

To Have or Not to Have Competence: EU Integration by Stealth through Permacrisis

by Virginia Volpi

ABSTRACT

We reside in an era of *permacrisis* that demands a prompt response from the European Union. "Integration by stealth" defines a unique form of European integration that does not necessitate amending the Treaties: in emergency, European law may become malleable, allowing the Union to act where no competence is conferred. Exploring the Union's reaction to the sovereign debt crisis (2010–15), the refugee crisis (2015–16), the Covid-19 pandemic (2020–21) and Russia's invasion of Ukraine (since 2022), a comprehensive panoramic of the new creative solutions and their benefits and drawbacks is illustrated. Could this be the potential future of the European integration process?

European Union | EU integration | Sovereign debt | Refugees | Coronavirus
| Ukraine

keywords



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by Virginia Volpi*

Introduction

Necessitas non habet legem? wondered European integration scholar Christian Kreuder-Sonnen.¹ In times of crisis, particularly *permacrisis* – meaning the continuous stumbling from one crisis into another, be it war, inflation, or political instability – the law tends to become malleable.²

Even though the question of competence has long been crucial, the European Union has often managed to react to crises by legislating and acting where no specific competence was conferred, giving rise to six different forms of competence creep: indirect legislation, economic governance, soft law, parallel integration, negative integration through case law and international agreements.³ As a whole, these phenomena may be addressed as “integration by stealth”.

This paper investigates the responses provided by the EU to the four main crises which occurred in the last fifteen years, namely: the sovereign debt crisis (2010–15), the refugee crisis (2015–16), the Covid-19 pandemic (2020–21) and Russia’s invasion of Ukraine (since 2022). As Jean Monnet, one of the architects of the

¹ Christian Kreuder-Sonnen, “Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance”, in *Journal of Common Market Studies*, Vol. 54, No. 6 (November 2016), p. 1350-1366 at p. 1354, DOI 10.1111/jcms.12379.

² Christiaan Timmermans, “The Competence Divide of the Lisbon Treaty Six Years After”, in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*, Portland, Hart, 2017, p. 19-33.

³ Sacha Garben, “Competence Creep Revisited”, in *Journal of Common Market Studies*, Vol. 17, No. 2 (March 2019), p. 205-222, DOI 10.1111/jcms.12643.

* Virginia Volpi is working as a policy expert within the Delegation for the Italian G7 Presidency, in the Unit for political aspects of G7/G20 of the Foreign Affairs Ministry. Before, she served the European Commission, being employed in DG Reform and in the Cabinet of Executive Vice-President Maroš Šefčovic. She authored the book *Cos’è per te l’Europa?* (Feltrinelli, 2020), and began her career at the Istituto Affari Internazionali (IAI).

European integration process, used to say, “Europe [will] be built through crises, and [will] be the sum of their solutions”.⁴

Analytically, the challenge is to bring crisis-led integration and integration by stealth together. The competence issue has historically been a “code word” for European integration,⁵ but how far can the integration process move without a Treaty revision?

1. Integration by stealth and the question of competence

The EU has no competence on its own competence. Thus, it can act only within the limits of the competences that member states have conferred upon it in the Treaties. This is what makes the principle of conferral one of the most – if not the most – important core principles of the EU.⁶

Although its critical significance had long been recognised, this principle was officially codified in 2009 through the Treaty of Lisbon. Just a few years prior, addressing the perceived necessity to contain the creeping expansion of European competencies without halting the integration process became a primary objective of the EU, as articulated in the 2001 Laeken Declaration on the future of Europe.⁷

The Lisbon Treaty introduced a rigid competences’ categorisation – sometimes addressed as ossification – and gave relevant space to that principle, repeated as a mantra in several articles (see Articles 4, 5, 13 TEU).

However, the competence of the EU, though limited, is not static⁸ and a constant “mutual adjustment resolution”⁹ between boundaries of national and EU actions takes place. As a matter of fact, there are scholars, such as Adrienne Héritier, who speak about “covert integration”,¹⁰ meaning “a process that takes place outside the

⁴ Jean Monnet, *Memoirs*, London, Collins, 1978, p. 417, <https://archive.org/details/memoirs0000monn>. Original version: “J’ai toujours pensé que l’Europe se ferait dans les crises, et qu’elle serait la somme des solutions qu’on apporterait à ces crises”. See Jean Monnet, *Mémoires*, Paris, Fayard, 1976, p. 488.

⁵ Franz C. Mayer, “Competences—Reloaded? The Vertical Division of Powers in the EU and the New European Constitution”, in J.H.H. Weiler and Christopher L. Eisgruber (eds), “Altneuland. The EU Constitution in a Contextual Perspective”, in *Jean Monnet Working Papers*, No. 5/04 (2004), <https://jeanmonnetprogram.org/archive/papers/04/040501-16.html>.

⁶ Inge Govaere, “To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon”, in *Research Papers in Law*, No. 04/2016, <https://www.coleurope.eu/node/35803>.

⁷ European Council, *Presidency Conclusions of the Laeken European Council*, 14-15 December 2001, p. 19-23, <https://www.consilium.europa.eu/media/20950/68827.pdf>.

⁸ Stephen Weatherill, “The Constitutional Context of (Ever-Wider) Policy-Making”, in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union*, Oxford, Oxford University Press, 2012, p. 570-582 at p. 574.

⁹ Lena Boucon, “EU Law and Retained Powers of Member States”, in Loic Azoulay (ed.), *The Question of Competence in the European Union*, Oxford, Oxford University Press, 2014, p. 168-192 at p. 175.

¹⁰ Adrienne Héritier, “Covert Integration of Core State Powers: Renegotiating Incomplete Contracts”,

formal European political decision-making arena”, a “competence accrual through covert policy-entrepreneurship by the European Commission”, as in the words of Sophie Meunier.¹¹

The expression “integration by stealth” may encompass the aforementioned phenomena: a unique form of EU integration that does not require amending the Treaties. In times of emergency, once a solution arises, the necessary legal instrument will be sought out or created *ex novo*.

Commenting on the first measures adopted by the EU to curb the impacts of the Covid-19 pandemic, President of the European Commission Ursula von der Leyen remarked, “we achieved this without having full competence”.¹²

1.1 Forms of competence creep

Before analysing the European response to the four crises, an overview of the six forms of competence creep is provided. This includes the re-conceptualisation introduced by Sacha Garben¹³ and the inputs of other scholars, such as Mark Dawson, Giandomenico Majone, Sacha Prechal, Stephen Weatherill and Christiaan Timmermans.¹⁴

First, *indirect legislation*. It stands for the adoption of European legislation where the EU has limited competence. The Treaty’s functional powers can cut horizontally through several policy areas. Articles 114 and 352 TFUE are considered the “catch-all” provisions. Specifically, Article 114 provides for harmonisation in the area of the internal market, but it has also been used for issues remotely connected to it. Article 352 possesses a “gap-filling” function: if an action of the EU should be proved necessary to attain one of the objectives in the Treaties, but the Treaties did

in Philipp Genschel and Markus Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers*, Oxford, Oxford University Press, 2014, p. 230-248.

¹¹ Sophie Meunier, “Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment”, in *Journal of Common Market Studies*, Vol. 55, No. 3 (May 2017), p. 593-610, DOI 10.1111/jcms.12528.

¹² European Commission, *State of the Union Address 2020 pronounced by the President Ursula von der Leyen during the Plenary session of the European Parliament*, 6 September 2020, https://state-of-the-union.ec.europa.eu/node/21_en.

¹³ Sacha Garben, “Competence Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers”, in *Oxford Journal of Legal Studies*, Vol. 35, No. 1 (Spring 2015), p. 55-89, DOI 10.1093/ojls/gqu021.

¹⁴ Mark Dawson, “Integration through Soft Law: No Competence Needed? Juridical and Bio-Power in the Realm of Soft Law”, in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*, Portland, Hart, 2017, p. 235-250; Giandomenico Majone, *Dilemmas of European Integration. The Ambiguities and Pitfalls of Integration by Stealth*, Oxford, Oxford University Press, 2005; Sacha Prechal, “Competence Creep and General Principles of Law”, in *Review of European Administrative Law*, Vol. 3, No. 1 (June 2010), p. 5-22, DOI 10.7590/REAL_2010_01_02; Stephen Weatherill, “The Constitutional Context of (Ever-Wider) Policy-Making”, cit.; Christiaan Timmermans, “The Competence Divide of the Lisbon Treaty Six Years After”, cit.

not provide the necessary powers, the Council, on a proposal by the Commission, shall adopt the appropriate measures.

EU economic governance is the second form. Especially during the sovereign debt crisis and the Covid-19 pandemic, this form of competence creep exerted an unprecedented influence on a broad spectrum of other policy domains to such an extent that Sacha Garben referred to it as a “competence coup”.¹⁵ Economic policy is a responsibility of each member state, but it requires multilateral coordination, which may result in a tension between the imperative for containment and the necessity for conferral of competence at the EU level. Economic governance is one of the most relevant sources of competence creep for the range of action and the purposes of the present research, serving as a framework to introduce the third and fourth inroads of competence creep: soft law and parallel integration.

Soft law, by definition not binding, is rarely subject to judicial oversight and parliamentary scrutiny, serving as a vehicle to enact policy evading EU ordinary law.¹⁶ The European Semester, the framework established in 2010 for the coordination and surveillance of economic and social policies, is an example of both economic governance and soft law and will be addressed in the following lines.

Parallel integration takes place outside the perimeter of the European framework, in particular by leveraging international law instruments. Member states, or some of them, may undertake actions and conclude international treaties among them with the aim of complementing EU policy. The European Stability Mechanism and the 2016 EU–Turkey Statement¹⁷ are suitable instances.

The fifth way of competence creep is *negative integration through case law*. When the Court of Justice of the EU (CJEU) rules that a national provision breaches the EU law, the former must be disapplied, without considering if it falls in the area pertaining to member states’ autonomy.

Finally, there are *international trade agreements*. The EU’s Common Commercial Policy can impinge on areas not subject to the legislative competence of the EU, and trade agreements can limit the member states’ regulatory power on the basis of free movement and investment obligations. Especially from the 2015 Trade for All Strategy,¹⁸ it “regularly happens”¹⁹ that non-trade elements such as labour and

¹⁵ Sacha Garben, “The Constitutional (Im)balance between ‘the Market’ and ‘the Social’ in the European Union”, in *European Constitutional Law Review*, Vol. 13, No. 1 (March 2017), p. 23-61, DOI 10.1017/S1574019616000407.

¹⁶ Mark Dawson, “Integration through Soft Law: No Competence Needed?”, cit., p. 236.

¹⁷ European Union and Turkey, *EU–Turkey Statement*, 18 March 2016, <https://europa.eu/!Uk83Xp>.

¹⁸ European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (COM/2015/497), 14 October 2015, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52015DC0497>.

¹⁹ Karen Banks, “The Lisbon Treaty’s Competence Arrangement Viewed from European Commission

environmental standards²⁰ are included.

2. Permacrisis

I can now explore the most relevant measures that the EU has undertaken to respond to *permacrisis*, meaning the interlinking and overlapping of crises that have been dominating the international and European stage in the latest years. These crises include the 2008-9 financial crisis, which originated in the US subprime markets and swiftly jeopardised the economic and financial stability of the EU. The massive influx of refugees and migrants that threatened the asylum and reception schemes between the years 2015 and 2016. The Covid-19 pandemic that put healthcare systems and the economy across the EU under enormous strain. Lastly, Russia's unjustified military aggression against Ukraine that undermined the multilateral rules-based international system and upended Europe's security order.

2.1 The sovereign debt crisis

In mid-September 2008, the US investment bank Lehman Brothers filed for bankruptcy, officially marking the start of the great recession. The Eurozone entered a recession in the first quarter of 2008. Due to diverging economic and financial preconditions, European member states were unevenly affected by the crisis. Greece was the first European country to be hit followed by Ireland, Portugal, Spain and Italy.

While the EU has exclusive competence in the area of monetary policy – for the member states whose currency is the euro – it predominantly has coordinating competence with regard to economic policy (see Article 3 TEU and 2(3) TFEU and Part Three, Title VIII, TFEU). As the EU did not have any institutional means for providing financial assistance to the Eurozone, credit facilities were formally provided through inter-governmental agreements under private and international law, circumventing the so-called no-bailout clause of Article 125 TFEU,²¹ giving rise to several CJEU rulings, e.g. *Pringle*²² and *Gauweiler* cases, and “moving into a legal grey zone”.²³

Practice”, in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*, Portland, Hart, 2017, p. 188-197 at p. 189.

²⁰ Peter-Tobias Stoll, “Mega-Regionals: Challenges, Opportunities and Research Questions”, in Thilo Rensmann (ed.), *Mega-Regional Trade Agreements*, Cham, Springer, 2017, p. 3-24.

²¹ Christian Kreuder-Sonnen, “Beyond Integration Theory”, cit.

²² Jonathan Tomkin, “Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy”, in *German Law Journal*, Vol. 14, No. 1 (2013), p. 169-189, <https://doi.org/10.1017/S2071832200001759>.

²³ Christian Kreuder-Sonnen, “Beyond Integration Theory”, cit.

Specifically, the European Stability Mechanism (ESM), set up in October 2012 as the permanent successor of the European Financial Stability Facility (EFSF), was established under an *ad hoc* intergovernmental Treaty among the Eurozone member states. The ESM, with an authorised capital of over 700 billion euros, borrows money on financial markets and provides loans to member states in need. Using for the first time the simplified revision procedure,²⁴ it has been included in the Treaties amending Article 136 TFEU.

The aid was subject to strong conditionality²⁵ taking the form of intrusive memoranda “not defined by European legislation under the Community Method or through consensus-oriented voting in the Council”²⁶ and often requiring specific financial reforms²⁷ on a broad spectrum, including healthcare, education, and social welfare. For instance, the 2015 memorandum between the Commission (acting on behalf of the ESM) and Greece²⁸ provided for a reform of the labour market and pension system that, as scholars such as Andreas Fischer-Lescano have shown, undermined healthcare and trade union rights.²⁹

Similarly, in 2012, 25 out of 28 (at the time) member states concluded the Treaty on Stability, Coordination, and Governance (TSCG)³⁰ – which is another instance of an intergovernmental treaty operating outside the European legal order – obliging the parties to introduce a balanced budget rule in national constitutional laws.

Furthermore, a new soft law instrument was launched: the European semester, i.e. a framework encompassing in a single policy coordination cycle several EU governance instruments, through which country-specific recommendations are issued. Over the years, these recommendations have progressively assumed

²⁴ Bruno De Witte, “Using International Law in the Euro Crisis, Causes and Consequences”, in *ARENA Working Papers*, No. 4 (June 2013), p. 5, <https://www.sv.uio.no/arena/english/research/publications/arena-working-papers/2013/wp4-13.html>.

²⁵ European Council, *Statement by the Heads of State and Government of the Euro Area*, 25 March 2010, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf.

²⁶ Fritz W. Scharpf, “After the Crash: A Perspective on Multilevel European Democracy”, in *European Law Journal*, Vol. 21, No. 3 (May 2015), p. 384-405 at p. 389, DOI 10.1111/eulj.12127, https://pure.mpg.de/pubman/faces/ViewItemOverviewPage.jsp?itemId=item_2144676_6. See also Fritz W. Scharpf, “The Asymmetry of European Integration, or Why the EU Cannot be a ‘Social Market Economy’” in *Socio-Economic Review*, Vol. 8, No. 2 (April 2010), p. 211-250, DOI 10.1093/ser/mwp031.

²⁷ Maria Meng-Papantoni, “Legal Aspects of the Memoranda of Understanding in the Greek Debt Crisis”, in *Zeitschrift für europarechtliche Studien*, Vol. 18, No. 1 (2015), p. 3-26 at p. 20, <https://doi.org/10.5771/1435-439X-2015-1-3>.

²⁸ European Union and Greece, *Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece*, Brussels/Athens, 19 August 2015, https://economy-finance.ec.europa.eu/document/download/54a27cc5-c22f-4d4b-bedd-c5ae98747c61_en.

²⁹ Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy. The EU Institutions and the Conclusion of Memoranda of Understanding*, Baden-Baden, Nomos, 2014.

³⁰ European Union, *Treaty on Stability, Coordination and Governance in the Economic and Monetary Union*, 2012, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:42012A0302\(01\)](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:42012A0302(01)).

compulsory and intrusive characteristics,³¹ with targets and deadlines capable of affecting policy areas of member states' autonomy, such as wage determination, education and healthcare. As I will illustrate in a separate section below, following the outbreak of the Covid-19 pandemic, the European Semester became "the framework to identify national reform priorities and monitor their implementation".³²

To conclude from the pairing from which we had started, the economic and monetary policy. As testified by the famous words of the European Central Bank (ECB) President Mario Draghi "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough",³³ the ECB emerged as the most active crisis management institution. However, as the ECB's mandate is very narrow focusing on maintaining price stability, the set of actions undertaken by the ECB was labelled as "mission creep".³⁴ For the sake of brevity, I will focus on the Outright Monetary Transaction (OMT) programme. The OMT is an ECB programme that enabled the bank to buy almost unlimited amounts of sovereign bonds in the secondary markets, bypassing the prohibition of buying state bonds in the primary market (Article 123 TFEU) and challenging the boundaries between monetary and economic policy. Consequently, the German Constitutional Court brought the case before the CJEU, considering *ultra vires*³⁵ the OMT programme, as it exceeded in scope, transcending monetary policy. However, according to the CJEU, the OMT could not be regarded as an economic policy instrument just because it has "indirect effects" on the stability of the euro area,³⁶ which pertains to the economic policy domain.

2.2 The refugee crisis

In 2015, the confluence of conflicts in the Middle East, in particular Syria, Iraq and Afghanistan led to an unprecedented increase in the flow of asylum seekers fleeing towards Europe.³⁷ The member states were asymmetrically hit by the surge in migrant inflows, a situation further aggravated by the Dublin III Regulation's

³¹ Sacha Garben, "Competence Creep Revisited", cit.

³² European Parliament and Council of the EU, *Regulation (EU) 2021/241 of 12 February 2021 Establishing the Recovery and Resilience Facility*, point 4, <http://data.europa.eu/eli/reg/2021/241/oj>.

³³ European Central Bank, *Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London*, 26 July 2012, <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

³⁴ Ingrid Hjertaker and Bent Sofus Tranøy, "The European Central Bank", in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises*, Cham, Palgrave Macmillan, 2021, p. 339-355 at p. 344.

³⁵ European Court of Justice, *Judgment of the Court (Grand Chamber) of 16 June 2015 in Case C-62/14: Gauweiler and Others*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62014CJ0062>.

³⁶ European Court of Justice, *Opinion of Advocate General Cruz Villalón delivered on 14 January 2015 in Case C-62/14: Gauweiler and Others*, para. 104, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62014CC0062>.

³⁷ Frontex, *Risk Analysis for 2016*, Warsaw, Frontex, March 2016, <https://data.europa.eu/doi/10.2819/416783>.

provision entrusting the responsibility for processing asylum requests mostly to countries of first arrival.³⁸ This sparked a heated debate about the asylum system that culminated in the Commission's proposal on the Pact on Migration and Asylum,³⁹ which was favourably voted by the European Parliament on 10 April 2024.⁴⁰

Despite the designation, the Common European Asylum Policy is a patchwork of norms.⁴¹ At its core are the Dublin III Regulation,⁴² the Qualification Directive,⁴³ the Procedure Directive⁴⁴ and the Reception Directive.⁴⁵ The Eurodac Regulation,⁴⁶ the Temporary Protection Directive⁴⁷ and the Return Directive contributed to its structure.⁴⁸ Furthermore, the domain of migration and asylum policy mostly falls under national competence, as member states retain the authority to regulate admissions of third-country nationals and the volume of resources to invest in asylum policy.⁴⁹

³⁸ Hanspeter Kriesi et al., "Debordering and Re-bordering in the Refugee Crisis: A Case of 'Defensive Integration'", in *Journal of European Public Policy*, Vol. 28, No. 3 (2021), p. 331-349, <https://doi.org/10.1080/13501763.2021.1882540>.

³⁹ European Commission, *A New Pact on Migration and Asylum* (COM/2020/609), 23 September 2020, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52020DC0609>.

⁴⁰ European Parliament, *MEPs Approve the New Migration and Asylum Pact*, 10 April 2024, <https://www.europarl.europa.eu/news/en/press-room/20240408IPR20290>.

⁴¹ Kaija Schilde and Sara Wallace Goodman, "The EU's Response to the Migration Crisis: Institutional Turbulence and Policy Disjuncture", in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises*, Cham, Palgrave Macmillan, 2021, p. 449-468 at p. 455.

⁴² European Parliament and Council of the EU, *Regulation (EU) No 604/2013 of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person*, <http://data.europa.eu/eli/reg/2013/604/oj>.

⁴³ European Parliament and Council of the EU, *Directive 2011/95/EU of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted*, <http://data.europa.eu/eli/dir/2011/95/oj>.

⁴⁴ European Parliament and Council of the EU, *Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection*, <http://data.europa.eu/eli/dir/2013/32/oj>.

⁴⁵ European Parliament and Council of the EU, *Directive 2013/33/EU of 26 June 2013 Laying Down Standards for the reception of Applicants for International Protection*, <http://data.europa.eu/eli/dir/2013/33/oj>.

⁴⁶ European Parliament and Council of the EU, *Regulation (EU) No 603/2013 of 26 June 2013 on the Establishment of 'Eurodac' for the comparison of fingerprints...*, <http://data.europa.eu/eli/reg/2013/603/oj>.

⁴⁷ Council of the EU, *Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, <http://data.europa.eu/eli/dir/2001/55/oj>.

⁴⁸ European Parliament and Council of the EU, *Directive 2008/115/EC of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals*, <http://data.europa.eu/eli/dir/2008/115/oj>. Please note that this was the legal framework applying at the time of the refugee crises, before the Commission's proposal on the Pact on Migration and Asylum, voted by the European Parliament on 10 April 2024.

⁴⁹ Andrew Geddes and Peter Scholten, *The Politics of Migration and Immigration in Europe*, 2nd ed.,

The EU responded to the refugee crisis by externalising border control, primarily through a specially negotiated deal with Turkey. This unorthodox institutional development encompasses actions undertaken from the EU–Turkey Joint Action Plan (JAP) of 15 October 2015⁵⁰ to the EU-Turkey Statement of 18 March 2016.⁵¹ The EU justified the recourse to soft law with the need to address an urgent matter. As a result, the agreement did not require ratification by either member states or the European Parliament.⁵²

The JAP entailed a series of commitments for both parties and subtended a controversial assumption, namely that Turkey was a “safe third country”.⁵³ The EU agreed to allocate three billion euros to support Syrian refugees, committed to speeding up the visa liberalisation process for Turkish nationals and to opening Chapter 17 regarding Economic and Monetary Union of EU-Turkey accession negotiation. On 18 March 2016, through the EU-Turkey Statement published as a press release of the European Council,⁵⁴ the two parts undertook new commitments: a one-to-one resettlement scheme, a second tranche of three billion euros, the further acceleration of the visa process, and the opening of new accession negotiation chapters.

Due to its controversial legal nature, the EU-Turkey Statement was the subject of three similar actions for annulment.⁵⁵ However, the CJEU ruled that the statement consisted of an act by the representatives of the member states acting in their capacity as Heads of state or government, not attributable to the European Council,⁵⁶ and therefore outside the EU’s jurisdiction.

While the CJEU did clarify the authorship, it did not specify whether the Statement was binding or not. Hence, the document implied some obligations and required some legal *pirouettes*. In order to make the controversial one-to-one resettlement scheme compatible with fundamental rights, the Commission framed it as

Los Angeles, SAGE, 2016.

⁵⁰ European Commission, *EU-Turkey Joint Action Plan*, 15 October 2015, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5860.

⁵¹ European Council, *EU-Turkey Statement*, 18 March 2016, <https://europa.eu/!Uk83Xp>.

⁵² Elena Baracani and Virginia Sarotto, “The European Commission’s Role in EU-Turkey Migration: Political Leadership through Strategic Framing”, in *West European Politics*, Vol. 46, No. 3 (2023), p. 573-599, DOI 10.1080/01402382.2022.2066934.

⁵³ European Commission, *Next Operational Steps in EU-Turkey Cooperation in the Field of Migration* (COM/2016/166), 16 March 2016, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52016DC0166>.

⁵⁴ European Council, *EU-Turkey Statement*, cit.

⁵⁵ Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM v European Council (28 February 2017).

⁵⁶ European Court of Justice, *Order of the General Court (First Chamber, Extended Composition) of 28 February 2017 in Case T-192/16: NF v European Council*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62016TO0192>.

targeted,⁵⁷ temporary and extraordinary,⁵⁸ and designed to “meet the objective of ending the irregular migration”.⁵⁹

With the aim of coordinating and streamlining humanitarian and development aid, the “Facility for Refugees in Turkey” was designed,⁶⁰ i.e. a new creative mechanism, financed by member states for two-thirds and by the EU budget for one-third. By virtue of this, the European Parliament was sidelined, functioning merely as ex-post budgetary authority for EU budget funds. The member states’ contribution – in the forms of member states certificates⁶¹ – was made “voluntary” and “off-budget”, also because, as noted by scholars Elena Baracani and Virginia Sarotto, Cyprus, due to its political situation, could have not agreed on stronger commitments.⁶²

Eventually, with the goal of accelerating the visa liberalisation process for Turkish citizens – although Turkey had not fulfilled 7 out of 72 necessary requirements at the time – the Commission came up with an original formulation, opening the process “under the understanding that the Turkish authorities will fulfil, as a matter of urgency and as they committed to do so on 18 March 2016, the outstanding benchmarks of its Visa Liberalisation Roadmap”.⁶³

2.3 The Covid-19 pandemic

The Covid -19 pandemic presented three main characteristics that distinguish it from other crises. Firstly, it was symmetric, meaning that all member states were equally affected to a certain degree. Secondly, it was “unfamiliar”, thus stimulating “beyond conventional” responses.⁶⁴ Thirdly, it was “existential”, as it was perceived

⁵⁷ Sandrino Smeets and Derek Beach, “When Success Is an Orphan: Informal Institutional Governance and the EU–Turkey Deal”, in *West European Politics*, Vol. 43, No. 1 (2020), p. 129-158 at p. 146, <https://doi.org/10.1080/01402382.2019.1608495>.

⁵⁸ Elena Baracani and Virginia Sarotto, “The European Commission’s Role in EU-Turkey Migration”, cit., p. 590.

⁵⁹ European Council, *EU-Turkey Statement*, cit.

⁶⁰ European Commission, *Decision of 24 November 2015 on the Coordination of the Actions of the Union and of the Member States through a Coordination Mechanism – the Refugee Facility for Turkey*, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:02015D1208\(02\)-20180724](https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:02015D1208(02)-20180724).

⁶¹ Ibid.

⁶² Elena Baracani and Virginia Sarotto, “The European Commission’s Role in EU-Turkey Migration”, cit., p. 590.

⁶³ European Commission, *European Commission Opens Way for Decision by June on Visa-free Travel for Citizens of Turkey*, 4 May 2016, https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1622. See also European Commission, *Proposal for a Regulation Amending Regulation (EC) No 539/2001 Listing the Third Countries whose Nationals Must Be in Possession of Visas when Crossing the External Borders and Those whose Nationals Are Exempt from that Requirement (Turkey)* (COM/2016/279), 4 May 2016, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52016PC0279>.

⁶⁴ Erik Jones, R. Daniel Kelemen and Sophie Meunier, “Failing Forward? Crises and Patterns of European Integration”, in *Journal of European Public Policy*, Vol. 28, No. 10 (2021), p. 1519-1536, <https://doi.org/10.1080/13501763.2021.1954068>.

as a threat to the existence of the EU itself.⁶⁵ As a result, despite healthcare being a sensitive domestic prerogative, a more conciliatory, empathic and consensual stance emerged, to the extent that nine member states demanded a joint European response through a letter signed by the Heads of state.

In May 2020, the Commission tabled a post-pandemic recovery plan, known as NextGenerationEU (NGEU),⁶⁶ providing for the disbursement of a total amount of 750 billion euros in grants and loans borrowed on the financial markets by the Commission on behalf of the EU as a whole. The NGEU was conceived within the Treaties on a “complex legal constellation”⁶⁷ – i.e. a revised Own Resources Decision, the Regulation establishing the European Union Recovery Instrument, and the Regulation establishing the Recovery and Resilience Facility.

In essence, the revised Own Resources Decision⁶⁸ vested the Commission with powers that it previously lacked and empowered the supranational institution to issue – temporarily and extraordinarily⁶⁹ – common debt on behalf of the EU, borrowing funds on capital markets to financially support its member states. Furthermore, for the first time, the general escape clause was activated, allowing member states to depart from budgetary requirements that conventionally apply under the Stability and Growth Pact.⁷⁰

The European Union Recovery Instrument establishes the 750-billion fund and determines its allocation.⁷¹ The Instrument is based on Article 122 TFEU, which, in a spirit of solidarity, allows for special temporary crisis management tools, especially in case of sudden shocks to the supply of energy. Article 122 TFEU is a peculiar legal basis, atypically conferring non-legislative powers⁷² to the Council

⁶⁵ Eleanor Brooks et al., “EU Health Policy in the Aftermath of COVID-19 Neofunctionalism and Crisis-driven Integration”, in *Journal of European Public Policy*, Vol. 30, No. 4 (2023), p. 721-739, <https://doi.org/10.1080/13501763.2022.2141301>.

⁶⁶ European Commission, *Europe’s Moment: Repair and Prepare for the Next Generation*, 27 May 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_940.

⁶⁷ Federico Fabbrini, “Next Generation EU. Legal Structure and Constitutional Consequences”, in *Cambridge Yearbook of European Legal Studies*, Vol. 24 (2022), p. 45-66, <https://doi.org/10.1017/cel.2022.2>.

⁶⁸ Council of the EU, *Decision (EU, Euratom) 2020/2053 on the System of Own Resources of the European Union and Repealing Decision 2014/335/EU, Euratom*, 14 December 2020, <http://data.europa.eu/eli/dec/2020/2053/oj>.

⁶⁹ *Ibid.*, Article 6.

⁷⁰ Bruno De Witte, “The Innovative European Response to COVID-19: Decline of Differentiated Integration and Reinvention of Cohesion Policy”, in *Continuity and Change: How the Challenges of Today Prepare the Ground for Tomorrow. ECB Legal Conference 2021*, Luxembourg, Publication Office of the EU, 2022, p. 394-402 at p. 399, <https://data.europa.eu/doi/10.2866/255752>.

⁷¹ Council of the EU, *Regulation (EU) 2020/2094 of 14 December 2020 Establishing a European Union Recovery Instrument to Support the Recovery in the Aftermath of the COVID-19 Crisis*, <http://data.europa.eu/eli/reg/2020/2094/oj>.

⁷² Merijn Chamon, “The Use of Article 122 TFEU. Institutional Implications and Impact on Democratic Accountability”, in *European Parliament Studies*, September 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)753307](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)753307).

and sidelining the European Parliament in the decision-making process for reasons of urgency. The last decade saw a marked increase in the EU's reliance on Article 122 TFEU⁷³ as it was used for the adoption of various measures: from SURE, the instrument for temporary support to mitigate unemployment risks in the context of the pandemic, to the EU energy platform, one of the tools designed to respond to the energy supply crisis, as examined in the next paragraph. Though motivated by emergency and temporary nature, scholars, such as Luisa Marin, pondered whether this legal basis has become a general *passe-partout* for any situation requiring urgent action at the EU level.⁷⁴ Moreover, the fact that Article 122 TFEU has been used for an instrument aimed not only at recovering but also at supporting the rebuilding of the economy after the pandemic may demonstrate the intention to employ the provision in a more stable manner than temporary and extraordinary use.⁷⁵

The Recovery and Resilience Facility defines legal terms that govern the NGEU expenditures.⁷⁶ It has its legal basis in Article 175 TFEU, which provides for specific actions outside the Structural Funds, and falls under Title XVIII (economic, social and territorial cohesion). Some scholars, such as Bruno De Witte, spoke of a "retooling of cohesion policy."⁷⁷ Along similar lines, the NGEU package was designed as markedly redistributive.⁷⁸ This Facility may provide an inventive approach⁷⁹ within European fiscal governance and cohesion policy, combining reforms to be implemented by member states alongside investments funded through European resources. These investments and reforms are outlined in the national Recovery and Resilience Plans, which each member state must submit to the Commission for approval.

As mentioned above, European Semester's surveillance continued, as the consistency with relevant country-specific recommendations – issued in the context of the European Semester⁸⁰ – is a condition for eligibility for the Recovery and Resilience Plans. In other words, in order to receive NGEU funds, member states must meet country-specific recommendations. In addition, it is worth noting that the coordination cycle assumed a more socially oriented facet,⁸¹ including health

⁷³ Merijn Chamon, "The Rise of Article 122 TFEU", in *VerfassungBlog*, 1 February 2023, <https://verfassungsblog.de/?p=70525>.

⁷⁴ Luisa Marin, "The Principle of Energy Solidarity at Its First Stress Test: The Mitigation of the Energy Crisis between National Sovereignty and Supranational Integration", in *Diritti comparati*, 30 November 2022, <https://www.diritticomparati.it/?p=106223>.

⁷⁵ *Ibid.*

⁷⁶ European Parliament and Council of the EU, *Regulation (EU) 2021/241 of 12 February 2021*, cit.

⁷⁷ Bruno De Witte, "The Innovative European Response to COVID-19", cit.

⁷⁸ *Ibid.*

⁷⁹ Rosalba Famà, "REPowerEU: Next Generation EU's Architecture beyond the Pandemic", in *REBUILD Working Papers*, No. 6 (February 2023), <https://zenodo.org/records/10650714>.

⁸⁰ *Ibid.*

⁸¹ Scott Greer et al. (eds.), "Everything You Always Wanted to Know About European Union Health Policy but Were Afraid to Ask", 2nd rev. ed., in *Health Policy Series*, No. 54 (2019), <https://www.ncbi>.

objectives and the UN Sustainable Development Goals too.

By exploiting a crisis to solve another one, the pandemic was leveraged as an opportunity to address the Rule of Law crisis, which primarily concerned value issues in Poland and Hungary. It was therefore decided to bind the release of NGEU funds to the respect of the Rule of law,⁸² bypassing the unanimity necessary to activate Article 7 TEU, which allows for sanctioning member states breaching fundamental freedoms and basic rule of law procedures.⁸³ Even if the Council adopted a specific Regulation indicating the legal basis for such a use of NGEU funds, the connection between funds and values is anomalous. While the stated objective is the protection of the EU budget, the practical aim is to halt rule of law violations. Poland and Hungary vehemently opposed the Regulation, exploiting their veto power⁸⁴ to threaten the adoption of the Multiannual Financial Framework 2021–2027, to which the NGEU is anchored. Through a political compromise,⁸⁵ achieved in the European Council, the original language was softened,⁸⁶ circumscribing the notion of violation of the Rule of Law that must “affect or seriously risk affecting” the EU budget or the EU’s financial interests “in a sufficiently direct way”.⁸⁷ Furthermore, the application of the Regulation was delayed and conditioned to eventual CJEU’s rulings, in case of actions for annulment introduced by member states.⁸⁸ This was the case of Poland and Hungary, which filed two actions for annulment – both dismissed entirely – claiming the lack of competence of the EU and postponing the application of the Regulation by more than a year. It is worth mentioning that the conclusions of the European Council – which have become increasingly longer and more detailed throughout the years – are of extreme political relevance, but not legally binding.

nml.nih.gov/books/NBK551087.

⁸² European Parliament and Council of the EU, *Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget*, <http://data.europa.eu/eli/reg/2020/2092/2020-12-22>.

⁸³ Virginia Volpi, “A Union of States but Not of Intent. What If the Common European Vision Comes Apart?”, in *IAI Commentaries*, No. 18|56 (October 2018), <https://www.iai.it/en/node/9585>.

⁸⁴ Poland and Hungary, *Joint Declaration of the Prime Minister of Poland and the Prime Minister of Hungary*, 26 November 2020, <https://www.gov.pl/web/eu/joint-declaration-of-the-prime-minister-of-poland-and-the-prime-minister-of-hungary>.

⁸⁵ European Council, *European Council Conclusions*, 10-11 December 2020, <https://europa.eu/!Vh43CC>.

⁸⁶ Eulalia Rubio et al., “The Tools for Protecting the EU Budget from Breaches of the Rule of Law”, in *EPRS At a Glance*, May 2023, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA\(2023\)747931](https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA(2023)747931).

⁸⁷ European Parliament and Council of the EU, *Regulation (EU, Euratom) 2020/2092 of 16 December 2020*, cit.

⁸⁸ European Court of Justice, *Judgment of the Court (Full Court) of 16 February 2022 in Case C-156/21: Hungary v European Parliament and Council of the European Union*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62021CJ0156>; and *Judgment of the Court (Full Court) of 16 February 2022 in Case C-157/21: Republic of Poland v European Parliament and Council of the European Union*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:62021CJ0157>.

Conclusively, it should be recalled that member states, by putting aside their traditional reluctance to deepen the integration in the healthcare field,⁸⁹ mandated the Commission with a centralised purchasing of medical supplies and vaccines. To that end, the Emergency Support Instrument (ESI) was activated and the Regulation (EU) 2016/369⁹⁰ at its basis amended. The ESI is a solidarity emergency tool that enables the EU to swiftly react to eventual crises. The Regulation (EU) 2016/369 was modified in order to insert, under Article 4, a specific paragraph providing for the possibility of procurement by the Commission on behalf of member states. Thus, the Commission secured the right to purchase a specified volume of Covid-19 vaccine doses within a defined timeframe and price through Advance Purchase Agreements with individual vaccine producers. This approach increased the EU's leverage in negotiations with industry and prevented competition between member states. Furthermore, despite a very limited legal basis, i.e. Article 168 TFEU, Covid-19 marked a trend inversion: a special ESM Pandemic Crisis Support was inaugurated with the only condition to use the funds for pandemic-related expenses. The European Solidarity Fund was amended to provide assistance to countries most affected.⁹¹ The supposed-to-be-disbanded Health Programme was revitalised and reinforced by the new EU4Health Programme. Furthermore, the Health Emergency, Preparedness and Response Authority (HERA) was established.

2.4 The invasion of Ukraine

The Ukrainian crisis concludes the analysis. On 24 February 2022, Russian President Vladimir Putin announced a "special military operation" in Ukraine. To date, 30,457 civilian casualties have been recorded in Ukraine, including 10,582 death and 19,875 injured.⁹² The actual figures are estimated to be much higher, not to mention the military death toll. As of May 2024, the number of refugees fleeing to the EU from Ukraine amounted to 5,942,300⁹³ out of which 4.3 million have obtained the temporary protection status in Europe.⁹⁴

In "a historically unprecedented move",⁹⁵ the Temporary Protection Directive, which extends special rights to refugees, was activated. The Directive traced back to 2001,

⁸⁹ Ibid.

⁹⁰ Council of the EU, *Regulation (EU) 2016/369 of 15 March 2016 on the Provision of Emergency Support within the Union*, <http://data.europa.eu/eli/reg/2016/369/oj>.

⁹¹ Federico Casolari, *Leale cooperazione tra Stati membri e Unione Europea. Studio sulla partecipazione all'Unione al tempo delle crisi*, Napoli, Editoriale Scientifica, 2020, p. 68.

⁹² Statista, *Number of Civilian Casualties in Ukraine during Russia's Invasion Verified by OHCHR from February 24, 2022 to February 15, 2024*, <https://www.statista.com/statistics/1293492>.

⁹³ UNHCR Regional Bureau Office, *Ukraine Situation Flash Update*, No. 69 (16 May 2024), <https://data.unhcr.org/en/documents/details/108765>.

⁹⁴ Eurostat, *Over 4.3 Million People under Temporary Protection*, 8 February 2024, <https://ec.europa.eu/eurostat/web/products-eurostat-news/w/ddn-20240208-1>.

⁹⁵ European Commission, *Ukraine: Commission Proposes Temporary Protection for People Fleeing War in Ukraine and Guidelines for Border Checks*, 2 March 2022, https://neighbourhood-enlargement.ec.europa.eu/node/3792_en.

when was adopted in the aftermath of the conflicts in former Yugoslavia, but it had never been triggered before. In this regard, it will be relevant to understand what will happen once the temporary protection period ends. Temporary protection beneficiaries may experience a state of “legal limbo”,⁹⁶ potentially facing periods of irregular residence as the increasing number of international applications could overburden asylum systems.

In sharp contrast to previous waves of migration, the Ukrainian refugee crisis was dealt with very little in-fighting and clear evidence of burden-sharing, despite the fact that the member states were not symmetrical involved. Eligible displaced persons could thus obtain residence permits, access to education and the labour market across the EU. Several measures to counter this crisis were built on the principle of solidarity.

Russia’s invasion of Ukraine represented a turning point for the EU’s external action. Denmark decided to join the EU’s defence cooperation, ending its historical opt-out choice,⁹⁷ defence budgets are rising throughout Europe; Finland and Sweden joined NATO. For the first time, the EU provided lethal equipment to a third country,⁹⁸ through the European Peace Facility (EPF)⁹⁹ – which was envisaged to be used to prevent conflict, preserve peace and strengthen international security. A taboo was broken. This decision is even more impressive considering that the EU comprises three military-neutral member states, namely Austria, Ireland and Malta. Notably, their contributions are exclusively allocated to non-lethal supplies.¹⁰⁰ The EPF is an off-budget funding mechanism, with member states directly providing funds without the supervision of the European Parliament. As in the words of scholar Richard Youngs, the EPF acts as “a symbol that emboldens other actors to come in and provide military assistance because they feel that there is that broader European coverage”.¹⁰¹

The war laid bare the Union’s vulnerability to Russia’s political use – also referred to as weaponisation – of energy supplies. Therefore, less than two weeks after the Russian invasion, the Commission launched the REPowerEU plan¹⁰² and shortly

⁹⁶ Katrien Luyten, “When EU Temporary Protection for Displaced People from Ukraine Ends. Possible Scenarios, in *EPRS Briefings*, May 2024, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2024\)762309](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762309).

⁹⁷ Richard Milne, “Denmark Votes to End EU Defence Opt-out in Historic Referendum”, in *Financial Times*, 1 June 2022, <https://www.ft.com/content/b4cad25f-c061-47c9-8d55-9f048805d71f>.

⁹⁸ Council of the EU, *EU Adopts New Set of Measures to Respond to Russia’s Military Aggression against Ukraine*, 28 February 2022, <https://europa.eu/ldb3qH3>.

⁹⁹ Council of the EU, *Decision (CFSP) 2021/509 of 22 March 2021 Establishing a European Peace Facility, and Repealing Decision (CFSP) 2015/528*, <http://data.europa.eu/eli/dec/2021/509/2024-03-18>.

¹⁰⁰ Council of the EU, *Extraordinary Meetings of the Permanent Representatives Committee. Summary Record*, 16 March 2022, <https://data.consilium.europa.eu/doc/document/ST-7282-2022-INIT/en/pdf>.

¹⁰¹ Henry Foy, “Arming Ukraine: How War Forced the EU to Rewrite Defence Policy”, in *Financial Times*, 27 February 2023, <https://www.ft.com/content/1b762ff1-2c7f-40a1-ae9-d218c6ef6e37>.

¹⁰² European Commission, *REPowerEU: Joint European Action for More Affordable, Secure and*

afterwards the Commission and member states asked for the creation of an EU Energy Platform to ensure the security of supply. Since the energy crisis affected member states asymmetrically, it seemed appropriate to build REPowerEU on the legal construction of the NGEU. Indeed, REPowerEU has its main funding source in the Regulation establishing Recovery and Resilience Facility, which was amended with the aim of mobilising unused NGEU money.

The REPowerEU plan aims at rapidly reducing the dependency on Russian fuels while accelerating the green transition, by saving energy, producing clean energy and diversifying energy supplies. Strengthening the European energy resilience became a new objective of the NGEU, and a new chapter to include in the national Recovery and Resilience plans. The nexus between energy transition and economic recovery has led to what scholar Merijn Chamon calls “super competence” of the EU,¹⁰³ transcending the letter of the Treaties.

Energy policy has its legal basis in Article 194 TFEU, which was introduced with the Treaty of Lisbon and disciplines the functioning of the energy market and the security of the energy supply. The Article specified that the “measures shall not affect a Member State’s right to determine the conditions for exploiting its energy resources”.

Despite this limited competence in the field, the Union launched the EU Energy Platform in April 2022, and in December 2022 the Energy Council gave further momentum to it through the Council Regulation (EU) 2022/2576 encouraging, on the basis of Article 122 TFEU, in a spirit of solidarity, better coordination of gas purchases.¹⁰⁴ With the aim of maximising Union’s economic weight leverage to attract reliable supplies from global markets at stable prices, an original system of common purchasing of gas, liquefied natural gas (LNG) and hydrogen was built up, aggregating the gas demand from companies at the European level and matching it with the most competitive supply offers. To smoothen the process, an ad hoc steering board has been set up, chaired by a Commission Vice-President (currently Maroš Šefčovic, Executive Vice-President for the European Green Deal). In accordance with the principle of proportionality, the measures with respect to demand aggregation and joint purchasing are implemented on a voluntary basis, however, the participation in the demand aggregation is mandatory.¹⁰⁵

To complete this overview, the conflict also led to the opening of the EU accession process and negotiations for Ukraine, which was swiftly granted the status of candidate country. Ukraine’s President Volodymyr Zelensky called for immediate

Sustainable Energy (COM/2022/108), 8 March 2022, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52022DC0108>.

¹⁰³ Merijn Chamon, “The Rise of Article 122 TFEU”, cit.

¹⁰⁴ Council of the EU, *Regulation (EU) 2022/2576 of 19 December 2022 Enhancing Solidarity through Better Coordination of Gas Purchases, Reliable Price Benchmarks and Exchanges of Gas Across Borders*, <http://data.europa.eu/eli/reg/2022/2576/2023-12-31>.

¹⁰⁵ Ibid.

membership of the country¹⁰⁶ via a new special procedure. However, according to several scholars,¹⁰⁷ this would be inconsistent with the Treaties since they “can only be modified by means of the amendment procedure”.

Conclusion

Jean Monnet was right: crises shaped and continue to shape Europe.

Before delving into final considerations, a concise summary of the measures undertaken and novel insights gained is provided. To begin with, we have observed the European reaction to the economic and sovereign debt crisis. Within the realm of *economic governance*, member states and institutions have pursued several actions, which have been validated by CJEU rulings and its *judicial activism*.¹⁰⁸ These include: the use of private and international law to conclude intergovernmental treaties outside the EU legal order, such as the TSCG and the ESM, which are both expressions of *parallel integration*; the intrusive MoU attached to the fiscal aid and the stringent European Semester, making *soft law* less soft; finally, the ECB’s growing role, labelled as “mission creep”.

As for the refugee crisis, the externalisation to third countries (implicitly considered as *safe countries*) of the migration issue resulted in an “unorthodox” *soft law* package, comprising the JAP and the EU-Turkey Statement. This package imposed obligations on both parties and required ingenious legal operations to ensure conformity with the Treaties, including: the one-to-one scheme made temporary and extraordinary, and the original formulation to speed-up the visa liberalisation process, despite the non-compliance with necessary requirements.

The Covid-19 pandemic marked a paradigm shift. Thereafter, solidarity became crucial and solutions to crises started to be adopted within the Treaties. The NGEU package exemplifies these two affirmations as it has a redistributive design – i.e. for the benefits of all 27 member states, rather than for the 19 Eurozone countries only – and was built through a creative interpretation of existing norms, specifically, Article 122 TFEU, dubbed as the *passepartout* article, and Article 175 TFEU, regarding cohesion policy. During the sovereign and debt crisis, the incompleteness of the Economic and Monetary Union emerged clearly. A decade later, the Commission was empowered to issue common debt. Similarly, the Commission was entrusted by member states with purchasing vaccines on their behalf by amending the

¹⁰⁶ Victor Jack, “Ukraine’s Zelenskyy Ups Pressure on EU with Plea for Immediate Membership”, in *Politico*, 28 February 2022, <https://www.politico.eu/?p=2006291>.

¹⁰⁷ European Court of Justice, *Judgment of the Court of 8 April 1976 in Case 43-75: Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:61975CJ0043>.

¹⁰⁸ Alessandro Petryshyn, “Judicial Activism at the Court of Justice of the European Union”, in *SSRN*, 14 February 2022, <https://ssrn.com/abstract=4522647>.

Regulation (EU) 2016/369.

As witnessed by these last two examples, crises may unlock some “first times”. For instance, the release of NGEU funds was conditioned to the respect of the Rule of Law. Likewise, the Temporary Protection Directive was activated at the onset of the Russian invasion of Ukraine, more than 20 years after its adoption. This led us to the latest crisis analysed in this paper, i.e. the invasion of Ukraine. For the first time, the EU provided lethal equipment to a third country through the EPC. Additionally, in order to respond to the weaponisation of energy supply initiated by Russia, the REPowerEU plan was launched. Its structure replicates the already-tested NGEU's scheme of reforms and investments, suggesting that the NGEU may have developed a toolkit applicable for addressing future emergencies.

In conclusion, “crisisification” has become the EU's *modus operandi*,¹⁰⁹ proving the resilience of the EU and its ability to adapt, absorb, and if necessary, change itself.¹¹⁰ Crises represent moments of truth¹¹¹ characterised by open decision-making situations,¹¹² where it is not uncommon to observe a creeping transfer of competences from the national to the supranational level. Crisis-led integration and integration by stealth usually go hand-in-hand, often resulting in creative solutions and major leaps in integration. However, by definition, integration by stealth takes place in quite opaque ways, escaping the democratic control of the European or national parliaments and making it more difficult to allocate responsibility for decisions.

Until now, Treaties have been a living instrument. Nevertheless, crises are increasing in frequency and intensity and a Treaty reform might be needed, even more, if a future enlargement is envisaged. However, it is exactly this *permacrisis* status that does not allow to develop a more extensive reasoning on European architecture and procedures.

In this *permacrisis* landscape, can integration by stealth be the alternative to Treaty reform?

Updated 29 May 2024

¹⁰⁹ Mark Rhinard, “The Crisisification of Policy-making in the European Union”, in *Journal of Common Market Studies*, Vol. 57, No. 3 (May 2019), p. 616-633, DOI 10.1111/jcms.12838.

¹¹⁰ Marianne Riddervold, Jarle Trondal and Akasemi Newsome, “European Union Crisis: An Introduction”, in Marianne Riddervold, Jarle Trondal and Akasemi Newsome (eds), *The Palgrave Handbook of EU Crises*, Cham, Palgrave Macmillan, 2021, p. 3-47.

¹¹¹ Luuk van Middelaar, *Alarums and Excursions, Improvising Politics on the European Stage*, Newcastle upon Tyne, Agenda Publishing, 2020.

¹¹² Frank Schimmelfennig, “European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises”, in *Journal of European Public Policy*, Vol. 25, No. 7 (2018), p. 969-989, DOI 10.1080/13501763.2017.1421252.

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Council of the EU, *Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, <http://data.europa.eu/eli/dir/2001/55/oj>

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