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IMPRESSUM

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Praesidens

Anyone who has seen the Monty Python film *The Life of Brian* will know that Latin is not an easy dead language. The scene around "Romani ite domum", or "Romanes eunt domus", or "Romans go home", is one of the best moments in the film.

The Latin equivalent of president is *Praesidens*. Etymologically, it is composed of two parts: *præ* (in front) and *sidens* (who sits). So the word "presidency" implies leadership, being at the forefront. However, it consists of a passive and an active element; to sit and to go forward. Which one then: sit or go? This is the Hamlet question.

The Hungarian EU presidency starts on 1 July, 2024. It's been a long time since we've been in a situation like this, but we're starting to feel a bit *déjà vu*. The European Parliament's attempt to delay the Hungarian presidency has not succeeded, yet it leaves a bad taste in the mouth, even though the presidency has not even started. What is more, there may still be *intermezzos* later as well. It seems that the era of calm diplomacy is over for good.

Browsing through the Treaty on European Union (TEU), the reader may be struck by the first paragraph of Article 3, which states that "[t]he Union's aim is to promote peace, its values and the well-being of its peoples". In our view, all Europeans can identify with this goal to the furthest reaches, and are on pins and needles waiting for it to be achieved. Perhaps, under the Hungarian EU Presidency, we will be closer to the actual realisation of the declared goal of moving forward.

However, there is more to the TEU: its preamble makes it clear, that in the development of the Union, decisions are taken at the level closest to the citizen, in accordance with the principle of subsidiarity.

The *European Mirror* naturally wants to contribute to the success of both the Hungarian EU Presidency and the EU. In 2023/2024, we will publish five special issues on different topics, of which this issue will focus on subsidiarity.

There are few concepts in EU law that are so high on the agenda, yet so marginalised in every respect. The precise observance of competences and respect for contractual guarantees to protect them are, beyond argument, a matter of capital importance. This is not only in the interest of the Member States, but of the Union as a whole and ultimately of its citizens.

Boglárka Bólya, Péter Budai, Ferenc Csibor, Péter Gottfried, Endre Orbán, Lénárd Sándor, Tamás Simon and István Szent-Iványi will explore this topic, combining past and present, from near and far, in their exciting and no less thought-provoking writings.

"Respect the past to understand the present and work for the future."

Krisztián Kecsmár
Editor-in-Chief

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Lénárd Sándor[1]

The Different Angles of the European Democracy

Chances and Challenges of Achieving Democratic Legitimacy in Europe

The history of the institutionalised cooperation in Europe now looks back to more than seven decades. What differentiates this cooperation from other international organisations is the common heritage and destiny the European countries share and the community they have found in a high level of integration. However, since the very beginning of this cooperation, there have been debates about the best method and way to express common European positions. Part of this debate is the question of the democratic legitimacy of the Union institutions. As it is set out in Article 2 of the Treaty of the European Union, democracy is not only a fundamental value of the Member States, but also an expectation towards the European Union. Even though the institutional setting of the European democracy has gone a long way in the past seven decades, the question of democratic legitimacy is still being one of the key subjects and future challenges within the framework of the currently ongoing discussions on the future of Europe. There is no shortage of reform proposals, nevertheless, the main debate has been rather one-sided as it envisions only one avenue to decrease the so-called "democratic deficit" and strengthen the European policy space. What is the function of democracy in the context of the European integration and how can it represent a European position or serve as a check over the Union institutions? What institutions could be able to create a bridge between the peoples of the Member States and the European institutions? This paper seeks to outline the different responses to these questions. To this end, it outlines the theoretical background and institutional evolution of democratic legitimacy in the European integration while seeks to evaluate the current proposals and envision the alternative ones.

Keywords: democratic legitimacy, subsidiarity, national institutions in the European cooperation, democratic deficit, European Council, parliamentary scrutiny, yellow card procedure, green card procedure

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Introduction

Alexis de Tocqueville made his journey to the New World in 1831. Based on what he saw and experienced in the early decades of the United States that gained its independence not long before, he wrote his notable and influential book, *De la démocratie en Amérique* that later became popular both in America and in the old continent.[2] One of the main themes the book aimed to explore was the institutional and societal conditions that created the circumstances for democracy and democratic rule in America. In light of the more than seven decades long history and recent difficulties of the institutionalised European cooperation, one might rightly pose the question about the state of the democracy in Europe: its major differences form the American experience and the specific challenges to reinforce the democratic legitimacy of the European cooperation. This paper aims to offer a brief outline of the historical evolution and current dilemmas of democracy in Europe, and explore the competing alternatives of strengthening the democratic legitimacy of the institutionalised European cooperation.

Since the conception of the idea of uniting the coal and steel productions of France and Germany under one supranational organisation, the High Authority in the Spring of 1950, the question of democratic – parliamentary – overview or control has been continuously present in the debates about the institutional setting and decision-making process of the growing European cooperation. This is a cooperation that exclusively consists of parliamentary democracies: a fundamental requirement for the adhesion, and also a trademark of the cooperation. Furthermore, as the Member States agreed upon in the Founding Treaties, democratic legitimacy is a (legal) expectation towards the European institutions and their governance structure.[3] It is also a fundamental condition for those countries who wish to join the European integration according to the Copenhagen accession criteria that were adopted in 1993.[4]

Yet, one of the key questions throughout the development of the European integration has been the formation of an institutional avenue that is both receptive to a "European public opinion" and also capable of channelling or embodying their sentiments and views in the European governance structure. In other words, there has been numerous efforts – both successes and failures – for the past seventy years to form an institutional framework that gravitates "common European causes" and also willing to embrace and express them in European politics. Among the ultimate motivations (and justifications) of these efforts are that people across the integration can regard Europe as their own cause.

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2 Tocqueville 2007.

3 According to Article 2 of the Treaty of the European Union: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. In addition, "Article 2 TEU is not a mere statement of policy guidelines or intentions, but contains values which, as has been set out in paragraph 145 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles" (see Judgement of 16 February 2022 in case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paragraph 264).

4 See: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/accession-criteria_en Also see Judgement of 10 December 2018 in case C-621/18, *Wightman and Others*, ECLI:EU:C:2018:999, paragraphs 62 and 63.

For multiple reasons, one of the most decisive turning points in the historical evolution of the European integration was the era of the Maastricht Treaty in the early 1990s. The period that led up to this era was centred around market integration and characterised by an economic focus and a strong emphasis on creating an effective internal market. However, at the same time, it was an era under the shadows of the Cold War: the artificial division of Europe and the military occupation in its Eastern part. The success of the market integration and the prosperity it brought served as a model, as well as a source of aspiration for those that remained east to the Iron Curtain. With the fall of the Iron Curtain and the inclusion of fields of political cooperation by the adoption of the Maastricht Treaty,[5] the European cooperation commenced navigating more autonomously. Its democratic legitimacy was gradually put to the test. Have the Union institutions been able to embody the public sentiment of the peoples in Europe? How responsive have they been? Can the European Parliament or other institutions of the European cooperation serve as a wide and fast avenue that is able to channel public – or citizen – opinions to the machinery of the Union institutions? Can such institutions truly reflect the voice of the Europeans as a whole? In light of the past one and a half decade, the response to these questions has been far from being positive. Since the Great Recession of 2008,[6] the European Union went through a series of external period of crises,[7] and was unable to give effective responses and, for the first time in its history, lost one of its strategically important Member States by the beginning of 2020.[8] Not only the appeal of the European integration has shrunk over the past three decades, but its institutions and especially the European Parliament remained ineffective and did not live up to the expectations of becoming a public debate forum for European cases that concern the question and challenges ahead of the integration, and thus effectively enhancing public acceptance and democratic legitimacy of the governance structure of the European integration.[9]

Against this background, the present paper will first provide a historical overview of the role and dilemma of democracy and democratic legitimacy of the European integration (II). As a result of both the long period of crisis and for the ongoing discussion on the expansion of the European integration, the question of democracy is in the focal point of the reform proposals around the European Union. Therefore, the paper will explore and evaluate these proposals that mainly concern the election and competence

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5 The Maastricht Treaty, signed in 1992 and entered into force in 1993, introduced the internal and external security questions (common foreign and security policy and the cooperation in justice and home affairs) under the institutional framework of the European integration and created the European Union. See the second part of this paper.

6 The Great Recession of 2008 was the most severe economic downturn and financial meltdown since the Great Depression.

7 The Great Recession was followed by the ongoing migration crisis since 2015, the coronavirus pandemic in 2020 and the outbreak and prolongation of the Russo–Ukraine war since 2022. Economic difficulties, competitiveness, energy scarcity, national and geopolitical security are now all on the table, and pose a grave challenge for the future success of the European cooperation.

8 The United Kingdom is the second largest economy in Europe and strategically important in terms of its military and intelligence. See Statista 2024.

9 The electoral turnouts have been generally low and – except for the 2014 European Parliamentary election – they show a decreasing tendency. See: https://www.europarl.europa.eu/election-results-2019/en/turnout/

of the European Parliament (III). Then, in a somewhat wider context, it will outline some alternative ways, especially the role of national parliaments to enhance democratic legitimacy of the institutional setting of the European cooperation (IV). The paper will end with a concluding section with a view to the future challenges (V).

The European integration arrived at a historical crossroad: in the face of a long external crisis period, it is struggling internally to offer effective responses, while its last major success was the eastward expansion more than fifteen years ago. One of the central questions of the way forward is how to strengthen the confidence of the European people in the effective role of the European institutions which raises the question of democratic legitimacy. This paper aims to contribute and enrich the ongoing scientific and political discussions about the approach of how to strengthen democracy in Europe.[10]

The historical overview of the role and dilemma of democracy in the European cooperation

The democratic considerations were already present in the negotiations leading to the establishment of the European Coal and Steel Community (hereinafter: ECSC) in 1950. With forming the ECSC, the six founding Member States agreed to provide the arrangement of their national parliaments with oversight functions.[11] The "Consultative Assembly" of the Council of Europe that had been set up not long before served as a model for ESCS structure.[12] Accordingly, the Paris Treaty establishing the ECSC envisioned an "Assembly" – l'Assemblée – that consisted of 78 representatives of the Member States' national parliaments,[13] and was given a relatively strong democratic control function including, for example, the right to refuse the annual reports of the High Authority.[14] This democratic legitimacy was constituted by the agreement of the Member States, and was embodied by their democratic bodies. While the Assembly turned out to be an efficient partner of the High Authority in solidifying the first steps of the European integration, its voice was rather hollow among the peoples, and thus unable to make it as a popular common cause.[15]

10 For example, BAUME 2015 or WEILER et al. 1995: 4–39.

11 It was the German Federal Republic who favoured and supported the introduction of democratic control of the national parliaments over the High Authority. See, for example, MIDDELAAR 2014.

12 Articles 22–35 of the Treaty on the Council of Europe established the Consultative Assembly in 1949; see: https://rm.coe.int/1680935bd0. In 1994, the Committee of Ministers decided to use the "Parliamentary Assembly" denomination instead of the "Consultative Assembly". Also, the idea of a "European Assembly" was proposed during the Hague Congress in May, 1948; see: https://www.cvce.eu/recherche/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/5c35593d-484a-4f53-b0bd-a6605110c3b3

13 Articles 20–25 of the ECSC Treaty, see: https://eur-lex.europa.eu/eli/treaty/ceca/sign

14 Article 23 of the ECSC Treaty.

15 However, this was also due to the rather technical questions – relating to the production and pricing of coal and steel – it focused on.

Based on these early experiences, the Rome Treaty of 1957 also established a common "Assembly" for the European Communities.[16] The number of representatives was increased, and they were continued to be delegated by the national parliaments of the Member States.[17] While the competences of the newly formed Assembly were reduced compared to the Assembly of the ECSC, it was nevertheless entrusted with an important objective: to prepare the design of a European election with direct universal suffrage.[18] As a result of its decrease of competences, the centre of the decision-making power in the institutional cooperation lied with the Council of Ministers. It also served as an important avenue that includes the national political systems into the European affairs. The corresponding powers of the European Commission and the Assembly were diminished. Nonetheless, while the technocratic mindset and approach of the Commission was essentially important in the gradual formation of the internal market (and removing the barriers), the Assembly initially assumed an advisory role, and their opinions had no binding effects on the Council. Even though the actual competences were quite modest, the Assembly was envisioned to become a significant player in the future of the European integration: the Assembly is the representative of the peoples of the States[19] and, based on the creation of the European election, might later represent a single European electoral community.

The subsequent phase of the development was centred around a symbolic debate about how to call or designate the Assembly. With the adoption of its own "Rules of Procedure", the Assembly began to declare itself a "Parliament" in March 1958, to show its aspiration to vindicate its role as the representative of the "European people(s)" as well as its legislative function. Both France led by President Charles de Gaulle and the United Kingdom led by Prime Minister Margaret Thatcher refused to give their approvals to this change and continued to call it "Assembly". In their views, there has been no European sovereign people which a single parliament could embody. Against this backdrop, the Member States only agreed and thus authorised the usage of the name "European Parliament" in 1986, with the adoption of the Single European Act.[20] At the same time, the concept "democratic deficit" was also introduced into the European public discourse.[21] From that time on, it has been used to justify the reinforcement of the European Parliament and the expansion of its competences to reach an allegedly ideal "equilibrium" position vis-à-vis the European Commission and the Council. This

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16 The separate Assembly of the ECSC ceased its operation in 1958, and a common Assembly was established for the ESCS as well as for the European Economic Community and for the European Atomic Energy Community; available, for example: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf

17 Article 138 paragraph 2 of the Treaty of Rome, see: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT

18 See Article 138 of the Treaty of Rome, *"L'Assemblée élaborera des projets en vue de permettre l'élection au suffrage universel direct selon une procédure uniforme dans tous les États membres."*

19 According to Article 137 of the Rome Treaty: *L'Assemblée, composée de représentante des peuples des États réunie dans la Communauté, exerce les pouvoirs de délibération et de contrôle qui lui sont attribuée par le présent Traité*.

20 See the preamble of the document, The Single European Act is available: https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/single-european-act (accessed 30 December 2023).

21 The concept was first used by David Ian Marquand in his book: Parliament for Europe in 1979.

aspiration was also facilitated by the introduction of the direct election of the representatives of the European Parliament from 1979.[22] That provided a basis of reference to stronger legitimacy for the European Parliament.[23] These developments set the stage for a period in which the European Parliament has demanded an increasingly significant role in the European governmental arrangement and legislative process that began its robust expansions beyond the market dimensions.

The events of world history also stepped in and opened new prospects in the horizon of the European cooperation. The geopolitical shift of great magnitude – including the collapse of the Soviet Union and a rival economic system, as well as the fall of the Iron Curtain and the possibility to reunite Europe – during 1989 and 1990 gave rise to rethinking and re-establishing the framework of the European cooperation. In a certain sense, the stake of these shifts was whether Europe could be able to stand on its own feet as an economic union and a political cooperation.[24] Germany was reunified, and as a result of an agreement between President François Mitterrand and Chancellor Helmuth Kohl, the introduction of a common European currency and monetary policy became an objective.[25] But a perspective of a monetary union was still far from creating a framework for the political solidification of Europe. In these historical circumstances, Jacques Delors, then President of the European Commission envisioned a *"quantum leap"* and the need to transform the Commission into an executive that would be responsible to the democratic institutions of a future European federation.[26] Even though his proposal was considered detached from reality and from the aspirations of the Member States, this represented a watershed moment of history, and it was the Maastricht Treaty signed in 1992, which institutionalised this historical turning point.

With the adoption of the Maastricht Treaty, the Member States envisioned a European Union that rested on three different pillars – i.e. three different governance arrangements. Consequently, the institutional setting of the European Community did not apply to the areas of cooperation in foreign policy and matters of justice. The introduction of the co-decision procedure elevated the European Parliament to its long-desired role of co-legislator. The subsequent treaty revisions gradually expanded the legislative areas in which the co-decision competence applies, continuously strengthening the position of the European Parliament.[27] Yet, the continuous increase of its competence was not able to solidify the democratic legitimacy or acceptance of the whole European construction. The electoral participation, which was not only generally low, but also continuously decreased until 2019 and the European Parliament, was unable to

22 It was a result of a comprise based on the demand of President Valéry Giscard D'Estaing: in exchange of introducing the direct election of Members of the European Parliament, the operation of the European Council was formalised.

23 See BEESLEY 1963.

24 It also marked the achievement of one of the underlying objectives – and the *"finalité politique"* – of the European integration, namely protecting the European countries' cultural community against the spread of the hostile ideology of Soviet communism.

25 See SAROTTE 2010.

26 DELORS 1992: 335.

27 The Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf

become a true debate forum of the decisive questions that concern Europe.[28] It therefore continued to struggle to convey the will of the peoples of Europe.

As an attempt to use the mandate from the voters and sought to enhance the democratic characteristic of the integration, the European Parliament has tried to "politicise" the – otherwise technocratic – European Commission. In 2003 – on the 40th anniversary of the Elysée Treaty[29] – a Franco–German compromise offered a key opportunity for this. In exchange of establishing and institutionalising the position of president of the European Council, the European Parliament gained the competence to elect – based on the proposal of the European Council – the President of the European Commission.[30] Even though the European Parliament began to use its power, it did not lead to the reinforcement of the democratic legitimacy or the acceptance of the European construction. Nevertheless, this consideration set the stage for the further reform proposals outlined in the subsequent part of the paper.

In the meantime, what started in Maastricht in terms of the solidification of a political integration was supposed to end with the adoption of the Constitutional Treaty by the Convention on the Future of the European Union a little bit more than a decade later.[31] It was the ultimate test of widening the legitimate foundations of the European integration beyond the Member States and include the European citizens. Besides the Member States, the European citizens would have become the constituting power of the European Union. However, two referenda – organised in France and in The Netherlands – declined to accept the proposed new construction. The Constitutional Treaty failed and the process of Maastricht was not fulfilled: its constituting democratic foundations were refused. In a sense, the Member States continued to remain the master of the Treaties, and thus they continue to constitute the basis of democratic legitimacy of the European integration and their institutionalised cooperation also remained the political basis of the Union.

The current institutional structure is provided by the Lisbon Treaty signed in 2007, that, by amending the existing treaty structure, was designed to fill the necessary gaps the failed Constitutional Treaty had not been able to do. It terminated the pillar structure and thus the differences between the European Community and the European Union, and as a result, the process by which the European integration had become a political body ended. Even though the institutional settings remained the same from a democratic perspective, one of the noteworthy novelties of the Lisbon Treaty[32]

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28 The participation rate was 45.47% in 2004, 42.97% in 2009 and 42.61% in 2014; see: https://www.europarl.europa.eu/election-results-2019/en/turnout/

29 The text of the Treaty is available: https://www.fransamaltingvongeusau.com/documents/dl2/h6/2.6.3.pdf

30 This competence was institutionalised by the Lisbon Treaty reflected in Article 17 of the Treaty on the European Union.

31 The Convention on the Future of the European Union by the Laeken Declaration of the European Convention in 2001. The purpose of the Convention was to draft a Constitutional Treaty for the European convention.

32 Also, the Lisbon Treaty further increased the competence of the European Parliament by extending the codecision procedure. See: https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.1.pdf Nevertheless, Article 10 of the Treaty on the European Union (introduced by the Lisbon Treaty) is considered more significant from the point of view of democratic foundations.

was that it declared – for the first time – that the European Parliament represents the citizens – instead of *the peoples of the States brought together in the Community*[33] – at the Union level.[34] This change has symbolic force in the eyes of the European Parliament. In the following decade, it used this mandate – as the next section of the paper will show in detail – to strengthen its position vis-à-vis the Member States. It tries to achieve what the European Convent and Constitutional Treaty failed to do so: to constitute European democratic legitimacy. In the meantime, however, the past experiences show that it continues to struggle to become a meaningful debate forum of European questions, thematise the European public discourse and gravitate the attention of the peoples across the continent.[35] Instead, most media and public attention rather focuses on the agenda and questions discussed during the negotiations of the European Council.

In parallel, the Lisbon Treaty also empowered the national parliaments to control over the principle of subsidiarity and encouraged interparliamentary cooperation. This is coupled with the introduction of the European Citizen Initiative. These point to alternative ways of strengthening democratic legitimacy in the European cooperation, which will be highlighted in section IV.

The recent proposals to enhance democracy in the European Union

One of the last significant accomplishments in the history of the European integration was its eastward expansion in the 2000s that fulfilled the long-standing promise and objective of the change of regimes in the early 1990s.[36] It was also one of the opportunities for a reunited Europe to attain more autonomy or "strategic autonomy" as it has aimed to commence and solidify the political basis of the institutionalised European cooperation. However, the last long decade presented an unprecedented series of crises and many external challenges to the European cooperation. In the face of – and also by using – these challenges, the European Parliament – and in some cases along with other European institutions – has aspired to formulate various proposals in an attempt to establish its own legitimacy – by envisioning the notion of the "European people" – from top to bottom, as well as to enhance its own position in the institutional setting of the European integration and vis-à-vis the Member States.

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33 Article 189 of the Maastricht Treaty (Nice consolidated version): "The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty."

34 Article 10 of the Treaty on the European Union: "1. The functioning of the Union shall be founded on representative democracy. 2. Citizens are directly represented at Union level in the European Parliament."

35 See, for example, BOROŃSKA-HRYNIEWIECKA 2017: 248.

36 The German Chancellor, Helmuth Kohl pointed out in 1989 that the unification of Germany and the unification of Europe are the two sides of the same coin, see for example: https://www.robert-schuman.eu/en/european-issues/0582-europe-as-a-power-european-sovereignty-strategic-autonomy-a-debate-that-is-moving-towards-an

During the 2019–2024 term, the European Parliament has discussed and prepared numerous documents and initiatives that aim not only to solidify but also to expand its competences and scope of actions along with the possible establishment of its institutional legitimacy. In its report on the stocktaking of the European elections, the European Parliament already emphasised its determination to reform the democratic process and institutional arrangement of the European Union.[37] The proposed changes to the European electoral system have included the introduction of the "lead candidate system" *("Spitzenkandidaten")*[38] as well as the "transnational list" as the hallway of a so-called European political space.[39] A related institutional question and proposal of the European Parliament is the shift in the role of the European Commission that continues to assume a more political character and responsibility towards the Parliament, while the Council undergoes a gradual transformation and becomes a second legislative chamber of the Union.[40] These initial considerations were further detailed in subsequent parliamentary documents. Accordingly, a separate report has been adopted about the election of the members of the European Parliament by direct universal suffrage.[41] The motion aimed to introduce a Union-wide constituency from which members are elected on the basis of transnational lists.[42] The European Parliament also adopted a resolution on its right of initiative.[43] The resolution reflects the longstanding demand of the majority of the European Parliament to acquire the competence to a general direct right of legislative initiative which would reflect – in their views – the nature of the institution. Interestingly, one of the main starting points of the resolution is the comparison of the constitutional traditions and systems of the Member States with the position of the European Parliament.[44] However, setting the Member States' governmental arrangements as an explicit objective to where the European Parliament shall aspire and position itself accordingly is somewhat misconstrued or misleading, since neither the Founding Treaties nor their interpretations by constitutional courts envision such an objective.[45] Even though the resolution refers to it,[46] it fails to elaborate on or show the reasons why the direct right of initiative in itself enhance the democratic legitimacy of the European

37 European Parliament 2020b.

38 See Navracsics 2020: 7–28.

39 See paragraphs W) and AD) as well as paragraphs 14–15 and 20 of the European Parliament resolution on stocktaking of European elections.

40 See paragraphs U) and 21 of the European Parliament resolution on stocktaking of European elections.

41 European Parliament 2020c. It was followed by the 2015 electoral law reforms proposal: https://www.europarl.europa.eu/thinktank/en/document/EPRS_IDA(2015)558775

42 See especially European Parliament 2020c, paragraph 19.

43 European Parliament 2022a.

44 See paragraph B) and points 1 and 3 of the explanatory statement of the resolution on the Parliament's right of initiative.

45 For example, in this decision on the Lisbon Treaty, the German Constitutional Court emphasised that peoples of the Member States retain the "democratic self-determination of a constitutional State" and therefore the European Parliament does not represent European people [Bundesverfassungsgericht – BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 – 421)]. Likewise, the Hungarian Constitutional Court also stressed that the Lisbon Treaty had not established a "superstate" and the national parliaments – based on restrictive and constitutional principles – actively control the common exercises of the competences of the European Union [Constitutional Court Decision no. 143/2010 (14.VII.)].

46 See paragraphs 24–26 of the resolution on the Parliament's right of initiative.

Parliament. Rather than exploring the question of the democratic debates of common European interests, the resolution focuses on a narrow question, namely the potential disciplinary role in rule of law and democracy debates on Member States and national governments as point of justification to introduce the general right of initiative.[47] The European Parliament also debated a resolution on the statute and funding of European political parties and European political foundations.[48] The proposed resolution strengthened the transnational dimension of the European political parties by the establishment of European authority or other requirements that support these objectives.

Beyond the recommendations and efforts of the European Parliament, the Conference on the Future of Europe that was organised between 2020 and 2022 also put forward similar conclusions.[49] The proposals that were adopted all point to the direction of an explicit "federalisation",[50] even though some of the recommendations mention the involvement of national political institution into the European politics.[51] The introduction of an EU wide – transnational – electoral list, the leading candidate system and the legislative initiative have been recurrent themes.[52] It also suggests the restructuring of the European institutions in a way to reflect the functions of a sovereign state.[53] The overall objectives of these recommendations are to create an autonomous European public space, strengthen its legitimacy and makes it more independent from the Member States by relying directly on the citizens. To this end, the recommendations include the re-opening of a discussion about a constitution[54] and re-launching the European Convention.[55]

Last but not least, the Franco–German Working Group on EU Institutional Reform (hereinafter: Franco–German Reform Paper) published in September 2023 contains a separate section on the European-level democracy, as it considers as one of the parts of the "heart of the debate" about the future of Europe.[56] The starting point of the Franco–German Reform Paper is that a continued "parliamentarisation" is needed as the "European elections remain largely focused on national issues with low visibility" since the "European (transnational) dimension of the European parliamentary election" is feeble.[57] However, instead of insisting on the proposition of the lead-candidate system, the Franco–German Reform Paper suggests an interinstitutional negotiation and agreement in regard to the election of the President of the Commission.[58] It admits that the instruments of participatory democracy – such as the European Citizen's Initiative,

47 See paragraph 5 of the resolution on the Parliament's right of initiative.
48 European Parliament 2022b.
49 The Conference on the Future of Europe was a joint initiative by the European Parliament, the Council of the EU and the European Commission, launched on 10 March 2021. See: https://www.consilium.europa.eu/en/policies/conference-on-the-future-of-europe/
50 Conference on the Future of Europe 2022: 79–84.
51 Conference on the Future of Europe 2022: 84.
52 See Conference on the Future of Europe 2022: 81, proposal no. 39.
53 Conference on the Future of Europe 2022: 83.
54 Conference on the Future of Europe 2022: 83.
55 Conference on the Future of Europe 2022: 84.
56 Franco–German Working Group on EU Institutional Reform 2023.
57 Franco–German Working Group on EU Institutional Reform 2023: 26.
58 Franco–German Working Group on EU Institutional Reform 2023: 27–28.

the petitions of the EP etc. – are underutilised and proposes their reinforcement also in areas that are traditionally belong to the domains of the Member States such as treaty reform or enlargement.[59] However, considering the politically controversial nature of the transnational list, the Franco–German Reform Paper rejects the idea for the time being.[60]

The common focus and directions of these reform aspirations to enhance democratic legitimacy is to increase the legitimacy of the inner or supranational institutions – especially the European Parliament and the European Commission – of the European Union by reducing their attachments to the institutional cooperation of the Member States and by strengthening the reliance on a transnational – or a Pan-European – political space and a hypothetical citizenry that are separate from the Member States' arrangements. Consequently, to a greater or lesser extent, they all propose in some forms the continuation of the failed Constitutional Convention of the early 2000s. Their main logic is that if the institutional setting is created from above, then the inner legitimacy will follow suit sooner or later. However, these proposed directions have difficulties to justify the link between the inability of the European Parliament to embrace questions of European interests, or becoming the main forum of debates on European questions and the lack of its transnational democratic legitimacy. Nor are they able to well justify that through a transnational political space, the European Parliament will be able to attract the attention of the peoples of Europe. Furthermore, these theoretical proposals also take it for granted that a single and Pan-European public space can emerge from Europe. In fact, despite all the efforts, the historical experience shows otherwise: since the beginning, the European public space has been built on the multitude of national political space and debates. The continuous increase of the competences of the European Parliament does not necessarily follow democratic legitimacy and voters' attention.

Alternative way(s) to increase democratic legitimacy: establishing the democracy of democracies

One of the essential characteristics of the European cooperation is that its Member States are all constitutional democracies. This is also a basic condition of the adhesion to the European cooperation according to the Copenhagen Criteria.[61] As a result, it is a cooperation of existing and functional national democracies that form and operate according to their own national public debates and public spaces. Furthermore, these national political systems have been integral parts of the institutionalised European cooperation, and have shaped its political directions.

These national democratic forums have found – and been provided – ways into the institutionalised European constructions and decision-making process since their early foundations. The Special Council of the Ministers was composed of national ministers,

59 Franco–German Working Group on EU Institutional Reform 2023: 28.
60 Franco–German Working Group on EU Institutional Reform 2023: 26.
61 See part I.

which became the predecessor of the Council of the European Union. The members of the democratically elected governments assumed legislative role since the early beginnings. The institutionalisation of the European summits within the framework of the European Council in 1974[62] not only provides a common platform for strategic governance of the European integration, but also serves as an important – and at the same time visible – bridge connecting the peoples of the Member States and the European institutions, and thus continuously infusing democratic legitimacy. In those circumstances, the democratic legitimacy lies in the democratic responsibility and accountability of the heads of states or governments to their national parliaments and peoples.[63] The parliamentary scrutiny is a fundamental guarantee of the separation of the constitutional functions between the executive and legislative powers that also include – albeit to a different extent – the scrutiny of the government participation in the institutional European cooperation. The extent of this scrutiny depends on the concrete constitutional setting and parliamentary tradition of the Member States. The Danish parliament, the Folketing for example has broad mandate to shape or determine the position of the Danish government in questions of European cooperation.[64] Therefore, in general terms, by increasing the scope and actual power of the parliamentary control and the oversight over the adoption of the government position, the governmental participation in the European decision-making will enjoy larger democratic legitimacy. This is all the more important since a fundamental constitutional requirement is that binding legal regulations or acts – including the European regulation – must be originated from the ultimate source of public authority that is popular sovereignty.

The engagement and oversight functions of the national parliaments are quite significant in terms of the characteristics of the European Council. It is the institutional forum that is in the position to decide the common political directions and development of the European cooperation. Furthermore, the regular summits of the heads of states and governments offer the attractions of the European politics that can gravitate the most media and popular attention. Among the few things that most people across the European countries are interested in, regarding European politics, are the debates lasting into late night, bargaining and hard compromises of the European Council meetings.[65] The European Council therefore gives significant actions by providing a forum to discuss the common questions and raise the interests of the peoples in European politics.

The second avenue for the national political systems to participate in the European politics is the more direct forms of participations of domestic parliaments in which they would represent a counterweight to the interests of the supranational institutions, such as the European Parliament or the Commission. Instead of providing democratic legitimation of the governmental cooperation, in this scenario the national parliaments would serve as a check on the supranational aspirations and might embody a "second chamber" of the European Parliament. Since 1989, the Conference of Parliamentary Committees

62 See: https://www.europarl.europa.eu/factsheets/en/sheet/23/the-european-council

63 See Treaty of Lisbon (2007/C 306/01) Article 8 A, paragraph 2: "Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens."

64 See Article 19 paragraph 3 of the Danish constitution.

65 See KALAS 2022: 53–69.

for European Union Affairs (COSAC) provided a consultative forum for members of the relevant committees of the national and European Parliaments. In addition to this, the Conference of the National Parliaments of the European Communities composed of the members of the national and European Parliaments, however, despite of an ambitious launch in the aftermath of the fall of the Berlin Wall, only held one meeting in November 1990. The difficulty of institutionalising this role of the national parliaments mainly lies in the opposition of the supranational institutions such as the European Parliament and the European Commission. As it was shown in the previous section, in the view of the European Parliament the citizens are represented by them while the Council should gradually evolve into a second chamber. However, their opposition has not taken into account that the European Parliament is yet unable – or at least has serious difficulties – to represent the interests or aspirations of the peoples of the Member States.

Certain roles of the national parliaments would have been introduced in the failed Constitutional Treaty and was introduced in the Lisbon Treaty.[66] The early warning system (hereinafter: EWS) or yellow card procedure have included the national parliaments in the European legislative process by providing them with the right to indicate whether a legislative proposal would fall under national competence and exceed the competence of the European Union. In this way, the national parliaments gained a right of subsidiarity control: the European Commission is required to send the "draft legislative acts" to the national parliaments who have eight weeks to formulate their opinions. If one third of the national parliaments state an objection, then the European Commission is required to review the draft legislation, however, the reasoned opinions of the national parliaments remain non-binding.[67] The EWS failed to live up to the original expectations: it has only been activated three times, and in none of these three occasions did the yellow card prompted the European Commission to withdraw its proposal based on subsidiarity control.[68] The EWS has been criticised for its weaknesses, including the short scrutiny period and the insufficient Commission feedback on parliamentary reasoned opinions.[69]

While the EWS put the national parliaments in a counterweight role, a fairly new initiative by some of the national parliaments called *"green card"* procedure could provide a more proactive role by granting them the indirect right to initiate legislative acts. The introduction of the green card procedure was first formulated in the 2013 COSAC meeting in Dublin.[70] Based on a green card initiative, the national parliaments can invite the European Commission to develop legislative initiatives and therefore are provided a greater influence on shaping the development of EU policies. As an indirect legislative mechanism, it can be dispatched within the infrastructure of the existing

66 See Protocol (No 2) to the Treaty on the European Union on the application of the principles of subsidiarity and proportionality.

67 In the case of the "orange card" procedure, the reasoned opinions of the national parliaments represent at least a simple majority of all the votes allocated to them, the European Commission must review the proposal and decide whether to maintain. See Protocol (No 2) to the Treaty on the European Union on the application of the principles of subsidiarity and proportionality.

68 See European Parliament 2022a.

69 Borońska-Hryniewiecka 2017: 248.

70 „[…] national parliaments should be more effectively involved in the legislative process of the EU not just as the guardians of the subsidiary principle but also as active contributors of that process." Contribution of the XLIX COSAC Dublin, 23–25 June 2013.

political dialogue without Treaty modification. Even though the smooth application of the green card procedure might require the modification of some of the EU and national constitutional provisions,[71] it can reinforce the connection between the EU and the peoples of the Member States by further involving the national political systems into the European cooperation. These institutional involvements therefore might also contribute to strengthening the democratic legitimacy of the European integration by offering the construction of procedural and institutional frameworks that can effectively reach out to the peoples of the Member States, and channel their viewpoints into the European decision-making and policy space. This, of course, stems from the recognition that the European Parliament has been struggling to embody the voices or channel the interests and aspirations of these peoples, nor has it been seen as their "own parliament". Also, from the experience that the concept of the "European citizen" does not coincide with the peoples of Member States. But this made the national political systems rival in the eyes of the European Parliament as this development might be seen as positioning one parliamentary system against the other.[72]

The involvement of national political systems – both the parliamentary scrutiny of the European Council and the legislative or supervision role of national parliaments – endeavour to remedy the lack of democratic control and legitimacy, as well as establish political leadership in a European cooperation whose scope has expanded beyond the economic and market integration. However, it is pursuing a different approach. Instead of reinforcing the competences of the supranational European Parliament, it complements it by relying and building on the existing and functional national democratic institutions: it endeavours to create a "democracy of national democracies" and reveals that democratic legitimacy of the European cooperation has various angles.

Conclusions

The question of democratic legitimacy has been increasingly present throughout the entire historical development of the European integration. On the one hand, members of the European cooperation are exclusively functional constitutional democracies, and it is considered as a basic requirement for accession. On the other hand, the notions of "democratic accountability" and "democratic deficit" aim to create the control of the supranational institutions of the European cooperation. The institutionalisation of the European Council and the introduction of the direct election of the Members of the European Parliament were both designed to shed better "democratic light" on the operations of the integration and make it more visible among the peoples and citizens of Europe. The watershed moment came with the fall of the Berlin Wall and of the Iron Curtain. The cooperation exceeded the framework of market integration and laid down the founding pillars of the political cooperation in the Maastricht Treaty. The Maastricht process would have fulfilled by the Constitutional Treaty that was designed to place the

71 Borońska-Hryniewiecka 2017: 254–257.

72 The European Parliament rejects or at least is deeply suspicious about the institutionalisation of the national parliaments. See, for example, Borońska-Hryniewiecka 2017: 259–260.

legitimacy of the European construction also on the European citizens. This process, however, was rejected.

At the same time, while the competences of the European Parliament has been continuously expanded in every treaty revision and it continues to be a central aspiration of the European Parliament since then, it remained largely unable – or at least has serious difficulties – to create the basis of democratic legitimacy of the European integration and become a central forum of questions of European interests. It is therefore questionable whether the current efforts and reform proposals of the European Parliament as well as of the supranational institutions can further enhance the democratic legitimacy of the EU only by themselves. Experiences show that the European public space is built on the existing national public spaces and democracies. Consequently, the involvement of national democratic and political systems including the national parliamentary control of the Council and of the European Council as well as the national parliamentary participation in the European decision-making process seem essential in enhancing democratic accountability. That can also complement the longstanding efforts of the supranational institutions to stand on stronger foundations. Strengthening the involvement of these systems and forums thus aim to give rise to the formation of a democracy of nations, while can also help the EU reinforce its own legitimacy vis-à-vis the citizens and peoples of Europe.

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Endre Orbán[1]

The Concept of Constitutional Identity as a Substantive Expression of the Principle of Subsidiarity

The introduction of the subsidiarity principle by the Maastricht Treaty was intended to strike a balance between the Member States and the supranational level in terms of non-exclusive competences. However, the principle of subsidiarity in the current EU structure is Janus-faced: although it was theoretically included in the founding treaty to protect the lower levels, its modus operandi is actually aimed at demonstrating the supranational level's capacity to act. Perhaps this is why the enshrinement of the subsidiarity principle in the Treaty has not lived up to expectations, and the relevant Treaty provisions have largely remained dead letters. At the same time, the need represented by the principle of subsidiarity, namely the protection of the autonomy of the Member States, remained present in European integration, which finally emerged in the concept of constitutional identity, linked to the redefined identity clause after the Lisbon Treaty. In this sense, the identity clause in Article 4(2) TEU has become the legal device or standard that is able to transfer the constitutional needs of the Member States to the level of EU law and provide the possibility for their recognition at EU level. For this to work, a cooperative approach by national constitutional courts seems essential.

Keywords: European Union, subsidiarity principle, constitutional identity, preliminary rulings, constitutional court

The unique structure of the European Union

As Azoulai and Dehousse put it, the European Union is a "paradise for lawyers".[2] To achieve their common objectives, the Member States have transferred powers to the European Union, which they exercise through a legal and institutional system established by

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2 Azoulai–Dehousse 2012: 354.

a specific type of international treaty.[3] The historic innovation of the European Union's legal order is precisely this special system of state cooperation, which is established on the basis of international law but does not operate on the basis of international law, but rather on the basis of a *sui generis* legal and institutional system. The EU can, therefore, be understood in terms of its unique in-between situation: it has long been more than an international organisation but still less than a state.[4] This in-betweenness has inspired a number of academic narratives, with a recurring question being the extent to which the EU can be interpreted through the tools of federalism studies. These include such ideas as legal federalism, in which the founding treaties can be seen as a functional constitution,[5] or the idea of federalism without federation,[6] and even a version of a dual *(layer cake)* or cooperative *(marble cake)* federalism, based on the development of the United States of America.[7]

The basis for these ideas can be traced back to the defining elements of federalism.[8] According to Riker's classic definition,[9] three conditions must be fulfilled to be a federal structure: first, there must be two distinct levels of government in a given geographical area (supranational level – Member State level); second, each level must have at least one autonomous power of its own (supranational and Member State exclusive powers); and finally, there must be safeguards that protect the autonomous powers of the governments (judicial procedures and principles). However, this also means that although the debates related to the 'f' dilemma[10] revolve around the concepts of statehood and sovereignty, in fact this dilemma can be put in brackets: the European Union is not a sovereign state,[11] while the *sui generis* theory[12] describing the European Union independently of the question of statehood allows the use of the adjective federal as a structural attribute instead of the noun of federation.[13]

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3 According to paragraph 157 of Opinion 2/13, "the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in van Gend & Loos, 26/62, EU:C:1963:1, p. 23; Costa, 6/64, EU:C:1964:66, p. 1158, and Opinion 1/09, EU:C:2011:123, paragraph 65)." ECLI:EU:C:2014:2454.

4 Sulyok–Orbán 2017: 117. According to paragraph 156 of Opinion 2/13, "unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State." ECLI:EU:C:2014:2454.

5 Bogdandy 2010: 1–2. Voigt 2012: 13–15. This is also referred to in the judgment of the Court of Justice of the European Union in the Les Vert case: "It must first be emphasised in this regard that the European Economic Community is a community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty." C-294/83. Les Verts v. Parlament ECLI:EU:C:1986:166, point 23.

6 Burgess 2006: 226.

7 Schütze 2009: 346.

8 Elazar: 1995: 5.

9 Riker 1964: 11.

10 Millet 2012: 53.

11 Schütze 2018: 263.

12 Schütze 2018: 73.

13 Lenaerts 1990: 205; Pernice 1999: 707; Weiler 2000: 2–4; Walker 2002: 27; Avbelj 2008: 5; Vauchez 2020: 22.

The use and erosion of the subsidiarity principle

The specific legal structure of the European Union means that it has both the strengths and weaknesses of federal structures. As far as the strengths are concerned, federal structures are typically created for two reasons: to counterbalance central power, as in the case of Germany (more a feature of *coming together federalism*), and to reconcile diversity, as in Bosnia and Herzegovina, Iraq or Belgium (more a feature of *holding together federalism*). Similar advantages can be mentioned in the case of the European Union: on the one hand, the founding treaties were created as a guarantee of peace after the Second World War, the instrument of which was the establishment of interdependencies between states,[14] and on the other hand, the motto of the European Union, "United in Diversity", refers to the pluralistic nature of an integrating Europe.

The greatest threat to the federal structure is that the levels involved may feel an urge to undermine its functioning. The top tier tends to overreach its defined powers, while the bottom tier can undermine the functioning of the structure by giving up its willingness to cooperate and shirking its responsibilities.[15] The identification of this danger draws attention to the second element of Riker's definition, the distribution of competences, and the third element, procedures for resolving conflicts between the different levels, and to the principles of guaranteeing order, such as the principle of subsidiarity. As regards the distribution of competences, the distinction between supranational and national competences was unclear for a long time. However, the focus on the appropriate level of action, and with it the focus on efficient operation, has been a relevant issue since the birth of the European Union. It is also at the core of the theory of *multi-level governance,* which is interested in partnership-based governance, the maximum development and exploitation of territorial capital and the optimal use of human resources. The need to clarify competences was already expressed in the Laeken Declaration and, after the rejected Constitutional Treaty, the Lisbon Treaty was intended to find a solution. Finally, the latter distinguished between so-called exclusive and shared competences, and competences to support, coordinate and complement the actions of the Member States and coordinate economic and employment policies.[16]

Several mechanisms for resolving conflicts between different levels – annulment procedure and the action for failure to act on the one hand and infringement proceedings on the other – have been institutionalised before the Court of Justice of the European Union (hereinafter: CJEU),[17] to which the subsidiarity principle has been added among the guarantee principles in the Single European Act in relation to environmental protection. It was subsequently enshrined as an overarching principle in the Maastricht Treaty,[18] at the birth of the European Union, as a counterweight to integration, designed

[14] Mitrany 1966.

[15] Kelemen 2007: 53.

[16] Király 2005; The Committee of the Regions' White Paper on multilevel governance: http://www.cor.europa.eu/pages/DocumentTemplate.aspx?view=detail&id=31bc9478-1acb-4870-999d-cc867f1925f6. Craig 2004: 323; Craig 2008: 137.

[17] Orbán 2021: 71.

[18] Article 25(4) of the Single European Act and Article 3b(2) of the Treaty establishing the European Community.

to protect the competences of the Member States.[19] The introduction of the principle of subsidiarity by the Maastricht Treaty was intended to strike a balance between the Member States and the supranational level as regards non-exclusive competences.[20]

Under the current Treaty definition

> "[u]nder the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[21]

There are two tests hidden in this formulation. The first is the test of inadequacy of the national level, meaning that the EU shall act "when" the lower levels cannot provide a satisfactory solution in a particular area. The second is the test of comparative effectiveness, whereby the EU shall act "only if and in so far as" the action in question can "be better achieved at Union level".[22]

The enshrinement of the subsidiarity principle at the level of the founding treaty also ensured its enforceability before the CJEU. However, Protocol No 2 to the Lisbon Treaty not only provides for a judicial, *ex-post* possibility to examine subsidiarity, but also a political, *ex ante* mechanism.[23] Under the Protocol on the application of the principles of subsidiarity and proportionality, national parliaments became the custodians of subsidiarity control, which was also intended as a solution to the so-called democratic deficit by integrating national parliaments into the EU's decision-making procedure. This means that an *early warning mechanism* involving national parliaments can be successful if several national parliaments (or their chambers) present a reasoned opinion, which can trigger what are metaphorically known as the yellow or orange card mechanisms, which can get a draft legislative act taken off the agenda.[24]

However, the effectiveness of both mechanisms has become questionable by now. On the one hand, the horizontal communication of national parliaments is difficult,[25] as shown by the fact that, since its introduction in 2009, not even a single orange card procedure was initiated by national parliaments.[26] On the other hand, experience also raises questions about the enforceability of the subsidiarity principle before the CJEU. The restrictive interpretation of the CJEU[27] came to light relatively early on, when the CJEU concluded, without further analysis, that the EU legislator had paid sufficient

19 Estella 2003: 179.
20 "Subsidiarity comes into play when competence is not exclusive." Minnerath 2008: 54.
21 Article 5(3) of the Treaty on European Union [TEU].
22 Schütze 2018: 257.
23 Tamás 2010: 7–23.
24 Jančić 2015: 940.
25 The Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) is the key institution for communicating between national parliaments.
26 To date, the yellow card procedure has been triggered three times in total: the first on the so-called Monti II Draft Regulation, the second on the establishment of the European Public Prosecutor's Office and the third on the Posted Workers Directive. Barrett 2016: 433; Kecsmár 2022: 56–58.
27 Toth 1994: 268.

attention to the subsidiarity principle in the context of a directive.[28] Beyond the formal fulfilment of the obligation to state reasons, the CJEU has not undertaken any quantitative or qualitative analysis when carrying out the substantive tests of Article 5(3) TEU, so, putting the second test in brackets and focusing only on the first test, it is content to leave the Council with a wide discretion as to what area it considers to be in need of EU level legislation.[29] Consequently, the CJEU has reduced the level of subsidiarity scrutiny to whether the EU legislature has committed a manifest error or misuse of powers, or whether the institution in question has manifestly exceeded the discretion conferred on it.[30]

One of the reasons for the low threshold set by the CJEU may be the statement made by Antonio Tizzano, an Italian judge at the 2010 Madrid Congress of the International Federation of European Law (FIDE), on the subsidiarity scrutiny, which he said was "a political question *par excellence*".[31] However, in addition to the difficulty of using the concept, the enforceability of the subsidiarity principle is also hampered by the fact that while subsidiarity can, in principle, be invoked in the interests of the Member States,[32] in the EU it is in fact used as an effective justification for greater integration: what needs to be justified in the case of the draft legislation is that "the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level". In the light of all this, it is safe to assume that the concept of subsidiarity in the current EU structure is *Janus-faced*;[33] although it was theoretically included in the founding treaty to protect the lower levels, its modus operandi is actually aimed at demonstrating the supranational level's capacity to act.

"Repackaging" the substantive needs hidden in the principle of subsidiarity

To understand the problem rooted in the dual nature of the principle of subsidiarity, it is necessary to return to the original meaning of the concept. The principle of subsidiarity is not a legal concept, but is essentially a social-philosophical one, which Aristotle himself had already called for.[34] If we approach the concept from an etymological point of view,[35] it is basically focused on helping the individual, a kind of "help for self-help".

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28 C-233/94. Germany v. European Parliament and Council ECLI:EU:C:1997:231. Similarly, see C-377/98. Netherlands v. European Parliament and Council ECLI:EU:C:2001:523; C-508/13. Estonia v. European Parliament and Council EU:C:2015:403.

29 C-84/94. United Kingdom v. Council ECLI:EU:C:1996:431; C-491/01. R v. Secretary of State for Health, ex parte Imperial Tobacco ECLI:EU:C:2002:741. 177–185.

30 de Búrca 1993: 105.

31 Juhász-Tóth 2011: 43–47.

32 This is also confirmed by the second sentence of Article 1 TEU, which states that it "marks a new stage in the process of creating an ever-closer union among the peoples of Europe, *in which decisions are taken as openly as possible and as closely as possible to the citizen*". (Emphasis added by the author.)

33 Paczolay 2006: 69–70.

34 Pálné Kovács 2006: 288.

35 Sorondo 2008: 63.

The term subsidiarity derives from the Latin *subsidium,* which means "reserve", and figuratively "help" or "assistance". From the point of view of the larger scale levels, the idea is that, through decentralisation, initiatives from lower levels relieve the burden on higher levels. Subsidiarity is therefore closely linked to the principle of the common good and the idea of solidarity: the common good can be achieved through the division of labour and cooperation between the members of a community built on the principle of solidarity.[36] This makes it unlawful to pass on to the larger community the tasks that can be carried out at the lower level, the idea being that if the state consistently applies the principle of subsidiarity, it will operate more efficiently, as the higher levels will not have to deal with issues that smaller communities are able to deal with appropriately. As a result, this perspective sees the principle of subsidiarity as a positioning of the lower levels meaning that the further we move towards larger scale communities, they must strive to create the right conditions for the lower levels to flourish.

However, the European Union is not a structure fragmented from the centre, where tasks are delegated downwards, but rather a *coming together* structure where, in accordance with the principle of conferral, it is precisely the delegation of tasks to the supranational level that must be justified. This reverse-perspective structure was intended to incorporate the principle of subsidiarity as a kind of restraining mechanism to protect the Member States' room to manoeuvre when the European Union was created in 1992. Nevertheless, it seems that the application of the principle does not reflect its original philosophical meaning of assistance and enabling.[37] While the principle of subsidiarity has been interpreted in the European Union as a fundamentally formal and jurisdictional, if you like, technical, state-organisational element, legitimising the possibility of action at the supranational level on the basis of efficiency considerations, the philosophical concept of the principle has a reverse optic, focusing on the autonomy, identity and development of smaller-scale communities. Perhaps, this is why the latter concept of subsidiarity,[38] which formulates substantive requirements, found its place not in the originally intended subsidiarity scrutiny, but in the concept of constitutional identity, and has risen especially after the adoption of the Lisbon Treaty, which redefined the treaty clause on the protection of national identity.[39]

The close link between subsidiarity and constitutional identity has already been discussed in the literature since the Amsterdam Treaty.[40] However, the nexus has not received much attention, which may be related to the rather "decorative nature" of the early formulation of national identity, as evidenced by the small number of cases before the Court of Justice of the European Union. However, especially because the ordinary legislative procedure became the default rule which went together with the almost complete abolition of the veto rights, Member States continued to insist on the need to

36 Minnerath 2008: 45–57.

37 "Subsidiarity is synonymous with auxiliarity." Minnerath 2008: 53.

38 Similarly, a distinction can be made between the terms top-down regionalisation, which is purely technical and modernising, and bottom-up regionalism, which values localism and is linked to a sense of identity and community self-organisation, and is of a permanent nature. Sterck 2018: 281.

39 Cloots 2016: 96.

40 "The principle of subsidiarity is closely linked to this obligation of the Union and its institutions [the Union shall respect the national identities of its Member States]." Pernice 1999: 742.

strengthen their position with a more detailed identity clause[41] resulting in the current wording of Article 4(2) TEU in 2009. According to this, "the Union shall respect the equality of Member States […] as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".

The increasing importance of constitutional identity in the EU context has been pointed out in the literature, for example by Michel Troper, who argues that identity means the highlighting of some constitutional principles, the function of which is, on the one hand, to distinguish the constitution from other constitutions and, on the other hand, to be used to defend the constitution.[42] In this context, he also examined the "principle of a common constitutional tradition" developed by the CJEU as a way of capturing the common denominator of the separate constitutions of the Member States. An important difference, however, is that while national constitutional identities can be detected "within national constitutions", common constitutional traditions can be detected "between national constitutions". Moreover, they have different functions: the constitutional identities of Member States identify the essential content of the constitution concerned in order to distinguish between permissible and impermissible delegations of powers towards the supranational level,[43] whereas the function of the common constitutional traditions is to create a kind of constitutional legitimacy.

Nevertheless, unlike the subsidiarity principle, the concept of constitutional identity has legal theoretical significance as it challenges the principle of the supremacy of EU law, according to which "the validity of a community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure".[44] While the supremacy of EU law over the so-called ordinary law is generally recognised in the Member States of the European Union,[45] this relationship is much more diverse in terms of the constitutional laws of the Member States. Examining the latter, Christoph Grabenwarter classified the Member States into three groups.[46] According to this classification, some Member States, such as the Netherlands, which has a monist legal system, fully recognise the primacy of EU law as one not derived from the constitution, but as a given, derived from EU law. This means that there can be no conflict of laws between EU law and the national constitution following the transfer of competences based on an international treaty, which was adopted by

41 CONV 375/1/02 REV 1. 12: https://data.consilium.europa.eu/doc/document/CV-375-2002-REV-1/en/pdf

42 Troper 2010: 195, 202.

43 Sajó–Uitz 2017: 65.

44 C-11/70. Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle für Getreide und Futtermittel ECLI:EU:C:1970:114. point 3. The decisions following the entry into force of the Lisbon Treaty confirmed the previous doctrine, see C-409/06. Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim ECLI:EU:C:2010:503. paragraph 61: "The provisions of national law, even at constitutional level, cannot be allowed to have a negative impact on the coherence and effectiveness of EU law." For similar reasoning, see C-399/11. Stefano Melloni v. Ministerio Fiscal ECLI:EU:C:2013:107. paragraph 59.

45 de Witte 2021: 212.

46 Grabenwarter 2010: 85–91.

a two-thirds majority in the Dutch Parliament.[47] In contrast, another group of Member States recognise the limited supremacy of EU law over constitutional law: in their case, the supremacy of EU law over the constitution is also guaranteed by the national constitution, but with restrictions, in other words with constitutional reservations. This group includes, for example, Italy (*contro-limiti* doctrine),[48] Spain (recognition of *primacía,* but maintaining the *supremacía* of constitutional law),[49] and also Germany. Finally, the third group includes those Member States that clearly give primacy to the constitution. In this context, the author mentions Greece and France.

The latter two groups are of particular relevance to our topic, since both of them contain the formulation of a reservation related to constitutional identity. If we compare two founding Member States from the latter two groups, we can see that the German and French constitutional protection bodies have formulated different doctrinal responses to the protection of constitutional identity,[50] which have been determined in their elaboration by their constitutional culture, their different procedures and, obviously, by the petitions put before them.

L'identité constitutionnelle

In the jurisprudence of the *Conseil constitutionnel,* the issue of constitutional identity, formulated as inherent rules and principles of constitutional identity *(règles et principes inhérents à l'identité constitutionnelle de la France)* appeared in decision 2006-540 DC,[51] after which it was raised as a limitation of EU law in about fifteen other decisions. With its 2006 decision, the French Constitutional Council was the first among the bodies performing constitutional court functions to formulate a limitation of this type. The source of inspiration for this, as the official commentary on the case[52] points out, was the Treaty establishing a Constitution for Europe, from which the clause on the protection of national identity was later transferred to Article 4(2) TEU as well.

The late emergence of the examination of constitutional identity is probably due in part to the trivial reason that this conceptual construct simply did not arise in the context of EU law earlier,[53] but it has come to the fore during the debates taking place within the framework of the European Convention.[54] All this was further facilitated by the introduction of Article 88-1 of the Constitution, linked to the Maastricht Treaty, which created the possibility for the Constitutional Council to contribute to ensuring the effective application of EU law and to the control of its constitutionality. Prior to this, as Anne Levade notes,[55] the relationship between the Constitutional Council

47 VAN DER SCHYFF 2021: 340.
48 FABBRINI–POLLICINO 2021: 210.
49 Decision No. 1/2004 of the Spanish Constitutional Court, 13 December 2004.
50 MILLET 2013: 27, 87.
51 2006-540 DC 27 July 2006, paragraph 19.
52 Conseil contitutionnel 2006: 5.
53 DUBOUT 2010: 453.
54 The European Convention 2002: 12.
55 LEVADE 2009.

and the CJEU was characterised mostly by ignorance and mutual trivialisation, as is illustrated by the fact that the Constitutional Council did not react to the CJEU's Costa and Van Gend & Loos judgments and simply considered EU law as international law. This means that the Constitutional Council, on the basis of Article 54 of the Constitution, in accordance with the monist doctrine, only examined whether international treaties, such as the EU founding treaties and their amendments, which are interposed between the Constitution and national legislation, are constitutional; in other words, whether the commitments contained in them may pose a threat to the essential conditions for the exercise of sovereignty *(les conditions essentielles d'exercice de la souveraineté nationale)*.[56]

However, the emergence of Article 88-1 of the Constitution prompted the Constitutional Council to review its previous practice, as the constitutionality of several French laws implementing various directives was referred to the Constitutional Council in 2004.[57] The panel concluded that recognition of the constitutionality of a law transposing a directive could be refused if an EU standard satisfying the conditions for direct effect was in concrete contradiction with an express provision of the Constitution *(disposition expresse contraire de la Constitution)*.[58] This test, used three more times in 2004,[59] was changed in 2006 to "inherent rules and principles of constitutional identity". According to the new doctrine, the constitutionality of an implementing law can be called into question if the constitutional "hard core" is violated by the directive's provisions having direct effect, as included in the transposing law; in other words, by the sufficiently clear and unconditionally applicable provision of the directive.

The introduction of the so-called priority constitutionality question (*question prioritaire de constitutionalité,* QPC) in Article 61-1 of the Constitution in 2008 promised to be a further significant step in the examination of the constitutionality of transposing legislation. Based on this provision, both supreme courts – the Cour de Cassation, at the top of the ordinary courts, and the Conseil d'État, at the top of the administrative courts – can initiate *ex-post* norm control of laws if a party to the proceedings claims that the law applied infringes their right or freedom guaranteed by the Constitution. However, in order for the judiciary to initiate proceedings before the Constitutional Council, they themselves must first assess the constitutionality of the transposing legislation. However, it appears from the 2007 *Arcelor judgement* of the Conseil d'État that the level of protection under EU law is not assessed in the context of safeguarding fundamental rights; instead, all that needs to be examined is whether the constitutional principle allegedly infringed is also protected by EU law and, if so, to presume that the appropriate level of protection is met.[60] Later, in line with this, the Constitutional Council also found that it lacked competence with regard to the principles of freedom of expression, freedom of opinion and freedom to conduct a business, as these are also guaranteed by EU law.[61]

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56 The first appearance of this test is linked to the examination of the Treaty of Luxembourg of 22 April 1970 amending certain budget provisions: 70-39 DC 19 June 1970, paragraph 9.

57 Guerrini 2015: 157.

58 2004-496 DC 10 June 2004, paragraph 7.

59 2004-497 DC 1 July 2004, paragraph 18; 2004-498 DC 29 July 2004, paragraph 4; 2004-499 DC 29 July 2004, paragraph 7.

60 Dubout 2010: 454.

61 2018-768 DC 26 July 2018.

However, it also follows from this assertion of the principle of equivalence that only principles and rules that are not guaranteed by EU law can in fact form an inherent part of constitutional identity. In other words, constitutional identity is a narrow concept, the content of which may be some specific constitutional provision that applies only to a given Member State.[62]

Nevertheless, the Constitutional Council did not give a definition or examples of the content of constitutional identity, but instead expressed the negative expectation that the implementation of the directives and the national regulations implementing other EU acts shall not infringe the constitutional identity of France. Moreover, it is always reiterated that even if such a principle or rule were to be infringed, it is not an absolute barrier to the application of EU law, since the infringement can be remedied with the consent of the constituent power *(sauf à ce que le constituant y ait consenti)*.[63] According to the sovereign understanding of the constituent power, the Constitutional Council does not examine the constitutionality of constitutional amendments,[64] therefore if it finds a breach of the Constitution due to EU law – whether an amendment to the founding treaty or secondary EU law – it leaves it to the sovereign decision of the constituent power to resolve the conflict of laws.

Verfassungsidentität

Until the adoption of the Maastricht Treaty, the German *Grundgesetz* did not contain a separate European clause, but EU membership was made possible on the basis of transferring sovereign powers to international organisations, as ensured under Article 24.[65] Since the German legal system can be described as moderately dualistic in its approach to the enforcement of international law, international commitments must be incorporated into the German legal system by separate legislative acts, such as the Act of 27 July 1957 ratifying the Treaty of Rome.

The standalone European clause was finally included in Article 23, according to which the Federal Republic of Germany contributes to the realisation of a united Europe through the establishment of the EU. At the same time, the clause also defines the core of the German constitution that cannot be affected by integration, by referring to the eternity clause of the Basic Law, Article 79(3).

In the context of EU membership, the idea of the protection of constitutional identity *(Verfassungsidentität)* is only mentioned in the Constitutional Court's decision revising the Lisbon Treaty,[66] but, independently of this conceptual construction, the concept of identity[67] has already appeared in the earlier Constitutional Court decisions formulating another reservation. These earlier decisions are also of particular importance, because it was in the German context that the absolute understanding of the principle

62 Guerrini 2015: 159–160.
63 Dubout 2010: 453; Levade 2009.
64 DC 2003-469 26 March 2003, paragraph 2.
65 Vincze–Chronowski 2018: 53.
66 BVerfGE 123, 267.
67 Polzin 2016: 418–421.

of primacy was formulated by the CJEU, according to which the fundamental rights contained in the German Basic Law could not constitute an obstacle to the application of EU law. Following the judgment in the Internationale Handelsgesellschaft case,[68] the Frankfurt Administrative Court referred the matter to the Federal Constitutional Court for a review of the Community regulations. The resulting *Solange I* decision of 1974[69] included the so-called *fundamental rights reservation,* in which the Karlsruhe panel, for the first time, emphasised the protection of identity *(die Grundstruktur der Verfassung, auf der ihre Identität beruht).* According to this, since Article 24 of the Basic Law does not allow the ratification of an international treaty that would result in a change of the basic constitutional structure, it follows that, in the framework of an international treaty that has already been ratified, no secondary law may be created that conflicts with the identity based on the basic structure.

This reasoning also implies that, in the early stages of integration, the mention of possible violations of identity was in fact an expression of the need for further deepening of integration, for the development of a fundamental rights dimension. In comparison, the test of constitutional identity developed by the Federal Constitutional Court in the Lisbon Decision has an integration-limiting character: it defends the constitutional autonomy of the Member States against European integration.[70] The identity check allows the Constitutional Court to examine whether the inviolable provisions of the Constitution have been violated.[71] A possible change of identity would mean a takeover of the constituent power, which would mean the erosion of the principle of democracy and the right to vote guaranteed by Article 38 of the Basic Law,[72] which also provides the basis for constitutional complaints against acts of public power by the EU.

In addition to the eternity clause of the *Grundgesetz,* the Lisbon Decision named five further areas related to constitutional identity as a guarantee of the framework of democratic statehood: criminal law, the monopoly on the use of military and civilian forces, basic financial decisions of state operations, decisions on living conditions that can be guaranteed within the framework of the welfare state, and the shaping of areas of particular cultural importance such as family law, religious communities and the school and training system. Matthias Cornils sees these areas as the substantive limits to integration.[73] The German panel argued that the transfer of powers by sovereign states cannot be achieved without leaving sufficient room for manoeuvre *(ausreichender Raum)*[74] for the Member States to determine the political direction of economic, cultural and social life. The EU institutions must therefore use the powers delegated to them, especially in the area of freedom, security and justice, in a way that maintains the framework conditions for a living democracy *(lebendige Demokratie)* at national level.

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68 C-11/70. Internationale Handelsgesellschaft mbH kontra Einfuhr- und Vorratsstelle für Getreide und Futtermitte ECLI:EU:C:1970:114.

69 BVerfGE 37, 271.

70 Besselink 2010: 36.

71 Vosskuhle 2010: 196–198.

72 Grimm 2009: 360–362.

73 Cornils 2017b: 856.

74 Cornils 2017a: 249.

In its decision, the Constitutional Court also referred to the fact that the protection of identity is also guaranteed by Article 4(2) TEU;[75] however, in its request for a preliminary ruling in the OMT case, it explained that national identity as per Article 4(2) TEU is not the same as the concept of constitutional identity, since the latter requires absolute protection, which is the task of the Constitutional Court.[76] Nevertheless, the reservation based on constitutional identity – just like the *ultra vires* control mechanism developed in the Maastricht Decision[77] – must be applied in an integration-friendly manner, initiating, where appropriate, a preliminary ruling procedure.[78] The interpretation given by the CJEU must be respected by the Constitutional Court until it appears to be objectively arbitrary *(objectiv willkürlich)* on the basis of the methodology used.[79]

What can we learn from French and German jurisprudence regarding constitutional identity?

A comparison of the French and German interpretations of the concept of constitutional identity allows us to make some important observations.

First, it shows the different nature of the concept in the EU Member States, as the French and German bodies have formulated different dogmatic responses to the protection of constitutional identity. The French constitutional identity focuses on the special national characteristics, as opposed to the German eternity clause, which stipulates general values such as respect for human dignity.

In this respect, it is worth pointing out that Pierre Mazeaud, former President of the *Conseil constitutionnel,* considers that the French constitutional identity is in fact the very essence of the Republic *(essentiel à la République)*.[80] In line with this, the literature suggests that the French constitutional identity is rather the identity of the state,[81] as opposed to the German constitutional identity, which is the identity of the constitution. The key to the latter is the application of the principle of democracy, democratic legitimacy and, ultimately, the right to vote and the community of German citizens exercising it. This can also be linked to the constitutional models of Rosenfeld, who distinguished between the French and German models within the seven constitutional models. The

75 BVerfGE 123, 267. 240.
76 BVerfGE 134, 366. 29.
77 BVerfGE 89, 155.
78 BVerfGE 142, 123. 156.
79 However, the Constitutional Court did not initiate a preliminary ruling when it blocked a European arrest warrant in a December 2015 decision on the grounds of a breach of German constitutional identity. (2 BvR 2735/14.) At the same time, for another European arrest warrant issued in 2017, the case was referred back to the Hamburg Court for a preliminary ruling to clarify the circumstances of the surrender. (2 BvR 424/17.) Furthermore, it initiated a preliminary ruling in the PSPP case, in which the Federal Constitutional Court, making use of its *ultra vires* test, declared the CJEU's Weiss judgment to be arbitrary (2 BvR 859/15.).
80 Josso 2008: 198.
81 Somssich 2018: 16.

former is based on the statehood defined by the territory as uniting the *demos* living there, while the latter is ethnically based, as it is the *ethnos* that defines the common statehood.[82]

Second, the two concepts of identity presented here also indicate that the existence of the eternity clause does not necessarily lead a constitutional court to identify it with the concept of constitutional identity: Article 89 of the French Constitution has such a character, but the French Constitutional Council – unlike the German body – did not link the two elements. This may be related to the relationship of the two constitutional identity concepts to their historical context: while François-Xavier Millet argues that the identity of the Republic has its roots in the French Revolution,[83] the German eternity clause, formulated after the Second World War, is meant to symbolise the rejection of the historical context.

Third, and closely following from the previous point, it is important to stress that the German concept of constitutional identity is much less flexible than the French one:[84] while in France any identity violation can be eliminated by a constitutional amendment, according to the German doctrine such a thing cannot take place, since the constitutional identity connected to the eternity clause constitutes an absolute limit of EU law *("absoluten Grenze" der Grundsätze der Art. 1 und Art. 20 GG).*[85] This absolute character also means that the concept of identity formulated in this way is potentially more conflictual.[86]

Fourth, it is also important to stress that the likelihood of conflicts depends on the narrow or broad understanding of the concept of identity: the fewer and more specific elements fill the national concept of constitutional identity, the more any possible norm-collision situations may appear capable of being moderated. In this respect, however, it is also worth pointing out that the narrowly conceived but undefined concept of French identity[87] is open to the Constitutional Council's examination in new contexts, as evidenced by the expansive practice of recent years: while the 2006 decision was only aimed at reviewing national legislation transposing directives and, in the context of that review, only the provisions that satisfied the conditions of direct effect, the examination of the breach of constitutional identity was extended in 2017 to the international agreement concluded by the EU through the free trade agreement with Canada (CETA),[88] and in 2018 to national provisions implementing the GDPR Regulation in national law,[89] and to national acts implementing the unconditional and precise provisions of EU decisions.[90] However, in none of the cases examined so far has the Constitutional Council

82 Rosenfeld 2010: 152–158.
83 Millet 2019: 148.
84 Reestman 2009: 384.
85 BVerfGE 153.
86 Both the *ultra vires* control and the identity control may lead to the Federal Constitutional Court declaring the secondary EU act inapplicable *(für unanwendbar erklärt werden)* BVerfGE 142, 123. 155.
87 For example, the official commentary to DC Decision 2008-564 refers to the principle of laicity as part of constitutional identity: Conseil contitutionnel 2008: 8.
88 2017-749 DC 31 July 2017.
89 2018-765 DC 12 June 2018.
90 2018-750/751 DC 7 December 2018.

found a violation of the inherent principles and rules of constitutional identity, unlike the 2015 decision of the German Federal Constitutional Court.[91]

Finally, it is worth drawing attention to the explicit nature of the German concept of constitutional identity, which has been identified through specific constitutional rules and which, by naming the five specific areas of statehood identified in the Lisbon Decision, seems to be close to a substantive approach to the principle of subsidiarity.[92] The German doctrine, which is based on the principle of democratic legitimacy, not only implies that democratic legitimacy is necessary for the possible transfer of new EU competences, but also requires that the citizens' right to vote is not emptied by leaving national institutions without sufficient power of disposal.[93] The issue of scale brings the concept of identity closer to the principles of subsidiarity and proportionality, which thus protects the room for manoeuvre of the Member States, which must be maintained even while participating in European integration and which is at the heart of maintaining statehood capable of democratic decision-making.[94]

Final thoughts

The enshrinement of the subsidiarity principle in the Treaty has not lived up to expectations, and the relevant Treaty provisions have remained largely dead letters. At the same time, the need represented by the principle of subsidiarity, namely the protection of the autonomy of the Member States, remained present in European integration, which finally emerged in the concept of constitutional identity, linked to the redefined identity clause after the Lisbon Treaty.[95] In this sense, the identity clause in Article 4(2) TEU has become the legal device or standard that is able to transfer the constitutional claims of the Member States to the level of EU law, and provide the possibility for their recognition at EU level. For this to work, a cooperative and proactive approach by national constitutional courts seems essential.

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91 2 BvR 2735/14.

92 On one occasion, Advocate General Kokott also referred to a possible infringement of the identity clause in Article 4(2) TEU during the discussion of the subsidiarity test. She believed that a stricter application of the subsidiarity test would require some kind of substantive, identity-based violation to be alleged. Moreover, if there is a dispute as to whether the substantive requirements of the subsidiarity principle have been respected in the application of Article 114 TFEU on the approximation of laws, the review must be carried out primarily at the political level, with the involvement of national parliaments. C-358/14. Republic of Poland v. Parliament and Council ECLI:EU:C:2016:323.

93 Spieker 2020: 367.

94 van der Schyff 2021: 332.

95 „One of the major constitutional problems for any multilevel system of governance is creating an appropriate and clear division of powers. Notwithstanding this, provisions on competencies—like fundamental rights or the institutional setting—clearly have a constitutional character. Here again, the Treaty of Lisbon provides for major progress in transparency and legal certainty by giving procedural teeth to the principle of subsidiarity, clarifying the guaranty for the respect of Member States' national identities, and spelling out the system of conferred competencies." Pernice 2009: 391.

In theory, there are four ways for national constitutional courts to deal with EU law: they may ignore EU law related issues, they can take a fully pro-EU approach,[96] oppose EU law, or engage in dialogue. The latter can be done either informally or in a formalised manner. On the one hand, constitutional courts may take into account the growing jurisprudence of the CJEU on national identity under Article 4(2) TEU,[97] whereby constitutional courts may determine, on the basis of the available CJEU decisions, whether a possible objection based on the protection of identity is theoretically admissible. However, this can be seen less as a dialogue than as a technique of argumentation, similar to the way in which a constitutional court might cite decisions of the European Court of Human Rights or other constitutional courts.[98]

On the other hand, the request for a preliminary ruling can be considered as the formal, genuine version of the dialogue.[99] There are three advantages of the procedure that are worth highlighting. First, the CJEU needs a credible source of information in order to take into account possible constitutional claims of Member States in cases before it, and in this respect, constitutional courts can take advantage of the preliminary ruling procedure as a channel for information. Second, the transmission of elements of national constitutional traditions towards the CJEU can strengthen the inclusiveness and legitimacy of the EU legal order, as the CJEU can no longer refer only to the common constitutional traditions in its judgments. Finally, the procedure also has the function of neutralising potential conflicts and collisions of norms since constitutional courts can indicate to the CJEU the elements of their constitutional systems that require identity protection.

While the use of the preliminary ruling procedures by constitutional courts is still rare, the trend is growing,[100] and more and more constitutional courts are turning to the CJEU to articulate constitutional concerns of Member States, the most notable example being the Italian Taricco II case.[101] Similarly to the spread of the concept of constitutional identity in Europe,[102] it seems that involvement in the preliminary ruling procedure can also be seen as a trend: fourteen[103] of the eighteen constitutional courts in the European Union have already declared their commitment to the spirit of cooperative constitutionalism by engaging in this formal dialogue.[104]

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96 Such is the case of the Austrian Constitutional Court, which adopted a landmark decision regarding the relationship between national law and the Charter of Fundamental Rights, which in 2012 ruled that the EU Charter of Fundamental Rights has the same status as the Austrian Constitution and that, in addition to the substantive scope of Article 51 of the Charter, all Austrian legislation and administrative acts must comply with it. U 466/11-18, U 1836/11-13, 14. 03. 2012.

97 Orbán 2022: 142–173.

98 Decisions on German constitutional identity have also been taken as a reference by the Czech, Spanish and Hungarian Constitutional Courts, as well as by the UK Supreme Court. van der Schyff 2021: 324.

99 2 BvR 424/17, Röss 2019: 39, Várnay 2022: 99.

100 Sulyok–Kiss 2019: 395–417.

101 C-42/17 Criminal proceedings against M.A.S. and M.B. ECLI:EU:C:2017:936.

102 Calliess – van der Schyff 2019.

103 The constitutional courts of the following Member States have referred a request for a preliminary ruling to the CJEU: Austria, Belgium, France, Poland, Latvia, Lithuania, Luxembourg, Germany, Italy, Portugal, Romania, Spain, Slovakia and Slovenia. Pivoda 2023: 7.

104 Ingolf Pernice sees the resolution of constitutional conflicts through dialogue as a shared responsibility of the courts, see Pernice 2013: 64.

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Pope Leo XIII's Legacy in European Union Law – The Origin and Practice of the Subsidiarity Principle in European Union Decision-Making

The principle of subsidiarity, which also appeared in antiquity, was refined and perfected by the Catholic Church. The essence of the principle of subsidiarity is to ensure that decision-making takes place as close as possible to the individuals, thus avoiding unnecessary centralisation and encouraging effective decentralisation. The rationale behind this principle is the recognition that higher levels of government do not always have an adequate level of insight or understanding of local realities, and that decision-making should therefore be taken at the lowest possible level of authority to achieve the best quality of governance.

The principle of subsidiarity is a fundamental principle of the European Union's decision-making system. A return to subsidiarity can play an important role in the constitutional disputes that have been revived in recent years between national constitutional courts and the Court of Justice of the European Union. This paper analyses the evolution of the subsidiarity principle in EU decision-making and the institutions and procedures that are supposed to guarantee its application. By examining the political and legal enforceability of the principle of subsidiarity, the paper draws conclusions on the present state of the enforcement of the principle and makes some proposals for the future.

Keywords: subsidiarity, European law, European Union, common European values, decision-making

Introduction

The term subsidiarity derives from the Latin *subsidium,* which means help or assistance; accordingly, the word *subsidiarius* means to help out.[2] According to the Hungarian Catholic

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[2] Tótfalusi 2008.

Lexicon, the principle of subsidiarity is "one of the basic principles of Christian democracy, according to which what a given organisational level can solve, a higher level is not entitled to decide".[3] The text adds that "higher levels of organisation are responsible for helping and supporting self-organisation and deciding on issues that clearly cannot be dealt with at local level". The principle of subsidiarity in the social organisation and political sense can therefore be defined as "the principle that all decisions and implementation shall be taken at the lowest possible level, where the greatest expertise is available".[4]

The principle of subsidiarity, although often not in a denominated form, has been present in the organisation of human society for thousands of years as a model for the division of labour in government. We need only recall Aristotle's insight that the right of ancient Greek polis extended as long as they *assisted* their citizens in the performance of their duties. Saint Thomas Aquinas attributed the effectiveness of decision-making in medieval Italian city-states, among other things, to the fact that it was carried out at a level close to the citizens.[5]

Despite the evolution and changes in civilisations, some elements of social organisation stand the test of time. The subsidiarity principle therefore plays a fundamental role in EU decision-making. This paper attempts to present the evolution of the subsidiarity principle in the European Union's decision-making process, focusing on the institutions and procedures that are intended to guarantee the application of the principle.

The ecclesiastical implications of the subsidiarity principle

Three pillars are traditionally identified as the foundations of a common European culture: Greek philosophy, Roman law and Christian ethics.[6] A pillar-based illustration also appears in the Maastricht Treaty, which entered into force in 1993, and also organised the structure of the European Union into three pillars. Strangely enough, the principle of subsidiarity is embedded in both pillar structures, figuratively speaking at the intersection of these two pillar systems. From the analysis below, it is clear that both the Roman Catholic Church and the European Union have discovered that subsidiarity is a natural and effective principle that may serve as a rule of thumb in the operation of extensive and complex decision-making structures.

Pope Leo XIII's 1891 encyclical *Rerum novarum* (RN) addressed the social problems of the working class in the wake of the industrial revolutions. One of the starting points of the encyclical is that "men precedes the State", therefore mankind's care for themselves cannot be entirely transferred to the State. In this light, paragraphs 10 and 11 of the encyclical present the relations between the family as a natural community and the state as an artificial structure, emphasising that state intervention and assistance

[3] See: http://lexikon.katolikus.hu/S/szubszidiaritás.html
[4] See: https://idegen-szavak.hu/szubszidiarit%C3%A1s
[5] VARGA 2016.
[6] ZLINSZKY 2009: 127–132.

can only play a secondary role in the functioning of the family community based on paternal authority. According to Leo XIII, excessive state interference in family life is against the natural law, as it necessarily destroys the unity of the family. Although the encyclical does not explicitly use the principle of subsidiarity as a term, it expresses it in its meaning by qualifying the intervention of State power as complementary to the autonomy of natural communities.

However, in the encyclical of Pope Pius XI, *Quadragesimo anno* (QA), the principle of subsidiarity is already explicitly mentioned. The encyclical, published in 1931, also dealt with social issues, and was also relevant to the specific historical events of the time: the Great Depression of 1929 and the beginning of the rise of totalitarian ideas. The encyclical is based on an appreciation and further development of *Rerum novarum* and states the principle of subsidiarity in accordance with the social order set out therein. The thought expressed in paragraph 79 of the encyclical reads:

> "As history abundantly proves, it is true that, on account of changed conditions, many things that were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organisations can do. For every social activity ought, of its very nature, to furnish help to the members of the body social, and never destroy and absorb them."

From the quoted sentence, one can clearly see the parallel with the ideas of the encyclical forty years earlier, which analysed the relationship between the family and the State. Pius XI, however, abstracts Leo XIII's ideas and posits the principle of subsidiarity in two sets of relations: one between individuals and other communities, and the other between lower and higher communities. Subsidiarity therefore underpins the right and duty of self-support in these relations; and the principle of assistance in situations where self-support would not be sufficient.[7]

The principle of subsidiarity is then further elaborated in paragraph 80 of the encyclical, in terms of the effectiveness of state operation. "The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully and effectively do all those things that belong to it alone, because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands."

Pope John XXIII also reflects on the principle of subsidiarity in chapter III of his 1961 encyclical *Mater et magistra*. Even so, the encyclical of John Paul II, *Centesimus annus*, written to commemorate the centenary of the publication of the *Rerum novarum,* also recalls the importance of the principle of subsidiarity, juxtaposing it with the principle of solidarity.

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7 Ockenfels 1994: 66.

The principle of subsidiarity in the Roman Catholic Church can thus be traced back to Leo XIII and Pius XI. However, as the introduction to this paper suggests, this does not mean that the Church has developed the principle of subsidiarity without any precedent. Its role is indisputable, however, in not only rediscovering the principle, but also in consistently refining and abstracting its content.

In the light of the above, the principle of subsidiarity is therefore an organisational principle in which the role of the higher social level is to assist the lower social level, which is capable of organising itself. The principle serves the common good, but it takes a different approach than the classical theory of the welfare society. The latter seeks the most active role possible for the state, which necessarily runs counter to the idea of the primacy of self-care.[8] This does not mean, of course, that the concept of the welfare state is unviable, but the principle of subsidiarity claims that an effective state will play a role only in areas where it is absolutely necessary.

The emergence of the subsidiarity principle in European integration

Soft-law

The European integration process has taken the principle of subsidiarity from the domain of ecclesiology.[9] The political, power-technical meaning of the principle, however, is not based on the social concept of self-support, but is a kind of vertical division of power between the decision-making levels of the Community and the Member States.[10] In 1971, former European Commissioner Ralf Dahrendorf, criticising the over-bureaucratic nature of the Community, argued that Europe should move away from the dogma of harmonisation and towards the principle of subsidiarity.[11] Subsequently, the Tindemans Report, named after former Belgian prime minister, published in 1975, also expressed the need for a more people-oriented Europe, although it did not root from the classical subsidiarity principle, rather saw the key to a more effective functioning in the expansion of the powers of the EU institutions.[12]

The Single European Act

After the soft-law precedents, the principle of subsidiarity first appeared in Article 130r(4) of the Single European Act, which entered into force in 1987.[13] This provision only appeared in relation to a narrower field: environmental policy. It stated that the

8 NOVITZKY s. a.
9 SZŐKE-KIS 2020: 27.
10 SCHILLING 1995.
11 CAROZZA 1997: 38, 50.
12 TINDEMANS 1976.
13 Single European Act. OJ L 169, 29/06/1987: 1–28.

Community would take action in this field only to the extent to which the objectives can be attained better at Community level than at the level of the individual Member States. This provision is clearly based on the essence of the principle of subsidiarity, setting up a rule of thumb for the way in which powers are shared between the Community and the Member States.

The Maastricht Treaty and the conclusions of the Edinburgh meeting of the European Council

The Single European Act has not yet codified the subsidiarity clause as a general principle of law, but merely as a rule for environmental policy. The first general declaration of the principle of subsidiarity covering EU decision-making as a whole was made in the Maastricht Treaty, signed in 1992.[14] Article A(2) of Title I of the Treaty establishing the European Union states that it "marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen". According to Article B(2) of the Treaty, the objectives of the Union are to be achieved while respecting the principle of subsidiarity". This provision is reflected in Article 3b of the Treaty, which was inserted into the Treaty establishing the European Community through Article G(5). It states that "in areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". Linked to this is the restrictive provision in the next paragraph, which states that: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

In the conclusions made in relation to the European Council meeting held in Edinburgh in 1992, the Heads of States and Governments stressed the importance of the principle of subsidiarity and called for the conclusion of an interinstitutional agreement between the Council, the European Parliament and the Commission to ensure its effective application.[15] According to Annex I to Part 'A' of the conclusions of the Presidency on the practical application of the subsidiarity principle, in areas which do not fall within the exclusive competence of the Community, the Community has to answer two questions when planning a decision: "should the Community act?" and, if so, "what should be the intensity or nature of the Community's action?". Paragraph 4 of said Annex also suggests a number of practical considerations for the institutions in order to apply the subsidiarity principle more effectively.

Among other things, the European Council points out in principle that it is the responsibility of each institution to enforce the principle of subsidiarity without upsetting the balance between the institutions. It also states that the principle of subsidiarity

14 Maastricht Treaty. OJ C 191, 29/07/1992: 1–112.

15 Conclusions of the Presidency 1992.

may not call into question the powers conferred on the Community by the Treaties or the case law of the Court of Justice of the European Union (CJEU), but should serve as a guide to their proper exercise at Community level. Finally, it also states that the application of the subsidiarity principle cannot undermine the primacy of EU law. However, the European Council also stated that the principle of subsidiarity is a "dynamic concept" that not only allows for the reduction and cessation of Community action, but also for its extension when circumstances require.

The conclusions of the European Council also point out that, where the subsidiarity principle precludes Community legislation, Member States are obliged to take the necessary measures to fulfil their obligations under the Treaties. According to the conclusions, although Article 3b, which refers to the subsidiarity principle, does not have direct effect, the Court of Justice of the European Union is empowered to review the application of the principle within the framework of the Treaty. Finally, the conclusions also state that the more specific the nature of a Treaty requirement, the less scope exists for applying subsidiarity, which functions as a general rule.

It is worth pointing out, however, that under the wording of the Maastricht Treaty, the exclusive and shared competences of the Union were not as clearly delimited as they are in the Lisbon Treaty. Indeed, Article 3 of the Maastricht Treaty lists the "activities of the Community" without classifying them into types of competence. A good example of the difficulty of delimitation is the internal market, where, according to the Commission's assessment, a dynamic approach is also needed in the application of the subsidiarity principle, given the difficulties in distinguishing between basic operation and complementary rules and the constant evolution of the internal market.[16] The Commission also pointed out that the application of the subsidiarity principle should not result in stagnation in the development of the Community, and therefore also stressed the need for an interinstitutional agreement.[17]

Protocol annexed to the Treaty of Amsterdam

The next step in the application of the subsidiarity principle was the Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam, signed in 1997. In its preamble, the Protocol refers back to the conclusions of the European Council meeting in Edinburgh, and summarises the relevant provisions in 13 points in order to confirm them. The provisions of the Protocol partly cover the findings of the Council conclusions, but also introduce a number of new elements.

Thus, according to point 4 of the Protocol, "For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators". This finding remains true in the EU legislation process, and somewhat counterbalances the European Council's

16 Conclusions of the Presidency 1992: 121.

17 Commission of the European Communities 1992: 117–119.

conclusions that the applicability of the subsidiarity principle is limited when specific legal bases are applied. This is a welcome development, as the principle of subsidiarity was already a general principle in the previous Article 3b, and not a provision that could be ignored or narrowed down. The Protocol therefore makes it clear that the subsidiarity principle is not just an ancillary principle in EU law-making.

Point 5 of the Protocol sets out a practical yardstick for the EU legislator: a Community action is justified if it satisfies two criteria: "the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community." To determine these, it is necessary to consider, firstly, whether the issue under consideration concerns several Member States; secondly, whether the possible actions by Member States alone or lack of Community action would conflict with the requirements of the Treaties; and thirdly, whether the action at Community level would produce clear benefits.

The Protocol also draws attention to the need to respect the principles of simplicity, necessity and proportionality in Community legislation, which also implies that Community legislation must leave as much scope as possible for national legislation. The Protocol requires the Commission to consult before proposing legislation and to report annually on the application of Article 3b.

The Constitutional Treaty

The Treaty establishing a Constitution for Europe was signed in Rome in October 2004, but could not enter into force because of the outcome of referendums in France and the Netherlands.[18] The Constitutional Treaty would have included several provisions on the principle of subsidiarity, in addition to a number of reform measures. Article I-11(1) of the Treaty referred to the principle of subsidiarity directly alongside the principle of conferral, considering these two principles to be of equal weight, also symbolically. This is also appropriate from a systemic point of view, as it confirms the principle of subsidiarity as a general principle governing the whole functioning of the Union. After defining the principle of subsidiarity in the same terms as in the Maastricht Treaty, the Constitutional Treaty also stipulated that the "institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality". This Protocol would thus have established a system of guarantees for the application of the subsidiarity principle, in accordance with Article I-18(2) of the Constitutional Treaty, with the broad involvement of national parliaments. However, due to the failure of the Constitutional Treaty, the provisions of this Protocol will be discussed in the next chapter of the paper, in the context of the changes brought about by the Lisbon Treaty, given that the text of the Protocol annexed to it is almost identical in content to that of the Protocol annexed to the Constitutional Treaty.

[18] Treaty Establishing the Constitution of Europe 2004. OJ C 310, 16/12/2004: 1–474.

The Lisbon Treaty

Member States have implemented the reforms foreseen in the Constitutional Treaty by the Lisbon Treaty,[19] signed in 2007, which retained around eighty percent of the provisions of the Constitutional Treaty.[20] Article 5 of the Treaty on European Union[21] (TEU), as amended by the Lisbon Treaty, deals with the principle of subsidiarity, building on the provisions of Article 3b introduced by the Maastricht Treaty. The Lisbon Treaty has not changed the definition of subsidiarity as described above, so the current Treaty reads it as follows: "in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." The principle of subsidiarity is logically complemented by the principle of proportionality enshrined in Article 5(4) TEU, which states that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".

The second sentence of Article 5(3) TEU provides the legal basis for the subsidiarity control procedure. It says that the "institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol." In addition, Article 12(b) TEU underlines that national parliaments contribute to the good functioning of the Union by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol.

The fact that the contracting Member States have chosen the protocol form for the establishment of the subsidiarity control mechanism does not make the provisions of the Protocol subordinate to those of the TEU, as the Protocols annexed to the Treaties share the status of the Treaties pursuant to Article 51 TEU, meaning that they are binding primary sources of EU law.[22] The next chapter of this paper describes the procedures described in the Protocol that enable the application of subsidiarity to be monitored.

Provisions of Protocol (No 2)

The yellow card and orange card procedures

As mentioned above, the Protocol on the application of the principles of subsidiarity and proportionality was originally intended to be annexed to the Constitutional Treaty, but was added to the Lisbon Treaty with virtually unchanged substantive content. The provisions of the Protocol not only confirm those of the Protocol of the same name annexed to the Treaty of Amsterdam, but also give national parliaments quite extensive powers,

19 OJ C 306, 17.12.2007: 13–390. Treaty of Lisbon 2007.
20 Dienes-Oehm et al. 2014: 123.
21 OJ C 326, 26/10/2012: 13–390.
22 Kende et al. 2018: 459.

in line with the provisions of the TEU quoted above. Under Article 2 of the Protocol, the Commission is required to consult before proposing legislative acts, and may only depart from this obligation in cases of exceptional urgency and including a justification. The Commission must then not only send the legislative proposal to the EU legislature but also to national parliaments at the same time. Article 4 adds that the "Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments".

Under Article 5 of the Protocol, "draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality". By this provision, the principle of subsidiarity has indeed evolved into a horizontal rule of general application. Justification must be accompanied by impact assessments and qualitative and, where possible, quantitative indicators to demonstrate that the objective of the proposed action can be better achieved at Community level than at lower legislative levels.

Under Article 6 of the Protocol, any national parliament or any chamber of a national parliament may, within eight weeks from the date of transmission of a draft legislative act, send a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission. In these, the Parliament (chamber) explains why it considers that the respective draft act does not comply with the principle of subsidiarity. The President of the Council shall ensure that, where the draft act was not initiated by the Commission, the reasoned opinion is forwarded to the initiating institution or a group of Member States. Reasoned opinions sent by Parliaments (chambers) must be taken into account by the co-legislators and the Commission (or the institution that submitted the draft), in accordance with Article 7 of the Protocol. A voting system is used to analyse the opinions. Each national parliament has two votes, in the case of a bicameral parliamentary system, each of the two chambers has one vote. The Protocol establishes two types of procedure, known as the yellow card and orange card procedures.[23]

The yellow card procedure is carried out in the following manner. Where reasoned opinions on a draft legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national parliaments (chambers), the draft must be reviewed. This threshold is one quarter in the case of a draft legislative act submitted on the basis of Article 76 of the Treaty on the Functioning of the European Union[24] in the area of freedom, security and justice. After such a review, the Commission (or the initiator of the act concerned) can make one of three decisions, either to maintain, amend or withdraw the draft, with the obligation to give reasons for the decision.

The orange card procedure applies to drafts to be adopted under the ordinary legislative procedure. Where reasoned opinions on a draft for a legislative act represent at least a simple majority of the votes allocated to the national parliaments (chambers), the proposal must be reviewed. After the review, the Commission has the option to withdraw, amend or maintain the draft, as in the yellow card procedure. However, if it decides to maintain the draft, the justification (together with the reasoned opinions of

[23] Bóka et al. 2019: 244.

[24] OJ C 202, 07.06.2016: 47–360.

the national parliaments) must be submitted to the EU legislature (the European Parliament and the Council). The legislator is obliged to examine the draft before concluding the first reading of the legislative procedure, taking the opinions of the Commission and the national parliaments (chambers) into account. If the majority position in the legislative institutions (a majority of the votes cast in the European Parliament or a majority of 55% of the members of the Council) is that the proposal is not compatible with the principle of subsidiarity, the proposal cannot be given further consideration. According to the Hungarian Parliament's Rules of Procedure, the European Affairs Committee is responsible for the role of the subsidiarity control to be carried out by national parliaments.[25]

By June 2021, there had been only three yellow card procedures. The Commission's 2012 Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services the (so-called "Monti II Regulation") received 19 votes against.[26] Although the Commission did not raise any concerns following the review, it later withdrew the draft,[27] claiming that the proposal lacked the necessary political support to be adopted.[28] Then, in 2013, 18 national parliaments (chambers) considered that the Commission's proposal for a regulation establishing a European Public Prosecutor's Office violated the principle of subsidiarity.[29] In this case, the Commission also did not recognise a breach of the principle and, therefore, maintained the proposal.[30] The third yellow card was issued in 2016 by 14 parliaments (chambers) on the draft amendment to the Posted Workers Directive.[31] However, the Commission did not find the proposal to be in breach of the subsidiarity principle either, and it was left unchanged after the review.[32] Moreover, there has not been a single orange card procedure so far.

As can be seen from the above, national parliaments (and chambers) cannot directly secure the mandatory withdrawal of a proposal they consider to be in breach of the subsidiarity principle, neither in the yellow card nor in the orange card procedure. As a result, the Treaty change package preceding the referendum on the UK's exit from the EU included a draft red card procedure, whereby the EU legislature would have been obliged to reject the draft or remedy its shortcomings if the number of votes in national parliaments (chambers) was equal to at least 55%.[33] However, the Brexit referendum in 2016 has led to a break in negotiations on elements of the Treaty change package.

Two other aspects of the evaluation of the provisions of the Protocol are worth highlighting. On the one hand, the subsidiarity control established under the Protocol does not mean that all measures envisaged in the field of secondary EU law must be subject to subsidiarity control. The provisions of the Protocol consistently limit this obligation to

25 Parliamentary Decision No 10/2014 (24.II.), Sections 142–143.
26 COM(2012) 130 final.
27 OJ C 109, 16/04/2013: 7.
28 Letter from President Barroso to Martin Schulz, President of the European Parliament, Brussels, 12 September 2012.
29 COM(2013) 534 final.
30 COM(2013) 851 final.
31 COM(2016) 128 final.
32 COM(2016) 505 final.
33 BÓKA et al. 2019: 244.

legislative acts, therefore, implementing and delegated acts are not affected. The Commission has nevertheless indicated that it is open to stricter scrutiny of non-legislative acts regarding the enforcement of subsidiarity and proportionality.[34]

On the other hand, despite its name, the Protocol only allows subsidiarity to be examined, but not proportionality. However, these two principles are considered closely intertwined in both EU primary law and the Protocol, it is therefore difficult to understand why the explicit possibility of scrutinising proportionality is missing from the national parliaments' toolbox, as some authors point out.[35]

The possibility of judicial review

Following the above introduction to the political control of subsidiarity, the question may arise as to whether a Member State can request the annulment of an EU act on the grounds that it violates the principle of subsidiarity. In order to answer this question, it is necessary to examine whether the infringement of the principle of subsidiarity can be classified under one of the grounds for annulment listed in Article 263 TFEU (lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any provision of law relating to their application or misuse of powers).

On this point, Article 8 of the Protocol states that the "Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States". The Court of Justice also has jurisdiction to rule on actions "notified by Member States in accordance with their legal order on behalf of their national Parliament or a chamber thereof". Finally, it should be noted that Article 8 of the Protocol also confers on the Committee of the Regions the right to bring an action "against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted".

According to the Act on the National Assembly of Hungary, "the National Assembly may initiate, within one month of the publication of the legislative act of the European Union in the Official Journal of the European Union, that the Government brings, in accordance with Article 263 TFEU, an action before the Court of Justice of the European Union on grounds of infringement of the principle of subsidiarity by the legislative act of the European Union".[36] On the basis of this initiative, the Government shall bring the action, which shall be notified to the National Assembly.

As a preliminary point, it can be noted that, just as in the case of political control of EU legislation, there is the same phenomenon in terms of legal control: the wording of Article 8 of the Protocol only provides for a possibility of action for compliance with the principle of subsidiarity, but not for breach of proportionality. However, this does not limit the possibility of bringing an action for breach of the proportionality principle:

34 COM(2019) 333 final.
35 Weatherill 2005: 23–41.
36 Act XXXVI of 2012, Section 71, paragraph 3.

there have been a number of cases before the CJEU in which the parties have challenged the proportionality of an EU act.[37]

However, the CJEU's relevant jurisprudence provides the institutions with a fairly wide margin of discretion in assessing compliance with the subsidiarity (and proportionality) principle.[38] In *Case C-84/94,* for example, the applicants unsuccessfully argued that the EU legislator had breached the principle of proportionality (and thus subsidiarity) in adopting a directive requiring minimum harmonisation.[39] The compliance of a directive with the principle of subsidiarity was also at issue in *Case C-233/94,* in which the CJEU held that where the recitals of a directive show that the EU legislature has taken account of the principle of subsidiarity in its action, this is sufficient to justify the application of the principle.[40]

In a more recent case *C-547/14,* the applicants again unsuccessfully invoked a breach of the principle of subsidiarity on the issue that the protection of human health can be better achieved at national level. The CJEU confirmed its previous position, stating that in applying the principle of subsidiarity: *"Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level."*[41] In this judgment, the CJEU also clarified that, of the subsidiarity scrutiny procedures mentioned in the Protocol, scrutiny by national parliaments is of a primary, political nature; whereas scrutiny by the CJEU is of a secondary, legal nature.[42]

In its judgment in *Case C-128/17,* the CJEU confirmed the wide margin of appreciation of the EU legislature in the assessment of subsidiarity and proportionality, adding that the only factor to be examined in assessing whether there has been a breach of the proportionality principle is whether the EU legislature has made any manifest error.[43] Further widening the scope of the institutions' discretion, the CJEU ruled in *Case C-482/17* that "not carrying out an impact assessment cannot be regarded as a breach of the principle of proportionality where the EU legislature is in a particular situation requiring it to be dispensed with and has sufficient information enabling it to assess the proportionality of an adopted measure".[44] These judgments show that the CJEU's case law consistently prioritises the protection of the institutions' freedom of discretion in the matter of subsidiarity control, and limits its own procedure to formal rather than substantive review.

At this point, two further comments are to be made. On the one hand, under the provisions of the Protocol, private individuals cannot bring actions before the CJEU for

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37 See: Case C-128/17, Poland v. Parliament and Council, EU:C:2019:194, paragraph 94 and the case law cited therein.

38 BÓKA et al. 2019: 245.

39 Case C-84/94, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, ECLI:EU:C:1996:431.

40 Case C-233/94, Federal Republic of Germany v. The European Parliament and the Council of the European Union, ECLI:EU:C:1997:231, paragraphs 22–29.

41 Case C-547/14, Philip Morris Brands SARL and Others v. Secretary of State for Health, ECLI:EU:C:2016:325, paragraph 218.

42 ECLI:EU:C:2016:325, paragraphs 216–217.

43 Case C-128/17, Commission v. European Parliament and Council, EU:C:2019:194, paragraph 96.

44 Case C-482/17, Czech Republic v. European Parliament and Council, EU:C:2019:1035, paragraph 85.

breach of the principle of subsidiarity, although under Article 263 TFEU private individuals could also bring actions before the Court of Justice under certain circumstances. In this respect, the CJEU ruled in *Case T-429/05* that the rules on the competences of the Union (and any infringement thereof) do not create rights for private individuals,[45] thus excluding their possibility to bring actions in these matters.

In addition, some authors argue that the proportionality test could offer a more promising solution than the subsidiarity test in deciding questions of competence, given that it is common practice in EU disputes.[46] However, as with the examination of the application of the subsidiarity principle, the CJEU also limits its powers in these cases to examining manifest procedural errors, misuse of powers and abuse of discretion.[47] The wide discretion of the EU legislature is consistently confirmed by these judgments, particularly in relation to issues arising from political value choices.[48] It can therefore be concluded that the CJEU's definition of its own powers is similarly narrow in the scrutiny of both subsidiarity and proportionality, and while respecting the wide discretion of the EU legislature, it focuses on procedural issues instead.

Subsidiarity in practice: measures taken by EU institutions and their analysis

The previous chapters described the subsidiarity principle and its enforceability in EU legislation. Below, the measures and mechanisms used by the institutions are examined, in particular the Commission, to implement the subsidiarity principle.

The 'Doing Less, More Efficiently' Task Force

It has already been mentioned above that the Council conclusions accompanying the adoption of the Maastricht Treaty foresaw that the EU institutions would lay down quality legislative criteria to give effect to the principle of subsidiarity in an interinstitutional agreement. This was the basis for the 1993 interinstitutional agreement;[49] the 2003 agreement[50] and the current interinstitutional agreement issued in 2016, still in force.[51]

In 2017, marking the 60th anniversary of signing the Treaties of Rome, the Commission published a White Paper outlining five possible scenarios for the future of Europe. The fourth scenario, titled *'Doing Less, More Efficiently,'* envisages a Europe in which "what

45 Case T-429/05, Artegodan v. Commission, EU:T:2010:60, paragraph 75.
46 Davies 2006: 66.
47 Case T-429/05, Artegodan v. Commission, EU:T:2010:60, paragraph 95.
48 Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v. Council, EU:C:2017:631, paragraph 206.
49 OJ C 329, 06/12/1993: 135.
50 OJ C 321, 31/12/2003: 1–5.
51 OJ L 123, 12/05/2016: 1–14.

is handled at EU27, national and regional level" is better separated to focus limited resources more effectively.[52]

It was in this spirit that Commission President Jean-Claude Juncker set up the 'Doing Less, More Efficiently' Task Force in November 2017. The aim of the Task Force was "making recommendations on how to better apply the principles of subsidiarity and proportionality, identifying policy areas where work could be re-delegated or definitely returned to Member States, as well as ways to better involve regional and local authorities in EU policy making and delivery".[53] It was chaired by the First Vice-President of the Commission in charge of Better Regulation, Interinstitutional Relations, the Rule of Law and the Charter of Fundamental Rights, and composed of members from national parliaments and the Committee of the Regions. The European Parliament could originally have delegated three members to the Task Force, but the European Parliament did not join the initiative, so the Task Force was composed of six members, including the President.[54]

The Task Force met regularly between January and July 2018, culminating in the final report published in July.[55] The report shows that the Task Force focused on three main issues:

- improving the application of the principles of subsidiarity and proportionality in the work of EU institutions
- identifying policy areas where some or all of the decision-making and implementation can be returned to Member States over time
- identifying policies that could be partly or fully transferred back to the competence of the Member States

The report made nine recommendations to make the subsidiarity principle more effective. The Task Force pointed to a problem already outlined in the case law of the CJEU: the institutions had a separate working method for monitoring compliance with subsidiarity. To this end, the final report recommended a uniform model assessment grid for all institutions, to allow for a detailed audit. The report also raised the issue of extending the eight-week period for national parliaments to examine subsidiarity to twelve weeks, which could lead to a more informed scrutiny and wider consultation. It also drew attention to the importance of closer cooperation between regional and national parliaments and local authorities, which it called "active subsidiarity".

The practical implications of the Task Force report

The final report of the Task Force was reflected in the Commission's October 2018 Communication on strengthening the role of subsidiarity and proportionality.[56] It stressed the importance of the principles of subsidiarity and proportionality in the creation of

52 White Paper on the Future of Europe. COM(2017) 2025 final.
53 European Commission 2017.
54 European Commission 2018a.
55 European Commission 2018b.
56 COM(2018) 703 final.

better EU regulations. In the Communication, the Commission foresees using the model assessment grid developed by the Task Force and amending its guidelines on better regulation accordingly.[57]

The Commission's subsidiarity toolbox also included the REFIT system, which was operated from 2015 to 2019 under its better regulation agenda.[58] REFIT was set up by the Commission as a platform to make EU legislation more effective and fit for purpose.[59] In the framework of REFIT, the Commission identified areas where the EU has used regulatory systems that are unduly complex and overly burdensome for legal entities. To ensure transparency, the Commission also publishes an annual scoreboard of the results achieved through REFIT, broken down by the different regulatory areas. In its 2019 Report,[60] the Commission explained that, after developing the successor to the REFIT platform, greater emphasis would be placed on the verifiability of subsidiarity and proportionality.

The Commission also updated the *Better Regulation Toolbox,*[61] a 540-page system linked to the *Better regulation Guidelines,*[62] introduced in 2017, following the recommendations of the Task Force on the verifiability of the subsidiarity principle. The former system was replaced in November 2021 by the Commission's new Better Regulation Guidelines[63] and the related Better Regulation Toolbox,[64] the latter amended in 2023.

Under Article 9 of the Protocol (No. 2) to the Lisbon Treaty, which was described in detail above, the Commission is required to submit an annual report on the application of the subsidiarity clause in Article 5 TEU, which is also sent to the European Council, the European Parliament and the Council and national Parliaments, as well as to the Economic and Social Committee and the Committee of the Regions.

In the introduction to the 2021 report, the Commission highlighted that it had used the subsidiarity assessment model grid developed by the 'Doing Less, More Efficiently' Task Force effectively.[65] The REFIT platform has been replaced by the Fit for Future Platform service,[66] which also includes the *Have your say* consultation portal.[67] This allows interested legal and natural persons, and even national parliaments, to comment on Commission proposals through a single platform. The Fit for Future Platform establishes a more interactive relationship between EU citizens and institutions than REFIT.

The report also highlights that, as the number of proposals presented by the Commission increased, national parliaments also submitted more opinions (360), of which 16

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57 This is also confirmed in Commission Communication COM(2019) 333 final.

58 COM(2015) 215 final.

59 COM(2012) 746 final.

60 COM(2020) 272 final.

61 European Commission: Better Regulation Toolbox: https://commission.europa.eu/document/download/e8e78294-589e-484a-8c87-86e5b3f6c617_en?filename=better-regulation-toolbox.pdf&prefLang=hu

62 COM(2017) 350 final.

63 COM(2021) 305 final.

64 Better Regulation Toolbox: https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf

65 COM(2022) 366 final.

66 See: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof/fit-future-platform-f4f_hu

67 See: https://ec.europa.eu/info/law/better-regulation/have-your-say_hu

reasoned opinions pointed out the infringement of the subsidiarity principle. Although this figure is more than double the 2019 figure, it is well below the previous record set in 2012, when 663 opinions were received from national parliaments. A significant part of these were linked to the *'Fit for 55'* climate policy package. Interestingly, in 2021, the Hungarian National Assembly did not submit a reasoned opinion, neither on the new pact on migration and asylum, nor on the draft EU Minimum Wage Directive.

The Committee of the Regions

In addition to the Commission, it is worth mentioning the Committee of the Regions, which, by virtue of its role, has the potential to promote the subsidiarity principle. Since its strategy was adopted in 2012, the Committee of the Regions has been actively involved in subsidiarity control to the best of its ability through the Subsidiarity Monitoring Network *(SMN)*.[68] Prior to the legislative phase, the Committee of the Regions can identify possible subsidiarity related problems by studying the Commission's work programme, and react to them in the form of opinions during the legislative phase. One important tool for this within the SMN, is the REGPEX system through which national regional parliaments and municipalities can comment on draft legislation based on their own criteria.[69]

The Committee of the Regions also organises Subsidiarity Conferences and summarises the result of its work in annual reports. The Committee of the Regions also runs a network of regional hubs (RegHub) to review the implementation of EU policies and feed the opinions of participating local authorities into EU policy decisions. For the period up to 2025, one of the objectives of the Committee of the Regions is to ensure that new EU legislative initiatives have a regional dimension and are more in line with the recommendations of the 'Doing Less, More Efficiently' Task Force.[70]

Conference on the Future of Europe

The Conference on the Future of Europe was planned by the Commission, the Council and the European Parliament to be launched on 9 May 2020, on the 70th anniversary of the Schuman Declaration. However, the outbreak of the coronavirus pandemic delayed the launch of the initiative by a year, which was designed to open up a new space for EU citizens to express their views on the challenges facing the Union. On the basis of the joint declaration on the conference, the three co-organiser institutions undertook to take action following the conference on the basis of the results, in accordance with

68 See: https://portal.cor.europa.eu/subsidiarity/Documents/A8782_summary_subsi_strategy_EN_modif1_final.pdf

69 See: https://portal.cor.europa.eu/subsidiarity/regpex/Pages/default.aspx

70 Committee of the Regions 2021.

the principles of subsidiarity and proportionality, within their respective competences.[71] Based on the final report on the outcome of the conference, 49 proposals were put forward to the EU institutions, with the largest number of proposals received via the multilingual digital platform in relation to the topic of "European Democracy".[72] The 40th package of proposals was titled *Subsidiarity,* in which EU citizens proposed, among other things, a review of the subsidiarity control mechanisms and their extension to regional parliaments.

Summary

The paper sought to provide as comprehensive a picture as possible of how and when the subsidiarity principle has come into EU decision-making, what procedures are in place to monitor it, and what practical measures the EU uses to enforce it. Overall, since the entry into force of the Lisbon Treaty, the EU institutions have made significant efforts to implement the subsidiarity principle. However, until recently, the institutional frameworks and procedures designed to implement the principle have operated in a fragmented way across institutions, which has hampered effectiveness. On the positive side, the findings and recommendations of the 'Doing Less, More Efficiently' Task Force under the Juncker Commission have gradually started to be implemented in the actual practice of the institutions. This has unified the assessment of compliance with the principles of subsidiarity and proportionality, which is an encouraging step towards better law-making.

The yellow card and orange card procedures initiated by national parliaments have not yet resulted in the Commission withdrawing any draft act complained of by the Member States, acknowledging the lack of subsidiarity. It should also be noted that the number of reasoned opinions is rarely sufficient to initiate proceedings. In this regard, the effectiveness of the yellow and orange card systems may need to be reconsidered. Nor does the case law of the Court of Justice of the European Union encourage the institutions to carry out more detailed impact assessments, but emphasises instead their discretion in the legislative procedures, giving them a wide margin of manoeuvre.

Despite the steps taken by the institutions, both political and legal control of subsidiarity could be further developed. On the one hand, national parliaments could be given explicit powers to monitor not only subsidiarity but also proportionality of given draft acts. On the other hand, the Court of Justice of the European Union could also decide to extend its powers for review, in particular when examining proportionality. This would truly be a step forward, mostly because it would allow the inevitably politically-charged disputes between Member States and the EU institutions over the division of competences to be resolved by more neutral legal means.

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71 Joint Declaration on the Conference on the Future of Europe: https://futureu.europa.eu/uploads/decidim/attachment/file/6/EN_-_JOINT_DECLARATION_ON_THE_CONFERENCE_ON_THE_FUTURE_OF_EUROPE.pdf

72 Conference on the Future of Europe – Report on the outcome 2022: 10.

In the heat of managing the situations created by the coronavirus and the Russian–Ukrainian war, it may seem less relevant to address the principle of subsidiarity. This however is misleading, because applying the subsidiarity principle to EU decision-making can lead to more effective and efficient action in times of difficulty. The principle of subsidiarity is a fundamental principle in discussions on competences between the institutions and the Member States, thus its sufficient implementation could serve the interests of both the Union and the Member States.

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The Case of Implied External Powers – The History of Pragmatism in the EU's External Relations Law[2]

The Case of Implied Powers in External Relations – A History of Pragmatism

EU external relations law is not very much at the centre of the Hungarian EU legal discourse, so the matter of implied external competences may seem almost mystical. However, it is not mysterious at all, its development is rather evidence of the presence of pragmatism in the development of EU law, as the implied external powers were even used to extend competences in the period of the EEC. The aim the paper is to show how this pragmatism has been manifested from time to time in the development of the implied external competences. To do so, the paper also draws on Sinclair's theory, who sees the phenomenon of the expansion of powers in the law of international organisations as a coherent process in some cases. Accordingly, the article describes case C-22/70. Commission v. Council (ERTA), including the main arguments made in the case, and the relevant circumstances as well. This is followed by the explanation of the expansion of the implied powers to highlight the appearance of its different aspects involved. Finally, the paper points out a "dialogue" that has been developed between the Member States and the Court of Justice during the process of the Constitutional Treaty and the Lisbon reforms.

Keywords: European Union law, EU external relations law, implied external powers, ERTA, development of law

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Introduction

The case of implied external powers may seem mystical from time to time. It seems *prima facie* that no one knows where it came from, under what circumstances it appeared, or what exactly its essence and function is. However, the topic itself is not mystical, but rather pragmatic, in its pure form. The aim of this paper is to shed some light on how this pragmatism emerged in the development of the implied external powers, and how it accompanied its development. This paper does not intend to highlight all the minor legal correlations of the power approach, since their number is infinite. Instead, the paper provides the context for pragmatism to the extent necessary.

To make this approach more understandable, the paper builds on Guy Fiti Sinclair's theoretical framework to present this dynamic development. In Sinclair's approach, there are international organisations that increase their powers beyond the initial legal framework provided by their Member States. On this basis, although their founding treaties contain the powers granted and their wording remains unchanged, their underlying content changes. International trends come to the attention of the relevant international organisation, to which it intends to respond. It incorporates these into its own legislation, which provides giving the organisation room for manoeuvre. It also shapes the powers of the Member States, which they accept. The international courts legitimise this process, often with the help of representatives of the relevant professions.[3] As these features show similarities with the development of the Union, it may be worth approaching the emergence of the implied external power in EU law from this perspective.

On this basis, the study highlights some aspects of the development of implied external powers. Understanding the ERTA case is essential for this purpose. Consequently, this paper presents the circumstances of the case (going beyond a simple description of the facts, it highlights the approach taken by the Commission and the Court of Justice. This, of course, culminates in the arguments of the parties, which can be seen in the trial documents kept in the EU's historical archives. The interpretation of the ERTA case is followed by the Court of Justice's proliferation of ERTA cases, then by a presentation of the dialogue between Member States and the Court of Justice on Treaty reforms.

Historical background

The origin of the implied external powers

The phenomenon of implied external powers is not an EU-specific legal tool. The question is whether additional powers can be granted on the basis of already existing, explicit powers, if the former are necessary to carry out the latter.[4] There are examples of this in the case law of the US Supreme Court, but also in public international law.[5]

[3] SINCLAIR 2017.
[4] SCHERMERS–BLOKKER 2018: 195, paragraph 233.
[5] GADKOWSKI 2016: 45.

In the latter case, the Permanent Court of International Justice (hereinafter: PCIJ) first addressed the issue when it examined whether the International Labour Organisation (hereinafter: ILO) can adopt rules for workers in the agricultural sector. The PCIJ pointed out that the purpose of the ILO's establishment was to create a permanent international organisation that would adopt certain basic rules to improve the conditions of workers. Consequently, such an objective would be held back if the "most ancient industry" was left outside the scope of ILO rules.[6] The International Court of Justice in The Hague (hereinafter: ICJ) later duly refers to the relevant decision of the PCIJ in its advisory opinion on reparation for injuries suffered in the service of the United Nations, and then stresses that the UN necessarily has the powers which, although not enshrined in the UN Charter, are necessary to enable it to carry out its functions.[7] Later, before the ERTA case, the concept of implied powers was further clarified.[8]

The state of the European integration before ERTA

For a long time, European integration was not concerned with the external aspects of the nascent community, yet the changes in the international order had a significant impact at the time of its birth. The European Defence Community intended to find a solution to the Soviet threat, but it failed due to the resistance of its member states. The European Economic Community (hereinafter: EEC) thus took a more restrained approach, although in its case we cannot speak of military-defence powers.[9] The Treaty of Rome, serving as a basis of the EEC, (hereinafter: Treaty establishing the European Economic Community) explicitly provided for powers concerning external relations, such as trade policy, accession of states and cooperation with states and international organisations.[10]

In principle, this indicates that the EEC had considerable external relations powers from very early on. However, this conclusion would be unconvincing, because the Member States did not wish to grant powers of an uncertain nature and content to the EEC, especially in the field of external relations. The Council was careful not to conclude any trade policy agreements of unlimited duration, and the foreign policy of the Member States also had an impact on the EEC's external relations. An example of this was France's opposition to relations with the COMECON countries, Israel and Japan, but the same happened with regard to the Federal Republic of Germany in the case of the German Democratic Republic. In addition, one of the most important legal advisers in the Council, Jean Mégret took the view that any provision allowing the EEC to be an actor in its external relations must be interpreted expressly narrowly, which the Council has thus sought to defend in as many fora as possible. It is to be noted that this was not so blatant at the time: most lawyers back then considered that the EEC had

6 Competence of the ILO to Regulate Incidentally the Personal Work of the Employer 1926, Series B, no. 13.

7 Reparation for injuries suffered in the service of the Nations, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949.

8 See Effect of Awards of Compensation made by the UN Administrative Tribunal, Advisory Opinion, [1954] ICJ Rep. 56–59.

9 Noël 1975: 159–160.

10 Leopold 1977: 56.

no significant powers in terms of concluding international treaties other than the few cases otherwise provided for by the provisions of the Treaty establishing the European Economic Community.[11]

It is also true that other problems came to the fore when the EEC was born. The Member States were busy trying to create a better structure than the ECSC, leading to the creation of a common market. In the case of the concluded Treaty of Rome, however, they could not really determine whether it was an international treaty or a treaty that went beyond it and already included explicit rights and obligations for citizens. The Commission and Community law practitioners were much more concerned with the question of direct effect and the primacy of Community law, as well as the development of the common market.[12]

It can also be said that transport policy was the policy that represented the most the pursuit of Member State self-interests. Until 1973, there were no concrete political measures regarding the common transport policy, despite the fact that the Treaty establishing the European Economic Community defined it as a common policy; the Member States insisted on their own policy, and there was mainly an exchange of views at the relevant Council meetings.[13] It is to be noted that the Commission had tried to do something about this before. In 1961, legislation was adopted to abolish transport charges that deliberately discriminated between Member States. The Commission strived to propose programmes that included provisions for technical, social and financial harmonisation. Between 1958 and 1967, the then Commissioner Lambert Schaus tried to liberalise the sector to end anti-competitive national measures, but ended up in almost endless discussions on the axis of liberalisation and harmonisation.[14] The ERTA case arrived in this policy context, which agreement covered a particularly important element within transport policy.

The emergence of implied external powers: the ERTA case

The international convention on which the case was based was the European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (ERTA) under the auspices of the United Nations Economic Commission for Europe, which never entered into force. The renegotiation of the convention resumed in 1967. In the case of the EEC, legislation was developed for this purpose. In 1969, Council Regulation (EEC) No. 543/69 on harmonisation of social legislation relating to road transport was adopted. The Council indicated to the Commission that it was necessary to amend the scope of the Regulation in order to bring it into line with the obligations set out in the Convention. Although the Commission was aware of the negotiations, it did not in any way indicate to the Council that the Commission alone was entitled to negotiate

11 LEOPOLD 1977: 58–62.
12 RASMUSSEN 2014: 140–151.
13 BUSSIÈRE et al. 2014: 369–370.
14 GWILLIAM 1980: 48–52

in such a case and otherwise speak with one voice on behalf of the Community, but merely requested continuous information from the Council. However, the Commission subsequently brought an action for annulment before the Court of Justice.[15]

The Commission's position

Within the EEC, the issue was seen as less significant, as there was no intention within the Council to give the EEC a greater role in matters of external relations. No wonder that the Commission was noticeably opposed to the Council's behaviour. The initiation of the procedure by the college was led by Walter Munch and Gerard Olivier, who were then working in the Legal Service and wanted to pursue a pro-integration agenda like their predecessor, Michel Gaudet, former head of the Commission's Legal Service.[16] Gaudet was head of the Legal Service until 1969, under whom arguments for explicitly deepening European integration were made (including his personal opinions) in the Van Gend en Loos and Costa v. ENEL cases.[17] However, the decision to go to the Court of Justice was a personal one taken by the head of the Commission himself, Jean Rey.[18]

The parties' arguments in this respect

The Commission and the Council gave completely different arguments in the case. The Commission's position was that the Community is entitled to conclude an international convention in relation to powers in certain circumstances where it would otherwise hold such power in the context of internal relations. It is to be noted that the Commission did not rely on the primacy of Community law in its reasoning on the merits of the case, but took a different approach instead. It argued that Article 75, which is the basis of the transport policy, also has an external relations aspect, which is not mentioned in the Treaty establishing the European Economic Community. The adopted Regulation (EEC) No. 543/69 created the legal basis for this.[19]

The Commission pointed out, of course, that it is not that the Member States have lost all power in the field of transport policy, but rather that the nature of transport policy is much more dynamic compared to other policies. The provision contains Community powers, but it implies that they must be interpreted in the light of their dynamic development.[20] If this external aspect were not recognised, it would be contrary to the provision itself, and such a result would be meaningless in the case of Community law, which would necessarily lead to contradictions. This does not mean that there is a strict parallelism between internal and external powers, since this would be contrary to the nature of Community rules. In the case of transport policy, Member States retained power

15 Knapp 2019: 80–81.
16 McNaughton 2017: 136–137.
17 Rasmussen 2012: 377.
18 McNaughton 2017: 141–142.
19 Petti 2021b: 5–6, 11–12.
20 European Commission 1970: 26–32.

for internal matters as long as the Community had not exercised its powers. However, the Commission pointed out that, as the EEC had constantly adopted new rules, these external powers had gradually become exclusive.[21] The Commission underlined that the Treaty establishing the European Economic Community does not contain any provision allowing the EEC to act autonomously in foreign policy, but that this is present in certain common policy areas, which may even affect more sensitive areas of Member States' sovereignty.[22] Although the Council had discretionary power to decide on agreements with third countries, once the Community-level rules were adopted, this discretion did not extend to whether to proceed through intergovernmental or Community channels.[23]

It is to be noted that the Council's argument was more a reaction to the admissibility of the Commission's action than to its substantive arguments. Accordingly, the Council procedure did not constitute an act under Article 173 Treaty establishing the European Economic Community (on the challengeability of Community acts) for which such a procedure could be initiated. In its argument, the Council indicated in the context of Article 189 of the Treaty establishing the European Economic Community that since such an act of the Council cannot be considered a regulation, directive or decision, one cannot talk about such here. It also considered the possibility that the relevant provisions of the EEC Treaty could be interpreted more broadly, but in this case it suggested that the nature of the act in this case should be evaluated. The relevant act was therefore also only intended to express political acceptance of the agreement.[24] For the other part of the argument, the Council proposed a stricter scope of admissibility for the EEC institutions compared to claims brought by individuals.[25]

Opinion of the Advocate General

Advocate General Dutheillet de Lamothe also discussed the merits of the case, in addition to the admissibility of the action. It is to be noted that the Advocate General proposed the analysis of Article 116 of the Treaty establishing the European Economic Community as a possible legal basis. According to this article, from the end of the transitional period, Member States may act only jointly in the framework of any international organisation in issues concerning the common market.[26] The Advocate General stressed that this approach was not even mentioned in the submission, nor was the reference to the fact that the EEC is a legal person (as laid down in Article 210). It is to be noted that the Advocate General was already ambivalent about the Commission's approach, which was specifically related to implied powers. Based on the wording of the opinion, the Advocate General was clearly in a difficult position, which was apparent from the

21 European Commission 1970: 25–26.
22 European Commission 1970: 28.
23 European Commission 1970: 28–29, 37–46.
24 PETTI 2021a: 571.
25 European Commission 1970: 8.
26 Opinion of Advocate General Dutheillet de Lamothe in Case C-22/70 Commission v. Council, ECLI:EU:C:1971:32, 290.

terms and phrases used,[27] presumably also because he himself felt the risk involved. He pointed out that, if the Court of Justice were to recognise the existence in Community law of the implied external powers, it would in fact be enacting Community law itself in an arbitrary manner, by which the Court would be exceeding its own limits.[28] Consequently, it did not propose to the Court of Justice to recognise their existence under Community law.

The position of the Court of Justice

Even before the ERTA case, the Court of Justice had interpreted the powers of the ECSC and the EEC. In the case of the ECSC, the Court of Justice even held in the Fédéchar case that powers include the rules on the measures necessary to achieve the objectives laid down in the founding treaty.[29] In addition, in the cases Italy v. High Authority and the Netherlands v. High Authority, the question arose, also in the transport sector, of whether the High Authority was entitled to make price lists and conditions of sale public. In its decision, the Court of Justice pointed out that neither the nature of the policy, nor the fundamental principles of the Treaty imply that the High Authority is entitled to exercise such powers in the absence of an express provision.[30] The main issue in the case of the Netherlands v. High Authority was whether it could follow from Article 70 – which provides that tariffs and other relevant tariff regulations for coal and steel transport must be published and brought to the attention of the High Authority –that the High Authority may publish them. In this case, the Court of Justice confined itself strictly to a linguistic interpretation of that provision, from which it concluded that, in the absence of an express enabling provision, the High Authority was not entitled to exercise such a power.[31]

The Court of Justice, on the other hand, had to decide in the ERTA case whether the Community was entitled to conclude an international convention. The first important point of the Court's argument is that the Community is a legal person, and therefore is entitled to enter into contractual relations with third countries. In order to establish the necessary powers, it is necessary to take into account the system of the Treaty establishing the European Economic Community and its material provisions.[32] This points to the fact that, while the Court of Justice previously analysed powers on the basis of

27 For example: "I shall not conceal from the Court that I was momentarily persuaded to the view that authority in external matters can be transferred to the Community through the adoption of a Community regulation and it is with some regret that upon reflection I must finally suggest that this view should not be accepted." ECLI:EU:C:1971:32, 291.

28 Petti 2021b: 5–6.

29 Judgment of the Court of Justice of 16 July 1956, Fédération Charobinnere de Belgique (Fédéchar) v. ECSC High Authority, ECLI:EU:C:1956:11.

30 Judgment of the Court of Justice of 15 July 1960 in Case C-25/59 Italy v. ECSC High Authority ECLI:EU:C:1960:33.

31 Judgment of the Court of Justice of 15 July 1960 in Case C-25/59 Kingdom of the Netherlands v. ECSC High Authority ECLI:EU:C:1960:34.

32 Judgment of the Court of 31 March 1971 in Case C-22/70 Commission v. Council, ECLI:EU:C:1971:32, paragraphs 13 to 15.

the wording of the provisions, it now examines the entire Treaty system, in addition to its provisions. Recognising the Advocate General's dilemma, it stresses that such powers may derive not only from explicit provisions but also from other provisions of the Treaty establishing the European Economic Community and acts adopted by the institutions.[33] It stresses that, once common rules are introduced, the Community alone will be entitled to conclude agreements with third countries containing international obligations in these areas.[34] In essence, the Court is pointing out that not only on the express provisions of the Treaty establishing the European Economic Community, but also on other provisions or even other Community acts may serve as legal bases for such an agreement.

The Court also deduced that there are cases where this also results in exclusive competences for the Community.[35] The Court of Justice first of all points out that, where Community rules are adopted for the purpose of achieving the objectives of the Treaty, Member States may not, outside the framework of the institutions, assume obligations that may affect those rules or alter their scope.[36] The Court also notes in this regard that, since the entry into force of the regulation in question, the relevant part of transport policy belongs to the (exclusive) powers of the Community. In this context, the Court's indecisiveness is perhaps even somewhat felt in the argument when it points out that paragraphs 74 and 75 of the Treaty establishing the European Economic Community (i.e. the transport policy provisions) do not explicitly provide for the Community's power to conclude international agreements.[37] It is to be noted that, at the end of the argument, even in landmark decisions such as Van Gend en Loos or Costa v. ENEL, the uniformity of the Community market and the uniform implementation of Community law are invoked.[38]

The Court itself was clearly aware of the pragmatic side of this issue. In a letter to Antonio Tizzano (the then young law professor who would later become Vice-President of the Court of Justice), the rapporteur (and a very pro-integrationist judge), Pierre Pescatore wrote that the controversy surrounding the judgment showed that not everyone had yet accepted the logic of the new legal order, which was rather different from international law. However, Pescatore stressed that he is aware of the depth of the transformation. Pescatore's determination presumably also influenced the other judges.[39] This personal opinion was later reflected in his writings and speeches. In his later work (including his lectures at the Hague Academy of International Law programme), he stressed the need to clarify the depths of the Community's legal personality, in the course of which it is necessary to clarify the (greater) powers of the Community, including the importance of the ERTA case. He also stressed, however, that his idea would probably be frowned upon by other Member States.[40]

33 ECLI:EU:C:1971:32, paragraphs 16 to 18.
34 ECLI:EU:C:1971:32, paragraph 17.
35 ECLI:EU:C:1971:32, paragraphs 8 to 11.
36 ECLI:EU:C:1971:32, paragraph 21.
37 ECLI:EU:C:1971:32, paragraphs 23 to 25.
38 ECLI:EU:C:1971:32, paragraph 31.
39 PETTI 2021b: 21.
40 FRITZ 2020: 592.

Partial conclusions

In the light of the above, it can be concluded that the ERTA case is another milestone in the case law of the Court of Justice. It is also clear, however, that at the time it was perhaps only the Court of Justice that assessed the magnitude of this change:

Firstly, it is true that the Commission presented very convincing argumentation that deepened integration. However, it can be seen that the arguments do not display the elements that were necessary for the thesis itself to work properly. For this, the Court of Justice was necessary. In addition, the Court of Justice ruled in favour of the Council and not the Commission, despite the fact that the Commission presented evidence to the Court of Justice on numerous occasions that it objected to the Council's action.[41]

Secondly, the Advocate General assessed the significance of the issue. This is also apparent from the fact that he did not agree with the Commission that the provisions in question confer on the EEC the power to conclude an international agreement. However, it is also clear from the language of the Advocate General's opinion that he was in fact completely puzzled as to what to do. In this respect, it relied much more on the Court's earlier reasoning based on a grammatical approach to the interpretation of powers.

Thirdly, it is clear from the argument that the Court struggled to provide a convincing reasoning. Not considering the grammatical interpretation sufficient (which would have led to the opposite conclusion, based on the Advocate General's reasoning), it had to rely on the system of the Treaty establishing the European Economic Community and a somewhat teleological approach, such as the common market and the uniform implementation of Community law.[42] Of course, it acknowledged that Member States were entitled to conduct negotiations, but its actual position on the situation of powers was innovative. This led to a rather pragmatic (and quite constitutional law-like) argument. The Court was presumably able to appreciate the importance of the case. It is no coincidence that Craig argues that a court generally resorts to teleological interpretation of the law when there are significant cases when the "stakes are high", both in principle and in practice.[43] However, it is also true that the Court could not see the system as a whole at the time. This is so only because only one of the cases of implied external powers covered ("in so far as its conclusion may affect common rules or alter their scope") is dealt with, the other provisions (including paragraph 18 on powers in general) not indicating that other cases had been examined by the Court. This is a significant finding, since there are approaches that assume this degree of discretion on the part of the Court of Justice in the ERTA case. No wonder, since in other cases it is assumed that the Court could understand the situation in a relevant key case (such as the Dassonville case). Consequently, in the decision, the concept itself was assessed, but its precise nature could not be identified by the Court at that time. This took place later. However, it is also true that the teleological interpretation used and the concise, yet somewhat imprecise wording favoured later evolution.

41 See: C-22/70.
42 Butler–Wessel 2021.
43 Craig 2014: 213.

Elaborating the implied external powers until the Lisbon Treaty

Necessity for the implied external powers

The very first case before the Court of Justice that dealt with this option was Opinion 1/76 on a draft agreement on a European fund for the temporary decommissioning of inland waterway vessels. The proposed agreement would have involved the six EEC Member States and Switzerland to eliminate the disruption caused by the excess capacity of the inland waterways in the Rhine and Moselle basins and the excess capacity of the Dutch and German inland waterways in the Rhine basin.[44] The agreement would necessarily have affected the decision-making and judicial powers of the Community institutions, so the Commission consulted the Court of Justice on the draft. Although the Court reiterated the position it had taken in the ERTA case, it was clear that, since Switzerland was a member of the Convention, it was not possible to establish this by internal rules, but only by an international treaty.[45] This was also confirmed by the Council before the Court of Justice, which in its argument ruled out in advance that the eventuality in the ERTA case would apply, since there were no Community rules on the subject at the time.[46] On this basis, the Court of Justice ruled that the EEC may enter into international obligations with third States even if the Treaty establishing the European Economic Community authorises it to adopt internal rules on such matters, subject to the condition that its participation is necessary for a Community objective to be attained.[47] Knapp also points out that it is to be considered that the conclusion of an international treaty was the only instrument that made it possible to achieve the objective in this case. It can be seen that, in this case, the Court of Justice has also presumably not fully grasped the complexity of the implied powers, although it has used the ERTA case as a reference, in a necessarily pragmatic manner.

Obligation to conclude contracts imposed by a legislative act of the Union

This case was based on Opinion 1/94 on the conclusion of international treaties on services and the protection of intellectual property. In the case of the GATS, the Commission argued that there was no area within GATS where the Community did not have appropriate power; it covers the freedom of establishment and the freedom to provide services [48]. However, the Court of Justice (referring back to the ERTA case) pointed out

44 KNAPP 2019: 82.
45 Opinion 1/76 of the Court of Justice of 26 April 1977, ECLI:EU:C:1977:63, paragraph 7.
46 HODUN 2015.
47 KNAPP 2019: 84.
48 Opinion 1/94 of the Court of Justice of 15 November 1994, ECLI:EU:C:1994:384, paragraphs 73–74.

that even within the field of transport, common rules do not always apply.[49] In the case of the freedom of establishment, the Court of Justice has also held that the sole purpose of the relevant chapter of the Treaty is to guarantee the Member States the freedom of establishment and the freedom to provide services, and that it cannot be inferred from these chapters that the Community has exclusive competence with regard to relations with other States.[50] However, the Commission (presumably erroneously referring to Opinion 1/76) suggested that where Community law conferred powers on the institutions to achieve specific objectives, according to the Commission, the power to conclude such an agreement followed from this.[51] It is to be noted that the Commission also mentioned that the Community remains inactive on these issues in the international arena. The Court of Justice could have used this more or less faulty reasoning (on the basis of which it sought to prove necessity).[52]

Fine-tuning the ERTA doctrine

The vagueness of competences

In addition to the foregoing, however, the conclusion reached in the ERTA case was continued. The case right after the ERTA case took the same approach further. The Kramer case was based on accusations that Dutch fishermen were in breach of the North-East Atlantic Fisheries Convention on the limitation of catches of sole and plaice. The defendants defended that the convention was contrary to the provisions of Community law, of which almost all states were members except Luxembourg.[53] Here the Court of Justice also began by stating that the Community has legal personality, and then made the determination of the exclusive external power of the EEC conditional upon the examination of the system of provisions of the Treaty establishing the European Economic Community. Here, too, the Court of Justice not only referred to certain provisions of the Treaty establishing the European Economic Community, but also to secondary legislation in order to establish power. The Court of Justice first established that the Community has exclusive competence for the biological conservation of marine resources.[54] Since this means an exclusive competence (which, moreover, according to the Court, follows from the nature of things), the external aspect of this necessarily also results in implied external powers, with which the Court drew a parallel with its conclusions in the ERTA case.[55] Here, however, it is already suggested that, in the present case, an exclusive inter-

49 Opinion 1/94 of the Court of Justice of 15 November 1994, paragraph 81.
50 Opinion 1/94 of the Court of Justice of 15 November 1994, paragraphs 73 to 74.
51 Opinion 1/94 of the Court of Justice of 15 November 1994, paragraphs 95 to 96.
52 Hodun 2015: 173–174.
53 Judgment of the Court of 14 July 1976 in joined cases C-3-76, C 4-76 and C-6-76 Cornelis Kramer and Others ECLI:EU:C:1976:114.
54 ECLI:EU:C:1976:114, paragraphs 42 to 43.
55 ECLI:EU:C:1976:114, paragraph 20.

nal power replaced the exclusive implied external powers, whereas previously this was only the case with regard to a shared competence.[56]

Nevertheless, in Opinion 2/91, the Court of Justice was again faced with the distinction between exclusive and shared competences. The subject of Opinion 2/91 was the International Labour Organisation Convention No. 170, which aims to protect workers from the harmful effects of the use of chemicals in the workplace and contains rules on various topics such as the handling of chemical products from origin to use, the rights and obligations of employers and workers, and health and safety requirements for the export of hazardous chemicals.[57] The Commission argued that the subject matter of the Convention falls within the power of the Community. Germany, Spain and Ireland argued, referring to the ERTA case, that such power can only be established in the case of common policies.[58] As ILO Convention 170 focuses on social issues, this approach cannot be used. The Court of Justice stressed that, contrary to the arguments of the Member States in question, such powers are not limited to common policies, since this would allow Member States to enter into international commitments that could affect or change their scope. It logically follows that it is possible to apply the ERTA doctrine also in the case of shared competence.[59] It is to be noted that the Court of Justice stresses that this can be established even if the Community rules are otherwise not contrary to the rules of the international agreement.[60]

The above also suggests that the Court of Justice already strived at that time not to allow the ERTA doctrine to shake the foundations of the division of powers. In the case of Opinion 2/91, the Commission argued that Member States might be inclined not to adopt provisions better suited to the specific social and technical conditions of the Community. Since such an approach would jeopardise the development of integration and Community law, the Community should therefore have exclusive competence to conclude an ILO convention, but the Court of Justice rejected this argument.[61]

The vagueness of common rules

The issue of common rules has also been steadily broadened by the post-ERTA case law. It is also significant in the Kramer case that, although the Court of Justice again took the Council's side at the end of the ruling, the Court's decision only confirmed the establishment of the ERTA doctrine. The Court decided to clarify the ERTA case – although it could have, given the narrow interpretation sought by Denmark and the United Kingdom in the case – insofar as it made clear that the creation of the implied powers does not require that the internal rules and the subject matter of the envisaged agreements are identical.[62] This approach was also followed by the Court of Justice in Opinion 2/91,

56 LOCK 2022: 82–84.
57 Opinion of the Court of Justice of 21 August 1991, No 2/91, ECLI:EU:C:1993:106, paragraphs 73–74.
58 Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 1–6.
59 Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 9 to 11.
60 Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 16 and 18.
61 Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 1–6.
62 Joined Cases 3/70, 4/70 and 6/70, paragraphs 44–45.

where the Court took a further step. As this was a case of shared competence, only minimal harmonisation rules could be adopted in this area. In doing so, it rejected the objections of the Council, Spain, Denmark, France, the Netherlands and Belgium.[63]

It is to be noted that the development of case law has also clarified the fact that, if the common rules cover a given power, Member States cannot conclude any international treaty on that subject. According to the Advocate General's opinion in the Open Skies decision, this also applies in cases where the provisions of the international treaty in question are otherwise in line with the rules of the common market. Their very existence is incompatible with the common market itself.[64]

Lack of common rules

Finally, it is worth mentioning the lack of common rules separately. In the Kramer case, the institutions were only granted authority to adopt internal substantive rules, in other words, it was not even necessary that these internal rules had already been adopted, contrary to the UK's argument to this end. The delegation itself was sufficient to create this competence.[65]

Codification of the implied external powers

The Constitutional Treaty and the Court's "response"

It is to be noted that an attempt was also made to codify the case of implied external powers in the Constitutional Treaty. This is not new to the extent that they wanted to include not only this power issue in the document, but a complete and clear catalogue of powers.[66] Accordingly, the Constitutional Treaty tried to codify existing case law. Article III-323 of the draft provided that the Union may conclude an agreement with one or more third countries or international organisations where (1) the Constitution so provides or where (2) the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Constitution, or (3) is provided for in a legally binding Union act or (4) is likely to affect common rules or alter their scope. The Constitutional Treaty also seeks to codify the sub-case of exclusive competence of the implied external powers in Article I-13(2).[67] It is to be noted, however, that there is no implied external shared competence under the text, only exclusive, and no one proposed an amendment to this effect at the time.[68]

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63 Opinion of the Court of Justice of 21 August 1991, No 2/91, paragraphs 16 and 18.

64 Opinion of Advocate General Tizzano in Joined Cases C-466-76/98 Commission v. United Kingdom and other Member States, 31 January 2002 ECLI:EU:C:2002:63, paragraph 72.

65 Joined Cases 3/70, 4/70 and 6/70, paragraphs 39–40.

66 European Union 2001: 3–4.

67 Treaty establishing a Constitution for Europe, 16.12.2004/C 310/1, Article I-13(2) and Article III-323.

68 Hodun 2015: 192–194.

Although the Constitutional Treaty was not adopted, it is worth comparing it with the subsequent case law of the Court of Justice. Opinion 1/03, in which the Court of Justice examined the question of whether the Community has exclusive competence to conclude the new Lugano Convention replacing the 1988 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, seems innovative in relation to the text. In this respect, the Court of Justice in a way "codified" the existing ERTA case law, in terms of in which cases such power may exist.[69] It stressed, however, that there are several possible cases of exclusive competence other than the case law to date, and that, consequently, the Court's findings to date are "based only on the specific contexts taken into account by the Court".[70] It should be stressed that the purpose of exclusive competence is to ensure the effective application of Community law and the proper functioning of the system established by the legislation. In this context, it stressed that Member States are not entitled to conclude international treaties containing obligations affecting Community provisions. This requires "a comprehensive and concrete analysis", which must not only take into account the existing situation, but also future trends in development, which are foreseeable at the time of the analysis.[71] In this context, it is to be noted that, following the Constitutional Treaty, Opinion No. 1/03 of the Court of Justice confirmed the institution of implied external powers, and even allowed the Court of Justice to extend it. In doing so, the Court sent a clear message to the Member States that it disagreed with the wording of the Constitutional Treaty (which adopted a restrictive interpretation compared to Opinion 1/03 and the preceding case law).[72]

The Lisbon reforms

With the Lisbon reforms, the Treaty on the Functioning of the European Union also introduced the case of implied external powers in the text of the Treaty (in the case of Article 216 TFEU and Article 3(2) TFEU). Despite the fact that it was adopted and sought to eliminate the pillar structure as a significant change,[73] it can be said that the scope of the two articles is almost the same, and, consequently, the content of the ERTA case and Opinion 1/76 were declared. Although it is unclear from the imperfect wording, presumably Article 216(1) TFEU is intended to explore the question of the implied external powers in general terms (including both exclusive and shared cases), whereas Article 3(2) TFEU only covers the conditions for exclusive competence (since it is located in Article 3 TFEU, otherwise containing exclusive competences).[74] The Lisbon Treaty took over the text used in the Constitutional Treaty in its entirety. Perhaps most importantly, however, despite the fact that the meaning of these provisions remains

69 Opinion of the Court of Justice of 7 February 2006, No 1/03, ECLI:EU:C:2006:81, paragraphs 122–123.
70 Opinion of the Court of Justice of 7 February 2006, No 1/03, paragraph 121.
71 Opinion of the Court of Justice of 7 February 2006, No 1/03, paragraph 133.
72 HODUN 2015: 198.
73 KAJTÁR 2010: 3–5.
74 Treaty on the Functioning of the European Union, J C 326, 26.10.2012: 47–390, Articles 3(2) and 216.

uncertain, a practice declared by the Court of Justice became part of primary EU law (as opposed to, for example, an explicit declaration of the primacy of EU law).

Another answer from the Court: new case law

In the late case-law it is typical that the Council tried to limit the phenomenon of implied external powers, somewhat. This is also due to the fact that the question was again raised as to what extent a catalogue of powers succeeded in limiting the extension of powers. Govaere stresses that, in Case C-114/12 and Opinion 1/13, the Council argued that if the Court of Justice were to infer exclusive competence for the Union in the absence of common rules, it would unlawfully extend the scope of Article 3(2) TFEU, violating the principle of conferral of powers itself.[75] In both cases, the Court of Justice firmly rejected the idea that the Lisbon reforms had only created a definitive version of the implied external powers through a partial codification. The Court stressed that the opinions on the ILO and the Lugano Convention did not create new tests in the context of ERTA, but merely explained the original ERTA test.[76] The pre-Lisbon practice continues to apply without any restriction after Lisbon.

Conclusions

The development of implied external powers shows several clearly visible features. Based on these, the following conclusions can be made:

Firstly, applying Sinclair's theoretical approach, one can see that the case of implied external powers is not an EU invention: implied powers already appear in the case law of the United States of America and the International Court of Justice in The Hague.

Secondly, reviewing the circumstances, it is most certain that, despite the early formulation of the case of deepening integration, the application of implied external powers does not follow directly from the provisions of the Treaty establishing the European Economic Community. Neither the provisions on external relations, nor those on transport policy justified its existence. The agenda was different for the practitioners of Community law, so it was necessary to find the right moment for such a decision.

Thirdly, the Commission's reasoning has some novel features, but the Court's conclusions and stated doctrines were also necessary for the ERTA doctrine to emerge. This was not really recognised by the Member States at the time, as they did not bring any arguments against its actual application. In addition, although the Advocate General recognised its importance, he did not agree with the introduction of its application. At the same time, the Commission and the Court of Justice almost deliberately sought to

[75] Govaere 2022: 18–19.

[76] Govaere 2022: 18–19; Judgment of the Court of Justice of 16 July 1956 in Case C-114/12 Commission v. Council, ECLI:EU:C:2014:2151, paragraphs 66–67; Opinion of the Court of Justice of 14 October 2014, No 1/13, ECLI:EU:C:2014:2303, paragraphs 70–73.

create a fairly effective instrument for securing competences. This approach follows from the spirit of the Commission at the time, as well as from Pescatore's later statements.

Fourthly, it is also clear that the ERTA doctrine does not express the entirety of the implied external powers, as it contains only one case of such powers, and they are not always traceable back in their entirety to the ERTA case. It is no coincidence that, in its Opinion No. 1/03, the Court of Justice, in response to the Constitutional Treaty, set it out in its then (and open-ended) entirety. Here, the further pragmatism of the Court of Justice necessarily appears, leading to a further development of the doctrine.

Finally, even after codification, the Court of Justice to a large extent pragmatically insisted on the completeness of the implied external powers, and did not allow Member States to limit them. As a result, the Court maintained this approach.

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Ferenc Csibor[1]

The Potential Indirect Impact of the European Citizens' Initiative on EU Legislation

The Example of the Initiative to Ban Glyphosate[2]

The EU re-authorisation of glyphosate, the active substance used in plant protection products, has once again highlighted the issues and problems associated with the active substance in 2023. The main source of tension is that the active substance was classified as a potential carcinogen by the International Agency for Research on Cancer in 2015, but the EU's competent agencies have not identified any reasons for banning the active substance. Despite calls from civil society for removing glyphosate from the internal market, the European Commission has refused to ban the substance from the internal market. The aim of this paper is to present in more detail the European Citizens' Initiative (ECI) to ban glyphosate and the Commission's response to the initiative. The European Citizens' Initiative is a legal instrument that gives EU citizens the opportunity to express their will on a specific issue or policy question. Thus, through the citizens' initiative, it is possible to channel the demands of EU citizens into the legislative process. An analysis of the measures taken in response to the initiative, that aimed to ban glyphosate shows that an ECI can not only have a direct impact, but can also have an indirect trigger effect in terms of getting the Commission to pay attention to an important issue. The result of this indirect trigger effect may be that, after a longer period of time, the Commission finally initiates legislation on the subject of a particular ECI.

Keywords: glyphosate, European citizens' initiative, legislation, pesticides, advocacy

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Introduction

The European Citizens' Initiative (ECI) aims to give citizens of the Union the opportunity to express their will on an issue directly. The need for deeper involvement of citizens in the functioning of Community institutions dates back to the last century, with the first significant step being taken in 1979, when the direct election of Members of Parliament (now the European Parliament) was introduced.[3] The Citizens' Initiative was already included in the 2003 draft Constitution, and finally became part of primary Community law with the Lisbon Treaty.[4]

The Citizens' Initiative requires organisers to collect at least one million statements of support (also known as signatures of support) from at least a quarter of Member States within a twelve-month collection period.[5] If they meet this threshold, they may submit the initiative to the European Commission, which is obliged to examine the initiative on its merits and, within three months of its submission, to publish a communication setting out its conclusions on the initiative and the action it intends to take or not to take on it, together with the reasons for its decision.[6] The ultimate aim of each European Citizens' Initiative is for the Commission to initiate legislation in a particular area.[7]

The significance of the ECI therefore lies in the fact that it is a globally unique transnational institution of participatory democracy.[8] Through it, EU citizens can try to channel their demands into EU legislation. This, therefore, allows bottom-up legislation.[9] It can also be linked to the principle of subsidiarity, which can generally be described as the principle that decisions must be taken at the lowest possible level, where the greatest expertise is available.[10] As the initiatives for the ECI come from the bottom, from the citizens, this can strengthen the subsidiarity principle in the functioning of the Union.

Among the EU institutions, the European Commission has a prominent role in relation to citizens' initiatives. The organisers of a given citizens' initiative must submit their initiative to the Commission for registration.[11] If one million signatures of support are collected for, it will again be submitted to the Commission, which will examine it, and decide whether to initiate legislation on the subject-matter of the given ECI.[12] It is part of the Commission's key role that only initiatives with a purpose that is within the Commission's competence to initiate legislation can be registered.[13]

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3 PETRESCU 2014a: 995.
4 VATAMAN 2013: 268.
5 Regulation (EU) No 2011/211 of the European Parliament and of the Council, Article 2, Article 5(5); Regulation (EU) No 2019/788 of the European Parliament and of the Council, Article 3, Article 8.
6 Regulation (EU) No 2011/211 of the European Parliament and of the Council, Article 9, Article 10; Regulation (EU) No 2019/788 of the European Parliament and of the Council, Article 15.
7 MORARU 2016: 156.
8 TÁRNOK 2021: 39.
9 KAISER 2019: 165–166.
10 HALÁSZ–JAKAB 2019: 92.
11 MILITARU 2017: 93.
12 LONGO 2019: 188.
13 GREENWOOD 2019: 949.

In addition to the Commission, the European Court of Justice has also played an important role in the history of the ECI, and its several decisions have had a significant impact on the development and functioning of the legal institution. As a result of a lawsuit brought by the organisers of the 'One of Us' initiative, the Court of Justice ruled that the communication containing the Commission's responses to the ECI could be subject to judicial review.[14] In the 'Stop TTIP' initiative the Court of Justice ruled that a citizens' initiative can be aimed not only at the adoption of EU acts but also at their withdrawal.[15] The possibility of partial registration of initiatives – which has by now become a part of the regulations on the ECI – arose in the lawsuit against the decision to refuse to register the 'Minority SafePack' initiative.[16]

The submission of citizens' initiatives has been possible since 2012. Since then, a wealth of experience has been gathered on the functioning of the ECI. During this more than 10-year period, more than 100 initiatives have been registered, of which 22 was withdrawn; in 60 cases the organisers were unable to gather sufficient signatures of support, and so far a total of 10 initiatives have been answered by the Commission.[17] The aim of the study is to show how this legal instrument works in practice through the 'Ban glyphosate' European Citizens' Initiative, one of the 10 initiatives that were answered. This initiative was chosen because, uniquely, the organisers had already collected the one million statements of support needed for validity halfway through the twelve-month collection period. The hypothesis of the research is that initiatives can not only achieve results by the Commission's direct legislative response to the initiative, but also by the ECI's indirect trigger effect on the development of EU legislation.

Introduction and reform of the European Citizens' Initiative

At the level of primary law, the Lisbon Treaty introduced the European Citizens' Initiative, but the detailed rules for the conduct of initiatives were laid down in Regulation (EU) No 211/2011 of the European Parliament and of the Council.[18] The first opportunity to submit initiatives was in 2012.[19] It can be said that the introduction of the ECI was generally met with great enthusiasm.[20] The reason was that this legal instrument was expected to provide an opportunity to channel issues of public interest into decision-making at EU level.[21] With this, the instrument could address the democratic deficit that has been criticised in terms of the functioning of the EU.[22]

14 Vogiatzis 2020: 694–695.
15 Karatzia 2018: 1668.
16 Tárnok 2017: 91.
17 See: https://citizens-initiative.europa.eu/find-initiative_hu
18 Petraru 2011: 71.
19 Gherghina–Groh 2016: 375.
20 Szeligowska–Mincheva 2012: 272.
21 Petrescu 2014b: 11.
22 Chronowski–Vincze 2018: 323–326.

Despite the initial enthusiasm surrounding the introduction of the ECI, the first few years of the legal instrument were not without difficulties. In the beginning, the Commission interpreted the admissibility criteria (in particular that the purpose of the initiative must be within the Commission's competence) in a disproportionately restrictive way, and refused to register several initiatives.[23] One difficulty was that the organisers of the citizens' initiative needed a lot of organisational work to promote the initiative and organise the concrete collection of signatures. A problem in this respect was that the Commission often did not provide adequate support.[24] A specific challenge was posed by the complexity of the signature collection form used to collect statements of support.[25]

Regulation (EU) No 211/2011 required the Commission to submit a report to the Council of the European Union and the European Parliament on the functioning of the European Citizens' Initiative by 1 April 2015.[26] In the report submitted, the Commission itself identified a number of specific problems with the functioning of the ECI, for example, the difficulty of organising the online signature collection system,[27] the requirements that differ from one Member State to another for the provision of personal data when collecting signatures,[28] or difficulties in preparing translations of the initiatives.[29] Following the publication of the Commission's report, the European Parliament's plenary session adopted a resolution on the European Citizens' Initiative, in which it called for implementing new regulations for the ECI.[30] Specific proposals from the European Parliament included lowering the minimum age for supporting a citizens' initiative to 16,[31] the Commission to give detailed reasons for refusing to register an initiative,[32] and for the Commission to provide organisers with free servers to store electronic signatures.[33]

The next major milestone in the history of ECI regulation came in 2017, when the Commission presented its legislative proposal for a new regulation.[34] Among the proposal's highlights was the option of creating a legal entity for the purpose of managing the initiative,[35] the creation by the Commission of a central online collection system,[36] translation of the content of initiatives,[37] and the possibility for organisers to choose the starting date of the twelve-month collection period within three months of registration.[38]

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23 KARATZIA 2018: 152.
24 MORARU 2016: 149–156.
25 TÁRNOK 2019: 144–145.
26 Regulation (EU) No 2011/211 of the European Parliament and of the Council, Article 22.
27 European Commission 2015a: 8.
28 European Commission 2017c: 7.
29 European Commission 2017c: 15.
30 TÁRNOK 2021: 151.
31 European Parliament 2015: Point 26.
32 European Parliament 2015: Point 15.
33 European Parliament 2015: Point 17.
34 TÁRNOK 2021: 147.
35 European Commission 2017c: Article 5(7).
36 European Commission 2017c: Article 10.
37 European Commission 2017c: Article 4(4).
38 European Commission 2017c: Article 8(1).

Based on the legislative proposal put forward, the new ECI Regulation, which is still in force, was finally adopted in 2019.[39] Among the significant innovations in the Regulation is that organisers can decide themselves, within six months of registration, when the collection period starts,[40] a central online collection system run by the Commission,[41] the legal personality of the group of organisers,[42] and that the content of the initiative is now translated into the official languages of the Union by the Commission.[43]

History of glyphosate and pesticide regulation in the European Union

Glyphosate itself is an active substance used in various plant protection products and insecticides. The first pesticide containing glyphosate was launched by the US biotechnology company Monsanto in 1974. The high efficacy of the active ingredient led to its rapid and widespread use, with glyphosate now being the dominant component in nearly a quarter of all pesticides used worldwide.[44] The first authorisation for glyphosate on the internal market was granted in 2002, under Directive 91/414/EEC concerning the placing of plant protection products on the market. This Directive has been repealed by Regulation (EC) No. 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, which still sets out the EU authorisation procedure for plant protection products.[45]

As regards the current authorisation procedure, it needs to be underlined that the authorisation of active substances used in plant protection products and the authorisation of specific plant protection products are separate.[46] The former are authorised at EU level, where the Member State representatives in the Standing Committee on Plants, Animals, Food and Feed (SCoPAFF), on the basis of a position paper from the European Food Safety Authority (EFSA), decide on the authorisation of an active substance under the rules of comitology procedure.[47] Where an active substance is authorised at EU level, each Member State authorises the use of plant protection products containing the given active substance on its own market.[48] It should be noted that, for the authorisation of active substances, only the material submitted by the applicant and the results of the scientific research, tests and studies available therein are taken into account.[49]

Under the new regulations, it was necessary to renew the authorisation of glyphosate, and for that purpose a review of the active substance was launched in 2012. As part

39 Regulation (EU) 2019/788 of the Parliament and of the Council.
40 Regulation (EU) 2019/788 of the European Parliament and of the Council, Article 8(1).
41 Regulation (EU) 2019/788 of the European Parliament and of the Council, Article 10.
42 Regulation (EU) 2019/788 of the European Parliament and of the Council, Article 5(7).
43 Regulation (EU) 2019/788 of the European Parliament and of the Council, Article 4(4).
44 Dilbeck 2021: 105–106.
45 Van Den Brink 2020: 438.
46 Robinson et al. 2020: 451–452.
47 Smyth 2017: 179–181.
48 Graefe 2019: 260.
49 Paskalev 2020: 530.

of the procedure, a consortium of 26 chemical companies led by Monsanto submitted the dossier for investigation to the rapporteur Member State, in this case Germany. The assessment prepared by Germany was subsequently examined by the EFSA, which concluded in 2015 that the available evidence did not support the conclusion that glyphosate is carcinogenic or genotoxic.[50] At the same time, however, the International Agency for Research on Cancer (IARC) of the World Health Organization classified glyphosate as a potential carcinogen in 2015.[51] In response to the decision, the European Commission asked the European Chemicals Agency (ECHA) to carry out its own assessment of the carcinogenicity of the substance. The assessment was completed in 2017, and the ECHA concluded that there is currently no technical or scientific evidence to suggest a causal link between glyphosate and the development of cancer.[52] In this context, it should be noted that the United States Environmental Protection Agency (EPA) also classified glyphosate as a carcinogen in 1985, but changed its decision in 1991, and reclassified it as a non-carcinogen. The reason for the change of classification was that animal testing on mice and rats did not show that exposure to glyphosate causes cancer.[53]

As a result of the IARC's finding, and the divergent views of European bodies, the re-approval of glyphosate has proved difficult. Member States' representatives first voted on the Commission's approval proposal in June 2016, but could not reach a qualified majority and hence the active substance was not authorised. In response, the Commission has temporarily extended the authorisation and negotiations have taken place in several rounds. Finally, in November 2017, a qualified majority was reached, but glyphosate was only authorised for 5 years, compared to the 15 years allowed under the regulations.[54] In addition, the Implementing Regulation approving glyphosate stated that Member States must pay particular attention to the protection of groundwater users, terrestrial vertebrates and arthropods and non-target terrestrial plants, when using glyphosate.[55] It was also in 2017 that the European Citizens' Initiative to ban glyphosate was launched. Following the expiry of the 5-year authorisation, the authorisation procedure for glyphosate was repeated in 2023, preceded by a new assessment launched in 2019.

Following the authorisation of the active substance in 2017, there have been attempts by several Member States to exclude glyphosate from their national markets. In 2019, the Austrian legislature adopted a general ban on all plant protection products containing glyphosate. The Commission objected to the decision, arguing that, as the authorisation of active substances is an EU competence, the general ban violates EU law and therefore it was not possible to exclude glyphosate from the Austrian market.[56] The Brussels Capital Region brought an action to annul the decision to renew the approval of glyphosate, but the Court of Justice of the European Union rejected its application.[57]

50 CLAUSING 2019: 352–354.
51 FINARDI 2020: 473.
52 LEONELLI 2018: 590–591.
53 TOMLINSON 2020: 151, 161.
54 European Commission: *Earlier Assessment of Glyphosate*.
55 Commission Implementing Regulation 2017/2324, Annex I.
56 LEONELLI 2022: 215.
57 LEONELLI 2022: 206–208.

In Luxembourg, the Minister for Agriculture withdrew the marketing authorisation for all plant protection products containing glyphosate in 2020.[58] The decision to withdraw the authorisations was annulled by the national administrative court on the grounds that the decision to withdraw the authorisations was not properly reasoned.[59] In the case of France, rather than taking general measures against glyphosate, the competent French administrative body subjected the various plant protection products containing glyphosate to individual and rigorous examination, withdrawing marketing authorisations for most of them and rejecting several applications for new authorisations, thereby withdrawing a significant proportion of plant protection products containing glyphosate from the national market.[60] At present, the competent French authority is actively investigating in which cases it is possible to replace plant protection products containing glyphosate with other alternatives and if it is possible to replace the product containing glyphosate with an alternative, then it does not get authorised.[61]

The various approaches to the phase-out of glyphosate in the different Member States illustrate the divergent views on glyphosate-containing plant protection products in the European Union. This division was strongly reflected in the course of the renewal process of the active substance's authorisation in 2023. In 2019, a re-evaluation of the active substance was launched, which resulted in the EFSA again concluding that there are no critical areas that would prevent authorisation. However, the Member State representatives meeting in the Standing Committee on Plants, Animals, Food and Feed on 13 October did not reach a qualified majority to authorise the active substance, and, similarly, no qualified majority was achieved in the vote in the Appeal Committee on 16 November.[62] As a result, the Commission finally decided to renew the authorisation of glyphosate on 13 November 2023. It limited its decision by authorising the active substance for only 10 years instead of 15 years, and by imposing certain restrictions on its use, such as maximum application rates, a prohibition on its use as a desiccant and a requirement for Member States to take risk mitigation measures.[63]

The 'Ban glyphosate' initiative

The full name of the initiative is 'Ban glyphosate and protect people and the environment from toxic pesticides!' (or 'Ban glyphosate!' for short). The organisers' objective was to ask the Commission to propose a ban on glyphosate in the Member States, to review the pesticide approval procedure and to set EU-wide mandatory reduction values for pesticide use.[64]

Glyphosate-containing herbicides have been linked to cancer and are causing ecosystem destruction, the organisers said. This was their justification for the need for

58 Leonelli 2022: 218.
59 Donati 2023: 818–819.
60 Leonelli 2022: 219–220.
61 Anses 2024.
62 European Commission 2023.
63 European Commission 2023.
64 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en

a total ban. Herbicides containing glyphosate have also been found in the wider literature to contaminate surface water when used, and may also be present in food through their use for desiccation.[65] An additional problem with the widespread use of plant protection products is that residues of the products may remain in the soil after use.[66] The organisers wanted to ensure that the evaluation of plant protection product authorisations was based only on published studies written at the request of the competent public authorities and not on behalf of pesticide-manufacturing companies. The rationale for this is to avoid that the various pesticide-manufacturing companies commission studies that tend to hide the potential harmful effects of the substances they produce. Finally, on the third objective, the organisers said that setting binding reduction targets would bring us closer to a pesticide-free future.[67]

According to the official fact sheet, the initiative was registered on 25 January 2017.[68] The actual collection of signatures started later, as it was only announced on the eighth of February that health and environmental NGOs had gathered in Brussels to launch a European Citizens' Initiative to ban glyphosate.[69]

In the case of the 'Ban glyphosate' initiative, the collection of signatures of support was extremely fast and smooth. On 14 March, it was reported that nearly half a million signatures had been collected.[70] By the fourth of May, more than 720 000 statements of support was collected.[71] Finally, on 15 June, the organisers announced that they had collected more than 1 million statements of support.[72] According to the official fact sheet of the initiative, the organisers closed the collection on 2 July.[73] Once the collection was closed, the organisers had to submit the collected statements of support to the competent authorities in the Member States for verification.[74] In this case, the verification was completed on 6 October, when the initiative was declared valid.[75] The initiative could then be submitted for substantive examination to the Commission, which published its Communication on 12 December.[76]

To date, this is the only initiative where the organisers, after collecting the required number of signatures, have closed the collection before the end of the twelve-month collection period. This speeded up the whole process and enabled the Commission to publish its response within a year of the initiative being registered. A question to consider is how organisers of other initiatives should proceed if the necessary number of signatures is collected more quickly.

In relation to the continuation of the collection of statements of support, it could be argued that a larger number of signatures collected could give a stronger legitimacy

65 SZEGEDI–TELEKI 2020: 249.
66 CENTNER 2021: 73–74.
67 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en
68 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en
69 Health and Environment Alliance 2017b.
70 Health and Environment Alliance 2017a.
71 Health and Environment Alliance 2017d.
72 Health and Environment Alliance 2017e.
73 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en
74 Regulation (EU) No 2011/211 of the European Parliament and of the Council, Article 8.
75 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en
76 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en

to an initiative, thus giving the Commission more incentive to take substantive action on the basis of the initiative by presenting a legislative proposal. However, the argument in favour of closing the collection period earlier is that this would significantly speed up the whole process of the initiative, thus allowing organisers to receive a response to their initiative sooner. In the case of glyphosate, as the authorisation renewal process took place during 2016 and 2017, it could be argued that closing the collection period earlier was justified. The primary objective of the organisers was to ensure that no plant protection products containing glyphosate could be placed on the internal market. It is, therefore, not surprising that they wanted to submit their valid initiative to the Commission before the end of the authorisation process in order to oppose the renewal of authorisation. In the future, organisers of other initiatives, if they find themselves in a similar situation, will have to consider what would better serve the purpose of the initiative: to continue the collection, and thus eventually collect a larger number of statements, or to end the collection earlier, with a better chance of influencing a current EU decision-making process.

European Commission responses to the initiative

In its official Communication published on 12 December 2017, the Commission treated the three objectives of the initiative separately, namely banning glyphosate, reforming the authorisation of plant protection products and setting reduction targets. For this reason, it is also necessary to look at the Commission's individual responses separately in the course of our assessment.

Responses to the first objective

In the section of the Communication on the requested ban on glyphosate, the Commission first explained that the IARC was the only organisation to date to have assessed glyphosate as a probable human carcinogen. They pointed out that both the EFSA and ECHA had carried out detailed assessments of the substance, and that no carcinogenicity had been identified by either EU agency. The IARC's different assessment result was justified by the Commission by the fact that the agency had examined both glyphosate as an active substance and plant protection products containing glyphosate, whereas the EU assessment only looked at glyphosate itself, as the authorisation of plant protection products is a national competence.[77]

In addition to the effects on human health, the Commission has specifically addressed the effects on ecosystems. In a related part of the Communication, it first noted that the EU assessment concluded that glyphosate does not cause ecosystem degradation when used properly. In addition, the responsibility was primarily specified at Member State level, with reference to the fact that it was the Member States' task to

[77] European Commission 2017a: 6–8.

take measures to mitigate the risks involved when authorising plant protection products containing glyphosate.[78]

On the basis of the arguments presented, the Commission took a clearly negative position on the prohibition of glyphosate. It stated that there was no reason to question the EU's assessment and conclusions on glyphosate. Therefore, it argued, there was no basis to present a legislative proposal to ban glyphosate. It also highlighted that it had presented a proposal for an implementing regulation to extend the approval of the active substance for five years, which was adopted by a qualified majority of the representatives of the Member States. In extending the approval, it pointed out that the five-year timeframe is significantly shorter than the fifteen years allowed by the regulation. In addition, the Commission underlined that new information on glyphosate is rapidly emerging, which could lead to a review of its approval at any time.[79] As such, the response shows that the Commission is not open to the possibility of banning glyphosate; at most, there is only a slight degree of openness towards certain restrictions, such as shorter authorisations.

The organisers of the initiative did not respond directly to the Commission's negative reply. However, they strongly criticised the five-year authorisation of the active substance. They argued that, by authorising it, the Commission was failing future generations.[80]

Responses to the second objective

With regard to approvals based on studies written at the request of the competent public authorities, the Commission took a clearly supportive position – in contrast to the first objective – and has finally initiated legislation. With regard to the studies to be submitted for the evaluation of active substances and plant protection products, the Commission pointed out that they must comply with international protocols and that the institutes that prepare the studies must be regularly inspected by national supervisory authorities. On the issue of the approvals being based on studies commissioned by public authorities, the Commission argued that public money shall not be used to commission studies which would help the industry to put a product on the market. This is why the system works in such a way that it is the responsibility of those who benefit from the approval, in this case the manufacturers, to prove that the active substance is safe.[81]

At the same time, the Commission underlined that it fully agrees that the transparency of scientific assessments and decision-making is essential for trust. To this end, it undertook to put forward a proposal for a legislative amendment to increase transparency related to studies commissioned by industry players and submitted in the application dossier.[82] In addition, it also undertook to put forward a proposal for a legislative amendment to strengthen the governance of the studies on which the authorisation is based.

78 European Commission 2017a: 9.
79 European Commission 2017a: 9–10.
80 Health and Environment Alliance 2017c.
81 European Commission 2017a: 10–12.
82 European Commission 2017a: 11.

As a result of these commitments, the Commission adopted a proposal for a Regulation of the European Parliament and of the Council in April 2018, which led to the adoption of a Regulation on the transparency and sustainability of risk assessment in the food chain in June 2019.[83] The enhancement of transparency is a key element of the new regulation, by making studies and information submitted by industry publicly available, and by ensuring that EFSA is notified of all studies commissioned, so that companies applying for authorisation are unable to withhold information.[84]

The legislative proposal put forward by the Commission was welcomed by the organisers, but it was stressed that citizens must be guaranteed effective access to the documents on which the authorisation is based, in all cases. In particular, it was noted that the final legislation must ensure that companies applying for an authorisation cannot exclude the public on the grounds of confidentiality.[85] Under the new regulations introduced as a result of the reform, the EFSA is obliged to publish all documents, data and information submitted for the evaluation of active substances, and is required to publish studies commissioned from private laboratories. The new regulations aim to ensure that results that are unfavourable for a given active substance are publicly available.[86]

Responses to the third objective

Finally, the last objective of the initiative was to achieve binding EU-wide reduction values for the use of pesticides. The Commission, like in the case of the first objective, also took a more negative position, but in this case it essentially relied on the proper functioning of existing EU legislation. It stated that experience so far showed that mandatory quantitative reduction targets alone did not reduce the risks from pesticide use. For this reason, the Member States and the Commission focus not only on reducing the overall quantity of pesticides, but also on reducing the risks from their use.[87] And as far as the reduction of risks is concerned, the Directive on the sustainable use of pesticides contains the relevant provisions.[88] In addition, the Commission undertook to evaluate the national action plans developed under the Directive and, if the evaluation showed that insufficient progress had been made in reducing the risks from the use of pesticides, to consider setting binding reduction targets at EU level.

It is important to note that, since the publication of the Communication, the Commission has changed its position on this issue. The official website with the responses to the initiative no longer refers to the Directive on the sustainable use of pesticides, but to the 'Farm to Fork' strategy that has since been adopted, one of the objectives of which is to reduce the use of the most dangerous pesticides by 50%.[89] As such, it is clear that

[83] Regulation (EU) 2019/1381 of the European Parliament and of the Council.
[84] See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en
[85] Health and Environment Alliance 2018.
[86] Szegedi 2022: 104.
[87] European Commission 2017a: 13–14.
[88] Directive 2009/128 (EU) of the European Parliament and of the Council.
[89] See: https://citizens-initiative.europa.eu/initiatives/details/2017/000002_en

the Commission also initially refrained from taking any substantive action on the third objective, arguing that the existing rules were adequate and did not need to be changed. However, its approach to the issue has subsequently changed, and it has subsequently partly implemented the third objective of the initiative as well.

Comparison with other citizens' initiatives

Compared to other citizens' initiatives that have been responded to, the way some of the objectives of 'Ban glyphosate' were addressed is not unique. The response given in relation to the rejection of the glyphosate ban was similar to the stance taken on the 'Stop Vivisection' initiative, which aimed to end animal testing.[90] In its Communication, the Commission explained that the organisers of the initiative wanted to achieve their aim by having Directive 2010/63/EU on the protection of animals used for scientific purposes repealed.[91] By contrast, the Commission's position was that animal testing plays an important role in safeguarding human and animal health, and the Directive ensures that animals used in testing are adequately protected. As a result, it did not initiate legislation based on the ECI.[92] Hence, in this case, as with the ban on glyphosate, it emerges that if there is no clear intention on the part of the Commission to make a given policy decision, it cannot then be swayed by a successful initiative.

For the third objective of 'Ban glyphosate', the Commission originally argued that the existing EU regulatory system was adequate and therefore there was no reason to initiate legislation. In fact, the same argumentation was used for the 'Minority SafePack' initiative, which aimed to strengthen the protection of persons belonging to national and linguistic minorities at EU level.[93] The Commission argued in its response communication that, for each of the objectives of the initiative, the existing institutions and available options adequately support the rights of persons belonging to national and linguistic minorities, and therefore does not initiate legislation.[94] However, for the third objective of the 'Ban glyphosate' initiative, the Commission's approach has subsequently changed and the Commission has already included mandatory reduction targets in the 'Farm to Fork' strategy. In connection with this change, it is worth mentioning a further initiative that has been responded to, entitled 'Water and sanitation are a human right! Water is a public good, not a commodity!' (Short name of the initiative: Right2Water.)

In the case of the Right2Water initiative, the Commission has not yet committed in its initial Communication to present a legislative proposal, but only to improve the existing EU framework. For example, strengthening the implementation of water quality-related legislation, making the management of data on urban waste water treatment more transparent and setting more and more diverse benchmarks for water services.[95] However, it has subsequently initiated legislation in several cases related to the objectives of

90 See: https://citizens-initiative.europa.eu/initiatives/details/2012/000007_hu
91 European Commission 2015b: 2.
92 European Commission 2015b: 10–11.
93 See: https://citizens-initiative.europa.eu/initiatives/details/2017/000004_en
94 European Commission 2021: 20–23.
95 European Commission 2014: 15.

the initiative.[96] These legislative initiatives have resulted in the adoption of the revised Drinking Water Directive[97] and the Regulation on the minimum requirements for water reuse.[98] As such, in this case too, although the Commission may initially be reluctant to initiate legislation on an ECI issue, it may subsequently change its attitude to a particular policy issue and reach the point where it finally initiates legislation. In this respect, the 'Water and Sanitation are a Human Right!' initiative can be compared to the 'Ban glyphosate!' initiative, as both ECIs finally resulted in EU legislation.

Background to the Commission's change of preference

For both the Right2Water and the 'Ban glyphosate' initiatives, there has been a subsequent shift in the Commission's preferences. For the third objective of the 'Ban glyphosate' initiative, the Commission initially refrained from setting specific reduction values, but such reduction values were already part of the 'Farm to Fork' strategy. As for the Right2Water initiative, in its initial statement it only committed to improving the existing EU system, but later put forward several legislative proposals on the subject. Hence, in this way some of the objectives of the initiatives have been achieved, and it is appropriate to examine the reasons for the change in the Commission's position separately.

The two pieces of EU legislation that have been adopted based on the 'Water and Sanitation are a Human Right!' initiative are Directive 2020/2184 on the quality of water intended for human consumption and Regulation 2020/741 on the minimum requirements for water reuse. In the latter case, the adopted text does not contain any reference to the initiative, but the Commission refers to the European Parliament's resolution of September 2015, on the follow-up to the initiative, which called on the Commission to develop a legal framework for water reuse.[99] Similarly, the impact assessment accompanying the proposal refers only to the European Parliament's resolution.[100] For this reason, a stronger link with the ECI cannot be established in the case of the Regulation.

In contrast, Directive 2020/2184 makes a much stronger reference to the initiative. The preamble of the Directive highlights that, following the closure of the initiative, the Commission launched an EU-wide public consultation and carried out a review of the 1998 EC Directive on the quality of water intended for human consumption. On this basis, it became clear that certain provisions of the Directive needed to be updated.[101] A closer link with the initiative is reflected in the Commission's proposal. The justification for the proposal briefly explains the initiative itself and the Commission's commitment

96 See: https://citizens-initiative.europa.eu/initiatives/details/2012/000003/water-and-sanitation-are-human-right-water-public-good-not-commodity_en

97 Directive 2020/2184 (EU) of the European Parliament and of the Council.

98 Regulation (EU) 2020/741 of the European Parliament and of the Council.

99 European Commission 2018: 2.

100 European Commission 2018: 2.

101 Directive 2020/2184 (EU) of the European Parliament and of the Council.

to review the previous EU directive. The proposal further states that it is directly based on the European citizens' initiative 'Right2Water'.[102]

The second objective of the 'Ban glyphosate!' initiative was for the Commission to set binding reduction targets for pesticide use. In this respect, the Commission did not initially plan to present a proposal, but undertook to develop harmonised risk indicators and to report on Member States' action plans.[103] It finally delivered on both commitments in its 2020 report. This report specifically refers to the 'Ban glyphosate' ECI in terms of the risk indicators developed, and states that risks from the use of pesticides had been reduced by 2017. Nevertheless, there is scope for further risk reduction.[104] The report highlighted as a shortcoming of the national action plans that the majority of Member States have not addressed the weaknesses identified by the Commission.[105] Finally, the report refers to the 'Farm to Fork' strategy and the reduction values it sets.[106]

The 'Farm to Fork' strategy, which is part of the European Green Deal, does not directly refer to the 'Ban Glyphosate!' initiative, but it does include the harmonised risk indicator presented. The 'Farm to Fork' strategy itself states that the use of high-risk pesticides must be reduced by 50% by 2030.[107] In other words, in this case, the initiative itself is not directly reflected in the strategy, but the review carried out in response to the initiative played a significant role in determining the reduction value.

Based on both initiatives, the legislation was not initiated directly in response to the ECI, but as a reaction to the initiative, as a result of the review of related EU legislation. This shows that a citizens' initiative can be successful not only if it directly gets the Commission to initiate legislation on a given issue, but also if it gets the Commission to review an existing piece of legislation, or even a particular EU policy. The outcome of the review may identify existing shortcomings, and the Commission will initiate legislation to remedy these. This raises the possibility that a European Citizens' Initiative could complement the work of the Regulatory Scrutiny Board by pointing out possible shortcomings in existing EU legislation.[108]

Conclusion – the potential trigger effect of the European Citizens' Initiative

Among the Commission's responses to the ECI, it is necessary to highlight the change of preference related to the second objective of the initiative. Complemented by the change observed with the 'Right2Water' initiative, it can be concluded that a citizens' initiative can not only be successful if the Commission initiates legislation directly as a result of the ECI concerned. For both ECIs, the Commission's immediate response was to review

102 European Commission 2017b: 2.
103 European Commission 2017a: 15.
104 European Commission 2020a: 9–10.
105 European Commission 2020a: 22.
106 European Commission 2020a: 23.
107 European Commission 2020b: 7.
108 See: https://commission.europa.eu/law/law-making-process/regulatory-scrutiny-board_en

the relevant EU legislation. It was the reaction to the shortcomings identified as a result of the review that finally led to the legislative proposal. This means that, although the initiatives did not initially achieve their objectives immediately after the twelve-month collection period, following the longer review period, the initiatives' objectives were finally achieved. This confirms the research hypothesis that the European Citizens' Initiative may have a trigger effect, inducing the Commission to initiate legislation. It can be seen that the potential of the ECI instrument goes beyond the question of whether the Commission initiates legislation directly in response to an initiative.

A successful ECI will give the organisers the opportunity to draw the Commission's attention to a policy issue of importance to EU citizens. Basically, this means that, through the initiative, the organisers want the Commission to amend EU legislation in the area concerned or to initiate the adoption of new regulations. If we take into account the process that has taken place in relation to the third objective of 'Ban glyphosate' and the objectives of 'Right2Water', we can see that the organisers of a successful initiative can bring about a change in EU law, even indirectly. If, in response to the initiative, the Commission carries out a review of the relevant sources of law and the implementation of legislation, it may identify shortcomings that eventually lead it to initiate legislation. It should be noted, however, that the launch of a review does not guarantee that the process will actually lead to legislation. However, it is an important opportunity to ensure that initiatives that are not successful directly on the basis of the Commission's responses achieve their objectives eventually.

For the organisers, the presented process opens up new strategic opportunities for the initiative to achieve the objectives of the ECI indirectly. On the one hand, it may be worthwhile to include in the initiative itself, alongside the request for specific legislation, a request to the Commission to review the implementation of an EU source of law, to carry out an investigation in relation to a given EU policy. This way, if the Commission decides not to initiate legislation, there is still the possibility that, after the scrutiny, it will decide to propose draft legislation. In addition, it would also be appropriate to extend the time dimension of the advocacy and campaigning activities related to the initiative. Hence, if we take into account the possibility of ex-post changes in the Commission's preferences, it is not enough to focus only on the twelve-month collection period. It may be necessary to continue advocacy even after the campaign has closed and the Commission has published its responses. This will keep the subject of the initiative topical, and increase the chances that the Commission will initiate legislation at a later stage.

Finally, as regards the future of glyphosate in the EU, there is currently little chance that the possibility of an EU-wide ban on the substance will arise in the near future. In its responses to the initiative, the Commission refused to ban the substance, and, although the Member State representatives failed to reach a consensus, it finally authorised the substance in the 2023 renewal process. This shows that, at the moment, there is no intention on the part of the Commission to ban glyphosate. The Commission justified its decision primarily on the grounds that the European Food Safety Authority had not identified any problems with glyphosate that could justify a ban, and the European Chemicals Agency had not found any reason to classify the substance as carcinogenic. Thus, until possible future evaluations to be published by these EU bodies

produce a different result, the Commission is unlikely to change its decision. It should be noted that, in the context of the 2023 re-authorisation, the Commission has taken the position that if new evidence emerges that would justify the withdrawal of the approval of glyphosate, it will act without delay.[109] This possibility for ex-post change shows that, on various policy issues, there is scope for the Commission to change its established position if sufficient pressure is applied. Such a role can be played by the European Citizens' Initiative through the trigger effect it presents.

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The Future has Begun?
The Hungarian Experience of the Conference on the Future of Europe

The Conference on the Future of Europe, launched by the European Union in 2021, aimed to engage citizens in a dialogue and serve as a key platform for EU institutions to discuss the future direction of the European Union. Hungary actively participated in the process, and the objective of our study is to shed light on the contributions of Hungarian citizens and the conclusions drawn from them. The study also explores the post-Conference landscape, tracing the evolution of the proposals arising directly or indirectly from the debates on the future of Europe, with a reflection to their possible implications on the revision of the EU Treaties.

Keywords: Conference on the Future of Europe, EU reform, Treaty revision, European Parliament, federalism

The Conference on the Future of Europe concluded its work on 9 May, 2022, and made proposals for major reforms of the EU. However, the large-scale joint reflection on the future of Europe was not without prior history, and can by no means be considered definitively completed.

Today, the European Union can look back on more than seven decades of peace and expanded transnational cooperation, with 450 million citizens living in freedom and security, in relative prosperity in one of the most stable economic systems in the world. At the same time, the EU is currently facing many crises and serious internal divisions. For this reason, we can state that the Conference on the Future of Europe, launched in April 2021, was a timely attempt to rethink our future together. However, the process cannot be regarded as an exercise in objectively reflecting the will of European citizens and bringing the EU institutions closer to them. The process, which lasted a little over a year, ended up reinforcing the power aspirations of certain institutions and, ignoring

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transparency, selectively summarised the proposals of citizens, including the Hungarian ones. This paper aims to present the background, process, final proposals and current state of following up the Conference on the Future of Europe.

Background

Without knowing the background to the Conference, we cannot adequately assess either the final proposals or the way in which they were developed.

From 23 to 24 March, 2017, the European Commission (hereinafter: the Commission) organised a conference to commemorate the 60th anniversary of the signing of the Treaty of Rome establishing the European Economic Community, which took place on 25 March, 1957. The conference was called *"A Jean Monnet Seminar. The Future of Europe: A Commitment for You(th)"* and was one of the reflections in which citizens, in particular young people, and the EU institutions thought together about the future of Europe. Although this conference was only attended by academics, its themes already partly reflected those of the Conference on the Future of Europe, which was officially launched in 2021: problems in the functioning of the EU, the objectives to be faced and the problems to be solved by the EU.[3]

The 2017 conference was, however, preceded by an even more important strategic document, as the Commission published a so-called White Paper in the spring of that year, outlining possible scenarios for the future of Europe, as announced by then Commission President Jean-Claude Juncker in his 2016 State of the Union address (hereinafter: *SOTEU*). In the 2016 *SOTEU* address, President Juncker said that: "Our European Union is, at least in part, in an existential crisis."[4] He noted how little agreement there was between Member States, and criticised how Member State leaders very often only talked about their domestic problems without even mentioning Europe, or if they did, only in passing. This foreshadowed the way that the later Conference also took a more federal approach.

The Commission's White Paper set out several different paths for the EU27.[5] It has looked at the changes Europe could face in the coming period, from the impact of new technologies on society and jobs, to the potential effects of globalisation, security concerns and the rise of populism. It sets out five scenarios, each giving a version of what the EU could look like in 2025, just 8 years from then, depending on the decisions the European Union takes. These are, in brief:

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3 Kengyel 2017: 661–665.

4 Juncker 2016.

5 Although the UK was still a member of the European Union when the White Paper was presented on 1 March, 2017, the document was drafted with a view to a 27-member EU following the 2016 Brexit referendum. As is known, the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020. L 29, 7) entered into force on 1 February, 2020 (see judgment of the CJEU of 9 June 2022, C-673/20–Préfet du Gers and Institut National de la Statistique et des Études Économiques, ECLI:EU:C:2022:449, paragraphs 1, 11, 20, 26, 45 or 55).

Scenario 1: "Carrying on" – The European Union focuses on delivering its positive reform agenda without major structural reforms.
Scenario 2: "Nothing but the single market" – The focus is on the single market as Member States are increasingly unable to agree on policy issues.
Scenario 3: "Those who want more, do more" – Countries that are willing can deepen cooperation in specific areas, creating a multi-speed Europe.
Scenario 4: "Doing less, more efficiently" – The EU focuses on delivering more and faster in certain areas, while doing less where it cannot add value.
Scenario 5: "Doing much more together" – Member States share more powers and resources in all areas and extend decision-making.

The actual implementation of these scenarios would definitely require an amendment of the Treaties for Scenarios 4 and 5, but maybe even for Scenario 3.[6] As a stimulus to the debate on the White Paper, the Commission, together with the European Parliament and interested Member States, was planning a series of debates on the future of Europe across Europe. To this end, the Commission had also published various discussion papers.[7]

The European Parliament set out its vision for the future of Europe in three resolutions adopted in the plenary session of 16 February, 2017. Members of Parliament proposed, among other things:

- the transformation of the Council of Ministers into a genuine second legislative chamber and into preparatory bodies similar to parliamentary committees
- the appointment of an EU Finance Minister and a mandate for the Commission to develop and implement a common EU economic policy, backed by a Eurozone budget, and
- the creation of a fiscal capacity consisting of the European Stability Mechanism (ESM) and a specific additional fiscal capacity for the Eurozone, financed by the Member States as part of the EU budget

In addition to the resolutions, at the session of the European Council in October 2017, then President of the European Parliament Antonio Tajani announced his intention to organise a series of debates on the future of Europe in plenary sessions of the European Parliament from the beginning of 2018, as a democratic and open forum for EU Heads of State and Government to express their vision of the future. This initiative has also included contributions from Emmanuel Macron, President of France, Leo Varadkar, Prime Minister of Ireland, António Costa, Prime Minister of Portugal, and Angela Merkel, Chancellor of Germany. A total of 18 Heads of State and Government had taken part in such debates before the Conference on the Future of Europe began.

Emmanuel Macron, the President of France, originally proposed in March 2019, that a conference should be organised to develop a roadmap for the future of the European Union.[8] He argued that his proposal would bring together EU institutions, Member States, civil society and EU citizens to review the way the EU works and, already at this

6 European Commission 2017a.
7 European Commission 2017b; European Commission 2017c.
8 Macron 2019.

point, mentioned that the Conference could possibly propose a revision of the EU Treaties. This idea was then taken up by Ursula von der Leyen when she was nominated as President of the Commission following the 2019 European elections, and in her opening statement *(A new push for European Democracy)* on 16 July, 2019, before her election by the EP, she expressed her wish to involve European citizens as part of a broader renewed impetus for European democracy.[9] Later, in her candidate political guidelines, she said, among other things, that she was open to amending the Treaties and that she would fully support the idea if an EP representative were proposed as President of the Conference.[10]

The Commission and the EP took the plan forward after Ursula von der Leyen was confirmed as President of the Commission. The EP resolution of 15 January, 2020 on the European Parliament's position on the Conference on the Future of Europe set out the institution's proposals on the scope and organisation of the Conference, in which it considered that the Conference should also take into account initiatives taken in the run-up to the 2019 elections. Finally, the EP's resolution did not rule out the possibility of amending the Treaties either.

The Conference was originally planned to take place between 2020 and 2022, but was delayed due to the Covid–19 pandemic and disputes between the EU institutions over the scope of the Conference and the chairmanship. The EP and the Council were unable to agree on the leadership of the Conference for a very long time, largely because of the nomination by the EP of Guy Verhofstadt (Renew, BE) as Chair of the Conference. In contrast, the Permanent Representatives of the Council proposed an independent person to lead the Conference in June 2020, when they formally endorsed the Conference's proposal and stressed the need to share responsibilities between the EU institutions.[11]

What exactly was the Conference on the Future of Europe?[12]

To put it simply, one could say that the process that eventually took place was nothing more than a well-disguised and very costly exercise to support the agenda of certain political opinion-leaders. However, given the deceptive nature of the exercise and the large number of real suggestions from EU citizens involved, we cannot be so simple and blunt, as it is important to look at the steps taken, the elements of the Conference in order to be able to assess them properly in the future.

After lengthy preparation, the plan for the Conference on the Future of Europe was finally formally adopted on 10 March 2021, with the Conference running from April 2021 to 9 May 2022. It was jointly launched by the Commission, the European Parliament and the Council of the European Union (the representatives of the governments

9 Von der Leyen 2019a.
10 Von der Leyen 2019b.
11 Council of the European Union 2020.
12 For this section, several pieces of information were provided by the Conference's multilingual digital platform. The site is available in archive format.

of the EU Member States).[13] In a Joint Declaration, the leaders of these institutions (at the time of signature: the late President of the EP, David Sassoli; the Prime Minister of Portugal, holding the Presidency of the Council, António Costa; and the President of the Commission, Ursula von der Leyen) committed themselves to listening to European citizens and to taking action within their respective spheres of competence to implement the recommendations made by citizens during the process. Hence, they pledged to take a more direct approach to grassroots ideas from citizens, than the strict limits and procedural rules of the European Citizens' Initiative.[14]

A distinct innovation of the Conference on the Future of Europe was that anyone across the EU, and in some cases beyond, could organise an event under the auspices of the Conference and register it on a multilingual digital platform, launching public debates and contributing to specific topics. By the end of the Conference on 9 May 2022, a total of 52,346 individual users had registered on the platform, recording 18,955 ideas, 22,570 comments and 7,005 events, with 652,532 participants at the events.[15] Hungary was extremely active in terms of the number of contributions recorded on the platform, as the second highest number of contributions per capita within the European Union was recorded from Hungary.[16] An outstanding achievement is that Hungary organised the largest number of events, with more than 800 events. The digital platform gathered all citizens' contributions, whether shared online or at offline events, in a single platform. Citizens could raise any issue of their concern on the platform, as, in addition to the pre-defined topics reflecting the main objectives set out in the Commission's political priorities and the European Council's strategic agenda, there was also an "other" category for expressing cross-cutting ideas or topics other than those listed on the platform. These topics were defined and approved in a Joint Declaration signed on 10 March 2021 by the Presidents of the three institutions leading the implementation of the Conference. These were: climate change and the environment; health; a stronger economy, social justice and employment; the EU in the world; values and rights, rule of law, security; digital transformation; European democracy; migration; and education, culture, youth and sport.

Member States could also organise national citizens' panels, based on guidelines.

The contributions of the citizens' panels, the national citizens' panels and the online digital platform were taken into account, or were at least intended to be taken into account, by the plenary sessions of the Conference.

The Conference therefore included a series of different events, including EU-wide citizens' panels held with a random sample of 800 EU citizens. Four citizens' panels were set up, each consisting of 200 EU citizens. An external service provider randomly contacted potential participants, taking into account the diversity of EU citizens in terms of geographical origin (nationality and urban/rural), gender, age, socio-economic background and educational level. At least one female and one male citizen per Member State participated in each panel. Young people aged 16–25 made up a third of each panel. The

13 Council of the European Union – European Parliament – European Commission 2021.

14 In 2021, Boglárka Bólya wrote an article titled *The Conference on the Future of Europe is Green-lit* on the organisational system of the Conference.

15 European Commission 2022.

16 Kantar Public 2022.

distribution between Member States was declared to have been based on the degressive proportionality applied to the composition of the EP. The selection took place between May and August 2021, covering the entire EU citizenship. Each panel discussed one topic:

- economic and social issues;
- EU democracy and values;
- climate change;
- migration and global issues.

Each panel held three sessions and made proposals. During their deliberations, participating citizens had access to certain information sources and could contact specific experts. This was done by providing citizens with a list of experts and other stakeholders, from whom they could choose and contact according to their topic and specific needs. In addition, each panel meeting was attended by experts identified through a service provider hired by the Commission to introduce the topic. At this point, the restriction and influencing of the free expression of citizens' opinions was already quite strong, and this trend continued later on as well. Researchers were allowed to attend the citizens' panels, and conduct interviews with citizens for research purposes. Another transparency concern is that while the plenary sessions of the citizens' panels were live-streamed and the documents of the debates and deliberations were made publicly available on the multilingual digital platform, the deliberations of the working groups were not. The rationale communicated by the organisers was to protect the freedom of citizens to debate and make recommendations, but this raises questions as to who exactly formulated the basis of the final proposals of the Conference, and how.

The plenary sessions of the Conference were attended by representatives of the EU institutions, national parliaments, "civil society" organisations and citizens' panels. Nine thematic working groups were set up within the plenary sessions. National citizens' panels from six EU countries were recognised within the national events. These were Belgium, France, Germany, Italy, Lithuania, the Netherlands and Germany. In Hungary alone, a total of 6 national citizens' panels were held, but these were not recognised by the Commission for vague "methodological" reasons, consequently the contributions made at these panels were not taken into account.

These debates originally started as open discussions with no pre-defined outcome. Based on the initial ideas, after presenting the proposals and discussing them with citizens, the plenary would have presented its proposals on a consensual basis to the executive board, which would draft a report in full cooperation with the plenary and with full transparency. However, throughout the process, the working groups set up to support the work of the plenary sessions and citizens' panels, as advocated and enforced by Verhofstadt/EP, continuously took on the substantive roles (as MEPs also chaired working groups and participated in all working groups) and thus formulated, and in many aspects altered the main proposals.

In total, nine thematic working groups contributed to the outcome of the Conference. These discussed the recommendations of the citizens' panels as well as the contributions submitted on the Conference's multilingual digital platform, although the latter were

not taken into account in the final proposals. The working groups were mostly chaired by prominent senior figures from the EU institutions, as follows:[17]

- Working Group on European Democracy – Chair: Manfred Weber (EPP, DE), European Parliament
- Working Group on Climate change and the environment – Chair: Anna Pasková, Council/Czech Republic
- Working Group on Health – Chair: Maroš Šefčovič, Vice-President of the European Commission
- Working Group on a Stronger economy, social justice and jobs – Chair: Iratxe García Pérez (S&D, ES), European Parliament
- Working Group on the EU in the world – Chair: Hans Dahlgren State Secretary for EU Affairs, followed by Asees Ahuja, Council/Sweden
- Working Group on Values and rights, rule of law, security – Chair: Věra Jourová, Vice-President of the European Commission
- Working Group on Digital Transformation – Chair: Elina Valtonen, national parliaments (Finland)/Riina Sikkut, national parliaments (Estonia)
- Working Group on Migration – Chair: Alessandro Alfieri, national parliaments (Italy)/ Dimitris Keridis, national parliaments, Greece
- Working Group on Education, culture, youth and sport – Chair: Silja Markkula, President of the European Youth Forum

Implementation was overseen by a special council, the so-called Executive Board, co-chaired by representatives of the three EU institutions. On the European Parliament side, Guy Verhofstadt (Renew, BE) eventually became co-president in this formation, along with the Vice-President of the Commission in charge of Democracy and Demography, Dubravka Šuica, and the representative of the Member State holding the Council Presidency, in turn: Portugal in the first half of 2021, Slovenia in the second half of 2021 and France in the first half of 2022. Sweden, Spain and Hungary, as incoming Presidencies, participated in the discussions with observer status, which helped to prevent, among other things, a number of harmful decisions and "proposals" specifically targeting Hungary.

Looking at the final proposals of the four European citizens' discussion groups, it can be seen that a significant proportion of them, around 90%, reflect left-wing, liberal and federalist political views, which were and are in stark contrast to the Hungarian government's position and the Hungarian citizens' contributions. There are only a few elements that are in line with the Hungarian proposals (e.g. forced return of rejected asylum seekers, support for having children, helping to reconcile work and family life). Furthermore, there are hardly any positions that are otherwise in line with or similar to the Hungarian proposals or, if there are, these are general, thus weakly formulated in a muted, general way, such as with the support for having children.

On the other hand, it is clear that the proposals, in their original form and wording, were clearly not suitable for a possible treaty amendment process to be drafted.

[17] Exceptions are two working groups chaired by national parliaments and one by the European Youth Forum.

The final report on the digital platform of the Conference on the Future of Europe was published in May 2022. [18] The report includes all contributions (events, ideas, comments) registered and closed between the start of the Digital Platform on 19 April 2021 and its closure on 9 May 2022.[19] This report is not representative at all, as it refers to only seven Hungarian events out of more than 800. On the rule of law and democracy issues, our country is presented in a distinctly negative context in the report. We can therefore say that Kantar's reports did not meet the requirements of impartiality or objectivity.

Proposals pointing towards a federation were highlighted in the report: stronger health integration, a single taxation system, a single social security system, the abolition of unanimity in foreign policy, the strengthening of rule of law mechanisms and the definition of common European values (human rights, freedom, equality, the rule of law, solidarity, gender equality), which should be enshrined in a European Constitution. Other proposals included transnational lists, direct EU presidential elections, proposals for federalisation, a European Constitution, a move to qualified majority voting in the Council instead of unanimity, a common EU labour migration policy, strengthening Frontex in border protection, and a single EU language (Esperanto or English).

At the same time, the report also reflected opposing views, albeit in significantly smaller proportions: enlargement to the Western Balkans, a focus on the EU's economic role, refraining from interfering in Member States' internal affairs in relation to the rule of law, taking account of Christian values and conservative voices, support for subsidiarity, stricter external border protection, rejection of all forms of migration, the social threat of migration to EU identity and addressing the root causes of migration.

The Conference formally closed on 9 May 2022, where the Co-Chairs adopted the document containing the final proposals.[20] It is also crystal clear from the document that, as could have been foreseen, some prominent representatives of the EU institutions managed to steer the Conference in a direction that led to proposals for reform along federalist lines. The proposals of EU citizens pointing almost clearly towards federalisation were the focus of the conclusions of the Conference.

The Conference thus served as an opportunity for the federalist forces to present their own approach as democratic will, referring to a consultation of citizens, thus putting more political pressure on the Council. Among the EU institutions, the European Parliament was particularly active in using the Conference to promote its own political interests. However, the process was conducted in an even more opaque and confusing procedural framework than expected, and its outcome is rightly questionable.

Asking for citizens' opinions is nothing new in Hungary, and could even be called a best practice,[21] which could be adopted throughout the EU. Since 2011, the Hungarian

18 *Note*: Several interim reports have been published by Kantar Public in which Hungarian contributions are presented in an unrepresentative way, highlighting opinions with a negative context and without any references. This practice has been repeatedly opposed at several forums by representatives of the Hungarian government and the French Presidency. The problem and the disqualification of national citizens' panels have been repeatedly reported in letters to Vice-President Šuica.

19 Kantar Public 2022.

20 Report on the final result 2022.

21 A "best practice" is a good/best (proven) practice, a way of working, a model, a solution, the main details of which can be studied, learned and applied elsewhere based on the experience it provides.

government has been continuously asking citizens for their views on key issues and incorporating the results into its decision-making. This is the spirit in which the Government had approached the Conference from the outset, hoping that the proposals of citizens would enable us to take joint, useful and forward-looking initiatives for the future of our continent. The Hungarian government therefore saw the process as a great opportunity to showcase Hungary's vision of an attractive Europe: by presenting an alternative, a vision of a Europe where nations are seen as a source of pride and a value to be preserved, where it is believed that a strong Europe can only be built and sustained by strong nations; where demographic problems are solved by supporting families and not by resettling immigrants; where anyone is free to express their views without fear of being "cancelled" because they are not the spokespersons of mainstream ideology and where common sense and pragmatism prevail in the service of the common good and citizens.

Unfortunately, it turned out that this was not the spirit in which EU citizens were able to participate in the Conference on the Future of Europe. In the European Citizens' debate groups of the Conference, ideas that ran counter to the ideological mainstream prevailing in the EU political institutions[22] were simply steered in the "correct" direction by the 'independent' moderators. Furthermore, the invited experts, who were not publicly identified, presented their individual, subjective convictions as the only possible scenario to the participants, who were less familiar with the subject and EU terminology but who had equally valid and valuable opinions, before they had even expressed their own individual ideas. A striking demonstration of the problem is that there was a slight fear on the part of the prominent federalist-minded leaders of MEPs at the beginning of the Conference, slightly questioning the sense of the process, but they eventually succeeded in bringing the exercise under the "control" of the bureaucratic institutional machinery. The Conference thus became an opaque, over-bureaucratised process at European level, overriding its own rules as it went along, not serving the citizens but rather the self-serving ambitions of the EU institutions concerned.

Despite this, and the failed, illusory outcome of the Conference, it is important to continue to make our voices heard. For Hungary, as a Central and Eastern European country, it is in our vital interest to have voices outside ourselves, even as a reference point, within the large critical mass of Europe who are constructive, who think in terms of a common future, but who have a different view of the continent's future and who are also unquestionably pro-European.

So what did we achieve: what good came from the active Hungarian participation?

In Hungary, preparatory activities for the Conference started before the official launch of the series of events, in June 2020. The Ministry of Justice, as the ministry responsible

[22] Opinion of Advocate General Maciej Szpunar of 9 March 2023, C-680/21–Royal Antwerp Football Club, ECLI:EU:C:2023:188, point 49 and footnote (29).

for EU affairs (until 31 July 2023) was already involved in organising and promoting events related to the Conference before its official launch. Four major international conferences were organised by the Ministry, bringing together EU government officials, Commissioners, MEPs, experts and academics to share their thoughts and engage in a rich exchange of views on the future of Europe. A round-table discussion series was organised especially for young people, with the participation of Ministers Judit Varga, János Martonyi, László Trócsányi, Tibor Navracsics and László Palkovics, on the issues of national sovereignty and ever closer integration, the Hungarian government's green policy, the main challenges the EU is facing and youth policy. The Ministry of Justice also launched an essay competition for young Hungarians on topics related to the Conference.

Although, in the end it did not live up to the initial hopes, and even confirmed our doubts, the Conference on the Future of Europe cannot be called completely useless. On 19 June 2021, Prime Minister Viktor Orbán was the first among the leaders of the Member States to present his proposals for the future of the continent at the conference "Thirty years of freedom".[23] On this occasion, the Prime Minister said that freedom did not just arrive with the change of regime, but was something we had won, and that "now, when the European Union is in trouble, it will not mend its ways, we must be the ones who mend it". In this spirit, he outlined seven theses with which Hungary contributes to the debate on the future of the European Union:

1. In Brussels, they are building a superstate for which no one has given a mandate. We must say no to a European empire.
2. Integration is a means, not an end in itself. The objective of an "ever closer union among the peoples of Europe" should be struck from the text of the treaties of the European Union.
3. Decisions should be taken by elected leaders, not by international NGOs. According to the Prime Minister, much of the power of the European Union has been outsourced to various networks and American Democratic Party interests. We must say no to the outsourcing of the rule of law.
4. The strength of European integration lies in shared economic success. If we cannot be more successful together than if we are apart, the European Union is finished.
5. The next decade will be a time of dangerous challenges: the threat of mass migration and global pandemics. Restoring democracy is a precondition for success. A new institution must be created, involving the constitutional courts of the Member States.
6. The European Parliament is a dead end: it only represents its own ideological and institutional interests. The national parliaments should send representatives to the EP and be given the right to halt the legislative process; in other words, a red card system must be introduced.
7. Serbia should be integrated as a member state of the European Union.

The addressees of the proposals made by Viktor Orbán are none other than millions of European citizens, which is why the Prime Minister's seven theses have been published

[23] Orbán 2022.

in foreign newspapers, thus initiating a kind of pan-European dialogue at the content level as well. This also proves that, contrary to many accusations, Euroscepticism is not the policy of the Hungarian government.

Hungary also demonstrated outstanding civic and governmental participation throughout the Conference. In 2021, it was always on the imaginary podium in terms of activity on the digital platform of the Conference series from the start of the process. In fact, in terms of population, Hungary was the second largest contributor to the digital platform among all Member States. And among the registered events, Hungary is the clear leader with 804 events. This should make us proud in absolute terms, and is a particularly outstanding achievement in terms of population. In terms of figures, the accusation of Hungary's Euroscepticism has been completely refuted, as the statistics show that Hungarians are enthusiastic, interested and proactive. Another important point to note in this context is that support for the EU in Hungary was 37% of the population in 2009, while in 2021 it reached 61%.[24] In addition to debunking the charge of Euroscepticism, these data also reveal another important truth. Namely, that critical opinions, which may differ from the mainstream, do not equate with opposition to the EU, and certainly not the idea of leaving the EU, known as "Huxit".

The many contributions made by Hungarian citizens at the Conference were summarised by Judit Varga, Minister of Justice, on 12 May 2022 at the conference entitled "Quo Vadis, Europe – Europe of Nations and the Hungarian Interest", organised by the Foundation for Civic Hungary.[25] At the Conference, the Minister also presented a brochure detailing the various Hungarian proposals for improving Europe, based on a summary of events registered on the digital platform.[26] This document summarises that, according to the contributions, although, as the Prime Minister has previously stated, the EU today sees integration as an end in itself, Hungarians still see EU integration as a means to the fulfilment of national freedom. Similarly, she notes that the EU today is building a Europe that denies traditional European values, while Hungarians believe that Europe is nourished by its Judeo-Christian roots, and its building blocks are our traditional communities: nations, families and historic churches. She also makes the important point that, in contrast to the EU's efforts to build a hegemony of opinion, Hungarians accept the diversity of world views, interests and positions, and consider it self-evident that they can express and represent their own views. It is also a specific Hungarian position to underline that the Member States are the sole holders of sovereignty, and thus only the Member States can decide which powers they wish to exercise jointly and define their constitutional identity. The brochure explains that achieving the rule of the European people is in fact the pretext for dismantling democratic control by European nations of the EU institutions. Hungarians, on the other hand, believe that being European is an integral part of their national identity: they are European because they are Hungarian, and only as Hungarians can they be European. It was also noted that today the European Union only provides financial support for the realisation

[24] European Commission 2023.

[25] Ministry of Justice 2022.

[26] Hungary has also sent a national activity report to Member States and EU institution leaders, which is available on the digital platform in Hungarian and English.

of mass immigration, while the financial and social burden of the model is borne by all Member States thanks to the various EU policies. Hungarian citizens, on the other hand, see the future of Europe in supporting families and encouraging childbearing, and suggested that the EU needs to recognise and support this model as a legitimate solution. Finally, they also stress the need for a new impetus in the enlargement toward the Western Balkans and to support the European integration of all Western Balkan states, as it contributes to the stability of our region.

The hundreds of events organised in Hungary show that Hungarians do not see the key to a stronger and more effective European Union in building federalism. The Hungarian people have made it clear: the European Union must change. They remain pro-European, but sceptical of extreme federalism. The Hungarian people want a stronger and more effective European Union but they do not see the key to this in a federation.

At the Hungarian events, a clear preference for respecting the sovereignty of Member States emerged across the wide range of issues covered by the Conference (migration, values and the rule of law, energy policy, education, health, taxation, etc.). The EU institutions should be working to promote cooperation between Member States, respecting national traditions and constitutional frameworks. Among the conclusions is that the continuation of the *"ever closer union"* requires the agreement of all Member States, and that the protection of national minorities is not an internal matter; the right to national identity should be defined as a fundamental right that must be protected by the EU.

The Hungarian contributions show that the public believes that the earliest possible integration of the Western Balkan countries into the EU is essential for the stability of the continent. Proposals have also been made to strengthen the role of national parliaments and to respect the division of competences laid down in the Treaties.

The ideas expressed at the Hungarian events advocate the maintenance of unanimous decision-making, and reject the extension of the areas covered by majority voting, as this would jeopardise the unity of the Union. The stealthy attempts of the European Parliament and the European Commission to extend their powers are also rejected. Proposals have been made to reform the European Parliament, including reducing the number of MEPs and delegating them from national parliaments. A review of events also shows that there is a need to reduce bureaucracy in Brussels and for the EU institutions to return to their original economic focus rather than ideological and political issues.

According to the Hungarian proposals put forward at the Conference, the European Union needs to support the border protection efforts of the Member States. Migration policy must be a national competence, and Member States must determine the extent to which they wish to make use of labour migration. A clear distinction must be made between immigrants and refugees, and demographic problems must not be tackled by promoting migration. The Hungarian proposals reject mandatory quotas.

Proposals have also been made to strengthen the EU's defence sovereignty and its resilience to external threats. The importance of nuclear energy for the security of energy supply was stressed. Several proposals suggest that the protection of Europe's Christian roots and traditions should be among the EU's core values. Several events in Hungary have drawn attention to the persecution of Christian communities, calling for stronger EU action.

Support for families, education for children, keeping sexual propaganda out of schools and respect for national competences on family and marriage are also among the proposals.

It is clear from this that Hungarians have a strong vision for the future of Europe, which in many ways does not coincide with the mainstream vision of EU decision-makers. It is also clear that the EU's current treaty framework does not allow the EU to stand its ground in a decade of crises.

The Hungarian people have thus been clear, but very little of this has been realised at EU level. The conclusions of the Conference set out a vision of a more federal Europe than ever before. These conclusions cannot be considered as a proportionate and representative summary of the national contributions. And the recommendations made by 800 randomly selected EU citizens participating in the so-called European Citizens' Panels cannot reasonably be expected to reflect the views of nearly 500 million European citizens, especially in the influence structure explained above. It was a particularly painful realisation that, contrary to the original plans, the content of the digital platform, the "ideas exchange" accessible to all citizens, ended up playing a miniscule role.

It is important, however, that the constitutional institutions of the Member States, and in particular the national parliaments, are involved in the joint reflection after the Conference. The Hungarian Parliament also joined this process, by giving the Hungarian government a clear mandate on the position to be taken. The Hungarian Parliament therefore took up the task of representing the opinions and expectations of the Hungarian people at the European level as well when, as the main bearer of democratic legitimacy in Hungary, it adopted a resolution on 19 July 2022 on the Hungarian position to be taken on the future of the European Union.[27] This is an extremely important step. Using this mandate, the Hungarian government has been working to build a Europe of peace, freedom and prosperity, in line with the expectations of the Hungarian people. The main messages of the resolution are the same as the main messages of the Hungarian contributions to the Conference, as follows:

- The EU needs to change, because the current Treaties are no longer able to guarantee cooperation in this era of crises
- Our European integration is based on the continent's Christian roots and culture
- The political and ideological neutrality of the European Commission must be enshrined in the Treaties. It is not acceptable for the Commission to act as a political gendarme over the Member States
- Europe must be able to defend itself without external help. It is therefore necessary to strengthen the continent's military capabilities, industrial capacities and, last but not least, to set up a common European army
- We must protect the generations of Europeans of today and tomorrow. Hence, the demographic challenge and support for families must become a common EU objective

[27] Parliamentary Resolution 32/2022 (19.VII.) on the Hungarian position to be taken on the future of the European Union.

- European democracy must be led out of the dead end into which it has been driven by the biased representatives of the EP and the institution itself. The role of national parliaments in EU decision-making must be strengthened
- The European perspective of the Western Balkans must be strengthened at Treaty level
- Indigenous national minorities in the European Union must be given greater protection

Follow-up and European Parliament initiatives

As a follow-up to the Conference, the European Parliament adopted a resolution on 4 May 2022, before the official closure of the Conference on 9 May 2022, calling for the launch of the ordinary revision procedure provided for in Article 48 of the Treaty on European Union (TEU) and for a Convention to be convened. The resolution stated that the EU is facing an unprecedented situation compared to when the Conference process was launched, and that war has returned to the continent, which requires a new impetus for European integration, with the need for even stronger common action and solidarity. It was stated in the text that not only legislative proposals but also institutional reforms are needed to fulfil citizens' expectations. The EP expressed its satisfaction with the "ambitious and constructive" proposals. The resolution stated that "deeper political integration, as underlined in the Conference conclusions, can be achieved through the EP's right of legislative initiative and the abolition of unanimity in the Council in all policy areas". So, even before the end of the Conference, the EU institution concerned called for unanimity to be abolished.

However, under Rule 85 of the EP's Rules of Procedure, the EP has acted a little prematurely, as the initiative to revise the Treaties[28] requires the relevant committee (in this case the EP's Committee on Constitutional Affairs, AFCO) to prepare a report, which must then be adopted in plenary.

On 9 June 2022, the EP started the process again, this time adopting a resolution with slightly more concrete textual proposals for amendments titled "The call for a Convention for the revision of the Treaties". During the related plenary debate, Dubravka Šuica, on behalf of the Commission, underlined the Commission's readiness to take concrete action, while Clément Beaune, then French Secretary of State for EU Affairs, at the time of the French Presidency, said on behalf of the Council that they supported the convening of the Convention. During the session, several MEPs, including Gabriele Bischoff (S&D, DE), Daniel Freund (Greens/EFA, DE) and Guy Verhofstadt (Renew, BE), justified the abolition of unanimity in the Council by saying that Hungary regularly obstructed decision-making.[29] The resolution again refers to Article 48 TEU and explicitly refers to

[28] Today, there are two treaties in force in the European Union. These are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). These Treaties are accompanied by protocols having the same legal binding force as the Treaties and by the Charter of Fundamental Rights of the European Union.

[29] In the minutes of the debate, the speeches are in the original languages, our highlights are unofficial translations.

the report on the final outcome of the Conference and the EP resolution of May. Although the text underlines that the EP's Committee on Constitutional Affairs (AFCO) will also develop concrete and detailed proposals, two textual proposals have already been made. These proposals are mainly aimed at abolishing the unanimity voting requirement for certain economic sanctions, as follows.

- Article 29 TEU would be supplemented to provide that decisions of the Council providing for the partial or total severance or reduction of economic and financial relations with one or more third countries shall be taken by qualified majority
- The last sentence of Article 48(7) TEU would be amended to allow the European Council to adopt decisions by qualified majority instead of unanimity when the passerelle clause applies, after obtaining the approval of the EP, adopted with the majority of its members

The motion for a resolution calls on the Council to submit these proposals directly to the European Council for examination, and to convene a Convention composed of representatives of national parliaments, Heads of State or Government, the EP and the Commission. It was proposed that the social partners, the European Economic and Social Committee, the European Committee of the Regions, European civil society and representatives of the candidate countries be invited to the Convention as observers.

However, the EP resolution of June 2022 was again adopted in a manner contrary to its own rules of procedure, so it is not suitable for triggering the review process, and the Council did not consider it to be such an initiative. The resolution mandated AFCO to make further proposals for amending the Treaties. This draft report was presented with a delay of more than 1 year to the Committee on 14 September 2023, where the related Committee work is still ongoing at the time of closure of this document.[30] Rapporteurs: Guy Verhofstadt (Renew, BE), Sven Simon (EPP, DE), Gabriele Bischoff (S&D, DE), Daniel Freund (Greens/EFA, DE) and Helmut Scholz (GUE/NGL, DE). Originally, Jacek-Saryusz Wolski (ECR, PL) from the ECR Group was co-rapporteur on the document, but shortly before its presentation he withdrew from this mandate, as the proposals were completely at odds with the principles of his political group represented by him and his colleagues did not take his views into account. In light of this, the ECR and ID Groups are the only ones not contributing to the draft report as rapporteurs, although the latter has been excluded from the offset.

The draft report formally consists of a resolution and textual proposals for amendments to the Treaties for their ordinary revision. The former briefly summarises the substance of the amendments, and again requests that the Convention be convened on such a basis. The draft report underlines the importance of reforming EU decision-making to reflect a bicameral system more accurately by giving the EP additional powers and changing the voting mechanism in the Council. They call for a significant increase in the number of areas where measures are decided by qualified majority voting (so-called

[30] In the meantime, in November 2023, the EP had adopted the resolution in its plenary and transmitted it to the Council. The Council then forwarded it to the European Council, thus triggering Art. 48 of the EU Treaty. There is no time limit for the EUCO to decide to open a Convention or not.

QMV) and the ordinary legislative procedure,[31] citing the need to strengthen the Union's capacity to act. They call for the EP to be given the right of legislative initiative, a long-standing demand of the institution, which it has repeatedly tried to assert in ways that run counter to the current Treaties. They call for the roles of the Council and the EP to be reversed in the nomination of the Commission President, essentially creating a *Spitzenkandidat* system, the system of lead candidates that has "failed"[32] following the 2019 European Parliament elections. They call for the Commission to be renamed *The Executive,* with its President taking the title of President of the European Union. They propose that the composition of the EP should be the exclusive competence of the EP. Simple majority voting would be the basic procedure in the Council, while a qualified majority would be a vote of at least two-thirds of the Council members, representing at least 50% of the population. The principle of one Commissioner per Member State would be abolished; the Executive would have a maximum of 15 members, and the EP could table motions of censure directed at individual Commissioners as well.

They also propose the creation of exclusive EU competences for the environment and biodiversity, while they call for shared competences for public health, industry and education. They call for the creation of an integrated European Energy Union. They call for a strengthening and reform of the procedure in Article 7 TEU by abolishing unanimity and making the Court of Justice of the European Union (CJEU) the sole arbiter, except for the right of initiative. They propose an abstract norm control by the CJEU,[33] which could be initiated by the EP. Also highlighted is the call for the EU to respect and promote academic freedom and freedom of scientific research and education. The revision of the Treaties would remove the requirement for unanimity when the final text of the amendments is agreed, and these would come into force as soon as four-fifths of the Member States ratified them in accordance with their own constitutional requirements. It is thus possible to imagine a sequence of events, at the end of which new treaty clauses could enter into force despite a vote to the contrary of, ad absurdum, all the inhabitants and members of parliament of a Member State.

The proposal to extend the deadline for the so-called "yellow card" procedure to 12 weeks and to introduce a "green card" procedure for legislative proposals submitted by national or regional parliaments with legislative powers can be considered to increase the weight of national parliaments and the subsidiarity principle. The former is a mechanism to defend the subsidiarity principle, which means that, under Article 7 of Protocol 2 to the Lisbon Treaty, national parliaments can oblige the EU institution that has proposed a legislative act to revise the draft if, on the basis of the votes allocated to them, at least a third of them find that the subsidiarity principle has been infringed in the same proposal. In practice, this has not proved to be a frequently used procedure, one reason being that the eight-week deadline may not be sufficient for national parliaments to carry out a substantive inquiry, as their main activities are not carried out in the intellectual and physical centres of EU institutional work. The latter would be

31 Article 294 TFEU.

32 In 2014, Jean-Claude Juncker (EPP, LU), the European People's Party's lead candidate, became President of the Commission.

33 European Parliament Committee on Constitutional Affairs 2023.

a completely new element in the Treaties, although there have been precedents for this initiative in practice. This would be a joint national parliamentary initiative in which national parliaments raise awareness of an issue and call for action and legislation at EU level.

From the point of view of Hungarian minority protection efforts, a key element of the draft report is that the amendments would stipulate at the level of the Treaties that the EU protects persons belonging to minorities in accordance with the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities, and that the EU would also accede to these conventions. The EP and Council could adopt provisions under the ordinary legislative procedure to facilitate the exercise of the rights of persons belonging to minorities.

It is proposed to use the ordinary legislative procedure and qualified majority voting for decisions on taxes. They also call for the inclusion of democratic values, good governance, human rights and sustainability, as well as the promotion of foreign investment, investment protection and economic security in the scope of the common commercial policy.

They reiterate the call for sanctions, intermediate steps in the enlargement process and other foreign policy decisions to be decided by qualified majority as well, removing the requirement for consensus, often colloquially described as a veto by Member States. In line with the Commission President's 2023 annual *SOTEU* speech, they call for the creation of a defence union with permanently stationed European military units with a permanent rapid deployment capability.[34] It is proposed that, along the lines of the North Atlantic Treaty Organisation, or NATO, an armed attack against one Member State should be considered an attack against all Member States.

They also propose that the term "equality between men and women" be replaced by "gender equality" in the Treaties. Consistent enforcement of this can be seen in the text of most EU legislative proposals. Family law measures with cross-border implications would be laid down under the ordinary legislative procedure, instead of the special legislative form currently used.

With regard to the Conference on the Future of Europe, in the 2022 *SOTEU,* the Commission President had only underlined that the Conference series has shown that citizens can have a say in the everyday issues that affect them, not only through elections but also through European citizens' debates groups, for example. For the first time, she envisaged the institutionalisation of the "citizens' panels" set up during the Conference and declared that the time had come for a European Convention.[35] A year later, on the issues of EU enlargement and institutional reform, she said in the address that proceeding with the enlargement process cannot wait for the treaty change, but that the Commission is preparing a proposal for the necessary institutional reforms to be presented to EU leaders during the Belgian Presidency of the Council (first half of 2024). In this context, Ursula von der Leyen stressed that previous waves of enlargement have led to a political deepening of integration, and that the next enlargement of the EU is therefore seen as a catalyst for this process.

34 Von der Leyen 2023.
35 Von der Leyen 2022.

Shortly afterwards, Olaf Scholz, Chancellor of Germany, also declared that there was a need for a rapid revision of the Treaties and a Convention.[36] However, no national government or EU institution has yet formally initiated this procedure.

In addition, on 4 May 2023, nine EU countries, Germany, Belgium, France, Finland, Italy, Luxembourg, the Netherlands, Slovenia, Spain and Finland, have set up a Group of Friends on qualified majority voting in the EU's Common Foreign and Security Policy (CFSP).[37] In a joint statement on the launch, the foreign ministries of the Member States said that the aim of the group was to improve the efficiency and speed of foreign policy decision-making. In the light of Russia's aggressive war against Ukraine and the growing international challenges the EU is facing, the members of the Group of Friends are convinced that the EU's foreign policy needs adapted processes and procedures to strengthen the EU as a foreign policy actor. Importantly, however, it was said that progress should be made in improving decision-making in the CFSP, by building on the provisions already contained in the Treaty on European Union. The members of the Group of Friends agreed to take stock of the situation on a regular basis and stressed the need to work closely with all EU Member States and to coordinate with the EU institutions.

The French and German governments convened an expert working group on EU institutional reform in spring 2023, along the lines of the formation of the Group of Friends, given that although EU enlargement is high on the political agenda, the EU is not yet ready to welcome new members, either institutionally or politically. After several months of deliberations, the working group ("The Group of Twelve") presented its work on 18 September 2023 with the study paper *Sailing on High Seas: Reforming and Enlarging the EU for the 21st century*.[38] Its underlying premise is that while EU enlargement has become a top priority, it must be accompanied by reforms that increase the EU's effectiveness, capacity to act and democratic legitimacy. Interestingly, the study was presented the very next day, at the General Affairs Council on 19 September 2023, where ministers and state secretaries responsible for EU affairs saw the document for the first time. This type of presentation, with this degree of abruptness, is extremely rare for a meeting at this level. Although the study prepared on the German–French initiative does not, either in the wording of Berlin or of Paris, reflect the governments' position and stems from several motives, several circumstances do tend to support this. On the one hand, the commissioning of the document itself and the initiative to convene the expert working group, the contacts and political activities of the authors, and the circumstances of its presentation. The content, while differing in some respects from the official positions, is largely in line with the ambitions of the French and German governments.

It contains a number of federalist ideas, several of which have been constant features in debates on this issue since the Laeken Declaration of 2001.[39] In this context, it should also be remembered that the EU chapter of the coalition programme of the German

[36] At the plenary session of the European Parliament. The minutes of the session record the speech in German.

[37] The declaration was released unchanged and translated into the appropriate languages by the participating Member States' Ministries of Foreign Affairs.

[38] Auswärtiges Amt 2023b.

[39] European Council 2001.

federal government, which was formed on 8 December 2021 and which commissioned the study jointly with the French, was based on similar concepts.[40]

The study proposes a flexible process of reform and enlargement, which would create a simplified "four-speed" EU. This would in fact mean that new or existing Member States would be set on a path towards different levels of integration or some kind of looser association. An "inner circle" would be created, comprising the Eurozone and Schengen area members working together on a wider range of policies. The second level would be the current EU. At the third level would be the associate members. This scope would allow for the rationalisation of different forms of association with EEA countries, Switzerland or even the UK. Associate members would not be bound by the principle of an "ever closer union", nor would they engage in deeper political integration in areas such as justice and home affairs or EU citizenship. However, they would be expected to respect the EU's common principles and values, such as democracy and the rule of law, and would fall under the jurisdiction of the CJEU. Finally, a fourth level would be the EPC, the European Political Community. This would not impose EU legal or rule of law criteria and would not give access to the single market. Instead, it could ensure political cooperation in areas such as security, energy, environment and climate policy, etc.

The document explains that more substantial reforms should be implemented during the new parliamentary term (2024 to 2029) – including preparations for the revision of the Treaties. The recommendations of the study have three objectives: to increase the EU's capacity to act, to prepare for EU enlargement, and to strengthen the rule of law and the democratic legitimacy of the EU. The study itself follows this structure, consisting of three main sections dealing with the rule of law, institutional reforms and the process of reforming, deepening and enlarging the EU. Among these, it is worth highlighting that they propose that the so-called conditionality mechanism must be made an instrument to sanction breaches of the rule of law, and, more generally, systematic breaches of the European values enshrined in Article 2 TEU (such as democracy, free and fair elections, freedom of the press, or fundamental rights enshrined in the Charter of Fundamental Rights). This would therefore bring a much wider range into the scope of a process that could potentially involve the freezing of funds, far beyond the current risk of damaging EU financial interests. The study also makes a strong statement that, at a certain level of persistency and gravity of violations, countries can no longer remain EU Member States; they become excludable.

Most of the proposed reforms are in line with the substance of the AFCO draft report, although slightly less ambitious in terms of institutional renewal. However, it also sees the extension of qualified majority voting as a solution to most decision-making problems, although it stresses that the instrument should be used with restraint, especially in the area of the common foreign and security policy, as the main objective should remain the search for consensus.

The study outlines a number of ways in which the Treaties could be amended, including the traditional option of an ordinary revision procedure, which in general and in the case of substantive changes inevitably requires a Convention. This is described as

[40] Koalitionsvertrag 2021. The current coalition parties in the government of the Federal Republic of Germany: SPD, Die Grünen and FDP.

a logical follow-up to the Conference. The study also presents several alternative options. Examples include the simplified revision procedure and the revision of the Treaties by means of accession treaties. The second subparagraph of Article 49 of TEU states that the latter is a separate, specific treaty amendment procedure, so technically such a route is also possible.

Quo Vadis Europe?

It is clear, therefore, that the European Union has different visions for its own future, both at the level of the Member States and the EU institutions.

As Konrad Adenauer, one of the founding fathers of the EU, put it: "only by returning to the values of European civilisation born of Christianity can the unity and peace in European life be restored." In a way, the Hungarian activity on the digital platform stems from a similar idea.[41] It is important to recognise, however, that although Adenauer spoke of unity, this is not and cannot be understood as unification, but as the slogan of the European Union in use since 2000: *"United in diversity"*. In other words, respecting each other's culture, history, particular economic model and constitutional identity. It is in this spirit that the debate on the future of the EU and the actions serving it should move forward. In contrast, the motto of the European Union has until today wrongly placed more emphasis on unification and less on the protection of national traditions and historical and cultural achievements.

The main question, therefore, is really, in the context of the developments of the last couple of years in relation to the future of the EU, whether we have reached a new frontline in the struggle between empire-building vs. a Europe of Nations, the two visions of the future. It is also a key question as to where our continent will find its place in the changing global world order, and whether it can become an important player in economic and political processes on its own right. Furthermore, although the conclusions and proposals of the French–German study and the AFCO report/EP resolution may differ in weight and may prove divisive in inter-institutional deliberations, the statement made as a starting point reflects a real problem, namely that the European Union must prepare seriously for enlargement. This is a topic that is expected to shape much of the work of the Council, the European Council, the Commission and the European Parliament in the near future. The question is therefore not just a rhetorical, utopian fantasy, but a serious one with high stakes. It should not, however, be forgotten that while Europe, and the European Union within it, has been busy for years with various forms of path-finding and self-definition, the future has already begun and, with enlargement back on the agenda, it could not be more timely.

41 Bólya 2021b.

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Péter Gottfried[1]

European Integration at a Crossroads – Which Direction to Take?

1. The past, the present and the future of European integration may be discussed from many different aspects. There is a broad historical perspective, there are geographic and geopolitical determinations; there are cultural foundations; and there are decisive economic and legal interrelationships. In this paper, I shall limit myself to focusing on potential or already existing challenges without elaborating on the major achievements like the unprecedented eighty year period of peace in Europe, the significant convergence of European countries, the creation of a Single Market and common currency and the complex system of community policies. It is also clear, however, that our joint project has entered a difficult period and significant and difficult decisions need to be taken. In this situation, Hungary, as a shareholder in the joint enterprise must assume its responsibility in contributing to finding solutions. The situation must be carefully assessed, and proposals must be made. To face these difficulties, there are three possible options to react. The first is to silently join the mainstream without making any specific remarks. The risk of this option is that our national interests shall not be reflected and incorporated in the common decisions. The second option is to be scared, even offended and consider leaving the European Union. When considering that option, one can talk irresponsibly about exit, but it should be considered that the geographical, historical, cultural and economic gravity and interdependence is so strong that these links cannot be replaced by any other link. Around 80% of our exports – which play a key role in our economy and in our prosperity – go to the European Union. Although public opinion reacts sensitively to recent conflicts, and sympathy for the European Union has fallen below the EU average of 45% to 37% in Hungary, this does not mean that the general public would seriously consider leaving the Union. Polls show that no more than 10% of the Hungarian population would be ready to consider a Huxit. There is no serious political party in Hungary that would even consider the option of exit. All this leaves us with the third possible option that is to form a position on the most important European issues and try to argue for our proposals.

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Based on a lecture delivered at the Ludovika University of Public Service on 1 September 2023.

2. It may be useful to go back to basics and recall the objective that led Member States of the European Union to join forces. What is the ultimate objective? Countries with common history and cultural backgrounds and with similar social and economic features believed that together they are better able to achieve their national goals. That is why common policies have been developed, and these common policies are translated into legislation at Union level. The aim was never to sacrifice national goals, nor is to guide Member States to the right path against their free will, but to integrate the interests of countries. The common EU rules, the acquis communautaire and the common budget are all created to serve that purpose.
3. Since the beginning of European integration, the world has changed significantly, but the ultimate objectives that is to ensure peace and security and prosperity for European citizens have not changed.

   In a changing external environment, the share of the European Union in the world economy has been substantially declining for decades, and the competitive advantage has been eroded. That trend is accompanied by a policy change. While the EU has always been at the forefront of liberalising world trade and has been for free competition worldwide, one can now see the regionalisation of the world economy and the fragmentation of world trade as a protectionist wave emerged. The European Union, as many of its partners, is applying more and more restrictions on both trade and investments.

   As the external world changed, new frontiers and dividing lines re-emerged within the European Union in at least four areas, namely in respect of common policies; common budget; decision-making and the appearance of rule of law related accusations.

   A dangerous trend may be observed in common policies. New policy areas, such as social policy, energy and climate policy and some others emerged, and no matter how justified they can be themselves, they led to significant additional costs on enterprises. Without taking into account the competitiveness aspect, the declining EU share in the world economy shall be difficult to be stopped. For example, energy prices in Europe, even after the peak are still three to five times higher than in the United States representing a competitive disadvantage for the whole economy. Disregard of the competitiveness implications of sectoral policies and the simple mechanical extension of uniformisation would certainly have consequences.

   There has always been a conflict of interests between net contributors and net beneficiaries of the common budget. A new conflict zone was created beginning with the 2014–2020 budget with a significant shift of allocations from East to South, while the overall size of the budget expressed as a share of GDP has not increased but rather decreased in the recent two decades. The original rules of allocation were modified to increase the relative share of the South which is still in average more prosperous than the East in per capita GDP terms. Reverse incentives were introduced, which reward poor performance rather than positive achievements, for example, higher school dropout rate or higher illiteracy rate, or poor performance of CO_2 emission reductions.

The Lisbon Treaty significantly increased the influence of the European Parliament, and as a consequence, the weight of political considerations increasingly appear in the decision-making process. The European Commission as guardian of the Treaties must not pursue national interests or party politics, still it defines itself as a political body pursuing political objectives ever since the Juncker Commission. The drive to eliminate unanimity even in the few remaining areas of foreign and security policy and taxation and some others may be a threat to the unity and solidarity and mutual trust among Member States. Let us go back to square zero. No Member State should feel too often that decisions taken by qualified majority are taken against its national interests.

The emergence of rule of law accusations and procedures and even sanctions led to new tensions not known in earlier history of European integration. Without going into details, I would limit myself to two remarks. The first is that sanctions started to be applied under circumstances when there is no objective yardstick to use in judging specific cases impartially guaranteeing to avoid double standard. The second is, that in order to address that situation, the Hungarian side repeatedly suggested that if a given practice in one Member State raises rule of law concerns, there should be an examination of the practice of the other 26 Member States to avoid double standard. It would be important to avoid a situation in which a given legal solution or practice is considered to be unacceptable in one Member State which is not even on the radar in another one. Unfortunately, there are examples for that. The attorney general in Hungary, for instance, is appointed by the Parliament, while in some other Member States, it is within the competence of the government or even of a minister. Many other examples can be cited. It does not contribute to the trust in a non-discriminatory and objective and non-partisan and evidence-based approach, when calls to avoid double standards are disregarded by the responsible commissioner saying that "it is not the text but the context that is important". There is no defence against such an approach, and no guarantee to avoid double standard and suspicion that rule of law is used for political purposes are not easy to dissolve.

Since the memorable failures to amend the Treaty, the practice of creeping modification of the Treaty has become the preferred option extending EU competence into areas which are classically Member State competences under the present Treaty. An example and an instrument for that is the so-called European Semester, where the European Commission regularly initiates recommendations for policy areas which belong to national competences, such as taxation or social policy or the composition of the energy mix. That practice is extended to the use of the Recovery and Resilience Facility (RRF) and the related so-called milestones which might cover actions falling under national competence.

4. A critically important issue of the future is the relationship between enlargement and deepening of integration. In recent decades, the undisputable pattern was that major enlargements were preceded by a substantial deepening of integration. The reason for that is understandable. To prevent centrifugal forces that may emerge as a consequence of increased diversity by Member States and regions, guarantees were needed to keep the community together stronger that

earlier. That was the reason at the time of the accession of Spain and Portugal in the mid 80's when the Single Market was created. Similarly, the common currency was created before the so-called great eastern enlargement in 2004. During the last decade, the momentum for further enlargement of the Western Balkans weakened as a consequence of the so-called "enlargement fatigue". With Russia's aggression on Ukraine and with Ukraine's desire and commitment for euro-Atlantic integration, a completely new situation and new momentum emerged. The decision to open accession negotiations with Ukraine, however, raises a number of unanswered questions. It is Europe's second largest country by area and the seventh in terms of number of population with half of the per capita GDP of the poorest Member State, Bulgaria. Among the questions to be answered, one is how to react to the Treaty obligation that Member States should ensure "by all means" the territorial unity and sovereignty of members. The interrelationship between EU and NATO membership needs to be carefully considered as well.

A further question particularly in respect of Ukraine will be the extent to which the EU will insist on full compliance with the Copenhagen criteria, and whether the previously applied principle that the process should be merit-based, remains valid. Or alternatively, larger room will be left for geopolitical considerations. It seems appropriate that the EU continued to insist that the speed of the accession process shall be determined by individual performance of the accession countries to meet each and every Copenhagen criterion. This would be even more important that the diversity and the distance from the present Member States' legal and economic characteristics are far more important in the case of Ukraine than in the case of Western Balkan countries. The Ukrainian accession might have a much bigger impact on the EU's existing policies and may affect the entire architecture of the future of European integration.

Bearing in mind the challenges of enlargement, it may be reasonable to consider a kind of "standstill" of deepening integration on new policy areas. An enlargement including Ukraine will increase diversity to an extent which questions the feasibility of parallel or preceding increase of uniformity. It would be reasonable to consider instead of uniformisation, the increase of flexibility. In any case, the quality of membership cannot be differentiated to create first- and second- and third-class membership. The existing instruments of flexibility, like enhanced cooperation as defined by the present Treaties can be more frequently used with a strong respect of the criteria that it cannot be applied in the Single Market related policies, and must remain open for all Member States at any later time.

In terms of internal reforms, it would be important not to start the process with institutional reforms. One has to avoid even the perception that reforms of the decision-making process refer to future enlargement only as a pretext to eliminate unanimity in the decision-making process.

In terms of cohesion policy, the reaction to enlargement should not be the weakening of the policy. To the opposite, it must be taken into account that with the appearance of new demands and the modification of statistical figures, don't give an answer to the still justified needs of existing beneficiaries of cohesion policy.

Cross-border cooperation involving acceding countries and existing Member States shall have to be given increased attention.

The integration of new members into the agricultural policy shall be particularly sensitive as the current situation on cereal markets already shows. Other sectors of the economy, such as steel may lead to similar adjustment challenges. The starting point of negotiations should be the EU-Ukraine Free Trade Agreement concluded before the Russian aggression and not the autonomous measures offered by the EU after the beginning of the war. The fairness of competition in the Single Market will be crucial for Hungary and for Europe as a whole. The diversity of market players will increase, but state aid rules; veterinary and phytosanitary and other technical rules and standards but also public procurement rules must be fully respected by all Member States. The proper functioning of the Internal Market is the most important pillar of European integration, and its integrity should not be endangered.

Enlargement with a country with the dimensions of Ukraine will have an impact on the entire architecture. That is not the case with the Western Balkan countries. There is an old debate, whether membership in the European Union should remain undifferentiated or a move towards a Europe of concentric circles is feasible. There may be a temptation to consider the latter option. The experience of Brexit among others shows, however, how difficult it is to strike a fair balance between the full rights and obligations of membership at any level lower than full membership. Such a move would mean a substantive change in the architecture of the European Union therefore it should have the agreement of all Member States. That is at least questionable to represent a realistic avenue.

I tried to collect only some flashes to provoke thoughts. One thing is for sure: we are entering an interesting but challenging period.

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István Szent-Iványi[2]

Europe of Nations – Illusions and Realities

Anyone who follows the debates on the future of Europe or the current issues of European policy can easily get the false impression that the Europe of Nations concept or the federalist position aiming for a United States of Europe is a realistic alternative that we face, and that one of these will be the dominant direction of European integration. This is far from being the case, however. In fact, these are the two extremes of the continuum of diverse positions, two vocal minorities, and neither has a realistic chance in the foreseeable future to determine the future of Europe, alone and exclusively.

The vast majority of the participants in the debate take a status quo-plus or status quo-minus position, in that they propose a correction of the current level of integration, either a step forward in the federal direction or a step backwards in the direction of intergovernmentalism. But these are not radical changes, they do not upset the complex system of integration protected by the Treaties, they are merely a slight shift in an *evolutionary* or even *devolutionary* direction. Changing the Treaties is a complicated, cumbersome process, requiring the full consensus of Member States and the European Parliament, and in the case of radical changes, many countries' constitutions require an always risky referendum for their approval. Therefore, major leaps and radical changes in the integration process are unlikely to take place in the foreseeable future (apart from unforeseen cataclysms). In other words, there is a greater chance of this integration breaking up rather than the sovereignist or federalist concept in its ideal-typical form being implemented.

The question rightly arises: does it make sense to deal with concepts that have very little chance of being implemented? The answer is that it does make sense, because both positions are a kind of point of reference, in European jargon *finalité politique,* that is, the political end, or guidance against which actors measure their own ambitions.

Although none of these concepts will be realised in their pure form, there is a direction in which the process moves, sometimes more slowly, sometimes more quickly, sometimes with detours, towards a federal end goal fading in the distant future. The Europe of Nations proponents would like to reverse this process and drive it back at least to the initial state of the Treaty of Rome.

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Charles de Gaulle and his Europe of Nations

Although it is generally accepted that the father of the Europe of Nations integration concept is Charles de Gaulle, former French President, this is a misleading assumption. The term itself is indeed derived from him, although he did not use it consistently. He used the phrase in this form at a notable press conference, labelled historic, on 15 May 1962, where he declared that "there cannot be any Europe other than that of the [nation] states, apart from in myths, fiction and parades". In this speech, he rejected supranational experiments and called them nonsense like the Esperanto and Volapük languages. This speech caused quite an outcry and the next day five MRP-party federalist ministers resigned from their posts.[3]

He used the term Europe of Nations interchangeably with "Europe of the Homelands" *(l'Europe des patries),* also known as "Europe of the Nation States". In his case, this does not indicate any conceptual confusion, but follows directly from the prevailing French understanding of the nation.

According to the French position, which is still valid today, the nation is essentially a public law category, constituted by citizenship, and therefore every French citizen is part of the French nation, regardless of his or her ethnic or cultural background or personal identity. Hungarian literature of the last century called this concept a political nation.

There is no doubt that de Gaulle, then in opposition, was not at all comfortable with the federalism of the founding fathers, and also fiercely criticised the Treaty of Rome (had he been President of France in 1957, he would probably have produced a much less ambitious treaty), defended member state sovereignty and encouraged intergovernmental cooperation even in European integration. He disapproved of qualified majority voting and, with his infamous "empty chair policy", was even willing to go so far as to endanger the whole integration process in order to prevent a majority vote. It didn't take much for this to happen. He finally succeeded in forcing through the so-called Luxembourg compromise in 1966, which continued to give each Member State the right of veto on major matters of national interest. The Commission's honest-to-goodness federalist President, the German Hallstein, found this hard to tolerate and resigned from his high post shortly afterwards.

It would be inappropriate to conclude from this that de Gaulle was a Eurosceptic who opposed European cooperation. He was very much in favour of cooperation on his own terms, but he imagined that it should be based on intergovernmental cooperation, with French dominance, and on the enforcement of French economic interests. He also feared French dominance when the United Kingdom joined, which he rejected twice (in 1963 and 1967) because he believed that the British would be the Trojan horses for the Americans within the community. He was also apprehensive of supranationalism partly because he believed that it would also make US dominance a determining factor. Moravcsik's excellent analysis reveals that de Gaulle's European policy was essentially motivated by his homeland's economic interests, with geopolitical goals being secondary

[3] Anceau s.a.

and ideological elements having almost no role in it.[4] National selfishness and self-interest played an important role in his politics, and he was rather successful in enforcing them. The principles and rules of the Common Agricultural Policy (CAP) were designed to provide the most benefits to French farmers. The others even called the CAP the French rebate.

At the same time, he had a major European initiative: In 1961 he requested Ambassador Christian Fouchet to draw up a draft for a European Political Union, the so-called Fouchet Plan. The essence of this plan would have been close foreign and security policy cooperation, of course on a strictly intergovernmental basis. The plan eventually failed due to open Dutch and covert German resistance.[5]

With de Gaulle's departure in 1969, the rigid opposition of French politics to a federalist approach to integration was tempered, and with Mitterrand–Delors, France became a champion of deeper integration and supra-nationalist transformation.

State nation versus culture nation

The French concept of the nation, as opposed to the German and Italian conceptions, was called the concept of national state by Friedrich Meinecke, a German historian and a leading representative of the intellectual history school. In his main work[6] Meinecke argued that there are basically two different conceptions regarding the definition of nation in Europe. This distinction is still valid today. The French approach, which has been adopted by many others, conceives of the nation as a public law "community of wills" *(Willensgemeinschaft),* based on citizenship, while the German and Italian concept of the nation is culturally determined. The German historian argued that the nation in the German understanding is a cultural community, which encompasses a community of people speaking the same language, sharing a common cultural tradition, and undertaking a sense of belonging, regardless of nationality or borders. According to him, the reason for the two different perceptions lies in their different historical development. Since in the case of German and Italian unity or other Central and Eastern European peoples, independent statehood and independence came later, the framework for defining national belonging was not the state but a shared culture. In Central and Eastern Europe, this concept became dominant, and Hungary has consistently advocated it since the Treaty of Trianon, although in the multi-ethnic successor states that emerged after the peace treaties closing the First World War, the emergence of a nation state concept was also perceivable.

János Martonyi, former Hungarian Foreign Minister, points out in an important paper that: "Hungarian history evolved in a less fortunate manner than that of France, our nation is forced to live in several states, for us the concepts of nation and state are not identical, the borders of the two do not coincide, and absolute sovereignty based on

4 Moravcsik 1998.
5 Teasdale 2016.
6 Meinecke 1908.

a homogeneous nation state cannot be the solution for the Hungarian nation as a whole.[7]" This clear position is the undisputed foundation of Hungarian national strategy.

The 19th century notion of sovereignty is closely linked to the concept of a Europe of Nations. In this era, sovereignty was understood as the unlimited freedom of disposal over the whole of a given territory and all its citizens, only a country that exercises sovereignty over the whole population of a given territory, alone and without restriction, and that is internationally recognised to do so may be considered as sovereign. In contrast, the modern conception of sovereignty is based on the assumption that fundamental changes have taken place in the international environment in the last century, and not only nation state actors exist these days, but also global and regional supranational organisations, which, to a varying degree, represent constraints on the traditional, so-called unfettered exercise of sovereignty. The modern conception has therefore introduced shared or jointly exercised sovereignty, meaning that individual states no longer exercise some of their sovereignty exclusively, but jointly with others. They cede part of their sovereignty in the classical sense to joint decision-making, but in return they also gain a say in the sovereign decisions of others or in a larger cooperation. This is what many international organisations and forms of cooperation are based on, but it is most clearly the case for the operation of the European Union. This follows from the principle that Community law prevails over national law in many areas, and that EU regulations are directly applicable, without internal approval or promulgation, throughout the EU.

Europe of Nations, today

It is not an easy task for anyone who wants to reconstruct the meaning of the concept of Europe of Nations today. There are almost as many versions as there are actors claiming and proudly proclaiming it. Of course there are common points, but there is no single, consensually agreed canon.

Several groups in the European Parliament already sought to link the name "Europe of Nations" to itself. These were political enterprises of very diverse composition and had less and less in common with the Gaullist tradition of the Europe of Nations. First, in 1994, Philippe de Villiers, former Minister of State for Culture in Chirac's cabinet, who had been a member of the Gaullist RP (Republican Party), founded his own party, the Movement for France (MPF), which was leaning to the right of Gaullism and tended towards Euroscepticism, and as a member of the MPF, created the Europe of Nations Group in the European Parliament in 1994. Although he also moved away from the original Gaullist concept (and since navigated himself and his party to the extreme right), he was still the closest to it. This group was quite short-lived and only lasted two years between 1994 and 1996.

The UEN (Union for Europe of the Nations) Group, which was in the European Parliament from 1999 to 2009, proved to be longer-lived, although its content changed significantly. The group was initially dominated by the Gaullist RPF and the Italian AN (National Alliance) led by Fini, but after the 2004 elections, the AN was joined by the

7 Martonyi 2021a: 32.

Polish PiS and the Italian Lega Norda, and by then, there was no French party representing even a fragment of Gaullist tradition in the group.

After the 2009 elections, the former UEN parties found themselves in a difficult situation, as some of their parties did not perform well and others aligned themselves with other formations (for example, the Polish PiS joined the European Conservatives and Reformists), so the radical right parties had to reorganise themselves under a new name: EFD (Europe of Freedom and Democracy). In this group, the UKIP party was the strongest force and the group was co-chaired by the vociferous Nigel Farage.

Between 2014 and 2019, the name Europe of Nations resurfaced like a subterranean river, with the Union of Nations of Europe and Freedom (UNEF) being created after the 2014 EP elections. They have already moved very far away from the Gaullist tradition, the group represents a distinctly right-wing platform and the dominant parties in the group are the French Front National (Marine Le Pen's party), the Dutch PVV (Gert Wilders' party) and the Italian Lega (Salvini's party). There is also a seat for the Austrian FPŐ and temporarily, until the British exit, for UKIP.

In 2019, the group took on a new name, which can be seen as the successor to UNEF: the currently existing group is called Identity and Democracy (ID). Today, this group is the most prominent representative of the right-wing "Europe of Nations" concept, although the views of some members of the ECR group and the currently independent Fidesz MEPs are also close to this.

By the mid-2010s, almost all the parties in these groups painted the exit programme on their flags (Fidesz being the clear exception). The most consistent and, let us add, successful party in this was UKIP, led by Nigel Farage, which finally achieved their goal in the June 2016 referendum, with a narrow majority of Britons voting to leave. The enthusiasm surrounding this success quickly spread to the other parties. In 2016, Harald Wilmsky, Austrian FPÖ MEP, spoke about the necessity of Öxit (Austria's exit); in a tweet congratulating Farage, Salvini wrote: "Now it's our turn." In 2017, Marine Le Pen stated in the presidential candidates' debate that: "End the EU!"[8]

The pro-exit position of these parties is completely at odds with de Gaulle's conception of the Europe of Nations, who, while disagreeing with the supranational direction and majority voting, was very much in favour of European cooperation, and would have extended it to a particularly sensitive area, namely to foreign and security policy.

Stepping back instead of exit

We have seen that the most enthusiastic parties, using the Europe of Nations as an attractive slogan, were all in favour of leaving the EU during the Brexit conjuncture, or at least seriously considered this option. Undoubtedly, this position has been most consistently and successfully (from its own point of view) taken by Farage's UKIP party. Following a brief sobering up after the Brexit binge, and faced with the plethora of problems posed by the exit and perceiving the doubts of the public, when approaching the 2019 EP elections, these parties had already fine-tuned their positions. They abandoned

[8] Pausch 2019: 4.

exit as their primary goal and instead campaigned on a programme of radical reform of the EU that is even harder to achieve than exit.

The main parties are calling for radical internal reforms in the EU, namely to move back to a model of purely intergovernmental cooperation. Many of the parties represented in the European Parliament identify to some extent with this programme, but it is currently represented in its purest form by the Identity and Democracy group, whose three most prominent parties are the Salvini-led Italian Lega, the German AfD and the French National Rally (RN) led by Le Pen.

In its 2019 election manifesto, the AfD called for the abolition of the European Parliament, Germany's exit from the Eurozone, limiting integration to economic cooperation and returning most Community competences to the nation states.[9]

Marine Le Pen's programme was not so detailed, but her slogan was for the UNE, i.e. Union dés Nations Européennes, which presupposed the restoration of full sovereignty and, in her vision, the EU would continue to function only as an economic area and customs union. The Austrian FPÖ saw the need for a radical reduction in the size of the European Parliament and a radical curtailment of its powers. They wanted to do the same with the European Commission. And they called for the introduction of strict unanimity in decision-making.[10]

Although the emphasis of each party is different, there are clearly identifiable common points. None of the parties has concealed the fact that they would either radically reduce or abolish purely Community institutions such as the Commission and the Parliament, with a narrow Council secretariat performing their minimal administrative tasks, the decision-making powers of the European Court of Justice would be limited, decisions would be left exclusively to the Council for intergovernmental cooperation, where qualified majority voting would be restricted, and the FPÖ would abolish them altogether. This would remove all the achievements of the European integration process, and transform the current Union into a loose, economic cooperation organisation. This would effectively put the integration process back to square one, and it would once again face the problems that it has already overcome after half a century of exhausting struggle to take its current form.

In June 2022, the parties of the Identity and Democracy group reached the point where they formulated a common European platform of these parties in a declaration. The Antwerp Declaration[11] rejects all the conclusions of the conference on the future of Europe, dealing separately with the rejection of qualified majority voting (QMV) and the conditionality mechanism. In a separate paragraph, it opposes the plan to create a common European army. It strongly criticises the current immigration policy, which it considers permissive, and calls for strict surveillance of European borders to protect European citizens. Finally, it calls for returning Community competences back to the Member States.

9 Pausch 2019: 5.
10 Pausch 2019: 6.
11 Antwerp Summit 2022.

Shortly after the Antwerp Declaration, in July 2022, the Hungarian Parliament also adopted a resolution on the Hungarian position on the future of the European Union.[12] This is almost word for word the same as Viktor Orbán's position a year earlier.[13] Both the Prime Minister's speech and the Resolution of the National Assembly endorse the Europe of Nations concept and explain in detail what they mean by it.

The National Assembly (OGY) resolution calls for the deletion of the objective of *"ever closer union"* from the Treaty, while at the same time expecting the Treaty to enshrine the importance of Europe's Christian roots. It demands a radical review of the EU's competences based on the principle of subsidiarity. A separate point calls for the creation of a common European army. It considers it important to make support for families a Treaty objective. All peoples must be guaranteed the freedom to choose who they want to live with. It would abolish the European Parliament in its present form and replace it with an Assembly of delegates from national parliaments. It demands the right of veto for national parliaments in the EU legislative process, as well as the right to table legislative initiatives for national parliaments. It also calls for the Treaty to provide protection for autochthonous minorities and for the European Union to support these communities.

The Hungarian government's position is much more detailed and elaborate than the common platform of the Identity and Democracy parties. There are many points of convergence between the Antwerp Declaration and the Hungarian resolution, but there are also very significant differences and even radically contradictory points between the two conceptions of a Europe of Nations. The surprising difference between the two documents is that the Hungarian resolution rejects neither the extension of majority voting (although we know from other sources that the Hungarian government is strongly opposed to this), nor the conditionality procedure, although currently Hungary is the only victim of the latter. There is one important point on which the two platforms are radically opposed, namely the creation of a common European army. The Hungarian government calls for this, but the Antwerp Declaration is strongly against it. Another important point of the Hungarian resolution is the support for autochthonous nationalities, which is completely absent from the Identity and Democracy parties' declaration. It was not a coincidence, but more on that later.

A quick analysis of these two documents also shows that there are serious differences of opinion between the two Europe of Nations concepts on important issues, which could make it difficult for the Hungarian government to cooperate with other European sovereignist parties.

12 Parliament 2022.

13 Government of Hungary 2021.

The internal contradictions of the Europe of Nations concept

The internal contradictions of the concept are well summarised in Boglárka Koller's comprehensive paper on this issue.[14] The problems start with the fact that, in Europe, there is no universally accepted concept of nation. In the context of Meinecke, we have already touched on the fact that, due to different historical development and its cultural influences, the nation and the nation state have a very different meaning in the early civilised Western countries than in the less developed Southern or Central and Eastern European regions.

According to the French concept of the nation state, which was adopted by many in the West, the citizens of individual Member States constitute a nation, and hence the Member State governments fully represent the "nation", understood as a political community. Member States are referred to in Anglo-Saxon terminology as nation states, regardless of the nationality composition of the state.

This is radically at odds with the Hungarian government's view, based on our national strategy interests. According to the concept of the nation, which is key to Hungarian national strategy, country borders in Europe do not necessarily coincide with national borders, and it is rare to find a nation state that can be called ethnically homogeneous (where autochthonous minorities are not present, in most cases there are communities with immigrant backgrounds). It follows that, according to the culture-nationalist conception, individual national governments represent citizens rather than the nation, and does not necessarily represent even them impartially. So when the representatives of the Europe of Nations talk about regaining the sovereignty of nations, they do not really talk about the sovereignty of nations in the cultural sense, but of the governments of individual member states, which is far from the same as the sovereignty of nations in the ethnic sense.

National strategy concerns

From a Hungarian perspective, the most serious concern about the Europe of Nations concept is of a national strategy nature, and it is no coincidence that the protection of autochthonous nationalities is emphasised in the Hungarian government's position. However, no other sovereignist party shares this view. It is for this reason that one can state that, from the point of view of national strategy, the political rise of the "Europe of Nations" concept represented by the ID parties is particularly disadvantageous for us. I have already drawn attention to this issue in an earlier paper.[15]

The basic premise of the political grouping that painted the concept of the Europe of Nations on its flag is that Member States must be capable of representing the interests of all citizens of that country without bias. Unfortunately, this assumption is contradicted

[14] Koller 2021: 22–24.
[15] Szent-Iványi 2021: 45.

in practice on a daily basis. Indeed, individual governments do not necessarily represent communities of citizens of different nationalities impartially, nor are they able to represent the nation as a whole even in the case where some of the members of that nation – as citizens of another country – are not subject to their jurisdiction.

This seems to be supported by the numerous independence and devolution movements from Catalonia, through the Basque Country, to Scotland. Protest movements, referendums and demonstrations provide rather clear evidence of the extent to which nationalities in a given country feel that the central government also represents their interests. We do not have to go that far to find a convincing refutation of the premise of the nationalist conception that national governments also act in the interests of autochthonous nationalities without bias or partiality. This is reinforced by decades-long desire of Hungarians in Transylvania for autonomy, but there is also a sense of something lacking among Hungarians in Slovakia, not to mention the situation of Hungarians in Transcarpathia and their relationship with the central government. This conflict has nothing to do with the current war, the curtailment of minority rights began much earlier.

It was this sense of lack that launched the initiative called *MinoritySafePack,* and for similar reasons a petition was launched for the autonomy initiative of the Szekler National Council. It is no coincidence that in both cases, well over a million European citizens have signed the petitions, hoping that the European Union may be the defender of autochthonous nationalities' interests vis-à-vis Member State governments. It is another matter that their trust in the EU so far, unfortunately, has remained unjustified and the Commission was also dismissive of both initiatives. At the same time, FUEN, the umbrella organisation of Europe's autochthonous nationalities, always turns to the European Union for help and redress in disputes. A so-called *Minority Intergroup* on the situation of autochthonous nationalities has continuously worked in the European Parliament for a long time, and the current intergroup is composed of 42 MEPs from 18 countries.[16] Without overrating the importance of this body, it can be concluded that this permanent body of representatives also constantly deals with discrimination against the nationalities of certain European "nation states". The very existence and functioning of the Intergroup proves that a significant part of nation states are not performing well in this area.

The EU's current legal order still has relatively few minority protection instruments, but the recognition of the rights of persons belonging to national minorities in Article 2 of the Lisbon Treaty is a step forward and the European Parliament regularly deals with the grievances of autochthonous nationalities. For nationalities, the EU is the hope and the hoped counterweight against discrimination and violations in the Member States. We have every right to be dissatisfied with the way it currently works, but if we dismantle what we have, the situation will not be better, but clearly worse for nationalities, for many European nations. The classic model of a Europe of Nations is based on a concept of nation states that does not in fact recognise the right of nationalities to freely choose their identity and exercise the rights necessary to commit to that identity. So for us

16 Gál 2020.

who value the rights of Hungarian communities living beyond our borders, this is surely a wrong way and a further erosion of our modest existing opportunities.

A further danger of the traditional Europe of Nations concept is that it represents an earlier conception of sovereignty that is based on a total rejection of interference in domestic affairs. In other words, if this model were to become dominant in Europe, which of course is unlikely, not only would the European Union's hoped-for role in guaranteeing fundamental rights be eliminated, but governments would also be less able to act on behalf of their communities living in other countries.

An alternative model for a Europe of Nations

Today it is almost completely forgotten, but there was also a highly utopian, alternative, federalist model of a Europe of Nations, although not under this name. Interestingly, not only the Gaullist concept of centralisation of the Europe of Nations is linked to France, but also its complete opposite, namely to Guy Héraud, a renowned law professor, minority expert and politician. Héraud was a prominent exponent of the minority issues, who came to the matter through his study of the problems of the French-speaking nationality in the Vallé d'Aoste (Valle d'Aosta in Italian). According to the traditional French concept of the nation, they are not French but French-speaking Italians, just as the Walloons are French-speaking Belgians and the inhabitants of French-speaking Switzerland are French-speaking Swiss and not French. In the course of his studies, Héraud discovered that there are many similar communities in Europe, whose problems can be hardly solved by the so-called nation states.[17] Therefore, as a solution, he proposed in his best-known work[18] that Europe is to be divided into ethnically homogeneous regions, or cantons, as far as practicable. He considered himself as a representative of "ethno-national federalism". According to Héraud's proposal, there are two important levels in public administration: regional and European levels. He intended to allow a small room for manoeuvre to nation states.

Héraud argued that if we really want all the national communities of Europe to see Europe as their home guaranteeing their rights, where a broad autonomy of national communities rather than that of governments applies, and that frameworks are set by national borders rather than by state borders, this is only conceivable in a completely new, utopian federal framework. In this imaginary federal Europe, the nation states are replaced by European "cantons" with wide-ranging autonomy, the borders of which follow ethnic rather than current national borders. Where homogeneous ethnic cantons can no longer be created because of mixed population (and let's face it, this is quite common in Europe), the minority living there would be guaranteed the free choice and exercise of national identity, on the basis of personal autonomy. In this diverse, multi-ethnicity Europe no more majority nations and minorities would exist, but a large number of autonomous territories of equal status and their free association. In this imaginary Europe of nations, subsidiarity is the guiding principle and the primary task of central

17 Héraud 1963.
18 Héraud 1968.

government, if at all, is to keep watch over compliance with the rules of equality and cooperation. Héraud's idea was framed by the federalist revolution he envisaged.[19]

This utopia was backed up by regionalism, which gained momentum in the wake of the Second World War. All this was rooted in the Vichy government's administrative reform, which regionalised the previously rigid, centralised French administrative system. In a similar way, regionalism was stimulated by the creation of the Land of Baden-Württemberg in 1952, which also took place on the basis of the principles of regionalism. A prominent theoretician of this tendency was Robert Lafont, who was also a friend of Héraud and who wrote a powerful book[20] on the revolution of regionalism. The trend of regionalism received a new impetus in the 1980s and 1990s, partly through the inclusion of the subsidiarity principle in the Treaty and partly as a response to globalisation.

It is indeed true that Héraud's model represents an equal Europe of nations, understood in cultural-ethnic terms, and not of national governments. In this idealised model, there are no discriminated nationalities, only European citizens, equal in terms of rights and dignity.

We do not need to go back to the distant past and France to find similar contemporary ideas close to Héraud's position, because we can find them here, in Hungary. János Martonyi is an advocate of this, and summarised his position clearly and unequivocally as follows: "The combination and co-enforcement of the cultural notion of the nation and grassroots federalism would thus constitute the 'Community of Communities', also known as the 'supranational Europe of nations', dreamed of for 25 years." This could lead to a resolution of the contradiction between a "Europe of Nations" and a "supranational Europe", and "ultimately to an agreement between sovereignists and federalists (which does not seem to be very likely currently)".[21] Martonyi also believes that "the future of European integration will be determined to a large extent by the success or failure of the link between the cultural notion of the nation and grassroot historical federalism".[22]

This is perfectly in line with the ideas of Jean Monnet, one of the founding fathers of the European unity process, as explained in 1943: "There will be no peace in Europe if the States are reconstituted on the basis of national sovereignty [...] The countries of Europe are too small to guarantee their peoples the necessary prosperity and social development. The European states must constitute themselves into a federation."[23] This was the intention Monnet emphasised in his much quoted speech in Washington, D.C., in 1952 at the Press Club there: "Our times demand that we unite Europeans and overcome their division. We are not making a coalition of states, but uniting people."[24] In the last seventy years we have not come much closer to the realisation of federalist

19 Héraud 1969.

20 Lafont 1967.

21 Martonyi 2021b: 193.

22 Martonyi 2021a: 36.

23 Monnet 1943. "During a meeting of this committee on 5 August 1943, Monnet declared: "There will be no peace in Europe, if the states are reconstituted on the basis of national sovereignty [...] The countries of Europe are too small to guarantee their peoples the necessary prosperity and social development. The European states must constitute themselves into a federation..."

24 "Notre époqu exige que nous unissions les Européens et que nous ne les maintenions pas séparés. Nous ne coalisons pas des Etats, nous unissons des hommes." Monnet 1952.

plans, although this would certainly be an opportunity for an alternative Europe of Nations model. It is a utopian alternative to the current concept of a Europe of Nations. The chances of its realisation are as slim as those of the Europe of Nations concept, but in theory it would serve the interests of Europe's cultural-ethnic national communities much better than Member State governments, elected by the majority nations.

Is there any reality to this alternative? None at the moment. The trend is exactly the opposite. Hope can only be found in the fact that when the founders of the Pan-European Movement, Count Coudenhove-Kalergi and his associates, announced the process of European unity between the two world wars, it seemed at the time an equally unrealistic and untimely dream. A few decades later, it did become something, and the process of European unity was set off. Right now it is stagnating, but it should continue to be moved forward rather than turn back.

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