressure from consolidation, rising compliance costs, shrinking networks, and competition from new entrants like FinTech and blockchain-based platforms. Traditional models are adapting, with a shift toward real-time data flows, advanced compliance tools, and the adoption of technologies like APIs, cloud computing, and distributed ledger systems.

While some banks believe evolution within the existing framework is sufficient, others argue for deep reinvention. Models for the future include peer-to-peer networks, purpose-built digital clearing platforms, interoperability layers for digital assets and regional payment hubs, all aimed at boosting cost-efficiency, speed, and security.

Stablecoins – digital tokens pegged to fiat currencies – have attracted growing interest for institutional cross-border payments due to their instantaneous settlement, low cost, and programmability. However, adoption faces major legal, operational, and strategic challenges. These include regulatory uncertainty, divergent jurisdictional policies, counterparty risks, compliance with AML/KYC rules, and concerns over the underlying asset quality.

With nearly all major stablecoins denominated in dollars, their rapid adoption by global corporates and banks could, as mentioned earlier, drive de facto “dollarization,” reducing usage of alternative currencies and limiting monetary sovereignty in many regions.

5.1.1 Emerging alternatives: mBridge, BIS Projects Nexus, and Agora

In order to achieve resilient paths for cross-border payments, such as creating payment system interoperability, new models are emerging.

Project mBridge, a 2022 collaboration between the BIS Innovation Hub Hong Kong Centre, the Hong Kong Monetary Authority, the Bank of Thailand, the Digital Currency Institute of the People's Bank of China and the Central Bank of the United Arab Emirates, developed and delivered a new blockchain – the mBridge Ledger – custom-built by central banks for central banks to serve as a specialised and flexible platform for implementation of multi-currency cross-border payments in central bank digital currencies (CBDCs). The pilot project advanced multi-CBDC experimentation by settling real value directly on the platform and on behalf of corporate customers. During experimentation over US$12 million was issued on the platform, enabling over 160 payment and FX PvP transactions of a total exceeding US$22 million in value.

BIS's Project Nexus aims to supercharge instant payment system interoperability by allowing different countries' real-time payment systems to connect through a single platform. Nexus promises near-instant, 24/7/365 cross-border retail and small-scale payments, reducing reliance on SWIFT, US networks, or individual organic connections.

Project Agora, another BIS initiative, is an ambitious attempt to enable wholesale cross-border payments and settlement via tokenized deposits for financial institutions. Unlike stablecoins, Agora is designed to maintain robust links to national financial systems, prioritizing compliance, transparency, and resilience rather than relying on private tokens or USD-pegged assets.

5.1.2 The ECB: DLT Initiatives and Pilot Projects

The ECB is proactively exploring distributed ledger technology (DLT) for cross-border payments. Recent milestones include the conclusion of Eurosystem exploratory work, in the second half of 2024, with CeBM settlement on DLT platforms, the Pontes project (including its Pilot) and the longer-term Project Appia, whose aim is to explore the settlement, in CeBM, of wholesale transactions over assets held on DLT platforms. The approach assesses how instant settlement, smart contracts, and digital assets can streamline wholesale euro area payments while retaining regulatory oversight and monetary sovereignty.

5.1.3 Wider lessons for payment sovereignty and operational resilience

The future of cross-border payments will require a multi-layered, interoperable architecture that balances innovation, regulatory protection, and resilience against cyber threats. Maintaining national payment sovereignty is crucial as the spread of dollar-denominated stablecoins and US payment networks threatens to push other currencies and financial systems to the margin.

The success of this, however, hinges on several factors.

- Harmonizing message standards (e.g., ISO 20022), legal frameworks, and compliance practices.
- Investing in public-private infrastructure - combining central bank platforms, commercial clearinghouses, FinTech rails, and Open Banking.
- Prioritizing operational resilience, with robust cybersecurity, real-time fraud controls, and scalable architectures.

In summary, transformative projects such as mBridge, Nexus, Agora, and the ECB's DLT pilots will help shape a more resilient, transparent, and efficient era for cross-border payments. Stablecoins may play a role but should be balanced with interoperable public infrastructures that safeguard sovereignty and systemic stability. As these innovations move from experiment to commercial reality, the global payment ecosystem must adapt – writing the future through collaboration, technology and bold reform.

6 Conclusion

European payment resilience is not only about ensuring security and continuity but also about strengthening sovereignty in the financial domain. As global payment infrastructures are often dominated by non-European actors, Europe faces the risk of strategic dependence that could undermine its economic and political autonomy. Payment sovereignty therefore becomes a crucial dimension of resilience, ensuring Europe retains control over its financial flows, regulatory standards, and critical infrastructures. Initiatives like the European Payments Initiative and the potential introduction of a digital euro highlight the continent's determination to reduce reliance on external providers and bolster its capacity for self-determination in payments.

Resilience also requires technological sovereignty, where Europe invests in secure, interoperable, and innovative payment solutions developed within its jurisdiction. This strengthens trust not only within the Single Market but also at the global level, positioning the EU as a competitive and independent player. Paired with frameworks such as the Digital Operational Resilience Act (DORA), these measures aim to protect against financial disruptions, cyber threats, and geopolitical pressures.

In conclusion, European payment resilience is inseparable from sovereignty: safeguarding operational stability, fostering innovation, and ensuring that Europe maintains control over its financial ecosystem in a hyperconnected yet fragile global landscape.


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Part IV

Extraterritoriality, equivalence, and mutual recognition

Introduction

Part 4 brings together three legal concepts that govern the interconnection between different legal orders: extraterritoriality, equivalence, and mutual recognition. These three concepts illustrate concrete applications of the dilemma between autonomy and multilateralism. Balancing these two values is a delicate exercise. While the EU may champion multilateralism, it cannot build it alone; cooperation is essential, and such cooperation is not always forthcoming. On the other hand, autonomy should not devolve into insularity. Both from an economic and international law perspective, connections between legal orders are necessary. Autonomy and multilateralism are not mutually exclusive, but this Part goes beyond this truism by exploring how legal orders – and the EU in particular – can specifically manage their relationships.

In his contribution, Matthias Lehmann argues that mutual recognition best promotes cross-border activity when there is robust trust, clear safeguards, and reciprocal commitments but is fragile outside institutionalized cooperation. Equivalence, on the other hand, offers a realistic, pragmatic path to openness, enabling deference to foreign rules while preserving domestic control through conditional, reviewable determinations. And these are very valuable attributes in times of geopolitical uncertainty. Lehmann also suggests embedding transparency, objective criteria, and periodic reassessment in equivalence decisions, coupled with mechanisms to suspend or tailor outcomes when standards diverge. He recommends fostering trust through supervisory colleges and data-sharing to reinforce mutual recognition, while using narrowly scoped extraterritorial measures to prevent circumvention without stifling integration.

Rafaella Assetta, in her contribution, investigated the role of equivalence as a prudential safeguard rather than merely a market access tool. She highlights how equivalence allows the EU to rely on third-country regulatory frameworks if they achieve comparable outcomes, ensuring financial stability, market integrity, and investor protection. The process involves both technical assessments by European Supervisory Authorities (ESAs) and political decisions by the Commission, reflecting strategic EU interests. Assetta contrasts equivalence with mutual recognition, noting the latter's deeper trust requirements and limited applicability to non-EU jurisdictions. She underscores the importance of monitoring equivalence decisions to manage risks and maintain trust in a shifting geopolitical context. Ultimately, she advocates for a balanced and agile approach to equivalence, aligning with EU priorities and international cooperation.

In his contribution, George Johnston examines how cross-border resolution hinges on ensuring that national resolution actions can take effect reliably across jurisdictions. He shows how legal certainty has been strengthened through single-point-of-entry strategies and contractual recognition clauses, which minimize conflict between diverging legal systems. Johnston emphasizes that statutory recognition regimes – exemplified by the EU's automatic intra-EU framework and the UK's "broad comparability" test – are essential to operationalizing the FSB Key Attributes.

His analysis of *Novo Banco* and *PrivatBank* demonstrates that courts and authorities increasingly favor broad, cooperation-oriented interpretations. However, he also highlights that the 2023 crises revealed persistent frictions, particularly in securities law, which require proactive, multi-authority engagement. Ultimately, Johnston shows how effective cross-border crisis management depends on mechanisms that foster trust, communication, and preparedness.

Inspecting the supervisory toolkit for cross-border matters: extraterritoriality, equivalence, and mutual recognition

Matthias Lehmann*

1 Terminological and conceptual issues

1.1 Extraterritoriality: an ambiguous notion

In the context of regulation, "extraterritoriality" is defined as rules that purport to regulate an actor or behaviour that takes place abroad.[1] However, the term is not as clear as one might think.[2] To illustrate, think of the prohibition to manipulate the price of a security that is listed in a certain country. Such a prohibition typically covers actions that take place in a third country.[3] There are thus good reasons to say it applies "extraterritorially". But from the perspective of the enacting state, the same rule may be considered as "territorial" – after all, it merely regulates securities that are listed on the domestic market.[4]

The ambiguity of the term "extraterritoriality" has its roots in a certain ambiguity of the concept of territory, or better: of the link that is required to a defined territory. The frontiers of a given state are usually clear. What is not so clear is the link to the territory that is required to make a rule "territorial". Is it the place where conduct

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1 See Scott, J. (2014), "Extraterritoriality and Territorial Extension in EU Law", *American Journal of Comparative Law*, Vol. 62(1), 87 (89 - 90) ("In this paper, a measure will be regarded as extraterritorial when it imposes obligations on persons who do not enjoy a relevant territorial connection with the regulating state."); Scott, J. (2014), "The New EU 'Extraterritoriality", *Common Market Law Review*, Vol. 51(5), 1343 (calling extraterritorial "a broad range of legislative techniques to regulate conduct that takes place outside the EU's borders").

2 For similar doubts about the notion of extraterritoriality, see e.g. Lowenfeld, A.F. (1994), "International Litigation and the Quest for Reasonableness", *Collected Courses at the Hague Academy of International Law*, Vol. 254, 43-44 ("The search for a satisfactory definition of extraterritorial jurisdiction . . . is doomed to failure"); Verdier, P.H. (2019), "The New Financial Extraterritoriality", *George Washington Law Review*, Vol. 87(2), 239 (245) (calling extraterritoriality an "ambiguous term").

3 See, e.g. Art. 2(4) Market Abuse Regulation, Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173/1, 12.6.2014, p. 1.

4 In the case *Morrison et al*. v *National Australia Bank Ltd et al.* 561 US 247 (2010), the US Supreme Court actually took the view that the application of US law to manipulative behaviour would be domestic insofar as it concerns a security listed on a domestic stock exchange, see paragraph 266 (underlining that the place from which a deception originates would be irrelevant).

occurs? Or is it the place where a security is listed? Depending on where one puts the emphasis, the application of a law is either territorial or extraterritorial.

In the context of supervision, the extraterritorial nature is often quite easy to grasp. For instance, where the EU supervises Central Counterparties (CCPs) in the UK, to the point that it sends officials over the Channel to conduct on-site inspections, there can hardly be any doubt about the extraterritorial nature of the activity.[5] Consequently, the EU has requested permission from the UK government, which has agreed in a Memorandum of Understanding to this extension of EU powers into British territory.[6]

Despite the terminological ambiguity, it is thus possible to identify extraterritoriality in most instances by looking at the focus of a law or activity. Generally, one would speak of extraterritoriality where this focus lies on persons, conduct or events abroad.[7] However, this does not exclude that significant uncertainty may exist in some cases.

1.2 Why extraterritoriality does not deserve its bad reputation

The term extraterritoriality is often used with a negative connotation.[8] Yet contrary to a common misconception, extraterritoriality as such is not illegal under public international law. In the seminal Lotus case, the Permanent Court of International Justice (PCIJ) famously drew a distinction between the power of a state to apply a law ("prescriptive jurisdiction"), the power to decide a case ("adjudicatory jurisdiction"), and the power to use force ("enforcement jurisdiction").[9] While it held that states cannot use force outside of their territory, it considered it legal to apply laws and decide on cases relating to events and actors outside of their territory.[10] The International Court of Justice (ICJ) later backtracked somewhat from this very liberal position. It conditioned the legality of extraterritorial laws or state actions on the existence of a "genuine connection" to the territory of the prescribing or deciding state.[11]

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5 On site-inspections in foreign territories are foreseen by Art. 25h EMIR (Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1, amended by Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, OJ L 322/1, 12.12.2019, p. 1.

6 ESMA and the Bank of England, Memorandum of Understanding to Set Out Arrangements for Cooperation on the Monitoring and Supervision of CCPs established in the UK, 2020.

7 See also *Morrison et al. v National Australia Bank Ltd et al.* 561 US 247, 266 (2010) (referring to the "focus of congressional concern" to distinguish between territoriality and extraterritoriality).

8 See, e.g. Lowenfeld (1994), (n. 2) ("extraterritorial jurisdiction", like "bureaucratic", is a term that could never be rescued from its unattractive reputation.").

9 Permanent Court of International Justice, SS Lotus (France v Turkey), judgment of 7 September 1927, Series A, No. 10, paragraphs 14-15. The terms in parentheses have been introduced later to summarise these concepts, see American Law Institute, *Restatement of the Law Fourth, The Foreign Relations Law of the United States*, American Law Institute Publishers, 2018, 401, comment b.

10 PCIJ ibid., p. 14.

11 See in particular ICJ in the *Nottebohm case (Liechtenstein* v *Guatemala),* second phase, 6 April 1955, ICJ Reports 1955, paragraphs 4, 23.

In the world of modern international finance, such a genuine connection exists as a matter of course. This is because operators may influence the financial system of a country from afar, without ever entering its territory. Virtual financial assets and services cross state frontiers in the blink of an eye without the possibility of controlling them. Some networks do not even have a specific author or location, because they are "decentralised". More than ever, it is therefore necessary to extend the reach of the law towards events and actors outside of the boundaries of the regulating state.[12] The genuine connection therefore typically exists, and extraterritoriality is thus not illegal.

Extraterritoriality is also not morally reprehensible. Quite to the contrary, in a world that is as highly interconnected and interdependent as ours, extraterritoriality is even a necessity.[13] With the rise of modern communications technology, the strict territorial frontiers are becoming increasingly blurred. The political, social and financial stability of a state may now be shattered from any point on the globe. To secure the application of the law, states increasingly must engage with actors or conduct from abroad. Sometimes they even have to enforce their laws on the soil of another state, as the example of CCP supervision demonstrates.

Hence, extraterritoriality is not bad as such. It can even be seen as good if one considers the alternative. Without extraterritoriality, foreign providers could locate in lowly regulated and supervised jurisdictions and engage in regulatory arbitrage.[14] This could lead to unfair competition to local firms, cause damage to local customers and undermine financial stability in the host state. To protect against such dangers, states could be tempted to close off their markets to foreign providers, resulting in market fragmentation.[15] Extraterritoriality, in contrast, permits states to maintain open markets while preserving the goals of domestic regulation. It allows foreigners to offer their products or services to local residents while maintaining a level playing field with domestic competitors and protecting the economy from negative externalities.

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12 See Born, G.B, "A Reappraisal of the Extraterritorial Reach of U.S. Law", 24 Law and Policy in International Business,1992, 1. ("This century's profound international political, economic, technological, and legal transformations have significantly undermined the strict territoriality presumption that prevailed in nineteenth century conceptions of public international law.").

13 Lehmann, M., "Extraterritoriality in Financial Law", in Parrish, A., Ryngaert C. (eds)*, Research Handbook on Extraterritoriality in International Law*, Edward Elgar Publishing, 2023, 412 (calling extraterritoriality "the new normal" in financial law).

14 On regulatory arbitrage, see McCann, H., *Offshore Finance*, Cambridge University Press, 2006, 173; Ringe, W.G. (2016), "Regulatory Competition in Global Financial Markets", *Annals of Corporate Governance*, Vol. 1, 175, 176 et seq; Zetzsche, D.A., "Competitiveness of Financial Centers in Light of Financial and Tax Law Equivalence Requirements" in Buckley, R.B., Avgouleas, E. and Arner, D.W. (eds), *Reconceptualising Global Finance and Its Regulation*, Cambridge University Press, 2016, 390 (394, 398).

15 Lehmann, M., (2017) "Legal Fragmentation, Extraterritoriality and Uncertainty in Global Financial Regulation", Oxford Journal of Legal Studies, Vol. 37(2), 406 (418-419) (describing the linkage between uncertainty, extraterritoriality and fragmentation).

1.3 Equivalence and mutual recognition as remedies for the cost of extraterritoriality

Although extraterritoriality is a necessity in the modern world, it comes at considerable costs. In part, these fall on the state itself in the form of costs of supervision. The EU, for instance, had to set up a specific supervisory board for the purpose of supervising CCPs abroad, which operates under the auspices of ESMA and is seated in Paris.[16]

But the main costs fall on foreign providers. As a consequence of extraterritorial regulation and supervision, they must respect two sets of rules and satisfy two supervisors: those of their home state and those of the host state. If the provider happens to be active in more than two markets, it will be subject to even more different regulations and supervisory authorities. The resulting burdens create technical market barriers. In the worst case, the provider will shun foreign markets altogether. This contributes to the divvying-up of the world economy into local markets that we are currently witnessing, and the corresponding loss of overall welfare.

Two approaches to avoid these costs are mutual recognition and equivalence. Where either of them is adopted, the legal system relinquishes its claim of regulating and supervising all operators active on its market in favour of another legal system, which is trusted to achieve similar goals. Both approaches can thus be summarised under the term “deference”.

Despite these commonalities, there are numerous differences between mutual recognition and equivalence: First, mutual recognition, as the name suggests, is bilateral, meaning that each side recognises the regulatory or supervisory framework of the other; equivalence, in contrast, is unilateral, in the sense that only one side defers to the law of the other. Second, mutual recognition is based on an international agreement between two or more states, while equivalence is based on the domestic legal system of the host state. Third, and consequently from the second, equivalence can be limited in time and can also be suspended or withdrawn relatively easily, at least when compared to mutual recognition.[17]

[16] On the CCP Supervisory Comittee, see Art. 24a EMIR.

[17] In comparison to equivalence, withdrawing mutual recognition is a very burdensome and complex affair. See for instance the attempt to refuse the execution of European arrest warrants issued by Polish authorities, Court of Justice of the European Union (CJEU), Judgment of the Court of 25 July 2018, *LM*, C-216/18, ECLI:EU:C:2018:586; Judgment of the Court of 17 December 2020, *Openbaar Ministerie* v *L and P (Indépendance de l’autorité judiciaire d’émission*, C-354/20 and C-412/20, ECLI:EU:C:2020:1033. In these decisions, the CJEU demands national courts to show the risk of a human rights violation specifically and precisely (so-called specific assessment), see C-216/18 – *LM*, paragraph 79; *Openbaar Ministerie* v *L and P (Indépendance de l’autorité judiciaire d’émission)*, paragraph 61. As a result, the national courts cannot systematically refuse to execute orders from another Member State. Put differently, it is impossible to completely and generally withdraw mutual recognition for all acts of another Member State, even if the latter is flagrantly violating common standards.

Equivalence and Mutual Recognition Compared

	equivalence	mutual recognition
function	deference	deference
supervision	home country	home country
legal basis	national law	treaty or MoU
decision	unilateral	bi- or multilateral
withdrawal	possible	difficult

Examples for mutual recognition are the EU's/EEA's internal market with its various "passports", the Berne Agreement between the UK and Switzerland,[18] and the Multijurisdictional Disclosure System (MJDS) between the US and Canada.[19] Examples for equivalence can be found in numerous EU regulations, such as the Prospectus Regulation, MiFID II or recently in CRD VI, which contain overall about 40 different equivalence regimes.[20] As can be seen from these examples, mutual recognition agreements are often entered into by neighbouring countries or those with relatively homogeneous legal systems. At least in the case of the EU/EEA, mutual recognition is also accompanied by minimum harmonisation, which ensures that the conditions for mutual trust are satisfied and the recognition scheme cannot be exploited for regulatory arbitrage. Equivalence, in contrast, works with regard to any country in the world. If the trust in the other legal system is disappointed, it will simply be suspended or withdrawn.

2 Which tool is preferable in an era of uncertainty?

In this Section, I will compare the tools of the toolkit and see which of them fits the needs of our present condition. But before doing so, we need to tidy up the toolbox a bit and bring the tools into order.

2.1 The sliding scale of open and closed markets

In a certain sense, extraterritoriality, equivalence and mutual recognition can be seen as points on a sliding scale.

18 Agreement between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation on Mutual Recognition in Financial Services, done on 21 December 2023 at Berne.

19 On the MJDS, see, e.g. Bloomenthal, H.S., Wolff S., (1992), "The Multijurisdictional Disclosure System and Other Cross-Border Offerings", *Denver Journal of International Law & Policy*, Vol. 20, 551.

20 For an overview, see Schürger, J., *Equivalence and Substituted Compliance in International Financial Markets Law*, Oxford University Press, 2023, 28-57.

The Sliding Scale of Open and Closed Markets

The high watermark is occupied by mutual recognition: in this case, the cooperation between legal systems is the strongest. The host state relinquishes virtually any control over the foreign providers operating on its markets. It can merely alert competent authorities of the home state to cases of non-compliance, provide information and findings, and ask how they have been taken into account. The appropriate measures are taken by the home state. Only where it fails to act, the competent authorities of the host state may take appropriate measures themselves to prevent further breaches. This obviously requires a high degree of trust in the law of the home state and its rigid application by the authorities there.

Where there is less trust, but trust nevertheless, the host state will use the equivalence mechanism. This allows it to examine the legal system of the provider’s home state, assess its appropriateness, and decide whether it achieves the same or similar objectives as its own. The host state has no possibility to influence this legal system, e.g. by way of harmonisation. But it has a safeguard in case the legal system evolves in an unforeseen direction in the form of unilaterally suspending or withdrawing equivalence.

Where trust in the other system is amiss, the host state will resort to extraterritoriality. In other words, it will apply its own rules and impose them on foreign providers who want to offer products and services on its soil. Where the foreign provider does not comply, the host state will bar the latter’s market access.

Still a more restrictive attitude exists, which is to deny any market access to foreign operators even where they comply with all of the host state’s rules. This is the location requirement. It comes in two forms: In the less rigid version, it suffices to operate a branch in the host state; in the stricter version, the creation of a subsidiary in the host state is required, which is actually a self-standing legal person. Both the branch and the subsidiary requirements can be combined with further conditions, e.g. with relation to capital or the reliability and reputation of the directors.

The lowest point of openness is reached where it is not allowed to provide banking and financial services from outside, but only from inside the market. Technically, this could be circumvented by creating a subsidiary that is 100% owned by a foreign company. But there may also be restrictions of foreign ownership. In this way, a state can shut down its market completely.

2.2 Legal empiricism: which tool is used when?

Before making a suggestion on when one or the other tool should be used, let us have a look at when they are actually deployed in practice. The EU has all of them at its disposal and made use of most of them. To illustrate,

- mutual recognition is applied by EU primary and secondary law to all credit institutions and investment firms from other EU/EEA Member States;[21]
- equivalence has been granted in roughly 300 cases as of June 2025, from the Transparency Directive to MiFID II/MiFIR;[22]
- extraterritorial legislation and enforcement can hardly be quantified, inter alia because of the blurred definition, yet they are clearly on the rise; examples include CCP supervision under EMIR[23] and the market abuse rules of MAR;[24]
- a branch requirement is foreseen in the CRD VI, which will have to be transposed by 11 January 2026;[25]
- a subsidiary requirement is foreseen, e.g., by the Credit Rating Agency Regulation[26] and for issuers of certain stablecoins (ART) and crypto service providers (CASP) by MiCAR;[27]
- a total market closure is foreseen for CCP of substantial significant importance (so-called Tier 2 Plus);[28] however, on the advice of the CCP Supervisory Committee, the Commission shied away from triggering it for the leading UK CCPs.[29]

Looking at this list from a bird's eye view, a pattern emerges with regard to the use of the toolkit. Equivalence is foreseen in regulations that typically do not implicate financial stability but rather aim at investor protection (e.g. Prospectus Regulation). Extraterritoriality is applied where negative effects on financial stability are possible, e.g. in the area of clearing (e.g. EMIR). The regulatory and supervisory vices are

21 See, e.g., Art. 49 CRD VI.

22 See European Commission, Overview Table Equivalence Decisions, 2025.

23 Art. 4(1)(a)(v) EMIR (imposing mandatory clearing between two-third country entities if the contract has a "direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of this Regulation").

24 Art. 2(4) MAR, Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ L 173, 12.6.2014, p. 1., (including in the scope of the prohibitions and requirements in this Regulation shall actions and omissions in a third country).

25 See Art. 21c CRD VI, introduced by Directive (EU) 2024/1619 of the European Parliament and of the Council of 31 May 2024 amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, OJ L, 2024/1619, 19.6.2024, p. 1.

26 Art. 4(1) Credit Rating Agency Regulation (Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302/1, 17.11.2009, p. 1.

27 Art. 16(1)(a), Art 59(2) MiCAR, Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.6.2023, p. 40.

28 Art. 25(2c) EMIR.

29 ESMA, Assessment Report under Article 25(2c) of EMIR, 2021, ESMA 91-372-1945.

tightened with the increasing likelihood and possible magnitude of financial stability effects. In line with this, branch requirements are foreseen where the possible negative effects are significant but still do not reach the banking and financial sector as a whole (e.g. CRD VI). Subsidiary requirements are imposed for gatekeepers, whose activity influences the entire market (e.g. Credit Rating Agency Regulation). A total closure of the market can be imposed in case of very strong and likely effects on the financial stability (EMIR for Tier 2 Plus CCPs).

This pattern is not without exceptions. To take just one example, the relatively benign threats for financial stability resulting from the activity of crypto-asset providers, such as a crypto-adviser, hardly justify the imposition of the rigorous location requirement under MiCAR. In comparison, the branch requirement for credit institutions under CRD VI appears to be relatively mild. Yet it must not be forgotten that these branches can be the subject of quite stringent requirements with regard to their capital and staff, especially when they play a significant role.

The last example demonstrates that the legislator and the regulator have more tools at their disposal than merely opening or closing the market. They can also impose additional capital requirements,[30] demand specific cooperation,[31] or require a remuneration policy and impose liquidity stress tests.[32] These additional tools allow to fine-tune the regulatory and supervisory regime. They operate like a net with holes of different sizes that is deployed at the shutter gate through which providers enter the single market. In other words, they allow for tweaking and adjusting market access in relation to existing trust, perceived risks, and potential consequences.

2.3 Making the right choice

We are living in extraordinary times. Their particular features can be best summarised in one word: uncertainty. Every day, we are confronted with news of tremendous political, social and economic upheavals. No one is able to foresee even the next day; prognoses lose their value within hours or even minutes. The reasons for this are deep divisions in national societies, exacerbated international conflicts, abrupt technological change, and existential challenges such as global warming and nuclear war. The convergence of these factors means that the face of the Earth, the life of humans, and the course of history could shift dramatically at any moment.

Bank supervision has to operate in this difficult environment. Today, it is more challenging than ever to decide which tools to use with regard to foreign jurisdictions. Each of these tools has its own characteristics, which make them advantageous in certain situations, but disadvantageous in others. I will inspect them one by one and evaluate their ability to respond to unforeseeable circumstances, while also keeping an eye on their economic effects.

30 See, e.g., Art. 48e CRD VI.

31 See, e.g., Art. 25(2b) EMIR.

32 See, e.g., Art. 45 MiCAR.

Let us start with mutual recognition. Obviously, mutual recognition creates a stable environment. This is because it is underpinned by a secure legal framework that creates reciprocal obligations and shared interests. Even where trust is scarce or shaky, a mutual recognition regime may have beneficial effects: It can teach the participants about the other country's system, bring them closer together, and ultimately lead to more harmony and deeper integration. But mutual recognition also has its risks. A change of the government or a legal reform in a participating jurisdiction may affect the content and the quality of the legal measures taken there. At worst, the regulatory and supervisory framework may change to the point that it seems no longer justified to trust the other system, which undermines the very basis of mutual recognition. There are only very few fixes for this problem. As was mentioned, withdrawing mutual recognition is particularly time-consuming and legally complex,[33] and starting the procedure risks alienating the other party even more.

Extraterritoriality fares better in this respect. It is totally independent of the rules of the provider's home state. The host state just relies on its own rules, imposes them equally on all participants, and monitors compliance itself. In that sense, extraterritoriality makes the market immune to foreign change. The downside of extraterritoriality is its economic cost. Investor choice is reduced, competition limited, and investment diversification made more difficult where foreign providers are burdened with double regulation and supervision. This creates problems not only for individual investors but also for financial stability. Significantly, extraterritorial regulation also adds to the process of deglobalisation and the increasing polarisation of the world. It contributes to an atmosphere where everybody follows their own interests and rules, and imposes them unilaterally on others. Such egocentric and egoistic behaviour may elicit similar responses from other states.

Lastly, let us look at equivalence. It opens up the market to foreign providers and facilitates their market entry, thus broadening investor choice, stimulating competition, and allowing diversification. In this respect, it is preferable, from an economic viewpoint, to extraterritoriality. At the same time, it hardly endangers financial stability because it can be relatively easily withdrawn, especially in comparison to mutual recognition. It is true that the withdrawal of equivalence may involve costs and undermine the foreseeability for providers. Yet in an era where legal frameworks and supervisory practices may suddenly change, this is a cost one must be ready to accept. In any event, it seems relatively minor compared to the cost of completely fragmented markets.

In sum, of the three tools inspected, equivalence seems to fit the current global context best. It strengthens the autonomy of the EU while maintaining a cooperative international framework. To be clear, the other means are still useful. Extraterritorially remains the default mode for those countries that do not pass the equivalence test. Where a country does not dispose of a comparable regulatory and supervisory framework, it is preferable to allow market access only under the condition that the provider fulfils all the requirements of domestic law. From the vantage point of overall welfare, mutual recognition still remains the most beneficial solution, which should be aspired to. But mutual recognition requires a high amount

[33] See above n. 17.

of trust. Therefore, one must ensure that it is extended only to countries that follow the rule of law and are likely to do so in the future. There is a risk that one may be trapped in a legal agreement that forces one to recognise decisions and matters from a country that has completely changed. This risk should not be taken lightly, especially in today's volatile world.

3 Political relations and the use of the tools

We now turn to the final and most difficult part of this contribution: how should the tools that have been analysed be used? To what extent should political relations influence their use? In particular, should these tools be deployed differently towards friendly nations than towards those that pursue different political values?

3.1 How politics may enter the calculus

When making investment decisions, it is best to set aside personal animosities. Similarly, political considerations should be kept outside when making assessments of whom to admit to your market. A state or economic block should not only trade with friends and family, but also with the rest of the world. Financial centres have an interest in trading with jurisdictions with which they are not politically aligned. Nothing stops democracies from entering into financial relations with autocracies. Both sides will economically benefit from such an arrangement. Whether it will improve their political relations or secure peace between them is another matter (and – taking into account experience from the recent past – extremely hard to predict).

The legal conditions for equivalence decisions reflect this political neutrality. Nowhere do they mention questions such as democracy, human rights or protection of minorities. Instead, they focus on financial and technical aspects, such as the existence of legally binding requirements that are equivalent to those laid down in EU law or the existence of effective supervision and enforcement.[34] Sometimes, they contain a reciprocity requirement, but this can be waived.[35] The most substantive conditions of equivalence are those relating to anti-money laundering and countering terrorist financing.[36] Some rules require in addition the conclusion of cooperation agreements between the European authorities and those of the third country.[37] Apart from that, basically any country can qualify for equivalence.

This does not mean, though, that basic values would be unimportant. A country in which corruption is rampant and the rule of law is not obeyed is unlikely to dispose of effective supervision and enforcement. Also, it is hard to argue that third-country providers are subject to legally binding requirements in their home state if they can

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[34] See, e.g. Art. 25(6) EMIR.

[35] See, e.g. Art. 25(6) subpara 1 (c) and subpara 2 EMIR.

[36] See, e.g. Art. 48b(1)(c) CRD VI.

[37] See, e.g. Art. 25(2)(c) EMIR.

simply buy and bribe the supervisor. The respect for basic standards of the rule of law thus inevitably has repercussions on the equivalence assessment.

Mutual recognition calls for a much higher threshold to be met. That is because a mutual arrangement creates a “lock-in effect”: once entered into, each of the parties is obliged to allow all of the other side’s providers of goods and services into their market, which may eventually become a common or single market. It cannot renege on this promise even where the government or framework of the other side changes in an unfavourable way. If such an arrangement is entered into, it has a tendency to remain permanent.

As a consequence, a state or supranational entity such as the EU should be careful to enter into a mutual recognition arrangement. It is well advised not only (1) to scrupulously scrutinise the entire legal system of the other entity, but also (2) to make sure that its quality will not deteriorate in time. For (2), mere assurances are not enough; instead, there must be legal safeguards, e.g. provisions in the other party’s constitution that protect against sudden changes, like guarantees of democratic government and minority rights that cannot be easily amended. Experience has demonstrated, however, that even these guarantees are not insurmountable obstacles for autocrats and dictators. Therefore, it is advisable to insert an “ejection mechanism”, which allows each party to cancel the mutual recognition agreement in case of significant changes in the governance and legal framework of the other party.[38]

In sum, while the mutual recognition is highly political, the equivalence mechanism is as such politically neutral.

3.2 Who should distinguish between friend and foe?

The statement that equivalence should be politically neutral may raise some eyebrows. Under certain circumstances, it seems reasonable to break off all relations with other states. An example is outright warfare. Continuing to grant equivalence while being engaged in war is more than paradoxical. It would allow the firms of your opponent continued market access, strengthening its economy. That would be nonsensical.

This raises an important question: Who should actually decide whether a certain jurisdiction is considered as following the rule of law or having a democratic government? Who, in the final instance, should make the call of whether to cooperate with another country?

In this regard, it seems that a fundamental dichotomy should be drawn in line with the organisation and structure of the European Union and the distribution of competences and powers between its organs. The complete rupture of economic

[38] Art. 7 of the Treaty on European Union comes to mind, yet this provision (1) suffers from too stringent conditions (unanimous decision of other Member States) and (2) allows only the suspension of the rights deriving from the application of the Treaties. It is up to discussion whether the mutual recognition of the legal framework for banking and financial services falls under the rights that can be suspended.

and financial relations with a certain country or part of the world is a question of the highest political importance. This decision must be taken on the highest echelons of power and not in the back offices of regulatory bodies. Article 215 of the Treaty on the Functioning of the European Union says as much by giving the Council the exclusive competence to take a decision on restrictive measures. Illustrative in this regard are the sanctions against Russia, which have been laid down in Regulations that have been repeatedly amended.[39] Restrictive measures can also consist of the prohibition to list securities from a certain third-country issuer or to offer them in the EU.[40] This type of decision, which concerns and defines the Union's external policy, can only be taken by the Council.

In contrast, the technical conditions of equivalence are within the exclusive purview of the regulator. They are adopted by the European Commission, and prepared by the ESAs. Especially after Brexit, there has been a hot debate in the literature as to whether equivalence is a political decision or not.[41] The better arguments speak in favour of considering this decision to be rule-bound, which means that the Commission is obliged to grant equivalence when the conditions for doing so are met.[42] The reasons for this are quite straightforward: the equivalence decision is an administrative decision. The Commission is bound to make a factual determination. While it has in this regard a certain margin of appreciation, it cannot decide whether to have relations with other states on policy grounds. It is not in charge of the external policy of the Union. It would be completely opaque if a Directorate General or one of its officials (which one?) would be able to decide with which country the EU should have good relations and with which not. Very grave repercussions would follow if such a policy decision contradicted the foreign policy of the other bodies, namely the Council. Moreover, the Most-Favoured-Nation obligation under the GATS does not allow a denial of market access where the legal framework of the other state is equivalent to that of the EU.[43] The EU is thus obliged by international law to grant equivalence whenever the regulatory and supervisory framework of another state achieves similar outcomes. It has no discretion to deny equivalence on other grounds.

The rule-bound nature of equivalence does not mean that the decision would be purely technical, though. To the extent that these decisions require the assessment of the certainty of the legal framework and the respect for the rule of law, the

[39] See, e.g., Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, p. 6, last amended by Council Implementing Regulation (EU) 2025/1476 of 18 July 2025 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 2025/1476, 19.7.2025; Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31.7.2014, p. 1, last amended by Council Regulation (EU) 2025/932 of 20 May 2025 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine OJ L 2025/932, 20.5.2025, p. 1.

[40] Art. 5 Council Regulation (EU) No 833/2014 of 31 July 2014.

[41] See, e.g. Wymeersch, E. (2018), "Third-Country Equivalence and Access to the EU Financial Markets Including in Case of Brexit", *Journal of Financial Regulation*, Vol. 4(2), 209 (224-226); Schürger, J., *Equivalence and Substituted Compliance in International Financial Markets Law*, Oxford University Press, 2023, 107-114.

[42] In the same sense Wymeersch, ibid.; Schürger, ibid.

[43] See Schürger, ibid., 114-117.

Commission must take the political situation in the third country and the quality of its institutions into account. The Commission itself has issued guidelines on the use of equivalence in the financial sector.[44] These explicitly mention that the Commission will follow a risk-based approach.[45] The regulator will have to weigh the benefits of granting equivalence against the likelihood of the non-exercise of effective supervision. This includes a prognosis of how the third-country authorities will behave in the future.

A very interesting question remains: How is the decision on equivalence be coordinated with the external policy decisions made by other EU bodies? A country which is the subject of sanctions by the Council should not obtain the possibility to enter the single market. Equivalence must be denied where the foreign state is in conflict with the EU. This is also not contrary to GATS.[46] But the equivalence regimes do not explicitly mention this exception. Nevertheless, it can be achieved by a systematic interpretation of EU law. The equivalence decision must be based on the entirety of EU law, not just the narrow reading of the particular regulatory act. A restrictive measure by the Council can thus be the proper basis for a Commission's decision denying equivalence or even its assessment with regard to a country with which the EU is in conflict.

3.3 How to strategically deploy equivalence

There is always a risk that the regulatory and supervisory framework of a state which has been granted equivalence may develop in an unfavourable way. This may cause damage to the host state since it may take some time until equivalence can be withdrawn or suspended. Against the background of this risk, a crucial question is how the equivalent assessment should be used. Should equivalence be withheld where a foreign regulatory supervisory environment is currently in line with one of the EU, but its future development is unclear? Or should it be granted based on the optimistic attitude that nothing will happen?

This is not merely a theoretical question, which could be overcome by a more granular risk assessment or a Bayesian probability analysis. Very often, the chances of a foreign legal system changing are impossible to predict because they depend on many unforeseeable factors, such as the results of an election or of a possible revolt. Therefore, it is impossible to carry out a meaningful risk assessment. What should the Commission do? Withhold equivalence because granting it may be dangerous? Or be optimistic and assume everything will be fine?

Game theory can provide some meaningful assistance. Game theory deals with the strategic behaviour of two or more actors who need to take action without knowing

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[44] European Commission, "Equivalence in the area of financial services", Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, COM (2019) 349 final.

[45] Ibid., p. 4 (calling the equivalence process "primarily a risk management exercise").

[46] See Art. XIVbis(1)(b) GATS.

whether the other side is going to cooperate or not.[47] The paradigm case is the so-called prisoners' dilemma, in which two persons are caught by the police and separately interrogated.[48] None of them knows what the other is going to do, and they cannot communicate with each other. They can reach an optimal result if both deny the charges, but if one of them confesses, the other will suffer a severe punishment, unless he confesses first. Under these conditions, each of them has an incentive to confess first, i.e. to act as a snitch. This inhibits both sides from reaching a mutually optimal solution.

What is the connection to the equivalence assessment? Indeed, there is one. Although the granting of equivalence is unilateral, it can be understood as an offer to cooperate with the other state. It effectively communicates the message that if the other state maintains a certain quality of regulation and supervision, its credit institutions and investment firms will retain market access in the host state. If, on the other side, the regime changes and the quality of regulation and supervision deteriorate, then this offer of cooperation can be withdrawn. This can give an incentive for the home state of the provider to keep its rules in balance with those of

The Strategic Aspect of Equivalence

Behaviour of EU / **Behaviour of home state**	**Grant equivalence**	**Deny equivalence**
Converge to EU standard	both win	home state loses
Diverge from EU standard	home state wins	both lose

Still, there remains a risk that the other side may decide to amend its laws and supervision in an unfavourable way. This is particularly likely after a new regime is established that prizes ideological, theological or other considerations more than economic benefits. Such a regime will simply not care that equivalence may be withdrawn. In this case, the host state may suffer negative consequences, such as the deception of its investors or temporary stay dangers for its financial stability, until it has suspended or withdrawn equivalence, which will take some time.

47 From the extensive literature on game theory, see, e.g. von Morgenstern, J. and Neumann, O., *Theory of Games and Economic Behaviour*, Princeton University Press, 1944; Axelrod, R., *The Evolution of Co-Operation*, Penguin, 1990; Poundstone, W., *Prisoner's Dilemma*, reprint ed., Anchor, 1993.

48 On this, see Poundstone, ibid. The prisoners' dilemma is far from the only game, but there exist many others. For an overview, see Spaniel, W., *Game Theory 101*, CreateSpace Independent Publishing Platform, 2011. Very often, a situation can be analysis differently. For instance, if two states with roughly equal economic power are vying for setting the dominant regulatory and supervisory standard, one could also model the situation as a "coordination game" or "game of chicken", see Drezner, D.W., *All Politics Is Global: Explaining International Regulatory Regimes*, revised edition, Princeton University Press, 2008, 53. This model could be particularly helpful to analyse the relations between the EU and the US.

Nevertheless, one must consider that the game will be played repeatedly over time. This is especially important in the context of cross-border regulation and supervision. While the home state of the provider may have the impression of having "won" the game and having exploited the host state at no cost, it will suffer the consequences in the next round. This time, the host state will "punish" the provider or home state by withdrawing equivalence. The cost this may entail may be quite high for the home state.

For this reason, game theorists suggest adopting a strategy to cooperate first and punish second.[49] Historically, this strategy has elicited the most cooperation from the other side. The strategy pays off in the long run, when the negative consequences of withdrawing cooperation are felt and understood by the other side. Crucially, it does not matter whether the other side is morally inclined or adheres to any ethical values. Even villains and bullies understand the language of "either cooperate or suffer the punishment". In the long run, their dominant strategy may therefore be to play along.

4 Conclusion

Extraterritoriality, equivalence, and mutual recognition are important tools with which the regulator and supervisor can fashion its relations with other states. They can be thought of as being points of a sliding scale, with extraterritoriality imposing particularly high burdens of market access, and mutual recognition relatively low. Each of these tools has advantages and disadvantages, making it suitable for particular countries and circumstances.

In an age of uncertainty, equivalence has much to commend it. On the one hand, it opens up the market, thus improving investor choice, stimulating competitiveness and allowing investment diversification. On the other hand, it can be suspended or withdrawn comparatively quickly in case the quality of the regulatory and supervisory framework in the other state deteriorates. While equivalence is not a political decision, it involves the assessment of political risks. Among the factors that have to be taken into account in assessing equivalence is also the respect of the rule of law and the sound governance of the other state.

Equivalence does not only have the economic function of opening up markets. Its granting is also obligatory under the GATS, where the foreign regulatory and supervisory framework achieves the same result as that of the home country. Strategically, it can be seen as a positive signal to other states that the host state is ready to cooperate with them. At the same time, this carrot comes with a big stick: in case the other jurisdiction refuses to cooperate, its operators will be barred from the market of the host state. This should provide sufficient incentive to maintain efficient regulatory and supervisory arrangements in the country of origin. While this may not be sufficient to elicit cooperation in all cases, it is the best option in a world of diverging values and unforeseeable reactions.

[49] See Axelrod, R., *The Evolution of Co-Operation*, Penguin, 1990.

Equivalence in financial services: combining technical assessment and political judgement

Maria Raffaella Assetta*

1 Introduction

The discussion about equivalence, mutual recognition and extraterritoriality is more than ever central to the way the EU engages with the rest of the world, in the area of financial services.

For decades, financial integration in the European Union had been mainly about building the EU single rulebook, promoting supervisory convergence in the internal market and ensuring the resilience of our banking and capital markets. The great financial crisis of 2008-2009 accelerated that agenda, leading to landmark reforms. The establishment of the European Supervisory Authorities (ESAs) and the creation of the Single Supervisory Mechanism (SSM), a key pillar of the Banking Union are just few examples.

The financial crisis also showed how crucial is the external dimension of the EU internal market. Financial markets are global in nature and their interconnection generates spillovers that need to be managed. This is becoming increasingly important in an evolving geopolitical context, where international relations, both at multilateral and bilateral level, pose new challenges.

The EU has equipped itself with a regulatory and supervisory toolbox, which touches upon the three key concepts for ordering the external dimension of the single market: equivalence, mutual recognition, and the application of our rules beyond our borders, but always when there is clear nexus to the EU market or financial system.

My contribution focuses particularly on equivalence, which is one of the main tools the EU uses to manage the interaction with non-EU countries frameworks in the area of financial services. It will touch upon what equivalence means in the area of financial services, whether this tool is suitable in the current geopolitical context, and how this tool is deployed in the EU. I'll then briefly talk about the interaction of the other tools in our law-making practice.

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2 Equivalence as a prudential safeguard

Sometimes described, somewhat inaccurately, as a “market access tool”, equivalence is primarily a prudential safeguard.

While equivalence is a tool to promote and exploit the benefits of an open and globally integrated EU financial market, it always involves the management of the risks associated with the cross-border activity of market participants. In the equivalence process, the EU strives to maintain a resilient and effective prudential framework that addresses risks related to cross-border activity insofar as they impact EU financial stability, market integrity, investor protection and the level-playing field in the internal market.

Equivalence allows the EU to rely on the regulatory and supervisory frameworks of third countries when those are deemed comparable in outcomes to the EU one, meaning that they achieve the same results as the corresponding EU rules, including effective supervision. The decision to rely on the regulatory and supervisory framework of a non-EU jurisdiction implies the assessment that the benefits it may bring do not come at excessive risk to the EU financial markets and may be managed in a prudentially sound way, respecting the level-playing field in the EU internal market. The use of equivalence is facilitated by the development and implementation of internationally agreed standards, that the EU has always strongly supported to encourage convergence around common principles.

There is no single equivalence regime in the EU financial services legislation, but different equivalence rules embedded in various legislative acts. Each piece of legislation tailors equivalence to its specific objective: reducing capital costs, enabling infrastructure access, facilitating cross border trading, or, potentially, opening a passport for non-EU firms.

For instance, some equivalence decisions provide relief of prudential requirements for exposures of EU firms to non-EU operations. An example is the equivalence envisaged in the Capital Requirements Regulation,[1] under which certain categories of banks' exposures to entities located in third countries (including central governments) can be subject to a more favourable prudential treatment. These entities include credit institutions, investment firms, exchanges, Collective Investment Undertakings; central banks, local authorities and the public sector, and may be subject to the same risk weights as those that apply to exposures to entities established in the EU.

In other instances, equivalence reduces regulatory burdens by allowing firms to avoid complying with dual sets of national legal requirements. For example, the Transparency Directive[2] provides that non-EU firms subject to EU rules on

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1 Arts 107(4), 114(7), 115(4), 116(5) and 142(2) of Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012, OJ L 176, 27.6.2013, p. 1.

2 Art. 23(4), third subparagraph, of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38.

transparency may be allowed to fulfil those obligations in accordance with non-EU country equivalent disclosure standards.

Equivalence may also eliminate overlapping supervision. Under the Regulation on Crating Ratings Agencies,[3] a credit rating agency authorised, registered and supervised in accordance with equivalent rules of a non-EU country may be certified in the EU and their ratings (related to entities established, or financial instruments issued, in third countries) may be used in the EU, under certain conditions.

A limited number of equivalence regimes enable third country market infrastructures or financial service providers to provide services in the EU, under conditions equivalent to those applied within the EU. For instance, under the European Market Infrastructure Regulation (EMIR),[4] central clearing counterparties established in an equivalent non-EU country may be recognised by the European Securities and Markets Authority to provide clearing services to clearing members or trading venues established in the Union for EMIR clearing obligations purposes.

The conditions for granting equivalence reflect the differences in the various equivalence regimes. For instance, the equivalence regimes under EMIR requires that the non-EU country has in place a corresponding recognition/equivalence regime. While each equivalence regime has a targeted objective, the EU equivalence in general be seen as a mutually beneficial tool, which enables the EU to have a robust cooperation with its partners, to promote fair, efficient and resilient financial markets and open up business opportunities for EU players in third countries and vice-versa.

3 Equivalence as an inherently flexible tool

To date, the EU has adopted 312 equivalence decisions across various sectors and jurisdictions,[5] which shows its practical significance as a tool to manage the external dimension of EU financial services policies. From a business perspective, equivalence enhances cross-border business conditions by reducing regulatory duplication for both EU and third-country firms, ultimately supporting international financial flows. From a public authority's perspective, it can serve as a mechanism to promote high regulatory standards globally and strengthen international cooperation. It signals to third countries that convergence with solid regulatory and supervisory standards will be "rewarded" (e.g. with relief from duplicative requirements). From both perspectives, the EU equivalence framework has proven to be a valuable tool to facilitate market integration while at the same time safeguarding financial stability, encouraging regulatory convergence, and fostering international cooperation, which is essential for preserving financial stability.

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3 Art. 5(6) of Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1.

4 Art. 25(6) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.7.2012, p. 1.

5 An overview of equivalence decisions and the related legal references may be found in the website of the European Union here.

Equivalence is a unilateral and discretionary decision, there is no obligation to grant equivalence to a country asking for it, and it is not automatic. Equivalence may be granted either in full or in part, and it may apply for an indefinite period or be limited to a specific duration. Equivalence decisions may apply to the entire framework of a third country for specific covered entities, products or services, to some of its competent authorities only or to some entities only (e.g. regulated markets). Equivalence is also, by definition, a revocable decision. It may be withdrawn if the conditions are no longer fulfilled. This inbuilt flexibility of equivalence makes it a suitable tool for times of geopolitical uncertainty where third country frameworks may evolve in a – sometimes unexpected – way that do no longer ensure the results equivalence is intended to achieve and thus affect the trust that should underpin those decisions.

This is also why in the last years we have been paying increased attention to the monitoring of equivalence and strengthened the role of ESAs in this respect.

Equivalence monitoring implies an analysis of market and regulatory developments and third country supervisory practices, as well as an assessment of how third-countries or EU financial institutions use an equivalence decision. The purpose is to verify that the conditions under which the equivalence decision was granted are still fulfilled, and it does not pose new risks for financial stability, market integrity or investor protection, or undermines the level playing field in the EU. Significant regulatory divergences or increased risks may lead to a review of the equivalence decisions and a potential withdrawal of equivalence decision, in accordance with the conditions set out in the relevant legal acts. However, effective monitoring permits to identify issues at an early stage and to address them, and so helps to prevent potential withdrawal of the equivalence. In this respect, the ESAs founding Regulations, as amended in 2019,[6] have strengthened the role of those authorities in monitoring equivalent third countries. Each of them does perform monitoring work and submits a confidential report to the European Parliament, Council, Commission and the other two ESAs on an annual basis.

4 How is equivalence being deployed by the EU?

The Commission's policy on equivalence in financial services is set out in a Communication of 2019,[7] which emphasises two key principles that remain highly relevant today. First, equivalence is approached as an outcome-based exercise

[6] Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, OJ L 334, 27.12.2019, p. 1.

[7] European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions - Equivalence in the Area of financial services, COM(2019) 349.

rather than a line-by-line technical comparison. Second, equivalence must serve EU interests, including financial stability, investor protection, and market integrity.

Adopted in the aftermath of Brexit and its disruptive effects, the 2019 Communication situates equivalence in a broader context. It underlines that equivalence must be grounded in a solid technical assessment, carried out in accordance with the criteria set out in the relevant sectorial legislation. At the same time, the process of granting equivalence involves political judgement and thus equivalence decisions should be compatible with EU external policy priorities.

A positive equivalence decision in fact demonstrates that the EU is prepared to forge a closer relationship with a non-EU country and to trust its institutions. This explains why equivalence needs to be compatible with EU policy priorities in areas such as international sanctions, the fight against money laundering and terrorist financing, tax good governance and alike. While they are not directly related to the specific equivalence criteria set out in the sectorial legislation, these factors are indicative of the risks that may affect the financial stability, market integrity or the protection of financial market participants and EU citizens in general.

Yet equivalence remains fundamentally about risk management. The decision-making process for equivalence reflects the two key dimensions that underpin it: the technical and the political. First, the technical assessment of equivalence, is usually performed on the basis of technical advice from ESAs: the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) or the European Insurance and Occupational Pensions Authority (EIOPA).[8] Technical assessments may involve some dialogue with authorities of the third country the framework of which is under assessment, to make sure it is solidly grounded. That assessment also includes an element of proportionality, reflecting the level of risk and the impact of the decision.

Then the final decision is taken by the Commission at the political level, with the Commissioners taking into account also the broader policy and strategic dimensions. The decision typically takes the form of an implementing act – or in some cases a delegated act – subject to Member States/co-legislators scrutiny.

The interplay between these two levels shows that equivalence is not merely a technical instrument but also carries a strategic dimension as it reflects a policy judgement about risk and trust, which is all the more needed when operating in an evolving and challenging geopolitical context.

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[8] Art. 33 of the ESAs founding Regulations: Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48 and Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84., mandates the ESAs to assist in the preparation of equivalence regimes.

5 Equivalence VS mutual recognition

To briefly compare equivalence and mutual recognition: if equivalence can be seen as conditional openness, mutual recognition is deep trust.

Within the EU, mutual recognition has been one of the pillars of the single market. But this it is hard to fully replicate this model externally. A bank authorised in one Member State can operate across the entire Union without further licences, because all Member States apply the same legislative framework and share supervisory practices reinforced by binding enforcement and dispute resolution mechanisms. It implies a high level of trust, not just in current rules but in future regulatory evolution and supervisory culture, in good as well as bad times. Mutual recognition requires not only robust cooperation, often treaty-based governance, but also alignment of enforcement and dispute resolution. Few jurisdictions are willing to make such deep and enduring commitments.

The result is that external mutual recognition agreements are rare. In specific areas there are arrangements for the recognition of third country regimes, but these arrangements are narrow, conditional, and revocable. An example is the recognition of certain non-EU benchmark administrators. Under the EU Benchmarks Regulation,[9] a non-EU administrator can apply to a national competent authority of an EU Member State for recognition. To obtain such recognition, the administrator must appoint a legal representative in the Union and demonstrate that it complies with requirements at least as stringent as those in the EU. Recognition is therefore conditional, subject to ongoing oversight by the relevant EU authority, and can be withdrawn if the underlying conditions are no longer met.

For this reason, the EU has generally relied on equivalence, which offers flexibility and control and is a much easier tool to deploy than mutual recognition. In a world of rapid financial innovation and shifting geopolitical conditions, flexibility is a valuable asset and control is needed for building resilience.

Finally, few words on extraterritoriality. I will not enter into what this notion is about, which I leave to academic debates. I just want to recall that in principle EU financial legislation applies to EU entities, which are established or authorised within the Union. There are cases where the scope of Union law may extend beyond our borders, but this occurs only where non-EU entities engage in activities with a clear nexus to the EU market or financial system and where those activities pose material risks. In such cases, applying EU rules it is about prudence and responsibility.

We may look at few examples: The Markets in Financial Instruments Regulation (MiFIR)[10] imposes conduct and investor protection obligations on non-EU firms providing services to EU clients. In new digital space, the Markets in Crypto-Assets

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9 Art. 30(3) of Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014, OJ L 171, 29.6.2016, p. 1.

10 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173, 12.6.2014, p. 84.

Regulation (MiCA)[11] applies to crypto exchanges serving EU customers regardless of where they are based, and the Digital Operational Resilience Act (DORA)[12] covers ICT providers, including major global cloud service providers, that are critical to EU financial entities. The examples may differ, but the rationale is the same. The intention is to make sure that, when importing risk, prudential standards are respected and ultimately, the level-playing field is guaranteed.

Digitalisation, tokenisation, artificial intelligence, and cloud computing mean that financial services are increasingly borderless. Activities conducted outside the Union can now have direct and immediate effects on EU financial stability. For example, AI-driven trading algorithms or decentralised finance protocols, even if hosted abroad, can influence liquidity and price formation in EU markets. This reality requires thoughtful but firm regulatory responses.

When EU rules are applied beyond our borders, the EU does this selectively and proportionately, and seeks to manage their impact through cooperation, both bilaterally and multilaterally. For instance, at bilateral level, the European Commission holds regulatory dialogues with several third country jurisdictions,[13] where potential spill-over effects of legislation in each other's jurisdictions may be discussed. At multilateral level, cooperation takes place in international standard setting bodies, such as for instance the Financial Stability Board, the International Organization of Securities Commissions (IOSCO), the Basel Committee on Banking Supervision.

6 Conclusion

Several important conclusions can be drawn from the discussion above. First, in the EU, equivalence remains a suitable tool to deal with third country partners in financial services. Yet, an external strategy may build on various complementary tools: equivalence, mutual recognition and, where needed and there is a clear link with the EU market or financial system, application of internal rules beyond the borders. The challenge is balancing them. Too generous an approach to equivalence may weaken incentives for regulatory convergence and expose us to imported instability. Reliance on mutual recognition may prove unworkable and overly rigid. Unnecessary rules with extraterritorial effects risk leading to undue fragmentation and tensions with our partners. This balancing act is particularly challenging as financial centres compete on multiple dimensions: liquidity, innovation, supervisory quality, and predictability. We should get the balance right.

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11 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.6.2023, p. 40.

12 Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011, OJ L 333, 27.12.2022, p. 1.

13 An overview of regulatory dialogues may be found at the website of the European Commission, *Bilateral Relations*.

Second, strategic agility is essential. Financial markets evolve faster than legislative cycles, and geopolitical conditions can shift suddenly. We must therefore remain flexible, adjusting equivalence decisions, considering deeper cooperative frameworks when warranted etc – to make sure that our approach remain fit for purpose.

Third, international cooperation remains indispensable, both at regulatory and supervisory level. Whether addressing systemic clearing risk, developing global sustainability standards, or shaping digital finance, no jurisdiction can act alone. We will continue to invest in supervisory cooperation, both bilaterally and in multilateral standard-setting bodies, not to dilute our standards but to encourage convergence and reduce harmful fragmentation.

Cross-border decisions in crisis management: recognition and cooperation

George Johnston*

1 Introduction

Following the global financial crisis of 2007-2008, Mervyn King, the former Governor of the Bank of England, coined the well-known phrase that "most large complex financial institutions are global – at least in life if not in death"[1]. While solvent, a major banking group's operations span multiple jurisdictions. But during the global financial crisis, it fell to national governments and authorities to manage the disruption resulting from the failure of such groups. Banking groups' local operations were either "bailed out" by national governments or entered national insolvency proceedings, which was disruptive to financial stability and continuity of financial services.

To address these disruptive effects, after the global financial crisis, jurisdictions developed resolution regimes which provide authorities with various powers to deal with financial institutions in difficulty as an alternative to insolvency proceedings and bail-outs. These resolution regimes provide authorities with tools to ensure that systemically important financial institutions can continue providing critical services without recourse to public funds. For example, resolution authorities have the ability to transfer a financial institution's assets and liabilities to a private purchaser or a temporary bridge institution or to recapitalise a failed financial institution by "bailing in" its liabilities (i.e. writing down and/or converting such liabilities into equity).

In designing and implementing these resolution regimes, the truth of major banks being global in life but national in death remains valid. However, managing such "deaths" may also involve significant international aspects. In the event of a bank resolution, there is a legal question as to how the exercise of a national resolution authority's powers can be given effect in a legally certain way when the failed bank has operations located in multiple jurisdictions or contracts governed by different

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[1] Mervyn King, Governor of the Bank of England, Banking: From Bagehot to Basel, and Back Again, *Second Bagehot Lecture*, Buttonwood Gathering, New York, 2010.

laws. In such cases, the themes of cross-border interaction of legal systems and international cooperation are particularly relevant and the stakes are clearly high.

In this contribution, I will provide an overview of how international bodies and national authorities have sought to address this question since the global financial crisis. This contribution will cover:

- The relevant international standards;
- How legal certainty is enhanced through the design of resolution strategies and contractual mechanisms;
- Statutory frameworks for the recognition of resolution actions, including both the European Union (EU) approach for the recognition of resolution actions across its Member States, and the approach of the United Kingdom (UK) which was applied in a resolution of a Ukrainian bank, PrivatBank; and
- Cross-border regulatory and operational issues that need to be considered in a resolution, such as those that arose in the 2023 banking crisis.

2 FSB Key Attributes and recognition of cross-border resolution actions

In the wake of the global financial crisis, the Financial Stability Board (FSB) developed the "Key Attributes of Effective Resolution Regimes for Financial Institutions" (FSB Key Attributes).[2] The FSB Key Attributes are the international standard for effective resolution regimes globally and were endorsed by the Group of Twenty (G20) in 2011.

The Key Attributes recognised the need for certainty in the cross-border effectiveness of resolution powers. The FSB noted in a report to the G20 that "Whichever resolution strategy is pursued for cross-border institutions, its effectiveness will be maximized if there is cross-border cooperation as called for by the Key Attributes…The effective implementation of resolution strategies can be stymied if the cross-border effectiveness of bail-in and other resolution powers is uncertain".[3]

For this reason, the FSB Key Attributes place great emphasis on cooperation between resolution authorities. Key Attribute 7 provides that: "The statutory mandate of a resolution authority should empower and strongly encourage the authority wherever possible to act to achieve a cooperative solution with foreign resolution authorities".

Critically, Key Attribute 7 goes on to state that "jurisdictions should provide for a transparent and expedited process to give effect to foreign resolution measures."

2 FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, revised version, 2024.

3 FSB, Progress and Next Steps Towards Ending 'Too-Big-To-Fail' (TBTF), 2013, 12-13.

This process of giving legal effect to a foreign resolution action is often referred to as recognition.

At the same time, Key Attribute 7 also provides that a resolution authority should have resolution powers over local branches of foreign firms and the capacity to use its powers either to support a resolution carried out by a foreign home authority (for example, by ordering a transfer of property located in its jurisdiction to a bridge institution established by the foreign home authority) or, in exceptional cases, to take measures on its own initiative where the home jurisdiction is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction's financial stability.[4]

3 Enhancing enforceability of cross-border resolution actions through resolution strategies and contractual mechanisms

In Sections 4 and 5 of this contribution, I will set out how the EU and the UK have provided for statutory frameworks for the recognition of cross-border resolution actions in line with the FSB Key Attributes. But before doing so, it is important to consider how resolution authorities have in practice also enhanced the enforceability of resolution actions through the design of resolution strategies and through contractual mechanisms.

First, resolution strategies for dealing with the failure of most large systemically important financial institutions are often centred on what is called a "single point of entry" resolution. Under this approach, the home resolution authority will take the resolution action by applying a bail-in at the top level of the financial group, often a holding company with limited operations other than to issue equity and debt on behalf of the group. Applying resolution action at the top of the group in a targeted way reduces legal uncertainty as in practice there are fewer cross-border elements that need to be addressed and facilitates cooperation between authorities. It reduces the need to apply resolution powers to entities in different jurisdictions and for example, does not involve the transfer of the financial group's operational assets and liabilities.

Secondly, the enforceability of resolution actions has been enhanced by the adoption of contractual mechanisms by financial institutions, as mandated by resolution authorities or relevant regulations. For example, some jurisdictions have required financial institutions to include contractual recognition clauses in their foreign law contracts governing debt issued to investors to ensure the bail-in of that debt would have legal effect.[5] Similarly, financial institutions have been required to amend their foreign law governed financial contracts, such as ISDA derivative contracts, to

[4] Key Attribute 7 notes that this "should not apply where jurisdictions are subject to a binding obligation to respect resolution of financial institutions under the authority of the home jurisdiction (for example, the EU Winding up and Reorganisation Directives)".

[5] For the EU, see Art. 55 BRRD; for the UK, see the "Contractual Recognition of Bail-In" Part of the PRA Rulebook.

include a clause recognising that a resolution authority may stay default rights under those contracts in the event of the resolution of the financial institution.[6]

In general, the expectation is that courts will give effect to a contractual recognition clause – in light of the principle of freedom of contract and given that the contractual parties will have consented to the recognition of the resolution action – unless such contractual clauses are deemed contrary to public policy.

The FSB has noted that contractual recognition approaches offer a workable solution and can help support the cross-border enforceability of resolution actions – in particular if properly crafted and widely adopted.[7] Contractual arrangements may also complement and support statutory recognition regimes. The FSB, however, has also emphasised that this does not negate the need for statutory recognition regimes. Such regimes can provide even greater legal certainty rather than solely relying on private law contractual approaches – for example, if contractual recognition clauses had not been widely adopted.[8]

4 Statutory recognition frameworks – the approach within the EU

With the FSB setting the international standards, it falls to local jurisdictions to implement those standards into law. In this respect, the EU has been a leading jurisdiction by providing for a statutory recognition regime in the Bank Recovery and Resolution Directive[9] (BRRD) and amendments made to the Credit Institutions Winding Up and Reorganisation Directive (Reorganisation Directive).[10]

Within the EU, the BRRD and the Reorganisation Directive effectively provide for the "automatic" recognition of a resolution action taken in one Member State across the EU. Article 3(2) of the Reorganisation Directive provides:

"The reorganisation measures [which include the application of the resolution tools and the exercise of resolution powers provided for in the BRRD] shall be applied in accordance with the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in this Directive.

They shall be fully effective in accordance with the legislation of that Member State throughout the Community without any further formalities, including as against third parties in other Member States, even where the rules of the host Member State

6 For the EU, see Art. 71a BRRD; for the UK, see the "Stay in Resolution" Part of the PRA Rulebook.

7 FSB, Principles for Cross-border Effectiveness of Resolution Actions, 2015, 6.

8 Ibid., 8-9.

9 Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC and Directive 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2011/35/EU, 2012/36/EU and Regulations (EU) No 1093/2010 and (EU) No 648/2012 of the European Parliament and of the Council, OJ L 173, 12.6.2014, p. 190.

10 Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions, OJ L 125, 5.5.2001, p. 15.

applicable to them do not provide for such measures or make their implementation subject to conditions which are not fulfilled.

The reorganisation measures shall be effective throughout the Community once they become effective in the Member State where they have been taken".

The high level of legal certainty which the BRRD and the Reorganisation Directive provide for the recognition of resolutions actions within the EU was tested but ultimately upheld in the Novo Banco case[11] that was decided in the UK Supreme Court in 2018, while the UK was a member of the EU.

In that case, Banco Espirito Santo (BES), a Portuguese bank, was placed into resolution in August 2014 by the Banco de Portugal (the resolution authority in Portugal) and part of its business transferred to a bridge institution, Novo Banco.

Some creditors under English law loans had challenged certain aspects of the resolution. The English law loans were initially insulated from any loss after they appeared to be included in the transfer of assets and liabilities to Novo Banco. However, a few months after the initial resolution, the Banco de Portugal issued an administrative decision in December 2014 clarifying that, since the relevant creditors were shareholders[12] of BES, the relevant English law loans had not in fact been transferred to Novo Banco and were left behind in the insolvent rump of BES (the loans were therefore expected to be exposed to loss in insolvency proceedings of BES).

Initially, the English High Court agreed with the creditors and took a narrow interpretation of the BRRD and Reorganisation Directive, essentially determining that the Banco de Portugal administrative decision in December 2014 did not fall within the scope of mutual recognition on the grounds that such a type of clarificatory decision was not explicitly provided for in the list of resolution powers in the BRRD.

This narrow interpretation was overturned by the English Court of Appeal and ultimately by the UK Supreme Court. The Supreme Court ruled that given the administrative decision was effective under Portuguese law, it would also be effective under English law pursuant to the Reorganisation Directive.

Delivering the leading judgment for the Supreme Court, Lord Sumption made two key points about the Reorganisation Directive. First, its purpose is to ensure that all assets and liabilities of the institution, regardless of the country in which they are situated, are dealt with in a single process in the home Member State. Lord Sumption noted that this can be achieved only by taking the process as a whole and applying the legal effects attaching to it under the law of the home Member State in every other Member State. It is inconsistent with the language and purpose of Article 3 of the Reorganisation Directive for an administrative act, such as the December

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11 Goldman Sachs International v Novo Banco SA; Guardians of New Zealand Superannuation Fund and others v Novo Banco SA [2018] UKSC 34. Also see the Press Summary issued by the UK Supreme Court.

12 Under Art. 145H(2) of the Portuguese Banking Law, no liability could be transferred to a bridge institution if it was owed to an entity holding more than 2% of the original credit institution's share capital.

administrative decision, which affects the operation of a "reorganisation measure" under the law of the home Member State, to have legal consequences for a credit institution's debts that are recognised in the home Member State but not in other Member States.[13] Second, Article 3 does not only give effect to "reorganisation measures" throughout the EU, but requires them to be "applied in accordance with the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in this Directive", and to be "fully effective in accordance with the legislation of that Member State". Lord Sumption noted that, in this legal scheme, it cannot make sense for the courts of another Member State to give effect to a "reorganisation measure" but not to other provisions of the law of the home Member State affecting its operation.[14]

The Supreme Court therefore took a broad interpretation as to what aspects of a resolution action qualified for mutual recognition within the EU, upholding the intention of the Reorganisation Directive and BRRD to provide for a single universalist approach within the EU for dealing with the assets and liabilities of the relevant financial institution. In doing so, the Supreme Court affirmed the high degree of effectiveness and legal certainty associated with the "intra-EU" recognition regime in the BRRD and the Reorganisation Directive.

5 The UK's statutory recognition regime

As well as providing a framework for the recognition of resolution decisions within the EU, the BRRD also provides a framework for the recognition of third-country resolution decisions (i.e. those taken by authorities in non-EU jurisdictions).[15] The framework is different to the framework for EU decisions – rather than being automatic in nature, there is a presumption of recognition of third-country resolution actions subject to limited, prescribed exceptions.

The BRRD regime was implemented by the UK and is set out in sections 89H to 89J of the Banking Act 2009. It was retained and adapted following the UK's withdrawal from the EU and is the applicable statutory framework for the recognition of any resolution action taken outside of the UK.

Under the Banking Act 2009 regime, both the Bank of England and His Majesty's Treasury (HM Treasury) as the UK's finance ministry have a role to play. The Bank of England is the primary decision maker under the regime but HM Treasury is required to approve the Bank of England's decision reflecting that, for example, the recognition of a resolution action may involve consideration of the UK's compliance with its international obligations and may also have fiscal implications.

[13] See paragraphs 24-26 of the Judgment.

[14] See paragraph 27 of the Judgment.

[15] Arts 94-95 of the BRRD.

Broadly speaking, the decision as to whether to recognise involves considering two questions: First, does the action meet the definition of "third-country resolution action"? Second, are there grounds to refuse recognition?

On the first question on whether a resolution action qualifies as a "third-country resolution action", the Bank of England is required to consider whether the anticipated results and objectives of the resolution are broadly comparable to the UK regime. The test of "broad comparability", looking at what might have happened in a similar situation under the UK regime, is a holistic assessment and gives the Bank of England a high degree of judgement in making the decision.

If the action is a "third-country resolution action", then the Bank can only refuse to recognise the resolution action if one or more of five grounds are met:

(a) recognition would have an adverse effect on UK financial stability;

(b) the taking of action in relation to a UK branch of a third-country institution is necessary to achieve one or more of the special resolution objectives;

(c) under the third-country resolution action, UK creditors would not receive the same treatment as third-country creditors with similar legal rights;

(d) recognition of the third-country resolution action would have material fiscal implications for the UK; or

(e) recognition of, and taking action in support of, the third-country resolution action would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the European Convention on Human Rights).

The Bank of England's decision whether or not to recognise a third-country resolution action is set out in a third-country instrument published by the Bank of England. The instrument must recognise the third-country resolution action, refuse to recognise the action, or recognise part of the action.[16] Where the instrument recognises the action, that third-country-resolution action produces the same legal effects in any part of the United Kingdom as it would have produced had it been made (with due authority) under the law of that part of the United Kingdom.[17]

6 Recognition of the PrivatBank Bail-in

The Bank of England and HM Treasury applied the UK recognition framework for the first time in May 2021 in relation to the resolution of PrivatBank. This was the first recognition of a foreign resolution action by the Bank of England and, as far as I am aware, the first recognition under any statutory recognition regime aligned to the FSB

[16] Section 89H(2) Banking Act 2009.

[17] Section 89I(2) Banking Act 2009.

Key Attributes (other than EU resolution actions that have been automatically recognised within the EU).[18]

PrivatBank, a systemically important Ukrainian bank, was declared insolvent and resolved by the National Bank of Ukraine (NBU) in December 2016. Certain liabilities were converted to equity pursuant to a bail-in and PrivatBank was nationalised. At the time, the International Monetary Fund (IMF) and the European Bank for Reconstruction and Development, alongside the United States (US) Embassy in Ukraine, issued a statement confirming their support for the NBU's decision to nationalise PrivatBank as the only effective method of protecting depositors and the stability of the Ukrainian financial system.

The PrivatBank resolution included the bail-in of four English law governed loans, totalling USD 595 million, made by investors via a UK special purpose vehicle to PrivatBank. Following the resolution, the NBU submitted a request for recognition to the Bank of England in relation to the bail-in. PrivatBank did not perform banking activities or have banking customers in the UK. The request for recognition arose solely because of the existence of the four English law loans.

With the approval of HM Treasury, the Bank of England concluded that the bail-in was broadly comparable in its objectives and anticipated results to those of the UK resolution regime and that none of the grounds for refusal were met. The Bank of England kept relevant stakeholders, including the NBU and representatives of creditors, informed throughout the recognition process. Following its decision, the Bank of England published its third-country instrument[19] which gave effect to the bail-in as a matter of English law.

One key point to highlight from the Bank of England's experience in the PrivatBank case was the importance of close cooperation and information exchange between the Bank of England as the authority making the recognition decision and the NBU as the home resolution authority. This was a complex decision and the Bank of England needed to get a detailed understanding of the Ukrainian regime to inform its decision. Although the initial notification from the NBU was very informative, there were aspects that the Bank of England needed to follow up on for the purposes of its assessment. The authorities had several rounds of information requests to enable the Bank of England to reach its conclusions, particularly on the comparability assessment. This highlighted why effective cooperation and open communication channels between the authorities is so important.

Following the PrivatBank recognition, the Bank of England published guidance[20] on the UK recognition regime, which was noted in the IMF's 2022 UK Financial Sector

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18 The IMF described the recognition decision as "perhaps a global first" – IMF, United Kingdom: Financial Sector Assessment Program-Select Issues in Financial Safety Net Arrangements and Financial Crisis Preparedness, 2022, paragraph 39.

19 Bank of England, PrivatBank Bail-in: Bank of England Recognises Bail-in by National Bank of Ukraine, 2021.

20 Bank of England, International co-ordination FAQs.

Assessment Program Technical Note on select issues in financial safety net arrangements and financial crisis preparedness.[21]

The Bank of England guidance emphasises that effective prior engagement between the third-country resolution authority and the Bank will help support the transparent and expedited process envisaged in the FSB Key Attributes. It encourages third-country resolution authorities to engage the Bank of England ahead of taking any resolution action that may require action from the Bank of England, including recognition. This gives the Bank of England time and flexibility to work with the third-country resolution authority when assessing the recognition request and supporting materials, and aids swift decision-making.

The guidance also notes that third-country resolution authorities could also consider recognition as part of business-as-usual resolution planning and engagement. This would allow third-country resolution authorities, host and any other relevant authorities to consider the information and decision making that may be required in advance. The guidance provides that, in the event that the third-country resolution authority is unable to engage ahead of taking a resolution action, the Bank of England encourages the home authority to engage as soon as possible after taking the measures.

7 Cross-border regulatory and operational considerations – 2023 banking crisis

The penultimate Section of this contribution reviews some lessons learned from the banking crisis in 2023, which saw the failure of Silicon Valley Bank and Credit Suisse in consecutive weekends.

The Credit Suisse case demonstrated the importance of close collaboration between authorities to address cross-border regulatory issues. Following the deterioration in Credit Suisse's financial position, the Swiss Financial Market Supervisory Authority (FINMA) was ready to place the financial institution into resolution and exercise bail-in over its debt instruments. However, resolution was averted as a result of the acquisition of Credit Suisse by UBS, which was facilitated by the Swiss authorities.

The FSB, in its review of the 2023 banking crisis, noted that as part of FINMA's planning for the bail-in of securities issued in the US, there were a number of cross-border securities law issues that needed to be resolved as part of the planned resolution.[22] US securities laws apply to any debt instruments held by US investors, irrespective of the currency or governing law of that instrument. FINMA established an approach to accomplish the bail-in of securities issued in the US in a manner expected to be in compliance with US securities law, which they had based on advice of US counsel. However, as noted in the FSB report, according to the staff of the US Securities and Exchange Commission (SEC), there would have been legal challenges relating to US securities laws in executing a bail-in. According to SEC

[21] IMF, ibid., paragraph 40.

[22] FSB, 2023 Bank Failures: Preliminary lessons learnt for resolution, 2023, 16-18.

staff, the conversion of Credit Suisse's bonds to equity under the planned bail-in would have constituted a sale, thus requiring registration or an exemption under US securities laws. This is in contrast to the position in the EU and UK.[23] In the view of the SEC staff, among the challenges involved in executing a bail-in in compliance with US federal securities laws is that it would require detailed preparation, including possibly adapting the bank's systems to enable prompt provision to the market of current and accurate financial statements. SEC staff considered that it would be difficult for an issuer to compile the disclosures required by securities regulations over a resolution weekend.

The FSB in its report concluded that in order to ensure confidence in the execution of bail-in, it is essential for authorities to cooperate among themselves and work together with financial institutions, as part of resolution planning, to reduce legal uncertainties. Further work has continued with the SEC and other market authorities to consider how firms can undertake actions to comply with relevant securities laws in a resolution and thereby enhance the legal certainty of bail-in. In its 2024 Resolution Report,[24] the FSB noted that it had together with market authorities held a workshop to support the effective execution of bail-in in the cross-border context. The workshop discussed how to comply with foreign securities registration (i.e. prospectus), reporting and disclosure requirements, including through the use of exemptions.[25]

The experience from the Credit Suisse case illustrates the point that, in addition to ensuring the legal effectiveness of a cross-border resolution, there will be regulatory issues – such as those under securities laws of different jurisdictions – that will need to be addressed. It further emphasises the need for cooperation among a broad range of authorities, not just resolution authorities but also securities and markets regulators, to ensure that a resolution can be effective on a cross-border basis.

Cooperation between authorities is, of course, also needed beyond legal and regulatory issues, for example with respect to operational continuity across banking groups in resolution and the provision of temporary liquidity by central banks. In 2023, the Bank of England managed the failure of the UK subsidiary of Silicon Valley Bank (SVB UK) by applying its resolution powers to transfer all SVB UK shares to HSBC for GBP 1 (thereby extinguishing all claims and rights of the previous shareholder) and the simultaneous write-down of SVB UK's Additional Tier 1 and Tier 2 capital instruments. As SVB UK relied on its US parent for technology and

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[23] FSB, 2024 Resolution Report: From Lessons to Action: Enhancing Resolution Preparedness, 5 December 2024, Box 3. The relevant FSB workshop, which is referred to further below in this contribution, noted that securities laws of the EU and UK do not require a prospectus for the issuance of new equity or interim securities where there is no offer to the public. It considered that where the bail-in mechanism is structured in such a way that there is no offer to the public, for example where the bail-in mechanism does not include an element of choice for the bailed-in investors, it is likely that there is no offer to the public and therefore that a prospectus would not be required. Otherwise, in both the EU and the UK, an offer of securities to the public requires publication of prospectus unless it falls within an exemption. Separately, it should also be noted that besides any obligation to publish a prospectus, a financial institution in resolution may also be subject to continuing disclosure requirements in different jurisdictions. See Bank of England, Executing bail-in: an operational guide from the Bank of England, 2021, paragraph 2.12.

[24] FSB, ibid., Box 3.

[25] At the workshop it was identified that, under US securities laws, the Section 3(a)(9) exemption of the US Securities Act 1933, typically used for debt-to-equity exchanges, was the most plausible existing exemption from the US registration requirements for an open bank bail-in.

systems, the Bank of England coordinated closely with the Federal Deposit Insurance Corporation (FDIC) to ensure the continuity of operations.

The Bank of England has highlighted how coordination at all levels between the UK and the US authorities, including between the Governors, the FDIC Chair and the Federal Reserve Vice-Chair for Supervision, was very close throughout the SVB UK resolution, which reflects the strong working relationships the Bank of England developed with its US counterparts.[26] The Bank of England was accordingly well placed to cooperate and collaborate at such pace with its US counterparts to secure a successful, coordinated and cooperative resolution of SVB UK's operations. This cooperation was in contrast to the events during the global financial crisis in 2008 where the relevant authorities lacked effective regimes to manage the failure of financial institutions on a cross-border basis – this led to a fragmented approach across jurisdictions (for example, in the case of the failure of Lehman Brothers), which had some adverse effects on broader financial stability. In the case of SVB UK, the authorities were able to cooperate effectively largely because of the coordination capability that has been built since the global financial crisis, including through the development of resolution plans for the largest cross-border banks, high level crisis management scenario-based exercises, and collaboration via fora such as crisis management groups (CMGs) and the FSB. The FSB highlighted how the FDIC maintained close cross-border cooperation in the case of SVB and initiated outreach with host authorities, making them aware of the situation, answering questions they had, and continuing to have touchpoints as needed.[27] Understanding each other authority's decisions and actions was central to being able to progress and act with speed.

8 Conclusion

The resolution of a global systemically important financial institution is a complex process which raises challenging issues of cross-border legal enforceability of resolution actions taken by the home resolution authority.

Resolution authorities have greatly enhanced legal certainty in cross-border resolutions through the structuring of the resolution process, including through the single point of entry resolution strategy, and by mandating widespread adoption of contractual recognition clauses in key debt instruments and financial contracts governed by foreign law.

Legal certainty is further enhanced in those jurisdictions which have adopted statutory frameworks for the recognition of resolution actions, in line with the FSB Key Attributes. The EU has been a leading actor in its implementation of the FSB Key Attributes by providing for statutory mechanisms for the recognition of resolution decisions made within the EU and by third countries. We have seen how the "intra-EU" recognition regime in the BRRD and Reorganisation Directive provides a high degree of legal certainty, as highlighted by the Novo Banco case in the UK Supreme

26 Bank of England, Letter to the Treasury Committee of the House of Commons, 2023, 18.

27 FSB, 2023 Bank Failures: Preliminary lessons learnt for resolution, 2023, 23.

Court. And we have also seen how the UK regime, which is based on the BRRD's framework for the recognition of third-country resolution actions, has been applied effectively in practice. In the PrivatBank resolution, the Bank of England's recognition of the NBU's bail-in of US 595 million of English law governed liabilities ensured that the bail-in took legal effect as a matter of English law.

Ensuring legal certainty is, however, a necessary but not sufficient condition for effective cross-border resolution. Close cooperation between the authorities is essential. Such cooperation should cover early engagement and sharing of information to enable resolution authorities to recognise each other's resolution actions. But such cooperation is also important to ensure the effective execution of resolution strategies, address regulatory issues (a key lesson learned from the Credit Suisse case) and coordinate on operational issues (as was evident in the Bank of England's resolution of SVB UK). Good cooperation requires practice and engagement between a broad range of authorities (including prudential supervisors, resolution authorities, central banks and securities regulators), which enables the authorities to have confidence that the regimes will work effectively if and when the need arises. This highlights the ongoing importance of work between the authorities at CMGs for specific financial institutions,[28] other fora and workshops at the FSB, and multilateral exercises, such as the Trilateral Principal Level Exercise which involves the heads of resolution, regulatory and supervisory authorities, central banks, and finance ministries of the US, UK, and the EU banking union[29] and has been described by the IMF as a key platform for cross-border cooperation for the resolution of a globally systemically important bank.[30]

Relying on cooperation in a crisis may need to be considered alongside a resolution authority's need to retain some level of control. For example, while the FSB Key Attributes emphasise that a resolution authority should be strongly encouraged to act to achieve a cooperative solution with foreign resolution authorities wherever possible, these standards also recognise that a resolution authority should have resolution powers over local branches of foreign firms which can be used, in exceptional cases, to take measures on its own initiative where the home jurisdiction is not taking action or acts in a manner that does not take sufficient account of the need to preserve the local jurisdiction's financial stability. Reflecting this, the Bank of England has such powers to act independently as a "back-stop".[31] The Bank of England has noted that these powers would only be used in the event that cooperation between resolution authorities proves ineffective, and where action is required to protect the public interest.[32] However, the structuring of resolution

[28] FSB Good Practices for Crisis Management Groups (CMGs), 2021.

[29] See, for example, FDIC, Principals of U.S., European Banking Union, and U.K. Financial Authorities Meet for Regular Coordination Exercise on Cross-Border Resolution Planning, 2024.

[30] IMF., ibid., paragraph 43.

[31] Chapter 6A Banking Act 2009; see also HM Treasury, Banking Act 2009: special resolution regime code of practice, paragraph 10.13.

[32] The Bank of England's approach to resolution, 15 December 2023, Box 5.

strategies incentivises cooperation.[33] Furthermore, the interdependence of most globally systemic important banks ensures that it is in the interests of home and host authorities to cooperate in a resolution. Failure of the home authority to cooperate could lead to seizure of local assets by hosts. And failure of the hosts to cooperate could lead to interruption of critical services supplied by affiliates in the home jurisdiction. This has led the Bank of England to previously observe that there is "likely to be too much at stake for authorities not to cooperate in dealing with a failure of a globally systemic important bank".[34]

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[33] For example, under the single point of entry resolution strategy, local operating subsidiaries holding local assets do not enter into resolution while the FSB's Total Loss-absorbing Capacity standards provide for the appropriate distribution of loss-absorbing and recapitalisation capacity in material subsidiaries outside of the home jurisdiction, which facilitates cooperation, see FSB, Total Loss-Absorbing Capacity (TLAC) Principles and Term Sheet, 2015.

[34] Bank of England, Response to the Treasury Committee's inquiry into capital, 2017, paragraph 1.37.


Building Europe's Autonomy:
Law, Institutions, Cooperation
Tuesday, 2 September 2025
European Central Bank
Frank Hoffmeister
European External Action Service
Christoph Herrmann
Universität Passau
Juliane Kokott
Court of Justice of the European Union
Laila Medina
Court of Justice of the European Union

Part V

Navigating sanctions, tariffs, and blocking statutes

Introduction

The Part of this volume on “Navigating sanctions, tariffs, and blocking statutes” is both timely and complex, touching upon the intersection of international public law, WTO law, and the evolving landscape of countermeasures and blocking statutes. As Advocate General Juliane Kokott stressed in her opening remarks of the respective panel, it asks a very fundamental question that lies in the heart of this book: how law relates to the instruments through which the EU seeks make its autonomous role to react to what it perceives as threats to its values and interests?

The three Chapters that follow offering a unique perspective on the challenges and opportunities facing the European Union and the broader international community.

Christoph Herrmann opens the discussion with an analysis of what he terms the challenge of international trade turmoil for the EU’s constitutional order. He critically examines the transformation of the global economic order, focusing on the EU’s evolving trade policy amidst rising geoeconomic tensions, particularly the strategic rivalry between the US and China. The analysis highlights how decarbonisation, digitalisation, and the race for technological dominance have shifted the EU’s priorities from liberal market integration to “open strategic autonomy.” This concept seeks to balance the preservation of independent policy space and reduction of dependencies with a continued commitment to multilateralism and the rule of law. The paper details the EU’s legislative responses, including the adaptation of trade defence instruments, tightening of export controls, and the introduction of new autonomous instruments such as the Anti-Coercion Instrument (ACI) and the Carbon Border Adjustment Mechanism (CBAM). These measures, while enhancing the EU’s capacity to respond to external economic pressures, often test the boundaries of WTO legality and raise questions about the coherence of the EU’s constitutional order.

Furthermore, Professor Herrmann interrogates the compatibility of these new instruments with both international and EU law, noting the inherent tension between the pursuit of autonomy and adherence to the rule of law. The discussion underscores that while the Lisbon Treaty has provided a legal foundation for a more assertive EU foreign economic policy, persistent challenges remain regarding competence allocation, policy orientation, and decision-making processes. The paper concludes that although the EU’s geoeconomic reorientation strengthens its ability to address contemporary challenges, it simultaneously exposes unresolved issues within the Union’s legal and institutional framework. The author cautions that the increasing use of trade policy instruments for security and industrial policy purposes risks undermining the integrity of the internal market and the foundational principles of the EU as a *Rechtsgemeinschaft* (community of law).

In the next chapter, Frank Hoffmeister, brings a concrete focus to our exploration. Hoffmeister examines the evolution and current challenges of the European Union’s strategic autonomy within the framework of its Common Foreign and Security Policy (CFSP). The analysis traces the political origins of the concept of “strategic autonomy,” highlighting its expansion to a broader foreign and economic policy objective, especially in response to global protectionism and the Covid-19 pandemic. He underscores the necessity of reducing external dependencies, particularly in the financial sector, and details the interplay between internal and external policies, emphasizing the EU's commitment to multilateral solutions while retaining the capacity for lawful unilateral action to protect its interests. His contribution addresses the legitimacy of economic sanctions and blocking statutes, with particular attention to the use of Russian immobilized assets for Ukraine, the protection of the International Criminal Court through EU blocking statutes, and the potential application of the EU's anti-coercion instrument.

Laila Medina concludes this Part with a chapter focused on restrictive measures (sanctions) in response to the Russian aggression against Ukraine, framing these actions as essential tools for defending EU values and interests. The analysis highlights the central role of the rule of law, arguing that even in times of crisis, the EU must not compromise its constitutional commitments. The Court of Justice of the European Union is the key guardian, ensuring that sanctions are both effective in achieving political objectives and respectful of fundamental rights. The author discusses recent case law, such as the *Kadi* and *Timchenko* cases,[1] to illustrate how the Court balances the Council's broad discretion in foreign policy with the need for judicial oversight and protection of individual rights. This balance is achieved by limiting judicial review over political decisions while maintaining full jurisdiction over the impact of sanctions on individuals, ensuring due process and proportionality.

The contribution also situates EU restrictive measures within the broader context of public international law, emphasizing their compatibility with international obligations and their function as instruments for upholding the international legal order. The effectiveness of these measures, however, ultimately depends on the enforcement capacity of Member States, which is further reinforced by recent legislative developments such as Directive 2024/1226.[2] The author concludes that the EU's response to external threats must remain anchored in the rule of law, with legal creativity used to strengthen – rather than undermine – core values. The judiciary, Member States, and EU institutions are collectively responsible for ensuring that restrictive measures are both effective and legally sound, preserving the Union's autonomy and its commitment to peace and international cooperation.

1 Judgment of the Court of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council* and Commission, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 ("Kadi I"); Judgment of the Court of 18 July 2013, *Commission and Others* v Kadi, C-584/10 P, ECLI:EU:C:2013:518 ("Kadi II"); Judgment of the Court of 1 August 2025, *Timchenko* v *Council*, C-702/23 P, ECLI:EU:C:2025:605.

2 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 2024/1226, 29.4.2024, p. 1.

Trade war v *Rechtsgemeinschaft*: the EU's trade policy course in a perfect storm

Christoph Herrmann*

1 Introduction

The world and the global economic system are obviously not the same today as they were in the 1990s, after the fall of the iron curtain. In particular, the economic rise of China and its challenge to the US' superpower status, but also the twin green and digital transitions have a significant impact on the global economic order. Decarbonisation and digitalisation are driving a shift away from fossil fuels and heavy machinery toward natural resources necessary for electrification and batteries, as well as computer chips, areas in which China has enormous market power. Furthermore, the ongoing fundamental economic transformation is causing a race for market shares in new technologies, to secure lasting dominance and advantages. Finally, the shift to renewable energies requires enormous investments whilst at the same time traditional fossil technologies remain significantly less costly. Around the world, industrial policies and significant state subsidies are being used to deal with these challenges.

Economic relations are becoming less shaped by liberal market efficiency gains and global value chains than by strategic alliances, decoupling, and containment of adversaries. Geoeconomics and "weaponization of everything" are the buzzwords of these trends. The EU's answer to the challenge comes under the heading of "open strategic autonomy": trying to preserve independent policy space and reducing factual dependencies, e.g. as regards critical resources, while remaining committed to an open multilateral trading system based on the rule of law. Whilst this already seems to imply squaring the circle politically, it also must operate within the constraints of both EU and international law. This contribution examines whether and to what extent the geoeconomic *Zeitenwende* challenges the EU constitutional order, in particular the rule of law.

2 The international economic order in turmoil

"We are not naïve free traders." These words of Jean Claude Juncker, the then president of the European Commission, ushering in an era of strategic interests shaping the EU's trade policy in 2017, echo loudly in today's trade policy parlance.

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Not too long ago, the global economy appeared to be on a different trajectory. The fall of the Iron Curtain, the end of Soviet communism, German reunification, the Treaty of Maastricht with its aim of establishing the Economic and Monetary Union in three stages, the establishment of the WTO, the increasing privatisation and liberalisation of services of general interest and other state enterprises, the emergence of the internet economy, the "new economy", the economic transformation and opening in China all left the global economic outlook seemingly without genuine alternatives to (social) market economy, open world trade, and free markets. As such, the 1990s were a time of radical change, proclaimed by some as the "end of history" (Fukuyama). By the end of the decade, however, the end to the "end of history" was already becoming apparent: the Asia crisis (1997), followed by the Russia crisis (1998/99), the failure of negotiations on a Multilateral Agreement on Investment within the OECD (1998), the Seattle protests against the WTO Ministerial Conference (1999), and the bursting of the dotcom bubble (2000). The succeeding decade – the "noughties" – was marked by the attacks of 9/11, the "war on terror", the subprime mortgage crisis and the ensuing global financial crisis (2007), which led almost seamlessly into the euro sovereign debt crisis (2009). Climate change, increasingly perceived as a climate crisis or climate catastrophe, runs parallelly and permanently.

In 2012, Xi Jinping assumed the presidency of China (now for life) with the aim of making China the leading global and economic power. The "Belt and Road Initiative" (BRI) and the "Made in China 2025" industrial strategy are the geoeconomic instruments that form the backdrop, involving massive state-backed overseas investment in infrastructure and the acquisition of key technologies. A side effect of China's emergence as a leading economic power has been the significant increase in its share of global CO_2 emissions, largely offsetting efforts to reduce emissions in the "old" industrialised parts of the world. At the same time, China is benefiting from the electrification of, for example, passenger transport and power generation, as this reduces Chinese dependence on oil and gas exporting countries (and thus on the sea lanes in the South China Sea). Finally, certain raw materials are increasingly seen as critical, not only for producing semiconductor chips and other consumer products, but also for achieving the transition to climate neutrality. Nevertheless, many of these materials are still supplied to the EU solely from China – like 98 % of rare earth elements.

US-China (G2) relations are dominated by concerns over jobs being lost to China, China's technological rise, and the tightening of US export control laws to prevent a possible military conflict in the Western Pacific or the South China Sea. The challenges facing the EU are quite different but, in many respects, greater. In particular, the EU has to manage the twin transitions of decarbonisation and digitalisation; bring the Western Balkan states – tempted by Chinese investment – closer to the EU while preventing a flare-up of ethno-religious-political conflicts in the area; moderate an escalating territorial dispute between EU member Greece and Turkey; address the constant threat of new waves of migration; and face Russia's war of aggression against Ukraine with all its geoeconomic implications. Managing this foreign policy agenda is further complicated by unresolved internal crises: the rule-of-law crisis, high national debt burdens, the management of the aftermath of the Corona pandemic, and finally the UK's exit from the EU (Brexit). The inauguration of Donald Trump as the 47th US President of the United States has complicated the picture even further and dramatically so.

3 The EU's response

The strategic challenge posed by the People's Republic of China has not gone unnoticed in the EU. More than 20 years after China's accession to the WTO, there is scarcely a piece of trade legislation that does not relate to China.[1] These measures reflect a broader shift towards a strategic EU trade policy, designed to safeguard the independence of the EU as well as to protect its values and interests. With the second Trump administration's tariff policy, the challenges have become even more complicated, since the US behaviour is clearly out-of-bounds of WTO law, whilst Chinese industrial policies are rather designed to use loopholes or grey areas within the WTO legal framework.

3.1 Trade policy strategy

Whether it was the sale of the port of Piraeus to the Chinese shipping company COSCO, the award of the contract for the construction of the Pelješac Bridge to the China Road and Bridge Corporation, or the takeover of the Augsburg-based robot manufacturer KUKA by the Chinese group Midea, it quickly became clear that China's new industrial strategy could cause considerable disruption to the internal market – and even affect other policy areas, such as the Common Foreign and Security Policy (CFSP). At the same time, transatlantic relations deteriorated significantly during President Trump's first term (2017-2021), due to the dispute over steel and aluminium tariffs, the US blockage of the WTO dispute settlement system, and the failure of negotiations on a transatlantic free trade area. It's getting even worse now during Trump 2.0.

Although the EU's new global CFSP strategy,[2] adopted in 2016, explicitly postulates the goal of strategic autonomy, its content has yet to be clearly defined. The European Commission's Communication "EU-China – A Strategic Outlook"[3] of March 2019 unequivocally identifies the challenges posed by China's economic rise and its industrial policy strategies pose for the EU and formulates corresponding policy responses. These include inter alia the areas of public procurement law, third country subsidies, investment, and export controls. The Commission further

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1 E.g. EPRS, Proposed anti-coercion instrument, Briefing PE 729.299; European Commission, Proposal for a Regulation […] on Foreign Subsidies Distorting the Internal Market, COM(2021) 223 final, p. 51; European Commission, Amended proposal for a Regulation […] on the Access of Third-Country Goods and Services to the Union's Internal Market in Public Procurement and Procedures Supporting Negotiations on Access of Union Goods and Services to the Public Procurement Markets of Third Countries, COM(2016) 34 final, p. 2.

2 Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy, 2016.

3 Joint Communication to the European Parliament, the European Council and the Council, EU-China– A strategic outlook, JOIN(2019) 5 final.

emphasises the need for a balanced and reciprocal opening of markets, as well as a need to ensure a level playing field and European competitiveness.

In its review of the Trade Policy Strategy 2021[4] and the update of the Industrial Strategy 2021, and with reference to its Communication “Europe's hour - repairing the damage and opening up prospects for the next generation” of May 2020[5], the Commission consistently refers to the guiding principle of the EU's “open strategic autonomy” (OSA) and elaborates on it. The OSA includes:

- resilience and competitiveness to strengthen the EU economy;
- sustainability and fairness, reflecting the need for the EU to act responsibly and fairly;
- assertiveness and rules-based cooperation, demonstrating on the one hand the EU's preference for international cooperation and dialogue, but on the other hand also its willingness to fight unfair practices and use autonomous instruments when necessary to pursue its interests.[6]

The latter “autonomous instruments” are particularly important for trade policy practice – and sometimes raise issues of both EU law and international economic law.[7] Based on this development, the Commission presented its economic security strategy in 2023 and an economic security package at the beginning of 2024, designed to enhance competitiveness whilst at the same time protecting the Union from economic security threads.[8] In particular, the proposed revisions of export control and investment screening may have further consequences in the trade and investment field.

3.2 Autonomous instruments

The EU's legislative activity on trade policy has increased considerably in recent years. Given the limited scope of this paper, only a few of the key legislative projects that fall under the heading of open strategic autonomy will be briefly presented here. In summary, the EU has significantly expanded and sharpened its trade policy “arsenal” or is in the process of doing so.[9] Increasingly, the WTO legality of the

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4 Communication from the Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final.

5 Communication from the Commission, Europe's moment: Repair and Prepare for the Next Generation, COM (2020) 456 final.

6 Communication from the Commission, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM (2021) 66 final, 5, emphasis added.

7 See Sahin, Die Handels- und Investitionspolitik der Europäischen Union im Zeichen „Strategischer Autonomie“, EuZW 2021, 348; see also with further references Müller-Ibold/Herrmann, Die Entwicklung des Europäischen Außenwirtschaftsrechts (2020-2022), Teil 1, EuZW 2022, 1029 (1031 Fn. 5).

8 Joint Communication to the European Parliament, the European Council and the Council on “European Economic Security Strategy”, JOIN (2023) 20 final.

9 More detailed and with in-depth references provided, see Herrmann/Müller-Ibold, Die Entwicklung des Europäischen Außenwirtschaftsrechts 2018-2020, EuZW 2021, 97 and Müller-Ibold/Herrmann, Die Entwicklung des Europäischen Außenwirtschaftsrechts (2020-2022), Teil 1, EuZW 2022, 1029; Müller-Ibold/Herrmann, Die Entwicklung des Europäischen Außenwirtschaftsrechts (2020-2022), Teil 2, EuZW 2022, 1085; Herrmann/Müller-Ibold, Die Entwicklung des Europäischen Außenwirtschaftsrechts (2022-2025), EuZW 2025, 606.

measures is cast in doubt or even bluntly absent, as is the case for the tariff deal of 2025 with the US administration.

3.3 Adaptation of existing trade defence instruments

The “traditional” trade defence instruments (TDIs), i.e. anti-dumping and countervailing duties, serve to maintain an international level playing field and thus prevent unfair trade practices as well as anti-competitive practices, i.e. dumping and subsidies.[10] Both types of instruments must comply with WTO law and, where applicable, additional rules in free trade agreements or customs unions (unless they are completely excluded there).[11] When China joined the WTO in 2001, special rules and transition periods were agreed for the application of the relevant WTO rules to China, some of which expired after 15 years in December 2016.[12] Even before that, the Commission had repeatedly attempted to reform the EU's basic regulations,[13] but failed to secure the necessary majorities in the Council.[14] In 2017 and 2018, the Commission presented a “modernisation package”[15] that introduced a number of adjustments, including a new methodology for calculating normal value in anti-dumping investigations regarding imports from countries where state intervention in markets distorts prices, and the possibility for higher tariffs to be imposed by partially removing the so-called lesser duty rule. The amendments also made it possible to consider the costs of complying with environmental or labour protection agreements.

At the enforcement level, the EU Commission has also tightened the reins and broken new ground by imposing duties on imports from Egypt to offset subsidies from China (“third country subsidies” or “transnational subsidies”), and has subsequently continued this practice in other cases.[16] The legality of this measure

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10 See DG Trade European Commission, Trade Defence – Ensuring a level playing field; Terhechte, Verwaltungsrecht der Europäischen Union/Herrmann, 2nd ed. 2022, 1185 ff.

11 See Bickel, F., *Customs Unions in the WTO – Problems with Anti-Dumping*, Springer, 2021.

12 Cf. Graafsma, F., Kumashova, E. (2014) “In re China’s Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?”, *Global Trade and Customs Journal*, Vol. 9(4), 154.

13 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176, 30.6.2016, p. 21; Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176, 30.6.2016, p. 55.

14 On the legislative procedure, see Hoffmeister Liber amicorum in memoriam Horst G. Krenzler, 2015, 365; Müller, W., “The EU’s Trade Defence Instruments: Recent Judicial and Policy Developments”, in Bungenberg, M., Krajewski, M., Tams, C., Terhechte, J.P. and Ziegler, A.R., *European Yearbook of International Economic Law*, Springer, 2017, 205 et seq.

15 European Commission, The EU is changing its anti-dumping and anti-subsidy legislation to address state induced market distortions, MEMO/17/3703.

16 E.g. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 Imposing Definitive Countervailing Duties on Imports of Stainless Steel Cold-Rolled Flat Products Originating in India and Indonesia and Amending Implementing Regulation (EU) 2021/2012 Imposing a Definitive Anti-dumping Duty and Definitively Collecting the Provisional Duty Imposed on Imports of Stainless Steel Cold-Rolled Flat Products Originating in India and Indonesia, OJ L 88, 16.3.2022, p. 24; see Herrmann/Müller-Ibold, Die Entwicklung des Europäischen Außenwirtschaftsrechts 2018-2020, EuZW 2021, 97 (102), Müller-Ibold/Herrmann, Die Entwicklung des Europäischen Außenwirtschaftsrechts (2020-2022), Teil 2, EuZW 2022, 1085 (1087).

under EU law was confirmed by the General Court and the Court of Justice,[17] yet questioned by the WTO's dispute settlement body.[18] The anti-subsidy duties on battery electric vehicles (BEV-imports) from China is further evidence or a tougher stance on the part of the Commission that initiated it ex officio. The recent Steel and Metal Action Plan[19] vividly demonstrates the willingness of the Commission to defend the interests of European industries once again.

Finally, the appointment of a Chief Trade Enforcement Officer is generally intended to strengthen the enforcement of the EU's treaty-based and autonomous trade rules in the sense of a more "robust" trade policy.[20] Whilst still rooted in the realm of "traditional" trade policy instruments that are governed by WTO rules, these policy changes try to fine-tune the trade policy arsenal more to the "China challenge" and tackle particular situations that are the result of China's industrial policies.

3.4 Tightening of export controls

While export controls are a geoeconomic instrument used intensively by the US in its relations with China, the EU faces constrains in employing it due to its primary legal framework. On the one hand, until the Lisbon Treaty, trade in services (which can also be subject to export controls, e.g. as assistance) was not under the exclusive competence of the EU. On the other hand, under Article 4(2), second and third sentences TEU, the protection of national security is a matter for the Member States. The control of trade in arms, ammunitions and war material is therefore largely (though not entirely)[21] excluded from the scope of Union law, as is evident from Article 346(1)(b) TFEU. However, the EU is responsible for regulating trade in so-called "dual-use goods".[22] The relevant Regulation[23] creates a Europe-wide system of export control in which the Member States continue to have the decisive decision-making powers. With its amendment in September 2021, after almost ten years of preparatory work,[24] the Regulation did not only considerably expand export controls

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17 Judgments of the Court of 1 March 2023*, Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry* v *Commission*, T-480/20, ECLI:EU:T:2023:90 and Jushi Egypt for Fiberglass Industry v Commission, T-540/20, ECLI:EU:T:2023:91; Judgment of the Court of 28 November 2024, *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry* v *Commission*, C-269/23 P and C-272/23 P, ECLI:EU:C:2024:984.

18 Cf. WT/DS616/R, *European Union–Cold Rolled Flat Products (Indonesia)*, Report of 2 October 2025.

19 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A European Steel and Metals Action Plan, COM(2025) 125 final.

20 European Commission, Chief Trade Enforcement Officer. See also Weiß., W. and Furculita, C. (2020), "The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014", *Journal of International Economic Law* 2020, Vol. 23(4), 865 (866).

21 Judgment of the Court of 15 December 2009, *Commission* v *Finland*, C-284/05, ECLI:EU:C:2009:778; *Commission* v *Germany*, C-372/05, ECLI:EU:C:2009:780, *Commission* v *Italy*, C-387/05, ECLI:EU:C:2009:781; , *Commission* v *Greece*, C-409/05, ECLI:EU:C:2009:782; *Commission* v *Denmark*, C-461/05, ECLI:EU:C:2009:783 and, *Commission* v *Italy*, C-239/06, ECLI:EU:C:2009:784 etc.

22 Judgment of the Court of Justice of 17 October 1995, *Leifer and Others*, C-83/94, ECLI:EU:C:1995:329, paragraph 11.

23 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, OJ 2021 L 206, p. 1.

24 Going back to the European Commission's 2011 Green Paper, COM(2011) 393 final.

under EU law[25] but also strengthened the Union's grasp on the trade in goods which might endanger its geopolitical resilience in the long run. Yet, making more aggressive use of export controls and restrictions may also backfire, when China follows the example in the fields where it has a particular leverage, such as critical raw materials like lithium or components needed in the battery industry. One day after the US tariff hike on "liberation day", the Chinese authorities tightened such controls significantly.

3.5 Amendment to the trade enforcement regulation

The Treaty of Lisbon introduced an important structural provision for trade policy in Article 207(2) TFEU, the importance of which for the interinstitutional relations is still sometimes misunderstood.[26] According to this provision, the Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the regulations laying down the framework for implementing the common commercial policy (CCP). Previously, the European Parliament had no say at all in EU trade policy, as provided for in primary law.[27] However, the involvement of the Parliament through an ordinary legislative procedure was not intended to apply to all measures, which were often very technical and related to individual cases, but only to the "framework". As a result, on the one hand, implementing powers have largely been transferred to the Commission (including for matters that previously had to be decided by the Council, e.g. around Trade Defense Instruments - TDI), and the comitology procedure has been applied to trade policy in this respect. This does not significantly change the practice of adopting trade remedies or the issue of legal challenges against them, but it does reflect a certain perception of de-politicization of the administration of trade remedies in the noughties. On the other hand, the Lisbon Treaty also necessitated the introduction of a "framework" and thus a legal basis in secondary law for the many different individual measures that trade policy entails. While not uncontested,[28] the correct legal opinion that used to prevail in institutional practice[29] held that the adoption of individual measures based directly on Article 207(2) TFEU should no longer be possible. Alternatively, if such individual measures were to be deemed permissible, they should be adopted only through the ordinary legislative procedure, which is often impracticable. Nevertheless, in implementing the "Turnberry deal" with the US, the Commission has based its proposal to introduce special tariffs on imports from the US directly on Article 207(2) TFEU – stretching the interpretation of the notion "framework" to its possible maximum.

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25 Vandenberghe, K. (2021), "Dual-Use Regulation 2021/821: What's Old & What's New in EU Export Control", *Global Trade and Customs Journal*, Vol. 16(9), 479.

26 Dimopoulos, A. (2008), "The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?", *Croatian Yearbook of European Law and Policy*, Vol. 4, 101 (126).

27 Ibid., 123; Streinz/Ohler/Herrmann, Der Vertrag von Lissabon zur Reform der EU, 3rd ed., 2010, 152 f.

28 Von der Groeben/Schwarze/Hatje, EUV/AEUV/Cottier/Trinberg, 7th ed. 2015, AEUV Art. 207 Rn. 66.

29 Streinz/Ohler/Herrmann, Der Vertrag von Lissabon zur Reform der EU, 3rd ed. 2010, 152; Bungenberg/Herrmann, Common Commercial Policy after Lisbon/Müller-Ibold, 2013, 158 ff.; Grabitz/Hilf/Nettesheim, Das Recht der EU/Weiß, 77. EL September 2022, AEUV Art. 207 Rn. 113; Calliess/Ruffert, EUV/AEUV/Hahn, 6th ed., 2022, AEUV Art. 207 Rn. 97 f.

The increase of customs duties, which is regularly used as a retaliatory measure in the context of trade disputes ("suspension of concessions"), hence required a legal basis[30] which was created in 2014 with the so-called Trade Retaliation or Trade Enforcement Regulation.[31] The blockade of the WTO Appellate Body appointments by successive US administrations has rendered the Appellate Body non-functional, allowing any WTO member to avoid the adoption of a panel report against it by the Dispute Settlement Body (DSB) simply by appealing the report "into the void".[32] Under the WTO Dispute Settlement Understanding (DSU), this prevents the authorization of a withdrawal of concessions, which is intended to coerce the losing member into complying with the adverse "ruling" of the panel. Following an amendment to the Trade Enforcement Regulation in 2021,[33] Article 3 aa now allows for the suspension of concessions and the imposition of retaliatory tariffs when the EU has successfully brought a case against another WTO member before a WTO panel, but the losing member appeals "into the void" (as well as in Article 3 bb for comparable situations in dispute settlement proceedings under bilateral trade agreements). Yet, the trade enforcement regulation has its limits, too. Most recently, the EU itself returned to an appeal into the void in a case that had been brought against the EU by Indonesia (which is not a member to the Multi-Party Interim Appeal Arbitration Arrangement).[34]

3.6 Economic coercion

The so-called "Anti-Coercion Instrument" (ACI)[35] entered into force shortly before the end of 2023. It has not been used so far, even though commentators frequently call for its application. With the ACI, the EU aims to counter economic coercion by third countries against individual Member States or the EU. The ACI is designed to protect EU and Member States' sovereign decision-making processes. One example concerns China's ban on imports of Lithuanian products or products containing parts and components from Lithuania due to the opening of a Taiwanese representative office in the Lithuanian capital Vilnius at the end of 2021. Although the EU has initiated WTO dispute settlement proceedings against this measure,[36] the WTO

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30 Not least because of Art. 52(1) Charter of Fundamental Rights of the EU.

31 Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ L 189, 27.6.2014, p. 50.

32 Pauwelyn, J. (2019), "WTO Dispute Settlement Post 2019: What to Expect?", *Journal of International Economic Law,* Vol. 22(3), 297 (303).

33 Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ 2021 L 49, 12.2.2021, p. 1.

34 Cf. World Trade Organization, DDG Zhang highlights continued relevance of WTO, importance of business input in its work, 2025.

35 Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ 2023 L, p. 1.

36 WT/DS610/8, *China – Measures Concerning Trade in Goods and Services*, Request for the establishment of a panel by the European Union, 2022.

dispute settlement procedure is very lengthy before retaliation is possible.[37] With the Appellate Body currently paralysed it is furthermore impossible to know whether any panel report can ultimately be adopted by the DSB. The ACI allows economic retaliation without prior WTO or FTA dispute settlement. The only requirement is that a third country must be found to be exerting undue economic pressure and attempts must be made – unsuccessfully – to remove this pressure through negotiations or other means.[38] In a similar vein to the trade remedies amendment, the ACI shows the difficult interplay between the diverging pillars of OSA. One the one side, the EU aims at strengthening the multilateral rules-based system. On the other, it faces geopolitical actors steering away from this once-shared understanding. Hereby, the EU appears to be seeking a middle ground and each new instrument – such as the ACI – must be assessed individually to evaluate the balance it strikes between these competing objectives. Whilst the ACI sticks to multilateralism in so far as it still requires negotiations with the third state allegedly violating the prohibition of non-intervention, it also enables the EU to react in cases where the multilateral system may be paralyzed.

3.7 Other instruments

There is a series of other trade-related instruments that serve the aims of the Open Strategic Autonomy, including the Investment Screening Regulation, the Foreign Subsidies Regulation, the CBAM Regulation and some other value-chain related instruments, as well as regulations and agreements trying to secure the access to critical minerals and the like. All of them raise more or less the question: whether they are WTO-compatible or not – a concern that has also been voiced by trading partners within the WTO framework. Most recently Russia brought the first dispute settlement case against CBAM in the WTO.[39]

4 The Open Strategic Autonomy from the perspective of WTO Law

The EU is committed to the international rule of law (see only Article 21 (1) TEU) and repeatedly proclaims the necessity of a rule-based order, especially around world trade. Explicit disregard or non-recognition of rulings by WTO dispute settlement bodies as “wrong” or “unlawful” – as the US government allowed itself to do shortly before Christmas 2022 regarding a panel report on the US Section 232 – is therefore typically avoided by the EU. However, the attitude of the Court of Justice, which rejects the direct effect of WTO law in the EU legal order and recently “dwarfed” the

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[37] Reich, A. (2017), “The effectiveness of the WTO dispute settlement system: A statistical analysis”, *EUI Working Papers LAW*, 20 et seq.; see also the explanation in Weiß/Ohler/Bungenberg, Welthandelsrecht, 3rd ed., 2022,117 ff.

[38] Wu, CH. (2023), “The EU’s Proposed Anti-coercion Instrument: Legality and Effectiveness”, *Journal of World Trade,* Vol. 57(2), 297 (305); Baetens, F., Bronckers, M. (2022), “The EU’s Anti-Coercion Instrument: A Big Stick for Big targets”, *EJIL:Talk!*

[39] See World Trade Organization, Russia initiates WTO dispute regarding EU’s carbon border adjustment and emissions trading, 2025.

exceptions accepted in the so-called Nakajima/Fediol ruling,[40] allows the EU institutions to commit a calculated violation of international law.

Of the instruments described above, the ACI and CBAM, as well as the reform of the Trade Enforcement Regulation, raise the greatest WTO concerns, but the EU's anti-subsidy practice vis-à-vis third country subsidies is not without problems either. The ACI is particularly problematic regarding the circumvention of the WTO dispute settlement procedure (Article 24 DSU) and the questionable recourse to general principles of international law on retaliation in the context of the WTO.[41] The same concerns apply to the Trade Enforcement Regulation after its recent amendment.[42] The CBAM, on the other hand, is a de facto tariff-equivalent charge that is likely to fall foul of several of the core WTO commitments such as Article II GATT and the selectively applied exceptions raise questions in light of the non-discrimination standards of national treatment in Article III:2 and the most-favoured-nation principle in Article I:1 GATT.

Overall, one gets the impression of a realistic turn in EU trade policy. It is true that there is has been an effort to ensure that the design and explanation of instruments are in line with international law. At the same time, the EU is increasingly entering the grey area of international law – especially WTO law – to avoid being completely helpless in the face of sometimes blatant violations by third countries. From the point of view of trade policy, this is understandable and perhaps indispensable for the evolving “sovereignty of Europe” that the OSA concept occasionally alludes to.[43] Whether it serves the international legal order in the medium to long term remains to be seen. With the Turnberry Deal between the EU and the US, even the lip-service to WTO compatibility has ended. The agreement clearly violates the tariff bindings (Article II) and MFN-obligation (Article I) of the GATT and cannot be justified as an interim agreement leading to an FTA under Article XXIV GATT either. Most recently, the EU also appealed “into the void” against the Panel Report on Countervailing Duties on imports of Biodiesel from Indonesia, a WTO member not party to the Multi-Party Interim Arbitration Arrangement.[44]

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[40] Judgment of the Court of 16 July 2015, *Commission* v *Rusal Armenal*, C-21/14 P, ECLI:EU:C:2015:494; The CJEU traditionally held that neither the WTO agreements nor the dispute settlement reports have direct effect in EU law, except in two situations: (a) the CJEU reviews the legality of an EU measure under WTO law if the measure directly refers to the WTO law (*Fediol*) or (b) the EU legislature intended to implement a particular WTO obligation (*Nakajima*), see in more detail Stoyanov, K., (2021) “Three Decades of the Nakajima Doctrine in EU Law: Where Are We Now? ”, *Journal of International Economic Law*, Vol. 24(4), 724.

[41] Azaria, D. (2022), “Trade Countermeasures for Breaches of International Law Outside the WTO”, *International & Comparative Law Quarterly*, Vol. 71(2), 389.

[42] Herrmann, C., Glöckle, C. (2018), “Der drohende transatlantische ‘Handelskrieg’ um Stahlerzeugnisse und das handelspolitische ‘Waffenarsenal’ der EU”, *Europäische Zeitschrift für Wirtschaftsrecht*, 477 (482); Brauneck, J. (2019), “Kann ein neuer EU-Multilateralismus das WTO-Recht bestimmen?“, EuZW, 397 (403 ff.).

[43] E.g. European Commission, 2020 Strategic Foresight Report – Charting the course towards a more resilient Europe, COM (2020) 493 final, referring to “Europe’s economic sovereignty” (p. 19) and “technological sovereignty” (p. 30, 34).

[44] World Trade Organization, EU appeals dispute panel report regarding duties on imports of biodiesel from Indonesia, 2025.

5 The open strategic autonomy under the EU's constitutional order

In the "*Rechtsgemeinschaft*" (Hallstein), an EU based on the rule of law, legislation and the enforcement of EU law by the Union institutions are subject to comprehensive legal and, if necessary, judicial control.[45] In the first place, there is always the question of whether the EU – in relation to the Member States – is competent to take certain measures at all. Any encroachment on the competences of the Member States renders secondary Union law unlawful.[46] In certain EU member states such as Germany, such a measure could be challenged before the Federal Constitutional Court in the context of ultra vires review.[47]

Additionally, Union secondary law must be compatible with the primary law as a whole. In this context, fundamental freedoms and rights naturally play a prominent role when it comes to encroachments on economic freedoms. Finally, Union law must be compatible with the objectives, values and interests entrusted to the EU (Articles 2, 3, 4(2), 21 TEU, 205, 206 TFEU) and coherent (Article 7 TFEU). For trade policy, this has always meant that judicial review of the objectives of concrete measures against the requirements of primary law is practically impossible due to the objectives being too disparate, partly contradictory and, of course, never entirely achievable at the same time.[48] In this respect, the institutions have a margin of discretion that can easily accommodate the various geoeconomic emphases of OSA. According to Article 3(5) TEU, the "Union shall uphold and promote its values and interests and contribute to the protection of its citizens". Obviously, values and interests are not the same and do not always lend themselves easily to a coherent policy approach. Whilst a human rights-based policy would possibly restrict trade in goods from Xinjiang significantly, the need to import products needed for solar power installations from the very same region may be without alternative, given the circumstances.

Nevertheless, the objectives are by no means insignificant for the assessment of the individual instruments under EU law, since they determine whether the instrument in question is based on the appropriate legal foundations. The CCP has always been the subject of much controversy and jurisprudence, not least because of its early exclusivity established by the Court of Justice and the lack of parliamentary involvement prior to the Lisbon Treaty.[49] With Opinion 1/94[50] on the WTO

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[45] Mayer, C, F. (2005), "Europe as a community of law", *WHI Berlin*, Paper 8/05.

[46] Streinz, S. *Europarecht*,, 11th ed., 2019, marginal number 550.

[47] Bundesverfassungsgericht (German Federal Constitutional Court), *Lissabon* [2009] BVerfGE 123, 267, paragraph 241; see Bast, J. (2014), Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review, *German Law Journal*, Vol. 15(2), 167 (168-171).

[48] Judgment of the Court of 19 November 1998, *United Kingdom* v *Council*, C-150/94, paragraph 67.

[49] Among others Judgment of the Court of 10 January 2006, *Commission* v *Parliament and Council*, Case C-178/03, paragraphs 40 *et seq*; Judgment of the Court of 8 September 2009, *Commission* v *Parliament and Council*, C-411/06, paragraphs 30 *et seq*; Opinion of the Court of 6 December 2001, *Protocole de Cartagena sur la prévention des risques biotechnologiques*, Avis 2/00, ECLI:EU:C:2001:664; Herrmann, Die EG-Außenkompetenzen im Schnittbereich zwischen internationaler Umwelt- und Handelspolitik, NVwZ 2002, 1168.

[50] Opinion of the Court of 15 November 1994, *Accords annexés à l'accord OMC*, Avis 1/94, ECLI:EU:C:1994:384.

Agreement, the Court ended its originally dynamic approach to CCP[51] that allowed EU trade policy to be adopted to the need of international commerce. In its post-Lisbon jurisprudence – notably in Opinion 2/15[52] on the competence of the EU to conclude the Trade and Investment Agreement with Singapore – the Court has returned to a somewhat more generous reading of the scope of CCP. The increasingly geoeconomic orientation of trade policy raises nevertheless concerns: the more these trade policy instruments move away from a primarily trade policy objective, the more difficult it becomes to rely on Article 207(2) or, in the case of agreements, Article 207(3) TFEU.

In particular, the ACI, allowing for the imposition of what can only be described as "sanctions light", is questionable because of its strong foreign policy character. In fact, the instrument appears to bypass the cumbersome unanimity requirement and the two-stage nature of Articles 75 and 215 TFEU, which complicates the EU's ability to exercise its – typologically unclear – competence for foreign policy under the Common Foreign and Security Policy (CFSP). The Investment Screening Regulation is another example, as it has to deal with Member State measures falling into the exclusive competence of the Union for the CCP, but are based on national or public security concerns, the responsibility for which remains a prerogative of the Member States. Generally, the more trade policy instruments are motivated by geoeconomic concerns, the more likely it is that they raise doubts about whether they fall within the scope of the Union's exclusive competence under Article 207 TFEU. In general, the EU's trade and investment constitutional setup is not designed for a world characterized by geoeconomic conflict and trade wars, but rather for the world of the early 1990s and for international cooperation and global governance. It is idealistic, not realistic.

6 Conclusion

Changing times require different policy responses. The OSA concept and the numerous autonomous instruments that are being added to the EU's trade policy toolbox under this heading, indeed strengthen the capability of the Union to deal with the challenges brought about by increased geoeconomic conflicts, the twin transition as well as the systemic rivalry by China. Yet, trade policy alone will not be sufficient to ensure that the EU preserves its autonomy to pursue a foreign policy in line with the Union's interests and values. The instruments described above may play a significant role, but more action is needed. The Commission has put forward further initiatives under the heading "Green Deal Industrial Plan".[53] Besides a significant

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[51] Dimopoulos, A. (2008), "The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?", *Croatian Yearbook of European Law and Policy*, Vol. 4(1), 101 (108-109).

[52] Opinion of the Court of 16 May 2017, *Accord de libre-échange avec Singapour*, Avis 2/15, ECLI:EU:C:2017:376.

[53] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A Green Deal Industrial Plan for the Net-Zero Age, COM(2023), 62 final.

adaptation of the EU State aid regime to the green transition challenges, it also features trade elements, in particular in the Critical Raw Materials Act.[54]

Yet, the geoeconomic re-orientation of the EU's trade policy is not unproblematic from a rule-of-law point of view. Whilst the Lisbon Treaty has indeed created the primary legal basis for a coherent and effective EU foreign economic policy, including a reorientation towards geoeconomic aspects, fundamental problems of competence allocation, policy orientation and decision-making remain, albeit in a new guise. This is not so much a question of the dichotomy between "trade" and "investment protection" agreements, which was triggered by the ruling of the Court of Justice in Opinion 2/15. Rather it appears that the European Union still lacks a suitable primary law framework for the formulation of a coherent and effective, genuinely common foreign policy, which could then also make use of the trade policy instruments that undoubtedly fall within the exclusive competence of the EU. This would encompass not only respecting the prerogatives of the Member States in the pursuit of their public security and order, and in particular their national security, but also extend to developing a concept of a common security and public order, as well as an EU security, which could serve as a yardstick, for example, in an investment screening procedure. Until this succeeds, the EU's geoeconomic "voice of power" will be audible, but will remain delicate and weak. From an international economic law point of view, at least some of the tools the EU has found to be useful, are in a grey area, to say the least. Not only is the EU internationally bound by the WTO agreements and other international treaties but is also constitutionally committed to respecting international law and the multilateral international order as a fundamental value under EU law. Yet, as the Court of Justice has repeatedly held, Union law does not require the institutions to obey international law under any circumstances. It is the geoeconomic turn of our times where the denial of direct effect by the Court has its merits. What cannot be overlooked, however, is the unavoidable conflict between autonomy and the rule of law: whilst the rule of law, in particular in the form of international and supranational legal norms, is meant to limit what states (or the EU for that matter) can do, autonomy is about the ability to do more. Yet there may be a solution to this fundamental dilemma: developing autonomy means first to develop the capacity to do certain things (and perhaps reduce reliance on others) – not that you must use the instruments you have developed, at least not in ways violating the rule of law. If the EU increasingly feels overly constraint by international rules, it should consider terminating them rather than breaking them.

At the same time, the loading of trade policy with security arguments and the – at least for now – indispensable increase of the Member States' involvement in areas traditionally under an exclusive competence of the Union, also poses risks to the internal market. For example, as seen in the field of State aid, the more or less rigid use of instruments such as investment screening by Member States may quickly evolve into a national industrial policy instrument. Indications for that kind of thinking were clearly visible in the German discussion about the investment of COSCO in the Hamburg port, where several commentators pointed to similar engagements of

[54] Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Ensuring a Secure and Sustainable Supply of Critical Raw Materials and Amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, COM(2023) 160 final.

COSCO in other EU ports. For the EU, the task is not only to strengthen the commercial policy arm of the EU's open strategic autonomy but also to ensure that this does not come at the expense of the integrity of the internal market or the rule of law foundations that define the Union as a *Rechtsgemeinschaft*.

Open strategic autonomy and EU foreign policy: current challenges and available instruments

Frank Hoffmeister*

1 Introduction

In her 2025 State of the Union speech, the President of the European Commission, Ursula von der Leyen, stressed that we are facing “a world of imperial ambitions and imperial wars, a world in which dependencies are ruthlessly weaponised. And it is for all of these reasons that a new Europe must emerge […] This must be Europe's Independence Moment”.[1]

In this context, the Common Foreign and Security Policy (CFSP) plays an ever more important role in fostering the European Union’s strategic autonomy. In order to present the current challenges and available instruments in the field, the present contribution is structured as follows: First, it provides an overview of the political origin of the concept of “strategic autonomy” and of the legal framework in which the EU efforts in reaching this goal are framed (Section 2). Next, it presents the innovative use of the EU’s sanctions policy by analysing the example of the Russian sovereign assets (Section 3). In Section 4, it will touch upon other CFSP instruments to pursue strategic autonomy. The final Section 5 provides a conclusion.

2 EU Strategic Autonomy and the EU Common Foreign and Security Policy

2.1 Political origins

The European Council mentioned the concept of strategic autonomy for the first time in 2013 in the context of the wars in Libya and Syria. At the time, it called for a strengthening of European defence capabilities to enhance “strategic autonomy”.[2] Moving from the purely military connotation of the term, former High Representative

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1 2025 State of the Union Address by Commission President von der Leyen, Strasbourg, 2025.

2 European Council, Conclusions of 20 December 2013, EUCO 217/13, paragraph 3.

Federica Mogherini's foreword in the 2016 EU Global Strategy further elaborated on this concept as foreign policy objective in broader sense.[3]

It was only in the face of increasing protectionism from geopolitical forces, such as the US and China, and the outbreak of the Covid-19 pandemic, which highlighted the Union's economic dependencies and vulnerabilities, that the concept of strategic autonomy reached the field of economic policy. In October 2020, the European Council Conclusions widened its scope by stating that "achieving strategic autonomy while preserving an open economy is a key objective of the Union".[4]

Russia's invasion of Ukraine on 24 February 2022 prompted the integration of foreign and economic policy strands. Using the even stronger term "European sovereignty", the EU Heads of States and Governments observed at their informal meeting in Versailles on 10 and 11 March 2022:

*"*Confronted with growing instability, strategic competition and security threats, we decided to take more responsibility for our security and take further decisive steps towards building our European sovereignty, reducing our dependencies and designing a new growth and investment model for 2030. In this respect, we addressed today three key dimensions: a) Bolstering our defence capabilities; b) Reducing our energy dependencies; and c) Building a more robust economic basis.*"*

The foreign and security dimension was further elaborated in the 2022 "Strategic Compass for Security and Defence", which referred to "Europe's geopolitical awakening" and emphasised the need to strengthen our resilience.[5] In the context of the European Monetary Union (EMU), the Council stated that a balance must be found between the Unions goals of, on the one hand, maintaining its commitment to an open international economic and financial order and, on the other hand, achieving EU strategic autonomy.[6]

2.2 Legal anchor

The EU's external action ensures the coherence between its internal and external policies, as well as their effective interplay, by making CFSP instruments available to support all EU objectives.

The geopolitical goal of strategic autonomy is anchored in Article 21(2)(a) of the Treaty of the European Union (TEU), according to which the Union "shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity". From this, one can deduce the necessity of decreasing dependence on external sources to protect the European economy from external interferences and shocks caused by geopolitical

3 EEAS, "Shared vision, common action: A stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy", June 2016, p. 4.

4 European Council, Conclusions of 2 October 2020, EUCO 13/20, paragraph 3.

5 Council of the European Union, A Strategic Compass for Security and Defence, 21 March 2022, 10.

6 European Council, Conclusions of 29 March 2022, EUCO 6301/22, paragraphs 1 and 4.

tensions. In particular, the EU financial sector must be sufficiently resilient to both internal and external shocks.[7] This also means that the EU's financial-market infrastructure must be shielded from extraterritorial measures or sanctions imposed by third countries with the aim of weakening or destabilising the European financial sector.[8]

To foster these objectives, the Union has recently adopted a number of legal acts addressed within the EU and aimed at strengthening its domestic industry and services in critical areas.[9] However, the Union may also activate foreign policy tools. When doing so, it must observe international law, as specifically set out in Articles 3(5) and Article 21(1) TFEU.

Combining both political and legal dimensions, the concept of strategic autonomy can thus be defined as: "Striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity!"[10] The following sections will focus on the major CFSP instruments available to the EU for protecting and upholding its strategic autonomy.

3 EU restrictive measures to counter the Russian aggression against Ukraine

3.1 The legal basis for freezing private property

Following Russia's recognition of the breakaway republics in Eastern Ukraine on 21 February 2022, and its full-scale military aggression against Ukraine on 24 February 2022, the European Union imposed a massive and unprecedented set of restrictive measures. These measures are first adopted by a Council Decision pursuant to Article 29 TEU and then implemented in the Union legal order by a Council Regulation under Article 215 TFEU.

The sanctions target, inter alia, individuals and entities in the Russian Federation, as well as key sectors of the Russian economy. The ultimate goal of EU restrictive measures is to change behaviour and, as in the case at hand, contribute to the re-establishment of international order.

As Union legal acts, restrictive measures must comply with the EU Charter of Fundamental Rights. Additionally, the Union has an obligation to respect international law and the UN legal framework by virtue of Article 21(1) TEU.

The jurisprudence of the Court of Justice of the European Union (CJEU) in the field of EU restrictive measures is extensive. When it comes to private assets, the Court

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7 EUCO 6301/22, paragraphs 17-18, 21 and 26; Versailles Declaration of 10 and 11 March 2022, paragraph 24.

8 EUCO 6301/22, paragraph 7, 35 and 41.

9 See Part 2 of this volume.

10 Hoffmeister, F. (2023), "Strategic autonomy in the European Union's External Relations Law", *Common Market Law Review*, Vol. 60(3), 667 (673).

has clarified that EU sanctions interfere with the right of property, enshrined in Article 17 of the EU Charter of Fundamental Rights and in Article 1, Protocol 1 of the European Convention on Human Rights, but are justified by reasons of international public policy.[11] The EU may freeze foreign assets because it is considered a temporary and reversible restriction that does not deprive the individual or entity of the right of property: while they remain the owner, their ability to disposing of such assets is temporarily limited.

3.2 The immobilization of assets of the Central Bank of Russia

Turning to the situation of Russian sovereign assets, the legal analysis becomes more nuanced. While CJEU case-law on public assets equally allows for temporary limitations to the right to property,[12] the property of states and state-owned entities benefits from sovereign immunity under the UN Convention on State Immunity.[13] In line with Article 21(1)(c) of the Convention, this protection includes the Central Bank of Russia (CBR).

While the Convention has not yet entered into force,[14] it is widely considered to reflect customary international law, according to the jurisprudence of national Courts,[15] an Opinion of the Advocate General[16] and the European Court of Human Rights (ECtHR).[17] The Convention's rules are thus binding on all states and by analogy to the EU as a subject of international law.

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11 Judgment of the Court of 3 September 2008 in Joined Cases, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities*, "*Kadi I*", C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, paragraph 358 that reads: "That freezing measure constitutes a temporary precautionary measure which is not supposed to deprive those persons of their property.(…)". See also Judgment of the Court of 18 July 2013 in Joined cases *European Commission and Council of the European Union v Yassin Abdullah Kadi*, " *Kadi II*", C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518, paragraphs 133-134; for the ECtHR see, *Al-Dulimi and Montana Management Inc v Switzerland*, Application no 5809/08, ECHR 2013, 26 November 2013

12 Order of the General Court of 8 October 2012, *Client Earth* v *Council*, T-62/12, paragraph 67 et seq., ECLI:EU:T:2012:525; Judgment of the General Court of 25 March 2015, *Central Bank of Iran* v *Council*, T-563/12, paragraph 49 et seq. and 111 et seq., ECLI:EU:T:2015:187., (also confirmed by the ECJ in appeal in Judgment of the Court of 7 April 2016, *Central Bank of Iran* v *Council*, C-266/15 P, ECLI:EU:C:2016:208).

13 United Nations Convention on Jurisdictional Immunities of States and Their Property adopted on 2 December 2004 by UN General Assembly Resolution 59/38.

14 As of September 2025, the Convention has 25 parties of the required 30 parties to enter into force under its Art. 30. Out of the 25 parties 11 are EU Member States.

15 See inter alia Lord Bingham in *Jones* v *Ministry of Interior of Saudi Arabia* [2006] UKHL 26; [2007] 1 AC 270, at 26: "Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases"; Lord Hoffmann (ibid., at 47) saw the 2004 Convention as a codification of the law of state immunity.

16 Advocate General Szpunar, Opinion of 14 January 2020, *LG and Others* v *Rina SpA and Ente Registro Italiano Navale*, C-641/18, ECLI:EU:C:2020:3, point 38.

17 See *Cudak* v *Lithuania* [GC], Application no. 15869/02, paragraph 66, ECHR 2010, 23 March 2010 and *Sabeh El Leil* v *France* [GC], Application no. 34869/05, paragraph 54, 29 June 2011: "Furthermore, it is a well-established principle of international law that a treaty provision may, in addition to the obligations it creates for the Contracting Parties, also be binding on States that have not ratified it in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule (ibid., paragraph 66). Consequently, Art. 11 of the International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 Convention, applies under customary international law, even if the State in question has not ratified that convention, provided it has not opposed it either (ibid., paragraphs 66-67)".

The Convention grants "jurisdictional" immunity. Accordingly, Russian sovereign assets are shielded from judicial measures of constraint. At the same time, an "ad maiore ad minus" argument can be made: if the conventional immunity granted by the Convention protects states and their entities from interference by independent judicial action, it may protect the same entities also from by executive action which be more prone for political motivation and potential abuse.

Against this background, the EU faced the challenge of blocking CBR assets located in the EU while respecting the boundaries of international law. In a sophisticated move, the Council adopted Decision (CFSP) 2022/33518, amending Decision 2014/512/CFSP,[19] which prohibited any transactions related to the management of reserves and assets of the CBR. As a result of that prohibition, the relevant assets of the CBR held by financial institutions in the Member States were not formally frozen, but rather "immobilised." Under this Decision, all actors within the EU are prohibited from making business with the CBR, and the assets located in the EU at that time remained in the custody of EU private central security depositories (CSDs) such as Euroclear. These CSDs were, and continue to be, prevented from returning the assets to the relevant Russian entities.

The concept of immobilisation is narrower and has a practical difference compared to freezing. Freezing assets entails a comprehensive prohibition on using, transferring and benefitting from the assets directed to the owner of the assets. Immobilisation, in turn, is directed to EU financial institutions prohibiting them from returning the assets to the CBR during the immobilisation. Consequently, in the view of the EU institutions, the Council Decision to immobilise CBR assets does not interfere with the CBRs' sovereign immunity, and, therefore, does not need to be justified under international law.

3.3 The use of the windfall profits generated through immobilisation

The immobilisation of CBR assets resulted in an unintended, but welcome side-effect. As the EU CSDs retained these assets in the financial system, they were generating interest at the central bank's prevailing rate lead interest.

Against that background, and after lengthy internal discussions, the Council adopted Decision (CFSP) 2024/1470[20] in May 2024. This Decisions, which amended Decision 2014/512/CFSP, imposes the obligation on CDSs to contribute 99,7% of their extraordinary net profits arising from the immobilisation of Russian assets ("windfall profits"). These profits were calculated from 15 February 2024 onward and

[18] Council Decision (CFSP) 2022/335 of 28 February 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 57, 28.2.2022, p. 4. On 9 March 2022, the Council adopted Decision (CFSP) 2022/395 amending that provision by including the Russian National Wealth Fund.

[19] Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31.7.2014, p. 13.

[20] Council Decision (CFSP) 2024/1470 of 21 May 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L, 2024/1470, 22.5.2024, p. 1.

directed to the Union. Regulation (EU) 2024/1469,[21] adopted on the same day, laid down the relevant implementing rules inside the internal market.

Pursuant to these Council Decisions, 90% of the financial contributions paid to the Union by the CSDs were to be used to support Ukraine, through the European Peace Facility (EPF). On the same day, the Council adopted Decision (CFSP) 2024/1471,[22] which established the allocation of the amounts of the financial contribution to be paid to the EPF pursuant to Decision (CFSP) 2024/1470 (Decision 2024/1471). Under its terms, the EPF should use the received windfall profits for assistance measures for the supply of military support to the Ukrainian Armed Forces "in addition to the voluntary contributions referred to in Article 30 of Decision (CFSP) 2021/509".

For 2025, the allocation ratio was adjusted.[23] Accordingly, 5% of the windfall profits has been allocated for military support through the EPF, while the vast majority (95%) was directed toward reconstruction, budgetary support, and other efforts to aid Ukraine through the Ukraine Loan Cooperation Mechanism (ULCM). The ULCM was established by Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024. This mechanism forms part of the G7 initiative, adopted at the G7 summit in Apulia in June 2024, to support Ukraine with loans of up to USD50 billion (€5 billion). Loans through the ULCM come on top of the EU's macro-financial assistance (MFA) to Ukraine.

The purpose of the G7 initiative is to "frontload" the windfall profits in order to provide Ukraine with sufficient and continuous financial support to address the immediate needs inflicted on the country by Russia's ongoing aggression. The ULCM provides Ukraine with non-repayable financial support to assist it repay loans extended by G7 partners, including the EU's MFA loan. Given the urgent nature of Ukraine's financing needs, the MFA loan was made available already in 2024.

According to the annex to the final agreement between G7 finance ministers on 25 October 2024, the EU's share of the G7 loan will be EUR 18 billion (USD 20 billion). Extraordinary revenues originating from Russian sovereign assets immobilised in the G7 member states are being used to repay these loans and the associated interest costs. The ULCM collects the extraordinary revenues and channels them to Ukraine to facilitate loan repayments. The first repayments took place in August 2025, with the EU (€617 millions), the US (€611 millions), the UK (€91 millions), Canada (€112millions) and Japan (€100 millions) receiving the promised amounts based on the principal of their respective loan.

In other terms, the EU ensured that the windfall profits (€2 to 3 billions per year) generated from the immobilisation of Russian sovereign assets would not end up

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21 Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L, 2024/1469, 22.5.2024, p. 1.

22 Council Decision (CFSP) 2024/1471 of 21 May 2024 on the allocation of the amounts of the financial contribution paid to the European Peace Facility pursuant to Decision (CFSP) 2024/1470, OJ L, 2024/1471, 22.5.2024, pp. 1-2.

23 Council Implementing Decision (CFSP) 2024/2760 of 24 October 2024 implementing Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L, 2024/2760, 28.10.2024, p. 1.

"into the pockets" of the CDSs and their shareholders, but instead would be used to help Ukraine in its defence against the Russian aggression through an innovative new mechanism.

3.4 Possible next steps

On top of the G7 loan, secured by the windfall profits, the question has arisen as to whether it is also possible to touch upon the Russian sovereign assets themselves. As the Commission President said in her 2025 State of the Union address: "This is Russia's war. And it is Russia that should pay". She further added:

"This is why we need to work urgently on a new solution to finance Ukraine's war effort on the basis of the immobilised Russian assets. With the cash balances associated to these Russian assets, we can provide Ukraine with a Reparation Loan. The assets themselves will not be touched. And the risk will have to be carried collectively. Ukraine will only pay back the loan once Russia pays for the reparations. The money will help Ukraine already today (…)."[24]

At the meeting of the European Council of 23 October the Heads of States and governments held a first exchange on the matter. The leaders of 26 Member States concluded:

"The European Council commits to address Ukraine's pressing financial needs for 2026-2027, including for its military and defence efforts. Therefore, the European Council invites the Commission to present, as soon as possible, options for financial support based on an assessment of Ukraine's financing needs and invites the Commission and the Council to take work forward, in order for the European Council to revert to this issue at its next meeting. Subject to EU law, Russia's assets should remain immobilised until Russia ceases its war of aggression against Ukraine and compensates it for the damage caused by its war."[25]

The details of such "reparation loan" will have to be developed in the coming weeks. Whichever way will be chosen to implement the reparation loan, the setting up of the loan could potentially open the door on a parallel ongoing international effort in that area.

Following four rounds of negotiations in The Hague, a group of States agreed in September 2025 on a Draft Convention establishing an "International Claims Commission". The signature of the Convention is expected on 16 December 2025. The Claims Commission will be an internationally legitimized body to examine reparation claims and determine the amounts owed by Russia as war reparations to Ukraine. The Commission will be established as an open Convention of the Council of Europe, allowing Russia to participate and join at any time.

However, given the current unlikelihood of the Russian Federation agreeing to join such a Convention, the question of legally feasible solutions in the event Russia

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24 2025 State of the Union Address by Commission President von der Leyen, Strasbourg, 2025.

25 European Council of 23 October 2025, EUCO Document 19/25, paragraph 8.

refuses to pay the due reparations to Ukraine is more than legitimate. In that regard, the immobilised Russian assets could potentially serve, in the future, as an advance payment for war reparations, pending on the negotiation and signature of a peace agreement between Russia and Ukraine. This solution would allow Ukraine to begin its reconstruction, without having to wait for the outcome of future peace negotiations with Russia.

3.5 Compliance with international law

Any future step involving the use of the immobilised assets may likely trigger a Russian objection on the grounds that it infringes upon its sovereign immunity. In any case, it is important to underline that international law, in certain circumstances, provides for the possibility of justifying a breach of an international obligation. Among the "circumstances precluding wrongfulness" of an international act is the concept of countermeasures. This concept is codified in the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

While it is well established that a directly affected State has the right to react to a breach of international law by another State in various manners, including by taking countermeasures, the question of whether third States are equally entitled to do the same is less certain.

Article 48 ARSIWA reads:

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(b) the obligation breached is owed to the international community as a whole.

This Article reflects the jurisprudence of the International Court of Justice (ICJ) since the Barcelona Traction case of 1979, according to which certain international obligations have an erga omnes character.[26] However, the ability of a non-directly affected State to invoke the erga omnes responsibility of another State does not clarify which types of reactions are allowed under international law. In 2001, the ILC left the question open in Article 54 ARSIWA, stating "This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."

As explained in the relevant ILC commentary, the state of international law regarding countermeasures taken in the general or collective interest was still uncertain at the time, as state practice was still limited and involving only a small number of states.[27]

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[26] ICJ, Barcelona Traction (*Belgium* v *Spain*), ICJ Reports 1970, 3 at paragraph 33.

[27] United Nations, Report of the International Law Commission (2001) A56/10, 2001, 139 (6).

Consequently, the choice was not to include a provision addressing whether other States, identified in Article 48, are allowed to take countermeasures in order to induce a responsible State to comply with its obligations. Instead, the ILC opted for a saving clause, which reserves the position and leaves the resolution of the matter to the further development of international law.

Since 2001, state practice and doctrine on the legality of third-party countermeasures have evolved significantly. The EU itself has previously adopted third-party countermeasures when adopting air traffic restrictions in the past.[28] A clear cross-regional example occurred in 2011 when the UN Security Council unanimously supported unilateral sanctions by the Arab League against Libya in 2011. Certain sanctions against Iran and Syria also fall within the realm of third-party countermeasures. In light of these and other relevant examples, important contemporary legal scholars assert that customary international law has evolved, so that third-party countermeasures against Russia are permitted in response to its violation of the prohibition on the use of force.[29]

Should the need arise for the EU to justify potential actions involving Russian sovereign assets as a third-party countermeasure before a national or international court, the EU would also have to comply with the relevant procedural and substantive requirements and make sure that countermeasures are lifted once Russia will have ceased its aggression and paid the due reparations. Given that the Union has always taken the position that the immobilisation of Russian sovereign assets will be lifted once Russia pays war reparations to Ukraine these requirements are also met.

4 The blocking statute and the anti-coercion instrument

In addition to sanctions, other tools are also available for the EU to respond to foreign actions that interfere with its autonomy. Even if their actual use may be limited, their mere existence may constitute an important political instrument in the EU's toolbox.

4.1 The blocking statute

First, in 1996, the Council adopted the so-called EU "Blocking Statute",[30] designed to protect EU operators from the extra-territorial effects of certain third-country laws. Its purpose is to protect EU operators engaged in lawful international trade and/or movement of capital, as well as related commercial activities, from the effects of the

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[28] See Hoffmeister, F., "The Contribution of EU Practice to International *Law*" in Cremona, M. (ed.), *Developments in EU External Relations Law*, Oxford University Press, 2008, 93.

[29] Walter, C. (2022), "Der Ukraine-Krieg und das wertebasierte Völkerrecht", *Juristenzeitung*, Vol. 77(10), 479; Gould-Davies, N. (2024), "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine", *The International Institute for Strategic Studies*, 1 (17-19).

[30] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996, p. 1.

extra-territorial legislation specified in its Annex. Currently, this Annex applies to US measures concerning Cuba and Iran.

The Blocking Statute prohibits EU individuals and entities from complying with third-country laws and actions that have extra-territorial effects, unless the Commission grants an exceptional authorisation to do so by to prevent irreparable harm to their interests or those of the EU. As such, it nullifies the effect in the EU of any foreign decision based on the foreign acts set out in its Annex.

The scope of the EU Blocking Statute can be expanded by amending its Annex to include new foreign legislation deemed to have unlawful extra-territorial effects. This was the case in June 2020 in response to secondary sanctions against companies doing business with Iran after the dismantling of the Iran nuclear deal.[31]

Following President's Trump executive order imposing sanctions on the International Criminal Court (ICC),[32] the EU had to consider whether it should respond through the use of the blocking statute. The US sanctions in this regard include the blocking of US-based assets of designated ICC officials as well as visa restrictions. Most notably, the scope of these sanctions extends not only to listed individuals but also to persons and entities that "materially assist, sponsor, or provide financial, material or technological support" for the ICC's designated activities, such as investigating or prosecuting "protected persons" without the consent of their country of nationality.

On the basis of the executive order, the US has already sanctioned individual ICC staff and judges. If these sanctions were to be directed also against the ICC as an institution and its service providers, the scope of application of the blocking statute would have to be analysed.

The Blocking Statute was adopted on the legal basis of the Common Commercial Policy (former Article 113 TEC) and the provision on capital movements to and from third countries (former Article 73c TEC). While the primary objective of US legislation may not be to target EU-US trade, it can be argued that it nevertheless creates a new trade barrier. In particular, companies working in both the EU and the US would be forced to choose between the two markets.

Moreover, given that sanctioning with asset freezes (as opposed to fines) has very severe consequences for any economic operator, sanctions against the ICC as such could coerce companies working with the ICC to terminate or limit their contractual relations. In other words, such legislation would effectively create a new condition to maintain business in the US (for EU banks or travel companies), namely, the obligation to terminate business with the ICC. For this reason, it can be argued that

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[31] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309, 29.11.1996, p. 1 as amended by the Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 199I, 7.8.2018, p. 1.

[32] Executive Order 14203 signed on February 6, 2025 by President Donald J. Trump "Imposing Sanctions on the International Criminal Court".

the effects would be sufficiently severe and would create new illegal restrictions for EU-US trade that justify its listing in the Annex to the Blocking Statute.

In such a scenario, it would be a question of political will for the EU and its Member States to activate the Blocking Statute or trigger other alternative mechanisms to protect the ICC against further US sanctions.

4.2 The Anti-Coercion Instrument

The most recent instrument to protect the EU's strategic autonomy though a foreign policy tool is the EU Anti-Coercion Instrument (ACI), adopted in 2023.[33] Its objective is to deter coercion, and, if necessary, to respond to it by setting out a framework for EU action in line with public international law.

Under the Regulation, "'economic coercion'" refers to a situation whereby a third country seeks to pressure the EU or a Member State into making a particular choice by applying, or threatening to apply, measures affecting trade or investment. Such practices to unduly interfere with the legitimate sovereign choices of the European Union and its Member States.

Article 2(2) of the Regulation introduces five criteria to guide the analysis of such foreign conduct.[34] The types of measures which the Commission may take include restrictions on the access to the EU market and other economic disadvantages for the third country involved. The list of options is broad, covering areas such as trade in goods, services, foreign direct investment, financial markets, public procurement, trade-related aspects of intellectual property rights, export controls, and more. Such measures qualify as countermeasures taken in line with international law in light of the definition of "coercion" provided by the Regulation itself which respects the principles derived from Article 2(1) of the UN Charter and the relevant international jurisprudence.[35]

For the time being, the ACI has not yet been activated. However, this could change quickly if a third country were to impose tariffs or other sanctions against the EU and/or its Member States in response to the operation of its internal regulatory regime or tax laws.

33 Regulation (EU) 2023/2675 on the protection of the European Union and its Member States from economic coercion (the Anti-Coercion Instrument) enables the EU to take action in cases of economic coercion of the EU or its Member States by non-EU countries, OJ L, 2023/2675, 7.12.2023, p. 1.

34 Coercion can be affirmed when a foreign State applies a measure of a certain gravity (criterion 1), and whether the third country is engaging in a pattern of interference seeking to obtain from the Union or from Member States particular acts (criterion 2). The third criterion asks whether the third-country measures encroach upon an area of the Union's or Member States' sovereignty and the fourth criterion assesses whether the measure is based on a legitimate international concern. Finally, the fifth criterion stresses the attempts of a third country for peaceful settlement before having imposed the measure. Importantly, these criteria require a holistic assessment of the situation. Once a determination of foreign coercion is made, negotiations with the third government should strive to find settlement (Arts. 5 and 6). If, however, they end without success, the EU can take "response measures" (Art. 7).

35 ICJ, *Nicaragua* v *United States of America*, 1986, paragraph 205.

5 Conclusion

Foreign policy plays an important role in defending the EU's strategic autonomy. The recent examples of sanctions imposed on the Russian Federation show the EU's determination to employ this tool in new and innovative ways. Moreover, the blocking statute and the Anti-Coercion instrument may need to be activated one day, particularly if sanctions against the ICC or other coercive measures are introduced by the current Trump administration.

In choosing the appropriate reactions, the EU will also remain faithful to the second element of the concept of strategic autonomy, namely respect for the limits of the law. As shown in this contribution, this includes the respect for international law, as required by Articles 3(5) and 21 TEU.

Reviewing sanctions: effectiveness and legality

Laila Medina*

1 Introduction

"Europe is in a fight".[1] With these words, the President of the European Commission, Ursula von der Leyen, opened her State of the Union speech on 10 September 2025. Indeed, Europe is fighting and is doing so on multiple levels and in the broader context of trade wars and other challenges to international cooperation. This contribution addresses some of these complexities, focusing on the restrictive measures adopted by the European Union in reaction to the Russian aggression against Ukraine.

After a brief introduction on the importance of restrictive measures under EU law and on their role as tools available to the Union to respond to threats to its values and interests (Section one), Section two will analyse the role of the Court of Justice in upholding the rule of law in this domain. Section three situates EU restrictive measures within the wider context of public international law, while Section four elaborates on the role of Member States and the overall effectiveness of EU restrictive measures. This contribution concludes with some reflections on the challenges posed by recent legislative developments, notably Directive 2024/1226 on the definition of criminal offences and penalties for the violation of Union restrictive measures.[2]

2 Sanctions under the rule of law

Restrictive measures, more commonly referred to as "sanctions", are one of the tools, which the Treaties make available to the EU, as part of the Common Foreign and Security Policy (CFSP), in order to prevent conflicts or to respond to current or emerging crises. Because of their very nature, restrictive measures often operate in a context characterised by controversial or even illegal acts committed by third

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1 Von der Leyen, U., 2025 State of the Union Address, Strasbourg, 2025.

2 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L1226, 29.04.2024, p. 1.

States, underscoring the need to protect the strength and the very existence of the European values.

As declared in *Les Verts*, the EU is a "Community based on the rule of law".[3] This requires, among other things, that the acts of the Council comply with primary law and, more specifically, with the Union's values and constitutional obligations. It further follows that, when adopting restrictive measures within the framework of the CFSP, the Council must, in conformity with Article 21 TEU, ensure that those measures respect the principles of the UN Charter and international law. In this regard, the Council is required to promote multilateral solutions and a high degree of cooperation in international relations, respecting at the same time the Union's and Member States' international obligations, for instance those arising from the WTO Agreements.[4]

Today's geopolitical context is characterised by various forms of measures adopted by public institutions, such as sanctions and tariffs, in which the openness and rules-based character of the liberal order, as reflected in Article 21 TEU, appears to be giving way to commercial wars and military threats. In this context, the Union might, at first glance, be perceived as constrained by provisions that do not sufficiently reflect contemporary challenges.

Is such a perception well-founded? On the one hand, Article 3 TEU requires the Union, in its relations with the wider world, to uphold and promote its values, including the rule of law as enshrined in Article 2 TEU. On the other hand, Article 21(2)(a) TEU further specifies this obligation by requiring the Union to safeguard, among other things, its interests. It is against this constitutional background that it is necessary to evaluate the potential of the different measures adopted in response to the threats to which the Union is exposed, as well as the possible ways forward to ensure that these instruments enable the Union to safeguard its autonomy. This raises a fundamental question: should the protection of the Union's interests be pursued at the cost of sacrificing its constitutional commitment to the rule of law? Or, put differently, does the current geopolitical context allow for a departure from the rule of law in order to equip the Union for the challenges ahead?

In my view, the answer must be no. The rule of law must be respected. Where existing EU rules appear insufficient, it is for the Union's legislature to exercise sound legal craftsmanship in devising solutions that comply with EU values, ensuring at the same time the principle of conferral, and more broadly, the rules stemming from the Treaties and the Charter. The solution cannot lie in bending the values and primary law. Does it demand creativity? Certainly.

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3 Judgment of 23 April 1986, *Les Verts* v *Parliament*, 294/83, ECLI:EU:C:1986:166, paragraph 23.

4 Council of the European Union, "Guidelines on Implementation and Evaluation of restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy", 4 May 2018, Brussels, point 11.

The Court of Justice has confirmed that the Council enjoys a wide margin of discretion in adopting CFSP measures.[5] It is therefore possible to think innovatively and make use of this ample discretion by adopting a holistic approach whereby different policies pursue a common objective. To do so, and notwithstanding the fact that they follow different logics as regards decision-making processes and the allocation of competences between the Union and its Member States, it may be necessary to regard the Common Commercial Policy and the Common Foreign and Security Policy as complementary tools that jointly protect the Union's autonomy and advance its objectives.[6] After all, although the former is a Union's exclusive competence and the latter remains largely withing the remit of Member States, despite following different decision making procedures, they are both negotiated under the roof of the EU institutions.

3 The role of the Court of Justice of the European Union and the recent case law on restrictive measures

The competence of the Court of Justice of the European Union in matters that relate to the CFSP is limited to the control of legality of the restrictive measures adopted by the Union. Indeed, while the first paragraph of Article 275 TFEU explicitly excludes the Court's jurisdiction over the "acts adopted on the basis of the [CFSP] provisions", its second paragraph establishes a so-called claw-back clause, allowing the Court to review "the legality of decisions providing for restrictive measures against natural or legal persons", thus vesting the addressees of those decisions with the right to seek their annulment in so far as they are concerned.

It should be noted that acts adopted pursuant to a CFSP provision, as is the case with restrictive measures, may pursue a wide range of political goals. Identifying these goals is the exclusive responsibility of the political institutions of the Union, and the Council in particular. This, in turn, requires drawing a line between the roles of different institutions to ensure respect for the principles of institutional balance and separation of powers. To use the words of Advocate General Bot, later adopted by the Court, in exercising its judicial functions the Court must not "substitute its own assessment for that of the competent political authorities".[7]

Yet, the protection of the rule of law and of the fundamental rights of persons targeted by restrictive measures is a core task of the Court. This creates a need for equilibrium between two aims: (i) ensuring that restrictive measures are effective and achieve the political goals envisaged by the Council, and (ii) remaining faithful to the Union's commitment to the rule of law and fundamental rights. In this difficult

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5 See, for example, judgment of 2 June 2016, *Bank Mellat* v *Council*, T-160/13, ECLI:EU:T:2016:331, paragraph 102. The Council's broad discretion was also confirmed by the Court in the appeal (see, judgment of 6 September 2018, *Bank Mellat* v *Council*, C-430/16 P, ECLI:EU:C:2018:668, paragraph 67.

6 See Hoffmeister, F. (2023), "Strategic Autonomy in the European Union's External Relations Law", *Common Market Law Review*, Vol. 60(3), 667, who provides examples of how the Common Commercial Policy and the Common, Foreign and Security Policy protect the Union's economic interests and values.

7 Opinion of Advocate General Bot in Joined Cases *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:176, paragraph 80.

exercise, the Court, as reflected in its case law, does not seek to weigh the global and economic impact of EU restrictive measures, nor their possible effects on international cooperation or trade relations.[8] According to the Court, it falls exclusively upon the Council to take into consideration these consequences and to act accordingly if it deems a certain path to be the best way to achieve its political objectives.

Instead, the Court assesses restrictive measures against the requirements of the rule of law and, in particular, fundamental rights, and, in this assessment, deals with the issue from a strictly juridical perspective. Indeed, on the one hand, the Court reviews the legality of these acts and, on the other hand, it ensures the uniform and effective interpretation of EU law, by way of both the annulment action under Article 263 TFEU and the preliminary reference procedure under Article 267 TFEU.[9] In this exercise, the rule of law amounts to a shield that ensures that the Union upholds its values, while the effectiveness of its restrictive measures is a spear, which is available to the Union in order to foster its objectives under Article 21 TEU.

Be as it may, the case law of the Court offers enough guidance on how to reach this delicate equilibrium, both in its internal (within EU legal order) and external (in relation to international law) dimension. Indeed, in *Kadi I*, the Court affirmed the autonomy of the EU legal order as a supreme principle,[10] which cannot be limited by the supremacy clause contained in the UN Charter,[11] and restated that "an international agreement cannot have the effect of prejudicing the constitutional principles" of the Treaties.[12] In so doing, the Court clearly suggests that should the EU objectives, currently codified under Article 21 TEU, be in contrast with actions of the United Nations, the Court would intervene, if given the opportunity, thus ensuring that the Union's commitments, among others, to the protection of fundamental rights and the rule of law, would prevail.[13]

It was, however, in *Kadi II*[14] that the Court defined the standard of review in restrictive measures cases, thus clarifying the internal dimension of said balancing exercise. Hence, the Court exercises limited judicial review over the legality of the Council's decisions and the listing criteria contained therein, assessing whether those measures are manifestly inappropriate for achieving the stated political objectives.[15] Conversely, the Court exercises full jurisdiction over the impact of such

8 See, for example, judgment of 25 June 2020, *Vnesheconombank* v *Council*, C-731/18 P, ECLI:EU:C:2020:500, paragraph 61. See also, by analogy, judgment of 28 March 2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236, paragraph 132.

9 For the sake of completeness, the possibility to pursue an action for damages needs to mentioned, see for example, judgment of 6 October 2020, *Bank Refah Kargaran* v *Council*, C-134/19 P, ECLI:EU:C:2020:793.

10 Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation* v *Council* and Commission, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 ("Kadi I").

11 Art. 103 of the United Nations Charter states that: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

12 *Kadi I*, paragraph 285.

13 Ibid., paragraphs 281-288.

14 Judgment of 18 July 2013, *Commission and Others* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECLI:EU:C:2013:518 ("*Kadi II*").

15 These objectives often result from the Recitals of the Council's decisions, as well as of the implementing regulations.

acts on individuals, thus ensuring the full protection of fundamental rights. This requires that any limitation to fundamental rights complies with the conditions set out in Article 52(1) of the Charter.[16] In practice, this entails that the Council must guarantee due process when listing targeted persons by, among other things, respecting the right to be heard and the duty to provide adequate reasons. In other words, the Court's assessment of the suitability of the contested act is limited to manifest errors in order to preserve a certain leeway in the realisation of the CFSP objectives. Nevertheless, the Court exercises full jurisdiction over the impact those general acts could have on the individual sphere of the persons listed, thus ensuring that the person's fundamental rights are safeguarded.

The upcoming judgments in five "pilot" cases addressing one of the listing criteria are expected to provide further clarifications on how both the external and the internal dimensions of this equilibrium are to be ensured. From the Opinion in *Mazepin* (one of these "pilot" cases), it emerges that the broad discretion enjoyed by the Council must, nonetheless, be exercised in the light of the principle of proportionality.[17] The case concerns the legality of the so-called "criterion (g)", which allows the listing of leading businesspersons in sectors that provide substantial revenue to the Russian government.[18] In the judgment under appeal, which the Opinion suggests upholding, the General Court held that this criterion covers any important businessperson involved in a relevant economic sector, without requiring the Council to demonstrate any specific conduct towards the Russian government.[19]

This criterion, now amended, illustrates the Council's effort to balance the protection of individual rights with the need to maximise the effectiveness of sanctions. In the Opinion, I argued that excluding the requirement to demonstrate the existence of a relevant individual conduct is consistent with the Council's aim to exert maximum pressure on the Russian government by reducing its financial resources, irrespective of the individual behaviour of the person concerned. This aim must be seen in the broader context of the extreme urgency and severity of the situation, further aggravated by the continuing aggression and the perceived need to strengthen the Union's reaction. By putting the contested restrictive measure in this context, the effectiveness and appropriateness thereof become a hermeneutic tool, which is indispensable for assessing whether the contested criterion manifestly exceeds the

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[16] According to the Charter, limitations to fundamental rights must respect the following conditions: (1) be provided for by law, (2) respect the essence of those rights, (3) respect the principle of proportionality; (4) be necessary, and (5) genuinely meet an objective of general interest or be based on the need to protected the rights and freedoms of others.

[17] Opinion of Advocate General Medina in *Mazepin* v *Council*, C-35/24 P, ECLI:EU:C:2025:412. This Opinion has been delivered together with the Opinions in other four cases (C-696/23 P, *Pumpyanskiy* v *Council*; C-704/23 P, *Khudaverdyan* v *Council*; C-711/23 P, *Rashnikov* v *Council*; and C-111/24 P, *Khan* v *Council*) and should be intended as the point of reference in light of which the other four Opinions should be read.

[18] See Art. 2(1)(g) of Decision 2014/145/CFSP as amended by Decision (CFSP) 2022/329 of 25 February 2022 amending Decision 2014/145, OJ L50, 25.02.2022, p. 1., and Art. 3(1)(g) of Regulation (EU) No 269/2014, as amended by Regulation (EU) 2022/330 of 25 February 2022 amending Regulation No 269/2014, OJ L51, 25.02.2022, p. 1. These provisions provide that: "All funds and economic resources belonging to, or owned, held or controlled by […] leading businesspersons or legal persons, entities or bodies involved in economic sectors providing a substantial source of revenue to the Government of the Russian Federation, which is responsible for the annexation of Crimea and the destabilisation of Ukraine […] shall be frozen".

[19] Judgment of 8 November 2023, *Mazepin* v *Council*, T-282/22, ECLI:EU:T:2023:701.

Council's discretion in achieving its objectives. The judgment of the Court of Justice is to be delivered.

Another recent case that exemplifies the role of the Court in determining the limits of the Council's margin of discretion in balancing the effectiveness of sanctions and their geopolitical impact with the rule of law, is the recent judgment in *Timchenko*.[20] This case concerned the interpretation of the notion of "natural persons associated". On this basis, persons associated with other subjects targeted by EU restrictive measures may be sanctioned as well.[21] More specifically, Ms Timchenko had been included in the list annexed to Decision 2014/145 and Regulation No 269/2014 as a natural person associated with her husband, Mr Timchenko, who was the primary target of EU restrictive measures. According to the Council, Mr Timchenko was a long-time acquaintance and one of the President Putin's confidants, the founder and shareholder of the Volga Group, and a shareholder of Bank Rossiya, considered the personal bank of senior officials of the Russian Federation.

The Court's case law had already clarified that, while an "association" criterion cannot be considered unlawful per se, the protection of the fundamental rights of the persons concerned requires that a family member not be listed as "associated" on the basis of the mere existence of a family relationship.[22] In this judgment, the Court analysed what constitutes a family relationship and when that relationship can be said to go beyond a pure marital link, thus being caught by the notion of "associated" natural persons. In that regard, the Court concluded that the balance between the effectiveness of restrictive measures and the protection of fundamental rights must be struck in favour of an interpretation whereby, as regards members of the same family, it is necessary for them to share common interests going beyond the mere existence of a family relationship and for those interests to be objectively interrelated.[23] That would be the case, for example, where a wife is associated with her husband by means of a foundation in which she performs duties objectively related to its functioning.

The case concerning the appeal lodged by Mr Timchenko,[24] provides another example of the role of the Court in ensuring that the Council exercises its powers in conformity with the rule of law. In that case, Mr Timchenko had contested his listing, arguing that the sole reason for his inclusion was the fact that he did not distance himself from the policy pursued by Bank Rossiya, in which he was one of the main shareholders. The Court, however, found that the General Court did not err in law in determining that there was sufficiently specific, precise and consistent evidence to establish that, through Bank Rossiya, the appellant financially supported Russian decision-makers responsible for the annexation of Crimea and the destabilisation of

[20] Judgment of 1 August 2025, *Timchenko* v *Council*, C-703/23 P, ECLI:EU:C:2025:608.

[21] See Art. 1(1) in fine of Council Decision 2014/145/CFSP, as amended by Council Decision (CFSP) 2022/329 of 25 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L50, 25.02.2022, p. 1.

[22] Judgment of 13 March 2012, *Tay Za* v *Council*, C-376/10 P, ECLI:EU:C:2012:138, paragraph 66.

[23] Judgment of 1 August 2025, *Timchenko* v *Council*, C-703/23 P, ECLI:EU:C:2025:608, paragraph 39.

[24] Judgment of 1 August 2025, *Timchenko* v *Council*, C-702/23 P, ECLI:EU:C:2025:605.

Ukraine within the meaning of the criterion (d).[25] The judgments of both courts – the General Court and the Court of Justice – confirm that listings must be based on sound evidence rather than on arbitrary decisions or assumptions, thereby illustrating the scope of the judicial review carried out by EU courts and their role in upholding the rule of law.

The assessment of the balancing efforts of the Council is also pertinent when the interpretation of sectorial restrictive measures is brought before the Court. The importance of the effectiveness of EU restrictive measures in light of the principle of proportionality and the need to combat their circumvention can be seen in the recent Opinion, which was delivered on 26 June 2025, in *Opera Laboratori Fiorentini*.[26] The case concerns Regulation No 883/2014 and the prohibition on awarding or continuing the execution of any public or concession contract to, or with, a natural or legal person acting on behalf or at the direction of Russian nationals or Russian entities.[27] The legal question at the heart of the case was whether this prohibition applies where a public contract is awarded to a company incorporated under Italian law of which two of the three members of its board of directors are Russian nationals, where one of whom is the chairman of the board of directors and the chief executive officer of that company, as well as the sole director of a parent company that holds 90% of the shares of that company.

The case concerned the extent of the duty of a public authority to evaluate the governance and ownership structures of the companies concerned in order to determine whether the tenderer is, in fact, acting on behalf of the entity, prohibited by the Regulation. The Opinion proposes that the prohibition contained in the Regulation at issue requires a case-by-case assessment. The specific circumstances of the case may trigger a duty of due diligence consisting in assessing whether the tenderer is acting, in essence, “on behalf or at the direction of” an entity covered by that prohibition, including through de facto control by persons, entities or bodies connected to Russia. This case therefore shows how the principle of effectiveness of EU law, read in the light of the principle of proportionality, can achieve an interpretation that could strike a fair balance between the effectiveness of EU law and the capacity of Member States to apply those rules. Indeed, this case illustrates how ensuring the effectiveness of Union’s restrictive measures, for which avoiding circumvention is essential, can be confronted with the need to ensure that national administrations have capacity to perform their duties effectively. Proportionality, once again, provides the key to strike that delicate balance.

In the same vein, the recent Opinion of Advocate General Campos Sánchez-Bordona in *T Trust* deserves mention.[28] The Advocate General argues that, because of the elusive nature of trusts and their instrumental role in facilitating the circumvention of restrictive measures, it is not disproportionate to consider the

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[25] Judgment of 1 August 2025, *Timchenko* v *Council*, C-702/23 P, ECLI:EU:C:2025:605, paragraphs 34 and 35.

[26] Opinion of Advocate General Medina in *Opera Laboratori Fiorentini*, C-313/24, ECLI:EU:C:2025:492.

[27] See Art. 5k(1)(c) of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L229, 31.07.2014, p. 1.

[28] Opinion of Advocate General Campos Sánchez-Bordona in *T Trust*, C-483/23, ECLI:EU:C:2025:559.

economic resources and funds placed in such trusts as being owned or possessed by a person targeted by EU restrictive measures, and thus subject to freezing.

The foregoing examples demonstrate how the EU Courts, by reviewing the legality of the Council's decisions and by interpreting them, concretely act as the guardians of the rule of law and, most importantly, of fundamental rights. Furthermore, these cases confirm that while the Council has a decisive role in setting political objectives and the Member States are the main actors in ensuring the effective application of the Union's restrictive measures, it is the Court that plays a pivotal role in protecting EU values and ensuring the uniform and effective interpretation of EU law.

4 Countermeasures under public international law and EU restrictive measures

Having illustrated the most recent developments in the Court's case law which showcase the role of the Court of Justice in this sensitive and delicate policy field, it is time to turn to the question of how measures adopted under the CFSP as a reaction to the war in Ukraine relate to the broader landscape of the international legal order. Indeed, one of the topics currently being debated concerns the relationship between countermeasures under public international law and EU law. This Section aims to provide some considerations with a view to encouraging further discussions, among other things, on the development of the measures to be adopted under the framework of the CFSP.

At the outset, it is worth noting that the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA), elaborated in 2001 by the International Law Commission, contain some fundamental principles, which are necessary to recall when looking for an answer to the question at issue. Firstly, Article 48 establishes that any state other than the injured state is entitled to invoke the state responsibility of another state if the obligation breached under international law is "owed to a group of States including that State, and is established for the protection of a collective interest"[29] or "the obligation breached is owed to the international community as a whole".[30] Paragraph 2 of the same article, further entitles third States to claim for the "cessation of the internationally wrongful act".

Furthermore, Article 49 sets the objective of countermeasures under public international law, namely inducing the responsible State to comply with its international obligations.[31] Additional limits to the possibility of invoking international responsibility are detailed in Article 50 which, among other things, states that "countermeasures shall not affect […] the protection of fundamental human rights",[32] and in Article 51 which enshrines the principle of proportionality by requiring that

29 Art. 48(1)(a) ARSIWA.

30 Art. 48(1)(b) ARSIWA.

31 Art. 49 ARSIWA also provides for temporal limitation to countermeasures taken by an injured State.

32 Art. 50(1)(c) ARSIWA.

countermeasures are “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”.

For the purposes of this contribution, the principles and conditions just recalled can be divided into three groups: (1) procedural requirements for adopting countermeasures; (2) guarantees associated with rule of law; (3) and the protection of collective interests. Whereas opinions differ – to say the least – on whether the ARSIWA actually codify international law and on the status of international law in this area,[33] the following observations can nevertheless be made.

Firstly, the very purpose of countermeasures is to induce compliance with the obligations all States have under international law. EU restrictive measures as it stems from the Treaties, regardless of whether they could be classified as “countermeasures” under international law,[34] must pursue the same objective. This is clearly the case as it appears by reading the recitals of Council decisions establishing new or maintaining old restrictive measures.

By way of example, the latest Council Decision on the restrictive measures adopted on 18 July 2025 as part of the 18th package uses expressions such as “[The Russian] attack was a blatant violation of the territorial integrity, sovereignty and independence of Ukraine” and contains calls to “refrain from such action and to abide by its international obligations”.[35] That has been a consistent position of the EU aimed at ensuring the compatibility of EU restrictive measures with public international law. For instance, on 22 February 2022, the High Representative of the Union for Foreign Affairs and Security Policy issued a declaration on behalf of the Union condemning Russia’s illegal recognition of separatist regions.[36] That was described as a “severe breach of international law” and other international agreements or key instruments such as the UN Charter, the Helsinki Final Act, the Paris Charter, the Budapest Memorandum, the Minsk Agreements, and UN Security Council Resolution 2202.[37] In the same declaration, the Union urged Russia to “reverse” its action, uphold its commitments, and return to dialogue.

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33 See, most recently, Hofer, A. (2025), “Third-Party Countermeasures: Making Custom Out of Ambiguous Practice?”, *International and Comparative Law Quarterly*, Vol. 74(2), 287, (288-289), where the author recalls that “there are stark division in States’ views over their legality and these measures are heavily contested” and that “under international law unilateral sanctions are largely unregulated and their legality is subject to debate”. See also, Hofer, A. (2017), “The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?”, *Chinese Journal of International Law*, Vol. 16(2), 175; and Hovell, D. (2019), “Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions”, *AJIL Unbound*, Vol. 113, 140.

34 Among those who consider EU restrictive measures as permissible countermeasures under international law, see Happold, M., Bogdanova, I. (2024), “Report on the limitations of the current EU restrictive measures (sanctions) regimes”, Luxembourg, 20-22. For an illustration of the ongoing debate, see Hofer, A. (2017), “The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?”, *Chinese Journal of International Law*, Vol. 16(2), 175; and Hovell, D. (2019), “Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions”, *AJIL Unbound*, Vol. 113, 140.

35 Recitals 2 and 3 of Council Decision (CFSP) 2025/1471 of 18 July 2025 amending Decision 2012/642/CFSP concerning restrictive measures in view of the situation in Belarus and the involvement of Belarus in the Russian aggression against Ukraine, OJ L1471, 19.07.2025, p. 1.

36 Borrell, J. (2022), “Declaration by the High Representative on behalf of the European Union on the decisions of the Russian Federation further undermining Ukraine’s sovereignty and territorial integrity”.

37 United Nations, Resolution 2202 (2015), adopted by the Security Council at its 7384th meeting, on 17 February 2015, S/RES/2202 (2015).

Secondly, ever since the judgments in *Kadi I* and *Kadi II* it is undoubted that EU restrictive measures must comply with the duty of not affecting the protection of fundamental rights, which is also enshrined in Article 50 ARSIWA. Indeed, the Union attaches great importance to this aspect of the rule of law. Primary law, and more specifically Article 275 TFEU, provides for the possibility of judicial review by the Court regarding the inclusion of a person as the addressee of a decision imposing restrictive measures, precisely with the aim of ensuring that fundamental rights are not affected beyond the limits set by Article 52(1) of the Charter. Besides the examples discussed in the previous Section, the Court seeks to ensure the fundamental rights-compliance of the restrictive measures adopted by the Union not only with regard to individual measures but also in so far as sectoral restrictive measures are concerned.

A prime example of this engagement of the Court can be seen in *Jemerak*.[38] In that case, the Court was asked whether a German notary could be considered to be providing prohibited legal advisory services to a Russian legal entity by authenticating a contract for the sale of an apartment. The central question to which the Court was requested to provide an answer was whether such notarial acts could fall within the prohibitions established in Regulation No 833/2014.[39] The Court interpreted the relevant provision of that Regulation in light of the classical interpretation methods of EU law and held that notarial authentication services should not be covered by that prohibition, since, in general, such services cannot be said to per se contribute to the circumvention of the restrictive measures.[40] To reach that conclusion, the Court considered that a different reading would be contrary to the objectives actually pursued by the Council.

Another example pointing in the same direction is the recent judgment in *Generalstaatsanwaltschaft Frankfurt am Main*,[41] in which the Court was asked to interpret the prohibition contained in Article 5i(1) of the same Regulation, according to which “it shall be prohibited […] to export banknotes […] to Russia” except when banknotes are for “[…] the personal use of natural persons travelling to Russia”. Applying the hermeneutical canons already used in *Jemerak*, the Court concluded that this provision is intended to exempt banknotes used to cover the costs occasioned by the travel and stay of persons travelling to Russia, thus ensuring the effectiveness of the right to travel to Russia. However, it does not extend to the financing of medical treatments that a person wishes to receive there, as was the case before the national court. Hence, the Court is careful in ensuring that EU law,

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38 Judgment of the Court of 5 September 2024, *Jemerak*, C-109/23, ECLI:EU:C:2024:681.

39 See Art. 5n(2) of Council Regulation (EU) No. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, OJ L229, 31.7.2014, p. 1., as amended by Council Regulation (EU) 2022/1904 of 6 October 2022, OJ L259I, 6.10.2022, p. 3.

40 Judgment of the Court of 5 September 2024, *Jemerak*, C-109/23, ECLI:EU:C:2024:681, paragraphs 54 and 55.

41 Judgment of 30 April 2025, *Generalstaatsanwaltschaft Frankfurt am Main (Exportation d’argent liquide en Russie)*, C-246/24, ECLI:EU:C:2025:295.

including sectoral restrictive measures, is interpreted proportionally and in the line with the requirements established by Treaties and the Charter.[42]

Finally, as regards the protection of collective interests, Article 21(2)(b) and (c) TEU requires the Union to define and pursue common policies, and act in order to "consolidate and support […] the principles of international law" and "preserve peace, prevent conflicts and strengthen international security". It could then be argued that the Council, by means of its restrictive measures, seeks to protect the common interests of its Member States also under international law. With the specific reference to the war in Ukraine, these common interests are represented by the need to put an end to a breach of an erga omnes obligation, i.e. an obligation that under international law is owned to the international community as a whole, and can be seen as necessary in order to ensure international security at a moment when the Russian aggression represents a threat to its Member States. That reading is also confirmed by the position taken by the Council in *Mazepin*,[43] in which it argued that the European Union responded robustly to a violation of obligations imposed erga omnes by international law in order to counter the military aggression against Ukraine, using for that purpose all the measures at its disposal that did not involve the use of force.

The conclusion that can be drawn from the foregoing is that EU restrictive measures respect international law and, moreover, they are mandated by it in order to restore the status quo ante. In this sense, EU restrictive measures can be seen as instruments for upholding the international legal order. They have withstood the judicial review of the Court and can thus be relied upon as guidance for further legislative developments.

Since 2014, the Union has continuously strengthened its reaction to Russia's threats by adopting new measures. In so doing, the Union's legislator continues to strike a fair balance between competing interests while upholding the Union's international obligations. Nonetheless, a number of important questions begins to emerge: what future developments of public international law regarding collective countermeasures can be expected? What is the impact of the turbulence caused by trade and military threats and how broad should the Union's competence be to enable it to face these challenges? Once the political institutions will have provided the answers to these questions, the Court of Justice may be called upon to interpret them, examine their legality, and provide further guidance on how to strike that balance.

5 The role of Member States in the effectiveness of EU restrictive measures

At the outset, it is worth recalling that the effectiveness of EU restrictive measures ultimately depends on Member States and the capacity of the relevant national

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42 See on this aspect, Opinion of Advocate General Medina in *Jemerak*, C-109/23, ECLI:EU:C:2024:307, point 52, in which the Court was urged to consider "whether the proposed textual interpretation is the correct interpretation to adopt in the light of the Charter of Fundamental Rights of the European Union".

43 Opinion of Advocate General Medina in *Mazepin* v *Council,* C-35/24 P, ECLI:EU:C:2025:412.

authorities to enforce them. It is indeed on the basis of this assumption that, for instance, Advocate General Norkus proposed in *Čiekuri-Shishki* to interpret Article 2 and Article 11(1) of Regulation No 269/2014 as meaning that a national court hearing a case before it is "required to verify on its own initiative, where it has indicia" whether one of the parties to the proceedings is among the persons targeted by EU restrictive measures and, in that regard, "to employ all the powers of inquiry at its disposal".[44] Furthermore, it is required to seek the necessary information from the specialised competent authorities, in order to be in a position to carry out that examination.

At the legislative level, one of the instruments adopted to empower national authorities is Directive 2024/1226 on the definition of criminal offences and penalties for violating Union restrictive measures.[45] The Directive seeks to prevent circumvention by requiring Member States to criminalise certain forms of conduct through which existing sanctions may be bypassed. Although the Court has not yet had the opportunity to interpret the provisions of this Directive, as the deadline for its transposition into national law is relatively recent,[46] a few observations can nevertheless be made.

Firstly, Article 3 of the Directive requires Member States to criminalise a wide range of conduct in breach of Union restrictive measures, ranging from making funds available to listed persons, failing to freeze them, or facilitating the entry of designated persons into the Union. However, EU restrictive measures evolve rapidly, with updates being frequent and constantly ongoing. This pace may create serious enforcement challenges. Indeed, investigations into circumvention are complex and time-consuming and present multiple challenges, thus raising doubts as to the capability of national authorities to ensure the effective application of the law and the effet utile of the Directive. The impact of that piece of legislation on the rights of defence, and more broadly on all the rights generally associated with criminal investigations, remains to be seen.

Secondly, although EU restrictive measures are not intended to have extraterritorial effects, they inevitably have political and economic consequences beyond EU borders. This stand is coupled with the intention of the Union to protect itself from the extraterritorial effects of sanctions adopted by other countries, as the EU's blocking statute confirms.[47]

It is on the backdrop of these considerations that the question of the possible extraterritorial effects of EU restrictive measures become worthy of a greater attention. Article 12 of the Directive requires each Member State to "take the

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[44] Opinion of Advocate General Norkus in *Čiekuri-Shishki*, C-480/24, ECLI:EU:C:2025:672, paragraph 37.

[45] Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L1226, 29.04.2024, p. 1.

[46] Art. 20 of the Directive sets the deadline to transpose it into national law on 20 May 2025.

[47] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L309, 29.11.1996, p. 1. The blocking statute, in fact, was specifically designed and adopted to protect EU operators from the extraterritorial application of third-country laws, originally US sanctions against Cuba.

necessary measures to establish its jurisdiction" over the conducts which the Directive determines as constituting a form of circumvention. In order to assert jurisdiction, Article 12(1) lists a series of criteria, which are normally accepted and recognized under international law, such as the fact that the criminal offence was committed in whole or in part on the territory of the state (principle of territoriality),[48] or the fact that the offender is one of its nationals (principle of nationality).[49]

Furthermore, Article 12(2) lists a series of optional grounds for each Member State to claim jurisdiction over conducts "which have been committed outside its territory" on the basis of the criteria which are listed in points (a) to (d) of that article.[50] Point (d), in particular, allows a Member State to claim jurisdiction if "the offence is committed for the benefit of a legal person in respect of any business done in whole or in part on its territory", thus making the connection with the territory of the EU rather weak, to the point that it could be argued that EU restrictive measures risk having effects which go beyond mere political or economic consequences outside EU borders.[51] Indeed, the connecting link with the EU, which is usually necessary to prevent a measure from having extraterritorial effects, appears difficult to establish, calling for a profound examination of the sufficiency of that link.

That is all the more relevant when one considers that, to declare jurisdiction, it suffices for the offence to be committed simply for the "benefit" of a legal person and "in respect of any business done in whole or in part on its territory". While the notion of "benefit", though open to broad interpretation, could provide a sufficient link to justify the jurisdiction of one or more EU Member States without producing extraterritorial effects, the same reasoning may be difficult to apply to the minimal territorial link required by Article 12(2)(d) of Directive 2024/1226.

While the Union's legislator has now played its role by setting out a legislative framework to combat the circumvention of its restrictive measures, it is now mainly for national authorities to ensure their full effectiveness by reconciling the rapidly evolving nature of these measures with the broad terms of the Directive, protecting at the same time the fundamental rights as enshrined, inter alia, in the Charter.

6 Conclusion

From many perspectives, today's world is different and calls into question the hopes at the origin of the European project. On the one hand, the liberal economic approach faces more and more protectionist measures. On the other hand, peace and international cooperation are severely impaired by the ongoing military actions, among which the Russian invasion of Ukraine. Confronted with these realities, it is

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48 Art. 12(1)(a) of Directive 2024/1226. In the same direction, see also point (b) of the same article which refers to crimes committed on board a ship or aircraft registered in the Member State concerned or flying its flag.

49 Art. 12(1)(c) of Directive 2024/1226.

50 These include the fact that: (a) the offender is a habitual resident in its territory; (b) the offender is one of its officials who acts in his or her official duty; and (c) the offence is committed for the benefit of a legal person which is established in its territory.

51 Svetlicinii, A. (2024), "The changing tides of extraterritoriality and the future of the European Union's blocking statute", *European Law Review*, Vol. 49(6), 597 (611).

now for the Union to demonstrate that it is robust and capable of upholding the rule of law. I argued that this is indeed the case: remaining faithful to the Union's constitutional commitments does not lead to a powerless Union. On the contrary, what is needed is the ability to think outside the box and transform challenges into strengths. In this sense, I believe that a holistic approach may offer a viable path, with different policy fields, notably the Common Commercial Policy and the Common Foreign and Security Policy, being employed simultaneously for the greater good. In this complex exercise, however, I submit that the following points could guide the Union's actions.

1. The rule of law must be understood as a non-renounceable value. The Union's response to external threats, including Russia's aggression, must always remain anchored in the rule of law. Legal creativity is necessary, but bending or disregarding the Treaties and the Charter is not permissible.

2. The judiciary has a key role in balancing contrasting interests and needs. The Court of Justice ensures that restrictive measures, among other instruments, are both appropriate for achieving their political objectives as established by the Council and respectful of fundamental rights, thus maintaining the equilibrium between broad political discretion and judicial protection.

3. The Union and its Member States are collectively responsible for maintaining the peace. The effectiveness of EU restrictive measures depends not only on the Union's legal framework but also on the active participation of Member States in enforcing them. Only through a common effort can the Union preserve its autonomy, protect its values, and uphold the international legal order.


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Part VI

Independent administrative discretion and the rule of law

Independent administrative discretion and the rule of law: balancing autonomy, accountability, and oversight

Frank Elderson*

The relationship between independent administrative discretion and the rule of law lies at the heart of contemporary debates about governance, accountability, and institutional balance. What role should independent administrative bodies play in a legal system based on the rule of law? How much discretion should these bodies be afforded, and how should that discretion be limited by judicial review? These questions are not merely theoretical; they have profound implications for the functioning of modern democracies and the legitimacy of their institutions. They are of constitutional nature.

This Part of the book delves into the "Independent Administrative Discretion and the Rule of Law," which forms an integral aspect of the themes explored in this volume. Entitled "Building Europe's Autonomy: Law, Institutions, Cooperation," this book explores how the European Union could develop a model of autonomy that enhances its capacity to act while remaining steadfastly committed to the principles of the rule of law, institutional integrity, and international cooperation. Within this broader context, this Part focuses on the critical and often contentious issue of independent discretion – its merits, its limitations, and its place within a legal framework that seeks to balance autonomy and accountability.

There are two key reasons why I consider this Part particularly interesting.

First, the title of this Part – "Independent Administrative Discretion and the Rule of Law" – brings together three constitutional concepts: independence, discretion, and the rule of law. Put together they pose a fundamental question that lies at the heart of many contemporary debates: What is the role of independent administration in a legal order based on the rule of law? To what extent should independent bodies be given discretion? And where should the limits lie? The second reason I find this Part so compelling is its comparative perspective. The contributors explore developments in both the European Union and the United States to help uncover shifts in how independent institutions are understood and challenged. Are there key differences in how the two legal orders approach this issue, particularly in the views of their highest courts? Are the two systems more similar than they might initially appear? Are there shifts in their development?

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In this short introduction I would like to set the scene, by suggesting that are two possible opposing perspectives on independent administrative discretion and its review, and they reflect very different worldviews.

The first view argues that independent administrative discretion should be tightly controlled, or even eliminated altogether. According to this perspective, the only approach consistent with popular legitimacy is strict oversight of independent bodies by a strong President or by the courts. There are now many proponents of this approach in Europe and beyond. Especially cross the Atlantic, this view seems to gain currency and is expressed in growing mistrust of independent discretion. This mistrust comes from various directions. Just this past February, an Executive Order gave the White House greater control over independent federal agencies that have traditionally operated outside its direct supervision.[1] This is based on the constitutional language of “unitary executive theory”. The recent developments surrounding the dismissal of Governor Cook and the legal challenges to it have also made headlines. The US Supreme Court has also added to this trend. Last year, it overturned the Chevron deference doctrine, which for 40 years had directed courts to defer to an agency’s reasonable interpretation of ambiguous statutes.

On the other hand, there is another perspective – one that views independent discretion as not only compatible with the rule of law but as a vital part of it. From this perspective, independent bodies are essential for good constitutional governance. They provide reliable statistics, enforce environmental regulations, and protect fundamental rights. After all, agencies are not only insulated from short-term political pressures; they also have expertise and are closer to the day-to-day realities of regulation. Their procedures engage those affected by their decisions and produce reasons for their action. Far from undermining the rule of law, their discretion can actually enhance it by protecting minorities, long-term goods such as the environment, and by providing expertise-based deliberation. Their accountability and review by courts can be ensured without reducing them to mere arms of the executive. Courts have a vital role is ensuring that administrative discretion does fulfil this role. They can calibrate a standard of review that ensures legality and the protection of individual rights without appropriating the discretion awarded to the administration by the legislator.

This leads us to the key question: Where does Europe currently stand in this debate?

The following three Chapters engage in a very interesting discussion on this question. Advocate General Emiliou's Chapter focuses on the standard of judicial review that EU courts apply when assessing acts adopted by EU institutions. He draws from his 2022 Opinion in *ECB* v *Crédit Lyonnais*, where shared the view that the SSM deserved deference when interpreting the CRR. This case was part of the Livret A saga. The General Court initially annulled the decision of the ECB. The ECB appealed, arguing that the General Court had overstepped the boundaries of appropriate review of administrative discretion: the legislator, we argued, had granted the ECB some leeway in interpreting the law, and the principle of institutional

[1] Executive Order 14215, Ensuring Accountability for All Agencies, 18.2.2025.

balance required respect for this space. In his Opinion (and in his Chapter), Advocate General Emiliou examines the intensity of judicial review, distinctions between policy and technical discretion, and factors influencing judicial scrutiny. He argues that judicial review plays a critical role in upholding the rule of law and ensuring democratic governance. His Chapter underscores the importance of balancing administrative discretion with accountability and legal oversight in a rule-of-law system.

Pedro Machado adds his experience as Member of the Supervisory Board. He argues that broad supervisory discretion is a cornerstone of ECB independence, necessary for effective and risk-based supervision, and counterbalanced by accountability and judicial review. Drawing on a transatlantic perspective, he compares the EU's model of judicial deference to administrative expertise with the US approach, particularly in the wake of the Supreme Court's *Loper Bright* decision that overturned the *Chevron* doctrine, placing it within its broader constitutional and political context. Machado highlights the importance of balancing independence, discretion, and accountability in both jurisdictions. He concludes that the SSM provides a compelling case study for understanding how discretion is part and parcel of the rule of law in modern regulatory systems. His Chapter highlights how legal frameworks reflect basic constitutional principles – separation of powers in the US and institutional balance in the EU – while underscoring the practical importance of supervisory discretion in qualitative measures, escalation, and enforcement within the ECB's supervisory approach.

Finally, in their Chapter, Mariolina Eliantonio and Oren Tamir focus in greater detail on the evolving intensity of judicial review in EU and US administrative law. They also discuss the contrasting trends signalled by the 2023 *Crédit Lyonnais* case and the 2024 *Loper Bright* decision. While the CJEU appears to adopt a more deferential approach toward the discretionary choices of EU institutions, the US has moved away from its previous stance on deference, abandoning the *Chevron* doctrine. The authors contend, however, that, despite appearances, overall, the EU is not moving toward a Chevron-like model, but rather, the US may be converging with the EU's approach, especially in its reconsideration of deference to agencies. They conclude that American and European administrative law, from a doctrinal perspective, actually resemble each other, though cultural and political contexts continue to influence judicial review in both systems.

Together, these contributions provide a rich and nuanced exploration of the role of independent administrative discretion in a legal order founded on the rule of law. They invite readers to consider not only where Europe stands in this debate but also what lessons can be drawn from the experiences of other legal systems. As the EU continues to navigate its quest for autonomy, this Part offers a timely reflection on how its institutions can balance independence with accountability, discretion with oversight, and autonomy with cooperation. As I have noted elsewhere, the rule of law is a fundamental pillar of the ECB.[2] Independent supervisory discretion is part of this very principle, as reflections of a constitutional model that recognizes the role of

[2] Frank Elderson, The rule of law as a constitutional pillar of European central banking, Speech at the Constitutional Court, Rome, 9 June 2025.

independent institutions as checks and balances on executive and legislative power. Our constitutions have created agencies insulated from politics for many issues precisely to uphold a constitutional system of government, free from day-to-day political pressure and from capture by specialized interests. Under the review of independent courts, these are not deviations of the rule of law but an essential part of it.

Independent administrative discretion and the rule of law: standards of review at the CJEU

Nicholas Emiliou*

1 Introduction: rule of law and judicial review

On 28 March 1849 – that is, well over 170 years ago – in the very town that hosts today the ECB, the first freely elected parliament for German states, the Frankfurt National Assembly,[1] adopted the "Frankfurt Constitution."[2] It aimed at establishing a constitutional monarchy based, *inter alia*, on the principle of the separation of powers, which included an independent administration of justice. Among other things, that constitution abolished the death penalty, and set out an extensive catalogue of fundamental rights that individuals could enforce before the imperial courts.

Today, those principles – which are basic components of all European legal systems – are not only enshrined in national constitutions, but also in EU primary law: the Treaties and the Charter. In particular, Article 2 of the Treaty on European Union enumerates the principle of the "rule of law" among the values on which the Union is founded. It is a multi-faceted principle that, in a nutshell, precludes the arbitrary exercise of the public powers. It is generally considered inextricably linked to the ideas of democracy and respect of fundamental rights.

The principle of the rule of law did not feature expressly in the original European Community Treaties. The idea encapsulated by that principle was nonetheless central to the process of integration envisaged by the architects of the Communities. In fact, Walter Hallstein, first President of the European Commission – erstwhile professor and first freely elected post-war rector of the University of Frankfurt – used the similar term "community of law" (or *Rechtsgemeinschaft*) in a speech delivered in March 1962, to express the idea that the Community had been created under the law, the integration process being in fact driven by the law (concept often referred to as "integration through the law").[3] It was the Court of Justice that filled the gap. In its 1986 judgment in *Les Verts*, the Court held that the then EEC was "a Community based on the rule of law, inasmuch as neither its Member States nor its institutions

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1 Active in 1848-1849. In German: *Frankfurter Nationalversammlung*.

2 Proclaimed on 28 March 1849. In German: *Frankfurter Reichsverfassung*. Also known as "Constitution of St. Paul's Church" (*Paulskirchenverfassung*), its official name was "the Constitution of the German Empire" (*Verfassung des Deutschen Reiches*).

3 See the relevant passages in von Danwitz, T. (2014), "The Rule of Law in the Recent Jurisprudence of the ECJ", *Fordham Law Journal,* Vol. 37(5), 1311.

can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty".[4]

That ruling is a part of a broader set of judicial decisions (such as *van Gend & Loos*, *Costa* v *Enel*, and *Francovich*)[5] through which the Court bolstered the capacity of EU citizens, undertakings and associations to take action, before a court, to claim rights they derive from EU law, regardless of the author of the breach (be it, national or EU authorities).

In short, these cases mean one thing: in the European Union, the principle *ubi ius ibi remedium* (wherever there is a right, there is a remedy) is prevalent. Thus, the role of the courts is crucial within the EU institutional setting, in particular their function to review the legality of measures adopted by the decision-making institutions.

In the EU legal system, judicial review of acts adopted (or not adopted) by the EU institutions is mostly centralised, being one of the main areas of the jurisdiction conferred on Court of Justice by the drafters of the Treaties. In particular, the Court reviews the legality of the action or inaction of the EU institutions, and, under Articles 268 and 340 TFEU, hears actions for damages based on the Union's non-contractual liability.

The grounds of judicial review of legally binding acts adopted by the EU institutions or by EU bodies, offices or agencies, under Article 263 TFEU, are "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". In essence, this means that the scope of review to be carried out by the Court covers any infringement of a superior rule of law, of a procedural or a substantive nature. To my knowledge, this part of the Treaty provision has given rise to relatively few issues, before the Court or in academic fora.

By contrast, the Treaties have been silent with regard to the standard of judicial review to be applied by the EU Courts. What I refer to, in essence, is the intensity of review to be carried out by the EU Courts, when reviewing the legality of contested acts. From another perspective, the standard of review can be regarded as being the degree of deference granted by the Court to the institutions that adopted the acts under review. Obviously, the higher the intensity of review, the lower the degree of deference granted to the decision-making institution and vice versa.

2 Standard of review

Quite clearly, as I noted in my Opinion of 2022 in the *Crédit lyonnais* case, questions concerning the limits to judicial control of legislative and administrative action have

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[4] Judgment of the Court of 23 April 1986, *Les Verts* v *Parliament*, C-294/83, ECLI:EU:C:1986:166, paragraph 23.

[5] Judgment of the Court of 5 February 1963, *van Gend en Loos*, C-26/62, ECLI:EU:C:1963:1; Judgment of the Court of 15 July 1964, *Costa v ENEL*, C-6/64, ECLI:EU:C:1964:66; Judgment of the Court of 19 November 1991, *Francovich and Others*, Case C-6/90 and C-9/90, ECLI:EU:C:1991:428.

arisen, and will continue to arise, in every legal system.[6] Just to give a recent example, the issue has very recently been put back in the spotlight in the United States. The US Supreme Court – in a ruling of 28 June 2024[7] – overruled the well-known *Chevron* doctrine (according to which, if federal legislation was ambiguous or left an administrative gap, the courts ought to defer to the regulatory agency's interpretation, if the interpretation was reasonable). I can hardly think of a legal system that could function properly – at least if observed from the vantage point of today's Western democracies, which are founded on principles such as the separation of powers and institutional balance – if the judiciary were empowered to set aside and substitute every decision taken by the other public institutions on any ground.

When it comes to the EU legal system, I would like to share with you some thoughts that I developed in my Opinion in *Crédit lyonnais*. That case offered me the opportunity to discuss in detail the standard of review that, in my view, the EU Courts should apply when assessing the legality of acts adopted by EU institutions enjoying a margin of discretion. In that Opinion, I first attempted to clarify the legal framework applicable in this area and, in doing that, I also focused on certain legal concepts that are, in my view, often misunderstood. In the Opinion, I argued, inter alia, that in the EU system, the intensity of judicial review depends on a number of elements.

First of all, on the specific characteristics of the act whose judicial review is sought. The intensity is the highest (full review) with regard to the establishment of "simple" or "primary" facts (those can be either true or false). In addition, EU institutions other than the Court of Justice of the European Union may have some leeway in applying the EU rules, but not in interpreting them. Indeed, it is for the Court of Justice of the European Union – as the "oracle" of EU law – to "speak the law".

However, according to well-established case law, some deference to the EU institutions by the EU judiciary is granted, where they enjoy a degree of discretion in applying the relevant provisions. In that regard, it seems to me that, generally speaking, two broad categories of discretion can be identified – although I am aware that, in academia, there are different views on this categorisation.[8] The first such category is that of "policy" discretion: that is the case where the applicable provisions grant expressly to the EU institutions concerned some latitude in choosing whether and/or how to act in certain circumstances, on the basis of some policy considerations. The second category is that of "technical" discretion, resulting from EU provisions that require, from the acting institution, a complex technical (for example, economic or scientific) assessment before the adoption of a given act.

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6 Opinion of the Advocate General Emiliou in *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2022:844.

7 *Loper Bright Enterprises* v *Raimondo*, 603 U.S. 369 (2024).

8 Some authors are of the view that there is no real distinction between the two categories. See, for example, Mendes, J. (2017), "Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU", *Modern Law Review,* Vol. 80(3), 443 (451). However, that distinction is well present in the case-law of the Court, see e.g. Judgment of the Court of 13 June 1958, *Meroni* v *High Authority*, C-9/56, ECLI:EU:C:1958:7, paragraphs 152 and 154 and, more recently, Judgment of the Court of 22 January 2014, *United Kingdom* v *Parliament and Council*, C-270/12, ECLI:EU:C:2014:18, paragraphs 41 to 54.

In that regard, I wish to clarify one element: in my view, an assessment is not "complex" simply because the establishment of the relevant facts is not straightforward, requiring instead a difficult, time-consuming and specific-knowledge-driven process. Indeed, it would be odd to think that judges may refrain from granting effective judicial protection to individuals each time a case is, from a factual point of view, not clear-cut.

A "complex" assessment is, to my mind, the one where the relevant factual background cannot be established objectively or with absolute certainty, since reasonable and well-informed persons could disagree, at least to some extent, on the outcome of the fact-finding exercise or the legal qualification of the facts. This may be the case where the institution in question is required, for example, to make use of some models or assumptions in order to infer, from a set of facts, certain complex conclusions, or to make some value-judgements to qualify the facts and/or determine the ensuing legal consequences.

The case-law of the Court is rather clear, however, that, in both situations, the EU institutions should be recognised to have some latitude.

In particular, the institutions must be accorded broad discretion in areas where their action involves political, economic and social choices, and where they are called upon to balance out policy considerations. In those cases, the validity of the measures adopted by the institutions can be affected only if they are manifestly inappropriate, in view of the objective that the competent institution seeks to achieve. In addition, in case of complex technical assessments, the Court has consistently held that judicial review is "confined to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers".[9] These two strands of case law, despite some terminological difference, appear to have an important element in common. With regard to the merits of the contested act, the EU judiciary can censure the institution in question only when manifest errors exist. These strands of case-law have given rise to some criticism. Some observers have taken the view that the Court only performs a "marginal review" of legality of the contested EU acts.

However, that is not the way I read the case-law. In fact, I find somewhat unfortunate the use of term "manifest" in that context, as it may convey the incorrect idea that the EU Courts will not censure errors that are not sufficiently evident. As I see it, the term "manifest" must be understood with reference to the duty of the applicant to prove, to the required standard, that the evaluation or analysis carried out by the institution in question was unreasonable, or the conclusions reached implausible. Indeed, where an institution enjoys some discretion as to how a rule should be applied, there is a (larger or narrower, depending on the circumstances) range of options which it can legitimately choose from. Thus, an error of assessment exists only where the institution in question choses a course of action that falls outside the range of permissible choices the law.

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[9] See e.g., Judgment of the Court of 14 June 2018, *Lubrizol France* v *Council*, C-223/17 P, ECLI:EU:C:2018:442, paragraph 37.

Accordingly, as long as the institution that adopted the contested act has complied with the applicable procedural rules and, with regard to the substance of the contested act, has remained within the boundaries of the discretion accorded to it by the relevant EU rules, the EU Courts will not (*melius*, cannot) review the choices made in the act.

In other words, the judges cannot decide what would have been, in their view, the best course of action for the institution concerned under the given circumstances. Judicial proceedings are generally ill-suited for any form of ex novo review of legislative or administrative action. Moreover, an excessively intrusive form of judicial review would encroach upon the margin of discretion given to the institutions in order to exercise their powers effectively, thus, conflicting with the principle of conferral of powers to the institutions, and upsetting the principle of institutional balance.

However, it must be acknowledged that determining in each case the exact boundaries of the permissible discretion of an institution – and, consequently, of the intensity of judicial review – maybe a difficult task, at times. The latitude enjoyed by an institution when taking a given decision obviously varies from case to case, depending on a number of variables. The most important of those variables are, in my opinion, the following:

First, I think that the EU institutions should be granted more leeway when they act in their legislative capacity, than when they act in the context of their administrative functions.

Second, case-law also suggests – correctly, I believe – that policy discretion should generally imply greater latitude for the institution concerned, than mere technical discretion.

Third, the margin of discretion accorded to the EU institutions also depends on the wording and objective of the relevant provisions. It is indeed the EU (constitutional or ordinary) legislature that, through the adoption of the relevant legal provisions, delegates certain powers to the institutions and determines the limits of those powers.

Fourth, the intensity of review of the exercise of discretion must also depend on the nature of, and level of interference with, the right invoked by the applicant. For example, as the Court has held "where interferences with fundamental rights are at issue, the extent of the [relevant EU institution's] discretion may prove to be limited, depending on a number of factors, including, in particular, … the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference".[10]

Last but not least, it seems to me, that the legal and factual context in which an act is adopted may also have an influence on the margin of discretion enjoyed by the institution in question and, consequently, on the EU Courts' review of the actual exercise of that discretion. Let us think, for example, of the precautionary principle,

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10 See Judgment of the Court of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, ECLI:EU:C:2014:238, paragraph 47.

that is applicable in the fields of public health and environmental protection, or the principle of the presumption of innocence applicable in the field of competition law. In my view, the application of those principles could, in certain cases, tip the balance towards giving the institution concerned more or less leeway in exercising its discretion in a given set of circumstances.

The above considerations lead me to the conclusion that there is no single standard of judicial review that is applicable in all circumstances, where the EU institutions enjoy some degree of (policy or technical) discretion as to how a particular rule should be applied. Nor do I think that an easy test or formula could be devised in that respect. The "marginal" review that the EU Courts have generally alluded to may be more marginal or less marginal, depending on the specific circumstances of each case. It is thus for the EU Courts themselves to determine, on a case-by-case basis, in the light of all relevant circumstances, the specific intensity of review to be applied when reviewing an institution's use of discretion.

3 Independent authorities

In the light of those considerations, one may wonder: what does the above mean*, in concreto*, for institutions and authorities that enjoy – on the basis of the relevant legislation or even, as it is the case of the European Central Bank, on the basis of primary law – a significant degree of independence. Should the judges grant such institutions and bodies more deference or less?

Clearly, arguments of principle may be made for both positions. On the one hand, a lesser degree of intensity of judicial review could be considered consistent with the intention of the constitutional legislature to enable those entities to operate autonomously, shielding them from any form of direct or indirect external influence. On the other hand, however, it could be argued that strict judicial review is even more necessary, given that there is limited political control, especially from the institutions that express directly the democratic choices made by the EU citizens.

I hope this does not appear as anti-climax, but my answer to that question – which would certainly merit a more detailed contribution, well beyond the scope of the present one – would again be: "it depends".

Indeed, it all depends on the specific situation. Coming back to the legal framework outlined above, I would say that the main variables in the equation are the following: (i) the nature, content and effects of the contested act; (ii) the scope and purpose of the provisions grating the institution the power to act; and (iii) the specific legal position of the natural or legal person affected by it. This is valid for acts of the ECB just like it is valid for acts of the other institutions.

Accordingly, I do not think that "independence"– whatever that term is understood to mean[11] – warrants, per se, a higher or lesser degree of judicial scrutiny. The relationship between independence, accountability, legitimacy and intensity of judicial review is very interesting indeed,[12] but I prefer to leave it to scholars. Seen from the bench, there is no a priori deference or, by contrast, stringency in the approach followed with respect to acts adopted by independent institutions or bodies. Judicial review is carried out with the usual diligence, whilst the Court being – as always – mindful of the key principles of separation of powers and institutional balance.

I do not think also that there is a single standard of review that applies horizontally regardless of the area, in which the ECB acts, and the nature and content of the contested act. For example, some observers have suggested a form of judicial review that would consist, in essence, in a control of "rationality" of the choices made by the acting institution; a standard that is in between "full judicial review" and "full discretion".[13] I am not sure that this is the way I would approach this subject. To me, it is obvious that the standard of review to be applied by the Court in decisions which involve policy choices (such as those at issue in *Pringle* or *Gauweiler*)[14] cannot be the same with that applicable in cases where individual decisions on prudential issues are adopted (such as that contested in *Crédit lyonnais* or other similar cases). Nevertheless, it remains true that, in both types of cases, it is not proper for the Court to engage in a fully-fledged and *ex novo* assessment of the matter.

4 Conclusion

In today's globalised and hi-tech world, markets evolve very rapidly, as well as in the areas of banking and finance. So does also economics theory. The institutions charged with the task to regulate and supervise those markets have, in principle, to adapt to those changes: devising new instruments or rules, and occasionally re-interpreting their role in a pro-active manner. However, one parameter does not change. That is, the need to have an independent and impartial judiciary, exercising effective review of the legality of the legislative and administrative action of those institutions. How far that control of legality has to go, in each case, to be "effective" may and does vary; and there may well be different views – among scholars, market

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11 See, for example, Zilioli, C., Selmayr, M. (2000), "The European Central Bank: An independent specialized organization of Community law" *Common Market Law Review,* Vol. 37(3), 591; Amtenbrink, F., de Haan, J. (2002), "The European Central Bank: An Independent Specialized Organization of Community Law – A Comment" *Common Market Law Review*, Vol. 39(1), 65; Tucker, P. (2021), "How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment", *German Law Journal*, Vol. 22(6), 999.

12 See, inter alia, Goodhart, C., Lastra, R., "Central Bank Accountability and Judicial Review", SUERF Policy Note, No 32, 2018; Hinarejos, A., Rakic, D. (2024), "Independence, discretion and accountability in the evolving monetary policy framework of the European Central Bank" *Maastricht Journal of European and Comparative Law, Vol. 30(4),* 473; Mendes, J., "Constitutive Powers and Justification: The Duty to Give Reasons in EU Monetary Policy" in M. Dawson (ed.), *Substantive Accountability in Europe's New Economic Governance*, Cambridge University Press, 2023, 228.

13 See Goldmann, M. (2014), "Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review", *German Law Journal,* Vol. 15(2), 265.

14 Judgment of the Court of 27 November 2012, *Pringle*, C-370/12, ECLI:EU:C:2012:756 and Judgment of the Court of 16 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400.

operators and public authorities – in that regard. I hope that the present paper has provided some elements of reflection on this matter.

Supervisory discretion under judicial review: a transatlantic perspective

Pedro Machado*

1 Introduction

Discretion is the point where law and policy converge. In the practice of modern banking supervision, discretion is not a peripheral notion but a cornerstone of effective oversight. This is particularly true for the European Central Bank (ECB) within the framework of the Single Supervisory Mechanism (SSM). Supervisory discretion enables regulators to navigate complex, dynamic, and uncertain environments, addressing risks that transcend mechanical compliance or purely quantifiable metrics. However, the exercise of such discretion must remain firmly anchored in law and aligned with the principles of accountability, judicial review, and legality, which safeguard both its legitimacy and effectiveness.

The calibration of the respective domains of (supervisory) law and policy is a fundamental issue for every jurisdiction. Courts have long grappled with delineating the appropriate sphere of administrative discretion and that of judicial review. This contribution, written from the perspective of a jurist currently serving on the Supervisory Board of the ECB, draws on a transatlantic comparative analysis between the European Union (EU) and the United States (US). It examines how differing legal traditions and constitutional frameworks approach the delicate interplay between independence, discretion, and accountability. The recent shift in the US following the Supreme Court's landmark *Loper Bright Enterprises* v *Raimondo* decision, which overturned the long-standing *Chevron* doctrine of judicial deference, serves as an entry point for reflecting on the EU's own model of judicial deference to administrative and technical expertise, particularly in the field of banking supervision.

This contribution argues that discretion is indispensable for the ECB to fulfil its supervisory mandate effectively, particularly in addressing emerging and qualitative risks related to governance, internal controls, and risk culture. Recognizing a space for the administration has a pivotal role for the SSM and its capacity to foster a forward-looking, risk-based supervisory approach. However, within a rule of law legal order, and discretion to command trust and legitimacy, it must operate within a robust framework of accountability, judicial review, and procedural safeguards. Through this lens, the SSM serves as a compelling case study of how discretion,

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when wielded judiciously, becomes the bridge between supervisory independence and the rule of law in the pursuit of financial stability.

2 Discretion at the heart of supervision: a transatlantic starting point

When we speak about banking supervision, we often focus on rules, ratios, and reports. Yet every rule, ratio, and report represents the concrete operationalisation of a single underlying concept: discretion. Discretion is the meeting point between policy, supervisory policy in our case, and the law. It defines the space that the legislator has deliberately left open for expert judgment when confronted with complex, rapidly evolving, and often uncertain circumstances.

Once the legislator has left this space open, the question arises as to who should fill it. There are essentially two main (lawfully entrusted) actors: the administration and the courts. Establishing their symbiotic relationship in the application of the law is a demanding task, and striking the right balance matters not only for the effectiveness of supervision but also for the integrity of the rule of law itself – a fundamental value of the Union, enshrined in Article 2 TEU.

In the EU, the standard of review, reflected in settled case law, is built on judicial deference to technical discretion, but subject to clear legal and procedural limits. In the US, for forty years the Chevron doctrine granted agencies wide interpretative authority of the law – until last year's landmark *Loper Bright* decision overturned that deference. The US Supreme Court now insists that judges, not agencies, must interpret questions of law, thus quashing the practice of judicial deference in the face of statutory ambiguity.

The European model of deference to technical expertise, and the American model's seeming retreat from its previous stance on agency interpretation, invite us to reflect on how independence, accountability, and judicial scrutiny can be reconciled in the practice of banking supervision. The following sections will try to explore these themes. First, I will examine the European approach to supervisory discretion, focusing on the ECB's role within the Banking Union and the legal safeguards that underpin its independence. Next, I turn to the US, tracing the evolution of judicial deference from *Skidmore* to *Chevron* and ultimately to *Loper Bright*. My point here is not to analyse the details of that case law,[1] but rather to reflect on the overall shift of the US legal order to a stance that purportedly shows less trust to the administration and the arguments behind this. Finally, I bring these perspectives together to reflect on the broader implications for supervisory governance and the balance between discretion, accountability, and the rule of law.

[1] See the contribution of Mariolina Eliantonio and Oren Tamir in this volume.

2.1 On the European perspective

The political choice underpinning the supervision pillar of the Banking Union was to grant an independent Union institution – the ECB – powers and responsibilities to supervise European banks.[2] Both concepts are important here: independence and discretion. The SSM Regulation empowers the ECB to exercise judgment in pursuit of its supervisory responsibilities. And rightly so: supervision is not a purely mechanical activity or a rigid application of legal norms. It relies on technical expertise, on forward-looking assessments, and on complex judgments. Effective and efficient supervision therefore requires a margin of technical discretion. This transfer of powers and responsibilities from national to EU level was to an independent institution.[3] Granting independent discretion to an authority immediately invites the question of legitimacy of those powers. In a system based on the rule of law, no authority is supposed to have unchecked powers.

The question of squaring independent supervisory discretion with accountability is thus a central one for the SSM. It is also one that has been explicitly litigated at the national level. The German Federal Constitutional Court (*BVerfG*), in its judgment on the banking union in the context of the system of German constitutional review,[4] offered a critical eye to what it understood as the tensions between the ECB's independence and the principle of democratic legitimacy as enshrined in the *Grundgesetz*.[5] The *BVerfG* pointed out, in a crucial passage of its judgment, that the ECB has broad discretion when performing its supervisory tasks.[6] In the Court's view, however, ECB discretion in the field of supervision is "compensated by specific safeguards that serve to ensure democratic accountability" in relation to the supervisory tasks and powers entrusted to the ECB. These safeguards in the SSM Regulation notably include judicial review of the ECB's actions in that domain and parliamentary oversight rights, coupled with the ECB being accountable to the EU institutions that have transferred tasks and powers to it, "in order to enable those institutions to evaluate such transfers, to rescind them where necessary, or to limit or withdraw the ECB's independence. The decisive factor is that the legislator must be able to exercise democratic responsibility for the actions of an independent body and can decide on amendments to the legal bases of [the ECB] where necessary".[7]

The approach of the *BVerfG* scrutinizes ECB discretion based on national, not EU law. Its standards thus flow from the domestic constitutional order and its stance

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2 For an overview, see Véron, N., *Europe's banking union at ten: unfinished yet transformative*, Bruegel, 2024, 1 (57-86).

3 Art. 19(1) and (2) of the SSM Regulation stress that the ECB and the national competent authorities have a duty to act independently, and that EU institutions and national governments have a duty to respect that independence. CRD IV includes additional rules on the independence of national competent authorities, see Art. 4, Directive (EU) 2024/1619 of the European Parliament and of the Council of 31 May 2024 amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, OJ L, 2024/1619, 19.6.2024, p. 1.

4 2 BvR 1685/14, 2 BvR 2631/14, 30 July 2019.

5 Ibid., paragraph 209.

6 Ibid., paragraphs 212-218.

7 Ibid., paragraph 211. This accountability towards the European Parliament and the Council is enshrined in Art. 20 of the SSM Regulation. Art. 21 furthermore enables national parliaments to be informed, in different modalities, by the ECB on its supervisory activities.

towards ECB independent discretion carries with it a national constitutional tradition that is not necessarily the same as the EU one. However, this judgment does make an important point: that judicial review, together with political oversight, is critical for the ECB's independent exercise of supervisory discretion.

Administrative discretion has long been debated in European law. As Advocate General Emiliou explains in detail in his contribution to this volume, the EU test for reviewing administrative discretion is that of "manifest error". Discretion must be respected unless the ECB commits a manifest assessment error or exercises this discretion in an unlawful manner – notably, if the ECB exceeds the remit of the competences entrusted to it or does not observe essential procedural guarantees. These guarantees include the ECB's obligation to carefully and impartially examine all the relevant elements of the situation in question and to provide an adequate statement of the reasons for its decisions.

A manifest error of assessment is the basic EU law concept for structuring the discussion on the judicial standard of review of administrative discretion. As proposed by Advocate General Emiliou in his Opinion in *Crédit lyonnais*,[8] "the concept of 'standard of review' refers, generally, to the intensity of review that courts may exercise when reviewing the lawfulness of the challenged acts. Approached from another angle, the standard of review corresponds to the degree of deference accorded by courts to the bodies which adopted the challenged acts. Obviously, the higher the intensity of review, the lower the degree of deference accorded to the body in question and vice versa."

The EU judicial standard of review, reflected in settled case law, revolves around deference towards technical discretion subject to certain limits. This means that EU courts do not perform a *de novo* assessment of the subject matter brought before them. Instead, they establish whether the evidence relied on is factually accurate, reliable and consistent, whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it. EU courts perform a "review of legality" of the challenged acts against the relevant procedures and substantive rules. The EU judges refrain from setting out what would have been, in their view, the best course of action for the institution concerned considering the specificities of the case at hand. This is also the standard followed by the Court in reviewing ECB acts adopted in the exercise of supervisory discretion. As expressly asserted in the judgment delivered in *Crédit lyonnais*, the leading case when it comes to the intensity of judicial review in banking supervision, "in so far as the ECB has a broad discretion (…), the judicial review which the Courts of the European Union must carry out of the merits of the grounds of a decision such as the decision at issue *must not lead them to substitute their own assessment for that of the ECB*, but seeks to ascertain that that decision is not based on materially incorrect facts and that it is not vitiated by a manifest error of assessment or misuse of powers."[9]

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8 Opinion of Advocate General Emiliou delivered on 27 October 2022 in *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2022:844, paragraph 42.

9 Judgment of the Court of 4 May 2023, *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2023:368, paragraph 55 (emphasis mine).

In the case at first instance, the General Court had assessed ECB's reasons for making its supervisory decision insufficient. According to the ECB, by doing so, the General Court substituted its own assessment to that of the administration, based on grounds other than those put forward by the ECB, and ultimately undertook the task itself of carrying out complex assessments of a prudential nature. In this way, in the ECB's view, the General Court departed from the established standard regarding the scope of judicial review of independent discretion. The Court of Justice found, as did Advocate General Emiliou, that the General Court had indeed unacceptably substituted its own assessment for that of the ECB. As the ECB had argued in this case, the wording of the applicable law in that case, Article 429(14) CRR[10] as it was applicable at the time, meant that the legislator intended that the supervisory authorities (and not the judiciary) should have the power to grant or refuse the exemption requested by a credit institution. This reflects the expertise of the supervisor in making these assessments. Respecting the ECB's assessment was therefore also a matter of respecting the institutional balance between the judiciary and the supervisor, a fundamental element of the rule of law itself.

In the field of banking supervision thus, it is not sufficient, in order to establish a manifest error of assessment, for the judges merely to take a different opinion to that of the institution responsible for the action under review. This is precisely because technical discretion entails choices which are permitted by law, notably when EU institutions are given discretion when applying the open-textured legal concepts in individual cases enabling, for instance, prospective analyses which necessarily rest on value judgements or empirical assessments.

2.2 The US trajectory: the rise of mistrust?

The EU framework, as illustrated by the ECB's supervisory role and the judicial standard applied by EU courts, rests on a model in which administrative discretion is in principle trustworthy, particularly in technically complex domains, subject to structured judicial review – and the interpretation of law remains squarely within the scope of full review by the EU courts. This balance between discretion and judicial review is central to the legitimacy of independent institutions within the EU legal order, based on the rule of law.

The US judicial standard of review has traditionally leaned towards judicial deference to administrative discretion exercised by independent agencies subject to certain limits.[11] Following the expansion of federal agencies during the New Deal, Congress enacted the Administrative Procedure Act (APA) in 1946 to establish procedures for agency rulemaking and adjudication.[12] Under the APA, courts were required to defer to agencies unless their actions were "arbitrary, capricious, an abuse of

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10 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance, OJ L 176, 27.6.2013, p. 1.

11 See in detail Mariolina Eliantonio and Oren Tamir in this volume.

12 Administrative Procedure Act (APA) codified in 5 U.S.C. §§ 551–559.

discretion, or otherwise not in accordance with law." Courts also had to accept agency factual findings unless "unsupported by substantial evidence."

Two years before the enactment of the APA, in *Skidmore* v *Swift*,[13] the US Supreme Court had established the deference standard affirming that judicial deference to an agency's conclusion was not automatic, requiring courts to consider "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade".[14] *Chevron* reshaped the deference doctrine in 1984,[15] requiring courts to defer to an administrative agency's interpretation of an ambiguous statute that it administers, provided the agency's interpretation is reasonable. The two-step framework consisted of assessing, as a first step, whether Congress had spoken directly to the precise question at hand – if so, courts and agencies would be required to follow Congress's intent; and in a second step, if the statute is silent or ambiguous, assessing whether the agency's interpretation is reasonable – if so, courts should defer to the agency's view.

Here we can see some similarities between judicial deference on both sides of the Atlantic: while deference is granted by the EU courts in the face of technical discretion, in particular when EU institutions are given discretion on how to apply certain open-textured legal concepts or undetermined legal concepts in individual cases, the US Supreme Court considered that statutory ambiguity offered grounds for agency discretion to which the US courts should award deference. That said, the Supreme Court in the United States had the opportunity to revisit the breadth of deference posed by the Chevron standard in some subsequent rulings.

In *United States* v *Mead Corp*. (2001),[16] the Court clarified that Chevron deference does not apply across the board: only when Congress has clearly delegated to the agency the authority to issue rules with the force of law. Otherwise, agency interpretations were entitled merely to Skidmore's more modest persuasive weight. This significantly narrowed the reach of *Chevron*, limiting it to cases where Congress had unmistakably entrusted lawmaking authority to an agency. Then, in *Encino Motorcars, LLC* v *Navarro* (2016),[17] the Court held that *Chevron* deference does not apply when an agency's interpretation is procedurally defective, such as failing to provide a reasoned explanation for changing a longstanding interpretation, hence underscoring that courts do not need to defer to agencies that fail to adequately explain policy shifts.

In addition to *Chevron*, the US Supreme Court developed another form of judicial deference known as Auer deference, originating from *Auer* v *Robbins* (1997).[18] Under this doctrine, courts deferred to an agency's reasonable interpretation of its own regulations, based on the premise that the agency possesses the requisite expertise to clarify ambiguities within its regulatory framework. However, in *Kisor* v

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13 *Skidmore* v *Swift & Co*., 323 U.S. 134 (1944), paragraphs 136-37.

14 Ibid., paragraph 140.

15 *Chevron U.S.A., Inc.* v *NRDC*, 467 U.S. 837 (1984).

16 *United States* v *Mead Corp*., 533 U.S. 218 (2001).

17 *Encino Motorcars*, *LLC v Navarro*, 579 U.S. __(2016).

18 *Auer* v *Robbins*, 519 U.S. 452 (1997).

Wilkie (2019),[19] the Court revisited the scope of Auer deference. While it stopped short of overruling the doctrine, it significantly narrowed its application. The Court held that deference should only be granted after courts have exhausted all traditional tools of statutory interpretation and determined that the regulation in question is genuinely ambiguous. Furthermore, the agency's interpretation must be reasonable and reflect demonstrated expertise, consistency, and procedural fairness. Kisor thus marked a turning point, signalling increased judicial scepticism toward broad administrative discretion and reinforcing the judiciary's gatekeeping role in statutory interpretation. This line of thinking continued in *West Virginia* v *Environmental Protection Agency* (2022),[20] where the Court invoked the Major Questions Doctrine, holding that agencies need clear congressional authorisation for decisions of major economic and political significance, hence limiting agency discretion in areas of major national policy, and signalling a further narrowing of Chevron-style deference.

The decisive break came with *Loper Bright Enterprises* v *Raimondo* (2024), where the Supreme Court made a significant shift by overruling *Chevron*.[21] The Court held that the APA requires courts to exercise their independent judgment in interpreting statutes and that courts may not defer to an agency's interpretation simply because a statute is ambiguous. *Chevron* was held inconsistent with the APA's requirement that courts, not agencies, decide questions of law applicable to agency action, hence ambiguity was quashed as a source of judicial deference towards the agency's discretion in statutory interpretation.[22]

Considering the judicial deference standards the EU and in the US post *Loper Bright*, the question is whether divergent paths seem to be emerging in the sense that US courts show a tendency towards curtailing independent agencies' discretion when called to review their actions – more than in the past. It might be premature to consider that *Loper Bright* heralds the end of judicial deference towards agencies' discretion, as more traditional deference principles seem to have been left intact, notably in the cases of discretionary determinations made when Congress conferred upon the agency the power to make that determination, or allegedly in the case of agency fact-finding. Leaning on Professor Thomas Merrill's carefully reasoned comment on the ruling, it is possible that Loper Bright could ultimately prove to be "a new framework accommodating significant acceptance of agency interpretations" rather than a "power grab" – at least in the hands of judges with the right "attitude".[23] Any comparison needs context. Regardless of its actual impact for future litigation, *Loper Bright* needs thus to be read in its broader political and constitutional context.

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19 *Kisor* v *Wilkie*, 588 U.S. ___ (2019).

20 *West Virginia* v *Environmental Protection Agency*, 597 U.S. ___ (2022).

21 *Loper Bright Enterprises* v *Raimondo*, 603 U.S. (2024).

22 Justice Thomas delivered a concurring opinion to underscore a more fundamental problem: Chevron deference also violates the constitutional separation of powers, because that deference standard permits the executive branch to exercise powers not given to it. In her dissenting opinion, Justice Kagan, joined by Justices Sotomayor and Jackson, expressed concern that the decision undermines the expertise of agencies and disrupts the balance of power among the branches of government, and warned that the majority's decision could lead to increased judicial intervention in policy areas traditionally managed by specialised agencies.

23 See Merrill, T.W. (2024), "The Demise of Deference – And the Rise of Delegation to Interpret?", *Harvard Law Review*, Vol. 138(1), 227 (231).

This context seems to point out to a greater mistrust towards administrative discretion exercised by independent agencies in the US.

The current US Administration adopted an openly sceptical stance toward the autonomy of independent regulatory agencies, pursuing a sustained effort to extend presidential oversight across what is commonly referred to in the US as “the administrative state”. This agenda has been supported by the constitutional theory of a “unitary executive,” asserting that all executive power must remain subject to presidential direction. Already in 2019, Executive Order 13891 (“Promoting the Rule of Law Through Improved Agency Guidance Documents,” 2019) subjected informal guidance – long used by independent agencies – to more formalised procedures.[24] A 2019 Office of Management and Budget (OMB) memorandum invited independent agencies to submit significant rules for Office of Information and Regulatory Affairs (OIRA) review under the Congressional Review Act, an encroachment on their procedural autonomy.[25] These orders extended OIRA’s coordinating influence well beyond executive departments.[26]

The Administration’s constitutional position was confirmed in *Seila Law LLC* v *Consumer Financial Protection Bureau*,[27] where the Supreme Court held that limits on the President’s power to remove the CFPB Director violated the separation of powers. The judgment echoed the Administration’s argument that independence from presidential control is inconsistent with Article II’s vesting of executive authority. An argument criticized for transforming “presidential administration into bureaucratic domination,” and consolidating White House influence over independent bodies.[28] Subsequently, the White House continued to explore expanding such review, culminating in the Executive Order “Ensuring Accountability for All Agencies” (18 February 2025), which now requires independent regulators, including the Fed under its supervisory mandate, to submit draft rules for OIRA clearance.[29] These developments reveal a broader mistrust of independence. Whether the principle of independence recognized in *Humphrey’s Executor* v *United States*[30] can endure this renewed centralisation remains an open question for American administrative law.

2.3 Bringing it together

This brief transatlantic overview invites a few concluding reflections. In the EU, broad discretion in the exercise of supervisory powers should be regarded as a cornerstone of independence. Independence must be counterbalanced by accountability and judicial review. The latter, however, should follow a deferential

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24 Executive Order 13891, 84 Fed Reg 55235 (9 October 2019).

25 Congressional Research Service, The Congressional Review Act (CRA): Frequently Asked Questions, 2022, 4-5.

26 Batkins, S., Brannon, I. (2019), “What Does the OMB Memo Mean for Review of Independent Agency Actions?”, *Cato Regulation Fall*, Vol. 42(3), 8 (12).

27 *Seila Law LLC* v *Consumer Financial Protection Bureau*, 591 US 197 (2020).

28 Kovacs, K. (2021), “From Presidential Administration to Bureaucratic Dictatorship”, *Harvard Law Review Forum*, Vol. 135(2), 104.

29 White House, Executive Order on Ensuring Accountability for All Agencies, 2025.

30 295 US 602 (1935).

standard when discretion involves technical or expert judgment. Independent administration, and its discretionary powers, are a critical component of a constitutional paradigm based on the rule of law and a central manifestation of the principle of institutional balance.

It is thus not sufficient, in order to establish a manifest error of assessment, for courts merely to take a different opinion to that of the institution responsible for the action under review. This is precisely because technical discretion entails choices which are permitted by law, notably when EU institutions are given discretion when applying the open-textured legal concepts in individual cases enabling, for instance, prospective analyses which necessarily rest on value judgements or empirical assessments.

As Advocate General Emiliou stressed in his above-mentioned Opinion in *Crédit lyonnais*, "*there is a constitutional reason militating against full judicial review of discretional choices made by the administration. In those cases, the power to make those choices has been expressly entrusted to an institution other than the Court of Justice of the European Union* (…). A too intrusive form of judicial review would encroach upon the margin of discretion given to the institutions in order to exercise their powers effectively*, thus conflicting with the principle of conferral of powers to the institutions and upsetting the principle of institutional balance*". [31]

The US Supreme Court seems to reach different conclusions when assessing the exercise of discretion granted to agencies from the perspective of the constitutional separation of powers between the executive and the judicial branches, than the CJEU when reviewing supervisory discretion granted to the ECB in the light of institutional balance. In my view, the conclusion of the CJEU is more appropriate for the effective pursuit of supervisory responsibilities within the SSM, ensuring that supervision is carried out efficiently and effectively.

Drawing on the recommendations of the expert group entrusted with an external assessment of the Supervisory Review and Evaluation Process,[32] empowering supervisory judgement is key for the ECB to become more risk-based in its supervisory approach. Supervisory judgement is particularly important in an environment of rapidly evolving risks, where past trends may not allow for sufficiently forward-looking risk assessments.[33] In this regard, qualitative measures are a key tool available to supervisors to address gaps – notably in banks' internal controls, internal governance and risk culture. As qualitative measures aim to address risks that cannot easily be measured numerically, they necessarily require a high degree of supervisory judgement. The effectiveness of qualitative measures relies on timely remediation by supervised entities. When remediation of identified weaknesses is insufficient, supervisors should expeditiously increase the severity of supervisory

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31 Opinion of Advocate General Emiliou delivered on 27 October 2022 in *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2022:844, paragraph 61 (emphasis mine).

32 The Assessment of the European Central Bank's Supervisory Review and Evaluation Process is available on the ECB's banking supervision website.

33 Buch, C., Reviewing the Pillar 2 requirement methodology, *The Supervision Blog*, 2025.

tools and swiftly move up the escalation ladder. Escalation and enforcement therefore help ensure that supervisory discretion is effectively exercised.

3 Conclusion

In conclusion, this quick transatlantic journey underscores that while both systems grapple with the same dilemma – the extent and limits of discretion and who should guard its limits – they currently seem to approach its resolution through distinct constitutional paradigms. The US Supreme Court seems to be leaning towards restoration of judicial supremacy reflected in a judiciary-driven interpretation of the separation of powers that favours a narrower deferential standard. By contrast, the EU judiciary, at least when it comes to banking supervision, places greater emphasis on institutional balance, thereby sustaining a wider judicial deference to administrative discretion, albeit under control, while ensuring that such discretion remains subject to appropriate controls. In the context of banking supervision, discretion emerges not as a side component but as a pivotal element of effective oversight, enabling supervisors to address emerging, uncertain, and qualitative risks that transcend mere mechanical compliance.

For the ECB, this necessitates empowering supervisors to make informed, risk-based judgments, particularly concerning qualitative factors like governance, internal controls, and risk culture. These judgments require discretion, escalation, and, where necessary, enforcement. However, such discretion must operate within a framework of accountability, judicial review, and respect for institutional balance. Judicial deference to the ECB's technical expertise, paired with robust procedural safeguards and a commitment to legality, ensures that supervisory discretion aligns with the principles of independence and the rule of law.

Supervisory discretion – when firmly anchored in accountability and judicial scrutiny – serves as the critical bridge between supervisory independence and adherence to legal frameworks. Borrowing from Simone de Beauvoir and Jean-Paul Sartre's reflections on transatlantic experiences, the divergence in approaches between Europe and the US offers not only a contrast but also a source for deeper reflection, enhancing our collective understanding of discretion's role in governance and oversight.[34] And more importantly about the form of polity the EU embodies and seeks to consolidate.

[34] Sartre, J.-P., *Witness to My Life: The Letters of Jean-Paul Sartre to Simone de Beauvoir, 1926-1939*, Simon & Schuster, 1992, 1 (317): "The distance is not merely geographical; it is a distance of experience, of seeing the world in such different terms. But I believe this very dissonance is what enriches our understanding."

Becoming more alike? Comparing EU and US substantive review of administrative action

Mariolina Eliantonio and Oren Tamir*

1 Introduction

The intensity of judicial review has been at the forefront of academic and judicial debates on both sides of the Atlantic, in light of cases such as *Crédit Lyonnais*, adjudicated in 2023 by the CJEU[1] and the 2024 ruling in *Loper Bright*.[2] While *Crédit Lyonnais* seems to signal a more deferential attitude by the EU courts towards the discretionary choices of administrative institutions at the EU level, *Loper Bright* seem to have moved in exactly the opposite direction: abandoning the traditional deferential approach on questions of law set out in the *Chevron* ruling and which used to be a staple of American administrative law for four decades.

We argue in this contribution that, despite what may appear at first sight, the CJEU's case law is not – at least not clearly and unequivocally – moving towards a Chevron-like review. Instead, the US intensity of review of administrative action (taken as a whole and looked at from a doctrinal standpoint) seems to increasingly resemble its EU counterpart. American administrative law, in other words, and at least looking at things from a strictly doctrinal perspective (we will speak to extra-doctrinal elements soon) has become more "Europeanised."

This contribution proceeds as follows. In Section 2, the evolution of the intensity of review by the CJEU is briefly presented. In Section 3, we move to compare and contrast the EU approach with the US, highlighting the main evolutions of the American case law throughout the years. A conclusion reflects on the overall discussion and suggests the ways in which the law in both jurisdictions is today both more similar but how it may still be different in important ways.

A brief note before we begin. Within substantive review of courts over administrative action, a crucial distinction is typically made between review of law, fact and discretion. While "[T]he demarcation between law, fact, and discretion can […] be problematic as any administrative lawyer will attest",[3] it is by now well entrenched. As a result, our discussion bellow will follow that distinction as we try and make

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[1] Judgment of the Court of 4 May 2024, *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2023:368.

[2] *Loper Bright Enterprises* v *Raimondo*, 603 U.S. (2024).

[3] Craig, P., *EU Administrative Law*, 3rd ed., Oxford University Press, 2018, 437.

sense of the differences – and similarities – between the different types of review performed by the Court of Justice of the European Union (CJEU) and the US courts.

2 The CJEU's approach and the elusive notion of "manifest error of assessment"

The assessment of the CJEU in direct actions concerns "legality" of the acts adopted by EU institutions, agencies, or other bodies. This means that the CJEU can only assess the compliance of EU action with the law (assessed on the grounds listed in Article 263 TFEU) and does not examine the merits of the challenged measure.[4] Within this review of legality, Article 263 TFEU specifies the grounds for bringing an action for annulment, namely "lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers". While the Treaty establishes the scope of review, it is silent on the intensity or exact contours of this review. Therefore, the issue has been primarily explored by the CJEU jurisprudence and Advocate General (AG) opinions.

In the EU legal system, it is uncontested that the Court has the monopoly of interpretation of EU law and exercises full review on questions of law, e.g. concerning the meaning or construction of a relevant term in a Treaty provision, Regulation, Directive, or Decision that underpin administrative action. As AG Bobek unequivocally stated:

It is for the Court to interpret the law. It hardly needs to be pointed out that the legal arguments put forward by the appellant […] do not become more credible for the Court by the mere fact that they have also been endorsed or even previously voiced by an EU institution or a Member State. The question is rather whether those arguments are persuasive on their own merits.[5]

It is indeed regarded as axiomatic that EU courts may substitute their interpretation of contested legal terms for that of the decision-maker. As Craig has suggested, it would be seen as "constitutional heresy to suggest otherwise."[6] Craig also observed that this approach persists despite the substantial expertise developed by EU institutions in specific subject areas.[7] Drawing on the famous *Marbury* v *Madison* case from the American legal system, this comparative expertise notwithstanding, it is the CJEU's exclusive authority – rather than that of any other institution – "to say

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[4] According to the CJEU, "[I]t is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercised under Art. 173 must be limited to the legality of the disputed measure", see Judgment of the Court of 12 November 1996, *United Kingdom* v *Council,* C-84/94, ECLI:EU:C:1996:431, paragraph 23.

[5] Opinion of AG Bobek in *Nord Stream 2* v *Parliament and Council*, C-348/20 P, ECLI:EU:C:2021:831, point 177. Along the same lines Opinion of AG Emiliou in *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2022:844, point 43.

[6] Craig, P., EU Administrative Law, 3rd ed., Oxford University Press, 2018, 442.

[7] Ibid.

what the law is."[8] On this basis, the determination of the meaning of terms such as "price stability" in Article 127 TFEU falls solely within the purview of the CJEU.

By contrast, when it comes to substantive review of facts, things are quite different. A distinction must be drawn between "simple" facts, which can be objectively true or false, and complex factual assessments, which are relevant within broader evaluative frameworks. In the first case,[9] the CJEU exercises full review, very much like it does on questions of law. In the case of "complex" factual assessments, however, the EU administration is afforded a certain margin of deference.

This deference is typically associated with what national legal systems refer to as "technical discretion", a notion which ought to be differentiated from that of "political discretion". This "technical discretion" is exercised at EU level both at the moment of establishment of complex facts and their assessment in light of the relevant law.[10] At a conceptual level, "political" discretion stricto sensu concerns the process through which the EU administration assesses and weighs competing public interests, while "technical discretion" refers to the assessment, within a framework of legislative criteria, of the aspects of the decision-making process that require expert knowledge.[11] For example, determining the existence of "systemic or macroprudential risks" under Article 5(2) of the SSM Regulation involves a complex assessment requiring technical expertise, constituting "technical discretion". The same provision also includes an element of "political discretion", as it empowers the ECB (through the word "may") to adopt more stringent measures than those adopted by the national competent authorities to tackle the above mentioned systemic or macroprudential risks.

In cases of political discretion, where institutions are granted a broad margin to balance conflicting interests, the Court has recognized a "significant freedom of evaluation" to the EU institutions. The Court's review must therefore be limited to determine "whether the evaluation of the competent authority contains a patent error or constitutes a misuse of power".[12] In short, in cases of political discretion, the review of the CJEU is rather deferential and has remained so throughout the years.

By contrast, the Court's approach to reviewing "technical discretion" has fluctuated over time. In cases of complex technical or economic assessments, the Court has consistently held that judicial review is "confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the

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8 *Marbury* v *Madison*, 5 U.S. 137 (1803).

9 E.g. was a certain document in the context of an inspection carried out pursuant to Art. 11(1)(a) of the SSM Regulation? See Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.

10 Fritzsche, A. (2010), "Discretion, scope of judicial review and institutional balance in European law", *Common Market Law Review*, Vol. 47(2), 361 (364).

11 Schimmel and Widdershoven use the term "margin of appreciation", Schimmel, M., Widdershoven, R., "Judicial Review after Tetra Laval: Some Observations from a European Administrative Law Point of View", in Essens, O., Gerbrandy, A. and Lavrijssen, S. (eds), *National Courts and the Standard of Review in Competition Law and Economic Regulation*, Europa Law Publishing, 2009, 51 (65). Paul Craig refers to this concept as "jurisdictional discretion", Craig, P., *EU Administrative Law*, 3rd ed., Oxford University Press, 2018, 440.

12 Judgment of the Court of 14 March 1973, *Westzucker GmbH* v *Einfuhr- und Vorratsstelle für Zucker*, C-57/72, ECLI:EU:C:1973:30, paragraph 14.

facts have been accurately stated and whether there has been any manifest error of assessment of the facts or misuse of powers".[13] While this formal threshold of "manifest error of assessment" has remained unchanged throughout the years, its interpretation has evolved, resulting in varying intensities of review.

In earlier cases, the review of the discretionary choices of the EU administration was carried out without much argumentation and attention for the factual support of the conclusions reached by it.[14] During this early period, "review of the sufficiency of the evidence supporting an administrative measure [was] virtually non-existent".[15] However, as Craig has argued, while the threshold of "manifest error" remains formally unchanged, it has evolved to allow for increasingly intensive review.[16]

This heightened review has included first and foremost greater attention to procedural guarantees. As stated in *Technische Universität München*, these "include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision".[17] Beyond this process-oriented review, the CJEU has however also exercised increasing scrutiny from a substantive point of view, namely on "whether the factual material on which the Commission's decision was based was accurate, reliable, consistent and complete, and whether this factual material was capable of substantiating the conclusions the Commission drew from it".[18]

Commentators generally agree that this test amounts to a relatively strict review of the decisions of the EU administration.[19] While judicial review does not require a full reassessment of administration's decisions, it does extend to "a review of factual accuracy, reliability, consistency and completeness of evidence, and allows the court to assess whether it serves as a sufficient basis for (the institution's) conclusions".[20]

This mode of review establishes an inextricable link between process and substance, particularly regarding the obligation to provide adequate reasons for

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13 See e.g. Judgment of the Court of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06, ECLI:EU:C:2009:610; Judgment of the Court of 7 May 2020, *BTB Holding Investments SA and Duferco Participations Holding SA* v *European Commission*, C-148/19 P, ECLI:EU:C:2020:354.

14 Craig, P., (n.3), 445.

15 Anderson, A. (2014), "Contrasting Models of EU Administration in Judicial Review of Risk Regulation", *Common Market Law Review*, Vol. 51(2), 424 (434).

16 Craig, P., (n.3), 450.

17 Judgment of the Court of 21 November 1991, *Technische Universität München* v *Hauptzollamt München-Mitte*, C-269/90, ECLI:EU:C:1991:438, paragraphs 13 to 15.

18 Opinion of AG Kokott in *Bertelsmann AG and Sony Corporation of America* v *Impala*, C-413/06 P, ECLI:EU:C:2007:790, point 240.

19 Wils, W. (2010), "The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights", *World Competition law and Economics Review*, Vol. 33(1), 5 (31); Lavrijssen, S. and M. de Visser, M. (2006), "Independent Administrative Authorities and the Standard of Judicial Review", *Utrecht Law Review*, Vol. 2(1), 111 (131). Lenaerts and Gerard, note that "despite the language of Article [263 TFEU], the "manifest error of appraisal" standard for reviewing the application by the Commission of Article [101 (3) TFEU] for instance has considerably evolved over time towards a "full review standard", see Lenaerts, K. and Gerard, D. (2004), "Decentralisation of EC Competition Law Enforcement: Judges in the Frontline", *World Competition*, Vol. 27(3), 313 (340).

20 Baran, M., "The scope of EU Courts' jurisdiction and review of administrative decisions – the problem of intensity control of legality", in Harlow, C., Leino, P. and Della Cananea, G. (eds), *Research handbook on EU administrative law*, Edward Elgar Publishing, 2017, 311.

decisions. The procedural obligation to give reasons enables thus the EU Courts to assess whether the EU administration took irrelevant considerations into account and whether its decisions were on a sufficiently solid factual basis.

While this formula recurs in virtually all rulings dealing with the assessment and evaluation of complex facts, it has led to divergent outcomes. For example, in a notable 2025 case brought against a Commission Delegated Regulation, both the General Court, and, on appeal, the Court of Justice, reviewed vigorously the Commission's technical assessments regarding the classification of titanium dioxide as carcinogenic.[21] In contrast, in the *Crédit lyonnais* case, the CJEU adopted a much more deferential stance. Overturning the decision of the General Court in first instance, the Court of Justice ruled that the General Court had exceeded the limits of judicial review by substituting its own assessment of complex economic factors for that of the ECB.[22]

It is therefore difficult – if not impossible – to identify a single, universally applicable threshold above which the Court will be considered to have exceeded the limits of its judicial oversight function. As AG Emiliou observed, "there is no single and specific intensity of judicial review that is valid in all circumstances where the EU institutions enjoy some degree of (policy or technical) discretion as to how a particular rule should be applied. [...] The "marginal" review that the EU Courts have generally alluded to may be more marginal or less marginal, depending on the specific circumstances of each case".[23]

3 The Europeanisation of US Administrative Law?

Similar to the EU context, in the US, the framework for substantive review of issues of facts, discretion, and law that accompany administrative action is primarily grounded in written law, namely Section 706(2) of the Administrative Procedure Act of 1946 (APA). The APA is the most important piece of legislation in US administrative law and, in fact, is often referred to as the "mini-constitution" of the American administrative state.[24] However, as in the EU, despite the written words of the APA, much of the real "action" happens in the "gloss" given to the APA through time by US courts and especially the Supreme Court.

[21] Judgment of the Court of 1 August 2025, *France* v *CWS Powder Coatings and Others*, C-71/23 P, ECLI:EU:C:2025:601, which upheld on appeal the ruling in Judgment of the Court of 23 November 2022, *CWS Powder Coatings* v *Commission*, T-279/20, ECLI:EU:T:2022:725.

[22] Judgment of the Court of 4 May 2024, *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2023:368, overturning the ruling in Judgment of the General Court of 14 April 202, *Crédit lyonnais* v *ECB*, T-504/19, ECLI:EU:T:2021:185.

[23] Opinion of Advocate General Emiliou in *ECB* v *Crédit lyonnais*, C-389/21 P, ECLI:EU:C:2022:844, point 73.

[24] See, e.g., Bremer, S. E. (2014), "The Unwritten Administrative Constitution", *Florida Law Review*, Vol. 66, 1215; Kovacs, E. K. (2015), "Superstatute Theory and Administrative Common Law", *Indiana Law Journal*, Vol. 90(3), 1207.

3.1 Substantive review of facts

In US administrative law, review of agencies' factual determinations is governed by two nominally different standards under the APA, depending on the type of process used by the agencies: if their decision followed a "formal" hearing process, governed by particular provisions in other parts of the APA,[25] then courts subject agencies' decisions on matters of fact to a "substantial evidence" standard.[26] If, however, an agency's decision did not follow that process – if it was, as US practitioners and scholars call it, an "informal" decision,[27] then the standard of review court will subject agencies' factual determinations is "arbitrary and capricious."[28]

Though nominally different, and though in the past some courts and commentators used to treat these standards differently, today this is no longer the case.[29] The widely accepted view today in US administrative law, shared by both courts and commentators, is that there is no longer any practical difference between the "substantial evidence" standard (for "formal" administrative proceedings) and the "arbitrary and capricious" standard (for "informal" proceedings) when it comes to the level of scrutiny applied to an agency's factual determinations.

But what is the intensity of that form of review? And how does that intensity compare with the intensity of review for facts in EU administrative law? It seems that there are some important differences. First, US administrative law does not recognize a distinction between types of facts like EU administrative law does between, especially, "complex" and "simple" facts. Second, unlike EU law where the test of "manifest error of assessment", which the CJEU uses in complex factual assessments, has become more robust throughout the years, the approach in the US is deferential across the board on issues of facts.[30] Indeed, the US Supreme Court has been quite clear that the "substantial evidence" and "arbitrary and capricious" standards are deferential as they apply to facts, more so than an appellate court is required to be deferential toward factual determinations made by a trial court.[31] As the US Supreme Court recently opined in an important decision from 2019, the "substantial evidence" standard (and, effectively, the "arbitrary and capricious" as well as it applies to review of facts) requires a court to "look […] to an existing administrative record and ask […] whether it contains 'sufficient evidence' to

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25 Sections 556 and 557 of the APA.

26 Section 706(2)(E).

27 For discussion of the importance of "informal" administrative adjudication, see Christopher J., Walker, J, C. and Wasserman, F, M. (2019), "The New World of Agency Adjudication", *California Law Review*, Vol. 107, 141.

28 Section 706(2)(A).

29 See especially *Association of Data Processing Service Organizations, Inc.* v *Board of Governors of Federal Reserve System*, 745 F.2d 677, 240 U.S. App.D.C. 301 (D.C. Cir. 1984).

30 This is clearly a difference between EU and US administrative law on the level of doctrine, and when one takes the distinction between issues of discretion and issues of facts seriously. However, as we noted at the outset, see supra note 4 and accompanying text, to the extent that the distinction in practice tends to collapse, it might be the case that the differences here between the EU and the US are less significant. Even if the "formal" doctrinal standard of review of facts seems more deferential across the board in the US, and not in the EU, many factual issues might be described by courts as part of the discretionary choices of agencies. And, as we discuss next, the standard of discretion could sometimes, and perhaps often, be aggressive in ways that are not at all remote from the intensity seen in EU case law around the "manifest error or assessment" standard.

31 See *Universal Camera Corp.* v *NLRB*, 340 U.S. 474 (1951).

support the agency's factual determinations."[32] However, the Court also made clear that the "threshold for such evidentiary sufficiency is not high."[33] All that is required is "more than a mere scintilla"; that the relevant evidence is one that a "reasonable mind might accept as adequate to support a conclusion."[34]

3.2 Substantive review of discretion

A slightly more complicated picture applies to the review of discretionary choices in US administrative law. Under the APA, administrative discretion is subject to substantive judicial review under the "arbitrary and capricious" standard – sometimes referred to as "arbitrariness review".[35] But courts have been notably less deferential when applying this standard to discretionary choices compared to their approach in reviewing matters of fact. A quite aggressive form of review has emerged to substantive review of agency discretionary choices – not unlike the review under the "manifest error of assessment" that has developed in EU law for complex factual assessment and, at least on paper, more stringent than the approach of the CJEU for the review of "political discretion" of the EU institutions.

This more demanding form of review did not arise immediately after the APA's enactment in 1946. For many years, the prevailing view about substantive review of agency discretionary choices was, for the most part, that courts were quite careful and restrained here. Sometimes they viewed discretionary choices as issues that are entirely free of judicial review – for example, because these are issues that are "committed to agency discretion by law" and are thus uncontrollable or free of judicial review under the APA.[36] Alternatively, courts applied a highly deferential version of the "arbitrary and capricious" standard that mirrored the "rational basis" test used in American constitutional law cases. Under this test, government actions were upheld as long as they could be shown to pursue a legitimate state interest and employ means that were rationally related to that interest.[37] Courts read the "arbitrary and capricious" standard in the APA, applicable more specifically to federal administrative agencies, as effectively expressing the same deferential "rational basis" test from constitutional law.[38]

This deferential stance markedly shifted in the 1970s and 1980s, however. First, in its dramatic decision in *Overton Park*,[39] the US Supreme Court signalled that it would no longer view discretionary choices as ones that are free of judicial review and would instead subject most administrative decision, presumptively, to judicial

32 *Biestek* v *Berryhill*, 139 S. Ct. 1148, 1154 (2019).

33 Ibid.

34 Ibid.

35 See, e.g., Sunstein, R.C., Miles, J.T. (2008), "The Real World of Arbitrariness Review", *The University of Chicago Law Review*, Vol. 75(2), 761.

36 Section 701 of the APA. See also Levin, M.R. (1990), "Understanding Unreviewability in Administrative Law", *Minnesota Law Review*, Vol. 74, 689.

37 For a useful discussion of the "rational basis" test in American constitutional law, see Chemerinsky, E. (2016), "The Rational Basis Test Is Constitutional (and Desirable)", *Georgetown Journal of Law & Public Policy*, Vol. 14, 401.

38 See *Pacific States Box & Basket Co.* v *White*, 296 U.S. 176 (1935).

39 *Citizens to Preserve Overton Park* v *Volpe*, 401 U.S. 402 (1971).

scrutiny. In that same decision, the Supreme Court also said that in order for agencies to survive substantive review, they must build a record demonstrating the reasoning behind their policy choices. That record should be created in real time, and it must be substantial enough to convince outside observers about the reasons that led agencies to their choices. According to *Overton Park*, courts will subject this record to "thorough, probing, in-depth review."[40]

Second, the Court cemented this form of review in another important decision, in the *State Farm case*.[41] In this case, the Court held that for agencies to survive "arbitrariness review" for their discretionary choices they must "examine the relevant data and articulate a satisfactory explanation for its actions,"[42] that courts must "consider whether the decision (by agencies) was based on a consideration of the relevant factors and whether there has been a clear error of judgment,"[43] and that "normally, an agency (decision) would be arbitrary and capricious if the agency had relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[44]

In the US, this form of review that the Supreme Court embraced in its decisions in *Overton Park* and *State Farm* is also known as "hard look" review.[45] By that, commentators and courts signal the "mood" by which courts are normally expected to review agencies' discretionary choices – taking a serious, "hard" look on the agencies reasons for its policy based on the record they develop.[46] And, to the extent that the explanations raise what seems like serious questions – including about whether the data the agency has collected is sufficient or supports the discretionary choice or whether the agency has not given satisfying consideration for an alternative course of action that could similarly satisfy its mandates – courts should not hesitate to send agencies back to the board to reconsider their work and correct any faults.

Even though the conventional story about "hard look" review of discretionary choices is that it is an assertive, non-deferential form of review, things are somewhat more nuanced. While the Court's decisions in *Overton Park* and *State Farm* were themselves quite assertive both in their rhetoric and ultimate results, and while there are other examples – of both Supreme Court decisions and lower courts' judgments – where courts engage in this form of aggressive review, it would be a mistake to think that this form of review is categorically intense. For one thing, while the "hard

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40 Ibid., at 415.

41 *Motor Vehicle Mfrs. Ass'n* v *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

42 Ibid., at 43.

43 Ibid.

44 Ibid.

45 The term "hard look" was coined by an influential administrative law judge, Judge Leventhal, in *International Harvester Co.* v *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973); Leventhal, J, H. (1974), "Environmental Decisionmaking and the Role of the Courts", *University of Pennsylvania Law Review*, Vol. 122(3), 514 (531-533).

46 See, e.g., Markell, L.D. and Hammond, E. (2013), "Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out", *Harvard Environmental Law Review*, Vol. 37, 324 (describing the "hard look" review as a requirement for agencies to "show [their] work" in making a policy determination to the satisfaction of external actors, such as courts).

look" review itself is supposed to be "probing"[47] and courts can fault agencies for deficiencies in their explanations, the Supreme Court has made clear that courts are not meant to "second-guess" policy decisions made by agencies – a stance that aligns with the deferential approach taken by EU courts in cases where EU institutions exercise broad discretionary powers. Instead, "hard look" review is often described as a "proceduralized" form of substantive review,[48] focusing on the sufficiency and robustness of agencies' reasoning. Courts are emphatically not meant to "substitute (their) judgment for that of the agency."[49] This differentiates the form of "arbitrariness review" from more intense forms of scrutiny US courts employ in constitutional law cases, where courts do opine themselves on whether the goals governmental institutions are pursuing are sufficiently important or valuable to justify the adverse effects they have on constitutional values like rights or state sovereignty.

Moreover, the application of "hard look" review is not uniform. Sometimes, courts are much more relaxed compared to the assertive, "in-depth" standard of review that the US Supreme Court seem to have endorsed originally in *Overton Park* and *State Farm*. Some have interpreted this inconsistency to suggest that instead of a "hard look" review that applies categorically and across the board in each and every case of substantive review of discretionary choices, courts are in fact much more context driven. They will employ a "hard look" only when there are good reasons, or "danger signals,"[50] suggesting that a particular agency decision calls for courts to really engage in "hard look." Others have gone further, suggesting that "hard look" review is more myth than reality, as US courts, like their EU counterparts, often defer to agencies, particularly in areas involving significant regulatory uncertainty or complex technical expertise.[51]

The parallels between "hard look" review in the US and substantive review under EU administrative law are striking. Both systems emphasise a non-deferential stance, which focuses on the reasoning of the agency, rather than on the merits, and has a tight connection between the procedural regularity of agency decision-making and its prospects of surviving judicial review. Also, the debates in the US about the proper intensity and scope of "hard look" review – whether it should be applied universally or contextually, and whether it is truly as assertive as it appears – mirror ongoing discussions within the EU regarding the appropriate threshold for judicial scrutiny of discretionary decisions.

3.3 Substantive review of questions of law

It is with the review of questions of law, the final component of substantive review of administrative action, that the differences between EU and US administrative law

[47] *Citizens to Preserve Overton Park* v *Volpe*, 401 U.S. 402 (1971), paragraph 415.

[48] For an excellent discussion of this concept of "proceduralized" substantive review in American administrative law, see Lawson, S.G. (1996), "Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions", *Rutgers Law Review*, Vol. 48(2), 313.

[49] *Motor Vehicle Mfrs. Ass'n* v *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), paragraph 43.

[50] *Greater Bos. Television Corp*. v *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

[51] See, e.g., Gersen, E.J. and Vermeule, A. (2016), "Thin Rationality Review", *Michigan Law Review*, Vol. 114(8), 1355.

have historically been most pronounced. In EU administrative law, as previously discussed, questions of law are and have always been a matter for courts to decide. In US administrative law, by contrast, this was not the case. For almost 40 years, explicitly, and potentially much before that, more implicitly, questions of law called for deference to agencies by courts.

The key doctrine that signalled that idea in US administrative law was the Chevron doctrine, named after the Supreme Court decision in the case of *Chevron* v *NRDC* from 1984.[52] The issue in that case was a change of policy by the Environmental Protection Agency (EPA). The Clean Air Act empowers the EPA to regulate various "stationary sources" in factories that emit pollutants to the air, for instance by subjecting them to reporting requirements as well as measures to reduce the degree of pollutants. Previously, the EPA had interpreted the term "stationary sources" to call for an individual approach – meaning individual sources of pollution within a single factory. But then, and under the influence of a new presidential administration, the EPA decided to change tack. It decided that a "stationary source" should not be viewed individually but on a "factory level." This had the important effect of easing regulatory requirements on factories: if the level of emissions is not calculated according to any individual source but cumulatively for the factory as-a-whole then the likelihood that thresholds of emissions will be crossed and therefore trigger regulatory mandates decreases.

A lower court, in a decision written by Judge Ruth Bader Ginsburg before her appointment to the Supreme Court, rejected the EPA's new interpretation, holding that the term "stationary source" should apply to individual sources, as it had in the past. The court ruled that the appropriate interpretation of the term "stationary source" in the Clean Air Act is to view each source individually and the law does not favour the new whole-factory approach of the EPA (under the influence of the new Reagan administration, known for being more business friendly). But the Supreme Court reversed, announcing a new doctrine of judicial deference to agency interpretations of statutory law.

The Court in *Chevron* said that because of agencies' superior expertise and stronger democratic credentials than generalist courts, the right framework to review whether agencies are acting within the law is not to ask, as the lower court did, whether the agency's interpretation of the statute seems "best." Rather, the relevant framework is altogether different. And it essentially follows two-steps of analysis (also known as the famous "two-step" Chevron framework): first, courts should ask whether the terms in the law under which the agency operates are ambiguous or vague. If they are not, then courts should enforce the clear terms of the law, and an agency has no discretion in this context. However, if the answer is that the terms of the law are indeed vague or ambiguous, then courts should proceed to the second step. And in that step courts need to ask themselves whether the proposed interpretation is a "reasonable" one. Drawing on this framework, the Court in *Chevron* found the term "stationary source" to be ambiguous, and the EPA's whole-factory interpretation a reasonable construction of the Clean Air Act.

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52 *Chevron U.S.A., Inc.* v *NRDC*, 467 U.S. 837 (1984).

The *Chevron* decision marked a sea change in US administrative law. It was taken up strongly by lower courts in the US as a strong signal for a new approach to the review of questions of law in administrative law, suggesting that courts should generally be deferential when determining those questions. To revert back to the *Marbury* line, it is not courts' role to "say what the law is"[53] in questions in which administrative agencies are given powers to make decisions, but rather it is the agencies' role to do it.

Chevron stood on its legs in America for almost 40 years. It was cited innumerable times and discussed in scholarship and commentary constantly (some might say, excessively). It was considered a staple of US administrative law, giving credibility to the suggestion that there is indeed something exceptional about the US administrative law system that make it different from the EU legal system and many others – the recognition of deference on questions of law.[54]

But just before its 40th birthday, its end has come. In 2024, in its dramatic decision in *Loper Bright*, the Supreme Court announced the overruling of Chevron.[55] The broad, categorical deference framework, is no longer good law.

This did not come out entirely out of the blue. *Chevron* always had its critics, questioning the legitimacy and sensibility of that decision.[56] This critique has gained force in the 1990s, especially from conservative jurists, who believed that even though deference to agencies' on questions of law can sometimes facilitate deregulation, for example when a market-friendly administration is in control of agencies (as was the case in *Chevron* itself), *Chevron*'s thumb on the scale in favour of agencies is more likely to allow them to regulate rather than leave people (and markets) alone.

With changing politics in the US, and with new appointments to the Court, the Supreme Court has proven quite receptive to this critique. At first, it basically stopped citing *Chevron* itself for quite some time prior to the decision in *Loper Bright*. And then, in that decision, the Court finally overruled *Chevron*.

The key holding in *Loper Bright* relied on Section 706(2) of the APA, which says that the reviewing courts "shall decide all relevant questions of law." According to the Court's majority opinion, written by Chief Justice John Roberts, the APA "means what it says": questions of law are entirely and wholly for courts, and the APA does not allow for the kind of deference that the Court has (mistakenly) permitted for the past 40 years following *Chevron*. In *Loper Bright*, the Court moreover rejected the very justifications of deference. It questioned whether the claim about agencies' superior expertise and democratic credentials compared to courts is of relevance because courts are expert in pure "legal" questions and that this is courts' role in a democracy. The Court also questioned another justification for *Chevron* – namely,

53 *Marbury* v *Madison*, 5 U.S. 137 (1803).

54 For a flavour of this exceptionality, see the symposium introduced in Rose-Ackerman, S. and Tamir, O. (2023), The Chevron Doctrine Through the Lens of Comparative Law: An Introduction to a Symposium, Balkinization. For a collection of all the posts in the symposium, see *here*.

55 *Loper Bright Enterprises* v *Raimondo*, 603 U.S, (2024), paragraph 369.

56 For a useful discussion, see Elinson, A.G., Gould, S.J. (2023), "The Politics of Deference", *Vanderbilt Law Review*, Vol. 75, 475.

that Congress itself should be presumed to want agencies to solve legal questions, saying that there is no real basis for such presumption and that Congress might be thought to desire courts to resolve such questions and not agencies. Finally, the Court suggested that the *Chevron* framework has proven “unworkable”: the two-step framework became complex in practice, and it was incredibly hard to give clear guidance about when issues are ambiguous or vague and what would be a “reasonable” interpretation.

With the elimination of *Chevron*, American administrative law does indeed look much less exceptional from a comparative perspective – both as a general matter and with respect to EU administrative law. Most clearly, there now seems to be cross-system equivalence and agreement about the right approach to substantive review of questions of law – namely, the issue is for courts and courts alone. The only jurisdiction that we are aware of that still allows its courts to defer to administrative agencies on questions of law, even if in ways that are importantly different from the *Chevron* formulation, is Canada.[57]

That said, it is important not to draw overly simplistic conclusions about this similarity. The story is again more complex.

To begin with, the US Supreme Court, while emphatically overruling *Chevron*, left the possibility for deference on questions of law on a case-by-case basis. This will happen when the Court finds “real” rather than presumed evidence that Congress wanted to delegate to agencies instead of courts the power to determine questions of law.[58] While the Court has not clarified what constitutes such evidence, this “escape hatch” from the *Loper Bright* ruling suggests that some deference on legal questions may persist. In fact, some commentators speculate that courts may invoke this exception frequently, potentially allowing deference to agencies to re-emerge in practice.[59]

In addition, cultural, political, and institutional factors matter as well. As we have suggested, *Loper Bright* reflects a broader political movement sceptical of the administrative state, a movement that has shaped the composition of the Supreme Court and its approach to administrative law. It is very likely that this sort of background will affect how precisely the US administrative law landscape post-*Loper Bright* will look like, and when and where courts might employ the escape hatch that *Loper Bright* created. This political backdrop may lead courts to adopt a more restrictive stance toward agency discretion in the US than courts in the EU, where there is less widespread opposition to the administrative state.

[57] *Canada (Minister of Citizenship and Immigration)* v *Vavilov* [2019] 4 SCR 653. For discussion, see Tamir, O. (2024), “Our Parochial Administrative Law”, *Southern California Law Review*, Vol. 97, 801.

[58] See Stephenson, C.M., “The Gray Area: Finding Implicit Delegation to Agencies *after Loper Bright*”, available at *SSRN*, June 28, 2025.

[59] For discussion of these views, see Roisman, G.S. and Tamir, O. (2025), “Pictures of A Revolution: Administrative Law in A Time of Change”, *Michigan Law Review*, Vol. 123(6), 1099 (1105).

4 Conclusions

If you were to ask an EU-based administrative lawyer with some knowledge of US administrative law about the differences and similarities between the two regimes, they would likely emphasize the differences over the similarities. An American administrative lawyer with a comparable understanding of EU administrative law would likely express the same view.

However, as this analysis has sought to demonstrate, the reality has always been far more complex than these broad generalizations suggest. Moreover, developments in both jurisdictions have shifted the landscape in ways that challenge the traditional narrative.

As we have aimed to show in this contribution, it may very well be that EU administrative law has become more "Americanised" through the years in ways that many have thus far failed to recognize – for example, by adopting, in cases of broad technical or political discretionary choices, a largely deferential approach to the EU administration. The *Crédit lyonnais* case seems to point in this direction. On the other hand, US administrative law has also undergone significant shifts that have made it more "Europeanised" than most recognize. The Supreme Court's recent *Loper Bright* decision, which overturned the *Chevron* doctrine, represents a dramatic departure from the previous presumption of judicial deference to agencies on questions of law. By rejecting the idea that agencies should generally be deferred to when interpreting ambiguous statutes, the US approach seem to align more closely with the EU's longstanding principle that courts alone are responsible for determining the meaning of legal provisions.

That said, the story remains far from straightforward. Labels like "hard look" in the US and "manifest error of assessment" in the EU obscure the complexities of judicial review in practice. Moreover, as we emphasized, the *Loper Bright* ruling did leave some important "loopholes" where its holding may be bypassed. The "manifest error of assessment" standard, as applied to complex technical and political decisions, is somewhat malleable itself – especially given the often-fragile distinction between matters of law, facts, and discretion. Finally, there are the important cultural and political dimensions one must keep in mind, and which undoubtedly impact the application of doctrines in the real world. For these reasons, sweeping claims about convergence or divergence between the two systems should be approached with caution. Instead, what is needed is in-depth and context-sensitive comparative legal research that focuses on specific policy domains and examines the concrete application of judicial review in practice.[60]

[60] For an argument calling for a cautious approach to comparative administrative law, Tamir, O. (2024), "Our Parochial Administrative Law", *Southern California Law Review*, Vol. 97, 801.


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Part VII

The role of the EU legal services in building EU autonomy

Safeguarding the rule of law and institutional autonomy: on the role of Legal Services

Chiara Zilioli*

1 Introduction

Finding a discussion on Legal Services in a book published by the Legal Services of a European institution may appear as a soul-searching exercise. Yet it is much more than that. The role of Legal Services has become a prominent public issue – both in academic research and in broader debates.[1] Some argue that legal services have evolved into autonomous actors, actively shaping EU law; others claim they merely rubber-stamp decisions that have already been made. Clearly, both views cannot be right. But the very fact that such divergent perceptions exist shows how rarely we have paused to reflect on what Legal Services actually do and why their work matters.

Within the architecture of European governance, Legal Services have always occupied a special place: ever present, quietly decisive, yet seldom the subject of open discussion. Across institutions legal advisers have increasingly found themselves at the centre of political, financial, and even moral storms. They are the custodians of legality when the rule of law itself appears strained, and they are often called upon to reconcile institutional purpose with constitutional restraint. The pursuit of autonomy in a way that respects the rule of law and international cooperation places Legal Services in yet another critical juncture.

This Part of the book reflects on the evolving role of Legal Services as loci of institutional conscience and as a bridge between law and policy. The contributions that follow seek to capture what it means, in practice, to "serve the law" within public institutions. I think that four dimensions help structure this search: the role of Legal Services as guardians of legality beyond adjudication; the delicate balance between confidentiality and transparency of legal advice; the independence of legal advice

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[1] See Vauchez, A., *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, Cambridge University Press, 2015; Wouters, L. (ed.), *Legal Advisers in International Organizations*, Edward Elgar Publishing, 2023; Van Den Meerssche, D., *The World Bank's Lawyers*, Oxford University Press, 2022; Leino-Sandberg, P., *The Politics of Legal Expertise in EU Policy-Making*, Cambridge University Press, 2021; Zilioli, C., "See better, Lear; and let me still remain / The true blank of thine eye: The Importance of an Independent Legal Function for Central Banks", in Haag, H., Donald, C.D. and Paech, P. (eds), *Nationales und Internationales Kapitalmarkt- und Gesellschaftsrecht - Festschrift für Andreas Cahn*, zum 65 Geburtstag, Beck Verlag, 2024, 529.

under conditions of political urgency; and the importance of international public law in the work of Legal Services.

2 Guarding the Rule of Law – beyond adjudication

The rule of law in the EU does not reside only in the gilded halls of the Court of Justice. It is also preserved in the corridors of the institutions themselves – in the daily work of those who ensure that ideas, proposals, and actual measures remain faithful to the Treaties. Indeed, much of EU legality unfolds ex ante, through internal control and deliberation rather than judicial adjudication. Legal Services are, in this sense, unseen guardians of legality: their work precedes litigation and often prevents it altogether.

Judges speak mainly through judgments. Legal advisers, by contrast, act through reasoning that circulates through internal opinions, notes, and consultations. Their authority does not derive from hierarchy but from authoritativeness: from the process of their reasoning, the consistency of their positions, and the integrity with which they reconcile law and purpose. As Daniel Calleja Crespo explains in his contribution, the Legal Service of the European Commission epitomises this function. Every legislative proposal, delegated act, and infringement action passes through its scrutiny. It is there that the idea of the Commission as "guardian of the Treaties" takes tangible form. In the European Parliament, the Legal Service fulfils a different but equally demanding role. As Freddy Drexler insightfully notes, advising a political body means navigating the proximity of law and partisanship, ensuring that political conviction does not overpower procedural or constitutional constraint. The Parliament's gradual strengthening as a constitutional actor owes much to this quiet insistence that legality and political legitimacy must grow together. Central banks, too, have their own form of legal guardianship. The ECB's Legal Services, as well as those of the national central banks (NCBs), operate at the delicate interface between independence and accountability of their institutions. The debates surrounding the ECB's asset purchase programmes, culminating in the *Gauweiler* and *Weiss* judgments, have shown that the legal reasoning of these Legal Services often sets parameters of what later becomes judicially endorsed. And as Lucía Arranz persuasively observes, Legal Services within NCBs face a particularly complex task: they operate simultaneously within the national and the European legal orders. They must preserve the rule of law both in the context of the Eurosystem and within their domestic legal frameworks. The challenge of preserving legal commitments beyond adjudication becomes even more pronounced at the international level. As Yan Liu explains, the IMF Articles of Agreement do not provide for judicial review of decisions taken by IMF organs. And in any case, much of the IMF's activities would be difficult to bring within the realm of adjudication. This arrangement places a unique responsibility on the Legal Department of the IMF to function as an internal yet independent "guardian of legality.

3 Confidentiality, transparency, and public trust

The tension between confidentiality and transparency is the second element I find critical when discussing the role of Legal Services. This dilemma is critical for the integrity and credibility of legal advice in public institutions. Confidentiality is essential to candour; transparency is essential to public trust. Confidentiality ensures that advice can be fearless. Decision-makers must know that they can ask questions – even uncomfortable ones – and receive frank answers without fear of immediate disclosure. Without this protected space, advice becomes defensive, stylised, and ultimately less useful. Yet when decisions affect fundamental interests or introduce novel interpretations, the public's demand for transparency becomes a demand for legitimacy. During moments of crisis – the euro area turmoil, the pandemic, the design of extraordinary financial measures – the interpretation of the law itself becomes part of public discourse. The public's confidence grows when institutions articulate not only what they decide, but how the law has shaped those decisions.

For practitioners, the challenge lies in maintaining a dialogue between these competing imperatives. The jurisprudence of the Court of Justice, particularly *Sweden and Turco* v *Council*,[2] has articulated this tension: legal opinions attached to legislative proposals may, in some cases, be disclosed when transparency serves the democratic process. Yet the Court acknowledged that complete openness could exert "undue pressure" on the independence of Legal Services.

Public discussion of legal advice is not solely about releasing memos. Communicating the principles and boundaries of institutional reasoning also fosters trust. Outreach by Legal Services – towards both the general public and specialised audiences such as academia – plays an important role here. The ECB's publication of Legal Working Papers, its Legal Conference, and indeed this very volume exemplify such engagement. The IMF's Legal Department, as Yan Liu explains in her contribution, has long adopted a practice of publishing thematic papers that make its legal frameworks accessible and comprehensible, reinforcing both credibility and understanding.

4 Independent legal advice under political urgency

Independence is perhaps the most fragile virtue of legal advising. It is fragile because it must survive intimacy with power. Legal Services are embedded within the institutions they serve; they are neither external watchdogs nor internal opposition. Their task is to enable decision-making, but within limits drawn by law. Independence therefore means loyalty to the institution's legal mandate, even when political urgency demands flexibility.

Crises expose this tension. During the euro area crisis, legal advisers in the Commission, the ECB, and the IMF were confronted daily with the challenge to reconcile necessity with legal constraint. Each institution faced intense pressure to

2 Judgment of the Court of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P, ECLI:EU:C:2008:374.

"find a way" – to interpret competences and limitations in ways that would make action possible. Yet the experience also revealed the value of principled restraint. When legal advisers say no, they seek to protect not only legality but also legitimacy, in the form of social acceptance of the exercise of public power. Independence thus becomes a precondition for trust.

The pressure of urgency does not vanish after crises. It reappears in new guises. Each new area demands speed and innovation; each tests the boundaries of existing legal frameworks. The challenge for Legal Services is to remain constructive without becoming instrumental. Independence must be cultivated through organisational design but also through an ethos of service. Independence, in this sense, is both an inner discipline and an external status. It is the quiet courage to remind an institution that its long term credibility also depends on the legality of its actions.

5 Custodians of international law

The fourth dimension concerns the role of Legal Services in relation to public international law. In recent years, the international legal order has come under visible strain. Principles once taken for granted, sovereign equality, the prohibition of the use of force, trade rules and State immunities have been challenged. Unilateralism and geopolitical fragmentation now threaten the foundations of the post-war legal order. In this situation, Legal Services of EU Institutions, national central banks, and International Organisations have raised to the challenge by becoming custodians not only of internal legality but also of the international legal order.

For the IMF this role is, of course, more prominent: its Articles of Agreement form a multilateral treaty, and the Fund's authority rests on international law. In the European Union, the relationship is more complex but no less significant. The EU's legal order is autonomous, yet it remains rooted in international law principles and engaged with them, particularly in areas such as external relations and sanctions. At the ECB, for instance, we have closely followed developments concerning the rules on central bank property – issues of direct relevance to the development of the international law on central banking.

International law functions not only as a normative order but also as an ethical compass: it reminds institutions that their authority exists within a broader community of norms. Even non-binding instruments, soft law, standards, and declarations carry moral and reputational weight. In an age where international law is sometimes dismissed as rhetoric, Legal Services of European and international institutions can embody its resilience. They anchor institutions in a world still governed, however imperfectly, by law.

6 Law, legitimacy, and the quiet strength of counsel

The contributions in this Part paint a picture of a demanding balance. One must be close enough to understand political and operational needs, yet distant enough to assess them by legal standards. One must translate complex norms into actionable guidance, often under extreme pressure, without betraying their objectives. And one must do all this knowing that success is measured not in public recognition but often in its absence – when legality is preserved, no resounding judgments occur, and no headlines are made.

In this light, Legal Services are far more than support functions. They remind administrations that the rule of law is not an obstacle to ambition but its necessary companion. They sustain the culture of public accountability that distinguishes a public institution from a private actor. And they embody a particular form of professional ethics – one that combines loyalty with independence, prudence with courage.

As the EU and the international community confront another era of transformation, this kind of counsel becomes ever more vital. Law, in such times, is both constraint and compass. The role of Legal Services is to ask the difficult questions: is this within our mandate? Are we faithful to our principles? Will this stand the test of time and consistency?

In an age in which speed and show dominate, the patient craft of legal reasoning remains an act of quiet resistance – and of hope. It is a reminder that even in complex systems, the law still speaks, if only through those who have chosen to listen carefully and serve it faithfully.

The role of the Legal Service of the European Commission

Daniel Calleja Crespo*

1 Introduction

The Legal Service of the European Commission was established in 1951. Initially it consisted of three lawyers, as the Legal Service of the High Authority of the European Coal and Steel Community. It grew, particularly after the creation of Euratom and the European Economic Community. Although the three communities had separate executives until they merged in 1967 to form the Commission of the European Communities, their Legal Service operated as a single service from the start, thereby contributing to the preservation of the unity of Union law.[1]

Today, the Legal Service of the European Commission could be compared to a fully-fledged law firm: it counts 350 lawyers from 27 different nationalities and working in 24 different languages. It handles yearly 3.000 court cases before the Court of Justice and the General Court of the European Union, as well as before international courts and tribunals, courts and tribunals of within Member States, and courts in third countries. The Service is organized into 13 specialised and operational teams that form a flat and non-hierarchical structure.[2] This is the service in which I started my career in 1986 as a young lawyer, and since 2020, I have had the privilege to lead, as its Director General.

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* Since July 2020, Daniel Calleja has been Director General of the Legal Service of the European Commission.

1 See in detail for the origins of the Legal Service European Commission., European Commission: Secretariat-General., "Service juridique. Histoire administrative", in *Haute autorité CECA – Inventaire des dossier*, Vol. 1, 1952-1967, 1998. That publication gives an overview of all documents available in the historical archives in the Commission, and provides an overview of all the members of the Legal Service of the High Authority in those years (299 - 302); Bailleux, J. (2013), "L'Europe et ses légistes", *Politique européenne*, Vol. 41(3), 88; Rasmussen, M. (2012), "Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952-65", *Contemporary European History*, Vol. 21(3), 375; Vauchez, A., *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*, Cambridge University Press, 2015.

2 See, in more detail on the Legal Service of the European Commission, Ehlermann, C.D., *The role of the Legal Service of the Commission of the European Communities in the creation of community law*, University of Exeter, 1981; Calleja, D., Maxian Rusche, T., "Introduction", in *Legal Service of the European Commission*, 70 Years of EU Law, 15; Flett, J., "A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience", in Qureshi, A.H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, 323; Ronkes Agerbeek, F., "The Legal Service of the Commission", in Guinchard, E. and Granger, M.P. (eds), *The New EU Judiciary: An analysis of current judicial reforms*, Kluwer Law International, 2016, 224; Leino-Sandberg, P., *The Politics of Legal Expertise in EU Policy-making*, Cambridge University Press, Cambridge, 2021, 173.

2 Role of the Legal Service of the European Commission

The fundamental mission of the Legal Service of the European Commission is to defend the law of the European Union, and to advise the institution accordingly.

Article 53 of the Rules of Procedure of the Commission[3] defines the role of the Legal Service of the European Commission as follows:

1. The Legal Service shall provide legal advice to the Commission.

2. The Legal Service shall ensure independent and objective review of legality, checking compatibility with European Union law, including the Charter of Fundamental Rights, and international law, of all draft proposals for legal acts, all draft acts to be adopted by the Commission and any other document that may have legal implications. It shall oversee the form of acts and provide legal-linguistic revision where applicable.

3. The Legal Service shall have exclusive competence to represent the Commission before all courts and arbitration bodies.

According to the mission statement of the Legal Service of the European Commission of 2001, “the mission of the Commission’s Legal Service is deeply rooted in the provisions of the founding Treaties and in the specific institutional functions and responsibilities assigned to the Commission, in particular as guardian of the Treaties. Our mission is to advise and represent the Institution and in performing those tasks, to ensure that the law is respected, thereby contributing to upholding the rule of law.”

This contribution will address two key points: First, the role of the Legal Service of the European Commission as defender of Union Law, with a particular reference to its influence in upholding the rule of law, and second, the role of the Legal Service of the European Commission as legal adviser to the College of Commissioners.

3 The Legal Service of the European Commission as defender of EU Law

To address this very important role, it is necessary to answer the following question: Why does the European Commission, like many (but not all) international and national administrations (as well as the other Union institutions), have a single Legal Service?

[3] Commission Decision (EU) 2024/3080 of 4 December 2024 establishing the Rules of Procedure of the Commission, OJ L, 2024/3080, 5.12.2024, p. 1. This provision has been newly introduced into the Rules of Procedure of the European Commission in 2024. It codifies the existing practice.

This organisational choice reflects a strong and deliberate policy preference in favour of a single, central body, as opposed to smaller, decentralized legal units within each Directorate-General of the Commission.[4]

A single central Legal Service better ensures the coherence in the interpretation of Union law, avoiding fragmentation. Furthermore, and possibly even more importantly, a single Legal Service is best placed to provide frank, honest, and independent legal advice to the College of Commissioners, through a core group of lawyers directly responsible to the President of the European Commission. Such a system prevents conflicting legal positions and secures a strong, unified interpretation of Union law, whether primary, secondary, or tertiary.

For Union institutions, having a Legal Service is particularly significant because the European Union operates on the basis of the principle of conferral, as enshrined in Article 5 of the Treaty of the European Union (TEU). This principle requires constant legally scrutiny to ensure that any proposed action falls within the competences conferred upon the Union, as well as to understand on which legal basis the competence should be exercised. The advice and control of the Legal Services of the Union institutions is key in this respect.

Furthermore, it is essential to acknowledge that the Commission, like all other Union institutions, functions as a rule-based organisation governed by the principle of legality and subject to the control of the Court of Justice. Therefore, it is imperative to ensure that legal acts adopted by the Commission (and the other Union institutions) respect this principle and are fully in line with the principles of proportionality and subsidiarity, also enshrined in Article 5 TEU. Compliance with these principles must always be demonstrably justified.

3.1 Main tasks

The main tasks of the Legal Service of the European Commission can be structured around three key areas.[5]

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[4] In many Directorate Generals of the Commission, such legal units or legal cells exist as well, in order to assist the officials of the Directorate General in legal questions. However, the lawyers in those units or cells may not appear before the Union courts to represent the European Commission – for that task, Art. 53 of the Rules of Procedure of the European Commission gives the monopoly to the Legal Service of the European Commission.

[5] Those tasks are also reflected in Art. 53 of the Rules of Procedure of the European Commission, and in the mission statement, which reads in that regard as follows:

"In particular, as a single, horizontal service, under the authority of the President, the Legal Service:

— Provides independent legal advice to the Commission as a whole, in order to assist it to achieve its policy objectives. Taking the time to consider carefully all relevant elements of law and fact, and to listen to all points of view, the Legal Service strives to guide the institution as to the limits of, and opportunities provided by, the law, based on our best assessment of how the law is to be interpreted and applied;

— Represent the Institution before the EU, national and international courts and arbitration bodies. In so doing, the Legal Service pursues the enforcement of EU law and defend measures attributable to the Commission and/or the European Union. It also assists the Court of Justice by presenting the Commission's position in all preliminary reference procedures that are notified to the Commission. The Legal Service informs judges and arbitrators as amicus curiae on relevant points of EU and international law;

First, providing independent legal advice to the European Commission. According to Article 57 of the Rules of Procedure of the European Commission, "the Legal Service shall be consulted on all draft acts, Commission staff working documents and all documents that may have legal implications." For example, all decisions taken by the Commission as the "guardian of the treaties" – whether concerning infringement procedures against Member States or the exercise of executive power by the Commission, in particular in the areas of competition, State aid control, trade defence and digital markets – require prior agreement from the Legal Service. A very important feature in this context is the participation of the Director-General of the Legal Service in the weekly meetings of the College of Commissioners. During these meetings, the Director-General can clarify legal issues or provide the necessary legal expertise.

Second, the Legal Service has the exclusive competence to represent the Commission before all courts and arbitration bodies.[6] The main "forum" of activity is the General Court and the Court of Justice of the European Union, because they control the legality of the acts of the Commission. Another important activity is the external representation of the Union before international courts and tribunals, as well as before courts of third states.

Third, the LEG Team, composed of specialised lawyer-linguists mastering the 24 official languages of the Union, oversees better regulation and the quality of legislation.

3.2 The role of the Legal Service of the European Commission in upholding the Rule of Law

Article 2 and Article 19(1) TEU enshrine the principle of effective legal protection as an expression of the rule of law. Those provisions must be read in the light of Article 47 of the Charter of Fundamental Rights. Together, they establish the right to effective legal protection before courts that are independent, impartial, and previously established by law.

— Provide advice to the Commission in its legislative and regulatory tasks seeking to ensure that all legal texts adopted by the Commission fully respect the Treaties and are drafted with the necessary legal clarity and in the interest of EU citizens."

6 For a detailed description of the litigation activity of the Legal Service of the European Commission, see Romero Requena, L., "La Commission devant la Cour de Justice: L'exemple de la procedure préjudicielle", in Rosas, A., Levits, E. and Bot, Y. (eds*), The Court of Justice and the Construction of Europe: Analyses and perspectives on sixty years of case-law*, T.M.C Asser Press, 2012, 155; Dewost, L., "Allan's legal battles before the Court, acting as the Commission's agent", in Lenaerts, K., Bonichot, J.-C., Kanninen, H., Naômé, C. and Pohjankoski, P. (eds), *An Ever-Changing Union? Perspectives on the future of EU law in honour of Allan Rosas*, Hart Publishing, 2019, 177; Lyal, R. (2015), "Compatibility of National Tax Measures with EU law: The role of the European Commission in Tax Litigation before the European Court of Justice", *EC Tax Review*, Vol. 24(1), 5; Flett, J., "A world wide web of law(yers): the lawyer function catalysing and mediating change in international economic regulations – the EU experience", in Qureshi, A.H. and Gao, X. (eds), *International Economic Organizations and Law: The perspective and role of the legal counsel*, Kluwer Law International, 335; Ronkes Agerbeek, F., "The Legal Service of the Commission", in Guinchard, E. and Granger, M. P. (eds), *The New EU Judiciary: An analysis of current judicial reforms*, Kluwer Law International, 224; Leino-Sandberg, P., *The Politics of Legal Expertise in EU Policy-making*, Cambridge University Press, 2021, 173.

In its seminal judgment of 27 February 2018 in *Associação Sindical dos Juízes Portugueses*,[7] the Court of Justice held that every Member State must ensure that the bodies which, as “courts or tribunals” within the meaning of Union law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection. Therefore, regardless of whether a court or tribunal is applying Union law in a specific case, Union citizens are entitled to have their disputes heard by courts or tribunals in Member States that are independent, impartial, and previously established by law.

Article 2 and 19(1) TEU also have direct effect, enabling Union citizens to invoke them before national courts and tribunals, in particular in order to request that national provisions that put into doubt judicial independence have to be left disapplied.[8] The Court of Justice also established that the values in Article 2 TEU are legally binding and not merely aspirational. This implies that these values, on the one hand, define the constitutional identity of the Union, and, on the other hand, are subject to the principle of non-regression. They are also *conditio sine qua non* to become member of the EU.[9] Accordingly, the EU must have the means to defend such values.

The Legal Service of the European Commission is particularly active in defending the rule of law and advancing the Court’s jurisprudence in this area. First, it takes legal action and represents the European Commission in all procedures before the Court of Justice, specifically in infringement cases and preliminary references. Second, it supports the European Commission’s legislative initiatives in these areas. Third, it activates other tools and mechanisms available to the College to uphold Union’s values. I want to illustrate this by three examples.

First, in the long series of rule-of-law cases before the Court of Justice, the Legal Service of the European Commission has defended judicial independence as a fundamental expression of the rule-of-law in all its dimensions. This includes in particular: the irremovability of judges, disciplinary regimes for judges, and the independent judicial review of decisions affecting the judge’s status, including their remuneration. Additionally, the Legal Service has achieved significant success by securing the imposition of sanctions on Member States for breaching interim orders issued by the Court of Justice aimed at preserving judicial independence.[10]

Second, an example for how the Legal Service supports the legislative initiatives to uphold the rule of law is its involvement in the preparation of proposals for the so-called Conditionality Regulation.[11] Here, the European Commission proposed to the European Parliament and the Council to adopt new legislation, which conditions financing of projects in a Member State from the EU budget – an expression of the

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7 Judgment of the Court of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, ECLI:EU:C:2018:117.

8 Judgment of the Court of 22 February 2022, *RS*, C-430/21, ECLI:EU:C:2021:311.

9 Judgment of the Court of 20 April 2021, *Repubblika*, C-896/19, ECLI:EU:C:2022:99.

10 Order of the Vice-President of the Court of 27 October 2021, *Commission* v *Poland*, C-204/21 R, ECLI:EU:C:2021:878.

11 Judgment of the Court of 16 February 2022, *Hungary* v *European Parliament and Council*, C-156/21, ECLI:EU:C:2022:97; Judgment of the Court of 16 February 2022, *Poland* v *European Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.

principle of solidarity established in Article 2 TEU – to adherence to the rule of law. The justification is that when the rule of law is not ensured when Union funds are spent, the financial interests of the Union must be protected. The European Parliament and the Council adopted those proposals, and the Court of Justice confirmed their legality.[12]

Third, with regard to other means at the disposal of the College, the Legal Service actively contributes to other new original instruments, such as the annual Rule-of-Law reports of Member States. These reports include four key chapters: "Judicial independence", "Freedom of the press", "Fight against corruption", and "Checks and balances". The annual Rule-of-Law reports include recommendations addressed to the 27 Member States and, since 2024, to certain candidate countries. The overall assessment of this instrument is very positive, since 66% of the recommendations to Member States have been complied with.[13]

It can be concluded that, in these three instances, the Legal Service has played a central role in defending the rule of law. A very recent case, currently pending before the Court of Justice, provides further evidence of this. The Commission has brought an action requesting the Court to declare that Hungarian media legislation, which discriminates against the LGBTQ+ individuals, breaches not only internal market rules but also Article 2 TEU. This is the first time that the Commission, in an infringement case, requests the Court of Justice to declare a breach of the values of the Union, as set out in Article 2 TEU.[14]

4 The role of the Legal Service of the European Commission as adviser to the College of Commissioners

The Legal Service of the European Commission must ensure that all legal acts adopted by the College of Commissioners are fully compliant with Union law. This role is particularly crucial given the Commission's dual function as the initiator of new Union legislation and as the guardian of the Treaties. As already explained, according to Article 57 of the Rules of Procedure of the European Commission, the consultation of the Legal Service is compulsory for all texts with legal effects that the Commission services plan to submit to the College.[15]

When assessing the texts, the Legal Service of the European Commission applies what can be described as the "Cascade" test, which consists of seven questions.

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12 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2020 L 433I, 22.12.2020, p. 1.

13 European Commission, Rule of Law Report 2024: with the 5th edition, the EU is better equipped to face rule of law challenges, 2024.

14 Opinion of the Advocate General Ćapeta in *Commission* v *Hungary*, C-769/22, ECLI:EU:C:2025:408.

15 This rule applied from the early days of the Commission. See the description in Dumoulin, M. (ed.), *The European Commission 1958–72: History and memories of an institution*, Publications Office of the European Union, 2014, 225 ("Gaudet was determined there should be a clear and simple rule about the role of the Legal Service in the Commission. No document was to be submitted to the Commission without having been seen and checked by the Legal Service. This was very simple, but it gave the service considerable power over the working of the Commission and the administration.").

The test starts with the fundamental question “Is the EU competent to adopt such a proposal?”, followed by “Is the legal basis chosen the correct one?” For delegated or implementing acts, questions three and four are “Is the Commission competent to do so?” and “Has the legal procedure been respected?”. The fifth question, applicable to all texts, is “Does the text conflict with higher-ranking rules of Union law?” (Treaties, including the general principles of Union law and proportionality and subsidiarity; in the case of delegated and implementing acts: secondary legislation). Finally, the last two questions assess, “Is the text compatible with our international obligations?” (which may serve as a benchmark for assessing the legality of the text in the Union courts)[16] and “Is the legal text coherent, logical and achieves all the objectives?” (Better regulation). It is rare for the Legal Service to formally issue a negative opinion on a draft text. If it is the case, Article 18(2) of the Rules of Procedure of the European Commission stipulates that a decision by the College of Commissioners in oral procedure is required to overrule the negative opinion.

In addition to this role, the Legal Service closely monitors the legislative process on a weekly basis, as member of the Interinstitutional Group (GRI). This ensures that the legislative process is also in line with the objectives of the proposal and its main principles. The Legal Service of the European Commission, alongside the Secretariat General, is the only service to participate in this group, which is otherwise composed by members of the cabinet the Commissioners. Once again, the Legal Service must give its approval before the College of Commissioner takes a decision.

Two significant points deserve consideration in this regard. First, the Commission rarely disregards a negative opinion from the Legal Service. The Director General participates in all the weekly meetings of the Heads of Cabinet of the Commissioners (so-called “Hebdo”) and in all meetings of the College of Commissioners, where he can raise any concerns and propose legal solutions, where appropriate.[17] Second, the Legal Service operates under the authority of the President. This position allows the Legal Service of the European Commission to fully exercise its influence in the discussions, to ensure that Union law is respected.

Three additional elements can be added.

First, the systematic consultation and participation of the Legal Service in every step of the decision-making process is underpinned by the strong technical legal expertise of all the colleagues involved in the various policies. This expertise makes the Legal Service irreplaceable for providing independent legal advice to its political masters.

Second, it is worth noting that the Legal Service of the European Commission holds a unique position within the European institutions. Unlike any other service, it participates in all stages of the rule-making process of any Union rule. This includes (1) the conception of proposals by the Commission services, (2) their adoption by the

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16 Judgment of the Court of 9 October 2001, *Netherlands* v *European Parliament and Council*, C-377/98, ECLI:EU:C:2001:523, paragraphs 52 to 54.

17 See in detail on that role Dewost, J. L., “Le jurisconsulte du Conseil et le directeur général du Service juridique de la Commission : Partenaires ou rivaux ? Ou 28 ans de conseil juridique au service de l’Europe”, in *A man for all treaties. Liber amicorum en l’honneur de Jean-Claude Piris*, Bruylant, 2011, 147.

College, (3) the legislative process with the European Parliament and Council, and (4) defending rules, if challenged, before the General Court and the Court of Justice.

Third, the General Court and the Court of Justice rigorously scrutinize acts adopted by the Union institutions in legal actions brought against them. The Legal Service of possesses unparalleled knowledge of Union law and occupies a uniquely central role within the EU's institutional framework. As Union law continues to expand into more diverse and contentious areas, the Legal Service's pivotal role has only strengthened. Legal challenges have increased, because Union legislation covers more and more controversial matters. To give but a few examples: minimum wage,[18] cabotage,[19] conditionality regulation,[20] emergency measures under Article 122 TFEU,[21] the taxonomy regulation[22] or the privacy shield[23] – are a few examples of the numerous delicate areas in which the Union has adopted legal acts in the past years.

5 Conclusion

In a famous quote of 1980, Judge Pescatore said:[24]

"The Commission has a well-organised Legal Service made up of qualified lawyers belonging to the different legal systems, animated by a real "esprit de corps" to develop a common doctrine, acting in a coherent manner. In fact, this allows the Commission to appear as remarkably well informed and able to present balanced view of problems and the legal questions"

While the challenges faced by today's Legal Service have grown significantly, the strong commitment of all its members in living up to the high responsibility of

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18 Action brought on 18 January 2023, *Denmark* v *Council*, Case C-19/23, ECLI:EU:C:2025:11, pending, challenging Directive (EU) 2022/2041 on adequate minimum wages in the European Union.

19 Judgment of 4 October 2024, *Lithuania and Others* v *European Parliament and Council*, C-541/20 to C-555/20, ECLI:EU:C:2024:818, rejecting a challenge against Regulation (EU) 2020/1054 of the European Parliament and of the Council of 15 July 2020 amending Regulation (EC) No 561/2006 as regards minimum requirements on maximum daily and weekly driving times, minimum breaks and daily and weekly rest periods and Regulation (EU) No 165/2014 as regards positioning by means of tachographs, OJ 2020 L 249, 31.7.2020, p. 1.

20 Judgment of the Court of 16 February 2022, Hungary v European Parliament and Council, C-156/21, ECLI:EU:C:2022:97; Judgment of the Court of 16 February 2022, Poland v European Parliament and Council, C-157/21, ECLI:EU:C:2022:98.

21 Action brought on 20 August 2025, *European Parliament* v *Council*, C-560/25, pending, challenging Council Regulation 2025/1106 of 27 May 2025 establishing the Security Action for Europe (SAFE) through the reinforcement of the European Defence Industry Instrument, OJ L, 2025/1106, 28.5.2025, p. 1.

22 Judgment of the Court of 10 September 2025, *Austria* v *Commission*, T-625/22, ECLI:EU:T:2025:869, rejecting a challenge against Commission; Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, OJ 2022 L 188, 15.7.2022, p. 1.

23 Judgment of the Court of 3 September 2025, *Latombe* v *Commission*, T-553/23, ECLI:EU:T:2025:831, rejecting a challenge against Commission Implementing Decision (EU) 2023/1795 of 10 July 2023 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate level of protection of personal data under the EU-US Data Privacy Framework, OJ 2023 L 231, 4.5.2016, p. 118.

24 Pescatore, P. (1980), "Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduits de la comparison des droits des Etats membres", *Revue internationale de droit comparé*, Vol. 32(2), 337.

defending EU law, remains unwavering. The organizational and procedural role of the Legal Service, combined with the exceptional expertise of its members, ensures that the Legal Service remains a cornerstone for the protection of the rule of law in Europe.

The Legal Service of the European Parliament: role and mission in a political institution

Freddy Drexler*

1 History and context of Parliament's Legal Service

As the only EU institution composed of directly elected representatives of European citizens, the European Parliament holds a distinctive role under the EU Treaties. This unique role is mirrored in the mandate and function of its Legal Service. The Legal Service of the European Parliament was established in 1986, many years, not to say decades after the Legal Services of the European Commission and the Council of the European Union. Since its inception, the European Parliament's Legal Service has evolved significantly, adapting to the growing complexity of the institution's functions and responding to the demands brought about by successive Treaty amendments.

Today, the Legal Service of the European Parliament employs approximately 135 staff members, working across its two main offices in Luxembourg and Brussels. Its team boasts a wide range of expertise, covering all EU Member States' legal systems and official languages, enabling it to support the Parliament's multilingual and multicultural character. The Service's remit is broad, encompassing essential functions such as advising on legislation, handling parliamentary and institutional matters, managing budgetary and financial issues, overseeing real estate and contractual affairs, and dealing with matters related to staff and employment law.

The Legal Service has a dual mission. First, it represents the Parliament in legal proceedings, whether before the Court of Justice of the European Union (CJEU) in Luxembourg or national courts, to defend the institution's interests, rights, and prerogatives. Second, it provides comprehensive and expert legal advice on a wide range of issues, ensuring the Parliament's activities are in full compliance with Union law.

The guiding principle of the Legal Service's work aligns with the principles articulated by the CJEU in its landmark *Turco* judgment.[1] In that case, the Court emphasised that the legal services of the EU institutions are required to provide advice that is frank, objective, and comprehensive. This principle forms the foundation of the Legal

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1 Judgment of the Court of 1 July 2008, *Sweden and Turco* v *Council*, C-39/05 P and C-52/05 P, ECLI:EU:C:2008:374.

Service’s commitment to impartiality, professionalism, and thorough analysis, ensuring the institution's legal and political actions are robustly supported by sound legal reasoning. This dedication to integrity and rigour underscores the indispensable role of the Legal Service in advancing the European Parliament’s legislative, institutional, and administrative functions in the service of European citizens.

2 Legal Framework defining the mandate of the Legal Service

The role and responsibilities of the Legal Service of the European Parliament are defined by a Decision of the Parliament’s Bureau, adopted in 2004.[2] According to this Decision, the Legal Service provides legal advice to the Parliament’s principal bodies, including the President, the Bureau, the Conference of Presidents, the Quaestors, the parliamentary committees, the Delegations, and the Conference of Committee Chairs, as well as to rapporteurs. To fulfil this advisory role, representatives of the Legal Service participate in the meetings of these bodies, as well as in interinstitutional negotiation processes, such as trilogues and conciliation meetings. Additionally, the Legal Service offers legal counsel to the Secretary General and the various Directorates General of the European Parliament. However, the Bureau Decision explicitly excludes the provision of legal advice to political groups or individual Members of Parliament, underscoring the institutional focus of the Service’s mandate.

The European Parliament’s Rules of Procedure further outline the Legal Service’s role in the institution’s legal and administrative functions.[3] Rule 22(4) stipulates that “Parliament shall be represented in international relations, on ceremonial occasions and in administrative, legal and financial matters by the President, who may delegate these powers.” This provision establishes the President as the primary representative of the Parliament in legal and administrative matters, with the possibility of delegating such powers as necessary. Rule 155, meanwhile, sets out the procedural requirements for the Parliament to initiate legal proceedings before the CJEU, emphasising the structured role of the Legal Service in representing the institution’s legal interests.

In addition to these overarching provisions, the functioning of the Legal Service is also governed by internal rules, which specify the procedures for consulting the Service and outline the circumstances under which consultation is mandatory. These internal rules ensure consistency, transparency, and accountability in the provision of legal advice within the institution. Through this robust legal framework, the Legal Service plays an essential role in supporting the European Parliament’s leadership and administrative bodies, ensuring that the institution’s activities are conducted in full compliance with Union law, institutional prerogatives, and thus the principle of the rule of law.

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2 Decision on the consultation of the Legal Service, Bureau Decision of 28 January 2004.

3 European Parliament, Rules of Procedure, 10th parliamentary term, 2025.

3 The role of the Legal Service in practice

There is no legal obligation for the European Parliament or its organs to follow the advice of its Legal Service. However, the authority of the Legal Service derives largely from the credibility and quality of the advice it provides. It is impossible for any legal opinion to satisfy all Members of the European Parliament. However, the critical function of the Legal Service lies in ensuring that decisions taken by the institution's authorities are made in a fully informed manner. Professor Päivi Leino-Sandberg has referred to a "free market of legal advice" within the European Parliament.[4] Indeed, Members and political groups may consult their own legal advisers or seek opinions from eminent academics. However, there is only one impartial and institutional Legal Service that consistently upholds the Turco criteria of providing frank, objective, and comprehensive legal advice, while resisting any attempts at instrumentalisation.

At the same time, it is essential for the Legal Service, in its role of representing the institution's interests, to understand the broader political and strategic context in which the European Parliament operates. This enables the Service to deliver legal advice that is not only impartial and credible but also practically relevant and aligned with the Parliament's overarching goals. For instance, the Legal Service played a crucial role in shaping the Rule of Law Conditionality Regulation.[5] During the legislative process, the Legal Service consistently emphasised the importance of adhering to the Regulation's budgetary legal basis, cautioning against the inclusion of broader elements – such as rule of law monitoring panels or investigative powers in Member States – that went beyond the Regulation's direct connection to the EU budget. The Legal Service warned that such additions could leave the Regulation vulnerable to annulment by the Court of Justice of the European Union if challenged by a Member State. In response to these warnings, the lead committees adapted the European Parliament's position to mitigate potential legal risks. When Hungary and Poland later challenged the Regulation, the Parliament, Council, and Commission were able to successfully defend its validity in Cases C-156/21[6] and C-157/21,[7] thanks in part to the careful and considered legal advice provided during the legislative process.

The credibility of the Legal Service as a trusted adviser during legislative and administrative procedures is closely linked to, and reinforced by, its role as the defender of the European Parliament's interests before the Court of Justice once legislation or decisions have been adopted. Beyond legislative matters, this dual role is equally relevant to administrative decisions. For example, the Legal Service's advice played a significant role in shaping the decision to introduce the verification of

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4 Leino-Sandberg, P., "WANTED: A Creative Lawyer with Great Technical Skills for Demanding Work in the European Parliament", in Korkea-aho, E. and Leino-Sandberg, P. (eds), *Law, Legal Expertise and EU Policy-Making*, Cambridge University Press, 2022, 95.

5 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1.

6 Judgment of the Court of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, ECLI:EU:C:2022:97.

7 Judgment of the Court of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, ECLI:EU:C:2022:98

Covid Pass Certificates[8] as a requirement for entering European Parliament buildings during the pandemic. Indeed, the Decision by the Bureau was challenged by MEPs and officials before the General Court and the Court of Justice, but without success.

The *Turco* criteria – ensuring legal advice is frank, objective, and comprehensive – serve as a cornerstone for the independence of the Legal Service. By adhering to these principles, the Legal Service not only safeguards its own credibility and impartiality but also upholds the independence of the European Parliament itself, thereby reinforcing the institution's commitment to the rule of law and its role in terms of democratic accountability.

4 Evolution of legal advice in the European Parliament: adapting to a dynamic institutional landscape

The provision of legal advice within the European Parliament has evolved significantly over the years, mirroring the broader development of the institution itself. While the traditional model of formal, written legal opinions remains an important feature – particularly for addressing significant legal questions or decisions that carry institutional responsibility – there has been a clear shift toward a more dynamic and informal approach. In recent years, the Legal Service has increasingly focused on delivering advice at earlier stages of the decision-making process, often in a less formalised manner. This advice may be provided orally, through informal discussions, brief emails, or even on-the-spot guidance during meetings, rather than solely through comprehensive, written legal opinions which pass through the full formal hierarchy. This evolution reflects the growing need for the Legal Service to align its work more closely with the fast-paced nature of parliamentary business.

This transformation has seen the Legal Service taking a more active and visible role in the day-to-day work of the European Parliament. Members of the Legal Service are regularly present in meeting rooms during sessions of parliamentary committees, the Conference of Presidents, the Bureau, or interinstitutional negotiations such as trilogues. By being embedded in these processes, the Legal Service is better positioned to provide timely and relevant legal advice, often in real-time, to facilitate decision-making and contribute to the legal soundness of the Parliament's actions. The trend towards more informal advice is particularly evident in situations where Members of the European Parliament (MEPs) require quick, "easily digestible" input throughout the legislative process. This reflects the increasing pressure on EU institutions, including the Parliament, to adopt positions swiftly in response to pressing issues, often under tight deadlines or in the context of high-stakes negotiations.

This need for agility is particularly pronounced during crises, where urgent legislative action is required. In such circumstances, the Legal Service's ability to provide rapid and flexible advice becomes even more critical and MEPs often prefer this less

[8] Bureau Decision of 27 October 2021 on exceptional health and safety rules governing access to the European Parliament's buildings in its three places of work, Bureau Notice n. 6/2021.

formal approach, as it allows for swift decision-making in an environment characterised by tight timelines, public scrutiny, and the risk of potential leaks, particularly during sensitive negotiations.

Despite this shift toward informality, the European Parliament remains deeply committed to the principles of transparency and adheres rigorously to the EU's access to documents regulation, as interpreted by the evolving case law of the Court of Justice. The Parliament's commitment to openness is enshrined in Title IV of its Rules of Procedure, which outlines the principles governing the transparency of its work. However, the increasing reliance on informal advice, necessitated by the fast-paced and high-pressure nature of modern legislative processes, does present certain challenges. These include managing time constraints, meeting short deadlines, ensuring consistency and coherence across advice provided, and maintaining the distinction between formal, comprehensive legal opinions and less formal guidance.

The evolving role of the Legal Service in this changing environment underscores the importance of adaptability, creativity, and a proactive approach. Members of the Legal Service should be prepared to engage at an earlier stage of the decision-making process and to contribute constructively in a manner that balances the demand for timely advice with the need to ensure legal soundness. These changes have made it more critical than ever for the Legal Service to remain well-coordinated, maintain high standards of coherence and consistency, and manage the flow of information effectively. By doing so, the Legal Service not only fulfils its mandate of supporting the European Parliament but also strengthens the institution's ability to navigate an increasingly complex and fast-moving political and legal landscape. This evolution in its advisory role ensures the continued relevance of the Legal Service while safeguarding the Parliament's commitment to transparency, accountability, and the rule of law in all its activities.

Balancing dual legal responsibilities: the role of NCB legal services in building EU autonomy and upholding the rule of law

Lucia Arranz*

1 NCBs unique dual role

The European System of Central Banks (ESCB) is a unique institutional construction. This has been explicitly acknowledged by the European Court of Justice (CJEU) in its rulings *Rimsevics*[1] and *Commission* v *Slovenia*.[2] The Court stated: “the ESCB represents a novel legal construct in EU law which brings together national institutions, namely the national central banks, and an EU institution, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails”.

The distinctive legal and institutional position of the national central banks (NCBs) within the Economic and Monetary Union (EMU) stems from a political compromise reached during the Maastricht Treaty negotiations. While alternative models – such as a single supranational central bank with decentralised branches at the national level – could have been envisaged, the current two-tier system was regarded as a good and workable solution. This arrangement enabled Member States to transfer sovereignty over monetary policy while preserving the identity and legacy of their well-established central banks. Through this compromise, NCBs retained their legal personality, national characteristics and structure within the EMU and the ESCB, while ensuring the singleness and effectiveness of the European Union’s monetary policy.

As part of this unique legal construction, NCBs have a dual role and a unique position within their respective national legal systems, setting them apart from other national public administrations.[3]

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[1] See Judgment of the Court of 26 February 2019, *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia,* C-202/18 and C-238/18, ECLI:EU:C:2019:299, paragraph 69.

[2] See Judgment of the Court of 17 December 2020, *European Commission v Republic of Slovenia, C-*316/19, ECLI:EU:C:2020:1030, paragraph 83.

[3] Martin F. Hellwig, reflects on this dual role as follows: “The NCBs are in fact hybrids. On the one hand, they are independent institutions under national law. On the other hand, in matters of monetary policy, they “are an integral part of the ESCB” (Art. 14.3 of the Statute), with duties and privileges determined by European law”, see Hellwig, F.M. (2024), “National Central Banks and the Governance of the European System of Central Banks”, *MPI Collective Goods Discussion Paper*, No 2024/7, 1 (6).

On one hand, NCBs are integral components of the ESCB, according to Article 282(1) of the Treaty on the Functioning of the European Union (TFEU) and Articles 1 and 14(3) of the Statute of the ESCB and of the ECB (ESCB/ECB Statute). They are bound by the TFEU, the ESCB/ECB Statute, and the legal acts issued by the European Central Bank (ECB). On the other hand, NCBs maintain their legal personality and remain embedded within their national institutional systems, subject to domestic laws, judicial review, and national accountability mechanisms.

The ESCB dimension of the NCBs is also directly derived from Articles 127(1) and 282(2) TFEU, which, along with Article 2 of the ESCB/ECB Statute, define the primary objective of the ESCB as maintaining price stability. Additionally, Articles 127(2) to 127(5) TFEU and Articles 3 and 4 of the ESCB/ECB Statute outline the fundamental tasks of the ESCB, which include the definition and implementation of the Union's monetary policy. Consequently, the responsibility for monetary policy and other ESCB tasks lies with the ESCB, which comprises both the ECB and the NCBs.

The national dimension of the NCBs plays an important role within the framework of the ESCB, particularly due to the principle of decentralization enshrined in Article 9(2) of the ESCB/ECB Statute.[4] NCBs are responsible for executing certain ESCB tasks, including monetary policy, within their jurisdictions. To do that, the Treaties establish a clear hierarchy: NCBs, as integral parts of the ESCB, must act in accordance with the guidelines, decisions, and instructions of the ECB, pursuant to Article 14(3) of the ESCB/ECB Statute. However, the implementation of ECB legal acts is carried out in accordance with the national legal frameworks and traditions. For instance, in some countries, NCBs implement ECB monetary policy legal acts through binding regulations, while others employ private contracts with their counterparties. Although the substance of these legal instruments is the same, their form varies to cater and respect different legal traditions.

Moreover, the national dimension is also relevant because NCBs may also perform, under the same legal and institutional personality, additional functions other than those specified in the ESCB/ECB Statute. These additional tasks – such as financial market supervision, consumer protection, or bank resolution- are carried out under the sole responsibility and liability of the NCBs, pursuant to Article 14(4) of the

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In the same vein, Paul Dermine and Menelaos Markakis observe that: "NCBs enjoy a dual, hybrid status in the Eurosystem. On the one hand, they constitute sub-units in an integrated European administrative system managed by the ECB, which they find themselves subordinated to as regards monetary policy. On the other hand, they remain part of broader national institutional systems and are subject to specific national constraints. The mantra faithfully repeated in the case law surveyed below is that NCBs and their governors are national authorities but that they act within the framework of the European System of Central Banks", see Dermine, P., Markakis, M. (2025), "Hybrid Governance Structures and Monetary Policy: The Legal and Institutional Position of National Central Banks in the Eurosystem", *Politics and Governance*, Vol. 13.

4 See Priego, F.J., Conlledo, F., "The role of the decentralisation principle in the legal construction of the European System of Central Banks", in *Legal Aspects of the European System of Central Banks*, published by the ECB, 2005; De Lhoneux, E. (2009), "Decentralisation and Specialisation in the Eurosystem", *Euredia*, Vol. 3, 454.

ESCB/ECB Statute.[5] These functions are basically subject to national law, judicial review and accountability.

This unique legal framework has led some scholars to observe that the ESCB, in practice, may be less of a purely supranational institution than it is often perceived to be, while NCBs, conversely, may embody a stronger European dimension than their name suggests.[6]

NCB governors also have a dual or hybrid role, serving both as members of the ECB's Governing Council and as senior national officials. As the CJEU noted in *Rimsevics*,[7] "Article 14(2) of the ESCB/ECB Statute and of the ECB reflects the logic of this highly integrated system which the authors of the Treaties envisaged for the ESCB and, in particular, of the dual professional role of the governor of a national central bank, who is certainly a national authority but who acts within the framework of the ESCB and sits, where he is the governor of a national central bank of a Member State whose currency is the euro, on the main decision-making body of the ECB."

This duality is firstly grounded in Articles 129(1) and 282(2) TFEU, as well as Article 8 of the ESCB/ECB Statute, which establish that the ESCB is governed by the decision-making bodies of the ECB, including the Governing Council. Additionally, Article 283(1) TFEU and Article 10(1) of the ESCB/ECB Statute specify that the governors of NCBs from Member States whose currency is the euro are members of the Governing Council. Thus, these governors participate in the adoption of the decisions necessary to perform the ESCB tasks, while also being highly ranked national public officials in their countries, subject to national rules regulating their appointment, remuneration or accountability.

A similar dual role exists within the Single Supervisory Mechanism (SSM) for national competent authorities (NCAs) and members of the ECB Supervisory Board. Under the SSM Regulation,[8] the SSM brings together national supervisory authorities and the ECB, cooperating closely to supervise banks. Members of the ECB Supervisory Board also embody this hybrid role, acting both as senior national officials and as members of the ECB Supervisory Board.

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5 Under Art. 14(4) of the Statute "National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB".

6 Van der Sluis, M. (2022), "National central banks in EMU: time for revision?", *Journal of Banking Regulation.*, Vol. 23(1), 19.

7 See Judgment of the Court of 26 February 2019, *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia,* C-202/18 and C-238/18, ECLI:EU:C:2019:299, paragraph 70.

8 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013, p. 63.

2 NCBs' balancing act: navigating between dual responsibilities and dual legal frameworks

This duality represents a unique challenge for the NCBs and their legal services, which operate at the intersection of EU and national law, as well as between ESCB tasks and their national responsibilities. Navigating between these two waters is always a delicate balancing act. While these two normative layers generally coexist harmoniously, tensions can occasionally arise when their respective obligations are at odds.

Some scholars argue that this dual or hybrid role creates an inherent conflict of interests for the NCBs, with the provocative term "schizophrenic" sometimes used to describe their position as being caught between competing legal obligations and loyalties.[9] In my view, however, this dual role is not inherently contradictory or "schizophrenic" for the legal experts of the NCBs. It rather reflects the inherent complexity of European integration, a system built on mutual recognition of the different legal orders that coexist. I suggest two main reasons for this.

First, our role as NCB legal experts remains fundamentally the same, whether we are addressing ESCB or national tasks, and whether we are interpreting Union or national law. Our primary responsibility is to provide sound and independent legal advice to ensure that our institutions make well-informed decisions, uphold the rule of law, and operate within their mandate. Second, the two dimensions of our responsibilities are complementary. By defending the rule of law and autonomy of the NCBs at the national level, the NCBs' Legal Services also contribute to maintaining the rule of law and the autonomy of the ESCB as a whole. Indeed, the autonomy of the system bults upon and depends on the autonomy of all its individual components. Conversely, the autonomy of the ESCB and the ECB could be compromised if the independence of an individual NCB or Governor were undermined.

Aware of this, the authors of the Treaties established robust structural safeguards to protect the independence of the NCBs and their governors.[10]Article 130 TFEU and Article 7 of the ESCB/ECB Statute extend the protection of central bank independence to NCBs and the members of their decision-making bodies.[11] Those provisions are, in essence, intended to shield the ESCB from political interference to enable the effective pursuit of the objectives ascribed to its tasks.[12] Article 14(2) of the ESCB/ECB Statute sets the minimum length of the Governors' term of office and provides that they may not be relieved from office unless they no longer fulfil the conditions required for the performance of their duties or if they have been guilty of serious misconduct. This provision also establishes an exceptional legal remedy

9 See Dermine, P., Markakis, M. (2025), "Hybrid Governance Structures and Monetary Policy: The Legal and Institutional Position of National Central Banks in the Eurosystem", *Politics and Governance*, Vol. 13.

10 See Judgment of the Court of 17 December 2020, *Commission* v *Slovenia*, C-316/19, ECLI:EU:C:2020:1030, paragraph 49.

11 See Judgment of the Court of 10 July 2003, *Commission* v *ECB*, C-11/00, ECLI:EU:C:2003:395, paragraph 131.

12 See Judgment of the Court of 16 June 2015, *Gauweiler and Others*, C-62/14, ECLI:EU:C:2015:400, paragraph 40.

before the CJEU for the Governors and for the ECB Governing Council against such a measure. Article 131 TFEU requires each Member State to ensure that its national legislation, including the statutes of its NCB, is compatible with the Treaties and the ESCB/ECB Statute.

As part of the structural safeguards, I would like to underline the role played by Article 127(4) TFEU[13] and Article 4 of the ESCB/ECB Statute. These provisions grant the ECB a relevant advisory role, requiring Member States to consult the ECB on draft national provisions affecting the status of the NCBs or assigning them new national tasks. This consultation ensures the compatibility of national law with the ESCB legal framework, particularly regarding the principles of independence and the prohibition of monetary financing, thus reducing the risk of conflicts between the EU and national dimensions. However, general legislation not specifically addressed to NCBs – such as laws on administrative procedures, transparency, budget, or public procurement – falls outside the obligation to consult. Such general laws may impact the institutional, financial, personal, or functional independence of NCBs or otherwise contradict their obligations derived from the Treaties and occasionally give raise to legal questions and tensions.

In this context, NCB legal experts are best placed to ensure the harmonious application of both EU and national tasks and legal frameworks. To navigate the two dimensions effectively, they must have a deep knowledge of both EU and national legal systems, and a clear understanding of how these frameworks interact. Armed with such expertise and institutional ethos, NCB legal experts contribute to EU autonomy and the rule of law, within the system. This contribution is twofold and comes both from the centre of the EU and from its periphery.

At the EU level, NCB Legal Services participate in the ESCB Legal Committee (LEGCO), which provides legal advice and support to the ECB's decision-making bodies, assists in drafting legal acts, and analyses legal questions related to the ESCB's tasks and framework. NCB legal experts also provide legal advice to their respective Governors, in their capacity as members of the ECB Governing Council.

At the national level, NCB Legal Services implement ESCB legal acts in accordance with national law, explain the singularity of the NCBs’ institutional position to other public administrations and to the public, and, when necessary, defend the ESCB legal framework in national courts, as we will see in the next section.

Frank Elderson, member of the ECB Executive Board and Vice-Chair of the ECB Supervisory Board, recently emphasized that “the rule of law is not negotiable. It is the bedrock of our Union”.[14] This principle is not only foundational for the ESCB but also serves as the guiding compass for NCBs as they navigate their dual responsibilities.

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[13] This obligation is further developed in Council Decision 98/415/EC of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, OJ L 189, 3.7.1998, p. 42 and in European Central Bank, *Guide to consultation of the European Central Bank by national authorities regarding draft legislative provisions*, published by the ECB, 2025.

[14] Elderson, F., The rule of law as a constitutional pillar of European central banking, 2025.

3 NCBs' role in case of conflicting legal obligations

As previously mentioned, conflicts between the ESCB and the national dimensions do occasionally arise. In such cases, NCBs can find themselves in a vulnerable position but are neither alone nor without tools to navigate these challenging situations.

One of the most effective resources available to NCBs' Legal Services are the fundamental principles of EU law, as interpreted by the CJEU. Several key principles have proven particularly useful in resolving legal conflicts:

- Primacy of EU law over national law:[15] the Treaties and the ESCB legal framework – including confidentiality rules, independence, and the prohibition of monetary financing – take precedence over conflicting national law.
- Consistent Interpretation:[16] national law should be interpreted, as far as possible, in line with the wording and purpose of EU law.
- Lex specialis derogat legi generali:[17] specific provisions addressed to NCBs prevail over conflicting general rules addressed to the national administrations in general.

Additionally, national provisions explicitly recognizing the unique status of NCBs as integral parts of the ESCB are invaluable in addressing tensions. For example, Banco de España frequently relies on the following instruments:

- Law 13/1994, of Autonomy of the Banco de España,[18] which expressly excludes the application of general provisions regulating the organization and functioning of the Spanish General State Administration, as well as laws governing budgeting, assets, and procurement for public bodies linked to the General State Administration, unless explicitly stated otherwise.
- Law 40/2014 on the Legal Regime of the Public Sector,[19] which confirms Banco de España's special legal framework and the primacy of the Treaties and EU/ESCB legal framework over national law.[20]

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15 Judgment of the Court of 15 July 1964, *Flaminio Costa* v *ENEL*, C-6/64, ECLI:EU:C:1964:66.

16 Judgment of the Court of 11 July 1996, *Marleasing SA* v *La Comercial Internacional de Alimentacion SAE*, C-106/89, ECLI:EU:C:1990:395.

17 Judgment of the Court of 30 April 2014, *Barclays Bank SA* v *Sara Sánchez García and Alejandro Chacón Barrera*, C-280/13, ECLI:EU:C:2014:279 and Judgment of the General Court, *Mayaleh* v *Council of the European Union*, T-307/12 and T-408/13, ECLI:EU:T:2014:926.

18 Law 13/1994, of 1 June, of Autonomy of the Banco de España, BOE 131, 02.06.1994.

19 According to the nineteenth additional provision of Law 40/2015, on the Legal Regime of the Public Sector (LRJSP): "The Bank of Spain, in its capacity as a national central bank, shall be governed, in the first instance, by the provisions of the Treaty on the Functioning of the European Union, the Statutes of the European System of Central Banks and of the European Central Bank, Council Regulation (EU) No. 1024/2013 of 15 October 2013, and Law 13/1994 of 1 June on the Autonomy of the Bank of Spain. In matters not covered by these regulations, and insofar as it is compatible with its nature and functions, the provisions of this Law shall apply."

20 See Annex 2 of Lastra, M, R., Vial, J. and Innearity, D., *Independence, autonomy, transparency and accountability in the Banco de España*, 2025.

- The opinions of the Spanish Consejo de Estado, which recognize Banco de España's "special, unique and exclusive" position within the Spanish public administration. These opinions describe Banco de España as "an entity of the State Administration of a special nature", enjoying "full autonomy in the field of monetary policy", being "part of the ESCB" and "directly subject to the provisions of the Treaties and the ESCB Statute".[21]

In any event, determining when to apply national provisions, when to interpret them in accordance with EU law, or when to set them aside due to clear conflict with the Treaties or the ESCB legal framework is a very complex task. It requires expert legal judgement, and it is, of course, subject to judicial review.

Although rare, there are instances where decisions taken by NCBs to implement the ESCB legal framework are challenged before national courts. In such cases, NCB Legal Services are responsible for defending the ESCB legal framework. Banco de España has successfully defended before national courts or international arbitration tribunals the ESCB ethics framework,[22] the allocation of responsibilities within the Single Supervisory Mechanism, the ECB Emergency Liquidity Agreement,[23] and the confidentiality of monetary policy counterparty data.[24]

Of course, the most striking example of conflict between the ESCB and national legal frameworks was the litigation concerning the ECB's Public Sector Purchase Programme (PSPP).[25] The basics of the case belong to the handbooks of EU law. A group of German citizens filed a complaint before the German Constitutional Court, arguing that the PSPP violated the prohibition of monetary financing (Article 123 TFEU) and the principle of conferral (Article 5(1) TFEU in conjunction with Articles 119 and 127 TFEU). On 18 July 2017, the German Constitutional Court referred several questions to the CJEU for a preliminary ruling. These questions concerned the prohibition of monetary financing of Member State budgets, the monetary policy mandate of the ECB, and a potential encroachment upon the Members States' competences and sovereignty in budget matters. On 11 December 2018, the CJEU ruled that the PSPP neither exceeded the ECB's mandate nor violated the prohibition of monetary financing.

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21 See for example Consejo de Estado, Opinion 1479/2008, of 9 October 2008.

22 Judgement of the Audiencia Nacional of 21 December 2020, *Kingdom of Spain* v *London Steam-Ship Owners' Mutual Insurance Association Limited*., A Trade Union appealed against the Banco de España Code of Conduct, transposing the ESCB Ethics Code (ECB Guidelines 2015/855 and 2015/856).

23 Judgement of the Audiencia Nacional of 26 February 2020. A shareholder lodged a claim for damages against the Banco de España for the supervision and resolution of Banco Popular, significant institution under the competence of the ECB and the SRB. Also, Final Award in PCA Case No. 2019-17, delivered on 13 March 2023 Antonio del Valle Ruiz and Others The Claimants v The Kingdom of Spain in relation to the resolution of Banco Popular.

24 Judgement of the Audiencia Nacional of 15 January 2025. Three members of Parliament appealed the Banco de España decision not to provide access to individual information of monetary policy counterparties pursuant to EU law.

25 The PSPP is a Eurosystem programme for the purchase of assets on financial markets that was launched in 2015. Under the PSPP, the Eurosystem central banks – subject to the framework set out in detail in the ECB decisions – purchase government bonds or other marketable debt securities issued by central governments of euro area Member States, by "recognised agencies" and international organisations or by multilateral development banks located in the euro area.

However, on 5 May 2020, the German Constitutional Court held that both the judgment of the CJEU and the PSPP decision were "ultra vires".[26] According to the German Constitutional Court, the review undertaken by the CJEU regarding whether the ECB's decisions on the PSPP satisfied the principle of proportionality was not comprehensible (nachvollziehbar) and, therefore, was "ultra vires" and could not be taken into account. The German Constitutional Court carried out its own proportionality assessment and concluded that it was not ascertainable from the PSPP decisions that these decisions contained, or were based on, the required balancing of the monetary policy objective against the economic policy effects resulting from the program. Therefore, the PSPP decision exceeded the ECB monetary policy mandate and was "ultra vires".

Based on these considerations, the German Constitutional Court concluded that the Federal Government and the Bundestag violated the complainants' rights by failing to take steps challenging that the ECB, in its decisions on the adoption and implementation of the PSPP, neither assessed nor substantiated that the measures satisfy the principle of proportionality and, therefore, exceeded the ECB's competences. Consequently, the Court ruled that: "following a transitional period of no more than three months allowing for the necessary coordination with the Eurosystem, the Deutsche Bundesbank may thus no longer participate in the implementation and execution of the ECB decisions at issue, unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the PSPP are not disproportionate to the economic and fiscal policy effects resulting from the programme. On the same condition, the Deutsche Bundesbank must ensure that the bonds already purchased and held in its portfolio are sold based on a – possibly long-term – strategy coordinated with the Eurosystem."

The judgment of the German Constitutional Court sparked significant tension within the central bank community and academia. It was seen as a fracture in the legal foundations of the European Union and an indication that the unique legal construction of the ESCB was no longer tenable. It was also viewed as a sign of renationalisation of the NCBs in the broader context of the financial crisis, disrupting the delicate balance between their dual role and hybrid responsibilities. But it also had a direct impact on the Deutsche Bundesbank and its legal position.

As a result of the German Constitutional Court ruling, the Deutsche Bundesbank found itself caught between two binding but conflicting obligations: on one hand, the ECB's binding legal acts as interpreted by the CJEU, and on the other hand, the ruling of the German Constitutional Court of 5 May 2020.

While the principle of primacy of EU law and the exclusive jurisdiction of the CJEU to interpret EU law and review the legality of ECB decisions provided sound legal

[26] The German Constitutional Court claims the power to review whether institutions of the EU act within the limits of the competences transferred by the Member States under the Treaties. Any ultra vires acts imply that: (i) the EU manifestly exceeded its transferred competences; and (ii) that such transgression is of a structural significance for the distribution of competences between the EU and the Member States. If an institution of the EU acts ultra vires, the German constitutional organs and authorities, including the Deutsche Bundesbank, must neither participate in the decision-making process nor in the implementation of such acts.

arguments that could have been put forward, I would like to emphasize that the ultimate resolution to the Deutsche Bundesbank's dilemma was achieved through intense legal cooperation and constructive dialogue.

The Deutsche Bundesbank played a pivotal role, facilitating a common understanding and a clear way forward, while navigating a path that respected both legal orders. Following the Court's ruling, all parties involved worked extensively to satisfy the Courts requirements. In particular, the ECB, through the Deutsche Bundesbank, provided the German Government and the Bundestag all the necessary information to demonstrate that the ECB had adequately balanced the economic effects of the PSPP with its monetary policy objective.

This case underscores that, in moments of high stakes, resolving conflicts is not necessarily a matter of one legal order prevailing over the other. Rather, it is about EU and national institutions working together – through communication, transparency, accountability, and cooperation – to ensure that ECB decisions are well understood and implemented. In this delicate balance, NCBs and their Legal Services are uniquely positioned to act as vital intermediaries, serving as a bridge between the EU and national legal frameworks. Their dual role enables them to play a crucial part in upholding the integrity and functionality of the European legal and institutional system and ultimately of the rule of law.

4 The need for enhanced accountability

Accountability is an important part of this discussion. Holding a unique position within the national legal system places a significant responsibility on NCBs. To maintain legitimacy and public trust, the dual role of the NCBs must be exercised with transparency, openness, and a strong commitment to institutional cooperation.

Accountability is not merely a legal or procedural requirement; it is a cornerstone of democratic legitimacy. Without clear communication, engagement with national authorities, and responsiveness to public concerns, NCBs risk being misunderstood or perceived as operating in isolation. This can erode the trust that is essential for them to effectively carry out their dual mandate.

Banco de España has long recognized this imperative. Over the years, it has fostered a constructive and continuous dialogue with other national institutions, reinforcing its role within the broader institutional ecosystem.[27] In addition, Banco de España initiated recently a review of its framework for independence, transparency,

[27] De Cos, H., The Independence of Economic Authorities and Supervisors. The Case of the Bank of Spain, 2020. Banco de España also explained in detail the SSM framework to the Spanish Court of Auditors in the course of audits in relation to the restructuring of the Spanish financial sector and to Parliamentary Inquiry Commissions. See Spanish Executive Resolution Authority, Actions of the FROB and the Bank of Spain in the merger between Caixabank and Bankia and on the status of the banking restructuring process as of December 31, 2021, Audit Report, 2021 as well as the Appearance of Governor Linde before the Commission of Inquiry into the Financial Crisis in Spain and the Financial Assistance Program on 10 April 2018, see Congreso de los Diputados, Diario de Sesiones de la Comisión de Investigación, núm. 44. Legislatura XII.

and accountability.[28] This initiative, which is still ongoing, represents more than a compliance exercise. It is a proactive effort to identify areas for improvement and to strengthen its operational foundations.

NCBs Legal Services are also an important player in this journey toward enhanced accountability. They provide expert legal guidance and interpret the relevant legal provisions in light of the most recent caselaw, balancing the principles of transparency with the secrecy obligations and proposing legal amendments when needed to align the institutional practices with evolving expectations and best international standards.

5 Conclusion

Given the unique nature of the ESCB, NCBs have a dual role: they are integral components of the ESCB and simultaneously national institutions embedded within their domestic legal frameworks. This dual role is far from static. On the contrary, it has evolved over time, shaped by legal developments, institutional practice, and broader political dynamics. Case law from both the CJEU and national courts has also influenced the contours of this dual role. While some rulings – such as the *PSPP* case – might be seen as signalling a “re-nationalisation” of the NCBs, others – such as *Rimsevics* – point towards their “Europeanisation”. Taken together, these developments suggest that the delicate balance between the European and national dimensions of the NCBs has, for the most part, been preserved.

Maintaining this delicate balance is also a responsibility of the NCB Legal Services. Although the Treaties establish a clear legal hierarchy to guide the functioning of NCBs within the ESCB, intensive dialogue and cooperation between EU institutions and national authorities have also proven essential in resolving tensions. On those instances, NCBs together with their legal advisors have served as a bridge between the ESCB and national authorities, facilitating a common understanding and a clear way forward that allowed NCBs to respect both legal orders.

For NCBs, operating at the intersection of EU law and national legislation is both a privilege and a profound responsibility. Today, more than ever, this dual role requires a steadfast commitment to safeguarding the rule of law, upholding institutional integrity, and strengthening democratic accountability. These principles are central to the continued success of the ESCB and its pioneering role within the broader European Union framework

[28] To structure this analysis, Banco de España set up an internal working group led by an Executive Board member and commissioned a report from three independent external experts: Daniel Innerarity, Rosa Lastra, and Joaquín Vial., see Banco de España, Comunicado del Consejo de Gobierno en relación con el informe de los expertos sobre la independencia, autonomía, transparencia y rendición de cuentas en el Banco de España, 2025.

Shaping international law in an evolving global landscape: the strategic role of the IMF's Legal Department

Yan Liu*

1 Introduction

When most people think of the International Monetary Fund ("the Fund"), they often picture economists and analysts working to safeguard global economic and financial stability. Yet, behind every major policy decision and membership engagement there is a team of lawyers. What exactly does the Fund's Legal Department – and why is its role so essential?

To those less familiar with the Fund, the Legal Department may appear to be a behind-the-scene support function within the institution. In reality, it is a vital institutional actor. Since its establishment in 1946, the Legal Department has been at the heart of the Fund's mission. Over the past 80 years, it has grown from a small advisory office into a strategic partner. Today, it not only safeguards the Fund's mandate and ensures the rule of law within the institution, but also serves as trusted advisor to membership, contributes directly to the development of public policies, and helps shape the very architecture of public international law.

This contribution offers a look into the Legal Department's multi-faceted role. It explores how legal counsel balances the responsibility of upholding the Fund's founding principles with the need to adapt its legal framework to meet new challenges consistent with its mandate. It also considers how the department influences and contributes to international legal norms, all while ensuring the Fund remains legally agile, credible, legitimate, and effective in a rapidly changing world.

2 The evolution of the Legal Department

Established in June 1946, the Fund's Legal Department began under the leadership of General Counsel André van Campenhout, supported by two counsellors. In its early years, the department focused on foundational legal functions such as providing legal advice, interpreting the Articles of Agreement, the By-Laws, and

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Rules and Regulations, and ensuring compliance with Fund policies and supporting the legal integrity of internal operations.

As the Fund's mandate expanded, so too did the scope of the Legal Department's work. By the 1970s, its lawyers were involved in providing technical assistance to member countries, contributing to the drafting of legislation in areas such as banking, finance, taxation, and foreign exchange regulation.

Decades later, the Legal Department plays a central role in nearly every aspect of the Fund's work. It continues to serve as the Fund's in-house counsel advising on internal administrative matters and to ensure that Executive Board decisions are consistent with the Fund's legal, policy and institutional framework.[1] It also advises members on a broad range of macro-critical legal and institutional reforms. These include anti-money laundering and countering the financing of terrorism (AML/CFT), central banking, debt transparency, digital money, financial and fiscal law, governance and anti-corruption, insolvency, PFM, sovereign debt, and taxation.

Today, the Legal Department has grown into a multidisciplinary team of over 140 people, including lawyers, financial sector experts, economists, analysts, and other professionals. Organized into seven specialized divisions, the department delivers a comprehensive suite of legal and policy services that support the Fund's mission.

3 Adapting the IMF's Legal Framework to today's world

As the Legal Department has grown in scope and complexity over the decades, so has the imperative to ensure that the Fund's legal framework remains responsive to a rapidly changing global landscape.

The Fund's legal framework was established in the 1940s in the aftermath of a devastating global conflict. It was built on a shared post-war conviction that multilateral economic cooperation was essential for sustaining peace, rebuilding trust among nations, and promoting global prosperity. The Articles of Agreement, the Fund's founding charter and a multilateral treaty, were designed to foster stability, trust, and coordination among nations.

But today the world faces a different set of challenges. The international system is grappling with rising economic fragmentation, accelerating technological disruption, the emergence of digital finance, and persistent geopolitical uncertainty. In this environment, the question becomes: how does a legal framework conceived 80 years ago remain relevant and continue to serve the needs of a vastly transformed world? And what is the role of the Legal Department in interpreting this legal framework within this current context?

The enduring strength of the Fund's legal framework lies not in its rigidity, but in its flexibility. The Articles of Agreement, first adopted in 1944, remain the cornerstone of the Fund's mandate and continue to guide the Fund's mission and work. They define

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[1] Under Art. XII, Section 3 of the Articles of Agreement, the Executive Board is responsible for conducting the business of the Fund.

the Fund's purposes, governance structure, and core functions, including its authority to conduct bilateral and multilateral surveillance, provide financial assistance to help member countries address balance of payment problems subject to adequate safeguards, and provide financial and technical services to members upon request.

Article I outlines the Fund's core purposes of promoting international monetary cooperation, fostering balanced growth, and maintaining exchange rate stability – which remain as relevant today.

While the Fund has weathered multiple global crises over time, the Articles have only been amended seven times in its history. The most consequential reform to the Fund's legal framework was the Second Amendment to the Articles of Agreement in 1978, following the collapse of the Bretton Woods system centred on fixed exchange rates. Prior to this amendment, a member's choice as to how it valued its currency against the currency of other members under the par value system was very limited – the value had to be expressed in terms of gold or through the US dollar. However, even after the US closed down the gold window, there still was broad consensus on the need for the Fund to continue its work to oversee the system of exchange rates. The second amendment subsequently rebalanced the rights and obligations of members and recalibrated the Fund's mandate in a world of flexible exchange rates. Other amendments have addressed more targeted issues like creation of Special Drawing Rights (first amendment), the suspension of voting rights (third amendment), a special allocation of Special Drawing Rights (fourth amendment), expanded investment authority (fifth amendment), basic votes (sixth amendment) and election and composition of Executive Directors offices (seventh amendment). The last of these amendments (the seventh) was adopted in 2010 and came into force almost a decade ago – in 2016. The limited number of amendments over 80 years is a testament to how the Articles of Agreement, as originally conceived, have withstood the test of time.

4 Flexibility within the Articles of Agreement

Yet not all evolution required formal amendment. Amending the Articles of Agreement demands not only significant political will but also a broad-based consensus – specifically approval by three fifths of the Fund's members representing 85% of the total voting power, a threshold that has become increasingly difficult to meet in today's fragmented global landscape.[2] The process is also a time-consuming, requiring complex and deliberate negotiation.

To avoid rigidity, the Articles were deliberately crafted with interpretive flexibility, allowing the Fund to adapt and evolve in response to new developments and challenges without the need for constant amendment. This flexibility has been applied repeatedly, as illustrated by the following examples.

[2] Art. XXVIII of the IMF Articles of Agreement.

4.1 Leveraging the Fund's lending toolkit

Article V, Section 3(a) of the Articles of Agreement gives the Fund the power to adopt policies for the use of its general resources to assist members to resolve their balance of payments problems in a manner consistent with the provisions of the Articles and to establish adequate safeguards for the temporary use of such general resources. This has enabled the Fund to adapt its lending policies as members' balance of payments needs shift with global economic developments.[3]

This adaptability has been put to the test in times of global crisis – two recent examples of which are the Fund's response to the Covid-19 pandemic and the global food crisis stemming from the war in Ukraine. In both instances, the Fund was able to act swiftly and effectively within its existing legal framework, demonstrating the flexibility of the Articles to support timely responses in rapidly evolving circumstances.

During the Covid-19 pandemic, the Fund responded quickly by providing emergency financing to its member countries. These measures were implemented through the Fund's existing lending instruments, specifically utilizing its Rapid Credit Facility (RCF) which provides fast concessional financial assistance to low-income countries facing an urgent balance of payment need, and Rapid Financing Instrument (RFI) which provides prompt financial assistance to any IMF member country facing an urgent balance of payments need.

Both RCF and RFI were temporarily adjusted to raise access limits while maintaining strong governance safeguards. As reported by the Fund's COVID-19 Financial Assistance tracker, by March 2022, the IMF had extended financial assistance to 90 countries totalling SDR 122,642.5 million (equivalent to USD 170,570.29 million). For countries with existing Fund-supported programs at the time, the Fund increased financial support through the Stand-By Arrangement and the arrangement under Extended Fund Facility permitting access to additional resources without requiring new program negotiations. It also introduced the Short-term Liquidity Line in 2020, further expanding its array of financial instruments to strengthen the global financial safety net.

In response to the global food crisis, the Fund established the Food Shock Window (FSW), a temporary financing mechanism under the RCF and RFI. The FSW was intended to deliver rapid and targeted support to countries experiencing urgent balance of payments pressures related to food insecurity, higher costs for food and fertilizer imports, or significant export shortfalls. By focusing on urgent balance of payment needs, the FSW aligned with the Fund's mandate and used assessments from organizations such as the United Nations, Food Agriculture Organization, and World Food Program to determine eligibility. Between September 2022 and March 2024, the FSW provided emergency financing totalling USD 1.8 billion to six countries and demonstrated the IMF's capacity to respond to emerging global challenges while adhering to legal safeguards and policy discipline.

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[3] Art. IV, Section 3(a) of the IMF Articles of Agreement.

4.2 Adapting to evolving financial landscape

Another example of adaptability is how the Fund has kept pace with rapid transformation in global finance. The rapid digitalization of the payments landscape – particularly in cross-border payments – has reshaped our understanding of what constitutes "money" and how payments are made. While the original drafters of the Articles of Agreement could not have foreseen the emergence of digital money and modern technologies, the Fund's core mandate to maintain domestic and international monetary and financial stability has proven broad and resilient enough to encompass these developments.

In light of this new reality, the Fund has placed digital money as a key priority on its agenda and developed a digital money strategy. This includes work on crypto assets, stablecoins, e-money, and central bank digital currencies. These efforts enable the Fund to support its members in navigating complex policy trade-offs, identifying potential benefits, managing risks and formulating appropriate policies and legal and regulatory frameworks to tackle the evolving challenges related to digital money.[4]

Crucially, the Fund's work in these emerging areas does not represent an expansion of its mandate. Instead, it reflects an ongoing evolution in the understanding of what is considered macro-critical in today's global economy. As monetary and financial stability increasingly interact with technological innovation, the Fund's engagement in these domains is both necessary and consistent with its mandate.

5 The Legal Department's unique role

These examples illustrate the power of creative yet principled legal interpretation – and this is precisely where the Legal Department plays a vital role. Far from being a passive custodian of precedent, the department acts as interpreter, adviser, and guardian of the Fund's legal framework. The Legal Department ensures that Executive Board decisions are firmly grounded in the Articles of Agreement and helps shape policies that are not only technically sound and innovative but also legally robust. In doing so, the Legal Department contributes far more than legal expertise. Taking into account the Fund's governance framework, it reinforces the legitimacy of Fund policies by complementing the political legitimacy of the Executive Board which is responsible for conducting the business of the Fund with legal and analytical integrity. This dual legitimacy – political and legal – is essential to maintaining the credibility and consistency of the institution as it responds to evolving global challenges.[5]

This role requires a careful balance: exercising legal agility to find innovative, forward-looking solutions, while firmly upholding the rule of law and the line on what

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[4] International Monetary Fund. (2021), "The Rise of Digital Money: A Strategic Plan to Continue Delivering on The IMF's Mandate", *IMF Policy Paper 2021/54*.

[5] Hagan, S., "The IMF and the evolution of international monetary and financial law in: Research Handbook on Law and Diplomacy", in McGuinness, M. and Steward, D. (eds), *Research Handbook on Law and Diplomacy*, Edward Elgar Publishing, 2022, 123.

cannot and should not be done.[6] Legal interpretation is not a mechanical exercise – rather it is a dynamic process that requires thoughtful engagement with multiple dimensions. These include the legislative intent of the original drafters, the evolving context in which the legal framework needs to be applied and the need to balance principles such as justice, equity and legal certainty. This interpretive agility has been central to shaping the Fund's approach to its activities.

The significance of this role is further heightened by the fact that the Articles of Agreement do not provide for judicial review of decisions taken by any Fund organ. Joseph Gold, a former General Counsel of the IMF, in his work on interpretation by the IMF of its Articles of Agreement commented on how unusual and unique it was at the time to give the Fund the power of its own interpretation, and that no special organ was created within the Fund for the purpose of exercising this power.[7]

Under Article IX, a member may request a formal interpretation of the Articles of Agreement, and such requests are submitted to the Executive Board, with a final appeal to the Board of Governors, the Fund's highest decision-making body. This procedure has been used sparingly throughout the history of the Fund – only ten times and primarily in its early years.

Although the Fund does have an Administrative Tribunal, this is a separate judicial forum established by the Board of Governors solely for resolving employment disputes between the Fund and its staff. It does not extend to institutional decisions taken under the Articles. Moreover, the Fund enjoys immunity from all forms of judicial process unless it expressly waives that immunity.[8]

This governance structure places a unique responsibility on the Legal Department to act as the internal guardian of legality, ensuring that the Fund's decisions are consistent with its founding charter and the broader principles of international law.

6 Principles guiding the Legal Department

The institution places considerable trust in the judgment of the Legal Department – particularly in assessing the legality of decisions taken by the Fund's organs and in resolving complex, often precedent setting legal issues. This trust underscores the department's responsibility to discharge its mandate with independence, consistency, and objectivity. Fulfilling this responsibility, the Legal Department – its General Counsel and its staff – must abide by a set of principles to ensure the

[6] The importance of adhering to the rule of law in the absence of judicial review is also emphasized by Francois Gianviti, a former General Counsel of the IMF in his article, Gianviti, F. (1999), "Decision Making in the International Monetary Fund", *Current Developments in Monetary and Financial Law*, International Monetary Fund, Vol. 1, 7.

[7] Gold, J. (1954), "The Interpretation by the International Monetary Fund of Its Articles of Agreement", *The International and Comparative Law Quarterly,* Vol. 3(2), 256.

[8] Art. IX, Section 3 of the IMF Articles of Agreement.

integrity of their advice and preserve the credibility and legitimacy of the institution as a whole.[9]

6.1 Independence and objectivity as the cornerstones of trust

Legal Counsels in the IMF's Legal Department are entrusted with providing impartial, objective, and consistent legal advice to all organs and key stakeholders of the Fund, including the Board of Governors, the Executive Board, management, departments, and member countries. As guardians of the Fund's legal framework, legal counsels' duty is to provide legal advice grounded in Fund's law, regardless of which organ seeks their advice.

Importantly, the independence of the Fund's General Counsel is both recognized and respected. Even though the General Counsel is staff of the Fund and thus subject to the authority of the Fund's Managing Director, his/her views are considered independent when it comes to interpreting or assessing the consistency of a proposal or action with the Fund's legal framework. Reflecting this unique institutional function, it has been consistently understood and well recognized that the General Counsel may issue legal opinions on her/his own authority and provide them directly to the Executive Board, as well as other organs and key stakeholders of the Fund.

6.2 Building trust through proactive partnership

Trust must be earned, and for the Legal Department, earning trust means active and sustained engagement across the institution. Far from being a reactive, back-office service, the department functions as a strategic partner in Fund policy development. It is involved early in the policy formulation process, working closely with other departments to ensure that legal feasibility and soundness are embedded from the outset. This early involvement and collaboration enable the crafting of solutions that are not only legally sound but also operationally practical to achieve the intended objectives consistent with the Fund's mandate.

Given its broad remit, the Legal Department provides advice across a wide spectrum from AML/CFT to central banking, digital finance, insolvency, sovereign debt, and taxation. It also brings valuable policy insights to the table. However, maintaining a clear boundary between legal advice and policy input is essential.

While the Legal Department has the final say on legal matters, its contribution to policy debates is one voice among many. This distinction is important. The line between legal and policy issues is not always clear-cut, and conflating the two can risk undermining the clarity and credibility of legal advice. It is therefore the

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9 These principles are also discussed in Liu, Y. (2018), "The Rule of Law in the International Monetary Fund: Past, Present and Future", *AIIB Yearbook of International Law,* Vol. 1, 61.

responsibility of Fund legal counsels to determine whether an issue falls within the legal domain.

The Legal Department's proactive engagement also extends well beyond the Fund. It extensively collaborates with other international financial institutions, regulatory bodies, standard setting organizations and stakeholders to advance global legal standards and contribute to the international policy dialogue. This outward-facing engagement reinforces the department's leadership on policy issues and strengthens its role in shaping the global financial architecture, reflecting its commitment to legal rigor and global cooperation. For example, the Fund – through the Legal Department – is an active observer to the Financial Action Task Force, responsible for setting the international AML/CFT standard.

6.3 Strategic communications for institutional credibility

In a world where legal certainty underpins institutional credibility and market confidence, clear and strategic communication is also essential. The Legal Department must clearly articulate not only what is legally possible but also what is not. As noted earlier, this clarity helps guide policy choices and reinforce the Fund's integrity.

Moreover, its communication must be tailored to its audience. Whether advising the Executive Board, management, staff, or member countries, the Legal Department adapts its messaging to ensure accessibility, relevance, and impact.

Strategic communication also means speaking with "one voice". Achieving this requires cultivating an environment that encourages open, candid and intellectually honest debate within the department. A diversity of perspectives combined with rigorous analysis is critical to ensuring legal advice is not only well-reasoned but also resilient under scrutiny. But once a legal position is reached, it is communicated consistently and authoritatively. This principle of "candor and one voice" ensures that the Legal Department's advice is not only clear but also trusted–both within the institution and externally.

Finally, the Legal Department recognizes the importance of communicating with the public. In today's environment, transparency and accessibility are essential to building trust and reinforcing the credibility of the Fund. It is crucial to convey legal concepts clearly and in an accessible way to non-specialist audiences. To this end, the department has developed comprehensive communications and publications strategies, and increased its outreach efforts, including through blogs, articles, social media posts, and online courses, to demystify the Fund's legal work and contribute to informed public discourse.[10] In addition, staff actively participate in and organize conferences, creating valuable opportunities to engage with a diverse range of stakeholders beyond the traditional government counterparts – from civil society, think tanks and academia to private sector actors and the broader public.

[10] Example of staff outreach efforts include IMF Blogs and IMF online learning programs.

7 Supporting the evolution of international legal norms

In addition to guarding the Fund's legal framework, the Legal Department also plays a critical role in supporting the evolution of international legal norms beyond the scope of its framework. As a subject of public international law, the Fund actively contributes to the development of both hard law (treaties, conventions) and soft law (guidelines, standards, codes of conduct).

As a multilateral treaty, the Fund's Articles of Agreement is part of the core architecture of public international law and plays a pivotal role in shaping international legal order. Through its work particularly on surveillance and lending, the Fund has generated a vast body of quasi-legal norms. While these norms may not always be binding in the formal sense, they have shaped state behaviour, institutional governance, and global financial standards. As noted by Joseph Gold, this has resulted in the "internationalization" of its soft law.[11]

Importantly, the Fund's legal framework does not operate in isolation and must interact with broader international legal norms. Although the Fund's mandate is economic, its work indirectly supports other aspects of international law such as social and economic rights by helping countries build stable economic and financial environments where these rights and more broadly human rights can flourish. One such example is the Fund's 2019 strategy for social spending, which positions it as a key policy lever for inclusive growth, addressing inequality and protecting vulnerable groups during structural changes.[12]

8 Leveraging on the power of normative soft law instruments

Beyond its legal framework, the Fund also relies on a broad set of soft law instruments to support its work. More specifically, the Fund has developed and endorsed standards and codes in twelve key areas from data standards and fiscal transparency to financial supervision.

Development of these standards and codes originated from the emerging market crises of the 1990s following the Asian Financial Crisis, and was subsequently refined following the global financial crisis, which revealed gaps and vulnerabilities in critical areas. These standards are subject to ongoing review and enhancement to ensure alignment with evolving international practices.[13]

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[11] Gold, J., *Interpretation: The IMF and International Law,* Kluwer Law International, 1996.

[12] International Monetary Fund (2019)., "International Monetary Fund. Strategy, Policy, &, and Review Department, A Strategy for IMF Engagement on Social Spending", *IMF Policy Paper 2019/16*.

[13] International Monetary Fund/The Word Bank (2011), "2011 *Review of the Standards and Codes Initiative – Background Paper*", *IMF Policy Paper, 2011*; Fact Sheet, Standards and Codes The Role of the IMF, 2025.

While not legally binding, these instruments are normatively powerful especially when adopted and implemented at the national level. They serve as benchmarks for good practice, guide legal and policy reforms, and influence market behaviour.

Fund staff actively promote the use of these instruments through our surveillance and financing engagement and support their adoption and implementation through capacity development. Countries may request an assessment of their observance of these standards and codes through various internal and external mechanisms: for example, the data standard initiative is monitored by the Fund's statistical department, while financial sector regulation and supervision are assessed in the context of Financial Sector Assessment Programs, and AML/CFT is assessed through FATF and its regional bodies' mutual evaluation reports.

The Legal Department actively contributes to the development and operationalization of several of these instruments, as illustrated by the following examples:

8.1 Central Bank Transparency Code

In 2020, the Fund launched a central bank transparency code, a comprehensive international standard designed to enhance the transparency and accountability of central banks across five pillars.[14] Legal Department staff played a pivotal role in developing this code. The code is used as a diagnostic and benchmarking tool in surveillance, financial sector assessment programs and lending. Member countries value its practical utility in strengthening central bank transparency, accountability, and policy effectiveness. Its self-review feature enables central banks to evaluate their current frameworks and identify pathways for future reform. When combined with the Fund's diagnostic support, it provides a comprehensive view that informs the central bank's strategic direction and fosters meaningful dialogue with its stakeholders on the status and rationale for reforms across the five pillars.

8.2 AML/CFT Standard

The Fund has also endorsed the international standard for AML/CFT developed by the Financial Action Task Force (FATF). Countries that fail to adequately implement the standard, may face "grey listing" by the FATF, which in turn can result in correspondent banking relationship pressures and disrupt their financial systems. The Legal Department holds the sole institutional mandate for AML/CFT within the Fund, providing advice to countries in surveillance and financial sector assessment programs, introducing conditionality in financing to countries with systemic AML/CFT deficiencies and providing technical assistance to help countries exit the FATF "grey list". As noted earlier, its active observer status of the FATF and its regional bodies supports the development and implementation of this standard. The Fund, through the Legal Department, also joins the FATF, its regional bodies, and the World Bank

[14] See the IMF's Central Bank Transparency Code.

in assessing countries' compliance against the FATF standards.[15] Spanning two decades of work, the 2023 Executive Board Review of the Fund's AML/CFT strategy re-affirmed that addressing money laundering, terrorism financing and proliferation financing risks is integral to the Fund's mandate to safeguard the integrity and stability of the international financial system and member countries' economies.[16]

8.3 Public Debt Management

Effective public debt management has become increasingly critical as countries navigate rising debt levels, tighter financial conditions, and heightened market scrutiny. A notable example of the Fund's contribution in this area is the Guidelines for Public Debt Management, developed jointly with the World Bank. These guidelines provide a comprehensive framework to help countries manage their public debt effectively, transparently, and sustainably. The Legal Department has stepped up efforts in this area. In 2024, it published a landmark working paper analysing the legal frameworks for public debt in over sixty jurisdictions, identifying both good practices and areas for reform. This work reflects a broader institutional focus on improving the legal underpinnings of debt transparency and accountability.[17]

In addition to analytical work, the Legal Department continues to leverage its convening power to foster dialogue among different stakeholders. In May 2025, it organized a public conference which brought together a diverse range of stakeholders including officials from borrowing and creditor countries, representatives of international organizations, private sector, civil society, and academia. The event facilitated constructive discussions on strengthening legal frameworks to enhance public debt transparency.[18] Finally, the Legal Department has an extensive technical assistance program to assist member countries in improving their legal frameworks in line with the Guidelines.

Through these soft law instruments, the Fund fosters international cooperation, builds trust among stakeholders, and provides practical pathways for reform, ensuring its continued relevance and impact in a world where formal consensus is increasingly difficult to achieve.

9 Looking forward

In conclusion, one is reminded of the enduring words of Roscoe Pound, the renowned former dean of Harvard Law School: "Law must be stable, and yet it

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15 These Fund-led AML/CFT assessments constitute Reports on the observance of Standards and Codes.

16 International Monetary Fund (2023), "2023 Review of the Fund's Anti-Money Laundering and Combating the Financing of Terrorism Strategy", *IMF Policy Papers 2023/52*.

17 Vasquez, K., Ashcroft, A., Alex-Okoh, K., Gullo, A., Kroytor, O., Liu, Y., Pineda, M. and Snipeliski. R., (2024), "The Legal Foundations of Public Debt Transparency: Aligning the Law with Good Practices", *IMF Working Papers 2024*/29.

18 IMF Blog, Disclosing Public Debt Boosts Investor Confidence, Cuts Borrowing Costs, 2025.

cannot stand still."[19] As we look ahead, the contours of the global landscape may remain uncertain, but the imperative to adapt and respond to emerging challenges is unwavering. The IMF's Legal Department meets this challenge by maintaining adherence to the rule of law while demonstrating legal creativity, and strategically leveraging soft law instruments to guide reform, foster cooperation and bridge normative gaps. In doing so, it not only safeguards the Fund's mandate but also actively contributes to the development of international law itself.

[19] Pound, R., *The Interpretations of Legal History*, Cambridge University Press, 1932.

Part VIII

The rule of law: on rights, risks, and responsibilities

The rule of law: on rights, risks, and responsibilities

Susanne Baer*

1 Introduction

This book addresses Europe´s autonomy – a rather distinct notion of collective, cooperative, and shared independence that goes beyond the conventional understanding of sovereignty – and today´s challenges to it. Many aspects, many experts. However, there is a need to address an underlying question: the rule of law. This is what this contribution is about, and in fact calls on lawyers and bankers, practitioners and academics to act, because it is urgent. In short: the rule of law is in bad shape, or at least under threat, and therefore it is high time to explain and defend it.

And yes, this may be a bit tricky. Officially, people engaged in finances, be they lawyers or economists, do like the law, and are all for it. But to be honest, law may not always be your best loyal friend. Most people understand that markets need the law to allow for reliable transactions. But there is also a recurring claim that law is in the way, in that it either creates untenable transaction costs, or does not allow for deals deemed necessary to foster progress, and that economics would do much better with less regulation. Whoever rejects law altogether engages in either ideology or naivité – and I am sure most professionals are not into that. However, the claim is there. In addition, law has its own problems. Today, law is fragmented, or "fractured", which is a specific challenge to the European "Verbund". But this is no reason to denounce the law, ignore or circumvent it. You may call for changes, better and sometimes less regulation, and coordination, but when it is there, you must treat law as binding.

Nonetheless, some people in the world of banking and monetary policy may sometimes be a bit annoyed. In fact, there is a persisting rumour that "Karlsruhe" was not a favoured term around the ECB for a while. However, when the German Federal Constitutional Court rendered its decision on the Public Sector Purchase Programme (PSPP) in 2020, it talked to the European Court of Justice (ECJ), at least primarily, and insisted on judicial review – thus, as called for in this book as well, on oversight – and insisted on proportionality, because it is "of great importance

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with regard to the principles of democracy and the sovereignty of the people".[1] Objections? The tone? The argument? Criticism is certainly acceptable. Court rulings are not authoritarian orders, and highest courts profit from critical epistemic communities. But disagreement, or at best, productive critique, must not be confounded with delegitimation, or attacks. Did comments on the German Court´s jurisprudence point in this direction? As long as rulings are anchored in law and doctrine, not ideology, they must not give rise to dismissing a court, or constitutionalism, or the rule of law entirely.

Today, there is in fact reason to call on everyone to defend independent courts, democracy, and fundamental rights, as well as constitutionalism. This rule of law is no formal minimalism, but a substantive foundation of who we are, and who we want to be. To defend the rule of law, we do however need to be a bit more precise. Why does the law matter to you, and to us? What is it exactly that matters today? And what can all of us, and you do, and should be done?

2 Why law matters

Why does the rule of law matter – to you?

Contributing to a conversation at the ECB, the easy answer is short: Lisa Cook. A few weeks ago, the US Federal Reserve Governor received a letter from the White House notifying her of her dismissal.[2] Does this endanger sound monetary policy? Maybe. But the key message is political, that no one is safe. So, we need law to prevent that. So far, US courts have protected Cook´s rights not to be unfairly dismissed, until a final verdict. For her, but also for everyone else, this is exactly why law matters. The longer answer is that we all need law, all the time, not as an abstract idea, but for real.

Think about your daily commute, or your last trip to a conference. The ticket, the passport – they all work because there are laws to make sure they do. Specifically, if you do not look like the majority on a train, or at the border, you want to trust authorities to rely on law, not prejudice or xenophobia. This is why law matters.

Why do you trust the chair you sit on not to fall apart, and if it does, that someone will cover the cost of the accident, take care of your backpain after you fell, and cover the hospital fee? There are laws you rely on.

Why do you think you will return to your office, and not be fired, or removed from your position – like Lisa Cook? Because you are not female and not black, and not otherwise marked? Remember the US judge handcuffed in her courtroom, or all the

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1 GFCC, Judgment of the second Senate, May 5, 2020, 2 BvR 859/15 u.a.: "A programme for the purchase of government bonds only satisfies the principle of proportionality if it constitutes a suitable and necessary means for achieving the aim pursued". The Court stated that it can only control for stark violations of EU law, which sounds harsh, but in fact is a sign of restraint, in that the Court does not exercise close scrutiny, which is left to the ECJ, or accepted as an element of ECB independence. Doctrinally, one may look for ultra vires acts or ask whether exceeding a mandate violates fundamental rights.

2 Letter to Federal Reserve Governor Lisa Cook Notifying Her of Her Dismissal from Office, *The American Presidency Project*, 2025.

civil servants fired under the heading of efficiency, or the researchers with no funding to even finish an experiment, or store important data? I hope you live in a context where law matters, with truly independent courts to control government, not serve it, thus the rule of law in action.

Finally, why do you think markets work, if they do? Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, recently noted that "the connection between the rule of law and a thriving economy is well-established", backed up by several Nobel Prizes in Economics, as is the connection with democracy, and that "Central banks are a crucial part of this mutual dependence."[3] Indeed they are. Certainly, they are also not perfect, and just like courts, banks also need and profit from criticism not just from interested parties, but also from an epistemic community. To insist that greening markets is urgent,[4] that neo-colonialism is not just a theory,[5] and that the increase of economic inequality endangers democracy by feeding populism is therefore a necessity.[6] And here again, law is one instrument to back up such calls, and do better, and install supervision, because as many stated across this book, it does not work without it. Therefore, as lawyers, be it in practice or the academia, as someone in central banking, and as people, you have reason to care for the rule of law.

3 What is the rule of law exactly?

The rule of law is an old concept.[7] Paradigmatically, the EU is built upon it, in that it was conceived by its founders as a "community of law", a notion popularised by Walter Hallstein. But it is contested, under pressure, eroding, sometimes captured, attacked.

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3 Elderson, F., The rule of law as a constitutional pillar of European central banking, Speech at the Italian Constitutional Court, 2025. He also stated: "The rule of law is not merely the bedrock upon which lawyers, judges and legal scholars build their work. In recent years, its pivotal role in fostering economic prosperity has come to the forefront of public debate". And "by fostering predictability and stability, it provides the essential foundation for robust economic analysis and informed monetary policy decision-making."

4 The EU seeks a Green Deal, and it may well be argued that the ECB has the mandate, and may even be obliged, to green its measures to ensure price stability, as much as climate disaster poses economic risks. For more, see Mathews, J. A. and Oqubay, A. (eds), *The Oxford Handbook on the Greening of Economic Development*, Oxford University Press, 2025. However, the very concept of greening the economy, or markets, must address the notion of growth, and its assessment of prices, to capture a wide range of effects, based on a substantive notion of the rule of law, including fundamental rights.

5 Elderson referred to Acemoglu, D., Johnson, S. and Robinson, J.A. (2001), "The colonial origins of comparative development: An empirical investigation", *American Economic Review*, Vol. 91(5), 1369; Acemoglu, D. and Robinson, J.A. (2012), *Why nations fail: The origins of power, prosperity and poverty*, Profile Books, 45.

6 There is an intense discussion on the connection between autocratic populism and social inequality, i.e. Gradstein, M. (2004), "Social status inequality and populism. ", *Journal of Comparative Economics*, Vol. (52)(2), 434; on methodological challenges Stoetzer, L., Giesecke, J. and Klüver, H. (2021), "How does income inequality affect the support for populist parties?", *Journal of European Public Policy,* Vol. 30(1), 1.

7 Note the broad definition of the ECB: "The rule of law is a basic ingredient of justice. The ECB itself declares it is committed to it: "The rule of law requires that public authorities act in accordance with constitutional norms, including fundamental rights, and general rules that have been laid down by democratically elected organs, as well as that they actively ensure that the law is observed by private actors.", Commission's Communication on further strengthening the Rule of Law within the Union. A central bank perspective.

The classic threat to the rule of law is to reduce it to a mere formality. However, this is a no-go. Law is, when reduced to formalism, nothing more than a tool, merely functional. Then, it may be used for anything, including injustice. But this is not the idea. After all, the rule of law is a sign of modernity because it replaces arbitrariness and ruling by intuition, mood, temper, greed, etc. This then in fact means that the rule of law as such ensures equal liberties.[8]

Certainly, this is the historical lesson Europe has learned. The post-1945 commitment of “never again” embraces more than formalism – and this is enshrined in constitutions, the Universal Declaration of Human Rights, as well as the current version of the basics, the European Charter of Fundamental Rights. After all, the German Nazis did not merely commit the Holocaust, but regulated, administered, legislated, did it by law. Thus, an instrumental, formal emphasis on law is not enough. The rule of law is a commitment to democracy and fundamental rights as well.

Now, you think this Nazi reference is too farfetched? Well. I wish we would be further away from Weimar, but there are indicators why we are not. Take, for example, the unmarked armed people dragging people off the streets into unmarked vans these days, driving them to unknown places, or placing them on planes in defiance of court orders, as in the US. There is arbitrariness all over. Certainly, this is not 1933 – the world is a different place today. But purely formal commitments to any law or decree, and the ways law and decrees are used as an instrument of injustice, are an even greater threat today.

Please also note that current autocracies are often not established through military coups or violent revolutions but through legal “reform”. There is law, but it is purely instrumental. Once in office, autocratic populists abuse the tolerance of democratic societies, “amend” laws and, eventually, the constitution, to then undo democracy. So, when elected presidents say that you may not have to vote again, an infamous statement by the current US President, take it seriously. When autocratic authorities go after the “other”, be it refugees or other foreigners, people with “the other” religious belief, or transpeople (this is list in the autocrat´s playbook),[9] be alarmed: they may come to you too, eventually. So, when that one person is fired, it is not only about her. Instead, solidarity is necessary regardless, because it could be you next.

Also note that this is no “erosion” or “natural backsliding”, or a “swinging pendulum”, a valley right before we reach new heights. Instead, these are deliberate, aggressive, planned, funded, and even smart attacks on our foundations. Democracies do not die (that was an urgent warning),[10] they are murdered. Carefully planned and

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8 One important contribution comes from the Venice Commission of the Council of Europe, including the call for an update by Klotilda Bushka, AS/Jur (2025) 05, of the Committee on Legal Affairs and Human Rights, with references.

9 Many have outlined the autocrat´s playbook, used by ethno-nationalist political movements in Europe, best implemented in Hungary, with variations to adapt to context. To educate, there is also The Authoritarian Playbook for 2025 available online, a report by “United to Protect Democracy”.

10 The update is Levitsky, S., Ziblatt, D., *Tyranny of the minority: Why American democracy reached the breaking point*, Crown, 2024. I got the clarification from Scheppele, K. L. (2025), “Rights into Structures: Judging in a Time of Democratic Backsliding”, *German Law Journal*, Vol. 26(2), 255.

executed. A frog in a pot of boiling water, a chicken plucked feather by feather – there are many metaphors.

And there is the reality: the threat today is that autocrats turn things upside down and steal our labels. Take Putin's "managed" or "sovereign" democracy, or Orban's "illiberal democracy" – a clear contradiction in terms, or take US Vice President JD Vance turning it all upside down at the Munich security conference, when he lectured Europeans on free speech in a democratic society, to de facto defend hate and side with a tech bro new masculinity.[11] These autocrats not only dismiss or ignore the rule of law, but try to capture and destroy it.

Instead, when taken seriously, the rule of law, *l'état de droit*, or *Rechtsstaat*, is the indispensable ingredient of democracies that deserve the label. It is the legal frame and structure of a society governed based on elections that are really fair and free, enabling peaceful transitions of government – no January 6 in the US, no storm on the German Reichstag, no Argentinian chainsaw. It is a society that cares, in that it ensures respect for all human beings – because "dignity is inviolable", one in which everyone has a fair chance in life – because there is equality – and all do really enjoy the freedom to live the way they want – because their liberty is protected. This is the fundamental triangle.[12] This is also the "never again", the grand idea, to inform, allow for, and protect vibrant societies.

But today, the law is carelessly ignored, arrogantly dismissed, snottily criticised, and most dangerously, deliberately undermined and attacked, captured or destroyed, hollowed out into a mere decorative shell. This is a rather recent development. After 1989, at least in Europe, most people thought we got it: democracy, equal liberties, freedom. But today, there is much reason to worry. Terror and war, both offline and online, atrocities, corruption, unhindered greed in mafia politics – the world and many people suffer. And the law is suffering too.

International law and the hope for a peaceful world order – is this gone? World Trade with reliable rules – is it an illusion? Independent, courageous courts providing genuine oversight? These days, even judges at the International Criminal Court need protection. Even as a German constitutional court justice, I was stalked, my family exposed, my private life invaded – and me: scared. Talk to judges at the European Court of Human Rights (ECHR), or in national courts, and talk to those judges who have been called "enemies of the people" (UK), or "not in tune with what people think" (Germany), or a "kangaroo court" (one of the funnier comments of the US President), or "illegitimate" (right wing politicians from the AfD, Germany), and the like. It is the sound of destruction. It delegitimates institutions, it takes away trust, it destroys the law.

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11 Mellström, U., Balkmar, D., and Callerstig, A.C., "Tracing the superheroes of our time: Contemporary and emergent masculinities in tech entrepreneurship." *Routledge Handbook on Men, Masculinities and Organizations*, Routledge, 2023, 417; Sandberg, B. (2025), "Startup Culture as a Masculinity Contest: An Exploratory Study on Prevalence and Gender Dynamics", *Social Sciences,* Vol. 14(7), 438.

12 There is a long history of such a holistic understanding of rights, different from isolated or hierarchical understandings that usually privilege autonomous liberty, instead of addressing people as living together, in always relative freedom. On the trias, see Baer, S. (2009), "Dignity, liberty, equality: A fundamental rights triangle of constitutionalism", *University of Toronto Law Journal,* Vol. 59(4), 417.

To do away with the rule of law, machine guns are not needed. Instead, smaller acts gradually accumulate, paving the way to risk and disaster. There are the dismissive comments. There are also those in positions of responsibility actors who ignore laws – and the law itself – and thereby break it, whether it involves overstepping their competences, violating a mandate conferred upon them by law, or breaching substantive limits such as fundamental human rights. Every instance feeds the autocrat's agenda. Also, there are formerly cooperating actors that cancel contracts, states that withdraw from treaties, leave or stop funding multinational organisations, actions all formally legal but representing a crisis for the rule of law.

Or take the letter from the White House to Lisa Cook mentioned above: "Dear Governor Cook", it says, presented in a formal and orderly manner, citing the constitutional authority of the President and providing reasons for dismissal that appear grounded in law. On the surface, it seems correct, formally appropriate. "Thank you so much for your attention to this matter", is the last sentence. But substantially, there is good reason to assume it breaks the law. And yes, Lisa Cook is not just any Governor, but a woman and Black, which makes her a first target, but not the only or the last one. Sadly, there is already more to add to such a list. But I think you know what I mean. The world is not in great shape, nor is the law, and in some contexts, we seem to be nearing a tipping or breaking point.

4 Action

What should we do, and what can – and should – you, and we, do about this?

The law is not the only concern. Today, autocratic attacks start with those who are weak and vulnerable but do not stop there. They exploit prejudice and resentment, including yours, to enlist acquiescence or even support. Often, politicians and parliaments are first, in that they are pitied as "not up to it", they "have no clue" – which are dangerous comments feeding a populist chorus. Attacks also hit on independent media, culture, and education, generally discredited and eventually dismissed as "woke" and "not neutral" – and there are too many out there who simply sing along, which also feeds a dangerous trend. Eventually, attacks denounce academic freedom in teaching and research. First, gender studies – "is this even a discipline"? Then, all humanities, but also medicine – "too much research on vaccines"? Eventually, they even hit on economics and law – "one-sided" and "biased". Quickly, "alternative" approaches feature prominently, which destroys our trust in facts across the board.

Then, and as a key component of the strategy, a meaningful rule of law is targeted because it is in the way of doing all of the above. Courts protect the vulnerable, the media and the arts, as well as academic freedom. Therefore, autocrats seek to first limit human rights, proposing that some are important, and some are not: and that we should not have too many anyways, no "inflation", no more "rights talk" – as if the grand promises of dignity, liberty and equality would be a reality already. They ignore the suffering. Rather, autocrats target courts by destroying trust, which is very difficult to rebuild, and eventually target the legal system, including law firms, with the same strategy: hit some to silence others. And eventually, also, autocrats do target central banks, as part of a planned, funded, and orchestrated strategy.

Now what is to be done? There are many people and projects out there already defending democracy and the rule of law. It may be a good idea to benefit from their expertise, invite them, talk, and learn, and fund them if you can, as a private person or based on institutional strategies. More generally, do not be fooled, do not delegate; this is no time to relax, but a necessity to do good and talk about it. And stand up for the rule of law.

Let me explain.

Do not be fooled. Autocrats target the weakest first, as the "other", to enlist prejudice and resentment, but no one is safe. They also steal terms, but their "democracy" is none; their "freedom" protects only privilege; their "independence" or "autonomy" is pure, unhindered power, and their "law" is merely instrumental, a tool. So, whenever things are turned upside down, be clear about it: If measures are illegal, they are that, and even if they are economically unconventional, they must be legally sound.[13] That needs to be said, early.

Do not delegate, because it is on all of us to act. Some people think that it is for politicians to defend democracy and take care of the law. But politics has enough to do fighting the widespread consumer version of democracy, a risky reduction, because elections are not online shopping. And politics cannot do it all. Then, some call on courts, especially the highest domestic, transnational or global institutions. This is certainly a good idea, because courts are quite special places. But courts also have their limits. They are responsive actors in that they only answer when properly asked; there is very little room for public relations; there are limited remedial powers. As such, courts are referees of games others play, waving red cards.[14] As safety belts, courts cannot ensure the very basics of their task.[15] Also, it takes too much time to wait for education and the next generation. We do not have the time. So, it is on you, too, the legal community, lawyers. Frank Elderson also said that "central banks do have specific responsibilities in this context."[16] I add that all of us do.

In fact, this is not a time to relax. These days, more than ever, you must, we all must, respect and implement the law, whether you like it or not. A relaxed attitude, "whatever it takes", "pragmatism" or "flexibility" – must all remain within legal

[13] Also, when a court is captured, this is not only age discrimination, as held by the Judgment of the Court of 6 November 2012, *Commission* v *Hungary*, C-286/12, ECLI:EU:C:2012:687, even if the capture is implemented by laws lowering the retirement age. To not be fooled, courts should address abuses of law to eventually destroy the rule of law as what they are.

[14] The ways courts work must earn the trust they need, and the independence they enjoy, similar to central banks. I describe the practice of the German Federal Constitutional Court in Baer, S., *Rote Linien. Wie das Bundesverfassungsgericht die Demokratie schützt*, Herder, 2025.

[15] In German constitutional theory, this is known as the "Böckenförde Diktum", by former Justice Ernst-Wolfgang Böckenförde ("Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann."), originally referring to the secular nature of the state.

[16] Elderson, F., The rule of law as a constitutional pillar of European central banking, Speech at the Italian Constitutional Court, 2025.

boundaries, even – and perhaps especially – in times of crisis. Otherwise, you enable autocrats to follow suit and risk the rule of law entirely.

Also, dismissive or snotty remarks are not in order. “Overregulation”, “bureaucratization”, “judicial activism”, “rights inflation”, or “those” politicians – do not join the autocrat’s populist chorus of “common sense” and the “true will of the people”. They seek to replace law with their version of efficiency. The concept may be tempting in economics, but note that autocrats target sound monetary politics as well as multilateral agreements with significant economic effects quickly. Therefore, I am sure you can withstand the temptation. And again, criticism is fine, as is any attempt to improve the legal system. But even careless and snotty dismissals are not.

Finally, do good – and talk about it. Frank Elderson said that the rule of law is “laying the very foundations for, and safeguarding trust in, money”,[17] whether coins, paper, or digital numbers, to deliver on your mandate and protect your independence. He is right. But this is not enough. Just as other actors, including courts, need to get better in explaining what they do, to justify the power entrusted to them, central banks need to explain what they do, and why, in the field, and to the general public. This is easier said than done, but independence is no license for silence. Independence, under the rule of law, also means accountability. This calls for good, fair, and transparent internal practice,[18] as much as it calls for best external practice. Since central banks, similar to constitutional and human rights courts, are designed “to mitigate a time-inconsistency problem”, and navigate in a multi-level system of governance, a “Verbund” of actors inextricably linked to each other,[19] they must accept all checks and balances, and explain what they do, how, and why.

All in all, you need to stand up, and if needed step up, for the rule of law, as a necessary ingredient of democracy, including fundamental rights, and ensure that all of it deserves the label. Counter the populist chorus and do not allow autocrats to enlist you; instead explain and defend the law, especially when it is in your way, too. When there is little enforcement of rules – demand it. When there are too many, revise, but do neither circumvent or denounce. Wrong way.

When people criticize rules or courts, fine – go talk about it, argue, but do not dismiss or attack easily. Make the law and courts do better, but defend democracy, the rule of law, dignity, and equal liberty for all. So, when courts are called “overly activist”, explain the system. Maybe argue for an upgrade (but not withdrawal, not a generally lighter touch, but a nuanced commitment to the law), but ultimately defend

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17 Elderson, F., The rule of law as a constitutional pillar of European central banking, Speech at the Italian Constitutional Court, 2025.

18 It is leading by example. This is why a letter from the chair of the ECB staff committee alleging the ECB of becoming an “unaccountable legal fortress”, because of “widespread complaints of favouritism, high burnout rates and the vulnerability of many colleagues working under temporary contracts” is more than an internal matter.

19 This link is not a hierarchy but more similar to a mobile, an image used by Renate Jaeger. The concept of a “Verbund” applied to constitutional courts has been featured by Voßkuhle, A. (2009), “Der europäische Verfassungsgerichtsverbund”, *TranState Working Papers*, No. 106, Universität Bremen. Important EU law rulings are Judgment of the Court of 26 February 2019, *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia*, C-202/18 and C-238/18, paragraph 69; Judgment of the Court of 17 December 2020, *European Commission* v *Republic of Slovenia*, C-316/19, ECLI:EU:C:2020:1030, paragraph 83.

it. When courts are called “illegitimate” or “lacking democratic legitimation”, or when law is called “ignorant” or “obviously wrong” (because lawyers have “no clue” about finances, the economy, money), explain why lawyers are not bankers, but bankers are bound by law – and defend the rule of law if needed.

To quote Frank Elderson again: “Populist, anti-establishment, and anti-expertise approaches that challenge independent institutions, focusing on their lack of direct connection with the “will of the people”, often fuel general mistrust against such institutions and target them sweepingly.”[20] Media, education and research, courts and, eventually central banks – we all have reason to worry. As lawyers, in whatever function, you are needed now. As citizens with a voice – you are needed very much right now. As human beings, as people with empathy who care – you are very much in demand.

So do not wait for a polite but devastating letter. The rule of law – not any law, not only instrumental law – is indispensable, in and for Europe and beyond, for real people. Do not allow us to get near tipping points. Act now.

[20] Elderson, F., The rule of law as a constitutional pillar of European central banking, Speech at the Italian Constitutional Court, 2025.

Biographies

Frank Elderson

Frank Elderson is a member of the Executive Board and of the Governing Council of the European Central Bank. He is Vice-Chair of the ECB's Supervisory Board and oversees the ECB's Legal Services. He co-chairs the Task Force on Climate-related Financial Risks of the Basel Committee on Banking Supervision.

Mr Elderson previously served as Executive Director of De Nederlandsche Bank (DNB). At DNB he held several senior positions before joining its Governing Board in 2011. Before joining DNB in 1999, Mr Elderson worked as a lawyer specialising in EU competition law.

Throughout his career, Frank Elderson has stressed the importance of climate and environment related considerations for the financial sector and for supervisors and central banks. He founded and chaired the Dutch Platform for Sustainable Finance from 2016 to 2020 and from 2018 to 2022 he served as the first Chair of the Network of Central Banks and Supervisors for Greening the Financial System (NGFS), a network he helped creating and expanding.

Mr Elderson graduated in Dutch law at the University of Amsterdam in 1994 and obtained an LL.M. Degree at Columbia Law School, New York, in 1995. He also studied various courses at the University of Zaragoza, Spain.

Lucia Arranz

Lucía Arranz is the Director of the Legal Services in the Banco de España. She joined the Spanish Central Bank in 2004 and previously worked in the Legal Department of a Spanish bank (Bankinter) and on the Brussels office of a Spanish Lawfirm (Garrigues). Lucía has a Law Degree from Universidad Complutense (Madrid), a double LLM in EU Law from the College of Europe (Bruges) and San Pablo CEU (Madrid) and an LLM in Telecom and New Technologies Law from Instituto de Empresa (Madrid). She is also a member of the European Central Bank Legal Committee (LEGCO), of the Committee on International Monetary Law of the International Law Association (MOCOMILA), of the Advisory Board of the European Banking Institute and the Advisory Committee of the Banking Law Section of the Madrid Bar Association.

Maria Raffaella Assetta

Head of International Affairs Unit, DG FISMA, EU Commission Maria Raffaella Assetta is the Head of the Unit for International Affairs in the European Commission's Directorate-General for Financial Stability, Financial Services, and Capital Markets Union. Lawyer by education, she started her professional career in the private sector as independent attorney-at-law before joining the European Commission in 2002, where she has been working in policy coordination, policy development, and enforcement of EU law, first in the field of public procurement and since 2010 in the field of financial services and capital movements. In the financial services field, she followed closely the implementation of the financial reform in the aftermath of the financial crisis. In her current position, she is in charge of developing and coordinating the strategy for the engagement with third country jurisdictions.

Susanne Baer

Susanne Baer is Professor of Public Law and Gender Studies at Humboldt University of Berlin, Global Law Professor at the University of Michigan Law School and currently a Centennnial Professor at LSE London. From 2011 to 2023, she served as Justice of the Federal Constitutional Court, in its First Senate. She received honorary doctorates from the universities of Michigan, Hasselt, Lucerne and Linz, and is a Corresponding Fellow of the British Academy of Arts and Sciences and a Member of the European Academy.

She has taught at CEU Budapest, Linz, and Toronto. At Humboldt University, she was Vice President, founded the Law & Society Institute Berlin and the Humboldt Law Clinic on Fundamental and Human Rights. She presides over the Advisory Board of the national Foundation Forum Recht and works on comparative constitutional law, anti-discrimination law and critical/socio-legal studies.

Catherine Barnard

Catherine Barnard FBA, FLSW, FRSA is Professor of European Law at the University of Cambridge. She is the author of EU Employment Law (Oxford, OUP, 2012, 5th ed.), The Substantive Law of the EU: The Four Freedoms, (Oxford, OUP, 2025, 8th ed), and (with Peers ed), European Union Law (Oxford, OUP, 2023, 4th ed). She is a member of the European Commission funded European Labour Law Network (ELLN). She is a Senior Fellow of the UK in a Changing Europe where she considers the legal issues around migration, together with the legal and constitutional issues associated with Brexit, in particular the Withdrawal Agreement and the Trade and Cooperation Agreement. She has appeared on the main media channels - BBC, ITV and Sky - as well as some of the more specialist programmes such as Law in Action, Woman's Hour, Question Time, Any Questions and the Briefing Room. She has also written for the Guardian and the Telegraph. She has given evidence to numerous select committees on the legal issues connected with Brexit.

Daniel Calleja Crespo

Since July 2020, Daniel Calleja has been Director General of the Legal Service of the European Commission. It advises the Commission on all legal matters and is responsible for its representation and defence in international jurisdictions.

Between 2015 and 2020, he was Director-General of the Directorate-General for Environment and, between 2012 and 2015, of the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs. Previously held other senior management positions in the European Commission, including Head of Cabinet of Vice-President of the European Commission Loyola de Palacio Commissioner responsible for Transport and Energy (2000-2004); Head of Cabinet of Commissioner Marcelino Oreja, Commissioner for Institutional Affairs, Audiovisual Policy and Relations with the European Parliament (1995-1999), and Member of the Cabinet of the President of the Commission Jacques Santer.

He joined the Commission in 1986 as a member of its Legal Service, after passing the opposition process. Previously, he was a legal adviser to Procter and Gamble Spain between 1984 and 1986. In addition, Mr Calleja has worked with various academic institutions to teach and lecture at universities and academics in Europe and also in the United States. He is co-author of several publications, including '70 years of EU law' (2022) - which is a collaborative project of the Legal Service of the European Commission, reflecting the principles and foundations of the European Union legal order over the past 70 years, as well as numerous articles on European law and Community policies.

Mr Calleja holds a degree in Law and Business Sciences from the Pontificia University of Comillas (ICADE E3) and completed his studies at the City of London Polytechnic (London) and the Complutense University of Madrid where he specialised in European Business Law and EU Law respectively.

Piero Cipollone

Piero Cipollone has been a member of the Executive Board of the European Central Bank since 1 November 2023.

He is responsible for the Directorate General International and European Relations, the Directorate General Market Infrastructure and Payments and the Directorate Banknotes. He also chairs the Eurosystem High-Level Task Force on Digital Euro, the Euro Retail Payments Board and the Euro Cyber Resilience Board for pan-European Financial Infrastructures.

Before joining the ECB, Mr Cipollone was Deputy Governor of the Banca d'Italia and a member of the Board of the Italian Institute for the Supervision of Insurance. He also served as a member of the Coordination Group for the Cross-border payments programme at the Bank for International Settlements. He previously served as an Executive Director on the Board of the World Bank Group.

Mr Cipollone is the author of several books. His papers have been published in international journals such as the American Economic Review, the Journal of the European Economic Association and the Journal of Policy Modeling.

Alberto de Gregorio Merino

Alberto de Gregorio Merino is Director-General of the European Commission's Legal Service.

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From 2016 to 2023 he was Director at the Legal Service of the Council of the EU, in the directorate dealing with economic, financial and EU budget affairs, where he was Legal Advisor to Ecofin and to the Euro Group, to the Economic and Financial Committee and to the Eurogroup Working Group. In his current and past attributions, he has been responsible for legal advise in different issues such as different sectors of the internal market (financial services, banking union, digital policy, the fundamental freedoms), and economic governance, including the ESM Treaty, the multiannual financial perspectives, the Next Generation EU, as well as the new mechanism on budgetary conditionality/rule of law. He has represented the Commission, the Council and the European Council before the Court of Justice (for instance, in cases Pringle, Banco Popular cases, and the actions brought by Poland and Hungary against the new mechanism on budgetary conditionality/rule of law). He is frequent speaker in conferences and seminars (f.i., institutional rapporteur of the 2016 FIDE congress, EU law seminars at the University of Berkeley, USA). He publishes frequently in EU law academic reviews (such as the Common Market Law Review) and collective works (most recently, The EU law of economic and monetary Union, Oxford University Press, 2020 and EU law in times of pandemic, EU law live press).

Bruno de Witte

Bruno De Witte is Professor of European Union Law at Maastricht University, codirector of the Maastricht Centre for European Law, and a part-time professor at the Robert Schuman Centre of the European University Institute in Florence. His main fields of research and publications: the constitutional law of the European Union; relations between international, European and national law; protection of fundamental rights in Europe; the rights of minorities, language law and cultural diversity in Europe; internal market law and non-market values; decision-making and legal instruments of EU law.

Paul Dermine

Paul Dermine (1989) is currently professor of European law at the Université libre de Bruxelles. He has previously worked as a référendaire at the Court of Justice of the European Union, and held research positions at the European University Institute (Max Weber Fellowship), Maastricht University (PhD Fellowship), KULeuven and the Hertie School of Governance (visiting researcher), and NYU Law (Hauser Global Scholarship). He holds degrees in law and European studies from the Catholic University of Louvain, the College of Europe and NYU Law, and a joint doctorate cum laude from Maastricht University and the KULeuven.

His research primarily focuses on EU institutional law, economic governance and the EMU. His most recent work has appeared in the Common Market Law Review, the European Constitutional Law Review, the Revue trimestrielle de droit européen and Politics and Governance. He is the author of The New Economic Governance of the Eurozone – A Rule of Law Analysis (Cambridge University Press, 2022) and Le plan de relance NextGenerationEU de l'Union européenne – analyse constitutionnelle d'une initiative historique (Larcier, 2023).

Larisa Dragomir

After initiating her career as a commercial lawyer in Romania, Larisa has dedicated herself since 2003 to European affairs. She has worked at the European Central Bank, as well as in the Brussels interest representation sector. In November 2010 she integrated the European Commission’s Directorate for Financial Stability, Financial Services and Capital Markets Union, where she covered asset management, banking, insurance and pension matters. Since December 2024, she is member of the Cabinet of Commissioner Maria Luis Albuquerque in charge of the Savings and Investments Union.

Larisa is a graduate of the Law School of the West University of Timisoara (Romania). She holds a master’s degree in European Studies from the College of Europe Natolin (Poland) and a PhD from the European University Institute in Florence (Italy).

Freddy Drexler

Freddy Drexler is the Jurisconsult of the European Parliament, Director-General of its Legal Service, having held this position since November 2013.

He is a graduate of the Institute of Political Studies and a holder of a DEA (Diplôme d'Études Approfondies) in Law from the Robert Schuman University of Strasbourg and has a first-class honours Higher Diploma in European Studies from the College of Europe, Bruges.

He joined the administration of the European Parliament in 1992; first as an administrator in the Directorate-General for Committees and Inter-parliamentary Delegations, then in the Directorate-General for the Presidency. Between 2002 and 2007, he held various advisory positions; to the Deputy Secretary-General of the Parliament; to the Director-General in charge of internal policies; and finally to the President of the European Parliament.

Mr Drexler was later Head of the secretariat of the governing bodies of the Parliament, before becoming Head of Cabinet for the Secretary-General in 2009. He joined the Legal Service in 2012 as Director for Legislative Affairs.

As Jurisconsult of the European Parliament, he plays the key role of advising the Institution on legal issues and representing it in legal proceedings before the Union and national courts.

Mariolina Eliantonio

Mariolina Eliantonio is Professor of European and Comparative Administrative Law and Procedure. Her research is focused on the enforcement of European law before national and EU courts. She does research specifically on the theme of access to court before national and European courts (with a special focus on environmental matters), on the Europeanisation process of national procedural administrative law and on the judicial review of the new modes of governance. She studied law at the University of Teramo (1997-2001) and of Maastricht (2001-2002). In 2008 she finalised her PhD on ‘Europeanisation of Administrative Justice? The influence of the ECJ’s case law in Italy, Germany and England’ at Maastricht University. The thesis was awarded a special distinction by the European Public Law Group. Between 2008 and 2015 she has been working as an Assistant Professor of European Administrative Law in the department of Public Law and in 2016 she became Associate Professor. She carries out research on the enforcement of European law before national and European courts, with a special focus on shared administration, environmental law and the new modes of governance. She coordinates courses of European and comparative administrative law.


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Nicholas Emiliou

Born in Famagusta (Cyprus), Mr Nicholas Emiliou studied at the l'Ethniko kai Kapodistriako Panepistimio Athinon (National and Kapodistrian University of Athens, Greece) from which he graduated in law in 1986. He continued his studies at the London School of Economics and Political Science (London, UK) where he obtained an LL.M. in European law in 1987. In 1991, he was awarded a doctorate in law by University College London (UK). He began his academic career at that university where he worked as a research associate from 1988 to 1991. He then took up teaching duties in EU law at the University of Southampton (UK) from 1991 to 1993, and then at Queen Mary and Westfield College, University of London (UK) from 1993 to 1994. Between 1995 and 1997, he held the Jean Monnet Chair of European Integration at the University of Durham (UK). From 1994 to 1997, while carrying on those activities, Mr Emiliou was also an Honorary Senior Research Fellow at University College London, also acting as Special Adviser to the Minister for Foreign Affairs of Cyprus. Between 1997 and 1998, he was Minister Plenipotentiary at the EU Division of the Ministry of Foreign Affairs of Cyprus and then, from 1998 to 1999, Deputy Permanent Delegate of the Republic of Cyprus to the European Union. From 1999 to 2002, Mr Emiliou was Ambassador Plenipotentiary and Extraordinary of the Republic of Cyprus to Ireland. Between 2002 and 2004, he was Permanent Representative of the Republic of Cyprus to the Council of Europe and Representative of the Government of Cyprus in cases brought before the European Court of Human Rights. In 2004, he was appointed as Permanent Representative of the Republic of Cyprus to the European Union and held that office until 2008. Mr Emiliou was then appointed as Permanent Secretary of the Ministry of Foreign Affairs of Cyprus, a position which he held until 2012. Between 2012 and 2017, he became Permanent Representative of the Republic of Cyprus to the United Nations in New York, before returning to his role as Permanent Representative of the Republic of Cyprus to the European Union from 2017 to 2021. He also served on the Panel of Arbitrators of the Permanent Court of Arbitration in The Hague (Netherlands) from 1995 to 2016. Mr Emiliou was appointed as an Advocate General at the Court of Justice on 7 October 2021.

Cristina Fasone

Cristina Fasone is Associate Professor of Comparative Public Law at Luiss University, where she is the Director of the BA in "Politics, Philosophy, and Economics". Visiting Professor at Nicolaus Copernicus University of Toruń since 2020, she holds a PhD in Comparative Public Law (University of Siena) and has been Max Weber post-doctoral fellow in Law (2013-2015), at the EUI. Holder of a Jean Monnet Module 2016-2019 'Parliamentary accountability and technical expertise: Budgetary Powers, Information and Communication Technologies and Elections' (PATEU), until January 2024 she has been the coordinator at Luiss research unit of the Horizon Europe Project RED-SPINEL. She was member of the Steering Committee of the ECPR Research Network on Differentiated Integration in the EU (2021-2023) and she is currently the co-coordinator of the Research Group on 'Judicial Review and Electoral Law' of the International Association of Constitutional Law. Cristina works on topics related to economic governance, constitutional adjudication and democratic accountability in between EU and national constitutional law. She has been Visiting Scholar at the Victoria University of Wellington, Georgetown Law Center, Uppsala University, Complutense University, the University of Copenhagen, Durham Law School.

Dessislava Guetcheva-Cheytanova

Dessislava Guetcheva-Cheytanova was appointed General Counsel on 1 September 2024. As Head of the Legal Service, Ms Guetcheva-Cheytanova serves as a member of the Bank's Executive Committee. Ms Guetcheva-Cheytanova joined the BIS in 2020 as Deputy General Counsel, providing legal advice on a broad range of issues. Before joining the BIS, she served as Director, Chief Counsel Corporate at the European Bank for Reconstruction and Development and also worked at the Organisation for Security and Cooperation in Europe. She holds a Master of Law degree and a Master of International Economic Relations degree from the University of National and World Economy (Bulgaria) and a Master of Law degree from the University of London.

Christoph Herrmann

Prof. Dr. Christoph Herrmann, LL.M. European Law (London), Wirtschaftsjurist (Univ. Bayreuth), holds the Chair of Public Law, European Law, European and International Economic Law at the University of Passau. After studying law with a supplementary education in economics at the University of Bayreuth (First State Examination in 1999), he completed a one-year Master's program in European and international economic law at the University of London (LL.M. 2000). In 2002, Prof. Dr. Herrmann obtained his doctorate in European law from the University of Bayreuth and passed the Second State Examination in Bavaria in 2005. From 2003 to 2009, Prof. Dr. Herrmann was a postdoctoral researcher at Ludwig Maximilians University of Munich, where he qualified for a professorship in early 2009. In 2006-2007, he was a Post-Doc Fellow at the European University Institute (EUI) in Florence. In 2008, he held acting professorships at the Vienna University of Economics and Business and the University of Passau, where he was appointed Tenured University Professor in 2009. From 2017 to 2020, Prof. Dr. Herrmann was a candidate select of the EU for the position of a WTO Appellate Body Member. He is listed as a potential arbitrator under both the EU/UK withdrawal agreement and EU trade agreements.

Frank Hoffmeister

Frank Hoffmeister holds a PhD from the University of Heidelberg (1998) and served as academic assistant at the Walter Hallstein-Institute for European Constitutional Law from 1998 until 2001. He then joined the European Commission where he worked first in the Cyprus Unit in DG Enlargement before becoming a member of the Commission Legal Service (external relations and institutional team). From 2010 to 2014 he acted as Deputy Head of Cabinet of the EU Trade Commissioner De Gucht, and as of 2015 he was Head of Unit dealing with anti-dumping at DG Trade. He joined the European External Action Service in November 2021 as Director of the Legal Department. He teaches EU external relations law at the Free University of Brussels and has written extensively on EU and international law matters. He edited (together with J Wouters, G Debaere and T Ramopoulos) The Law of EU External Relations - Cases, Materials and Commentary on the EU as an International Legal Actor (Oxford, OUP, third edition 2021).

George Johnston

George Johnston is Deputy General Counsel for Central Banking and Financial Stability at the Bank of England. In this role, George oversees the Legal Directorate's advice relating to the Bank's financial stability functions as the UK resolution authority, supervisor of systemic financial market infrastructures and macro-prudential authority, as well as the Bank's markets and payments operations as a central bank, banknote issuance and the internal affairs and governance of the Bank. Prior to joining the Bank, George was a member of the financial regulation team at Freshfields in London. George is admitted as a solicitor in England & Wales and an attorney in New York. He completed his education at Trinity College Dublin (LLB), KU Leuven (Erasmus) and Georgetown University (LLM).

Matthias Lehmann

Matthias Lehmann is a professor at the University of Vienna. His main interest lies in international and comparative aspects of financial law, both from a regulatory and from a private law viewpoint, as well as cross-border dispute resolution. He has published extensively on these topics. Matthias is regularly invited to teach at Sorbonne University, the University of Fribourg and the University of Lausanne, and has been a visiting academic at the London School of Economics and Political Science, at Oxford University and at Stanford University. He is a member of the European Law Institute, the American Law Institute, the Academia Europaea and the European Banking Institute. Matthias has participated in the European Commission's Expert Group on Conflict of Laws Regarding Securities and Claims, and in various working groups of the UK Financial Markets Law Committee, UNIDROIT and the Hague Conference on Private International Law (HCCH), inter alia on digital assets and digital tokens.

Yan Liu

Yan Liu is General Counsel and Director of the Legal Department of the International Monetary Fund. She advises the IMF's Executive Board, management, staff, and country membership on all legal aspects of the Fund's operations, including its lending, surveillance, capacity development, regulatory and advisory functions. Ms. Liu has led the Legal Department's work on a range of policy, country, and strategic issues, including reforms to IMF lending policies; legal frameworks for central banking and financial sector in response to technological changes; and corporate and household insolvency. She has also contributed to work on sovereign debt and enforcement, and to the development of international standards for financial regulation. Ms. Liu is widely published on various aspects of the law, and policy perspectives on areas such as private debt, sovereign debt restructuring, and good governance.

Pedro Machado

Pedro Machado is a Member of the Supervisory Board of the Single Supervisory Mechanism at the European Central Bank since March 2025. From 2020 to 2025, he was Board Member and Director of Resolution Planning and Decisions at the Single Resolution Board.

He has worked in financial regulation and supervision for more than 20 years. He was the Director of Legal Services and Chief Legal Counsel at Banco de Portugal, where he has also previously served as Deputy Director of the Prudential Supervision Department. A Portuguese national, he was the Minister of Finance's Chief of Staff between 2011 and 2013 and has worked before in the Legal Services of the European Central Bank. From 2012 to 2015, Pedro was a non-resident member of the European Investment Bank's Board of Directors. He holds a law degree from the Lisbon School of Law and has done post-graduate studies in European Law at the European University Institute.

Laila Medina

Laila Medina is an Advocate General at the Court of Justice of the European Union. Ms Medina obtained a master's degree in international maritime law in 1995 and was awarded a master's degree in European law in 2002. From 1995 to 2004, she worked in the Latvian Ministry of Transport. As from 2004, Ms Medina held the position of Deputy Head of the European Affairs Office at the State Chancellery of the Republic of Latvia before joining the Latvian Ministry of Justice as Director of the Policy Planning Department in 2005. From 2009 until 2021, she worked in the Ministry of Justice as Deputy State Secretary for Legal Policy. Ms Medina's career also includes teaching activities on EU law in Latvia and beyond. Ms Medina was appointed as an Advocate General at the Court of Justice on 7 October 2021.

Emanuele Rebasti

Emanuele Rebasti has been member of the Council Legal Service since 2014. He is currently Senior Legal Advisor in the Justice and Home Affairs Directorate with a role of horizontal coordination. He has previously been member of the ECOFIN and Institutional Directorates of the same Service. In these roles he has been involved in providing legal responses to some of the most pressing crises faced by the Union in recent years: the Covid-19 pandemic, the Rule of Law Crisis, Russia's war of aggression against Ukraine, and the migration crisis.

In particular he was part of the group of legal advisers working on the various emergency instruments adopted to address the economic consequences of the COVID-19 pandemic, and notably on the financial and legal architecture of the borrowing scheme for their financing (NGEU/EURI). He has represented the Council in a number of cases before the Court of Justice, including the seminal ones on the legality of the Rule of Law conditionality Regulation, an instrument which he concurred to shape during the legislative negotiations.

He regularly engages in conferences and scientific publications. Most recently, he presented to the 2025 FIDE Congress the Institutional Report on the topic of EU Emergency Law. The report offers one of the first attempts at giving a theoretical framework to this expanding area of EU law (EU Emergency Law. XXXI FIDE Congress | Katowice 2025 Congress Publications Vol. 1 | University of Silesia Press).

He is a qualified lawyer under Italian law. He is scientific collaborator of the Institut d´études européennes of ULB (Université Libre de Bruxelles) and visiting Professor at the Collegio Europeo affiliated to the University of Parma.

Ruth Wandhöfer

NED, Author, Speaker, Adviser, Professor

Dr. Ruth Wandhöfer has been instrumental in shaping the future of finance and money over more than 2 decades. She operates at the nexus of technology, cyber security, identity, finance and regulation and advises and speaks to international audiences on the evolution of the digital economy. After a distinguished career of over 11 years with Citi, Ruth has been an independent Non-Executive Director on various boards since 2018. She currently sits on the Board of Permanent TSB Bank in Ireland. She is also Head of European Markets at Blackwired, a cyber security innovator. Previously she was the Chair of the UK Statutory Payment Systems Regulator (PSR) Panel and board member of the London Stock Exchange Group, Gresham Technologies, Digital Identity Net and Aquis Exchange Group. A member of the Bank of England CBDC Engagement Forum she chairs the CBDC Privacy Working Group. She is a Visiting Professor at CASS Business School (now Bayes), teaching Fintech in Banking and Finance and Digital Money. She published three books: "EU Payments Integration" (2010), "Transaction Banking and the Impact of Regulatory Change" (2014), and "Redecentralisation: Building the Digital Financial Ecosystem" (2023), all Palgrave MacMillan.

Chiara Zilioli

Chiara Zilioli has dedicated her entire working life to the European integration project. In 1989 she joined the Legal Service of the Council of Ministers in Brussels, moving to the Legal Service of the European Monetary Institute in 1995 and subsequently to the ECB as Head of Division in Legal Services in 1998, where she was appointed Director General in 2013.

Ms Zilioli holds an LLM from Harvard Law School and a PhD from the European University Institute. Since 1994 she lectures at Goethe University Frankfurt, at its Institute for Law and Finance and at the European College of Parma, Parma University. In 2016 she was appointed Professor of Law at Goethe University Frankfurt. She has published numerous articles and four books. She is also a member of the Parma Bar Association.

Chiara Zilioli has been married to Andreas Fabritius for more than 30 years; they have four children.

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