RED SPINEL

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EUROPEAN DEMOCRATIC INSTRUMENTS AND PROCEDURES DURING THE PANDEMIC AND BEYOND

LUISS

WORKING PAPER

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ABOUT THIS WORKING PAPER

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

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

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

FOREWORD

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

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

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

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

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

AFET: European Parliament's Committee on Foreign Affairs
ATTAC: Association pour la Taxation des Transactions financières et pour l'Action Citoyenne
BUDG: Committee on Budgets
CFREU: Charter of Fundamental Rights of the European Union
CFSP: Common Foreign and Security Policy
CJEU: Court of Justice of the European Union
CoFE: Conference on the Future of Europe
COSAC: Conference of Parliamentary Committees for Union Affairs on Parliaments of the European Union
CSOs: Civil Society Organisations
DEA: Direct Elections Act
DG: Directorate-General
DoD: Defence of Democracy
ECA: European Court of Auditors
ECB: European Central Bank
ECI: European Citizens' Initiative
ECON: Committee on Economic and Monetary Affairs
EDAP: European Democracy Action Plan
EEC: European Economic Community
EMFA: European Media Freedom Act
EP: European Parliament
EPCs: European Citizens' Panels
EPF: European Peace Facility
ESM: European Stability Mechanism

LIST OF ABBREVIATIONS (CONT.)

EU: European Union
EURATOM: European Atomic Energy Community
EURI: European Union Recovery Instrument
EUSF: European Union Solidarity Fund
HATVP: Haute Autorité pour la trasparence de la vie publique
ICT: Information and Communication TechnologyMEPs: Members of the European Parliament
ILO: International Liberal Order
INGOs: International Non-Governmental Organisations
LGBTQI: Lesbian, Gay, Bisexual. Transgender, Queer, Intersex
MEPs: Members of the European Parliament
MFF: Multiannual Financial Framework
MPs: Members of Parliament
MSs: Member States
NGEU: Next Generation EU
NGOs: Non-governmental Organisations
NPs: National Parliaments
NRRPs: National Recovery and Resilience Plans
OECD: Organisation for Economic Co-operation and Development
OLAF: European anti-fraud office
ORD: Own Resources Decision
QMV: Qualified Majority Voting
RQMV: Reverse Qualified Majority Voting
RRF: Recovery and Resilience Facility
SILT: Sécurité Intérieure et Lutte contre le Terrorisme
SLAPP: Strategic Lawsuits against Public Participation
SOE: State of Emergency
SURE: Support to mitigate Unemployment Risks in and Emergency
TEU: Treaty on the European Union
TFEU: Treaty on the Functioning of the European Union

EXECUTIVE SUMMARY

This Working Paper discusses the instruments and the procedures of the EU democratic decision making, by looking at the role of representative institutions, citizens and civil society organisations during and beyond the polycrisis.

The adoption of the NGEU is considered the turning point in distinguishing between the pre-pandemic, the intra-pandemic and the post-pandemic stages. By examining those actors, the goal is to analyse the key aspects that characterise the EU democratic instruments and procedures and how they developed before and after the Covid-19 pandemic, also considering the further challenges that emerged in the meantime. Such challenges include corruption and foreign influence scandals, such as the Qatargate; the war at the borders of the Union; the disputed experience of the Conference on the future of Europe; and the many limits of the *Spitzenkadidaten* experiment – at its third implementation in 2024 – to foster democracy in the EU.

The fil rouge of the various contributions is represented by the analysis of the interplay between the targeted democratic instruments and procedures and the political and institutional dissensus surrounding them before, during and after the pandemic.

The Working Paper is divided into three parts. The first part discusses how dissensus has affected the bases of the EU's liberal democracy, including representative democracy, participatory democracy and direct democracy in ordinary times for democratic politics. The second part analyses if and how the democratic decision-making has been guaranteed in the aftermath of the pandemic and whether institutional and non-institutional actors have been empowered or, rather sidelined, in the middle of the crisis and in the planning of the recovery. The third part focuses on the state of democratic procedures after the pandemic and focuses on the latest responses of the EU to key issues affecting democratic values.

Introduction

Cristina Fasone (Luiss University) and Marta Simoncini (Luiss University)

Crises and dissensus have been shaping democracy in the EU for decades. Economic, social, migration, rule of law and political crises have profoundly affected the design and operation of democratic instruments and procedures in the EU and in the Member States. **The Covid-19 pandemic stalled economic growth and affected democratic politics and governance throughout Europe. The NextGenerationEU (NGEU) programme intervened in this polycrisis** (Zeitlin et al. 2019) with the aim of infusing the European economy with **new resources, boosting recovery and building resilience** in the different Member States. This Working Paper analyses how the pandemic polycrisis has affected the democratic instruments and procedures in the Union.

Since the start of the European integration process, **the quality of democracy** in the EU has been **the object of endless critical accounts** (see, e.g. Mény 2003). After all, although it was instrumental in building mutual checks on the functioning of national democracies following the atrocities of World War II, **the European project was not conceived of as a democratic construction in itself** (see, e.g. the Ventotene Manifesto). The failure of the European Political Community of 1952 marked a clear path towards **eminently economic integration and the creation of a common market**, with expected spillover effects on peace and the consolidation of constitutional democracies (De Burca 2011). It was only the deepening of the European integration that spotlighted democracy as a weakness of the then European Community. As intergovernmentalist scholars have argued, **provided the international-intergovernmental imprinting of the Community dynamics** remained dominant for the integration of a selected number of policies, the democratic legitimation of national authorities participating in the European institutions – national executives in the Council and national parliaments in the Parliamentary Assembly – would have been sufficient for the legitimacy of the European decision-making (Moravcsik 2002).

However, the democratic problem of the Community went beyond that and entailed a mode of decision-making largely anchored to non-majoritarian institutions and de-politicised agents (Majone 1998; on the need to consider politicisation and de-politicisation phenomena in a multilevel approach, see Zürn 2019). **An initial answer to this problem was to turn the Parliamentary Assembly into a fully-fledged elected Parliament** and in parallel strengthen its power as a legislature, thus tackling the issue of the democratic deficit (Corbett 1977; Marquand 1979). **After every revision of the Treaty, the European Parliament (EP) has been granted new powers** and the inter-institutional balance was further revised following the creation of the European Council in 1974 (though this was acknowledged in EU primary law only with the Treaty of Lisbon: see Puetter 2014, ch. 3).

Since the Maastricht Treaty **the deepening of the integration encompassing new policy areas - some of which are particularly sensitive for national sovereignty** (e.g., migration, foreign and security policy etc.) - **and the enlargement of the Community** have posed new challenges to the democratic principles at the supranational level. In addition to the discourse on the pitfalls of the supranational institutional dimension – i.e. how to strengthen democracy given the existing institutional system – **the lack of a truly European public sphere** (Habermas 2001) **and of a European *demos*** (Grimm 2017) have been considered the missing elements to building up a genuine supranational democracy. The experiences of the Conventions (in drafting the Charter of fundamental rights and the Constitutional Treaty,

respectively) and the failure of the process to ratify the "European Constitution" have led to a **variety of different solutions being proposed to the democratic problems of the Union. Some have argued that the legitimation of the Union is still eminently anchored to national democratic systems.** Hence, the more effective the national procedures for the democratic control and accountability of the EU executive institutions are (both in their individual and collective dimensions), the more legitimate the EU decision-making will become (see e.g. Raunio 2009). **Those seconding such an interpretation**[1] **– have supported the reinforcement of the scrutiny and oversight prerogatives of national parliaments** at both the domestic and the supranational level (Bellamy and Kröger 2016). **By contrast, those who are convinced that a truly democratic system should be set up at the EU level, using national democracies and other federalising processes as benchmarks, have advocated for the empowerment of the EP** (e.g. Fabbrini 2010).

There are also **other positions in between** that deserve considerable attention. For example, on both a descriptive and a normative level, **the EU has been labelled as a *demoïcracy,*** i.e. "as a Union of peoples, understood both as states and as citizens, who govern together but not as one" (Nicolaïdis 2012 and 2013). **This implies that various channels of democratic accountability** have to be used to mirror the mixed nature of the EU. They are to be arranged, based on the proponents' views, according to different models: for example, the *demoïcratic* understanding provided by "republican intergovernmentalism" insists on the primacy of national communities and sovereignty (Bellamy 2013 and 2019); **the "supranationalist" account insists instead on peoples' sovereignty** and sees the EU as the expression of a plural popular sovereignty given the plurality of peoples (Cheneval 2011; Cheneval and Schimmelfennig 2013). **A third *demoïcratic* view, "republican federalism" or "neo-federalism", considers the EU as a system based on "*dual* sovereignty, *dual* democracy and *dual* citizenship"**, drawing on the US federal experience (Schütze 2020, p. 36). While still acknowledging that we are in the presence of a "Union of States", republican federalism argues for the entrenchment of the political and constitutional dualism of the EU (*Ibid.)*.

Likewise, some scholars have emphasised that **the composite nature of the EU** is irremediably grounded on **both national constitutional democracies and the European constitutional system** (Pernice 2002; Besselink 2007), so that the democratic credentials of the Union depend on the democratic performance of domestic institutions as much as from the respect of democratic principles by the supranational institutions.

Others have argued that the original sin of the EU system lies primarily in the **disconnect between domestic democratic decision-making and the citizens' representative capacity of the EU institutions** (Lindseth 2010; Fasone, Gallo and Wouters 2020). One **option**, then, would be **to better connect the two layers of democracy in the Union** through a "multilevel parliamentary field" (Crum and Fossum 2009), by considering the Union as a "Euro-national parliamentary system" (Lupo and Manzella 2013) and by properly synchronising the timing of democracy (Goetz 2014) and that of the electoral cycles between the EU and the Member States (Lupo 2024).

The **response** provided at Union level has been a **mixture of representative** (Arts. 10 and 12 TEU), **participatory** (Art. 11 TEU) and **direct democracy** (Art. 14 TEU) for ordinary

[1] See Decision of 12 October 1993, *Maastricht Urteil*, Cases 2 BvR 2134/92, 2 BvR 2159/92; Decision of 30 June 2009, *Lissabon Urteil*, - 2 BvE 2/08 -- 2 BvE 5/08 -- 2 BvR 1010/08 -- 2 BvR 1022/08 -- 2 BvR 1259/08 -- 2 BvR 182/09.

times, while acknowledging to democracy the status of EU fundamental value (Art. 2 TEU), potentially applicable to both the EU and the Member States (Spieker 2023). Whereas the coordination and the fine-tuning between these various democratic channels have large margins for improvement – consider, for example, the weak role of European political parties "to forming European political awareness and to expressing the will of citizens of the Union" (Article 10.4 TEU) – **crises have certainly disrupted the regular functioning of democratic procedures and, therefore, have had a negative impact on the legitimation** and accountability of the **decision-making process**. Therefore, the democratic pitfalls of the Union already highlighted are further exacerbated in a context where a sequence of crises occurs; a **new crisis emerging without the problems triggered by the previous one having been fixed** (e.g. the Euro Area crisis unfolded into the refugee crisis, which was then affected in its management by the rule of law crisis that is still ongoing; meanwhile the Covid-19 pandemic occurred following which Russia invaded Ukraine).

Crisis management is problematic for democratic procedures in itself: it usually constrains the viable political options; it forces the decision-making to be sped up regardless of how thought out the determination was; it tends to bypass the participation of and control by parliaments and citizens; and it is eminently executive-driven (White 2015 and 2019).

Decisions are taken in a hurry, at times **overstretching** or **manipulating** the **interpretation of democratic procedures** and of constitutional or legislative emergency clauses, which can be activated, as happened during the pandemic, in ways that suspend the enforcement of fundamental rights' provisions.

In a crisis context, **dissensus**, as inherent to any democratic and pluralistic procedure **is either silenced** – to show the unity of intents in the response to the emergency – **or is very vocal and potentially disruptive** because it may undermine the effectiveness of the policy reaction. It also depends on whether the response to the crisis is in continuity with the past or whether the institutional system demonstrates that a learning process was set in motion and that the pitfalls of the prior response have been corrected in the present occurrence. For instance, regarding **the pandemic crisis, several scholars have pointed to an effective learning process having taken place** in comparison with the highly problematic EU reaction to the Euro Area crisis (Radaelli 2022; Capati 2023; Quaglia and Verdun 2023).

This Working Paper discusses the role of representative institutions, and of citizens through direct democracy and elections, in addition to the involvement of civil society organisations in the decision-making process during and beyond the pandemic crisis. The adoption of the **NGEU is considered the turning point** in distinguishing between the pre-pandemic, the intra-pandemic and the post-pandemic stages. By examining those actors, **the goal is to analyse the key aspects that characterise the EU democratic instruments and procedures and how they developed across the Covid-19 pandemic crisis and in its aftermath**, also considering the further challenges that emerged in the meantime. Such challenges include corruption and foreign influence scandals, such as the Qatargate; the war at the borders of the Union; the disputed experience of the Conference on the future of Europe, regarding the EU's democratic rehabilitation; and the many limits of the *Spitzenkadidaten* experiment – on its third implementation in 2024 – to foster democracy in the EU.

The *fil rouge* of the various contributions is represented by the analysis of **the interplay between the targeted democratic instruments and procedures and the political and institutional dissensus surrounding them before, during and after the pandemic.**

This Working Paper is divided into **three parts** and includes this Introduction and the Concluding Remarks by Robert Schuetze. **The first part discusses how dissensus has affected the bases of the EU's liberal democracy**, including representative democracy, participatory democracy and direct democracy in ordinary times for democratic politics. In particular, it considers how these different forms of democratic engagement have channelled dissensus and, in turn, have become themselves the object of dissensus prior to the Covid-19 outbreak. The chapter by **Nicola Lupo** discusses the foundation of representative democracy in the EU, the role of national parliaments (NPs) and the EP and the arrhythmias in the electoral cycles as a major source of dissensus. **Giovanni Piccirilli** focuses on the EU electoral procedures and EU-related referendums as further and key, though contested, instruments for people's engagement in the democratic life of the Union. **Gloria Golmohammadi**, instead, analyses the Treaty-based principle of participatory democracy intended as political and civic participation to the democratic life of the Union and its tools and procedures of implementation.

The second part analyses if and how the democratic decision-making has been guaranteed in the aftermath of the pandemic and whether institutional and non-institutional actors have been empowered or, rather sidelined, in the middle of the crisis and in the planning of the recovery. First, the state of emergency is discussed as the frame within which the management of the reaction to the pandemic can be properly understood at the domestic and the supranational level. By building upon the case of France, possibly the EU Member State that has been governed the longest under a state of emergency over the last decade, **Stéphanie Hennette Vauchez** in her chapter outlines the characteristics of the state of emergency and the challenges that it raises for liberal constitutionalism. **Bruno de Witte** then explains what the state of emergency in the EU is. Unlike many national constitutions, in fact, the EU Treaties do not provide for a general emergency regime and must use different tools of crisis management to deal with extraordinary circumstances. As was particularly apparent during the Covid-19 pandemic, all these instruments ended up forming the EU's emergency competence. Subsequently, **Andrea Capati and Sergio Fabbrini** examine the policy-making process leading up to the adoption of the major economic and financial response to the Covid-19 outbreak: the Recovery and Resilience Facility (RRF). They particularly analyse the political dissensus over the choice of the most appropriate means to face the crisis and the supranational or intergovernmental challenges raised by the competing interpretations of the crisis by the different actors. **Cristina Fasone** digs further into the issue of democratic accountability by exploring the role of the EP and NPs in the adoption and implementation of the NGEU, showing the lights and shadows of their participation in the democratic process. Finally, the chapter by **Dana Dolghin** discusses the challenges to the role of NGOs and civil society as a vehicle of dissensus in the liberal international order and in the EU, also reflecting upon their (lack of) contribution to the design of the NGEU.

The third part of the Working Paper focuses on the state of democratic procedures after the pandemic and focuses on the latest responses of the EU to key issues affecting democratic values. **Paul Blokker** in his chapter discusses the decision-making process and the findings of the Conference on the future of Europe, which was designed by EU institutions to engage citizens in the democratic debate in reaction to the authoritarian turn of certain national democracies and to counter the rising Euroscepticism. **Ylenia Maria Citino** then discusses the so-called "Defence of Democracy" package adopted by the European Commission in 2023 to boost democracy, representation of interests and participation of citizens with the aim of tackling foreign interference in European democracy. Relatedly, **Lola Avril and Antoine**

Vauchez engage with an analysis of the political scandal involving allegations that certain MEPs, EP officials and lobbyists, and their families were corrupted by the governments of Qatar, Morocco and Mauritania. Better known as *Qatargate*, this scandal is a case study about the vulnerability of the EU's democracy and the unpreparedness of the EU institutional response, to which this contribution offers some way forward.

Adriano Dirri in his chapter examines the role played by the EP in the EU's reaction against the war in Ukraine as a compass for testing how democratic it has been so far. Dirri notes that the EP had a significant voice only when decisions concerned budgetary choices on the macro-financial assistance to Ukraine and the establishment of the Ukraine Facility. By transposing the instruments and the procedures of the RRF in the scope of the Ukraine conflict, the EP has begun to play a strategic role in the EU reaction to the war and in the war management.

Finally, **Matilde Ceron, Thomas Christiansen, Dionyssis G. Dimitrakopoulos and Sophia Russack** in their chapter focus on the practice of the *Spitzenkandidaten* in the context of the 2014, 2019 and 2024 EP elections as an instrument for increasing the democratic legitimation of the Commission's Presidency. They highlight the weaknesses of the mechanism so far and offer suggestions on how to improve it in the future.

The **Conclusions of this Working Paper by Robert Schütze** builds upon the findings of the different chapters dealing with the complex interplay between democracy and emergency, also in the European context.

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PART I

SETTING THE SCENE

The EU representative democracy as an instrument for channelling dissensus: Limits and potentialities

Nicola Lupo (Luiss University)

1. Introduction

After recalling the main features of the EU representative democracy in Europe as depicted by Article 10 TEU and their origins, and noticing that neither the word "democracy" nor the word "parliament" was quoted in the original Treaties**, this contribution explores the existing mechanisms of representative democracy to determine whether they are sufficient to effectively channel the different forms of dissensus that emerge in EU policymaking**.

The main argument is that **the two existing mechanisms of representative democracy** – one based on the **European parliament (EP)** and the other on **national parliaments**, which may be involved in instruments of **interparliamentary cooperation** – **are not always able to channel and transmit the many dissenting voices** existing in the EU or give them adequate consideration in policy-making processes.

This is **due to the origins of the EU as an international organisation** and to its reliance on institutions that were initially lacking enough democratic and political features. The recent **trend towards democratisation and politicisation of EU institutions is thus welcome but incomplete and** it reveals many of the **ambiguities on which the EU has relied for a long time** (e.g., the habit of appointing politicians who have recently been defeated in national elections as leaders of EU institutions). These ambiguities are, of course, often the object of further **criticisms and dissenting voices** raised towards EU institutions and policies.

In addition, national electoral cycles are usually not synchronised with the EP elections, making it almost impossible to enforce the principle of political responsibility of the many executives coexisting in the EU, and increasing the risks of disconnection and arrhythmias in the functioning of the EU representative democracy.

2. The (recent) recognition of the principle of representative democracy

The wording of **Article 10.1 TEU**, titled: "Provisions on democratic principles", starts by declaring, in their first paragraph, that "**The functioning of the Union shall be founded on representative democracy"**.

In the current version of the Treaties, the recognition of **the principle of representative democracy seems very explicit and clear**. The contents of **Article 10.2 TEU** might even seem self-evident, because everyone knows that the European Parliament is directly elected by EU citizens, while National Governments, who compose the Council, are strictly linked to their national Parliaments (for all Member States but Cyprus, through a confidence relationship) and, indirectly, to the citizens, to which they are "democratically accountable".

However, this has not always been the case. **The word "democracy" was not in the founding European Treaties. Nor the word "parliament"**, i.e. the institution on which representative democracy is inevitably centred, called to represent political and social pluralism, ensuring that the main dissenting voices are part of the decision-making process (Fasone, 2023). Interestingly, both were even deemed by many as **"forbidden words"** when the European Communities were originally conceived.

This was largely due to the **tendency** of the international organisations' founding documents and main structures to aim at **highlighting the consensual elements** among its members, while avoiding the rude contrasts of parliamentary politics and often ignoring or sidelining – we might even say "sweeping under the carpet" – the issues on which a dissensus existed or might easily arise. Preferring, if necessary, to address those issues within negotiations behind closed doors, rather than openly and publicly, in a political assembly.

3. The democratic principles in the European Treaties

The **word "democracy" made its modest appearance in the preamble of the European Single Act of 1986, and then in the articles of the European Treaties in the Treaty of Maastricht of 1992**. In this instance, though, it exclusively referenced the systems of government of the member states, on the one hand, and the policy of development cooperation and the Common Foreign and Security Policy (CFSP), on the other.

This extreme caution, not to say reluctance, of the founding Treaties to address the democratic nature of the European institutional system comes as no surprise, if one considers the clearly **elitist genesis of the European integration process** and its purely internationalist origins and background (Habermas 2012: 342; Weiler 2012: 256 ff.). **A process that has certainly not seen the peoples, nor to a lesser degree the (controversial, in its own existence) European people, as protagonists** (Grimm 1995).

However, in the meantime the **democratic principle** had been **used by the Court of Justice** and qualified as a **general principle of the law of the European institutions** (Ninatti 2004: 6 ff and 70 ff.; Lenaerts 2013: 281 ff.). The Court had derived it both **from the common constitutional traditions of the member states and from the provisions regarding the representative nature of the European Parliament**. In order to highlight the latter element, the leading judgment of this case law was adopted soon after the first direct election of the European Parliament. The well-known judgment of 29 October 1980 (SA Roquette Frères v Council of the European Communities. **Isoglucose-case 138/79**), **in which the consultation of the EP in the legislative process was deemed as an "essential formality"**, as this consultation "reflects at Community level the fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly".[2]

It is only in the **Treaty of Amsterdam of 1997 that the democratic principle is explicitly referred to in the context of the European Union**, stating that "the Union is founded on the principles of liberty, democracy, the respect for human rights and fundamental freedoms, the rule of law, principles which are common to the member states" (Article 6 TEU). This was **influenced by the pressure of the German Federal Constitutional Court,** with its decision on the Treaty of Maastricht of 12 October 1993. It is well known that the Court pointed out the risk of contradictions between the structure of the European Union and the democratic principle (as is expressly stated by Article 20 of the German fundamental law), thus forcing the European institutions to address the question (Sorrentino 1994; Cartabia 1994) and proposing the German model of parliamentary democracy to the EU.

[2] In subsequent case law, the Court of Justice of the EU has recalled and used the democratic principles many times, for instance, in order to strengthen direct democracy mechanisms such as the citizens' legislative initiative and MEPs election (Fasone-Lupo, 2020). However, it has sometimes been accused of adopting a notion of democracy 'for the people', which favours the powers of non-majoritarian bodies (Ritleng, 2016).

The framework changed again, after the Treaty of Lisbon 2007, adopted following the outcome of the French and Dutch 2005 referendums that rejected the Constitutional Treaty. **The Treaties now deal directly with the "democratic challenge facing Europe"** and do this by using all the available resources of the European integration process (Manzella 2012), quoting and taking some elements from all the forms of democratic legitimacy (direct, participatory, deliberative) and **focusing first and foremost on the role of the traditional representative democracy** but excluding the possibility of European referendums (an instrument which continues to play a role at national level, also concerning EU matters, so determining important effects on the EU: see Giovanni Piccirilli in this working paper).

4. The European Parliament and national parliaments in the European Treaties

As is well known, even the expression "European Parliament" did not appear in the founding Treaties until it was included in the mid-eighties, with the Single European Act.

In fact, the Treaty establishing the European Coal and Steel Community (ECSC) of 1951, coherently with the functionalist approach, established what was generically called an "assembly", with mere consultative powers and made up – on the model of the consultative Assembly of the Council of Europe – of 78 members designated by each national parliament, once a year. Similar institutions, also called "assemblies", were set up by the European Economic Community (EEC) and European Atomic Energy Community (EURATOM) treaties of 1957.

The same assembly, which was soon unified, decided to be called, by way of its own resolutions, first the "European Parliamentary Assembly" in 1958, and then the "European Parliament" in 1962 (Corbett et al. 2024). **For the name "European Parliament" to make its appearance in the text of it has been necessary to wait for the European Single Act, which was signed in 1986 and came into force in 1987** – seven or eight years after the (first) direct election of the Assembly–Parliament in 1979.

For a long time, especially after 1979, the word "Parliament" in the European integration process has been used rather exclusively to refer to the European Parliament, thereby neglecting the relevance of other parliaments existing in the Community, obviously together with the elections needed to choose their members. **Neither national nor subnational parliaments were deemed relevant in the supranational institutional structure or in its decision-making processes**. In particular, **national parliaments were completely sidelined and "covered" by their respective governments**, at least in the day-to-day decisions at European level, centred on the Council of Ministers.

However, **national parliaments were defined an essential element** for the democratic legitimacy and for the good functioning of the EU (**Article 12 TEU**). **And also subnational parliaments – at least, those with legislative powers – acquired some limited relevance** thanks to their possible involvement in the **subsidiarity check**, as designated by Protocol No. 2 of to the Treaty of Lisbon, on the principles of subsidiarity and proportionality.

The inclusion of national parliaments in the text of the Treaties, with the addition of a limited but not insignificant set of powers, symbolises the **inclusion in the EU decision-making policies of the (many) voices of national politics** (Lupo 2013). By exercising the so-called "European powers" of national parliaments – including scrutiny of the subsidiarity principle and the so-called "political dialogue" (Wintzen 2017; Granat 2018) – **there is a greater chance of dissenting positions and minority interests on EU policies being represented**, even though they are usually still better represented at national level than at a

European scale (for the reasons explained by Mair 2007: 11). As noted by Bellamy-Kroger (2016: 149), **reconnecting the integration process to the domestic processes of normal party competition can reduce the tension between European policies and national politics**, encouraging the domestication and normalisation of EU affairs.

Indeed, not all the potentialities residing in parliaments have been adequately exploited to involve minorities and oppositions to ensure the effective participation of dissenting voices. As always, **dissensus needs to be regulated and limited to allow a proper deliberative process**, usually resolved through a decision taken according to the majority rule. However, **the trade-off between (wide) discussion and (timely) decision** in EU decision-making **often goes in favour of the limitation and sidelining of dissenting voices**, even when there is no specific need to ensure the adoption of a decision.

Just to quote one **example**, it is possible to refer to **interparliamentary cooperation**, in particular their most recent and relevant mechanisms, represented by interparliamentary conferences (Fasone and Lupo 2016). In theory, they are conceived to help national parliaments and the European Parliament to **counterbalance the executive dominance problem that has been known to characterise the EU since its origins**, and even more after its turn in favour of inter-governmentalism (Fromage and Herranz Surrallés 2020). In practice, although national **MPs representing national opposition** do take part in the interparliamentary conferences, they **do not seem to be particularly active in the debates, thus impairing the ability of these conferences to channel the viewpoints of national opposition parties, who would possibly echo the domestic discontent with** the governments' positions on EU affairs. This is based on an analysis of the Interparliamentary Conference on Stability, Economic Coordination and Governance in the EU (Bartolucci and Lupo 2022: 461), called upon to address a policy field on which EU democracy has shown many limits and flaws (Crespy, Moreira Ramalho and Schmidt 2024). It is not clear whether this outcome is more the result of marginalisation imposed by national parliamentary majorities or of a kind of self-restraint on the part of the national oppositions. In either case, actions should be taken to encourage a more rich and vivid articulation of the debates in these interparliamentary forums, to help them to channel, at least up to a certain degree, also oppositions, minorities and dissenting voices.

5. The coexistence and intertwinement of the two channels of the EU representative democracy in Article 10 TEU

As has been pointed out, the two coexisting channels of EU representative democracy have been clearly recognised in the Treaties currently in force since 2009. This also highlights their complex intertwinement. Although being a provision of the Treaties which is often reduced to an obvious statement and "hardly even commented in EU law textbook" (Besselink, 2017: 30), **Article 10.2 TEU establishes *expressis verbis* an unavoidable connection between the "form of government" of the European Union** (Lupo 2020; Citino 2023) **and those of each and every one of its member states**.

By affirming that "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", **Article 10.2 TEU recognises all the national forms of government as constitutive elements of the EU's form of government**. The legitimacy and the accountability of the intergovernmental institutions, the European Council and the Council, all derive from the democratic processes taking place at national level.

It is thus clear that **the democratic legitimacy of the EU institutions necessarily depends on the good functioning of each "form of government" of its member states**. This makes it extremely difficult to rule the EU democratically by unequivocally determining its political direction and at the same time, establishes an inescapable permanent interest on the part of the EU institutions – and even on the part of the other member states – in the orderly and correct "form of government" of each member state.

Public statements often repeat the traditional principle of "non-interference" by EU institutions and those of other member states in national-level political affairs (e.g., general elections, referendums, government crises, election campaigns), usually practicing the easy game of "blame shifting" to other institutional levels. **On the contrary, the legal-institutional framework drawn up by Article 10.2 TEU presupposes precisely that intertwining**, so it requires a certain level of "interference", mutual trust, and coordination, despite the lack of a proper competence attributed to EU institutions.

The principle of "non-interference" and other EU rituals (e.g., the display of flags or group photos taken at European Council meetings), appear to be all that is left of an ancient but persistent internationalist logic that seems completely unfit to represent the actual activity of the governments of EU member states that are now closely intertwined and working together on a daily basis.

6. The practice of appointing leaders recently defeated in national elections to "top EU jobs": A criticism

One practice derived from the **internationalist origins of the EU that persists**, despite the fact that it clearly seems incompatible with a democracy, consists in **appointing to the top jobs in the numerous institutions** that make up the "fragmented" executive of the Union (Curtin 2009) **politicians who previously held government** positions at the highest level in one of its member states and who no longer occupy them **because they were defeated in recent**, or very recent, elections.

It is clear that this practice has its own very precise rationale. These politicians usually enjoy great political and institutional experience and also bring with them a rich baggage of reputation, and intra- and extra-European connections in political parties, high administration, and diplomatic circles. Such baggage can obviously be an invaluable advantage in performing the functions of, for instance, President of the European Council, President of the Commission, or European Commissioner.

Furthermore, by proposing (or accepting, depending on the circumstances) the name of a predecessor belonging to an opposition party, the (new) government of the member state in question can even broaden its consensus and strengthen (indirect and undeclared, but nonetheless important) actions aimed at better protecting their national interest within supranational institutions.

However, unlike in a traditional international organisation, where it cannot produce particularly deleterious effects, **the persistence of such a practice in a democratic political system like the EU**, with its different levels of political representation and multiple electoral cycles and accountability, **may be problematic** and risks to discredit the Union in the eyes of national public opinion. This is particularly important when there is a need to improve confidence in the institutions of the Union and in its leaders, who are called upon to respond –

from a global perspective – to increasingly demanding challenges and greater amount of dissensus.

So, political leaders who have just been defeated in national elections have been appointed to head European institutions, thus offering in the eyes of citizens – especially those less equipped to grasp the complexities of today's European democracy – an outcome somewhat opposite to what would have been expected on the basis of the electoral response and the aforementioned principles of political responsibility.

From the perspective of the **dissenting voices, and especially from radical Eurosceptics, the practice in question could even be accused, in a polemical key, as being aimed at guaranteeing a sort of continental-scale "promotion" (or "survival") to national leaders who have done well in European terms**, but have come out losers in the national elections and have been ousted, for one reason or another, from the government of the member state to which they belong. It could be seen almost as a kind of justified promotion of "traitors" of national sovereignty.

Of course, this is clearly not the case, and it must also be said that many of the leaders in question have performed their European functions very well. However, for the proper functioning of EU institutions, and to strengthen their legitimacy, their leaders must be shielded from any possible accusations of this kind and must enjoy – even in the context of the delicate distribution of these offices among the different member states – an autonomous legitimacy "from below", on the part of European citizens, starting with those of the member state from which they come.

Otherwise, this practice, whenever repeated, clearly fuels Euroscepticism and radical dissenting voices. Finding someone whom voters had democratically removed from a national government in one of the few leading positions at the EU level might strengthen the arguments about the non-democratic and the elitist nature of EU politics.

7. Conclusion: The need to better synchronise political-electoral cycles to give (institutional) answers to dissenting voices

The almost impossible channelling of dissenting voices in EU decision-making is increased by **the lack of coordination and synchronisation among its multiple cycles and timeframes, which generate a series of "democratic arrhythmias"** (Lupo 2023). In other terms, a multi-level system in which political electoral cycles are not coordinated or synchronised risks being extremely difficult to rule, as **the traditional mechanisms of representative democracy**, such as political accountability and responsibility, **are deeply altered at the national as well as the EU level** (Fasone, Gallo and Wouters 2020).

Far from suffering an alleged "democratic deficit", EU representative democracy – interpreted, consistently with the terms of Article 10 TEU, as encompassing both EU and national dynamics – **seems to need a better synchronisation of its many political-electoral cycles.** In a better-synchronised democracy, it should be easier **to channel and convey the dissensus** that inevitably arises in democratic elections, **both at the national and EU levels.** Such a dissensus should be internalised and taken into consideration but without paralysing the institutional system or initiating asymmetrical and often unpredictable (especially in times of high electoral volatility) shocks for its (complex) decision-making process and (delicate) institutional balance.

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Dissensus on EP elections and referendums in the Union

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1. Introduction. The steady democratic tension in the European integration.

The process of **European integration** has been characterised by the **never-ending rhetoric about an actual or alleged "democratic deficit".** This **label**, which has been undoubtedly abused, was first introduced for completely different purposes: it was **conceived to denounce the political situation before the direct election of the European Parliament** (hereinafter EP), when it consisted of a union of delegations of national parliaments (NPs). The Manifesto of the Young European Federalists introduced the expression at their 1977 convention in Berlin, elaborated by Richard Corbett. However, the expression was widely circulated in a subsequent pamphlet (Marquand 1979: 64).

Notwithstanding the direct election of the EP introduced by the Council Decision 76/787/ECSC, EEC, Euratom (the so-called Direct Elections Act: DEA), which responded to the core points of the Manifesto, **the rhetoric on the democratic deficit has persisted and even increased since then**. Its evolution has been deeply studied (Mény 2003) and many scientific works have debated the democratic legitimacy of the European structure and its decision-making procedures (Majone 1998; Moravcsik 2002; Hix and Follesdal 2006; Schmidt 2013).

An institutional answer to this debate was provided by the Lisbon Treaty with Title II of the TEU, specifically dedicated to the democratic principles in the EU (Draetta 2008). The latter range from representative democracy at the EU level to the direct participation of citizens, **including the active role of NPs in carrying out European functions**.

Of this panorama, three issues will be investigated in response to **a common research question: Are these different approaches to representative and direct democracy sufficient to reduce the alleged democratic deficit at the European level? Or do they serve more domestic purposes?**

Firstly, the focus will be on the evolution of the balance between the EP and the NPs in achieving representative democracy and conferring democratic legitimacy to the EU decision-making process (Section 2). **Secondly, with specific attention to the EP elections, the aim will be investigating how setting an electoral threshold has been interpreted at the state level** (and by national courts) (Section 3). **The final part will be devoted to classifying the different uses of referendums** in EU matters as an exercise of direct democracy (Section 3).

This distinction between representative and direct democracy is made in full awareness of the recent scholarship that identifies referendums as manifestations of the former (Trueblood 2020; 2024). However, **we will show how the category of direct democracy** (or, at least, the role of the referendum in facilitating the involvement of the people in a concrete decision) **plays a specific role in the relationship between national democratic fora and the EU level**.

2 Before and after the Lisbon Treaty: different institutional strategies to improve democracy in the EU between the EP and the NPs

The evolution of the treaties of the 1980s and the 1990s transformed the EP "from a consultative assembly to a co-legislator" (Neuhold 2000), receiving also the acknowledgment of the ECJ in the seminal case *Roquette Fréres v. Council*[3] that the active involvement of the EP as an instrument of the democratic legitimacy of community decisions constituted an "essential factor in the institutional balance intended by the Treaty" (Kirchner and Williams, 1983).

However, **this evolution was not uncontested**. Notoriously, the ***Maastricht* decision** of the German Constitutional Court rejected the idea that the level of democracy in the EU could be measured only by assessing the role of the EP, claiming that only NPs (and the German Bundestag, in particular) had to be considered as the places where representative democracy is guaranteed. Moreover, and somehow **paradoxically**, **in the period in which the EP competencies were strengthened and expanded, the turnout in its election dropped** (from 63% in 1979 to less than 50% in 1999) (Rozenberg 2009).

This claim was later acknowledged and developed, opening a completely new second phase in the relationship between parliaments and European integration. **Between the late 1990s and the early 2000s, the empowerment of the EP was unable to increase the level of democratic citizen participation**. Thus, also in response to the **mounting discontent and drop in public opinion for the integration project of Europe** (Standard Eurobarometer 54 – Autumn 2000: 32), **NPs were first mentioned in the treaties and conferred with specific powers.**

The decision to "use" NPs to drain democratic legitimacy to the European level is possibly owing to the debate held at the European Convention convened to draft the Constitutional Treaty and, in particular, to President Valéry Giscard d'Estaing. The positive outcome of this proposal was not easy to predict. **Parliaments are perhaps the most reluctant constitutional branches with respect to their relationships with processes such as internationalisation or Europeanisation,** as they traditionally constitute the fora of national representation and the places where state sovereignty is exercised. It is therefore natural for them to resist any attempt at rethinking statehood or sharing legitimacy. Inherent to the nature of parliamentary bodies are structural characteristics that lead them to act as natural locations for discussion and exchange. As authoritatively remarked since the time of Hegel, they traditionally act as intermediate institutions between the government and the people, a sort of *portico*, namely, a middle space that is not yet part of the buildings where public power is exercised and is still accessible by the people in the streets. **At the same time, NPs can offer to the European integration process something that the EP cannot achieve on its own: a complete representation of the plural "*demoi-cratic* political system**" constituting the EU (Nicolaidis 2012; Winzen et al. 2015).

In short, the **Lisbon Treaty attributes new powers to the NPs** concerning matters such as defence, democracy, fundamental rights, economic resources, membership in the Union, and the *constitutional* rules of the latter. **These may be considered amongst the most delicate issues with which the EU deals,** especially in relation to the mutual relationships among its Member States and the prospects for its constitutionalisation. **The contribution of NPs to the good functioning of the EU is therefore extremely concrete.** Furthermore, **NPs are co-**

[3] ECJ 138/79: §34.

protagonists of the constitutional avenues for the further development of integration (Besselink et al. 2014) (See also the Chapter by Lupo in this Working Paper).

This evolution was likely inspired by the case law of the German federal constitutional court, although it restated the principles of the Maastricht–Urteil in the subsequent decision concerning the Lisbon Treaty. Thus, **a fundamental dissensus on the *loci* and the role of representative democracy in the EU seems not to be concluded: to some extent the EP and the NPs alone can cease the democratic deficit rhetoric**. Their empowerment created **further dissensus on the balance between them** and on the interpretation and application of the new role attributed to the latter.

As a provisional conclusion on this point, it is possible to state that the **empowerment of the NPs has both European and national relevance**. At the **EU level**, it contributed to enhancing **the transparency and participation in the elaboration of policies**, with multiple procedures that can stimulate discussion at the national level. At the same time, **at the national level, it has been fostering**, on the one hand, **the Europeanisation of NPs** and their policies and, on the other, offering a way to reduce, at least partially, the imbalance with the government that was induced by the same European integration.

3. Dissensus on representative democracy at the EU level: the electoral thresholds and their national implementation

A second area deserving consideration here is the **dissent arising among the various Member States concerning electoral thresholds in the election of the EP** as a way to compose the representation of the citizens at the EU level.

Art. 223(1) TFEU provides two alternative solutions (or, better, an alternative in case of failure to achieve the first solution): the adoption of a **uniform electoral procedure** in all Member States, or – in the absence of an agreement to this effect – **the identification of a series of "common principles"** to be integrated and specified by national legislation. In both cases, a special legislative procedure is envisaged, requiring unanimity in the Council and approval by the European Parliament, based on a proposal made by the latter. The approval of the Member States is then required in accordance with their respective constitutional requirements.

The national comprehensive deliberation may play a different role in each of the two hypotheses listed in Art. 223(1) TFEU. In the case of the uniform electoral procedure, national approval constitutes a mere (but indispensable) vote of approval of the procedure fully defined by the EU institutions. On the other hand, should the Council's decision (as it is) be limited to setting common principles, the margin of discretion left to the individual States is significantly wider. In the latter case, they can exercise a series of options from which notable differences arise in the application of said principles, with the consequence of configuring, in practice, 27 electoral systems that are fundamentally different and united by their contribution to the formation of the same Assembly and by the constraint of adherence to the (few) principles identified by the Council's decision (Viola 2016).

In concrete terms, the common principles are established by the DEA, adopted as the Council decision of 20 September 1976 and amended in 2002. In its original version, it contained **only a few principles establishing the direct and universal suffrage** for the

election of the MEPs (Article 1), the length of the mandate (Article 3), the list of incompatible offices (Article 6), together with an indication of the voting period (Article 9). No specific guidelines were given concerning the electoral formula, so that each Member State was free to regulate the electoral process. Even the conditions for accessing the right to vote and to be elected depended (and still do) on the national constitutional and legislative framework. Consider, for example, the voting age still varying from 16 – BE, DE, MT, AT – to 18 years and the minimum age of candidates ranging from 18 to 25 years, applied in EL and IT. Also, the voting methods accessible to citizens abroad vary, depending exclusively on national legislation (for example, only Estonia allows E-voting; BE, FR and NE recognise the possibility of proxy voting; postal voting or voting at the Embassy vary from State to State). This framework, rather than a unique European democratic moment, shaped the juxtaposition of parallel national elections, paving the way for understanding them as "second-order elections" (Reif and Schmitt 1980: 8).

The modification made by Council Decision 2002/772/EC, Euratom, of 25 June 2002 and 23 September 2002, introduced some principles of great importance such as the **proportional system and the possibility of providing thresholds** (at different territorial levels within the State) as long as they do not exceed 5% of the votes cast. Such principles still not provided the uniform electoral procedure mentioned as the first option in Article 223(1) TFEU; however, the effects of these new principles have been remarkable in quantitative and qualitative terms.

The simple fact of requiring a **PR electoral system that includes underrepresented parties in Member States with a majoritarian electoral system offers a great chance for visibility**. It is not by chance that, over time, EP elections have been the occasion for the sudden success of extremist parties like the Front National in France (later, Rassemblement National), or the UKIP in the UK. They usually underperformed in national general elections due to domestic electoral systems that enhance government stability and strengthen two-party systems. In contrast, in an electoral system created to mirror the voter distribution, such as the proportional system, the electoral outcomes of these parties have been hailed as a protest vote against national governments through a combination of second-order elections and midterm expression of popular will.

Further modifications to the DEA were made with the Council Decision (EU, Euratom) 2018/994 of 13 July 2018 and are yet to be fully affirmed by national implementation. On this occasion, additional common principles were added to achieve greater consistency in the national electoral systems. Among them, the new version of Article 3 includes a minimum threshold of 2% for the constituencies in which more than 35 MEPs are elected.

However, even in light of these new and more constraining norms, **the level of dissensus on their implementation has been high.**

Looking at the last EP elections in 2024, the differences at the State level remain striking. Almost half of the Member States decided not to set any electoral threshold (BE, BG, DK, DE, EE, IE, ES, LU, MT, NL, PT, SI, FI). The other half set it in a range from 1.8% (CV), 3% (EL), 4% (IT, AT, SE), to 5% (CZ, FR, HR, LV, LT, HU, PL, RO, SK).

The composite nature of the described regulatory framework highlights **the plurality of viewpoints and constitutional frameworks** of reference that interact with the individual national implementations of the common principles identified at the European level.

It seems appropriate to distinguish (at least) two levels of analysis: on the one hand the **relationship between EU law and national electoral law**, about which some misalignment may emerge (rather macroscopic) in the case of failing to respect common principles, **for example**, **by establishing a non-proportional electoral system or by inserting thresholds higher than the 5% ceiling set by the Council's decision**. However, the constitutional law of the individual Member State and the "implementing" electoral discipline of the common (European) principles for the election of the European Parliament are completely different. Compliance with the margin of discretion guaranteed by the common principles does not automatically exempt the resulting electoral system from constitutional control within the States, especially given the fact that the right to vote is in question, along with its regulation and its possible limitations, thus going to the heart of the fundamental rights and the democratic model implemented between the state and supra-state dimensions. Indeed, **some constitutions explicitly prohibit the possibility of introducing barrier clauses**, making the distinction between the two levels of analysis even more evident.

It is no coincidence that, called upon to decide on a substantially similar point, **different constitutional courts have followed different motivational paths,** ending up reaching opposing conclusions. Stating the most evident examples, the **Italian**[4] and the **Czech**[5] Constitutional Courts rejected the question of constitutionality related to the national thresholds in EP elections (Piccirilli 2016; Delledonne 2019; Smekal and Vyhnánek 2016). In contrast, the **German Constitutional Court** ruled (twice) on the unconstitutionality of thresholds set by the legislature, first at 5% (equal to federal elections) and then at 3% (Michel 2016).

Interestingly, the argument used by the BVerfG to twice strike down the legal electoral threshold for electing the EP underlined the disproportionality of the compression of the equality of the vote at the national level. For the court, this limitation occurred without requiring a less fragmented composition of the EP, it being the outcome of the electoral results of all Member States combined. However, the equality of the vote is not recognised by EU law.

Strange as it may seem, in none of the relevant provisions of EU law is there any reference to equal voting rights. The aforementioned Article 223(1) TFEU does not mention it (requiring "direct universal suffrage" for the election of the European Parliament), nor do the key provisions on the EP Union in the TEU and in the CFREU (Articles 14 (3) and 39 (2) CFREU, which identically state: "direct universal suffrage in a free and secret ballot"). Likewise, the Direct Elections Act is limited to reiterating the principles of "direct universal suffrage and shall be free and secret" (Article 1(3)). The main reason for this is likely to be found in the degressive proportionality mentioned in Article 14(2) TEU for the allocation of EP seats among the Member States: once this equality is not reflected in the number of citizens necessary for a seat in the EP, it cannot be enforced with regard to the functioning of the electoral system.

In conclusion, electoral thresholds in EP elections are much more relevant for domestic purposes than for European ones. **There is no guarantee that a higher threshold**

[4] 25 October 2018, Judgment no. 239/2018.
[5] 19 May 2015, Pl. ÚS 14/14.

set at a national level will produce a less fragmented (and thus a more effective) EP. On the contrary, this threshold will be extremely relevant in shaping the political body in the individual Member State.

An example from the EP elections in 2019 may illustrate this. The Five Star Movement was (and still is) a relevant party in Italian politics. At that time, it was the biggest party in the Italian Parliament, but it was not well connected with other parties at the European level.

Notwithstanding its good electoral result in Italy (17.06%, well above the 4% threshold), its members remained unattached to any political group in the EP. At the same time, among political parties that had not met the threshold in Italy, the Greens (2.32%) would have surely been part of the EP group. Thus, paradoxically, a national electoral threshold can produce an even more fragmented EP, as it happened in the case mentioned.

4. Different understandings of the use of popular referendums in European matters

Exploring the dissensus on the practice of democracy with regard to EU matters, another interesting division concerns **whether and how to access direct voter participation via referendums**. In this section three different scenarios will be briefly considered: the use made of the referendum to access the EU; the discipline (and, if any, the practice) of using a referendum to leave it, or to attempt to do so; the possibility to trigger a referendum during the membership in order to change it, both by ratifying amendments to the EU treaties or to further specific aims (e.g., participate in the decision to admit new members, propose treaty amendments).

Of course, the dissensus on the role of the referendum in these circumstances reflects the general idea of the role of the direct participation of the citizens vs. the primacy of representative democracy. Some countries have no experience with referendums at the national level (including Germany, where the possibility of a referendum is limited to the application of Article 146 of the Basic Law (*Grundgesetz*), related to the "free decision of the German people" to adopt a proper constitution (*Verfassung*)), and States in which referendums are frequently held to repeal legislation, pass constitutional amendments, and consult the people on matters of public interest. Consequently, one should not be surprised at the deep division in the use of referendums about European integration, as it depends on a "multitude of contextual factors" (Mendez et al. 2014: 4).

1.1.Referendums to join the Union

The role of the referendum in the accession to the EU has changed significantly over time.

At the founding moment, all six original members ratified the Treaty of Paris and the Treaty of Rome via legislation. Coherent with their parliamentary forms of government (a commonality at that time) and the dominant idea of the centrality of political representation, none of them used referendums.

However, popular votes had already been used in the early 1970s accessions. Both IE and DK joined the ECs after the referendums. The Irish one was held on 10th May 1972 (turnout was 70.88%, with an 83.09% approval nationwide and the majority of the population

supporting the adhesion in each county); the Danish referendum took place on 2nd October 1972 (turnout was 90.14%, with a 63% approval rate of the valid votes). The UK did not have a referendum at the moment of the accession but organised one a few years later to decide whether to stay (see §4.2). Notably, Norway held a referendum to join the ECs in September 1972, when a small majority of voters (53.5%) decided to stay out. The same result was confirmed in a subsequent referendum in November 1994.

No referendums were held in EL, ES, and PT in the 1980s, although in the same years, the Spanish people decided directly to remain in the NATO Treaty.

It was, however, with the 1990s and the 2000s accessions, with a specific relevance in Central and Eastern Europe, that referendums became the protagonists of the decision to join the EU (Albi 2005). The first round saw AT (June 1994[6], where the decision to join the EU was procedurally equalised to a total constitutional revision, thus requiring also a referendum), FI (October 1994[7], although proposed for wider popular legitimacy and not as a constitutional requirement for the adhesion) and SE (November 1994[8]), together with Norway, as stated. This wide use of a referendum at the moment of the adhesion was confirmed in the enlargement of 2004, where almost all candidate Member States (excluding CY and later BG) involved the population directly in the decision: MT (March 2003[9]), SI (March 2003[10]), CZ (April 2003[11]), HU (April 2003[12]), LT (May 2003[13]), SK (May 2003[14]), PL (June 2003[15]), EE (September 2003[16]), and LV (September 2003[17]). This occurred again in HR (January 2012[18]).

Interestingly, the role of the referendum in these cases varied from country to country.

In HU the referendum was foreseen by a constitutional amendment that explicitly mentioned requiring the popular vote for accession to the EU[19]. In EE, accession to the EU was approved by the people together with a supplement to the constitutional amendment supporting it. In RO in 2003 (some years before the formal adhesion) a popular referendum confirmed the constitutional amendment already passed by parliament that contained, inter alia, the principle according to which the participation in NATO and the EU would not require a further referendum.

As can be seen, most of these referendums registered a low turnout, with HU and HR well below 50%. However, research has shown how the voting behaviour on these matters has been far more aware and strategic than generally expected (Hobolt 2009).

[6] 66.6% in favour, with a significantly high turnout of 82.3%.
[7] 56.9% in favour, with 74% turnout.
[8] 52.2% in favour, 82.4% turnout.
[9] 53.6% in favour, 91% turnout.
[10] 89.6% in favour, 60% turnout.
[11] 77.3% in favour, 55% turnout.
[12] 83% in favour, although with a turnout of only 45% of the eligible voters.
[13] 91.1% in favour, 63% turnout.
[14] 92% in favour, 52% turnout.
[15] 77.45% in favour, 58.85 turnout.
[16] 66.8% in favour, 64% turnout.
[17] 67.5 in favour, 73% turnout.
[18] 66.27% in favour with the lowest turnout of these referendums: 43%.
[19] Article 79 of the Hungarian Constitution of the time.

1.2.Referendums to leave

The main reference to referendums on leaving the EU is Brexit in 2016. However, it was neither the first with this aim nor the first to succeed.

First in this category was the advisory referendum on whether to remain in the ECs held in the UK on 5th June 1975 (67% approval, 64.62% turnout).

Moreover, **the first successful referendum** to leave the ECs is often overlooked. It concerned not a full Member State, but a relevant part of it: the reference is to **Greenland**, which decided to **call for a referendum on remaining in the ECs after gaining home rule from DK** (Kochenov and van den Brink 2016). The referendum was held on 23rd February 1982 and a slight majority of the votes (53.02%, with a turnout of 74.91%) voted to leave. However, subsequent negotiations established a special status for Greenland, which is now considered among the overseas countries and territories having important trade agreements with the EU, particularly regarding the fishing industry.

Moving on to the Brexit vote, as it is well known, the referendum was not constitutionally mandatory, but it was called by the conservative leadership with a solid expectation of a good margin of victory for remaining. On the contrary, a majority of 51.89% (with a turnout of 72.21%) decided to leave. The subsequent ***Miller*** **litigation before the UK Supreme Court**[20] clarified further the advisory role of the popular vote, and the final decision to leave was made by the Parliament. Even after that decision, a debate continued on the possibility of revoking the decision to leave. **The CJEU stated the conditions to do so**: a request in writing to the European Council before the full effect of the UK's withdrawal and the integral restoration of the UK membership as it was before[21] (Martinico and Simoncini 2020).

1.3.Referendums to change EU treaties and agreements

Some Member States require compulsory referendums (or consider the possibility to call for them) **to finalise EU treaty amendments**. This happens in IE, where amendments to EU treaties concerning the essential scope and objectives of the ECs/EU are similar to a constitutional amendment and must follow the same procedure as a necessary popular referendum. This is the result of the so-called Crotty test, an evaluation named after the landmark *Crotty v. An Taoiseach*[22] case concerning the Single European Act and more recently refined on the occasion of the *Pringle* litigation[23]. The application of this test led to referendums in IE to ratify the SEA and the treaties of Maastricht, Amsterdam, Nice, and Lisbon (twice). A negative result of the test would allow modifications to the treaties concerning non-essential elements without having to call a referendum, as happened in the case of the modification of Article 136 TFEU.

[20] UK SC, *R (Miller) v. Secretary of State for Exiting the European Union*, 24th January 2017.
[21] CJEU, Case C-621/18, *Andy Wightman and Others v. Secretary of State for Exiting the European Union*, 10th December 2018.
[22] Irish Supreme Court, *Crotty v. An Taoiseach*, IR 713, 9th April, 1987.
[23] Irish High Court, *Thomas Pringle v. The Government Of Ireland, Ireland And The Attorney General*, No. 3772P, 17th July 2012.

Apart from IE, there have been significant precedents where referendums were held for the ratification of treaty amendments, especially in DK (SEA, twice for Maastricht, Amsterdam) and FR (Maastricht). However, the most famous application of a referendum to this field was in 2005 concerning the Constitutional Treaty, with a negative outcome in NL and FR and a positive outcome in SP and LU (the latter held after the ratification process was endangered by the French and Dutch results)[24].

In other Member States, referendums to ratify amendments to EU treaties are not mandatory, but they may be triggered in specific cases upon request of selected national institutions.

For example, Article 10a(2) of the CZ Constitution states that the ratification of international treaties, including EU ones, is approved by the Parliament unless a constitutional act requires a referendum on the matter. Similarly, Article 84(5) of the BG Constitution enables the Parliament to trigger a referendum. In HR a referendum can be called for the ratification of treaty amendments, but only when such a decision is made in the framework of a constitutional amendment (Article 87). In DK, referendums on EU amendment treaties are a possibility when the Parliament fails to reach the supermajority of five-sixths of its members and the same Parliament decides (in agreement with the government) to do so. In AT a referendum is necessary should the content of the treaty amendment be considered equal to a total revision of the constitution, as happened at the adhesion. However, this was neither the case with the Constitutional Treaty in 2005 nor the Lisbon Treaty, which were ratified via legislation.

Slightly different is **the case of FR**, where bills authorising the ratification of international treaties fall under the general clause according to which a referendum can be called based on Article 11 of the Constitution. According to this general provision, referendums can be called by the president of the republic or by parliament regarding an extensive list of matters. This procedure was followed in several cases, including the ratification of the Maastricht Treaty and the Constitutional Treaty. In PL, based on Article 90 of the Constitution, the ratification of specific international treaties (concerning the transfer of competences to international organisations) follow an extremely rigid procedure, which is even more complex than constitutional amendments. This procedure may include a referendum if the absolute majority of the lower chamber requires it.

Additional constitutional provisions identify specific fields in which the development of the EU would require a national referendum. This is the case in the accession of new members (Article 88-5 of the French Constitution, whose second paragraph allows bypassing the referendum upon the decision of the houses of Parliament by qualified majority[25]). This constitutional provision confirms an approach that FR has already followed on the occasion of its approval of the 1972 referendum concerning the enlargement of the ECs to DK, IE, and the UK.

In addition, the European Union Act 2011 of the UK foresaw a long list of cases in which a referendum was mandatory. This procedure would have included the decision to join the euro area, the extension of QMV and ordinary legislative procedure, and the removal

[24] Many other States approved the ratification of the Constitutional Treaty in their parliaments, not only before the referendums in FR and NL (LT, HU, SI, IT, AT, EL, BE, EE, SK), but even afterward (LV, CY, MT, LU, FI). In DE the procedure had votes before (in the Bundestag) and afterward (in the Bundesrat).
[25] This second procedure has been followed in the only case that has occurred so far (HR).

of border control under the Schengen Protocol. Interestingly, in these cases, the referendum would have followed (and not replaced) a parliamentary approval.

Occasionally, some Member States have deferred to popular referendums for decisions on specific issues related to EU membership. This has been the case with joining the euro area (DK in 2000 and SE in 2003[26]), the ratification of the Fiscal Compact (IE in 2012), the European Patent Court (DK in 2014), the JHA opt-out (DK in 2015), the bailout terms proposed by the troika to tackle the country's government debt crisis (EL in 2015), the association agreement between the EU and Ukraine (NL in 2016), and the refugee quotas (HU in 2016).

The case of an advisory referendum indicating institutional reforms of the EU is also notable. As a founding Member State that based its membership on a "silent" constitutional adaptation (Lupo and Piccirilli 2017) and an explicit exclusion of the popular referendum on international matters (Article 75 of the Constitution), **Italy did not hold a referendum at the time of the adhesion or for the ratification of treaty amendments**. In the first and long phase, this lack of popular involvement did not affect the support for European integration, and until the mid-1990s, Italy regularly had the highest results in the Eurobarometer polls on the citizens' evaluation of the benefits of European membership. However, the ever-present federalist tradition in Italian society, due also to the contribution of Altiero Spinelli, led to the exploitation of this popular support to push the European project a step further. **An ad hoc constitutional law was passed in 1989 to establish an advisory referendum to be voted on the same day as the EP elections. The referendum asked the Italian people to support a constitutional evolution of the ECs** (as they existed at the time) to transform them into a proper Union with a government responsible to the EP, which was mandated to draft a European Constitution to be ratified by all Member States. Although this occurred in the past, the precedent cannot be underestimated. It succeeded with an 88% approval and a turnout higher than 80%.

In conclusion, **the role of referendums on European integration not only depends on the context of the individual Member State, but also on the direct involvement of the people**.

In light of their evolution**, referendums have become almost unavoidable when approving a new accession, legitimising a decision** that also has an impact on the concept of citizenship (since Maastricht, only 2 of the new 15 states did not hold one).

On the other hand, instead of establishing the necessity for a referendum to leave the EU, the Brexit precedent (and court cases that emerged from it) stressed the intertwining of EU law and national constitutional principles.

As for the third category, it is notable that in very few cases have constitutions or national legislation been amended to anticipate a necessary referendum for the ratification of treaty amendments or for the accession of a new state. **National legal orders avoid requiring a referendum, preferring to leave open the possibility of calling them whenever the political and institutional situation is favourable**. In the general lack of agreement about the role of direct democracy in the EU Member States**, a common point has emerged**: **the instrumental**

[26] In contrast, LV, EE, and HR joined the common currency area without referendums.

use of referendums made by political majorities, confirming that the distinction between direct and representative democracy is more doctrinal than real.

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The principle of participatory democracy – Despite its discontents

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1. The turn to participation

At this juncture, "the peoples of Europe" arguably have unprecedented means and instruments to engage with conversations at the heart of political decision-making and governance (cf. Art. 1 TEU). **A growing consciousness on the value of universal participation and the rights of previously marginalized groups** (such as minorities, youth, children, women, non-citizens and migrants) **to contribute to decision-making in a globalized world,** prominently tied to the advancement of education, has propelled the re-conceptualization of concepts such as democracy, participation and rights. This development has also manifested in an increased appetite in Europe for more direct or innovative forms of involving citizens, civil society and other non-state actors in political decision-making and governance, sometimes dubbed as the "participative turn" or "deliberative wave" (e.g. OECD 2020). At the same time, growing apathy towards traditional participation mediums in Europe as well as serious challenges to democratic institutions and practices have been observed and widely debated (e.g. Daly 2019; Oxenham 2020). While the discussion surrounding EU democracy deficits traditionally center on the challenges posed by the multi-level setting and the specificities of EU governance (for an overview of the vast literature, see Craig 2021), such concerns are aggravated when confronted with a deepened crisis of democracy at the national level. Democratic backsliding within Member States (Pech and Scheppele 2017), the rise of populism (Urbinati 2019) and continued disinterest amongst youth to engage in traditional representative democracy mediums such as joining political parties (Dahl et al. 2018) has been prominent. Connected to these trends are the technological advances of the last decades impacting how information and knowledge is generated and shared, as well as how social connections and preferences are formed. Although potentially empowering to citizens, digitalization has created a vulnerability to misinformation, a risk of echo-chambers, rabbit-holes, challenges of inclusivity in content generation, not to mention the particular problems tied to an ever-expanding attention-economy (e.g. European Commission 2024; Wu 2016), especially for younger generations (Kidron et al. 2023). **Participation choices in such circumstances understandably raise concerns.**

While the increase in experimentation with more participatory democracy practices across Member States as well as at the EU-level certainly respond to these developments, **the tenet of a democracy *by* the people and not just *for* the people, is closely linked to a specific view of political and civic participation as both a natural manifestation and an ideal of individual and collective life which dates back to Athens**. Any conversation on "participatory democracy" in this context, whether at the national or EU level, inevitably then gets drawn into the question of definition. What do we mean with "participatory democracy"? A clear definition is no easy task, nor uncontroversial (Pateman 2012). Nevertheless, the last decade has seen a distinct uptake of "participatory democracy" as a concept being deployed to define an array of EU institutional related practices (Golmohammadi 2023); petitioning the Parliament, complaining to the European Ombudsman, participating in citizens' initiatives, organizing conferences, break-out events and various dialogue activities as well as participating in Commission consultations have all been labeled as expressions of participatory

democracy in the EU (e.g. European Union Youth Portal 2022). However, if participatory democracy is suddenly everywhere in the broad sense – the vagueness and dilution of the term implies it also nowhere, in any defining sense. Despite the increasing practices and arenas that are being labeled or promoted as "participatory democracy", there is also disagreement about whether such practices qualify for the label (it may be participatory, but is it democratic?) (e.g. Bailly 2023).

This contribution advances a definition of participatory democracy in the EU which is based in law (cf. Golmohammadi 2023). **The EU legal order, has the unique feature on the European continent of having "participatory democracy" as a constitutional principle enshrined in the Treaties**. Establishing this principle and its imperatives as a starting point for discussing and assessing EU participatory democracy allows us, not to erase dissensus on participatory democracy in the EU, but to potentially move dissensus to a different -and more fruitful- set of questions which in turn may promote learning about how a more participatory EU democracy can be advanced. **After briefly elaborating on the path to and content of the principle of participatory democracy, a few concluding remarks follow on how the principle may contribute to shifting dissensus on public participation in the EU to new arenas**.

2. The thorny path to constitutionalizing participation

The Lisbon's Treaty's democratic principles have been hailed as a framing of democracy for institutions beyond the state which are neither apologetic nor utopian, but plausible and viable (von Bogdandy 2012). At the same time, the articles have been criticized for being poorly drafted (Mendes 2011b), without clarity as to the relationship and linkages between them or precise links to democratic models, and thus portrayed as an "accidental meeting" between representative and participatory democracy (Smismans 2006: 131) or an "arbitrary smorgasbord" of instruments and mechanisms promoting participation and transparency (Rose-Ackerman et al. 2015: 236). The various perspectives on the current EU framing of democracy mirror the vigorous debate on EU democracy leading up to the drafting of the Lisbon Treaty which matched the dynamic shifts and reforms of the EU itself.

Historically, the raison d'être for participation in the EU governance structure was instrumental and focused on participation as a means to enhance efficiency. While participation in the form of interest-representation was a constitutive feature of EU decision-making - traceable across the practices of committees, agencies, regulatory networks and the Commission throughout the foundational period of the Union leading up until the establishment of the Single Market- it was viewed as a remedy of administrative deficits rather than democracy ones, addressing the limited resources and enforcement capacities of EU administration (Mendes 2011a). As debates on the European democratic deficit came more to the fore, one of the problem-solving approaches emerged to address this deficit was a turn to civil society with demands for enhanced civil society participation (Kohler-Koch et al. 2013). The question of what role citizen and interest-group participation should play in the political process paved the way for a normative body of literature (Saurugger 2008). Following the purposeful activities of political, bureaucratic and academic actors, the "participatory norm" in the EU emerged which led to an acceptance of civil society involvement in decision-making processes (Saurugger 2008). As participatory democracy entered the discourse, it did so ambiguously with regard to who the main participation protagonists were (Grevén 2007). As

some scholars have noted, **European integration literature frequently equated participatory democracy with civil society rather than citizen involvement** (Grevén 2007) **whereas the Commission (and other scholars) in turn equated civil society with interest groups of all types**, leading to accusations of epistemological sliding and "lip service" to participatory democracy and the role of civil society. (Smismans 2006: 137).

A *principle* of participatory democracy first surfaced when the Secretariat of the Convention put forth a series of articles on the democratic life of the Union, which included an article on "participatory democracy," (Article 34, Draft Title VI of the Constitutional Treaty 2003) and linked the proposal to the ongoing debate on how to bring the EU closer to its citizens (Bouza Garcia 2015: 80). While the proposal was generally well-received, during the drafting process, differences emerged between organizations as well as members of the Convention regarding the notion of civil society including the role of citizens in the civil dialogue (Bouza Garcia: 105). On one end, the opinion was expressed that the dialogue should be expanded to "literally everyone", particularly citizens, while on the opposing, dialogue with organized civil society, preferably a structured one was to be strongly preferred (Kohler-Koch et al. 2013: 36-37). Furthermore, strong calls from interest groups and civil society, with the somewhat grudging assent of the Commission, led to legal grounding to the consultation practices in place (Kohler-Koch et al. 2013; Golmohammadi 2023). Regardless of these differences, and although "the Constitutional Convention was not a body that engages in theoretical reasoning" (Kohler-Koch 2008: 66), the evolving draft built on debates from the preceding decade which had drawn from deliberative, direct and associative versions of democracy (Busschaert 2016). **The Lisbon Treaty constitutionalized a participatory norm oriented towards bringing the citizens closer to the Union clearly rooted in an understanding of participation beyond a narrow functional purpose, while placing it as a complement to representative democracy** (Mendes 2011b). "**Participatory democracy"** in the process of being constitutionalized therefore emerged as an inclusive concept **encompassing many of the main elements of deliberative democracy while holding true to the core tenet of democracy by the people**; deliberation was emphasized as a complement to voting, citizens and civil society emerged as political actors and the intrinsic value of participation was re-enforced (Golmohammadi 2023).

Following its adoption, the years following the ratification of Lisbon Treaty did little to lessen the debates on democracy in the Union. Early on, scholars noted that while the democratic principles, including Article 11 TEU, fell short of aspirational expectations of institutionalizing citizen engagement, public participation beyond the ballot-box was now for the first time explicitly linked to democracy in a constitutional setting (Kutay 2015; Mendes 2011b; Cuesta Lopez 2010). **A number of developments spurred this debate forward, often related to the legitimacy of EU procedures in direct response to a series of (real or perceived) crises**; the euro crisis, the refugee crises, Brexit, the Covid-pandemic, rule-of-law and political crises in Member States, a climate crisis and a war once again on European soil. Against this background, four developments post-Lisbon, which have generated particular controversy, have specific bearing on an understanding the context and potential import of the principle of participatory democracy (cf. Golmohammadi 2023). The first is that the rule of law crises, emphasized how the rule of law and democracy are mutually supportive, including how the rule of law flows from democratic practices (Jakab 2022). In this context, the interdependent nature of democracy at the EU-level and democracy at the nation-state was once again highlighted, prompting discussion and contestation on the potential to bring the EU values such as democracy, including through the Treaty's democratic principles, before the

Court (von Bogdandy and Spieker 2022). **The second development is that, despite strong focus pre-Lisbon, on configuring democratic participation through the lens of civil society and interest-representation, citizens emerged more strongly into focus as participation protagonists** (e.g. Hierlemann et al 2022). The Europeans Citizens Initiative (ECI) which attracted scholarly, activist and citizen attention, coupled with a small but distinct body of case law, contributed to this as well (Golmohammadi 2023). In addition, calls were renewed for including citizen perspectives into the law and policy-making apparatus, including engaging more citizens or groups through the Commission consultation regime, including "citizen narratives", expanding upon direct engagement with citizens through citizen dialogues and consultation as well as the practice of mini-publics (e.g. Hierlemann et al. 2022; European Court of Auditors 2019). The latter has a prominent position during the Convention on the Future of Europe and has since been integrated by the Commission into its law and policy-making. Reactions to these developments have been somewhat skeptical of their current potential for enhancing democratic legitimacy, while underlining that further experimentation and improvements over time might allow for the practice to rise to a participatory democracy contribution (Nicolaïdis et al. 2023). However the increasing focus on citizens has also brought again to the fore the sense that the legal framing for democratic participation beyond elections is inadequate with renewed calls for Treaty reform and a permanent EU citizens assembly (e.g. Nicolaïdis et al. 2023).

The third development relates to lobbying in the EU. The important role that interest-groups plays for governance outcomes in the EU in terms of knowledge contribution is widely recognized (Mendes 2011a: 111-112). While it is well-known that the types of interests that mobilize around policy areas depend on sociological and historical institutional factors, systemic imbalances of access and influence persist. More than half of permanent lobbyists in Brussels represent business interests (Coen et al 2021: 9). In addition, a recent OECD study on lobbying practices, including in relation to the EU, highlight widespread unethical practices of lobbying and their effects, especially on major global challenges (OECD 2023). This highlights the problem with ascribing to lobbying the virtue of democratic participation and the challenge of finding its place in a participatory democracy framework or contributing to the virtue of deliberation. Efforts to address and regulate interest mediation in EU affairs, and closely related to the obligations laid out in Article 11 TEU, also led to the establishment of the Transparency Register. And while many agreed the Registry represents a crucial step forward, there was also strong support for the view that it remained largely inadequate (Nicolaïdis et al. 2023; Greenwood and Dreger 2013).

The fourth and final development regards how the EU legislative process has evolved which has triggered further dissensus as regards public participation and access to EU decision-making. The tendency to delegate to either the Commission, committee bodies, regulatory agencies or standardization entities, difficult, controversial or significant features of legislation on which no clarity or consensus exists between the main legislative actors – has often persisted (Golmohammadi 2023: 80). **Institutional deal-making within the ordinary legislative procedure overwhelmingly took place in trilogues - calling into question the democratic legitimacy of these proceedings** (e.g. Case T-540/15 De Capitani) These developments coincided with the Commission's increased focus "better law-making" (currently under the label "The Better Regulation Agenda") which stresses evidence-based law-making, part of a broader global regulatory trend. Consultations were integrated into the impact assessment, a technocratic process centered on evidence collection and evaluation (Meuwese

2011). Additionally, consultation access-points were streamlined through a digital access point, the Commission's consultation "have your say" website. Different actors have been established to review the quality of impact assessments, including its participatory element of consultations, with debates following on what kind of regulatory review would be appropriate (Meuwese 2017). **With these developments and shifts of influence in legislative and policy-making to new arenas; non-state actors seeking to access and influence EU action gravitated along, often at unequal paces**. While participation as lobbying did not seem to suffer, participation grounded in democratic legitimacy it has been argued, remains elusive (Alemanno 2020).

3. Participatory democracy from the EU legal perspective; voice, dialogue, consultation, citizens' initiative and the right to participate in the democratic life of the Union

Since the Lisbon Treaty the constitutional framing of EU democracy now features a principle of participatory democracy alongside representative democracy. This marks a turning point not only for the EU legal order but more broadly for the framing of democracy on the European continent (Golmohammadi 2023: 97). **The principle of participatory democracy is primarily located in Article 11 TEU and Article 10(3) TEU which grounds participation (beyond elections) as a democratic cornerstone.**

The provisions of Article 11 TEU and Article 10 (3) TEU establish normative standards which are binding on the institutions (Mendes 2011b). For Article 11 TEU these can be headlined, in chronological order, as voice, dialogue, consultation and citizens' initiative (Golmohammadi 2023: 98) These four points deal with participation instruments in EU governance with different addressees (Lock 2019). While these mechanisms vary with respect to their immediate aims, as participatory democracy instruments they should all be viewed as serving to enhance citizen engagement with the Union and its institutions (García Macho 2013).

The first point requires the institutions to, "by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" (11(1) TEU) and the second that the institutions maintain "an open, transparent and regular dialogue with representative associations and civil society" (11(2) TEU). **The obligation to give voice and institute dialogue combine to a duty to establish a framework for ethical and transparent interest representation**, which is partly operationalized by the binding inter-institutional agreement on the Transparency Registry and related Commission decisions, entailing specific engagement and disclosure obligations (e.g. Article 11 (1) (2) TEU, Inter-institutional Agreement on mandatory transparency registry 2021; Commission Decision 2014). It further implies these institutions are obliged have a dialogue with some regularity and structure.

The third point of Article 11 (3) TEU states that the Commission "shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent". Protocol (No 2) on the application of the principles of subsidiarity and proportionality further clarifies that, except for areas of exclusive competence, consultation is a must for law-making with only "exceptional urgency" as a legitimate exception (Article 2 Protocol No 2.) Other constitutionally enshrined principles, such as transparency and equality, as well the stated goal of consultation in "ensuring" transparency and coherence, combine to establish an obligation to provide consultation feedback and

actively promote equality of access to consultation opportunities to ensure the "parties concerned" mentioned in the article are reached (Article 11(3) TEU; Article 10(3) TEU; Article 9 TEU; Article 2 TEU).

Before adopting a proposal, the Commission is further obliged to conduct public consultations in an open and transparent way, ensuring that the modalities and time-limits of those public consultations allow for the widest possible participation, as well as conduct internet-based consultations (11 (3) TEU; Interinstitutional Agreement of 13 April [2016] on Better Law-Making, COM (2002)704 final). This duty also provides the floor, for the exercise of citizens' rights to know and attempt to make their views known in relation to legislative proposals according to Article 10(3) TEU. This duty also applies to EU-rule-making and key policy initiatives. Crucially the Commission shall provide consultation feedback which details the reasoning of whether and how contributions have impacted the proposal (following, inter alia, from Article 11(3) TEU; 11(2) TEU; Article 15(1) TEU; Article 10(3) TEU).

The last point of Article 11 TEU provides citizens with the right to prompt the Commission to submit a proposal for legislation – provided the citizens number at least one million (the ECI) (11 (4) TEU). Now fleshed out through relatively recently reformed secondary law, has become one of the most visible and readily justiciable elements of the principle in question.

In addition, Article 10(3) TEU stipulates that "every citizen shall have the right to participate in the democratic life of the Union" and "decisions shall be taken as openly and as closely as possible to the citizen". Article 10(3) TEU should be understood as an overarching right relating to both representative and participatory democracy (Golmohammadi 2023; Grimonprez 2020; C- 57/16 P ClientEarth). To the degree it refers to participatory democracy it includes the right to access information about the EU legislative process and attempt to influence it. This legal right entails the opportunity to scrutinize legislative documents and information relating to EU law-making "in good time" in order to attempt to influence that process, so far as both the Commission's decision to submit a legislative proposal and the content of that proposal are concerned (C-39/05 P and C-52/05 P Sweden and Turco v Council paras 44-45; Case C- 57/16 P ClientEarth para 84; see also Article 15(1) TFEU).

Recent scholarship also highlights that the boundaries of the "the democratic life of the Union" mentioned in Article 10 (3) TEU are not confined to the EU-level (Golmohammadi 2023: 124-131; von Bogdandy and Spieker 2022). This means that following the principle of consistent interpretation, national actors are obliged to interpret national law in light of citizens right to participate in the democratic life of the Union. To the degree this "life" is happening through or within national structures, this citizen right is activated. The right would could therefore be applicable to direct forms of engagement with Member State institutions and agencies to the degree they are acting in a (quasi) EU legislative or EU rule-making capacity. Relevant national law which could be informed by the EU principle of participatory democracy, could include transparency, participation in law-making (e.g. for negotiation and implementation) and digital rights. Other areas included in the democratic life of the Union would include e.g. the citizen panels which the Commission has begun to streamline into its policy-cycle and stated as a new regular feature of the democratic life of the Union. (Commission 2023).

4. Concluding thoughts; shifting dissensus to new arenas

For each of the rights and duties elaborated in the previous section, the question of participation "ifs" revert to questions of how such duties are operationalized, promoted or indeed enforced (including through judicial review) as well as to what degree current practices align with the legal framework. The constitutional anchoring of democratic participation beyond the ballot-box, for instance, provides an important counterpoint to debates on the requirements of public participation in times of crises. Consultation obligations flowing from the principle of participatory democracy means e.g. Commission discretion is not just influenced by self-imposed guidelines, but by Treaty articles and primary law which is a procedural democratic guarantee. **This legal framing also potentially shifts the arena for dissensus to the Courts (with juridification itself controversial) or soft-redress mechanisms such as the EU Ombudsman's procedures**.

As regards the vertical dimension of the principle of participatory democracy i.e. the obligation of Member State actors to interpret national law in light of the right of citizens to participate in the democratic life of the Union - this adds a legal dimension and some teeth to the Commission's 2023 recommendation (as a part of its Defence of Democracy Package) for Member States to establish participatory and deliberative democracy infrastructure at the national level (Commission 2023) as well as overall greater burden sharing for democratic participation in the EU. With a new understanding of the legal framework applicable, such recommendations, depending on applicable national law, could very well be transmuted in light of the principle of participatory democracy, to binding obligations - in turn opening up new areas of debate. **The principle of participatory democracy is no panacea** for the participation challenges facing the Union. However, **through its legal force, it is an unfulfilled tool with potential to advance the conversation and learning about EU political participation beyond the ballot-box.**

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PART II

DEMOCRATIC INSTRUMENTS AND PROCEDURES IN THE EU DURING THE PANDEMIC EMERGENCY

The state of emergency as the new political normality. A critical assessment

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1. Introduction

After the fateful night of the **attacks of November 13th, 2015 and the fading away of the Covid-19 pandemic in July 2022, France lived under a state of emergency (SOE) for 53 of the 81 months that had elapsed**: first, a state of anti-terrorist emergency (November 2015- November 2017) and second, a state of sanitary emergency (March 2020-July 2022). These two recent states of emergency have differed from previous experiences of this derogatory regime, and have marked a new age for SOEs. **Firstly, they were marked by an intense use of the special powers endowed to the executive branch by the state of emergency**. It is estimated that around 10,000 measures were taken on the basis of the state of emergency between 2015 and 2017 (more than 4,000 administrative searches, just under 1,000 house arrests, etc.); and, as for the measures taken under the sanitary state of emergency, they were just as numerous, ranging from confinement measures to curfews to closures of establishments open to the public (schools and universities, shops (essential and non-essential), sports halls, places of worship, parks and winter sports resorts, etc.) and other teleworking arrangements. **Secondly, both these recent experiences of SOEs were long-lasting: the first one ended just before its second anniversary, a milestone that the second one exceeded by a couple of months**. Intense and long-lasting, the recent SOEs are both indicative of a form of routinization of the SOE as a form of government, which has become so entrenched in the legal and political order that it is difficult to bring to an end. Moreover, when a SOE does come to an end, it is often only formally. The expiry on November 1st, 2017 of the last extension period voted by Parliament did indeed put an end to the anti-terrorist SOE; but the day before, the SILT (Homeland Security and the Fight against Terrorism - Sécurité Intérieure et Lutte contre le Terorisme) Act had been promulgated (Loi n° 2017-1510 du 30 octobre 2017), the purpose of which was precisely to transpose into ordinary law - to normalize - four of the key measures of the state of emergency[27]. As for the sanitary state of health emergency, it was repeatedly modulated and lightened but never lifted for over two years, thus confirming the executive's reluctance to put it to an end. Under these conditions, it is legitimate to question the costs of the SOE which has been elevated to the rank of a new paradigm of government: **taking stock the two recent experiences and drawing lessons from them** are necessary prerequisites if we are to equip ourselves with the means to design the conditions for democratic management of future crises which are bound to come, if not already present.

2. The state of emergency

By definition, a SOE leads to a **tightening of the regime of rights and freedoms**; but this classic or mechanical effect of a SOE is all the more aggravated that it **lasts longer**. A SOE that only lasts a few months generates circumscribed and temporary restrictions; but one that lasts two years (as was the case, both times, in France) spreads throughout the legal system and comes to be used for a variety of reasons, well beyond those which originally triggered

[27] These four measures are: house arrest orders, house searches, security perimeters and administrative closure of places of worship.

the activation of the SOE. For instance, from the end of November 2015, the anti- terrorist SOE had been used as the basis for the house arrest orders targeting environmental activists who had planned mobilisations as part of COP21 to be held in Paris. When these orders were judicially challenged, the Conseil d'Etat (supreme administrative court) ruled that there was no rule requiring «a link between the nature of the imminent danger or public calamity that led to the declaration of the state of emergency and the nature of the threat to public security and order likely to justify a house arrest measure» (Conseil d'Etat, Section, 11 déc. 2015, n° 394990). Therefore, the SOE effectively served as a valid legal ground for house arrest orders directed towards persons who had no link with terrorism. Later on, the SOE also served as the legal ground for restrictions on the freedom to demonstrate (during the 2016 protests against an employment legislation reform), policing measures prompted by the Nuit Debout movement, operations to dismantle camps of migrants in the Calais region, etc. (Hennette-Vauchez et al. 2018). **Long-lasting SOEs thus raise important challenges because they fail to be confined to combating the reasons that initially triggered their activation and thus, get out of hand.**

Furthermore, the routinization of the SOE as an acceptable paradigm of government is part of a process of semantic corruption of the words that express rule of law and democratic standards. Surely, it is neither new nor extraordinary for regimes to make provision in their constitutions for mechanisms enabling the State to respond decisively in the event of imminent danger. Historically, such mechanisms were traditionally analysed through the **conceptual lens of the « state of exception »,** generally defined, notably by Carl Schmitt, as involving a suspension of the legal order (Schmitt 1922): in circumstances described as exceptional by the sovereign, the normal course of events was suspended and political decision-making was effectively freed from the constraints of the law - just long enough to deal with an extraordinary situation. **But the triumph of the rule of law in the 20th century and its generalization** (evidenced by the fact that it has come to be seen as *the* legal framework of democracy par excellence), **have undermined this concept of the state of exception, for the rule of law means subjecting state action to the rules of law, and potentially *all* state action**. In this respect, this idea of the rule of law is echoed in the words of the French Minister of Justice, Robert Badinter, at the time of the abolition of the Court of State Security in 1981: « the principles of ordinary law, except for the convenience or ulterior motives of those in power, make it possible to deal with all situations involving breaches of State security » (Badinter 1981: 260). But this rule of law paradigm has been significantly altered by the routinization of SOEs since 2015. Far from analysing SOEs as exceptional regimes, François Hollande and Manuel Valls (then President of the Republic and Prime Minister) claimed they were fully compatible with and respectful of the rule of law; they even claimed SOEs were necessary to the preservation of the rule of law. In their words, a SOE as « fully in keeping with the rule of law »; it is a « modality of application » of the rule of law (Champeil-Desplats 2018: 40-41). The minister of Interior Bernard Cazeneuve sang along, maintaining that « the state of emergency is not a state of exception. It is *part of the rule* of law » (Seelow et al. 2016). This discourse on the compatibility of the state of emergency with the rule of law conveys the idea that the brutal, authoritarian SOE of yesteryear has been replaced by the soft, "democratic" form of the SOE. But such a discursive move is problematic: while the SOE is presented as having conformed to the rule of law, a close, concrete analysis of its repeated implementation reveals that, rather, an opposite movement is at play: just as much as (if not more than) it has domesticated the SOE, the rule of law adapts to it, without managing to contain or control it, especially when it becomes entrenched over time. **The SOE has, indeed, led to redefine certain central categories of**

the rule of law. House arrest orders, which have been of the key measures of the anti-terrorist SOE from 2015 to 2017, provide an enlightening example.
Such order are administrative measures taken by the prefect without any prior judicial investigation or conviction. They can prohibit the person concerned from leaving their home, for instance, between 8 p.m. and 8 a.m.; they are generally accompanied by an obligation to report to the police station two to three times a day. As such, the system of house arrests was challenged before the Constitutional Council during the anti-terrorist SOE. One of the questions the Conseil had to address was the determination of whether house arrest orders were measure which *restricted* or *deprived* people from their freedom of movement. Had they been construed as deprivations of liberty, they would have had to be amenable to judicial review - for the Constitution names judicial courts as the guardians of individual freedom.

But the Constitutional Council ruled that « deprivation » of individual freedom occurs when a given measure exceeds 12 hours a day. Below that threshold, the measure merely restricts liberty, and it is acceptable for only the administrative courts to have jurisdiction. The Council thus opportunely picked timely positioning of the criterion for distinguishing between measures restricting and depriving liberty, in a ruling that illuminates the ways in which SOEs have an effect of shaping of permanent categories of law, and hence on the rule of law (Conseil Constitutionnel, 22 déc. 2015, Décision n° 2015-527). In other words, the SOEs are not merely a form of parenthesis which, once closed, would allow a return to the *status quo ante*.

3. The outlook: a state of emergency and democratic crisis management

What is at stake in the trivialization of the use of a SOE? Is it suited to future crises, which we know will inevitably arise? It is doubtful, particularly since SOEs tend to be used to deal with threats that are more structural than sudden and temporary (Gross and Ní Aoláin 2006). And yet the semantics of the SOE are spreading. The UN Secretary-General, for example, has called on states to declare a state of climate emergency (United Nations 2020). Is this relevant? The lessons we learn from recent experiences of SOEs allow us to **reflect on the conditions and procedures for the democratic management of situations of crisis. At *the very least,* this means rethinking two particularly important issues: the regime of freedoms and the regime of responsibility**.
SOEs relegate the cause of fundamental rights and freedoms. Given the consubstantial links between democracy and freedoms, such a situation of permanent curtailment must be taken at face value. Hence a first line of thought directed towards the reaffirmation of a genuine culture of freedoms, the first requirement of which would be to counter the rhetoric that seeks to pass off restrictions on public and individual freedoms as an obvious necessity.

In a liberal democracy, freedom must be the principle, and restrictions the exception, which must always be precisely justified. The SOE, however, precisely alleviates the constraint of justification that weighs on restrictions on freedoms - and it is this dynamic that needs to be halted. In order to do so, it is necessary that the trap of the discourse that presents SOEs as compatible or even necessary to the rule of law be denounced as a form of mystification.

The permanent state of emergency also reminds us that we need to keep rethinking what we mean by political responsibility, understood here as a constraint on justification. It is important to think about the procedures which, instead of alleviating the demands for justification that weigh on public action in times of crisis, actually reinforce them. Without glorifying it, the British example serves as an interesting illustration. In England, which

cannot be said not to have been widely exposed to the issue of terrorism, there is an independent authority - the *Independent Reviewer of Terrorism Legislation* - to which the government cannot object on the grounds of defence secrecy. Its function is to bring the voices of civil society into the dialogue with the government; this is an important and interesting proposal. In any case, it illustrates the fact that one of the ways in which responsible and democratic government can deal with tomorrow's emergencies is to increase rather than reduce contradiction.

The ever-deeper entrenchment of exceptional law and procedure is not the only way forward; **the affirmation of counter-powers is possible and deserves to be explored** in order to put an end to the Groundhog Day of SOEs.

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The state of emergency in the EU

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1. Introduction

The **state of emergency** is a particular feature of national constitutional systems. It consists of a set of procedures whereby **the normal constitutional rules are put aside** for the time of the emergency and then come back into operation once the emergency has ended. Some 90 percent of all constitutions worldwide contain explicit provisions for how to deal with states of emergency (Bjørnskov and Voigt 2018). When constitutions provide for the establishment of a state of emergency, they acknowledge that a crisis may necessitate "urgent exceptional and consequently temporary actions by the state not permissible when ordinary conditions exist" (Greene 2020: 12). Often, **this means a temporary increase of the powers of the executive branch**, which is considered to be better able to deal with emergency situations, although many constitutional systems provide for checks-and-balances limiting executive rule even in times of emergency (Ginsburg and Versteeg 2021). However, the existence of constitutional rules on a state of emergency still leaves **open the question of when a given crisis will be considered to require the declaration of a state of emergency**. With respect to the **Covid-19 pandemic,** some European countries did not, in fact, resort to the emergency powers that were available under their constitution (Grogan 2020; Vedaschi and Graziani 2022).

The constitutional law of the European Union does *not* contain a general emergency regime. Instead, the EU Treaty rules must be used in good and bad times, in normal times and in crisis times. Therefore, despite what the title of this contribution might seem to convey, **there is no "state of emergency" in the EU legal order, at least not in the traditional meaning of that term**. The absence of such a general emergency regime may be explained by the fact that major emergencies and crises primarily arise at the level of the EU's member states, so that the EU's role is of an ancillary nature, namely to help them dealing with those crises and emergencies. That role might be ancillary but is nevertheless crucial for the success of the European integration project: the degree to which the Union manages to effectively help its member states in such situations has a major impact, either negative or positive, on the resilience of the European integration process. This is reflected in the common narrative that "Europe is forged in crisis" (on that narrative, see De Vries 2023: 872).

The Union helps the member states in dealing with emergencies by using different tools of crisis management which will be briefly discussed below: (i) **by allowing derogations or flexible applications of EU law by the member states**; (ii) **by giving financial assistance** to the states facing an emergency; and (iii) **by taking common measures at the EU level** (whether regulatory or coordinating action) when it appears that common action is a useful or necessary response to the emergencies faced by one, more or all member states. **Taken together, those tools form the EU's "emergency competence"**, whose existence and exercise was **particularly apparent during the Covid-19 pandemic period**, which is the main focus in the following pages.

2. Derogations and flexible application of EU law in the face of an emergency

The first tool available in the EU's toolbox is **to accommodate the member states when they struggle with an emergency**. That accommodation takes the form of a derogation from, or **flexible application of, the rules of EU law** that apply in normal times. A number of such escape clauses are provided by both primary and secondary EU law. A well-known

example is the regime of **escape clauses in the Schengen Code**, which allows the Schengen states to reintroduce internal border controls for a variety of emergency reasons, and subject to a variety of European-level coordination mechanisms (Regulation 2016/399). They were repeatedly used (and possibly abused by some states) during the migration crisis years of 2015 and 2016 and, again, during the Covid-19 crisis in 2020 and 2021.

In the field of state aid, the Treaty contains a quasi-derogation clause in Article 107(3)(b) TFEU, allowing the member states to give **financial assistance** to undertakings when the aid serves to remedy a serious disturbance in the economy of a member state. In this case, the normal conditions for granting state aid are relaxed, but that derogation must be authorised by a decision of the Commission. **This mechanism was used early on during the Covid-19** pandemic to allow for a broad range of state aid measures justified by the need to counteract the negative economic effects of the Covid crisis in specific economic sectors and for specific companies (Temporary Framework 2020). **In addition to this ultra-flexible state aid regime**, the member states were further encouraged to **spend massively and increase their budget deficits by the adoption of a general exemption** from their normal budgetary obligations under the Stability and Growth Pact (Communication 2020; Dermine 2020: 338-341).

3. Financial assistance to states facing an emergency

Article 122, paragraph 2, TFEU provides that the **Council** may decide, by **qualified majority**, **to grant financial assistance** to a member state where that state "is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control". This provision entered primary law through the Maastricht Treaty, as part of the fairly detailed rules on the Economic and Monetary Union that were then included into primary EU law and, possibly, as a counterweight or complement to the no-bail-out clause then introduced and now laid down in Article 125 TFEU.

Prior to the Covid-19 crisis, Article 122(2) had been used in the early stages of the sovereign debt crisis as the legal basis for the European Financial Stabilization Mechanism, the modest EU-law based complement of the much larger, non-EU law based, European Stability Mechanism. In the context of the pandemic crisis, Article 122 was proposed by the Commission, and accepted by the Council, **as the legal basis of the SURE instrument**, offering €100 billion worth of temporary financial support to the national employment support programmes (Council Regulation 2020/672). Later on in the year 2020, Article 122 TFEU served as the legal basis for the **EURI Regulation, the linchpin of the NGEU programme** (Council Regulation 2020/2094). Remarkably, the NGEU programme was not conceived as a mere crisis instrument. It rather aims both at the "recovery" and "resilience" of the national economies, whereby the latter term refers to a myriad of long-term policy objectives, such as green transition and digital transition, which transcend the immediate pandemic crisis context.

The financial assistance provided to all the member states is thus legally justified by the pandemic-related emergency that affected all of them, even though that assistance serves broader policy objectives than the economic recovery from the corona lockdown**. However, the use of Article 122 TFEU as a legal basis of the EURI Regulation expresses the political view of the "frugal" member states** (including Germany) **that the NGEU, despite its broad substantive scope and huge financial means, is a one-off operation triggered by exceptional occurrences** (as the text of Article 122(2) requires).

Article 175 (3) TFEU, a generic legal basis allowing for action that is necessary to strengthen the economic and social cohesion of the Union outside the structural funds**, became**

another tool for emergency funding. It served in 2002 for the creation of the European Solidarity Fund (EUSF). That Fund was intended to offer rapid financial support to member countries facing major natural disasters such as floods or earthquakes; indeed, it was established following the disastrous flooding affecting central Europe in 2002. However, the EUSF was amended in 2020, by means of a very quickly conducted decision procedure, to include major public health emergences within its scope of application, and some funds were allocated to a number of Member States to deal with the health emergency caused by the coronavirus pandemic (Regulation 2020/461; Böhme and Lüer 2020). The same Article 175(3) TFEU served also as the **legal basis for the Recovery and Resilience Facility**, the flagship programme of the EU's economic response to the pandemic (Regulation 2021/241). In this case, the legal basis (which is *not* an emergency competence) was used less for dealing with the urgent economic fall-out of the pandemic and more for supporting the long-term resilience (and cohesion) of the European economy.

4. Common European emergency action

In addition to financial assistance to the member states, **the European Union can also adopt common action at the European level,** which can take the form either of binding regulation or of soft coordination. In both cases, and like for financial assistance, the Union needs a legal basis in the Treaties to justify its action. In constitutional terms, emergency action by the Union can be based on **an explicit emergency competence mentioned in the Treaties**, or it can, more generally, consist in using a generally defined competence to deal with an emergency.

An explicit emergency competence exists in the field of migration policy. Article 78 (3) TFEU states that the Council may adopt by qualified majority provisional measures in the event of one or more Member States being confronted by an emergency situation characterised by a sudden **inflow of nationals of third countries**. This legal basis served, most prominently, for the adoption of the two controversial relocation **decisions of 2015**, whereby the heavy and sudden pressure on the reception capacity of Greece and Italy, caused by the arrival of a large number of asylum seekers and other migrants, was to be temporarily relieved by transferring a number of those asylum seekers to other EU countries where their applications would be examined. The decisions were unsuccessfully challenged by Slovakia and Hungary who had been outvoted in the Council (De Witte and Tsourdi 2018). The Commission also used Article 78(3) in 2020 as the basis for a proposed Council regulation "addressing situations of crisis and *force majeure* in the field of migration and asylum", and, in 2021, for proposing a Council decision that would allow Poland, Latvia and Lithuania to derogate from a number of EU legislative instruments so as to help them "managing the emergency situation caused by the actions of Belarus", as part of a broader EU policy response to the state-sponsored instrumentalization of migrants by Belarus. However, these two initiatives were subsequently merged and integrated within the overall legislative package known as the Migration and Asylum Pact, and adopted in 2024 on the basis of the EU's general migration and asylum competence, rather than as an emergency measure (Regulation 2024/1359; Ineli-Ciger 2024).

What was put in place here is an **emergency management framework that can be triggered when a sudden crisis occurs in the future without the need for additional legislation and without the need to trigger the emergency competence of Article 78(3)**. A similar approach had been adopted in 2001 when the Temporary Protection Directive 2001/55 created a procedural framework to be activated when exceptional circumstances so require. It

took twenty years for this mechanism to be activated for the first time, but in a major way, in order to establish a protection regime for Ukrainian war refugees.

During the **pandemic**, **Article 122 TFEU played an important role as a basis for emergency measures**. As discussed above, its paragraph 2 allows for financial assistance in emergencies. Paragraph 1 of the same Treaty article is a separate legal basis that is formulated more broadly. It is not limited to financial assistance but can also be used for regulatory measures. It is not limited to emergency situations (Chamon 2024) but has mostly been used, at least in recent years, to deal with emergencies. Paragraph 1 states that the Council "may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy". It was used as the legal basis for a broader and permanent EU programme for emergency support when a state is hit by natural or man-made disasters. That Regulation of 2016 was amended in 2020 in order to allow for financial support to pandemic-related health measures taken by the Member States (Council Regulation 2020/521). **Article 122(1) was also used, in the aftermath of the pandemic**, as the legal basis for one of the measures leading to a European Health Union, namely the **Regulation on medical countermeasures** in the event of a public health emergency (Council Regulation 2022/2372). The same legal basis served yet again, in that same year 2022, for a number of EU regulatory and coordinating measures dealing with the energy crisis.

One must also mention **Common Foreign and Security Policy where dealing with emergencies is an important and integral part of the policy agenda**. The EU's institutional **toolbox contains a coordination instrument**, the Integrated Political Crisis Response (Council Implementing Decision, 2018), to be activated in order to put in place **quick responses to foreign policy crises, as happened, for instance, in February 2022, in response to the Russian invasion of Ukraine**.

This being said, the European Union also, quite often, **adopts emergency measures based on generally framed policy competences**. An example during the pandemic was the **regulation**, adopted in **2021**, setting the framework for the issuance of **EU Digital COVID Certificates** (Regulation 2021/953; Goldner-Lang 2021). It aimed at facilitating the exercise of the right to free movement within the EU which was hampered by the adoption of country-specific travel restrictions. Its legal basis was the general competence, conferred in Article 21(2) TFEU, to facilitate the exercise of free movement, but its crisis dimension was highlighted by the fact that its application was limited to one year, from 1 July 2021 to 30 June 2022.

5. Crisis law and the EU's Constitution

It is often claimed that EU emergency politics has given rise to institutional practices that have shifted the institutional balance embedded in the Treaties. At the time of the euro crisis, many political scientists had argued that the EU's response to that crisis implied major changes in the EU's institutional regime, although there was some **disagreement between those who argued that the crisis resulted in the affirmation of the intergovernmental institutions of the EU** (Fabbrini and Puetter 2016**) or, rather, of some of its supranational institutions such as the Commission and the ECB** (Bauer and Becker 2014). **These contrasting views were replicated when analysing the COVID-19 response**, with some authors highlighting the role either of the European Council (Wessel et al. 2022; Van Middelaar 2021) or of the Commission (Kassim 2023). Part of that **disagreement may be**

connected to the moment in time when the assessment is made; the intergovernmental institutions take the lead in formulating the overall political response to the emergency, but the actual policy responses are often taken by supranational institutions such as the Commission or the ECB. The European Council gave very detailed guidance, at its July 2020 meeting, for the EU's economic response to the pandemic, but it did so in close coordination with the Commission (Capati 2024).

Subsequently, when the crisis response was turned into practice, the European Council took a backseat and other institutions (including the European Parliament) took a more prominent role for the adoption of the relevant legislative texts and for their implementation.

EU crisis law is too fragmented along policy-specific and crisis-specific lines to allow for easy cross-crisis comparisons but, to the extent that an overall view is possible**, we are not convinced that the repeated crises have affected the foundations of the EU legal order**. On the contrary, the EU institutions (or, rather, their legal services) have constantly sought to argue and show that **their emergency measures were legally permissible**, even though they occasionally involved unprecedented and somewhat creative interpretations of existing competences. What we do see, in times of emergency, **is changing practice under constant rules** (Schmidt 2016).

This is linked to the fact that **EU constitutional law is both rigid and flexible**. It is (too) **rigid**, in that **it constrains the action of the EU institutions by the need to find a specific legal basis for every measure**, by the continued existence of cases of unanimous decision-making in the Council and, more broadly, by the excessive rigidity of Treaty revision. But, at the same time, **EU constitutional law is flexible enough to allow for creative interpretations**, especially of those Treaty provisions that allow for **purposive action by the Union**, i.e. action that is defined by a common interest to be achieved rather than by the identification of a precise policy domain. For this reason, **we agree that "the EU's crisis response mechanisms do not represent a radical break with its constitutional system** as much as they throw into high relief the profound functionalist reflex already built into it" (Isiksel 2019: 200). Also, the judicial review exercised by the Court of Justice on pandemic-related measures has followed established paths, applying existing doctrines to these novel facts. Emergency arguments raised by either the EU institutions or the member states were accepted by the Court when they could be fitted into existing concepts (such as the precautionary principle) or existing emergency regimes (such as those of the Schengen Border Code), but the Court did not accept a self-standing pandemic-related "force majeure" argument" as a justification for the breach of EU rules (Editorial Comments 2024). As a final conclusion, in light especially of the reasonably effective emergency response by the Union during the pandemic crisis, **there seems to be no compelling case for creating a special EU Emergency Constitution similar to that of a state** (Kreuder-Sonnen 2022), **also because "creating emergency powers is likely to foster the appetite to use them"** (White 2022: 47).

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Between Supranationalism and Intergovernmentalism: Political Dissensus in the Establishment of the Recovery and Resilience Facility (RRF)

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1. Introduction

This chapter examines the policymaking process leading up to the establishment of the Recovery and Resilience Facility (RRF) as the major financial assistance mechanism adopted by the European Union (EU) in response to the outbreak of the COVID-19 pandemic. In doing so, it focuses on **the emergence of political dissensus over the governance of the instrument**, which constituted the most controversial issue of the whole recovery package (i.e. Next Generation EU). The chapter makes **three interrelated arguments**. **First, the different interpretations EU institutional representatives and member state governments advanced of the pandemic crisis affected their proposed policy solutions** to it, resulting in political dissensus between those supporting policy continuity through the use of the European Stability Mechanism (ESM) and those demanding policy change through the adoption of what came to be known as RRF. **Second, once the European Commission issued its proposal for the establishment of the RRF**, the idea of relying on the ESM to address the economic consequences of COVID-19 had vanished and **political dissensus** emerged between those supporting a **supranational governance system** for the new instrument and those supporting **intergovernmentalism *à la* ESM instead**. Third, **the final compromise** on the governance of the RRF, struck at the European Council meeting of 17-21 July 2020, **entailed** a predominantly **supranational logic with intergovernmental correctives**, with implications for democratic accountability in the EU.

2. Political Dissensus over the Interpretation of the Pandemic Crisis: Between Continuity (ESM) and Change (RRF)

Aware that the predominant interpretation of a crisis usually determines the general policy approach as well as the specific policy instruments adopted to address its consequences (Genschel and Jachtenfuchs 2018), **EU institutions and member state governments alike immediately mobilized to advance their own interpretation of the COVID-19 pandemic**. As soon as the coronavirus emergency broke out, the ensuing health crisis was portrayed by a group of northern countries, self-identifying as the **"frugal four"** and led by the Dutch government, as an asymmetric shock mainly affecting **member states with high public debts (e.g. Italy) or inadequate healthcare systems (e.g. Spain)**. Embracing the "moral hazard" paradigm that had steered the EU's policy response to the Euro crisis, the Dutch prime minister and its finance minister put forward a view of the pandemic crisis as endogenous to individual member states, thus requiring major policy action at the national level (Fabbrini 2023).

The construction of the COVID-19 pandemic as asymmetric and endogenous was challenged by a coalition of **southern member states**, led by France but including Italy, Spain and Portugal, who **acknowledged the exceptional nature** of the crisis and urged equally exceptional measures at the EU level. In a letter of 25 March 2020 to the President of the European Council, these member states claimed: "[We] are all facing a symmetric external shock, for which no country bears responsibility, but whose negative consequences are endured by all. And we are collectively accountable for an effective and united European response" (Wilmès et al. 2020). On that occasion, what later came to be known as the "Solidarity coalition" (Fabbrini 2023) **put forward the idea of establishing a common debt instrument**

issued by a European supranational institution to borrow resources on the financial markets to the benefits of all member states. The letter concluded:

> By giving a clear message that we are facing this unique shock all together, we would strengthen the EU and the Economic and Monetary Union and, most importantly, we would provide the strongest message to our citizens about European determined cooperation and resolve to provide an effective and united response (Wilmès et al. 2020)

Because **Italy was the first EU country to bear the costs of COVID-19**, already on 19 March the Italian prime minister had urged the **EU to increase its bailout capacity**. At that point the ESM was the only financial tool available to accompany monetary policy and a reform of the instrument considering the new crisis had been discussed in an earlier Eurogroup meeting on 16 March. To this effect, Giuseppe Conte emphasised that "the ESM was crafted with a different type of crisis in mind" (Johnson et al. 2020). He stressed the exceptional character of the pandemic and argued that "the best, probably the only way to stave off large-scale economic damage in Europe would be the creation of a common European debt instrument to fight against the socio-economic consequences of the pandemic" (Johnson et al. 2020). These arguments received support from other government leaders and EU institutions. On 16 March, in his remarks after the G7 videoconference on COVID-19, European Council President Charles Michel admitted that "this crisis is serious. It is going to be long and difficult", adding "all of us are fully determined to do everything necessary, everything that must be done" (European Council 2020a). European Parliament President David Sassoli similarly claimed that "we need the tools to overcome this emergency and start with a reconstruction plan. We must be prepared for the effects of this crisis and not be overwhelmed" (European Parliament 2020a).

The Frugal Four criticised the letter and the idea of a new financial assistance instrument based on European common debt. Dutch Finance Minister Wopke Hoekstra thus advanced the proposal of a "healthcare emergency fund to which the Netherlands would make a very substantial contribution … That would be a gift as a sign of solidarity intended for countries dealing with the coronavirus" (Deutsch and Sterling 2020). Dutch Prime Minister Mark Rutte soon confirmed that the Netherlands would prefer making a one-off "gift" to European countries in economic trouble rather than have a common debt instrument at the EU level (Deutsch and Sterling 2020). Ahead of the Eurogroup of 9 April, the idea of using the ESM as either as the major financial assistance tool in the EU's response to the pandemic was revitalised thanks to the strong support by Germany and the Frugal countries. These latter claimed that "proposals to create new institutions or new instruments [take] time that we do not have right now. Therefore, it is best to make use of all existing institutions and instruments that have been raising large amounts successfully for years already" (Ludlow 2020a). German government officials also insisted that "what we need is quick and targeted relief. The ESM can provide precisely that if we adjust it sensibly"[28].

However, as the health crisis intensified, unprecedented national lockdowns were enacted and severe economic consequences lay ahead, the Dutch-led interpretation of the pandemic crisis as asymmetric and endogenous became too controversial to prevail (Buti and Fabbrini 2022; Capati 2024). On 21 April, Michel and von der Leyen presented a "Joint Roadmap for Recovery", taking stock of the unprecedented crisis and suggesting there would be no space for business as usual. The two Presidents acknowledged that the EU "needs a Marshall-Plan type investment effort to fuel the recovery and modernise the economy […] drawing on public investment at European and national levels and on mobilising private

[28] Typescript memo dated 2 April 2020, entitled: Für eine starke gemeinsame europäische Antwort auf die wirtschaftichen Herausforderungen der Corona-Krise. Available here.

investment" (Von der Leyen and Michel 2020: 4). **The European Council members thus met again online on 23 April. On that occasion, the political leaders agreed to move forward towards the adoption of a recovery instrument "which is needed and urgent"**. At this point, the idea of relying on the ESM to address the COVID-19 crisis, along with a one-off "gift" to EU countries experiencing the toughest economic shock, had completely vanished. However, because of outstanding disagreements on the details of the new recovery mechanism (Fabbrini 2023), the European Council once again asked the European Commission to "analyse the exact needs and to urgently come up with a proposal that is commensurate with the challenge we are facing" (European Council 2020b).

3. The European Commission Proposal and the Emergence of Political Dissensus over the Governance of the RRF: Supranationalism vs Intergovernmentalism

On 28 May 2020, **the European Commission presented its proposal for the adoption of a Recovery and Resilience Facility (RRF)** as a regulation of the European Parliament and Council through the ordinary legislative procedure. While stating that the RRF would be financed through borrowing operations of the Union on capital markets, and consist of €603 billion between €335 billion in grants and in the form of grants and €268 billion in the form of loans, the European Commission proposal also defined the governance features of the RRF, that is the decision-making powers of EU institutions over the activation and withdrawal of financial assistance to the member states. In this respect, **the Commission's scheme was "amongst the most imaginative and ambitious proposals it has ever published"** (Ludlow 2020b, 8). It envisaged that the Commission itself would assess and decide on the national recovery and resilience plans (NRRPs) and that the Council would suspend, on a proposal from the Commission, decisions on NRRPs as well as payments under the RRF in case of significant non-compliance. **The European Commission thus provided itself with considerable decision-making powers** and limited the Council's role to the suspension of decisions or payments under the RRF on a Commission proposal. Inspired by the lessons learnt from the experience of the Euro crisis, **this constituted a breakthrough vis-à-vis the governance system of the ESM**, which was based on unanimity voting and permeated with a purely intergovernmental logic (Capati 2023).

A first coalition of member states, led by France and Germany and including most of the countries from southern Europe, supported the Commission's scheme for the establishment of the RRF. **A second coalition, led by the Dutch government and comprising the Netherlands, Austria, Denmark, Sweden and Finland, opposed it** for what concerned the financing mechanism, composition and governance of the RRF. It was thus clear that several rounds of negotiations would be needed to find a political agreement on it. On the same say as the Commission's proposal came out, European Council President Michel asked the Council's offices to start examining the scheme. He urged "all Member States to examine the Commission's proposal swiftly" and scheduled a regular European Council meeting for 19 June, saying "everything should be done to reach an agreement before the summer break" (European Council 2020c). At the online European Council meeting of 19 June, political leaders discussed the plan presented by the European Commission. At the end of the meeting, President Charles Michel admitted that "there is an emerging consensus" on the Commission"s proposal for the RRF but "it is necessary to continue to discuss" (European Council 2020d). He then officially started negotiations talks with the member states. Between 24 June and 2 July 2020, Michel held videoconference meetings with all political leaders to work towards a draft compromise based on the Commission proposal to be presented ahead of the European Council meeting scheduled for 17-21 July.

On 1 July 2020, the German government assumed the rotating presidency of the Council and circulated a draft proposal on the RRF's governance. It provided that the Council would not be limited to suspending payments on a proposal from the Commission, but it would have a say on the approval of the NRRPs by qualified majority voting (QMV). While moving away from intergovernmentalism *à la* ESM, the German draft somewhat reduced the supranational character of the Commission's scheme to appease the demands of the Frugal Four. The German proposal was discussed by EU ambassadors on 8 July. Dutch EU Permanent Representative De Groot praised Germany's progress on the Commission's proposal but confirmed the Netherlands would only accept a governance based on unanimity voting in the Council. He also declared that the Dutch government would not support the emission of common debt (Politico 2020). Overall, however, **the German proposal was received by the Frugal representatives as a big progress in the negotiations** as it somewhat moved the balance of decision-making powers under the RRF from the European Commission to the Council (Politico 2020).

On 10 July, taking stock of the German draft, President Charles Michel launched a "negotiating box" as the official blueprint for the upcoming European Council negotiations of 17 July (Ludlow 2020b: 23). Similarly to the German scheme, he proposed to preserve the size and composition of the RRF as per the Commission's plan while giving concessions to the Frugal Four in terms of governance system. Specifically, Michel suggested that the NRRPs should be approved by the Council by a QMV on a Commission recommendation (European Council 2020e). The European Commission's representative, Gert-Jan Koopman, welcomed it and said that "the Commission was not opposed in principle to enlarging the Council's role" in the governance of the RRF (Ludlow 2020b: 28). Government representatives of the Solidarity coalition also appreciated the preservation of an overarching supranational system of financial assistance. **In sum, Angela Merkel and Charles Michel were able to provide the incoming European Council meeting of 17-21 July with a good starting base for compromise** (Capati 2024).

4. From Political Dissensus to Political Compromise: The Governance of the RRF and Its Implications for Democratic Accountability

At the **European Council meeting of 17-21 July 2020**, **the Dutch government insisted that the member states should have a large control over the national recovery plans**, demanding the prerogative of blocking the activation of funds in case a NRRP appeared not to be in line with the established criteria. **This was opposed by both the Italian government (along with the Solidarity coalition) and the European Commission**, who feared this could jeopardise the supranational structure of the recovery instrument (Ludlow 2020b). **The Frugal Four had however made the adoption of unanimity** voting a precondition for an agreement on the RRF, **which would allow them to exercise a veto power** over any national recovery plan similarly to the ESM. To avoid failure to find compromise, on 18 July Michel circulated a draft with the following clause:

> If, exceptionally, one or more Member States consider that there are serious deviations from the satisfactory fulfilment of the relevant milestones and targets, they may request the President of the European Council to refer the matter to the next European Council. The respective Member States should also inform the Council without undue delay, and the Council should, in turn, without delay inform the European Parliament. In such exceptional circumstances, no decision authorising the disbursement of the financial contribution and, where applicable,

of the loan should be taken until the next European Council has exhaustively discussed the matter.

Working in close contact with Angela Merkel, Michel thus put forward an amendment providing that, in case of doubts or concerns, member states could refer any NRRP to the next European Council meeting before the Commission could recommend the disbursement of funds under the RRF. He was thereby able to **accommodate the requests of Frugal Four without altering the supranational character of the RRF's governance**. Angela Merkel's imprint behind this final compromise was so manifest that a senior official of the European Commission went as far as to say that the emergency brake "was mostly a deal between the Germans and the Dutch" (Capati 2024: 15). **The emergency brake represented the fundamental compromise that allowed coalitions of member states with very different visions on the governance of the instrument to reach a deal for European post-pandemic recovery**. While losing the exclusively supranational character envisaged by the Commission proposal of 28 May, the RRF escaped the intergovernmental logic of its predecessor (i.e. the ESM). **Under the mediation of Angela Merkel and Charles Michel, the heads of state and government agreed on a governance based on a form of "constrained supranationalism"** (Fabbrini and Capati 2023) whereby decisions on the activation and suspension of funds would be taken on a proposal from the European Commission by the Council, acting by QMV and reverse qualified majority voting (RQMV) respectively. The European Council would be able to discuss NRRPs when asked to do so by a government representative, but without veto powers. **The final say over the assessment of NRRPs would thus remain with the European Commissio**n.

The new governance mechanism behind the RRF significantly changes the EU's financial assistance regime with respect to the European Stability Mechanism (ESM). This latter, which was based on a form of "unconstrained intergovernmentalism" (Fabbrini and Capati 2023), only provided institutions representing member state government with decision-making powers over the activation of financial assistance. Because of that, channels of democratic accountability in the functioning of the ESM were very limited, if at all. The Board of Governors and the Board of Directors – the two most prominent bodies in the ESM – either consisted of, or acted on behalf of, member state governments, taking decisions on the concession and disbursement of funds by mutual consent (i.e. unanimity). This made national executives hardly accountable to supranational institutions or Euro area citizens.

Unlike the ESM, the RRF abandons the unanimity logic and provides the European Commission – a supranational body representing EU-wide interests – with decision-making powers over the activation of financial assistance. Moreover, the (reverse) qualified majority voting rule in the Council facilitates the adoption of the European Commission's proposal with respect to a unanimity system, somewhat shifting the balance of power from intergovernmental to supranational institutions. **However, the European Parliament – which represents EU citizens as a whole – remains as marginalised in the decision-making system of the RRF as it was in the ESM**. On 23 July 2020, the European Parliament issued a resolution on the European Council's compromise on the governance of the RRF, stating that it "moves away from the Community method", thus demanding for itself the power to decide over the disbursement of funds (European Parliament 2020b). Because of time pressures and the need for a swift approval of the RRF, the Parliament eventually gave its consent to the governance scheme decided by the European Council but obtained in return the introduction of the general regime of conditionality for the protection of the Union's budget based on respect for the rule of law.

The RRF thus also presents limitations with respect to democratic accountability as the European Commission and Council only need to inform the European Parliament

of their decisions with respect to the approval of the NRRPs, with the latter playing no ultimate decision-making role. For this reason, while displaying improvements in terms of openness of the decision-making process with respect to the ESM, the EU's financial assistance regime's democratic accountability following the adoption of the RRF remains controversial.

5. Conclusion

This chapter has investigated the policymaking process leading up to the establishment of the Recovery and Resilience Facility (RRF) as the major financial assistance mechanism adopted by the European Union (EU) in response to the outbreak of the COVID-19 pandemic.

It has thus focused on the emergence of political dissensus over the governance of the instrument, which was one of the most complicated issues of the recovery deal. The chapter has advanced three arguments. First, EU institutional representatives and member state governments put forward different interpretations of the pandemic crisis that affected their proposed policy solutions to it, resulting in political dissensus between those advocating policy continuity through the use of the ESM and those supporting policy change through the adoption of what came to be known as RRF. This took place between the outbreak of the pandemic crisis in March 2020 and May 2020, with an ideational confrontation between members of the so-called Solidarity coalition and the Frugal Four. Second, following the European Commission's legislative proposal for the establishment of the RRF, the idea of relying on the ESM to address the economic consequences of COVID-19 had vanished and political dissensus emerged between those supporting a supranational governance system for the new instrument and those supporting an intergovernmental governance similar to the ESM. This took place between May 2020 and June 2020, with yet another ideational conflict between Germany and the Solidarity coalition on the one hand and the Frugal Four on the other. Third, the final compromise on the governance of the RRF, struck at the European Council meeting of 17-21 July 2020, was found around a predominantly supranational logic with small intergovernmental correctives, marking a radical change in the EU's financial assistance regime.

The governance of the RRF has implications for democratic accountability in the EU. While the European Commission as an independent supranational actor witnesses a strengthening of its policymaking powers compared to the ESM, **and member state government representatives lose their veto powers over the disbursement of financial resources**, **the European Parliament** – as representative of EU citizens – **remains marginalised** (see C. Fasone in this Working Paper). It is in fact excluded from both the procedure for the activation of financial assistance and that for the suspension of payments under the RRF, featuring a decision-making role for the European Commission and Council and a corrective mechanism for the involvement of the European Council. Therefore, the European Commission and Council only need to inform the European Parliament of their decisions with respect to the approval of the NRRPs, with the latter playing no ultimate decision-making role. For this reason, **while displaying improvements** in terms of openness of the decision-making process with respect to the ESM, **the EU's financial assistance regime's democratic accountability following the adoption of the RRF remains controversial**.

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The democratic credentials of the decision-making procedures for the NGEU

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1. Introduction

The adoption of the set of measures labelled as **"TheNextGenerationEU"** (hereinafter NGEU) **has been welcome by some as a positive watershed moment in the EU integration process** (De Witte 2021; Panascì 2024), whereas **others have been more reluctant to accept the complex legal construction underpinning the creation of the legislative package**, especially on legal grounds (Leino-Sandberg and Ruffert 2022).

The **NGEU**, worth almost €900 billion (in 2022 prices) comprises various **measures intended to foster the recovery from the pandemic in the Member States** and is anchored to various legal bases. **The most significant Fund,** which forms the principal reference point for this contribution – **is the Recovery and Resilience Facility (RRF) Regulation, no. 2021/241**, capable of mobilising approximately **€648 billion** and financed through **common borrowing** on the financial markets **by the European Commission**. Although it is not the **first time an EU programme has been funded through borrowing** (Tosato 2020), **in derogation from what some consider a prohibition of debt financing in the Treaties** (Arts. 310–311 TFEU), this is the first occasion the EU has committed to a debt of such unprecedented size. Moreover, the largest share of the fund is to be distributed across the Member States through grants (€357 billion) and, to a lesser extent, loans (€291 billion) by the end of 2026.

It might be expected that such a significant amount of mobilised resources would have led to a **remarkable level of contestation and politicisation** both at the EU and at national level, within representative institutions and in the public opinion. However, **this has remained to a large extent limited, both in the genetic phase** of the RRF and the NGEU and in its implementation once the initial hesitation was overcome. Indeed, what soon became a united supranational front between the European Parliament (EP), the Commission and a group of Member States (Belgium, France, Italy, Portugal, Spain) to launch a recovery plan financed through borrowing was initially met with scepticism by the group of "frugal countries" (notably, Austria, Estonia, Finland, Germany and The Netherlands), worried about the medium to long-term consequences of debt repayment and the risk of a "transfer union" (Lindseth and Fasone 2022).[29] The shift in the approach of then-German Chancellor Angela Merkel paved the way to the first steps toward the NGEU, without specific objections to the RRF itself nor of the rationale and mechanisms of allocation of the resources. **By contrast, the approval of a "satellite measure" to the NGEU, the so-called Regulation on the "rule of law conditionality", no. 2020/2092, has triggered political dissensus and legal contestation** from Hungary and Poland on the one hand, who are the expected targets of the spending conditionality tool, and on the other hand from the EP.

This raises the following questions: what role has been played by democratic institutions, in particular by Parliaments in the Union, in the adoption and first implementation of the RRF? What have been the main democratic pitfalls of these processes, if any? This section aims to answer these research questions in a concise manner, intending to provide brief insights into the involvement of the European and the national parliaments on the RRF and the NGEU.

2. The European Parliament's role in the NGEU: Lights and shadows

[29] In May 2020 the "Franco-German proposal" endorsed the principle of bond finance guaranteed by the EU budget for grants only.

2.1. Adoption

Since the outset of the pandemic crisis, **the EP has convincingly pushed for the adoption of a massive recovery instrument**. Already prior to the Euro Group meeting of 8–9 April 2020, two MEPs (Renew), Luis Garicano and Guy Verhofstadt, had proposed to set up a "European Reconstruction Fund" and on 17 April, the EP approved the first of a long series of Resolutions, with the support of the four main groups (PPE, S&D, Renew, and Greens), "calling on the European Commission to propose a massive recovery and reconstruction package [..], beyond what the European Stability Mechanism, the European Investment Bank and the European Central Bank are already doing, that is part of the new multiannual financial framework (MFF); [..] the necessary investment would be financed by an increased MFF, [..] and recovery bonds guaranteed by the EU budget; this package should not involve the mutualisation of existing debt and should be oriented to future investment. (para 19)".

It is evident that, **by means of this Resolution, the EP had already outlined what would have later become the NGEU and the mechanism grounding the RRF**. Almost simultaneously, the Commission President endorsed the EP's idea (Von der Leyen 2020)[30] and, although this was just the first step to building the architecture of the NGEU, the EP acted as an engine to secure the plan and, to some extent, as an agenda-setter.

One of the most notable intuitions of the EP was the strategy, accepted by the Commission and the other EU institutions, in particular the European Council at its meeting on 17–21 July 2020, **to negotiate the NGEU in connection to the new Multiannual Financial Framework (MFF) 2021–2027 and the new Own Resources Decision (ORD) still pending their approval, as if it was one single package**. Such a move, which took advantage of the internal cohesion of the EP on the strategy to pursue (Schoeller and Héritier 2019, on the EP as a strategic actor), could not have been taken for granted as the MMF and the ORD proposals had been tabled back in 2018. The legal bases of all these instruments are very different as are, in turn, their procedures and the role envisaged for the EP (Closa Montero, González de León and Hernández González 2021).

For example, while the **EP** is just consulted on the ORD (Article 311 TFEU) and can only approve or veto the MFF Regulation under a special legislative procedure (Article 312 TFEU), due to the legal bases chosen – Art. 175(3) and 322 TFEU, respectively – **it has acted as a co-legislator with the Council on the RRF and the "rule of law conditionality" Regulations**, thus contributing to shaping the contents of these legislative acts according to the ordinary legislative procedure. At the same time, the legal instrument enabling the EU to borrow on the financial markets to finance the RRF, the European Union Recovery Instrument (EURI) Regulation, no. 2020/2094, would in principle have provided the EP with the possibility to be informed on the act only ex post according to Art. 122 (1–2) TFEU, as an emergency measure (Chamon 2023; De Witte in this Working Paper). However, **the intertwinement of all these otherwise separated procedures**, as a consequence of the option for a joint negotiation on them collectively, **has led the EP to have a voice even where it should have remained at the very margins of the process** (Fasone 2022).

The capacity of the EP to influence the content of the measures gradually declined as the end of 2020 approached, with the need to secure the adoption of the comprehensive package on time for the start of the new multiannual cycle and to fulfil the need for a prompt recovery across the Union. Therefore, some of the EP's claims, for instance on tightening the provisions on the "rule of law conditionality" Regulation, had to be abandoned with the aim of

[30] "The European budget will be the mothership of our recovery.[..] We will use the power of the whole European budget to leverage the huge amount of investment we need to rebuild the Single Market after Corona."

sealing a deal on the package, which was eventually reached, on the political level, at the European Council meeting on 10–11 December 2020.

Regardless, due to the joint negotiation, **many of the EP's requests were accepted, in particular in the final text of the RRF Regulation agreed in February 2021**. Therefore, the objectives of the **RFF include the implementation of the European Pillar of Social Rights**, **the generation of European added value, the support to the green transition** (Art. 4). Because of the EP's insistence, the RRF is subject to the discharge procedure (Art. 22, para 3); the information rights of the EP were significantly enhanced (compared to the original draft regulation) on an equal footing with the Council (Arts. 16, 25, 31 and 32); and a recovery and resilience (RRF) dialogue was established with the Commission along the assessment of the National Recovery and Resilience Plans (NRRPs), with the Commission expected to duly consider the EP's resolutions adopted in this framework (Art. 26). The EP also managed to introduce in the text of the Regulation the adoption of delegated acts (Art. 33) to set indicators to be used for the reporting, to define a methodology specifically devoted to assessing social expenditures financed through the RRF (Art. 29, para 4), and to define the RRF scoreboard to monitor the progress in the implementation of the NRRPs (Art. 30, para 2). **However, the EP failed to replace the approval of NRRPs, of their updates and adjustments via implementing acts (Article 20) through delegated acts, which would have guaranteed more far-reaching democratic scrutiny.**

2.2. Implementation

If the EP was able to exert an influence on the adoption of the NGEU package – certainly stronger than at the time of the EU's response to the previous economic crisis in 2010–2014 (Bressanelli and Chelotti 2018) – **then the capacity to monitor, oversee and condition its implementation is much more limited.**

To a large extent, this derives from the **lack of the EP's powers over the execution of EU law and of the EU budget and funds**. This is a **task primarily assigned to the Commission,** also in cooperation with the Council (Fromage and Markakis 2022). This is a paradox of the EU Treaties' constraints: **Article 14 TEU grants to the EP, "jointly with the Council", the exercise of legislative and budgetary functions, which, however, are limited to the decision-making stage, not to the implementation**.

Moreover, as the **resources financing the RRF are qualified as external** assigned revenues,[31] **they are treated according to accounting and control procedures different from the traditional budgetary** ones with which the EP is regularly involved, with the result that the level of democratic **accountability is reduced** (on the external assigned revenues, see Crowe 2017 and 2020).

Nevertheless, the EP has the power to grant the discharge on the EU budget as well as on the RRF, despite this Fund being formally placed outside of the EU budget (Art. 319 TFEU). This is by far the most significant power the **EP has to control how EU money is spent and to validate (or not), from a political perspective, how the budget was executed**: the Parliament votes, after having reviewed the annual Report of the European Court of Auditors, by majority of the votes cast (Art. 231 TFEU and Annex V to the EP's RoP) to approve, reject or delay with observations the authorisation to the discharge to the Commission or to the relevant institution (for its portion of the budget).[32]The discharge procedure, however, takes place well after the budget was implemented: for example, in 2024 the EP voted on the execution of the budget for 2022.

[31] Art. 21(5) of the Financial Regulation, no. 2018/1046.

[32] For example, the EP has systematically denied the discharge on the budget for the European Council.

In the framework of the discharge procedure, the EP has come to contest the manner in which RRF funds are spent and accounted for. For example, on 10 May 2023, although the discharge on the 2021 budget as a whole was approved with 421 votes in favour, 151 against and 5 abstentions, the EP, in a resolution accompanying the Commission's discharge decision (passed by 460 to 129 and 49 abstentions), voiced some **concerns**. **First, the lighter control requirements set for the use of the RRF due to time pressures; second, the risk of misuse, fraud and organised crime emerging from the practice of RRF spending in the Member States; and third, the attitude of the Commission when checking the satisfactory fulfilment of milestones and targets**, which is more based on "political negotiations" than on clear and comparable data and indicators (although the Commission did in February 2023 publish the long-awaited payment suspension methodology, COM (2023) 99 final, 10).

Under the information obligations set by the RRF Regulation, **the EP regularly receives reports and reviews from the Commission on the status of the RRF implementation in the various Member States, but it cannot take decisions on the governance of the Fund itself** – save for amendments to the Regulation, as occurred with RePowerEU (Reg. UE 2023/435) – nor on the NRRPs. Their execution is demanded to Member States' authorities under the supervision of and in close contact with the Commission.

During the 9th parliamentary term, to devote specific attention to the implementation of the RRF, the EP set up the "RRF Working Group", composed of 27 members (and 14 substitutes) from all political groups, it being a cross-party concern. Most of the members were and are - as the Working Group has been confirmed at the beginning of the 10th parliamentary term - are from the Committee on Economic and Monetary Affairs (ECON) and the Committee on Budgets (BUDG), given their mandate, with their respective presidents co-chairing the Working Group. Moreover, the other standing committees most affected by the RRF governance – by policy area: Employment and Social Affairs; Environment, Public Health and Food Safety; Industry, Research and Energy; and Transport and Tourism – are represented by at least one MEP.

In any event, the main tool at the EP's disposal to monitor the RRF is the RRF Dialogue, a procedure that, like the other "dialogues" already in place at the EU level (e.g. economic dialogue, monetary dialogue, political dialogue), establishes a direct channel for the parliamentary institution to retrieve ad hoc information on the execution or formation of EU law and to question and oversee the activity of the executive, in particular the Commission in this case (Bressanelli, Chelotti and Nebbiai 2023).[33] **Although not strictly binding, the RRF Dialogue is able to exert a democratic control on the Commission**: it is organised every two months by the ECON and BUDG Committees, who jointly invite the Commission to provide a detailed account on the status of the RRF, the NRRPs, the Commission's assessment of them; the fulfilment of particular milestones and targets by States; any payment, suspension or termination procedure (and remedial action by the targeted country); the review report; and any intermediate evaluation (Art. 26). The Commission has to consider elements arising from the views expressed through the RRF Dialogue, including the resolutions from the European Parliament if provided.[34] At the time of writing, 15 RRF Dialogues have already taken place, the last one, on 22 April 2024, with Executive Vice-President Dombrovskis and Commissioner

[33] This is different from the 'structured dialogue' provided for in Art. 10, para 7 of Reg. 2021/241, which can be activated by the EP vis-à-vis the Commission, if and when the latter proposes a payment suspension of the RRF instalment against a Member State that does not take corrective measures while being under the excessive deficit procedure or in a macroeconomic imbalance procedure.

[34] See, e.g. European Parliament resolution of 10 June 2021 on the views of Parliament on the ongoing assessment by the Commission and the Council of the national recovery and resilience plans (2021/2738(RSP)).

Gentiloni, focusing on the RRF mid-term evaluation (Commission 2024), on cases of RRF frauds, on the analysis of the 100 largest recipients of RRF funds per Member State, and on the preliminary assessments related to payment requests by Czech Republic, Denmark and Malta.

More than the RRF specifically, in the framework of the NGEU **the main target of the EP's dissensus towards the action of the other institutions, in particular the Commission,** has been the use of **spending conditionality to tackle rule-of-law domestic problems through various NGEU instruments, from the cited "rule of law conditionality" Regulation to the Charter enabling condition under the Common Provisions' Regulation, no. 2021/1060** (Fasone and Simoncini 2024). Notwithstanding the various resolutions adopted (e.g. EP 2021 and 2022), **as the voice of the EP remains unheard, the Parliament has decided to channel its dissensus through judicial proceedings in front of the Court of Justice.** The EP has repeatedly complained about the lack of suspension of EU funds for Hungary and Poland by the Commission, who has refrained from using the conditionality mechanisms available. Thus, first, and without much success, on 29 October 2021 the EP filed an action for failure to act against the Commission (Art. 265 TFEU) for the persistent lack of implementation of the "rule of law conditionality" Regulation, eventually used only in December 2022 against Hungary (See Platon 2021; case C-657/21, Parliament v. Commission). **Second, on 25 March 2024, the EP brought an action for annulment against the Commission's implementing decision of 13 December 2023 to waive the suspension of the EU funds to Hungary for €10.2 billion under the Charter enabling condition**, although no effective remedies had been adopted by the country (case C-225/24, Parliament v. Commission).[35]

3. National Parliament's limited involvement: Any room for contestation?

If the euro crisis revealed significant problems in the fulfilment of the National Parliament's (NPs) role as budgetary authorities – particularly in countries where the economic measures enforced due to the financial situation were stricter – **the first two years of implementation of the NGEU and the RRF (2021–2023) do not appear to have led to a very different conclusion**.

Examining the **RRF, at first the situation appears more favourable for NPs than during the previous financial crisis** (Griglio 2022). In compliance with common EU priorities and conditions, on a voluntary basis and with a detailed multiannual investment and reform plan that they draft, national authorities are able to benefit from EU money provided that the promised milestones and targets are satisfactorily fulfilled. By 2022, the Commission had approved all the NRRPs. Although in compliance with the EU pre-defined objectives and with the country-specific recommendations, Member States have remained rather free to decide how to design their NRRPs through constant negotiation with the Commission, up to the point that the NGEU has been criticised for "nationalising" determinations on how EU funds are spent (Cannizzaro 2020). EU money is thus financing national investments and reforms in a variety of different policy areas, save for security and defence and financial markets' regulation (Leino-Sandberg and Raunio 2023).

Therefore, **it might be expected that national parliaments would actively participate in such strategic budgetary decisions. Some national parliaments have attempted to adapt and to strengthen ex-post oversight on the implementation of the NRRPs** (Dias Pinheiro and Dias 2022; Griglio 2022); however, **the governance of the RRF and the NRRPs is entirely executive-driven,** between the national Governments and the Commission (Leino-

[35] Prior to the change of the Government in December 2023, the EP had also been critical of the lack of suspension of funds against Poland and of the Commission's green light on the NRRPs of Hungary and Poland.

Sandberg and Raunio 2023). Moreover, time constraints are pervasive, and the schedule is tight to implement all the milestones and targets should a country be willing to obtain payments every six months. The result has been, in many cases, a worsening of the level of parliamentary involvement compared to the Euro-crisis economic governance reform.

The 35th COSAC Bi-annual Report shows that of 27 national legislatures, only 5 had the opportunity to scrutinise the draft NRRP, **while another five, including the Italian Parliament, received the NRRPs once adopted** by the Government and immediately prior to the submission to the Commission (COSAC 2021: 14-15). **The remaining parliaments had access to the plan ex post**. Moreover, one survey shows that of the 24 respondent national parliaments, 21 report that there is no legal obligation for the Government to submit the payment requests, or the related assessments by the Commission, to the national parliament, and 13 have established practices for the Government to present progress (including risks) on the implementation of the NRRPs (EGov Unit, EP 2022: 5). There is a lack of ad hoc, codified, rules for the parliamentary scrutiny on the plans, with very limited exceptions: for example, the Portuguese Parliament is the only legislature that has set up a specific Committee to control the implementation of the NRRP.

Moreover, to allow the RRF to be in operation as soon as possible, there has been considerable **time pressure put on national legislatures to give the green light to measures**, such as the ORD, which underpin the RRF's functioning and require domestic approval. Thus, time constraints did not help national parliamentary scrutiny of the various NGEU instruments.

The new ORD entered into force in the record time of six months, compared to the usual timespan of two years necessary for domestic parliaments to complete the national stage of the approval procedure under art. 311 TFEU for previous ORDs. Only in Germany was the ORD, through the national Act ratifying it, subject to the review of the Constitutional Tribunal, which eventually confirmed its validity subject to the necessarily temporary nature of NGEU and the RRF and constraining the possibility for the national Parliament in the future to confer fiscal sovereignty to the Union (Dermine and Bobić 2024).[36] Although the "ratification" of the ORD was quite divisive in the public debate in Germany, as also demonstrated by the number of subscribers of the constitutional complaints to the Tribunal (over 2500), in the Bundestag only the members of the AfD voted against, whereas the leftist MPs from Die Linke, traditionally extremely reluctant to approve EU measures, abstained.

Another legal tool that, in principle, could have triggered contestation in the NPs (as it did in the EP and in the public debate), **the "rule of law conditionality" Regulation, barely resulted in any parliamentary scrutiny in the Member States**. Within and outside of the political dialogue with the Commission, **very few parliamentary opinions were transmitted** and none was a reasoned opinion questioning the proposal on the grounds of the subsidiarity principle (Schininà 2020; Coman 2022). Despite the EP's attempt to highlight the issue of rule of law backsliding and to include it on the agenda of interparliamentary conferences and meetings (Dias Pinheiro and Dias 2022), **NPs have been extremely reluctant to engage in a serious discussion of the matter and have instead preferred to hide behind the positions of their national governments** (Fasone 2023; Granat 2023 who highlights the exceptions represented by the Belgian, the Dutch, the French and the German Parliaments).

4. Conclusion

[36] BVerfG, Judgment of the Second Senate of 6 December 2022 - 2 BvR 547/21 - 2 BvR 798/21. The ruling was preceded by a decision of 26 March 2021, BVerfG, Beschluss des Zweiten Senats vom 26. März 2021- 2 BvR 547/21, and by BVerfG, Order of the Second Senate of 15 April 2021 - 2 BvR 547/21, rejecting a request for temporary injunction against the Act. Eigenmittelbeschluss-Ratifizierungsgesetz, ERatG allowing the President of the Republic to sign the Act of ratification into law.

The adoption of the **NGEU package has provided an unprecedented European boost for the national economies recovering from the Covid-19 pandemic**. The mobilisation and redistribution of a significant amount of resources from the EU to the Member States **might suggest that parliaments, at the various levels of government as budgetary authorities, would have been actively involved** in the design and implementation of the RRF and the measures regarding the new multiannual budgetary cycle in the EU. This is even more logical considering the saliency of the issues at stake – virtually any policy area has been affected by the NRRPs and because of the connection established between spending conditionality and rule of law enforcement – in addition to the intensity of the institutional and public debate.

The situation of the EP shows lights and shadows. This institution has been effectively able to contribute to the decision making on the NGEU package, the MFF Regulation, ORD and the related measures thanks to the strategy of the joint negotiations carried out, despite the fact that significant concessions had to be granted by the EP as the end of 2020, set as a deadline for adoption, approached (see Capati and Fabbrini in this Working Paper). **Much weaker has been the EP's capacity to affect the implementation of the NGEU**, save for the discharge procedure and soft law mechanisms of reporting and dialogue with the Commission. Rather than inside the EP, **dissensus has been directed towards other institutions**, primarily the **Commission, for the lack of implementation of the conditionality mechanism linked to the rule of law,** to the point that, following repeated failures to use political pressure, the EP has attempted to resort to the Court of Justice of the European Union (CJEU).

The appraisal of the NPs' position in this context, instead, is more straightforward, with limited cross-country variations: they have remained marginalised both in the adoption of the NGEU and in the implementation. Despite the margin of manoeuvre left to Member States in the drafting of the NRRPs, **national legislatures have been mainly involved and informed ex post, with a limited ability to scrutinise the implementation process or, at worst, asked to rubber-stamp the implementing measures proposed by the Government and agreed with the Commission**. It is the executive-driven and performance-based method of government of the RRF, for example, that does not assist NPs in playing a more prominent role. Furthermore, regarding the **"rule of law conditionality" Regulation, NPs have tried to adhere to the government position**, unwilling to express the pluralism of views and, potentially, the dissensus surrounding the instrument.

All of the above may ultimately affect the democratic credentials of the NGEU and the level of accountability and scrutiny of the relevant procedures, as well as the visibility in the eyes of the public of the EU's efforts to support the national recovery.

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NGOs and the dissensus on liberal democracy in Europe

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1. A crisis of mandate in Europe

In 2020, the **EU's Next Generation Plan and the Recovery and Resilience Facility (RRF)** were unveiled as a **major step forward in economic governance**. This "bailout" mechanism was designed to foster recovery across the continent and introduce more equitable and welfare-oriented economic governance. The process of its design and implementation, characterised by a high degree of centralisation under a new "geopolitical commission" (Sánchez Nicolás 2024), was seen as an effective form of crisis governance (Ferri 2020). As Schramm et al. have argued, the RRF retains a fundamentally bottom-up approach, despite the numerous European governance mechanisms in place (Schramm et al. 2022). However, **the initiative has been criticised for indirectly perpetuating inequality by focusing on large companies and dominant sectors such as aviation, technology and energy** (Scherer et al. 2022). The EU's ambition to be a **strategic bulwark** against emerging challenges to liberal democracy in Europe (Armingeon et al. 2022) h**as been undermined by deep divisions over climate policy and the green economy**. Moreover, the consultation processes on the priorities of the NGEU, as outlined in Article 18 of the draft plan, were more integrated than in previous instances of EU governance (Fernandez 2020). However, **the limited influence and presence of the civil society sector in the outcomes of this initiative has led to wider concerns about transparency** and the effective participation and representation of organised and informal civil society.

The problem has been particularly visible in the **implementation of this mechanism**. In countries where this consultation system was either controversial or lacking in substance, the NGEU was typically perceived as an initiative lacking legitimacy and detached from pressing social concerns (Kaniok 2024). Despite the wealth of opportunities for input or influence available to the "social partners", **it was often observed that participation and representation were limited to the priorities and plans disseminated through the media**. This issue was highlighted by civil society representatives in Spain where, with few exceptions, citizens were not able to contribute to the decision-making process on future priorities (Scherer et al. 2022). In Italy, trade unions ultimately perceived a lack of representation in the decision-making process. (Sabato et al. 2023). Similarly, in Romania, public attention was drawn to a constant stream of debates about the restrictive pool of NGOs participating in the consultation process, which was perceived by many as inadequate.

This chapter addresses the broader context and implications of the ongoing debate on the participation of NGOs in the deliberations of the NGEU. It highlights the **dissonance** associated with the **limited space for participation** and credibility of the institutional bodies most likely to be allowed to participate in EU governance, namely **CSOs, NGOs and INGOs** (International Non-Governmental Organisations). Despite the general impression that these institutions continue to enjoy privileged access to policymakers and global governance bodies, and that they remain the most effective channel for societal "participation" in governance and policy-making (Drieghe et al. 2021), stronger than citizen participation, **there is evidence that their capacity to influence policy is increasingly constrained**. A significant number of members of CSOs (civil society organisations) describe it as "ad hoc", "informal" or "tokenistic" (EUAFR 2023). The level of participation of these institutions in governance is indeed limited to professional European NGOs (Keijzer and Bossuyt 2020), while there is a growing divergence between citizens and social movements and the bureaucratic form of civil

society. In the context of the current global political climate, in which liberal principles are increasingly seen as an unacceptable status quo by both the political left and the radical right, there is a growing sense of dissatisfaction with the mandate of these organisations to represent the interests of the general public and the political worldviews they espouse.

1.1. CSOs in the European context: prospects and challenges

In Europe, at the heart of the liberal project, **a wide range of civil society organisations**, including those involved in the delivery of social services, **are witnessing a decline in their influence and facing increasing challenges to their mandates** (Marzec 2020). Although the recent "illiberal" wave is most often cited as the cause, the legitimacy and influence of **(I)NGOs as human rights defenders is facing a global backlash** (Stroup 2022), following a slow recession of the humanitarian mandate over the past two decades (Fiori 2019; Narkunas 2014).

In particular, **the emergence of a geopolitical security narrative about Europe has catalysed this debate and has had a direct impact on the rights of associations and the activities of civil society organisations and associations over the last decade**. Such cases have recently led to public debates on the mandate of such organisations. **In 2022, a debate arose around the "Defence of Democracy Package"**, which included a requirement for non-governmental organisations (NGOs) to disclose their funding from outside the European Union (EU). The initiative was presented as a means to counter political influence in this area and to control foreign influence on policy-making. However, it has been **criticised as an indirect method of scapegoating the NGO sector for illicit funding influencing the European political environment, particularly in the European Parliament** (Fidh 2023). It has also highlighted the precarious position of NGOs as "watchdog" mechanisms, as they are vulnerable to discrediting by the industries and other sectors they hold to account. It has also sidelined other areas where engagement is essential within the NGO landscape. **Since 2022, non-governmental civil society organisations have been excluded from the drafting of the Council of Europe's "Convention on Artificial Intelligence, Human Rights, Democracy and the Rule of Law"**. It has been argued that the draft AI treaty on "national security" could be exploited by authoritarian regimes for their own benefit. **The role of NGOs in the containment of migration in Europe has also been highlighted** (Müller and Slominski 2022). These examples show how the growing awareness, salience, polarisation and mobilisation around EU affairs in domestic politics (Hutter and Kerscher 2014) has had a particularly pronounced impact on the domestic NGO environment, which tends to operate at both national and transnational levels. **As the space for intervention shifts from dialogue and representation to a more reactive critique, this positionality makes NGOs vulnerable to a confluence of potential criticisms.**

Similar to **Hungary, legislation targeting NGOs receiving foreign funding has been discussed in Poland** (Bretan 2020) **and Bulgaria** (European Citizen Action Service 2020). Elsewhere in Brazil, India and Russia, non-governmental organisations (NGOs) are labelled "foreign agents". This is on the grounds that, in exchange for "foreign" funding, they impose new narratives, concerns and "agendas" on the public and closely monitor government actions that violate human rights and minority representation (Chaudri 2022). A comparable focus of scrutiny, ostensibly discursive in nature, **has recently affected work on LGBTQI rights across Central and Eastern Europe** (Paternotte and Kuhar, 2018). In France, the "law on separatism" requires any association applying for public funding to sign a "contract of commitment to republican principles", in line with the Macron government's anti-Islamist policies (Griffin 2021). Similarly, in Germany, the non-profit status of the NGO ATTAC was revoked for engaging in political activities outside of its mandate, including advocating for tax

and financial regulation (Poppe and Wolffe 2017). **The migration crisis in Europe has resulted in numerous NGOs and human rights defenders being prosecuted or imprisoned for assisting asylum seekers** or providing emergency humanitarian assistance (Grzymala-Busse 2019). The "politicisation" of NGOs, defined as the adoption of a political stance and the advocacy of a particular position in support of a group or cause, has the potential to result in these bodies being deemed unfit to engage in deliberative processes within the context of intergovernmental and EU dialogue. They may be perceived as a disruptive force in the EU's deliberative governance process.

Governments are not the only ones criticizing NGOs' mandates as "too political", a threat to "stability", or a foreign "threat". **Similar attitudes from members of civil society** are reflected in shifts in public opinion that increasingly question the credibility of NGOs, their claims of "radical" change and their intrusion into communities. This is particularly evident in the case of NGOs whose mandates focus on social justice and fair redistribution in highly contested areas such as migration and systemic racism, climate change, and gender equality (Rosamond and Davitti 2023). **There has been an increase in the level of scrutiny applied to the role of NGOs in relation to social movements** and other grassroots civic organisations that span the political spectrum, from the right to the left. While some NGOs, whether national or transnational, are funded to address structural problems within the state apparatus, their sources of funding are often under threat or scrutiny. At the same time, the scope of their activities and the resources at their disposal are constrained by the need to address issues that are inherently political in nature. **In this context, the relationship between NGOs and transformative social movements remains contested** (Della Porta 2020). Indeed, the reality of funding shows that while progressive NGOs are demobilised and declared anti-national, NGOs working with corporations and multinationals through "corporate social responsibility" and "public-private partnerships" represent a growth sector.

The progressive promise of NGOs, of social justice and equal distribution and participation, **is increasingly contested in this period of dissent over the liberal project, for two very different reasons. First, it is argued that the organisations are too far removed from the urgency of the needs of the groups they represent**, and therefore not radical or fast enough in their demands (Bernstorff 2021). **Second, it is argued that organisations are too far removed from the consensus mechanisms of liberal governance**, and therefore unable to participate fully. In these contexts, efforts to challenge and discredit the role of NGOs have demonstrated the complex and ambivalent position of NGOs when state power encroaches on liberal democratic norms. For those engaged in this field of work, the inevitable dialogue and cooperation with governments and supranational bodies is becoming increasingly problematic. Those engaged in civil society organisations and as individual activists, with the objective of promoting democracy, the rule of law and human rights, are subject to smear campaigns, verbal and physical attacks and legal harassment. Such limitations restrict both the general public's access to these services and the ability of NGOs to engage with policymakers and secure funding. **In general, there is a greater degree of scrutiny of NGOs' positions, mandates and freedom of action by state structures, within the state bureaucratic apparatus and by the public at large** (Lian and Murdie 2023).

The imbalance between the role of NGOs and stakeholders, particularly industry representatives in the NGEU and national implementation, is another example of this dynamic (Corporate Europe 2024). Industry representatives are routinely more audible than the non-profit sector in the EU ecosystem (Schmoland 2024). The avoidance of engagement by various governments in negotiations with CSOs around the NGEU shows the vulnerable position of organisations, which are also constrained by various other actors operating at national level (Vanhercke 2022). For example, demands to strengthen environmental and transport reforms were severely limited and debated in several countries in Eastern and Central

Europe. Similarly, in the case of Italy and Spain, consultations on human rights and accountability issues were specifically limited to digital policies. In many cases, the social actors who pushed for these additions and consultations were criticised in the public sphere. This highlighted the constraints faced by NGOs who have to navigate national contexts in order to claim representation at EU level.

1.2.NGOs and the liberal order.

The long-term legitimacy of NGOs in the context of a perceived decline in the values of the liberal order is in question, particularly in terms of their representational influence at levels of governance where the nature of grassroots issues and concerns are increasingly at odds with mainstream governance mechanisms**. NGOs have long embodied an optimistic narrative about the potential for openness** and participation of liberal internationalism. But the growing moralisation of European politics, which readily uses labels such as "good" or "bad", "corrupt", "guilty" or "innocent" as an expedient currency for ideology and political positions (Patrick and Brown 2012), particularly during the migration debate of 2014-2015 and the global pandemic, has exacerbated the shrinking of NGO operational spaces (Marzec 2020). **A crisis narrative that has led to a systematic prioritisation of securitisation over human rights in liberal institutional and governance spaces** (Ben-Porat and Ghanam 2017; Huysmans 2004) has contributed to the acceleration of autocratic tendencies operating within liberal democracies themselves, such as the categorisation of certain groups as "other". Both of these conditions have proved equally damaging to international bodies tasked with humanitarian mandates, which are increasingly scrutinised for complicity and inaction, and forced to navigate the boundaries of international humanitarian law (Tusan 2014). Some of the affordances of fighting for international liberal norms are less effective as a tactic, making **NGOs easy targets for critics in the current global contestations of the applicability of liberal norms**. **They find themselves at a crossroads in the ongoing crisis of legitimacy of the narratives of internationalism (values), institutionalism (norms and rules)** (Alcaro 2018; Börzel and Zürn 2021), **and the liberal global order**.

The conundrum that NGOs face today is determined by their genealogy, which is closely linked to the role of liberal ideas and policies in the consolidation of Western hegemony and, in particular, the expansion of American power (Fiori, 2019). Voluntary and social organisations, as institutional actors, have long been seen as the epitome of this order and a barometer of the ILO (International Liberal Order), whose tenets, including human rights, international law and internationalism present problematic framings and exclusions of the liberal myth (Moyn 2018; Moses 2017).

The role of facilitating the "open" participation of society in the international order was formalised in the UN Charter after the end of the Second World War in 1946 (Alger 2002). Humanitarian organisations became a central component of the post-war reconstruction phase, addressing a wide range of issues, including displaced persons, those seeking to return to or leave Europe, and the wider reorganisation of societies in the 1960s (Cullen et al. 2021). But it was the Final Act of the Conference on Security and Cooperation in Europe and the Helsinki Accords of 1975 that established this institution within the liberal-democratic framework by providing international protection to human rights organisations, regardless of whether they were approved by national governments (Strachwitz and Toepler 2022). At this point, these institutions aligned themselves with an increasingly Atlanticist vision of liberal democracy, which was also being consolidated in the Eastern bloc as the only alternative to authoritarianism. The emergence of dissidence, social solidarity networks and liberal values (as opposed to communist values) created a distinctive cultural milieu in which NGOs emerged as an alternative instrument of development and a specific instrument of economic policy,

intertwined with notions of citizenship and representation. The late 1980s and early 1990s saw the emergence of NGOs as a global phenomenon, coinciding with the triumph of liberal democracy. At the height of this fervour, there was a loosening of the constraints on working with state powers, even military interests, against the backdrop of a general triumph of the Atlantic liberal consensus.

Indeed, scholars have long emphasised the potential limitations of viewing NGOs exclusively as the "voice" of civil society, without taking into account their mandates and visions for change. Historically, NGOs are situated at the political juncture of the global rise of neoliberalism as a philosophy of governance and vision of world order, especially since the 1970s. **In contexts of political "exceptionalism" (such as crises, wars, emergencies and power vacuums), NGOs have often been associated with the emergence of a political economy centred on a humanitarian minimum** (Ramsay 2020). The expansion of NGOs is primarily a consequence of two decades of neoliberal focus on privatisation (Edwards and Hulme 1996), **where NGOs have taken over the implementation of restricted social programming, becoming a major conduit for development and less so for representation** (Ismail and Kamat 2018). Indeed, there has been a notable focus on the role of this sector as indirect contributors to inequality. The role of NGOs in the context of security concerns, whether economic or political, inevitably leads to the development of programmes based on issues of self-reliance, segregation of target groups and levels of vulnerability. This places them in a position of complicity with certain tenets of neoliberal thought, including ethnic and identitarian hierarchies of ability in the context of market competition. Such organisations have often served as indirect instruments of policies that call for austerity in spending, maximisation of citizen effort and productivity, and emergency redistribution, without challenging the concentration of wealth in the hands of a smaller number of much more powerful actors. Notwithstanding their mission to strengthen social ties and solidarity networks and movements, **the scope of NGO activities tends to place the onus on individuals to remain constantly vigilant and adaptable to the vicissitudes of an uncontrollable market**. This contrasts with the view that the state should play a more active role in regulating the market.

While NGOs are able to operate within the state apparatus and effect change on issues of representation, they remain ambivalently dependent on state structures, which limits their ability to build alliances. (Dauvergne and LeBaron 2014). **NGOs often act as proxies for the state, working to address issues and provide services that the state infrastructure is either unable or unwilling to address** (Alexander and Fernandez 2020). In the context of austerity, many direct agendas become complementary to state services, often substituting for policy and social support measures traditionally provided by state institutions. In many cases, regardless of political affiliation, NGOs respond to areas that are affected in one way or another by austerity and securitisation by the state and operate in areas where the state apparatus is reluctant to become directly involved. Their status as transnational actors with the capacity to influence human rights and state accountability has often positioned them in opposition to the fundamental issues of entrenched paternalism and the perpetuation of global disenfranchisement (Bettiza et al. 2023). Indeed, NGOs, especially when broadly defined in terms of humanitarianism, have also served as a useful illustration of how the liberal order is readily and repeatedly implemented through instruments that are less than liberal and repeatedly employ illiberal or authoritarian methods (Heatherington and Sluga 2020).

In this political context, the relationship between NGOs and the broader notion of "participation" has been closely examined. **It can be argued that the mandate, influence and potential for intervention of NGOs in current contexts of extreme need, human rights abuses or various forms of humanitarian exclusion are shaped by political and economic interests.**

> The **most profound and ongoing structural rearrangement of civil society** since the late 20th century is its NGO-ization. **NGO-ization** delineates a process during which **social movements professionalize, bureaucratize, and institutionalize in vertically structured and policy outcome–oriented organizations**. This is a socially and politically constructed process that entices civic groups to focus on generating issue-specific and, to some degree, marketable expert knowledge or services (Lang 2022).

As the "preferred institutional form" (Kamat 2013: 9) of the state, as **they are primarily tasked with providing services, representing and responding to areas of social welfare where the state is reluctant to intervene**. Indeed, there is an ongoing shift in the public perception of NGOs that is specifically linked to their real potential to advance practices of community participation, which has been the primary "encoding" of NGOs in liberal consensus politics. Much of the legitimacy of NGOs rests on the assumption that direct communication with those in power is more important than the ability to convey the full complexity of the message. The potential of this participation is being questioned, particularly in terms of whether the limited capacity to truly represent the "grassroots" is not causing further damage. **The recent shift in institutional political interests, where NGOs cultivate punctual and long-term contacts with policymakers, has come under scrutiny in the current dissensus over liberal governance**. The concern is that such an approach represents a very limited way in which NGOs can represent the interests of the population concerned.

2. Conclusion

One of the biggest **challenges for NGOs is how to present themselves to governments whose main political message is "security", especially in Europe**. The issue of a shrinking "space" for NGOs to operate is not new. In Egypt, for example, concerns have long been raised about indirect government control of these organisations by channelling access to funding, including international funding, through the government. Russia's 2006 NGO law was further formalised in 2012. **However, it has become clear that the narrowing of the operational space for NGOs** (van der Borgh and Terwindt 2012) **is not limited to nominally authoritarian or explicitly radical right or conservative contexts. The relevance of NGO advocacy within the EU institutional sphere appears to be declining**, and the ability of these actors to influence and mobilise public opinion is increasingly being questioned.

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PART III

DEMOCRATIC INSTRUMENTS AND PROCEDURES IN THE EU AFTER THE PANDEMIC EMERGENCY

The Conference on the Future of Europe and its democratic potential

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1. Introduction

Since some 15 years, the European Union is challenged by an **accumulation of significant crises**. **One of such crises involves the state of democratic institutions**. As also witnessed by the recent European elections, political forces with questionable democratic credentials are increasingly successful in mobilizing the European electorate (even if numbers of electoral abstention remain very high). **European democracy, as liberal, representative democracy in general, appears to be in a dire state**. It suffers from augmenting citizen distrust in politicians, political parties, and institutions, a structurally low levels of citizen engagement and participation in elections, increasing voter volatility, a weakening of traditional political parties, and increased polarization and radicalization of the political landscape.

According to many observers, (European) democracy needs to be reinvented or at least prominently renovated. **One core problem is the lack of meaningful and effective input by ordinary citizens in the democratic decision-making process**. A core instrument to counter democratic malaise lies in the area of participatory democracy and enhanced citizens engagement. The most debated democratic innovation in recent years is the citizens' assembly (or related forms such as mini-publics or citizens' juries).

This chapter discusses one unique experiment with a citizens' assembly on the transnational level, the Conference on the Future of Europe (CoFE), a one-year event organized by the European institutions and held between 2021-22. I will **first briefly discuss the origins** of the Conference. **Second, I will discuss the CoFE's operation** in particular in terms of actual citizens engagement and participation.[37] **Third, I will briefly conclude that the CoFE process**, if to lead to significant effects on citizens engagement with the EU, would need a proper **institutionalization** of a **permanent European Citizens' Assembly**.

1.1.The Conference on the Future of Europe

The CoFE was neither a response to specific policy problems (such as enlargement or climate change) nor the result of a direct response to a specific crisis or of spontaneous, bottom-up calls for change. **The CoFE started from the top-down**, was initiated by the EU institutions and was largely controlled by these. The CoFE used **innovative** (multi-lingual, multi-level) **forms of citizen participation**, in the form of a **specifically set-up Digital Platform**, the organisation of **Citizens' Panels with randomly selected citizens** (with one-third of young people), and a mixed Plenary, with citizens, politicians, and stakeholders (see table 2 below).

Table 1 - Citizen involvement in the Conference on the Future of Europe

Organization of the CoFE			
Elite/institutional control	Common Secretariat	Executive board	Conference Plenary

[37] See also Blokker 2022.

	Responsible for material process; methodology	Representation of three EU institutions.	Decision-making power on final proposals amongst the 'constituent' powers (3 institutions and member states)
Direct citizen participation	Digital platform Information provision; possibility for European citizens to suggest ideas	Citizens' Panels 4 thematic deliberative assemblies with 200 randomly selected citizens each National panels/events Variegated; without common methodology	Conference Plenary "Citizen component" of 20 ambassadors per panel, representing their panels and functioning as Plenary members; 27 additional national panel members

Source: Own elaboration.

The CoFE - held from 9 May 2021 until 9 May 2022 - may be placed in the context of a longer and complex tradition of (transnational) democratic experiments that emerged in particular in the wake of the EU's failed constitutional convention of the early 2000s (Smith 2013). **The CoFE originated in an idea of French President Emmanuel Macron with as objective to propose changes to the European political project** (Abels et al. 2022; Bailly 2023: 10; Berg 2022; Democratic Society 2023; Fabbrini 2022). Various institutional actors made claims towards empowering European citizens in a Conference on the EU's future. In a joint non-paper on the Conference on the Future of Europe, France and Germany suggested a "strong involvement of our citizens" and a "bottom-up process", with "EU-wide participation of our citizens on all issues discussed". **The EP presented two documents on the CoFE in 2020, inter alia proposing the idea of citizens' agoras**. Only the Council - representing the sovereign Member States – remained sceptical but ultimately endorsed the idea of a Conference. **The Commissions' president Von der Leyen presented the CoFE as a "new push for European democracy"** and stated that "I am ready to follow up on what is agreed, including by legislative action if appropriate. I am also open to Treaty change" (Von der Leyen 2019). The predisposition to Treaty reform as a result of the CoFE process has been reiterated by the Commission as well as the European Parliament, while the Council remains divided on the issue (see Bailly 2023).

2. Participatory Citizenship in the Conference on the Future of Europe

The **experience of the CoFE** – as a "new, experimental democratic ecosystem" (Alemanno and Nicolaidis 2022: 6) - is of direct **relevance for participatory citizenship** in Europe, and in several ways.

First, in a ***procedural* sense**, the operational process of the Conference (which was an ad hoc process not foreseen in the EU Treaties) was to **enhance citizen participation**, **deliberation, and input**. The CoFE therefore was to boost a form of input-oriented legitimacy (allowing voice for citizens), and to relate civic participation to political and legislative processes.

Second, **the CoFE's efficacy** – in terms of strengthen and innovating European democracy – **lies at the level of the *political*, that is, its capacity to mobilize a European political will to indicate structural reforms with regard to the *democratic functioning* of the EU and to the rule of law,** including on the constitutional/treaty level. The "objective of Citizens Panels was to allow, by way of a citizens-focused, bottom-up exercise, European citizens to have a say on what they expect from the European Union and an active role in shaping the future of the European Union" (Democratic Society 2023: 21).

As the citizens who participated in European Citizens' Panel 2 on democracy, the rule of law, human rights, and security, recommended, one important outcome of the **CoFoE was the proposal to institutionalise a permanent European citizens' assembly** (recommendation 39). Such a view was further echoed in endorsements by European civil society organizations as well as by scholars, and further elaborated in policy-oriented proposals by experts.[38] One report, co-authored by Niccolò Milanese, founder of the transnational civil society coalition European Alternatives (Cooper et al. 2021; cf. Patberg 2020), called for permanent forms of citizen participation:

> Create a permanent European Citizens Assembly: Recent experiences with citizens assemblies in Ireland, in Belgium, in France, in Germany and elsewhere have shown that a sortition-based format of citizen participation can create social consensus for change, can build social trust, and can reinvigorate politics. A European Citizens Assembly would be a pioneering transnational experiment which should be led by independent civil society, with a view to providing a permanent space in which the European Union can fulfil its obligations of dialogue with citizens and civil society under Article 11 of the Lisbon Treaty.[39]

In terms of **the participatory process** of the CoFE itself, **different issues** may be observed. **First, the Conference was clearly not the result of bottom-up pressure** and spontaneous societal calls for radical change (as happened for instance in France as an institutional reaction to societal protests), but the outcome of elite and institutional propositions, first by Macron, to be taken over by the head of the Commission Ursula Von der Leyen. The whole process was notably delayed due to political infighting over whom was to

[38] Conference on the Future of Europe Observatory, 'Conference on the Future of Europe:
What worked, what now, what next?', High-level advisory group report, 22 February, 2022, available at: https://conference-observatory.eu/wp-content/uploads/2022/03/High_Level_Advisory_Group_Report.pdf; Abels et al. 2022.
[39] Cooper 2001.

preside over the event and what its functions were to be. **In this regard, the CoFE is in line with earlier institutional attempts to stimulate participation from above**.

The actual convening stage of the **CoFE**, which relates to the design, organization, and implementation of the Conference,[40] was predominantly **institution-driven**. The CoFE was an "inside institutional experiment": it was entirely organized and convened in an institution-driven fashion (see Oleart 2023a, b; Gjaldbaek-Sverdrup, Nicolaidis, and Hernandez 2023).

The Common Secretariat was run by representatives of the three main EU institutions (the Commission, the Parliament, and the Council), and was responsible for the day-to-day operation of the Conference. Main decisions regarding the Conference were made by the Executive Board, headed by three co-chairs, representatives of the main institutions (Guy Verhofstadt for the EP, Dubravka Šuica for the EC, and a representative from the rotating Presidency of the Council). In the final instance, choices on organization seemed to be restrained by a reticent attitude of Council. The operation of the Secretariat and Executive Board has in many ways shown to be top-down, little transparent, and not receptive to external influences in any transparent fashion (Oleart 2023b). While this was also to a significant extent due to the intricacies of the inter-institutional culture of the EU, in practice it has meant that the organization gained an opaque and rather unpredictable flavour**. What is more, the selected citizens, or wider European society for that matter, did not have any input on the way the Conference has been set up, on its agenda-setting, nor how it has been executed**.

Citizens were clearly central to the debating stage. In processual terms, the design allowed for direct citizen participation in the Conference in a number of ways. The Digital Platform, set up to allow all European citizens to suggest ideas and recommendations, to be discussed in the Citizens' Panels (which hosted 800 randomly selected European citizens) and the Conference Plenary, gathered numerous ideas from a wide range of European actors.[41] **The core participatory dimension was to be found, however, in the second dimension, the Citizens' Panels as an instantiation of citizens' assemblies or mini-publics.**[42] **Four thematically driven panels were set up,** hosting 200 randomly selected citizens each, and meeting in three deliberative weekends (a first one in Strasbourg, a second one online, and a third one in one of four European cities: Florence, Natolin, Maastricht, and Dublin). Citizens were the core participations of the European Citizens' Panels (EPCs), but their deliberation was circumscribed by the context.

To start, as mentioned, the citizens' influence on the actual set-up and design of the deliberative process in the Panels was limited. **The execution of the ECPs could be partially labelled as "imposed" by the institutions**. The process was driven by the institutions and executed on the ground by a number of professional organizations with well-developed deliberative and participatory methods. Citizens had little to no influence on the selection of experts or in priority choices in agenda-setting or for the deliberation of specific themes. Also, **citizens had difficulty in taking control due to the fact that they received notifications on**

[40] For an extensive discussion of the whole process, see Alemanno 2021 and Oleart 2023b.

[41] Although if related to the overall number of European citizens, the citizens participating on the platform and the number ideas fed into it remained highly modest. In addition, it remained unclear how these ideas were effectively feeding into the debates within the Conference.

[42] The extent to which the randomly selected citizens represent the wider European public is however questionable. According to the report of Democratic Society, the official observer of CoFE, participants to CoFE were generally more favourable to the EU and EU institutions than the general European public. Also 75% of the selected participants indicated to have voted in the 2019 European elections, whereas for the general public the percentage was/is only 50% (Democratic Society 2023: 42-3).

procedure and methodology very late in the process (admittedly, complicated by the pandemic situation), and they had limited time to actually engage in the exchange of viewpoints and deliberation. In addition, the deliberation of the Panels was in part taken over by aggregation, in terms of voting and rationalization (for instance, in the form of expressing preferences for specific recommendations in a kind of "market of ideas", not unlike the process found on social media such as Facebook in the form of "likes"), rather than in-depth, time-consuming deliberative practices or the identification of divergent opinions and positions.

In other ways, however, citizens clearly *did* have influence on the process, as they formed an integral component of the discussions on the future of Europe (by formulating ideas in the form of orientations) and were collectively responsible for the recommendations produced. **The recommendations formulated by the different Panels were the outcome of an interactive, participatory process**. In addition, citizens' representatives - so-called ambassadors[43] - became part of the mixed Conference Plenary too, together with inter alia politicians, representatives of the institutions, and of civil society.

The Plenary of the CoFE formed the final debating stage where citizens played a role. The recommendations formulated by the ECPs were taken up and carried forward in the Plenary. The Plenary was itself populated by political actors (local and regional authorities, national and European members of parliament; Council, Commission, and Committee of the Regions representatives), social partners, civil society organizations and the citizens themselves (80 "ambassadors", selected from the Citizens' Panels as well as 27 representatives of national panels or events).[44] According to the Rules of Procedure, the Plenary's task was to "debate and discuss the recommendations from the national and European Citizens" Panels, and the input gathered from the Multilingual Digital Platform, grouped by themes, in full respect of the EU's basic principles and the Conference Charter, without a predetermined outcome and without limiting the scope to pre-defined policy areas. "After these recommendations" had been "presented by and discussed with citizens, the Plenary" was to "on a consensual basis put forward its proposals to the Executive Board" (Rules of procedure, article 17).

Regarding the follow-up of the process or policy take up, it has remained rather unclear to what extent the recommendations have become part of actual EU policy, despite stark claims from not least Commission representatives to the contrary. According to article 23 of the Conference regulations, the "final outcome of the Conference will be presented in a report to the Joint Presidency. The three institutions will examine swiftly how to follow up effectively to this report, each within their own sphere of competences ad in accordance to the Treaties". **In fact, on 9 May 2022, the plenary's final report with 49 proposals and some 320 measures was presented as the final product of the CoFE. The process has however**

[43] The citizens' ambassadors (80 representatives of the ECPs) played a double role in the Plenary: they were both representatives of the ECPs and full members of the Plenary. This means they both needed to articulate and present the recommendations formulated by the Panels and constituted deliberating members of the Plenary as such. The ultimate recommendations formulated by the Plenary were adopted 'on a consensual basis' by EU institutional and political representatives, that is, those actors recognized as 'constituent' forces by art. 48 TEU (Alemanno 2021: 28). The citizens (but not the other stakeholders or civil society representatives) did have some form of right to a 'dissenting opinion'.

[44] The composition of the Plenary – if understood as some form of deliberative forum - is unprecedented in its inclusion of multiple levels of governance. The mixing of politicians and citizens (as well as other stakeholders) constitutes according to some authors a recent trend in deliberation (one instance is the Irish Constitutional Convention, see Strandberg et al. 2021).

left little room for explicit ratification by European citizens, although an evaluation meeting with the citizens involved took place in December 2022.

3. Concluding remarks

In general, **modern democracy seems paradoxically caught between an innovative "participatory turn", on one hand, and a regressive, authoritarian-democratic turn**, on the other. **The Conference on the Future of Europe was to contribute to the former in an attempt to react to the latter**. Whether the CoFE has been a success in holding off anti-democratic forces and stimulating citizen involvement is very difficult to assess with clarity. Rather than providing effective citizen input into the process of policy-making, and hence reducing the distance between citizens and institutions, **the CoFE seems to fit more in the established EU repertoire of consulting without really including citizens**. One critical observer evaluates CoFE as "democracy without politics", and argues:

> The main institutional and policy follow-up of the CoFoE to these set[-s] of recommendations was process-related: the integration of "citizen participation" via citizens' panels in the EU Commission policy-making. The Commission claimed in October 2022 that much of its 2023 work programme was inspired by the Conference, yet this responds primarily to the fact that most recommendations are in line with the previously established policy agenda, and that those recommendations that envisioned Treaty change were sidelined (Oleart 2023b: 117).

Examining the Conference, also in the comparative context of other global participatory processes, reveals a number of pertinent questions around deliberative and participatory processes. **One clear problem is the unwillingness of political institutions to diminish their hold on organizational and design dimensions and to share some political sovereignty with citizens**.

This often results, in counterproductive fashion, in limited citizen input into the organization of specific and often ad hoc participatory processes. As discussed, this became clear in the convening as well as deliberative phases of the CoFE. The same attitude also, however, prevented institutions from imagining any structural inclusion of citizens participation in the broader democratic constellation. **Similar problems of control seem to occur with the European Commission's New Generation European Citizens Panels** (Gjaldbaek-Sverdrup, Nicolaidis, and Hernandez 2023).

In the European context, a clear lack of public pressure on the EU institutions from below is part of the problem (a process of monitoring and "counter-democracy" that does exist in domestic settings; think of the *gilets jaunes* in France[45]). The Conference lacked the dimension of a broad societal engagement, not least due to a great lack of broad public awareness of the process. In a related sense, **a key problem is how to connect relatively well-designed and innovative micro-level deliberation to broad societal, macro-level debate**. **In CoFE, the absence of a micro-macro linkage resulted in inexistent pan-European public debate and greatly compromised any durable beneficial effects in terms of the**

[45]See Ulrike Liebert, 'Seven lessons on citizen participation for CoFoE' (2021) available at: https://blogs.eui.eu/transnational-democracy/seven-lessons-on-citizen-participation-for-cofoe/.

generation of democratic and societal legitimacy, and a broadly shared acknowledgement of being part of a political community-shaping process.

For the participatory and deliberative turn to effectively and durably institutionalize participatory citizenship, **institutionalised democracy would need to permanently include channels for citizens to meaningfully participate**.[46] Permanent deliberative assemblies in a meaningful sense would however involve a significant shift in the distribution of political power towards citizens. This remains one of the core battles of contemporary forces of democratisation.

[46] Smith 2021.

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The Commission Package on Democracy, Interest Representation and Effective Citizens' Participation

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1. Overview

This chapter delves into the 2023 Commission "Defence of Democracy" package (hereinafter, **DoD package**), comprising a set of initiatives to foster present and future EU democratic processes. The following analysis unpacks the content of the Package from the perspective of the **political "dissensus"**, intended as a phenomenon developing in the core of liberal democracies, and not only at the margins of the political arenas (Coman and Brack 2023: 8).

First, we unfold the **context** in which the DoD package was developed. Then, we analyse the core of the package, namely the **proposed Directive on interest representation** by non-EU actors. It follows a brief outline of the **two Recommendations** that accompany the Directive and an appraisal of the action resulting from the **European Democracy Action Plan (EDAP)**, siding the DoD package and contributing to the attainment of the overall targets. In the remainder of this chapter, we confront the **criticism** that the described pieces of legislation, above all the Directive, are faced with in scholarship.

The idea of dissensus hovers over the entire analysis, given that the objective of regulating sensitive areas such as lobbying activities and the participation of civil society and NGOs clashes with an evident risk. In particular, the hazard inherent in such regulation is that instead of silencing manipulative and distorting voices in the democratic public debate, **it stifles legitimate dissensus or jeopardises freedom of expression**.

2. The context

Democracy, the rule of law, and respect for fundamental rights form the EU's underpinnings, as set out in **Article 2 TEU**, and need to be permanently upheld by all Member States. At its core, democracy enables citizens to freely express their opinions, participate in the decision-making processes, elect political representatives with equal rights, and "exercise final control over the agenda" (Dahl 2020: 35). The EU and its national jurisdictions are committed to ensuring a public space where diverse viewpoints thrive, **allowing for disagreement and peaceful change of governance through elections**.

However, democracy faces growing challenges and powerful adversaries from the inside, such as the **illiberal "turn"** in certain Member States and the mounting power of anti-EU players (Lorenz and Anders 2021). Furthermore, **authoritarian regimes outside the EU** promote a contrasting idea of democracy or prompt deliberate efforts to undermine democratic processes within the EU.

Both internal and external regimes act by weakening democratic institutions, muzzling the media, and restricting civil society's space. Their **tactics** range from exploiting societal divisions and fostering distrust in established institutions to subverting citizens' democratic voices through misinformation, disinformation, and electoral manipulation. Recent developments, such as Brexit, Russia's aggression against Ukraine, and the "Qatar-gate" corruption scandal affecting the heart of the EU decision-making processes, – not to mention

the conflict in Israel, – underscore **the urgency** for the EU **to lead the charge** against political upheaval and destructive forces.

External interference in the EU's democratic processes, often through proxies, has garnered heightened political attention at both national and EU levels (Bressanelli 2021). The Commission recently backed concerns voiced by the European Parliament, emphasizing the need for a coordinated EU strategy to counter foreign interference and information manipulation (see the latest Resolution on foreign interference by the European Parliament, 2022). The Resolution stressed the importance of acting swiftly in the run-up to the 2024 European elections, where the need to preserve free and fair competition, with independent and transparent electoral mechanisms, was seen as pivotal to garnering citizens' trust.

The 2020 European Democracy Action Plan provides the foundation for ongoing efforts at the EU level (European Commission 2020). The political agenda enshrined in it places among the **Commission's top priorities** the need to pursue a holistic approach, by addressing diverse risks of foreign interference, including those impacting economic security. Measures encompass **proposals to counter economic coercion, regulations on screening foreign investments, and initiatives to fortify cybersecurity and counter hybrid threats**. The most prominent pieces of legislation in progress, under EDAP, are the European Media Freedom Act (EMFA), (European Commission 2022a) associated with the Recommendation on editorial independence and media transparency (European Commission 2022b), and the Directive on Strategic Lawsuits against Public Participation (SLAPP) (European Commission 2022c).

In critical circumstances, the EU demonstrated that it can also resort to imposing restrictive measures under EU sanctions regimes to safeguard its fundamental interests (see the sanctions against state-owned media outlets, Russia Today and Sputnik, on the grounds of information manipulation, Cabrera Blázquez 2022). Nonetheless, scholars highlight how the Commission remains reluctant to force MS to correctly implement its legislation (see Kelemen and Pavone's theory on "**supranational politics of forbearance**" 2021).

Against this backdrop, the European Commission's unveiling of the DoD Package in December 2023 has stirred both anticipation and apprehension across the EU. At its core lies a proposal for a Directive on transparency of interest representation on behalf of third countries (European Commission 2023d), designed to **shed light on lobbying activities conducted for foreign governments** and non-manifestly intended to prevent covert influence tactics from either Russia or China. However, despite assertions from Commission officials that the Directive is not akin to **foreign agent laws** from "certain other jurisdictions", namely (again) Russia (Rebo 2022), Georgia (Zedelashvili 2023) and Bosnia-Herzegovina (EEAS 2023), dissensus persists about its potential implications (see below).

Besides the Directive, the DoD Package includes specific initiatives oriented for the 2024 electoral cycle concrete: measures regarding **electoral matters** concerning the European Parliament elections, as well as initiatives to cultivate a supportive **civic environment** and encourage comprehensive and meaningful interaction between public authorities, civil society organizations, and citizens. All this is contained in a **Communication on Defence of Democracy** (European Commission 2023a) and two Recommendations later discussed (European Commission 2023b; 2023c).

Through these three additional plans, the Commission calls the Member States to collaborate in establishing a safe and democratic political arena involving, on one side, political

parties, political foundations and campaign organisers and, on the other side, civil society institutions and associations.

This is achieved by leveraging new avenues for citizen participation such as the "framework for participation", built on the process inaugurated with the **Conference on the Future of Europe** (Blokker 2024). To counter the risks from foreign interference in open public debates, the Commission proposes a set of measures intended to defend democracy by "allow[ing] EU citizens and public authorities to understand the motivation behind [lobbying campaigns] and to see which third countries invest in influencing democratic debate and the decision-making processes in the EU" (European Commission 2023a). Such measures, however, are to be guaranteed by safeguards to avoid an excess of administrative burdens, to prevent power abuse (intimidation or even stigmatization) from MS authorities and, more importantly, to preserve freedom of expression, freedom of information and freedom of association.

3.The core of the Package: The Directive on Foreign Interest Representation

The Directive, part of the broader effort to safeguard democratic processes within the EU heretofore enshrined in the EDAP (European Commission 2020), covers foreign interest representation. Targeted activities consist of communication or advertising campaigns regardless of whether they entail political elements, thus adopting a broad scope.

Following the annual **Rule of Law Reports**, many Member States were recommended to introduce national provisions to regulate foreign interest representation. While some reforms had a positive outcome in tackling corruption in some given Member States, other countries didn't yet follow the recommendations on lobbying or, despite them being compliant with the Commission's advice, new problems surfaced (see Annual RoL 2022, anti-corruption pillars).

In brief, the proposed Directive seeks to introduce **rules on openness and transparency** of interest representation activities that are directed to "influence the development, formulation or implementation of policy or legislation, or public decision-making processes, in the Union" (recital 13 and Article 2, para. 1). To this purpose, it requires Member States to establish new national registers or to improve existing ones to identify individuals engaged in lobbying for third countries and make them disclose their activities, funding sources, and primary objectives.

The Directive applies to natural or legal persons that engage by remuneration in "interest representation services" as described above. A **non-exhaustive list of such activities** is provided by Article 2, para. 1 and comprises the organisation or participation in meetings, conferences or events, participation in consultations or parliamentary hearings, organisation of communication or advertising campaigns, networks and grassroots initiatives, preparation of policy and position papers, legislative amendments, opinion polls, surveys or open letters, or activities in the context of research and education.

Overall, **the proposal's objectives** include enhancing transparency and accountability in interest representation activities conducted on behalf of third countries, taming the cross-border nature of such activities, and harmonizing the fragmented regulatory framework across Member States. Regulatory differences create obstacles in the internal market and increase compliance costs for entities involved. Furthermore, the Directive seeks to promote the improvement of public trust by providing citizens and policymakers with information about the sources of funding for interest representation activities.

According to the **explanatory memorandum**, the Directive, unlike the abovementioned foreign agent laws, is not meant to develop measures "that unduly restrict civic space by stigmatising, intimidating and curtailing the activities of certain civil society organisations (CSOs), journalists or human rights defenders". Instead, following the narrative of the proponents, it is not intended to ban any activity. Rather it will focus on transparency enhancement and accountability strengthening for all entities involved in foreign lobbying.

Accordingly, the measures proposed will be guaranteed by the **principle of proportionate transposition** as well as **mutual trust in its enforcement**.

4. The Two Recommendations

In conjunction with the Directive, the Commission is introducing a Recommendation on "Inclusive and Resilient Electoral Processes in the Union […]" (European Commission 2023b) and a Recommendation on "Promoting the Engagement and Effective Participation of Citizens and Civil Society Organisations in Public Policy-Making Processes" (European Commission 2023c).

The **first Recommendation** aims at electoral safety and integrity in EU elections. It seeks the fortification of electoral processes against vulnerabilities, alongside facilitating voter engagement, inclusive participation, and equitable exercise of electoral rights. It calls Member States to multiple actions, such as complementing traditional voting methods with e-voting and other ICT practices, simplifying voter and candidate registration, and even allowing online procedures and electronic collection of signatures in support of candidates.

It also encourages MSs to strengthen gender equality and the rights of disabled people all along the electoral process, by further promoting new electoral infrastructures, physical ones and electronic ones (with a focus on avoiding or countering cyberattacks). Associated with this is the need to promote election observation by citizen associations and international organisations, alongside the objective to address legislative gaps to avoid foreign interference in the forthcoming elections, in particular with third countries' donations, financial activities that may hide corruption or money laundering and any other criminal activity.

The Recommendation further addresses national political parties, campaign organizations, and political foundations and invites them to foster the European nature of the elections of the European Parliament. By doing so, they are supposed to announce prior to the beginning of the electoral campaign their political affiliations to the corresponding European political party. Furthermore, with the aim of increased political integrity and fairness, they are asked to adopt campaign pledges and codes of conduct as well as to refrain from spreading disinformation, using AI-generated fake content such as deepfakes, or disseminating hateful or misleading content.

Political parties and movements shall also disclose their financial information to enhance transparency on political funding and the use of political advertising (on financing Eurosceptic political parties, see Wolfs 2022: 138). These rules appear to establish a sound framework in order to allow a reasonable political dialogue among counterparts in the approaching campaign and to avoid that a detrimental undemocratic dissensus from specific political parties may thrive to dismember electoral integrity in a given country.

As for **the second Recommendation**, building on the conclusions of the 2022 Report on the application of the Charter and the civil society pillar of the annual Rule of law reports, it targets civil society and Non-Governmental Organisations, as well as human rights defenders. It should be noted that it seeks to promote their participation in the name of freedom

of expression and freedom of association. It intends to create the condition for the exercise of the **right to participate in public affairs** and, to this end, it promotes "evidence-informed policymaking" by gathering their views and obtaining a stricter engagement. This shall be done through the promotion of "online and in-person deliberative and co-creation processes" (Recital 11), citizen panels, citizen assemblies and other "**co-creative formats**". This involvement may be developed not only for consultation but also for the purpose of policy-making and legislative processes.

Having this in mind, Member States shall overcome the lack of formalized processes and include civil society and CSOs in structured dialogues, strategic partnerships and other forms of structural collaboration on specific topics and with all levels and stages of decision-making processes. Citizens' capacity to act shall be protected from external threats such as cyber-attacks, attempts to intimidate or criminalise, and online surveillance from public authorities. Specific and dedicated state funds should help bridge the gap among the various organisations.

5. A Stocktaking of Action Taken Under EDAP

The feasibility of the above-described measures rests on the prior adoption of the EDAP, which establishes a foundational framework for subsequent initiatives. The EDAP underscores the EU's commitment to safeguarding media freedom and countering disinformation, recognizing these efforts as essential facets of democratic resilience. In this context, the Commission has introduced significant initiatives: among them, rules on **transparency of political advertising and online communication**, complementing the Digital Services Act (European Commission 2021a); rules on the **statute and funding of European political** parties and foundations (European Commission 2021b); rules to promote **active citizenship and political participation for mobile Union citizens**, in line with the principles of the European Pillar of Social Rights (European Commission 2021c).

As previously foreshadowed, the two principal ongoing initiatives are the proposed European Media Freedom Act and the proposed anti-SLAPP directive. As of the writing of this paper, both measures have attained a political consensus in December 2023 and are presently undergoing the initial parliamentary reading phase.

With the **EMFA**, the Commission advocates for the harmonization of national regulations regarding **media services** in view to foster media freedom, pluralism, and editorial independence (Citino 2022). The EMFA targets not only private media outlets but also public service media, establishing standards of independence and transparency in the name of fighting disinformation and manipulation of information. The EMFA is a complementary tool that must be associated with the outcome of the Rule of Law reports.

EMFA's goals have heightened their significance amidst Russia's war of aggression against Ukraine. It is well known that Russian authorities have engaged in a systematic crackdown on independent media outlets, highlighting the imperative to combat propaganda and preserve journalistic freedom.

To this end, EMFA's efforts are strengthened by the **anti-SLAPPs proposed Directive** (Milewska 2023), aimed at bolstering the safety of journalists denouncing ground realities and shielding them, along with human rights defenders, from abusive legal actions such as SLAPPs (**Strategic Lawsuits Against Public Participation**). The Directive presents overall a robust framework comprising procedural safeguards tailored to address cross-border SLAPP cases effectively, now even more important in light of the journalistic duty to inform citizens amidst

geopolitical conflicts. These measures not only empower courts to handle abusive litigation but also serve as a deterrent against potential future SLAPP cases, offering early dismissal options and providing effective remedies for victims (for the Polish case, see Wójcik 2023).

6. Dissensus Surrounding the Package

The Foreign Influence Directive is the piece of legislation that **since its inception generated controversy and criticism** (Fox 2023a; 2023b), with initial postponements due to opposition from NGOs and concerns about its impact on civil society.

According to its antagonists, while the Commission maintains that the Directive is **distinct from traditional foreign agents laws**, similarities are apparent. The broad scope of the Directive and its potential for stigmatization raise apprehensions about enforcement and unintended consequences. Critics argue that the Commission's control over how Member States implement and enforce the law is limited, leaving room for varied interpretations and applications across the EU's diverse political landscape (Korkea-aho 2023).

According to a report from European Partnership for Democracy (2024: 9), there is a high risk of **stigmatization**. Despite the Commission's noble intentions, they argue, data stored within national registries could be readily manipulated by Member States with the intention of stifling and censoring civil society. This could lead to **smear campaigns** or, worse, **abusive criminalization** pursuing perceived political foes.

Additionally, worries persist about the **independence of national supervisory authorities**, especially in light of democratic backsliding and rule of law concerns in given Member States, which could compromise their ability to handle sensitive information responsibly.

Overall, Feisel argues that "contrary to the Commission's assertions, the legal safeguards in the Directive would be largely ineffective in preventing an adverse impact on civil society organisations as agents of European democracy" (Feisel 2023). Importantly, the DoD package was released merely twenty-four hours later that the Commission disbursed €10 billion in funds to Hungary (Liboreiro 2023), funds that had been withheld due to non-compliance with the rule of law and democratic principles.

However, despite these worries, it should be noted that the European Commission proposing a Directive to counter foreign political interference is different, say, to the Russian authorities enforcing their Foreign Agents Law. In that case, the law was wielded to stymie dissensus and to criminalise the voices of political opponents. This was easily achieved through imposing cumbersome registration duties, punitive sanctions and further substantive constraints all of which collectively hindered civil society organisations and political associations labelled as foreign agents from continuing their activities.

Furthermore, the reference to militant democracy theories as argued by Feisel seems hyperbolic to the writer, as these largely known (and abused) theories, delve into whether a democratic regime is authorized to silence anti-system voices when they risk jeopardising the existence of democracy (Müller 2016). This is a hasty conclusion in the present case, given that the Directive **is not intended to suppress every form of dissensus** but, on the contrary, when read in conjunction with other acts of the package, **it aims to protect healthy dissensus** from increasingly frequent and concrete attacks on the European open society.

As we have seen, the debate surrounding the DoD package underscores broader tensions within the EU regarding democratic governance and the balance between transparency and individual freedoms.

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The EU democracy in the aftermath of Qatargate. Towards a new «art of separation» to tackle the continuum of threats

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1. Introduction

Scandals have a democratic virtue. Not only do they illustrate, through their impact, citizens' attachment to public ethics and to the democratic nature of decision-making processes, but they also shed valuable, if often cruel, **light on how our political and administrative institutions operate in practice**[*]. **Qatargate was no exception to the rule**, with the arrest in December 2022 of a vice-president of the European Parliament, a parliamentary assistant and a former member of parliament, all three accused of taking part in a corrupt system designed to influence the positions taken by the parliamentary assembly with regard to the country hosting the 2022 World Cup. While the case is in many ways extreme, what it reveals is less so, **namely the fact that the European decision-making chain is today subject to continuous and sustained pressure from influence strategies**, which takes a variety of forms (direct corruption, conflicts of interest, lobbying etc.) all of which short-circuit and circumvent democratic processes.

But Qatargate has also served as a reminder that, **in a European Union that has historically thought of itself as a laboratory of public policy**, or as a giant agency regulating the single market, **European democracy is not only exposed and vulnerable; it is also ill-equipped and ill-prepared to deal with the challenges to democracy**. As Member States and the European Union are called upon to lead the ecological transition of our societies and economies, and to deal with a multitude of crises, **Qatargate has revealed the vulnerability and unpreparedness of European institutions** in the face of the powerful politics of influence that has been built up on their periphery. These monumental challenges now require us to lay the foundations for a new "art of separation" (Walzer 1984: 315-330; Vauchez and France 2020) which places at its heart **the protection of the autonomy of political decision-making and deliberation**, and thus guarantees the viability of democracy in the European Union. The European Union, in particular because it has made the fight against corruption one of the pillars of its enlargement policy, has a special responsibility on this matter.

2. A General State of Unpreparedness

While some continue to argue that corruption and conflicts of interest are entrenched in all forms of government**, there are many reasons to believe that the vulnerability of European democracies in general, and the European Union in particular, to influence strategies has increased in recent years**. As the neo-liberal turn of the 1990s transformed public bodies into a long chain of "regulators" (economic ministries, independent agencies, central banks) tasked with organising and overseeing the free and competitive operation of

[*] This text is a policy paper drawn from a Report for the *Observatoire de l'éthique publique* which brings a small group of legal scholars and political scientists: Antoine Vauchez, Lola Avril, Chloé Fauchon, Emilia Korkea-Aho, Juliette Lelieur, *One year on from Qatargate: How can the European Union be better protected against conflicts of interest and corruption?*, Report for the *Observatoire de l'éthique publique*, December 2023. For more detailed information and bibliographical references, please refer to this document, which is available on the Observatory's website.

private markets, economic players became increasingly dependent not only on public regulation, but also on the subsidies and massive investment that are now driving the ecological and digital transition (Green Deal, recovery plans, etc.). **Because it governs a market of 450 million consumers and 22 million businesses, the European Union is a prime target for influence strategies**, whether they come from big business, the most diverse interest groups or even foreign governments. This is all the more true given that, because of the size of this market and the concentration of this regulatory power, the European Union has a structural effect (sometimes referred to as the "Brussels' effect") on the global economy as a whole, well beyond its borders (Bradford 2019).

3. A powerful field of intermediation and influence

European decision-making processes in the European Union today are subject to particularly strong pressure. A whole industry of intermediation and influence has thus developed along the "coral reef" (Tarrow 2001) that stretches from the European capitals to Brussels (Laurens 2018), and which has grown steadily over time in size, professionalism and political importance (Lahusen 2022).

Academic research and the network of anticorruption bodies, from the European Ombudsman to NGOs, have long documented **the diversity of ways in which this field of influence and intermediation now impacts European public decision-making**. The modes of action go far beyond lobbying alone: **a series of "sliding doors"** (Coen and Vannoni 2016) run through all the EU institutions, involving parliamentary assistants, commissioners, MEPs and senior civil servants in continuous circulations between the regulator and the regulated; **an area of side activities has gradually developed for parliamentarians in the worlds of consultancy and expertise**; finally, a dependence on big business has developed when it comes to funding certain key areas, be they forums for technical expertise (Boulier 2019; Vassalos 2017), places for political deliberation[47] (Nielsen 2010), or even, more surprisingly, the presidencies of the Council of the European Union by the various Member States.[48] While none of this is illegal in itself, **these well-established practices in the field of European power are particularly conducive to the emergence of a series of risks** (conflicts of interest, capture, corruption) which, taken together, form a continuum of threats enabling a number of private interests (large companies, interest groups, even third countries, etc.) to exert a disproportionate influence on the EU's decision-making processes.

This is all the more worrying given that the European Union appears to be particularly **vulnerable to influence strategies**. **As already mentioned, the EU has historically been built around the Single Market project, and the European Commission - as well as, to a lesser extent, the European Parliament - have forged a close partnership with businesses and their interest groups in this major enterprise**, which is constantly being relaunched. As the European regulatory State has grown, the latter have become the privileged interlocutors of the small Brussels bureaucracy of the European Commission in its quest for expertise in the

[47] Regarding forums and groups of the European Parliament, which are frequently financed by private actors, see Jean Comte, Au cœur du lobbying européen, Paris, Maison des sciences de l'homme, 2023.

[48] Just think of Coca-Cola, or Renault and Stellantis, which contributed directly to funding the Romanian and French presidencies. In March 2024, the European Ombudsman opened an investigation "following concerns about ongoing sponsorship of presidencies accepted by Member State governments, in spite of guidelines issued by the Council". See here.

economic sectors, as well as its strategic allies in the constitution of a political authority over the Member States (Laurens 2018).

Added to this symbiotic relationship, which has been only partially disrupted by the European Parliament's entry into the legislative game, is the **structural weakness of the EU's "civil society"**, **which undermines European citizens' ability to mobilize in the face of scandal**. In the absence of Europe-wide media that could bring to light the interests of a "European public", the small group of NGOs specializing in public ethics (Corporate Europe Observatory, Transparency International, Follow the Money, etc.) seems quite isolated in the "Brussels bubble", and everything indicates that their capacity to influence the political agenda remains limited. While corruption scandals do open up windows of opportunity from time to time, these are short-lived, as demonstrated by Qatargate, **which attracted only fleeting attention, to the exclusion of the media in the countries "directly" concerned by the nationality of the accused** (Belgium, Greece and Italy).

4. A permissive institutional culture

There's more: **Qatargate has revealed a "permissive institutional culture", adding to the general state of vulnerability of European decision-making processes** described so far. It's not just that the powerful economic poles of the European institutions (DG Competition, DG Internal Market, etc.) are historically open and receptive to the influence strategies of major companies and their advisors (consultants, lobbyists, etc.), in the name of the competitiveness and attractiveness of the internal market, for which they claim to be the guarantors (Sacriste 2014: 52-96).[49] Also, since the neo-managerial reform of its organization and recruitment in the early 2000s, **the European administration has been attracting new candidates with more private-sector experience than their predecessors**, and who are less inclined to see the risk of conflict of interest (Avril 2019; Alayrac 2022) in their circulations between the public and the private sectors - as demonstrated in July 2023 by the (ultimately aborted) appointment of American professor and consultant Fiona Scott Morton as Chief Economist of DG Competition (Alayrac 2023; Georgakakis 2000: 39-71). In short, far from being a besieged citadel threatened "from the outside" by influence strategies of major businesses, the Commission is also part of a structural underestimation of public ethics issues. **This widespread lack of vigilance within the EU institutions is manifested in a general preference for non-binding ethical rules** (the soft law of charters and codes of conduct), for consultative ethics committees deprived of real powers of investigation or decision, and for forms of self-regulation deeply rooted in each institution, whether the Commission, the Parliament, the European Central Bank, and so on. The Commission's *ad hoc* ethics committee, set up in 2003, is a notable example. Renamed the 'independent ethical committee' in 2018, this body examines post-employment activities of former Commissioners (following the former Commission President Manuel Barroso's "pantouflage" at Goldman Sachs). It has shown **limited effectiveness** and seems to have become more of a tool for protecting the Commission's reputation than a solid instrument of control,[50] the number of incompatibility opinions is

[49] We refer here to the analysis of another scandal, the Dalli case, which refers to the work of influence, even corruption, to which the European Commissioner for Health John Dalli was subjected on the eve of the revision of the Tobacco Products Directive.

[50] European Ombudsman, «EU administration at critical point in treatment of 'revolving doors'», 18 mai 2022.

remarkably low, and the Committee is extremely cautious in monitoring the implementation of its own opinions, in the name of the need to protect the privacy and reputation of companies recruiting former Commissioners.

Qatar also brought to public attention the weakness at European level of criminal law, even though it is known to be the main means by which contemporary societies protect their fundamental values. **The European Public Prosecutor's Office, whose creation in 2021 had been presented as the birth of European criminal law, was found to be incompetent** (in the legal sense of the term) **to prosecute the people implicated in Qatargate, since its mandate is limited solely to the protection of the EU's financial interests**, while the EU's other public interests, such as the integrity of the European public decision-making process, fall outside its remit. **It thus has been necessary for Belgian, Italian and Greek prosecutors to conduct the investigation**, thereby initiating proceedings that are more complex, longer and more vulnerable to delaying tactics by lawyers than those we would have experienced under a European law enforcement system offering full protection of the Union's public interests.

5. A new "art of separation"

It is undoubtedly not possible to undo a collusive system that has been consolidated over the last decades simply by using a combination of institutional tools. However, the EU has so far shown little ambition in examining solutions that would go beyond its usual preference for transparency tools, soft law and self-regulation. **And while Qatargate has been followed by a series of ethical reforms, notably in the Parliament, at this stage these have more to do with "panic laws"**, providing *ad hoc* institutional solutions to some of the symptoms, than actually answering the various warnings - issued notably by the Ombudsman Emily O'Reilly in the course of her many investigations into the practices of the European institutions - as to the systemic nature of the issue.

6. The damaged interests of the European public

It is true that the **European democracy remains opaque** to itself and that it struggles to know what is going on at its shores, beyond fragmented knowledge. This lack of knowledge is not only problematic in that it prevents us from appreciating the extent and seriousness of the risks hanging over European decision-making processes and from raising the level of awareness among the European public of the importance of protecting democracy in the EU, but also because it allows all sorts of demagogic narratives to flourish and delegitimise European institutions. **Hence the need to set up a permanent, independent observatory for the integrity of democracy at European level, with a broad mandate** (along the lines of the European Tax Observatory now headed by Gabriel Zucman). Its mission would be to develop methodologies and accumulate knowledge about the systemic threats and networks of interests weighing on the functioning of European democracies (revolving doors, EU subcontracting to consultancy firms, European public commissioning, lobbying expenditure, etc.).

Such an Observatory would also make it possible to better assess the costs of conflicts of interest and corruption. Until now, these costs have most often been analysed from the point of view of the damage done to the "reputation" of the various EU institutions (the Commission or Parliament) or the individuals concerned (MEPs, Commissioners and senior officials) - without seeing the overall and widespread damage done to European democracy as a whole.

Yet conflicts of interest and corruption undermine above all the very idea of citizenship and its promise of equality before the law, which is supposed to underlie the entire operation of European public institutions: equal access to rights and public functions, fair and transparent distribution of public money, equal participation in public decision-making. When judged against the egalitarian promise that lies at the heart of democracy (Ceva and Ferretti 2017), corrupt and collusive practices have a long-term collective cost for the European public. **The scandals that punctuate the history of the EU are reducing the legitimacy of its institutions and, consequently, their ability to take charge of and resolve, in the future, the Europe-wide problems that we are collectively facing** (war, ecological destruction, rising inequalities, etc.), for which solid, reliable and legitimate public institutions are needed. From this point of view, all EU citizens are the diffuse victims of these corrupt and collusive practices.

7. The limits of transparency policies and the protection of European democracy through criminal law

If we now turn to the **institutional toolbox**, it has to be said that it is **the arsenal of transparency that has emerged as the main tool in the fight against conflicts of interest and corruption**, with the idea **that transparency obligations on public and private actors in European decision-making will provide a sufficiently strong incentive to initiate a virtuous dynamic and transform behavior** (Robert 2018). Of course, there is no question of denying the demographic value of these transparency policies. However, their transformative capacity in the field of public ethics has been greatly exaggerated. It is not just that total transparency ("fishbowl transparency") is illusory and largely unattainable; nor is it that transparency measures tend to generate a "halo effect" that shifts political efforts and debates towards the instrument itself (its flaws, its implementation, etc.) while losing sight of both the objective (the protection of public ethics) and the actual results.

Transparency does not offer a global solution: it can help to assess the situation, but it cannot counteract the development of influence strategies around the edges of European institutions, **nor can it deal with the systemic nature of the conflicts of interest that are undermining democracy in the European Union**. In a context of unprecedented interlinking between public regulators, major companies and interest groups, it is not enough to make lobbying and influence activities "transparent" in order to avoid the risks associated with conflicts of interest and corruption. In other words, **the recent inter-institutional agreement creating an EU ethics body is emblematic of this lack of bite and firmness**: its mission is limited to harmonizing transparency standards and promoting an "ethics culture" across EU institutions – short of any meaningful power of inquiry on conflicts of interests, or indeed capacity to sanction EU public agents who resist solving them.[51] While the president of the European Parliament had initially been relatively assertive in words, **the "Metsola Plan" which was eventually adopted as EP's new rules of procedure has only brought very little change** – save for the modest prohibition imposed on MEPs to meet former MEP's who have become lobbyists or representatives of the public authorities of foreign States within six months of the end of their term of office. Additionally, the actual implementation of this new policy lies with the internal *ad hoc* committee of MEPs (and ultimately of the president of EP herself).

[51] https://commission.europa.eu/about-european-commission/service-standards-and-principles/ethics-and-good-administration/interinstitutional-body-ethical-standards-members-institutions-and-advisory-bodies-eu_en

The agreement over the **creation of an EU ethics body** responsible for ensuring compliance with transparency obligations and investigating breaches by MEPs and Commissioners seems quite **inadequate**. It could certainly make a useful contribution to rationalising the current patchwork of public ethics in the EU, with its numerous ad hoc rules and codes of conduct. **But the experience of France's *Haute Autorité pour la transparence de la vie publique* (HATVP),** which is now being held up as a model for reform on a European scale,[52] **calls for some caution**, as its effectiveness in detecting conflicts of interest, and in taking account of their systemic dimension, remains uncertain (Vargovcikova and Vauchez 2024).

If the European public is indeed the one that is being collectively harmed by the violation of the integrity of democratic processes in the Union today, then it is first and foremost the arsenal of criminal law that we should be considering. On the one hand, for its "educational" function, as it helps to clarify the fundamental values of European society and disseminates a culture of public integrity not only among civil servants, but also among civil society organisations and businesses. **The absence of criminal sanctions would indicate indifference to issues of public integrity within EU institutions**.

Criminal law also has a "dissuasive" effect, if the penalties imposed appear fair and if they are proportionate to the seriousness of the attack on democratic values. From this point of view, **the adoption of a European directive on the protection of the integrity of democracy would strengthen the protection of European political and administrative leaders**. The new offences could include active and passive corruption, as defined in the 1997 EU Convention on Corruption, as well as active and passive trading in influence, as defined in the 1999 Council of Europe Criminal Law Convention, or even the most serious forms of behaviour resulting from conflicts of interest. Beyond that, the strengthening of this criminal protection would involve extending the competence of OLAF (the European Anti-Fraud Office) and the European Public Prosecutor's Office to criminal offences against the democratic interests of the Union, as these bodies are currently only empowered to act in relation to offences against the Union's financial interests.

Adopting, as we do here, the point of view of the "European public" and its damaged interests has a last implication: **the degree of separation between the public and private sectors, as framed through the rules on "revolving doors"**, the authorisation of side activities and the prevention of conflicts of interest, is not just a matter for discussion between experts or simple institutional engineering. While the "art of separation" inevitably has a technical dimension, the pitfalls of technicalisation should be avoided. Not only because there is no magic solution in this area, and institutional engineering alone cannot solve a problem that has deep political and economic roots; but above all because the level of permeability (or impermeability) between the sphere of public institutions and the market and, consequently, the nature of the protections that we collectively wish to build around European democracy, vary from one political actor to another, be they conservatives, liberals, ecologists, social democrats or the "radical" left.[53]

[52] See the report by the former head of advocacy at Transparency International and current Green MEP, Report on strengthening transparency and integrity in the EU institutions by setting up an independent EU ethics body, 28 July 2021, (2020/2133(INI)).

[53] We know that left-wing parties have historically paid more attention to the supervision of the financing of political activities, while liberals have emphasised the usefulness of transparency mechanisms and the need to avoid penalising entrepreneurial freedom.

The task of the experts in this field is therefore not to settle the debate, but rather to open it up by envisaging sets of **complementary solutions** and possible levels of protection. The upcoming European Parliament offers a new opportunity to promote this issue.

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The EU's reaction to the war in Ukraine: How democratic is it?

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1. Introduction

This chapter discusses the role of the European Parliament (EP) in the EU's reaction to the Russian invasion of Ukraine. At the beginning of the war, in February 2022, the EU mainly adopted financial sanctions and provided humanitarian aids and weapons to Ukraine. **The EU action took place under the Common Foreign and Security Policy (CFSP),** formally excluding the (EP) and the Commission from the decision-making process.

Never before in the history of European integration has the EU faced a similar military crisis at its borders,[54] one which has led not only to the disbursement of large quantity of money already allocated for preserving peace and military assistance but has also forced the EU to retrieve new resources on the financial markets. **The support for Ukraine via the EU budget led to the adoption of a specific Facility for Ukraine in late February 2024, consisting of €50 billion for the country and required the participation of the Parliament, according to articles 212 and 322(1) Treaty on the Functioning of the European Union (TFEU).** Overall, from 2023 onwards, the Parliament was more involved in the medium-to-long term of the EU's strategy for Ukraine. The different instruments adopted to react to the war can tell how democratic the EU response has been. Simply put, assessing how democratic is the EU's response to the war in Ukraine implies analysing the role of the Parliament. The involvement of the latter has grown after the initial reaction was driven by the immediateness of the crisis and has been aimed at isolating and shocking the Russian economy as well as fostering the resistance of the Armed Force of Ukraine.

The chapter proceeds as follows. First, it analyses the involvement of the Parliament in the first stage of the EU's response to the Russian attack under the remit of the CFSP (section 2).

Second, the role of the Parliament is taken into account both in the CFSP itself and in the development of broader and more far-reaching aid to Ukraine, which led to the adoption of the Ukraine Facility in 2024 (section 3). Lastly, in the conclusion (section 4), the evolution of the reaction will be considered in light of similarities between other instruments adopted by the EU in more recent times, i.e. the Recovery and Resilience Facility and the conditionality mechanisms for the protection of the rule of law.

2. Russian invasion and EU's reaction: sanctions and aid, quickly!

Since the CFSP falls into the domain of intergovernmental institutions (see below), its treaties do not guarantee a margin of legal manoeuvre to other institutions, meaning that the EU cannot adopt regulations and directives (Eckes 2009: 121–124; Lonardo 2023: 60).

Therefore, the CFSP is "a distinct sub-system of law on the outer-most sphere of European supranationalism" where the key role is played by the Council (Wouters 2021: 178), which is "shielded" from parliamentary involvement (Butler 2019: 1, 39 ff.). This is the starting point in analysing the large and unprecedented array of restrictive measures (sanctions) against Russia and the two separatist republics of Donetsk and Luhansk adopted under the scheme 2014/2015 sanctions because of the annexation of Crimea and the war in Donbass (*infra*).

[54] The Russian invasion is not even comparable with the dissolution of Yugoslavia, which was the implosion of a federal system kept united by Josip Tito and by its successors during the 1980', when tensions among different groups emerged and led to the extinction of the Federation. In the present case, the deliberate invasion by a nuclear power of a sovereign country poses a different and major threat to the security of the borders as well as for the desire of Ukraine to become part of the European Union.

At the beginning of the invasion, the EU's reaction has been twofold: a smooth and steady assistance (military and humanitarian) to Ukraine as well as the adoption of several sanctions against both Russia and many individuals connected to the Russian establishment and elite (Lonardo 2022). The EU, for the first time, quickly adopted and implemented a broad set of sanctions, from ban on investment, trade, export of goods and technologies and financial assistance, to individual restrictive measures against personalities of the Russian establishment.

The sanctions became even broader and more tailored in order to weaken the most relevant sector of Russian economy and defence industry (Challet 2022).

Essentially, within the domain of the CFSP, the main role is played by the two intergovernmental institutions: the European Council and the Council. The former identifies the strategic interests and objectives of the Union by unanimous vote and define general guidelines (Decisions) for the CFSP (art. 22(1) and 26(1) of the Treaty of the European Union (TEU)); the latter, instead, acts as the main rule-making body, whilst the Parliament detains only the right to be informed (art. 26(2)) TEU. Hence, it shall be emphasised that the Decisions under the CFSP are not legislative acts (art. 31(1) TEU) and are adopted by the European Council and the Council by unanimity. In derogation to the general rule, the Council decides with Qualified Majority Vote (QMV) in case of Decisions defining a Union action or position and for implementing and amending Decisions previously enacted as well as for the appointment of the Special Representative (art. 31(1) TEU). The second derogatory provision fits this chapter, since sanctions are generally adopted in order to strengthen previous Decisions. This means that once "basic sanctions" have been set, more Decisions may be adopted on such a legal basis by the recourse to Qualified Majority Vote (QMV) (Lonardo 2023: 58-66). Besides Decisions under Title V of the TEU, there is an additional legal basis for adopting sanctions, which is art. 215 (TFEU). This disposition works in pair with arts. 29 and 31(1, 2) TEU, and it is "a legal basis within the TFEU" which, as of today, has been used for sanctions. Thus, it shall be borne in mind that the sanctions are regulated by a "combination of legal instruments based on a legal basis from each Treaty, which puts the powerful legal instrument of a directly applicable TFEU regulation at the service of CFSP objectives" (Eckes 2018: 207). To sum up, firstly a Decision is adopted by the European Council and/or the Council by unanimity and by QMV, secondly, under the TEU; and secondly, a Regulation which implements the previous Decisions by the Council follows, based on art. 215 TFEU (Lonardo 2023: 75, 85). Thus, the CFSP Decision is a prerequisite for the validity of a regulation (Case C-72/15, Rosneft).

The restrictive measures were adopted firstly in February 2022 on the basis of those in force against Russia since 2014, which have been renewed until 2022, when their impact was greatly expanded. At that time, three batch of sanctions were adopted: the first against persons linked to the violation of the territorial integrity of Ukraine; the second were related to the annexation of Crimea, which led to the almost total ban of trade and investment on the peninsula; finally, the third aimed at punishing people and entities connected to the destabilisation of Ukraine. Therefore, the Decisions adopted (to begin with Council Decision 2014/145/CFSP of 17 March 2014 and Council Regulation (EU) 269/2014 of 17 March 2014) were "ready" to be implemented and broadened since the recognition of the two separatist republics by the Russian Federation (Challet 2022: 4). In fact, Decisions and Regulations adopted from 21 February 2022 amended or implemented previous Decisions of the Council and contained both targeted and comprehensive sanctions (Graziani and Meissner 2023: 284).

In the first seven days, four heavy packages of sanctions were adopted and as of July 2024, fourteen batches of measures are in force against Russia (the last being Council Regulation (EU) 2024/1745) and specific personalities and proxies in the two separatist republics (Congressional Research Service 2024; Fella 2022: 32).

Especially at the beginning, the European Commission strengthened de facto its political role despite the prevalence of intergovernmental institutions. The Commission prepared the five packages of restrictive measures which were put on the table of the Council and quickly adopted; this stage did not last long. From the sixth package onwards, an increasing disagreement among Member States has been witnessed, including many derogations such as the exemption of Hungary over the importation of crude oil from Russia (Håkansson 2024: 34–39; Bosse 2024: 1229–1235).

The reaction of the European Union was not limited to the enactment of restrictive measures but also to financing military aid to Ukraine. Regarding the latter, the legal basis is art. 41(2) TEU which, contrary to CFSP measures within the EU budget, requires the unanimity of the Council because the expenditures are funded by the Member States. This tool was already set up via the European Peace Facility (EPF) (Council Decision (CFSP) 2021/509 of 22 March 2021), an off-budget instrument financed outside the Multiannual Financial Framework (MFF) for providing military assistance (Rutigliano 2022). Moreover, the European Union, **for the first time provided military equipment to a third country with Council Decisions (CFSP) 2022/338 and (CFSP) 2022/339**, aimed respectively at strengthening the capabilities and resilience of the Ukrainian armed forces **with lethal and non-lethal force (first aid kits, fuel etc.).** Formally, these **Decisions are subjected to the Peace Facility**, which implies that the aid given to the armed forces of Ukraine are subjected to the purposes set in art. 21 TEU and with humanitarian and human rights law (Rutigliano 2022: 412; Hofer 2023: 1701–1703).

It has been emphasised that the measures adopted above are managed by intergovernmental institutions and, as such, the role of democratic representative institutions falls short. Both sanctions and the Decision adopted under the EPF are implemented and funded by the Member States, whereas the EU has acted as common coordinating forum and framework, within which the national governments have been able to reach a common understanding to react to the Russian invasion of Ukraine (Lonardo 2022). Therefore, the adoption of Decisions (CFSP) 2022/338 and 2022/339 excluded **the Parliament and the Commission, since they fall under the umbrella of** a**rt. 24 TEU**, derogating the general disposition contained in art. 14 TEU which assigns legislative and budgetary functions to the Parliament and the Council.

Nevertheless, the Parliament may use tools for influencing intergovernmental institutions, especially through the Committees, which have proven to be able to scrutinize the CFSP Decisions. It is the case of the Committee on Foreign Affairs (AFET) (Longo, Fasone and Delputte 2016), which may enter in conflict with the budgetary committee (BUDG) given the funds allocated to the CFSP. Moreover, **the Parliament may intervene,** without any binding power, only to address questions and recommendations to the Council or the High Representative regarding the CFSP, without having the possibility to be consulted over individual measures adopted by the Council (Lonardo 2023: 92; Schütze 2017: 10).

Hence, the Parliament is involved only when the European Union budget is at stake but, as the case of the first reaction to the Russia invasion of Ukraine shows, the financial burden lies on the Member States.

Therefore, the Parliament may influence the CFSP decision-making process informally (Goinard 2020: 107–120) **as well as through the adoption of resolutions and the activity of the AFET.** For example, regarding the restrictive measures enacted by the Council, the Committee is working informally in strict compliance with the Commission over the issue of the sanction's implementation and circumvention. To this regard, it has been noted that the Parliament must enhance its consultative and scrutinising role by establishing an independent monitoring repository, fostering the technical expertise among the Parliament advisors and, above all, strengthening the role of the AFET, which should receive a timely technical briefing once restrictions are amended or adopted (Portela and Olsen 2023: 38, 53).

Thus, enhancing the parliamentary scrutiny of the tailored recommendation is considered the only way to influence the decision-making behind the sanctions to make them more transparent in the representative institution par excellence. **This was the objective, for example, of the Parliament Resolution of 1 March 2022, which enlisted all the issues at stake and warned against "sectoral or national interests" of the Member States** (European Parliament 2022a). Afterwards, the Parliament recommended the extension of the QMV in certain areas of foreign policy in the Council and firmly expressed its willingness to be involved in the scrutiny of the European Peace Facility (European Parliament 2022b) as well as questioned the effectiveness of the EU sanctions (European Parliament 2023). **Besides that, the Parliament promoted the growing financial support to Ukraine**, which led quickly to the approval, based on art. 212 TFEU, of the Decision (EU) 2022/1201 (macro-financial assistance, for 2022) and Regulation (EU) 2022/2463 (macro-financial assistance +, for 2023) through ordinary legislative procedure, the prelude of the broader "plan" for Ukraine.

3. The role of the European Parliament and the Ukraine Facility

The involvement of the Parliament in the reaction to the Russian invasion is directly connected to the enlargement of the EU budget. In this regard, in one of the resolutions referred to above (European Parliament 2022b), the Parliament already aimed for a more comprehensive budgetary functioning of the CSFP, according to arts. 14(1), 16(1) and 41 TEU.

The available tools within the CFSP excluded a prominent role of the Parliament, which from time to time asked for more procedures of scrutiny over the restrictive measures adopted.

The Parliament opened the way, along with the Commission, to a broad and overarching assistance to Ukraine which had already applied for European membership on 28 February 2022 (Tatham 2022).

This was coupled with the EU adoption of financial measures to face the COVID-19 pandemic. The **macro-financial assistance, for example, was aimed at expanding the fiscal capacity of the EU through common borrowing and spending, but it was blocked in December 2022 by Hungary which did not consent to the amendment of the MFF** and, consequently, it was necessary to resort to Member States' financial guarantees (Council Position (EU) No 4/2022, 2022/C 476/03). In addition, the macro-financial assistance resorted to the design of the Recovery and Resilience Facility (RRF) (Regulation (EU) 2021/241), establishing conditions such as the compliance with democracy and the rule of law to receive the payments (Fabbrini 2023: 54). The time was thus ripe for a broader and more far-reaching instrument which would enable the EU to borrow a large quantity of money to support Ukraine, as well as give substance to the accession path of the country to European Union.

The Ukraine Facility (Regulation (EU) 2024/792) was adopted in February 2024 and **replaced the** previous regulations of the macro-assistance to Ukraine. In total, it amounts to **€50 billion**, composed of **€17 billion in grants guaranteed by a new tool, the Ukraine Reserve, within the MFF**, and **€33 billion in loans by the EU budget "headroom"**. This financial support will be retroactively available since 1 January 2024 and will last until 2027.

It is noteworthy that the Parliament willingness was, since the beginning, **to assure democratic control over the expenditure of the Facility**, through enhanced control of both the Parliament and the Verkhovna Rada (the Ukrainian Parliament) (Peters 2024). The Parliament promoted the creation of a far-reaching tool for supporting Ukraine in a medium-to-long-term range, which would have been connected directly to the MFF. This has meant the revision of the MFF (Regulation (EU, Euratom) 2020/2093), in order to finance Ukraine and expand the financial capacity of the EU.

The Facility shows similarities with the RRF: Ukraine must submit a plan to the Commission (art. 16), which will be assessed by implementing a Decision by the Council.

What matters here are the **achievements of the Parliament in the legislative process**, among which a stronger transparency, information flow, democratic scrutiny, and audit and investigation rights of the European Court of Auditors and of the Ukrainian bodies. The Commission must assure the democratic scrutiny, according **to art. 4(6) of the Regulation, "in the form of consultation by the Ukrainian government of the Verkhovna Rada in accordance with the constitutional order of Ukraine"** (Peters and Chahri 2024). This is a **very questionable provision** because **it requires that the Commission should ensure that the Ukrainian Parliament and society are duly consulted** in the drafting of the Plan, but this can be hardly achieved by the Commission. This is linked to the **precondition** for support under the Facility (art. 5), **which encapsulates most of the EU values set by art. 2 T**EU such as **the respect of democratic mechanisms**, party pluralism, the rule of law and human rights, though in a war context. The Plan, therefore, must cope with **"high level" protection of financial interests** of **the Union**: while art. 9 of the Ukraine Facility Regulation enlists the benchmark which must be respected, it shall be noted that the wording "high level" remains vague and flexible to interpretation.

Regarding this, **the Court of Auditors (ECA) raised criticisms** assessing the proposal, that the Commission did not prepare an impact assessment due to the "urgent nature of the proposal" (ECA 2023: 9). In addition, **the ECA highlighted the vagueness** of the preconditions as well as the possibility envisaged by art. 13(1) to allows for **exceptional financing** in "duly justified exceptional circumstances" through a Council implementation decision after a proposal by the Commission. The ECA again noted the slight control over this exceptional measure and called for a limitation of the validity of the Council implementing Decisions for a fixed period, to assess the factual background which would back the exceptional financing (ECA 2023: 11, 14). During the legislative drafting, in the first reading, **the Parliament proposed relevant amendments to art. 5 in line with the ECA recommendations**, with the objective to make more precise the preconditions to be fulfilled by Ukraine (European Parliament 2023). But despite this, the final version of the disposition does not show such precise conditions, probably because it would have been difficult to fairly assess them, representing a burden for both Ukraine and the Commission given the short time in which the payments had to be disbursed. More detailed prescriptions are entailed in art. 35, which relates to the EU financial interests, whose protection shall be assured by the Commission and Ukraine. It implies that the latter is committed on the one hand to respect preconditions and on the other hand, to protect the financial interests of the EU, without having the administrative and legal machinery for this purpose and in a very short period of time. **The Commission, instead, is obliged to report annually about the progress under this Regulation**, as well as quarterly about the state of play of the implementation of the Facility.

The investment flow has been the subject matter of a **joint declaration of the Parliament and the Council in late February 2024**, where the Commission was invited to create different budget lines for the three Pillars in which the €50 billion for Ukraine is divided under the Facility, where grants and loans are directed to reconstruct, modernize and support reforms for accession (Pillar I – €38.27 billion in grants and loans); to attract public and private investments (Pillar II – €6.97 billion in grants); and to assist capacity building programmes for implementing the EU acquis standards (Pillar III – €4.42 billion in grants)[55]. Furthermore, shortly after the adoption of the Facility, several questions were raised by the EU Institutions, especially those especially related to the exceptionalism of the tool. This is the content of **a common declaration of the Parliament on 29 February, the Council and the Commission**, where on the one hand were highlighted **the exceptional circumstances which Ukraine** is

[55] €0.34 billion are allocated for technical and administrative assistance in accordance with Article 6(5) of the Regulation.

passing through and, on the other, the support of the Plan in rushing (or facilitating) the accession path to membership. The solution found for Ukraine, the statement says, shall not be considered as a precedent for future economic assistance and it echoed **an additional resolution of the Parliament of the same day, which called the Commission and the Council "to set out a clear pathway for the accession negotiations"** and to an accession process based on merit, **by focusing on the respect for the rule of law, fundamental values, human rights, democracy and the fight against the corruption.** Lastly, the Parliament, shortly after the adoption of the Ukraine Facility, wanted to express its concerns about the process of disbursement of funds as well as regarding its oversight role (European Parliament 2024). From the Resolution, it is palpable that the Parliament is aware of the risk of this kind of accession, as much as the EU and individual Member States about the capability of Ukraine in the fulfilment of the preconditions set by the facility, that is a prerequisite for the accession.

4. Conclusions

The Russian invasion of Ukraine has provided the EU with an additional opportunity (or burden?) to rethink its value-oriented decision-making in policy areas, such as CFSP, which fall within the domain of intergovernmental institutions, i.e. the Member States.

Therefore, questioning the reaction to the war in Ukraine in relation to democracy and the rule of law is likely to be even a harder task for two main reasons: first, legally speaking, the Treaties do not confer any binding power in the CFSP upon the Parliament, which here has been considered the compass according to which it is possible evaluate how much the representatives of the European citizens have been involved in a crucial "reaction" to the Russian invasion of Ukraine; second, the involvement of the Parliament in this field may be measured only when budgetary functions are at stake. This latter feature has recently been at the epicentre of discussion in both EU institutions and academic scholarship. The Ukraine Facility lies in continuity with other legal instruments adopted by the EU (the RRF and the Conditionality Regulation) and as a novelty for what concerns the application of secondary EU law to this exceptional tool provided for the Ukraine's accession to the EU. The adoption of the Ukraine Facility means, in terms of decision-making, the involvement of the Parliament in the enlargement process or, better to say, an overarching operationalisation of the rule of law principles to Ukraine for protecting the financial interests of the Union (Rabinovych 2024). It has implied more Parliament scrutiny over the Commission which is tasked to monitor the Ukraine Plan. Hence, **for geopolitical reasons, the EU used its legislative scaffolding to apply the rule of law conditionality to Ukraine**, which has also implied an additional and exceptional increase of EU fiscal capacity (Fabbrini 2023).

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Is the EU's *Spitzenkandidaten* procedure fit for the future?

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1. Introduction*

This chapter presents insights on the functioning and impact of the *Spitzenkandidaten* process for selecting and appointing the President of the European Commission (Ceron, Christiansen and Dimitrakopoulos 2024).

Since it emerged in 2014, the *Spitzenkandidaten* procedure has seen a significant departure from the previous practice of national leaders essentially choosing the Commission President behind closed doors in the European Council. Its supporters highlighted the benefit of giving European voters clear alternatives – not only in terms of manifestos or political programmes, but also regarding political leaders, in a manner that citizens are familiar with from national politics (Politiser le débat européen n.d.; Notre Europe, Jacques Delors Institute 2008; Letta 2023)

When first introduced in 2014, the procedure worked in the way its promoters had intended – all major party-political families nominated rival leading candidates who campaigned in favour of competing political platforms ahead of the European elections. In the end, Jean-Claude Juncker – the European People's Party's (EPP) *Spitzenkandidat* – was successful in his quest to become Commission President because he had been able put together a coalition commanding the support of an absolute majority in the European Parliament (EP). Despite some misgivings in several national capitals, the European Council voted overwhelmingly in his favour.

Yet in 2019, after no majority could be found for either of the lead candidates, the European Council succeeded in appointing Ursula von der Leyen as Commission President, even though she had not been nominated as a leading candidate by any of the political parties and had only emerged after the elections as a possible contender – and solution to a growing deadlock. Lead candidates Frans Timmermans and Margarete Vestager, however, were given elevated roles within the College as Executive VicePresidents.

Despite the controversial nature of the process and the negative experience of 2019, predictions of the death of the *Spitzenkandidaten* procedure have proven to be premature. In the run-up to the 2024 European elections, all main political parties have appointed candidates.

The Christian Democratic EPP, with a long-standing commitment in its statutes to choose a lead candidate, has nominated current Commission President Ursula von der Leyen. The Social Democratic PES has nominated Nicolas Schmit, the former Commissioner for Jobs and Social Rights. The Greens chose two *Spitzenkandidaten*, Terry Reinke and Bas Eickhout. The liberal Renew group is running again with a "Team Europe" of three candidates – Sandro Gozi, Valérie Hayer and Marie-Agnes Strack-Zimmermann (European Greens 2024)

The EP itself not only took a principled stance to support the process but sought to enshrine this formally in legislation when it proposed new election rules in 2022 (Kurmayer 2022). Even

* This chapter is based on two previous publications: Ceron, M., Christiansen, T. and Dimitrakopoulos, D.G. (eds.), (2024). *The Politicisation of the European Commission's Presidency: Spitzenkandidaten and Beyond*. Cham: Palgrave Macmillan, and Ceron, M., Christiansen, T., Dimitrakopoulos, D.G., and Russack, S. (2024) Is the EU's *Spitzenkandidaten* procedure fit for the future?, *CEPS Explainer, CEPS*.

though these reforms will not (yet) be in force for 2024, the new election of the EP provides an opportunity to take stock of this key reform and consider options for it to operate (better) in the future.

After the apparent "success" of 2014 and the alleged "failure" in 2019, this third outing can be seen as pivotal in the attempt to establish a new dynamic for choosing the Commission President where party politics and popular preferences matter more than bargaining and horse-trading among national leaders.

This chapter analyses the procedure's past performance, looking at a range of aspects beyond the rather simplistic dichotomy of success and failure, before then providing several general conditions that would need to be met to ensure a more effective and more respected lead candidate procedure from 2029 onwards.

2. No impact on the "Europeanness" of the elections

The initial indications show that, arguably, the lead candidate procedure has not (yet) led to the most obvious hoped for improvements – higher stakes at the EP elections translating into more interest in the elections and increased turnout. Voter turnout has remained relatively low at around 50 %, even though the historical decline in turnout has been arguably stemmed. The media's reporting on the European elections has remained decidedly national, indicating that even with the *Spitzenkandidaten* European elections remain second tier elections.

A note of caution is, however, needed here. Reforms of this kind take time to produce results – especially when they are contested as much as this one has been and have been introduced during a period of continued crisis. We have been witnessing the early stages of the potential institutionalisation of the *Spitzenkandidaten* procedure. In the context of widespread ignorance about the nature of this procedure (or the elections more generally), if the public has noticed the competition among the lead candidates, it has only been significant in the Member States where the individual candidates come from.

Both in 2014 and in 2019, country and partisan differences were seemingly more relevant for mainstream parties and in countries with Europhile home candidates. Or to put it another way, national party competition is key for whether and how the *Spitzenkandidaten* procedure is made visible. In this sense, the fact that the main candidates have all hailed from a small number of countries in north-western Europe has not been helpful, potentially reinforcing perceptions among voters in southern and eastern Europe that the EU is distant from them.

In other words, the choices made by political elites and the European party families on who to nominate as *Spitzenkandidaten* (especially for as long as these nomination processes don't attract wider media and public attention) may well have a detrimental effect on the overall legitimacy of EU politics – an aspect that leaders ought to consider in future decision-making.

3. More transparent leadership selection

Even though the *Spitzenkandidaten* procedure has not produced a major shift in the way citizens engage with European elections and – by extension – with EU politics more generally, **there has been an increase in the public scrutiny of candidates**, which was one of the procedure's key objectives.

The *Spitzenkandidaten* procedure has made executive leadership selection more transparent, giving the public more opportunities to scrutinise the contenders vying to become

Commission President. The nomination processes within the political parties, the electoral campaigning among the lead candidates and the post-election negotiations among the institutions all combine to make a previously obscure process much more transparent. The nature of the competition now allows those who want to become Commission President to have their credentials finely scrutinised in the media – even if in practice the intended engagement with the general public has so far largely failed to materialise.

Even in 2019, when the European Council wrestled back control over selecting the Commission President from the EP, the nature of the political debate was fundamentally different to the previous era, such as the circumstances that led to José Manuel Barroso's appointment. Contenders for the position in 2019 were publicly examined in terms of the personal qualities they would bring to the job, alongside their executive experience, European credentials and linguistic skills, as well as other factors such as their gender and age. It also clearly made party political affiliation an essential ingredient in determining who could become Commission President.

Introducing the *Spitzenkandidaten* sparked a genuinely competitive dimension to the selection process, not only among the formally nominated lead candidates but also any alternatives – such as Ursula von der Leyen – that the European Council would rather prefer to appoint to the job. This is a far cry from before where the members of the European Council were seen putting forward one of their own who could be expected to do their bidding, following the logic of the lowest common denominator in a process that typically unfolded behind closed doors.

However, the increased level of transparency has a flipside too. The greater the transparency, the more complicated the public debate and scrutiny of the contenders becomes, not only over the actual appointment of the Commission President but also in terms of reaching "package deals" that involve the other top jobs being filled at the same time, namely the Presidents of European Council, EP and European Central Bank as well as the High Representative for EU Foreign Policy.

What had already been a game of three-dimensional chess – involving criteria such as nationality, party-political affiliation, gender and prior experience as well as personal characteristics – **is now subordinated to a much more public contest over the Commission Presidency**. It's certainly odd that the package deals that are being made for these five positions combine one subject to a democratic selection by the EP with the remaining choices still being done a in more traditional, diplomatic style, largely away from the public eye.

Yet the experience shows that the *Spitzenkandidaten* procedure has not made package deals impossible – indeed, the practice of package deals has expanded to include the senior echelons of European Commissioners (with the creation of "Executive VicePresidents of the European Commission"). It can be argued that Ursula von der Leyen's decision to appoint Frans Timmermans and Margrethe Vestager as Executive VicePresidents was because they were the *Spitzenkandidaten* of their respective political families whose votes she needed to be successfully elected by the EP.

For 2024, there was even the possibility of linking the appointment of a new NATO Secretary-General and the mutual impact of one decision on the other cannot be excluded. Thus, the message here is that despite adding further complexity to the leadership selection process, its partial democratisation coming with party-political lead candidates hasn't led to any breakdowns or blockages. In short, the EU political system's ability to forge consensus continues to live on.

4. Examining the *Spitzenkandidaten* procedure's institutional impact

4.1.What did it do to the Commission (President)?

The public exposure of the Commission President that comes with the *Spitzenkandidaten* procedure enhances the postholder's public stature, strengthens their support in either the EP or European Council (or both) and provides them with greater legitimacy to direct the Commission's work.

President Juncker had used his mandate derived from the *Spitzenkandidaten* process to define a new model of presidential leadership involving a "political Commission" that was meant to be "independent, proactive, and strategic" and used new working methods to successfully implement the President's policy priorities. This model has had an enduring impact, persisting under von der Leyen, even if her presidency has also been characterised by greater deference to key Member States – unsurprisingly given the manner of her appointment.

4.2.What did it do to the European Council?

President Juncker had used his mandate derived from the *Spitzenkandidaten* process to define a new model of presidential leadership involving a "political Commission" that was meant to be "independent, proactive, and strategic" and used new working methods to successfully implement the President's policy priorities. This model has had an enduring impact, persisting under von der Leyen, even if her presidency has also been characterised by greater deference to key Member States – unsurprisingly given the manner of her appointment.

Moreover, it's important to go beyond the potentially misleading characterisation of leadership selection as simply a battle between the EP and European Council. National leaders within the European Council are also decisive figures in the corresponding party federations. They must contend with the tension between domestic and (EU) party-political interests. The European Council's consensus and package deals, balancing various criteria including national origin, gender, and – increasingly – partisanship when nominating individuals for high-level EU posts play a crucial role. **Conflicts with the EP over the *Spitzenkandidaten* procedure are likely to persist, as the European Council remains central (but not alone) in nominating at least the European Commission's top job.**

4.3.What did it do to the EP?

The EP's role has evolved over time, with a longer-term trend that has empowered the europarties rather than the political groups in the EP – a trend that the *Spitzenkandidaten* procedure has further amplified. Europarties are now more visible and central to the process of selecting the *Spitzenkandidaten*, with some similarities emerging over how this process unfolds, such as an element of competition, low thresholds and the key role of a permanent collective body that aligns with understanding EU democracy as a political union (European Greens 2024).

Yet there are still obstacles stopping the EP from decisively ensuring a *Spitzenkandidat* becomes Commission President, especially when internal EP cohesion can be low, party-political divides prevail, there are objections to a specific candidate, or the European Council presents a united front.

The procedure's continuation can suggest that the EU has moved the Commission President's appointment well beyond the purely intergovernmental model, arguably irreversibly. **After three election rounds following the Lisbon reforms, the *Spitzenkandidaten* process can be understood as an informal constitutional convention, with certain elements being formalised in the statutes of the European parties and other aspects such as "presidential debates" being integral parts of the process.**

The *Spitzenkandidaten* Presidency of Jean-Claude Juncker also exhibited closer ties between the Commission and the EP, compared to both Barroso's second term and von der Leyen's experience. Conversely, the von der Leyen Commission has been geared more towards key members of the European Council. However, party-political dynamics in the EP have not become significantly more adversarial (Bressanelli, Ceron and Christiansen 2024). For instance, Juncker didn't enjoy more stable coalition support like Barroso did with the "grand coalition" or von der Leyen did with the "super grand coalition" – except for the initial phase of Juncker's term when a formal coalition deal between EPP and S&D was struck, with Martin Schulz committing his party's votes in support of Juncker's Presidency.

4.4.What did it do to the EU's Institutional setup?

The growing trend towards the internal "presidentialisation" of the European Commission is at odds with the characteristics of the EU political system more generally. The EU is neither a presidential system nor a fully-fledged parliamentary system but continues to be based on the dual legitimacy that is derived from representatives of both Member States (in the Council and European Council) and citizens (in the EP). Consequently, the European Commission does not possess the powers – and thus not the credibility – to act as a "President of Europe".

This is where the *Spitzenkandidaten* procedure collides with the complex reality of European governance. The latter involves a consensual political culture, a long-standing practice of compromise and cooperation across political cleavages, of many veto-players and widely diffused interests. The idea of "presidential candidates" publicly competing to lead the EU's executive, and the "winner-takes-all" mentality that may come with it, generates a misleading image of the job's nature. Without broader reforms, it risks misrepresenting the power that the postholder has in the eyes of the public, leading to false expectations as to what impact the democratic choices of citizens can have.

We also need to consider the wider context in which this process has been introduced. The EU's almost continuous state of crisis management due to the "polycrisis" (the euro crisis, the migration crisis, Brexit, the pandemic and then Russia's invasion of Ukraine) has impacted how the EU's political system functions in important ways – which is why any conclusions about the impact of the *Spitzenkandidaten* procedure remain tentative at this point. In any case, considering these circumstances, it comes as little surprise that the process hasn't fundamentally transformed EU politics. It's remarkable that the europarties have even persisted at all with the procedure, putting forward candidates at each election since the Lisbon Treaty entered into force.

After the first decade of *Spitzenkandidaten* in action, it's evident that the process has not delivered on the exaggerated hopes originally associated with it. While it remains in place, it sits awkwardly within the EU's political system, given the centrality of the Member States. Yet its persistence and impact on the leadership selection process – and EU politics more generally – makes it nevertheless important to fully understand how it operates,

to identify the underlying dynamics it has engendered and to spell out the weaknesses that would need to be addressed to improve it.

5. The wider impacts and dynamics of the *Spitzenkandidaten* system

5.1.Intra-party competition

Whereas the nomination process during the previous two elections was a complex "game" – an intra-party game with many variables where a candidate's electability may or may not fall by the wayside – in 2024 something changed. In practically every europarty, only a single candidate emerged and was "crowned" due to the absence of any internal competition. Only the Greens stand out as the single outlier where there were rival internal candidates.

One unintended consequence of the internal nomination processes has been to establish a stronger link between the national and the EU level in the life of the political parties, raising awareness of the preferences, objectives and ambitions of leading personnel in the EP and national parties. Whether this rising awareness extends beyond the confines of these European party federations to include ordinary citizens is a point that the corresponding political personnel ought to grapple with.

5.2.Campaigning challenges

Challenges remain, particularly the continued dominance of domestic politics, with the EP elections remaining second order. Many national parties continue to nominate national lead candidates. Multilingualism remains a barrier even to the most polyglot among the lead candidates. Mainstream party manifestos are generally centrist, pro-integrationist compromises, catering for a broad coalition during the legislature. Consequently, the few public (usually live-streamed) debates featuring the main candidates have struggled to identify the key choices confronting the electorate at these elections. This is compounded by the absence of anti-European populists lead candidates (in 2014) to rival the mainstream ones.

While lacking the drama and polarisation familiar from televised presidential debates in the United States, these European debates have nevertheless provided the opportunity for the individual candidates to improve their name recognition and appeal to particular audiences (e.g. young voters in the case of the Maastricht debates in Mathiesen 2024) and raise their profile as future EU leaders. This is an important challenge, particularly for those candidates whose careers are limited to the EU level or their own country and are thus less widely known to the European public.

5.3.Coalitions and cohesion

Regardless of these limitations, the election's outcome is obviously an important milestone in the process. **The candidate nominated for the Commission Presidency by the party that secures the most seats in the EP will be considered the "winner" and is assumed to be the EP's first choice.** However, given that even the EPP – traditionally the largest party-political group in the EP – cannot expect to command the absolute majority required for electing the Commission President, it's at this point that deals need to be made.

The support of other groups will need to be "engineered" through agreements about future cooperation, on both appointments for other positions and on future policy choices. Any such

deals among party groups occur in the European Council's shadow, where national leaders can be expected to influence their respective parties to achieve their desired outcome.

It's not only the outcome of the election but also the relative strength of opinion in both the EP and the European Council that matters. Cohesion within the EP was far higher in 2014 than it was in 2019. The European Council voted overwhelmingly in Juncker's favour in 2014 but quickly dismissed Manfred Weber in 2019, thus shifting the focus immediately to whom it – rather than the EP – could agree on as the new Commission President.

In any case, the appointment stage of the executive leadership selection process also critically involves the perceptions of national interests, party political considerations and individual leaders' preferences. This configuration provides the basis for calculating the Commission President's future performance – whether they will deliver on policies, legislative proposals and personnel choices that are to the liking of both a majority in the EP and in the European Council. As Ursula von der Leyen is standing as the EPP's 2024 *Spitzenkandidat*, the current election provides the very first opportunity since Lisbon for voters to pass judgement on a Commission President's performance.

How von der Leyen performed in the role was not profoundly different from previous Commission Presidents, whether they were *Spitzenkandidaten* or not. The need to achieve super-majorities in both the EP and Council, and the political manoeuvring that this requires, might matter more than being a lead candidate. The areas where von der Leyen was able to take personal initiative were outside the traditional legislative decision-making arena, namely managing the Covid-19 pandemic and the EU's response to Russia's war against Ukraine. In both areas she appeared to be decisive and competent in managing the relevant files and taking the required action.

5.4.Cross-institutional party power

Having recognised these distinct stages in the process, and the different dynamics at play within each of them, it's also important to connect them and identify their linkages – especially as the procedure matures and there are lessons to be learned from one electoral cycle to the next.

One example is the relative strength that a particular national government has within a given party family. Being able to shape the positioning of a major European party federation while at the same time having a voice around the European Council's table would provide advantages in both the selection and the appointment stage.

Emmanuel Macron's role is a good example of this. He has combined his leading role in the European Council with the significant influence that his party has had in the EP's Renew group. This made it possible to prevent the liberals from nominating a single *Spitzenkandidat* – something of a soft sabotage of the entire process – and then later push for appointing the non-candidate von der Leyen as Commission President.

6. Some conditions to make the lead candidate procedure more effective

Following 2024's experience where the *Spitzenkandidaten* procedure has seemed incoherent, muddled and resulted in many lead candidates (with some political groupings confusingly nominating more than one), this could lead to doubts regarding the procedure's future (Russack 2024).

However, regardless of what has happened this time around in 2024, there could still be life left in the *Spitzenkandidaten* procedure, and so for a more effective process in 2029, several general conditions would need to be met.

6.1. A more transparent and inclusive process of selecting candidates

If the process is to achieve its original democratic objectives, greater engagement with party members and even citizens ought to be at the forefront of further reforms. This means making the process more transparent and accessible to the European electorate.

Europarties ought to involve their own members more directly in the nomination process, for example by having more open, public and competitive "primaries". That will also allow voters to become familiar with potential leaders and would facilitate electoral pacts in favour of joint candidates that have the potential to challenge the large parties' monopoly over the European Commission President.

6.2.A more pan-European campaign

The campaign – just like the nomination process itself – also needs to become more genuinely *pan*European, breaking out of the "prison" of northwestern Europe, for example by having far more public and televised debates, campaign events and stump speeches across the entire EU. To the extent to which citizens in central, eastern and mediterranean Europe are aware of the European Commission and its President – particularly after Ursula von der Leyen's high-profile tenure – they can also be expected to be interested in the race for her successor if given the opportunity.

6.3. Genuine support from EU leaders

Once a party family has decided in favour of nominating a *Spitzenkandidat*, the numerous members of the European Council who are often also party leaders at the domestic level and have a major role in the nomination process must be upfront about it. If they publicly acknowledge their role in the nomination process and defend its outcome, ordinary citizens are more likely to take the *Spitzenkandidaten* process seriously.

Indeed, since national party leaders frequently also lead national governments, and thus are members of the European Council, their position in the process, and indeed their personal involvement in the nomination process, should be subject to greater public scrutiny. Or, putting it in reverse, Angela Merkel's consistent ambivalence about Jean Claude Juncker and Manfred Weber's candidatures is a kind of political behaviour that should be more heavily scrutinised in the future.

Instead, one would expect much more sustained involvement from national leaders in the electoral process, a greater presence at party-political rallies and campaign events and explicit support for related manifesto commitments. Such pre-election engagement then ought to go hand-in-hand with a greater commitment to engage in the kind of negotiations, agreements and institutional decisions that these same actors need to take after the election.

6.4. Increased visibility from the media and national parties

The call to give the process more visibility is also directed at the media, and indeed at the leadership of national political parties as both often privilege domestic lead candidates over the jointly nominated EU candidates. The fact that the national lead candidates are *not* competing for any office, unlike the European *Spitzenkandidaten*, ought to provide good arguments as to why voters should also pay attention to the contest at EU level.

6.5. The role of pre-electoral coalition pacts

Finally, party federations must put far more serious thinking into the idea of pre-electoral pacts. The fundamentally vague treaty concept of "the outcome of the European election" needs to be filled with meaning *before* voters go to the polls. This would then ensure that there's a better understanding of what voting for a particular candidate means. A more openly competitive election, where different candidates – possibly supported by several parties on a pre-agreed policy platform – have a genuine chance at "winning" the election will make it both more relevant to voters and more honest in terms of the deals that are required *after* the election.

At least on the centre-left (broadly conceived) of the political spectrum, as things stand in 2024, only a strategy like this would have possibly threatened the EPP's entrenched position as the largest party in the EP. Such a move might then trigger similar movements on the right, for example a cooperation agreement between the EPP and (parts of) the ECR – thus mirroring the developments in Italy that propelled Giorgia Meloni to power in 2022. Broader centre-left or centre-right alliances that agree on a joint candidate before the election could conceivably hope to win an absolute EP majority. Naturally, this would further constrain the European Council in any attempt to parachute in a non-*Spitzenkandidat*.

Pre-electoral pacts and agreements on joint candidates among political parties would also increase transparency. The erosion of electoral support for the pro-European alliance of mainstream parties (Christian Democrats and Socialists, often enlarged to also include the liberals and Greens), alongside the rise of Eurosceptic parties on both the left and the right, has only strengthened the need for these mainstream parties to collaborate to achieve the necessary majorities.

This doesn't necessarily work against the *Spitzenkandidaten* procedure. Its supporters argue that it can make the EU more responsive by changing the political "flavour" of the pro-European consensus in line with changes in public opinion.

7. Conclusion

When President von der Leyen introduced herself as the European Council's candidate to MEPs back in 2019, she committed to strengthening the *Spitzenkandidaten* system, claiming that she wanted "to work together [with the EP] to improve the Spitzenkandidaten system. We need to make it more visible to the wider electorate and we need to address the issue of transnational lists at the European elections as a complementary tool of European democracy" (von der Leyen 2019).

This did not happen. Von der Leyen did not make any attempt to revise or formalise the process.

The EP, in its attempt to revise the European Electoral Act in mid-2022, tried to formally institutionalise the *Spitzenkandidaten* procedure, as a means to politicise the Commission President's selection. There is currently no appetite among Member States in the Council for this – and after the more chaotic handling of the process by the political groupings in 2024, it is unlikely that Member States will change their mind anytime soon (European Parliament Press Room 2022).

National governments are equally opposed to another mechanism which would complement the *Spitzenkandidaten* process well, namely transnational lists. The combination of EU-wide lists with codifying the *Spitzenkandidaten* procedure would arguably strengthen the Commission's accountability and democratic credentials. The Council rejected the EP's demands when the required unanimity among Member States to change European electoral law failed to materialise (Fox 2022).

This implies that any rerun of the *Spitzenkandidaten* procedure would (for the foreseeable future) be undertaken on the same informal basis that was used in 2014, 2019 and now in 2024. Looking towards the 2029 elections, this bodes ill for the procedure's long-term survival, unless the series of conditions detailed in this chapter are finally taken seriously and are actually implemented.

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Final reflections: emergency and democracy*

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Emergencies are "sudden and unexpected occurrences" that "urgently demand[] immediate action" (Oxford English Dictionary). Today, modern societies potentially face **three types of major crises**. They may be threatened by a **political crisis**, provoked by wars or rebellions; they may have to cope with **natural disasters**, such as floods or earthquakes; or, they might struggle with the effects of an **economic crisis**, and in the twentieth century, **this third type of emergency has become particularly prominent** (Rossiter 1963). How should a legal order deal with such emergencies? Constitutional orders are designed to offer permanent legal solutions to general social problems. **But what if this social order is itself challenged – internally or externally – to such an extent that its "ordinary" principles appear inadequate?**

Two constitutional options are here possible: a "relativist" and an "absolutist" approach.

The "relativist" approach accepts that the ordinary constitutional principles might not apply in emergency situations. Constitutional principles, like the separation of powers or human rights, can thus be "suspended" in times of crisis. **This approach has informed German constitutional thought**. The best-known expression of this idea was perhaps Article 48 of the 1919 Weimar Constitution. The latter **allowed the President to take all the necessary measures** – such as the suspension of fundamental rights – where "the public safety and order in the German Republic [were] seriously disturbed or endangered". The abuse of emergency powers during the Weimar era originally led the Bonn Constitution to reject this "relativist" constitutional approach. This however changed in 1968, when a constitutional amendment returned to the "relativist" position (Schweitzer 1969). Today, the German Constitution provides an extensive "emergency constitution" that can abrogate the ordinary constitutional principles in times of crisis.[56]

The "absolutist" approach, by contrast, considers the constitution as a "law for all seasons" (Lobel 1988-89). **This position has traditionally been the American constitutional solution**. In *Ex parte Milligan* (1866), the US Supreme Court thus held that "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace" and therefore applied "at all times, and under all circumstances" (ibid. 120). Yet this does not prevent the legislator from adopting "emergency legislation" (Ferejohn and Pasquino 2004). However, and importantly**, this emergency legislation remains subject to the ordinary constitutional principles**, even if the concrete application of these principles during an emergency may produce different substantive results. In the words of the Supreme Court: "[w]hile emergency does not create power, emergency may furnish the occasion for the exercise of power" (Home Building & Loan Association v Blaisdell 1934: 426).

The European Union legal order is posited nearer the "absolutist" constitutional position. Yet since its early days, the EU legal order has also offered a variety of **flexible constitutional and legislative tools to deal with internal or external emergencies**. This adaptability to especially economic emergencies could already be seen in 1974, when the (then)

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[56] The "emergency constitution" is placed in a separate title within the German Constitution and was designed for the "state of defence". It provides, inter alia, for special constitutional principles that allow an extension of the legislative powers of the federation (Article 115c GC) and a shortened legislative procedure for urgent bills (Article 115d GC).

European Economic Community faced a global economic emergency – the oil crisis (European Council 1974: 7):

"Recognizing the need for an overall approach to the internal problems involved in achieving European unity and the external problems facing Europe, the Heads of Government consider it essential to ensure progress and overall consistency in the activities of the Communities and in the work on political cooperation. The Heads of Government have therefore decided to meet, accompanied by the Ministers of Foreign Affairs, three times a year and, whenever necessary, in the Council of the Communities and in the context of political cooperation… These arrangements do not in any way affect the rules and procedures laid down in the Treaties …

With a view to progress towards European unity, the Heads of Government reaffirm their determination gradually to adopt common positions and coordinate their diplomatic action in all areas of international affairs which affect the interests of the European Community … The Heads of Government consider it necessary to increase the solidarity of the Nine both by improving Community procedures and by developing new common policies in areas to be decided on and granting the necessary powers to the Institutions."

The birth of the European Council here represented an "institutional" emergency solution; **yet the EU Treaties today also contain more concrete competence arrangements for emergency situations**. **Article 78 (3) TFEU** for example offers a **special legal basis for Council measures** "[i]n the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries". And a particularly famous example can be found in **Article 122 TFEU**, which **simultaneously aims to offer a solution to, respectively, economic and natural crises** affecting the Union and its Member States:

"1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

The European institutions here mainly charged to deal with a crisis resolution are the Council and the Commission. **Where is the European Parliament in the decision-making in all this? And how, more generally, have democratic processes been affected by the various crises that have haunted the European Union and its Member States? This is the main question this collection of essays wished to answer**. **Part I** began with an **analysis of the ordinary constitutional principles of democratic government**, such as the Union principle of representative democracy (Lupo). It was complemented by two contributions focusing specifically on the **dissensus elements within the participatory** (Golmohammadi) **and non-parliamentary** (Piccirilli) arenas within the Union.

Following on from these ex-ante constitutional benchmarks **were two important contributions exploring the state of emergency rules within France** (Hennette Vauchez) **and the EU** (de Witte). They formed the opening chapters to **Part II** on the **democratic procedures** (or absence thereof) during EU emergencies and crises. The **thematic focus** had here, rightly, been placed on the **recent Covid-pandemic and the Union's responses in the form of its Recovery and Resilience Facility** (Capati and Fabbrini) and **NextGenerationEU** (Fasone), **as well as on how NGOs have been affected** (Dolghin). What has, or can, be learned

from these pandemic crisis experiences? The various chapters in **Part III** approached this question from a **variety of perspectives, including the war in Ukraine** (Dirri), the **Qatargate scandal** (Vauchez and Avril) and even **the rule-of-law crises within the Union** (Citino). **Two additional chapters** within this part, furthermore, analysed the **"Conference on the Future of Europe"** (Blokker) as well as the **2024 European Parliament elections** (Ceron et al.).

The history of the twentieth century has – sadly – shown the "weaknesses of democracy to meet crises" (Mauer 1935: 688); and the early twenty-first century does not seem all too different. The slowness and complexities of the parliamentary procedure continue to seem ill-equipped for emergencies with the latter often asking for quick and strong action. Indeed: when on 4 March 1933 **President Roosevelt** took office and the United States of America underwent the **biggest economic crisis of the century**, the new President had asked "for the one remaining instrument to meet the crisis – broad Executive power to wage a war against the emergency" (Leutchenburg 1963: 41). **This led to an explosion of regulatory executive activity – and the radical erosion of the "parliamentary" state**. **Has the same happened to the European Union? The Union has, to some extent, followed these steps in the past decade.** The rise of the Union executive, especially in the form of the European Council, has **marginalised the ordinary Union procedures and European Parliament in important decisions**.

What can here be done in the future? Perhaps the Union constitutional order would be better served by an express and formal "emergency constitution" that was to explicitly regulate the respective spheres of executive and parliamentary governance? Or should the Union follow the US American example and respond to crises mainly by (temporary) delegations of legislative power to its executive: the Commission? **The Union does enjoy extremely flexible delegation regimes under Articles 290 and 291 TFEU**; and the **parliamentary control methods especially under the former are well constructed** (Schütze 2021: 313-356). **This solution may however not please those Member States that feel that each European crisis has (almost) always represented a moment of European centralisation**; and it is, indeed, mainly for that reason that **the legal adhockery**, in respect of the various crises of the European Union in the past, has been **invented to please the Member States**. This flight into international law, through formal inter-se agreements or informal decisions, however, poses a serious **problem to democracy. For much of international affairs are non-parliamentary affairs**.

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