

# THE STATE OF THE EUROPEAN UNION

Towards a new legislative term



**REPORT 2023**



# **The state of the European Union**

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legislative term



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FUNDACIÓN ALTERNATIVAS AND FRIEDRICH-EBERT-STIFTUNG

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# Introduction

## The challenges facing Europe

The year 2023 has provided further proof of the importance of European unity. Even after – especially after – the attack on Ukraine in violation of international law, the European Union (EU) offers the most robust response to the current threats and, more than ever, the common promise of a brighter future in the 21st century. Against a multipolar international backdrop, one of growing rivalry among powers, tackling multiple crises like war, climate change, social inequality and the rise of populism poses the biggest challenge to have faced the EU since its inception. The European people will go to the polls in May 2024 to determine the composition of the European Parliament. In doing so, they will be deciding on the EU's political priorities and its capacity for action. A lot is at stake.

For the twelfth time, experts in European politics devote this report to the various European political projects currently on the table. All the papers were written between spring and summer 2023. At the time of the report's publication, the Spanish Presidency of the Council of the European Union in the second half of 2023 was still in progress; it was therefore too early to register its results.

No matter how we look at it, there is no denying that the EU cemented a turnaround in 2023. European defence, reliant on the United States until now, has acquired a prominence that had been practically non-existent since the implosion of the Soviet Union. The end of cheap Russian gas has sent energy prices rocketing. EU enlargement to the Western Balkans is getting off the ground, and it includes Ukraine. That same philosophy underpins the idea of a European Political Community comprising 44 countries, i.e., the EU and its neighbours. In short, we can say we are without doubt at what the German chancellor, Olaf Scholz, dubbed *Zeitenwende*, a turning point in history.

Indeed, the impact of the war in Ukraine, the biggest geopolitical shift since the Second World War, has continued to influence EU strategy in 2023, practically the final year of the current European legislative term. Naturally, it is shaping the Spanish Presidency of the Council of the European Union, which began with a major summit in Brussels on 17 and 18 July 2023 between the EU and the Community of Latin American and Caribbean States (CELAC).

This report, then, is a study of the challenges facing Europe at this critical juncture, at a time when we can no longer always assume the United States will provide a security guarantee. One first move has been Finland and Sweden using the NATO option. But beyond that it has also fallen to the Union to respond to the threat posed by such an unexpected and brutal assault, one so contrary to a rules-based international order, as the attack unleashed by Vladimir Putin. The policy and strategy the Union has adopted

are irreproachable. It has reacted without detriment to its unity, quite the opposite. Solidarity with Ukraine is proving – and will continue to be – exemplary. The debate, however, is whether all that will lead to a new European order, or a new Cold War.

The EU response to the Ukraine invasion has built on a concept presented by Federica Mogherini as High Representative of the Union for Foreign Affairs and Security Policy in 2014-2015 in a document on European security and defence: “strategic autonomy” as a vital component of the Union. But it has not stopped there; strategic autonomy has extended, as an absolute necessity, to other major challenges facing the European Union.

The energy transition towards a low-carbon economy, the technological challenge implicit in the digital transformation, or the industrial competition and uncertainty embodied by China – which the EU describes as a “systemic rival” – are just some examples of the need for autonomy. But this autonomy is not to be confused with independence or nationalistic protectionism, which exist in Europe and which we already saw when the COVID-19 pandemic broke out.

Alongside the developments in this global and increasingly fragmented world, the Union cannot overlook what we might call “domestic” policies: in the economic, social and institutional spheres. Let’s take a look at them.

Following a period of liberalisation of the state aid and fiscal rules laid down in the treaties, the Union is debating – the Council has yet to reach a unanimous decision – how to adjust those deficit and debt rules without breaking them.

No less important is monetary policy managed by the European Central Bank, which currently amounts to interest rate hikes, supposedly to stem the inflation afflicting us. There has to be a delicate balance between interest rates and growth that prevents a return to the days when monetary restriction wreaked havoc on Europe’s economy and its people during the Great Recession.

Social Europe remains a weak spot of EU policy. The prime instrument of European social policy, the European Pillar of Social Rights (EPSR), weathered the pandemic; in fact, it grew in stature over that period. Yet the EU still has a long way to go in this respect, and despite the resilience of the labour market the risk of poverty and social exclusion remains high.

A critical aspect of European social policy – and of the need for reforms – is the migration phenomenon and the right to asylum. The Pact on Migration and Asylum, a longstanding aspiration of the Mediterranean countries, may well be the most significant achievement of the Spanish presidency. We are committed to it. In this and previous reports, we have championed the defence of migrant and asylum seekers’ rights, and solidarity among countries.

One of the consequences of the absence of a European Union migration policy is the catastrophic death toll in the Mediterranean, which has become a watery grave for many seeking to make it to Europe from Africa.

The EU has proven incapable of creating a legal framework that enables lawful migration in that direction and which allows real application of the international convention on refugees. The Mediterranean countries are bearing more than their fair share of the burden here compared with those of northern and eastern Europe, which are taking a tough stance, an approach that is set to become even more hard-line, given the rise of far-right parties and their entry into European governments.

EU enlargement to the Western Balkans, spurred by the situation in Ukraine, and with Moldova in mind too, is another issue under debate during the Spanish presidency.

The decision on enlargement will have a clear impact on the institutions. A Union of 33 or more would be unworkable if unanimity voting were maintained on such strategic issues as foreign, security and defence policy, and tax harmonisation. One example of such an institutional dilemma is the differing positions we find among the 27 member states regarding China, and even towards the United States and the Union's autonomy.

There are currently four candidate countries from the region – Albania, Montenegro, North Macedonia and Serbia – and another two potential candidates: Kosovo and Bosnia and Herzegovina. The first three back Ukraine joining the EU. It is no coincidence that all three of them belong to NATO. Resuming the process of EU enlargement, then, sends out a signal to Russia and China. The integration of the Western Balkans into the Union, with the political, economic and social development it could entail, is something that Russia and China are not in a position to offer the Balkan people.

The battle against climate change is without doubt one of the greatest challenges facing the EU. The deep interconnectedness of the political reforms required to address climate change and its consequences only increases the magnitude of the challenge. It is not a matter of making a few odd adjustments: energy and climate policy are closely linked to European industrial and economic policy, and even to the very future of European businesses. It may be that this link between energy, climate, industry and economics is more visible; but security policy, trade policy, development policy, and fiscal and tax policy are bound to energy and climate policy too. Europe needs a new, global approach to generalise climate transformation.

There are other challenges. According to a survey by the Pew Research Center, the biggest threats people perceive on a supranational level are cyberattacks and disinformation. These concerns must be taken seriously. It is essential to continue safeguarding the security and rights of European citizens. And the EU must also continue to develop as a democracy. European society has a major opportunity to determine the course of the EU with its vote in June 2024.

In the face of this kind of diversified globalisation, what might be described as a "new consensus" has been marked as essential. The EU, and the option of "de-risking" rather than "decoupling", particularly regarding China and the strategic Indo-Pacific area, has a key role to play.

The European Union has shown muscle and grit to take a consistent line in the face of the polycrisis of the early 21st century. Its stance is congruent with the alliances in which it participates and the multilateral organisations of which it forms part, like the G7 and G20.

There has not always been unanimity, because the EU is a plural political construct, but it has stayed true to its values of democracy, rule of law and freedoms throughout. And that is the path it must never stray from.

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## **I. THE INSTITUTIONAL ASPECT**



# European identity and the new geopolitics

Carlos Carnero

## The new geopolitics

Since the fall of the Berlin Wall, the world has been trying to establish a new international order to replace the Cold War, a framework defined by three basic features: the balance of nuclear terror, the existence of two conflicting and barely interconnected economic systems and an institutional distribution of power embodied by the United Nations.

In the Cold War order, two superpowers—the United States and the Soviet Union—operated as opposing hegemonic forces. Between them, they had created emergency brakes to avert a nuclear disaster. Even so, the world was wilfully pushed to the brink of catastrophe at least once—that we know of. Against that backdrop, the planet underwent such profound changes as decolonisation and was dogged by such persistent problems as the absence of democracy and the systematic violation of human rights in countless countries, underdevelopment and regional conflicts.

Despite the hegemony of Washington and Moscow in that time, certain groups of countries, like the non-aligned states, tried to tread their own, somewhat different, path.

The European Union (EU)—whose process of construction spanned the various stages of the Cold War, from the darkest to the more restrained—arrived at 1989 with 12 member states and immersed in a clear acceleration of its process of political deepening. This would culminate shortly afterwards in the Maastricht

Treaty, with which it acquired its definitive name, spawned what would ultimately be the euro and defined its common foreign and security policy for the first time. In other words, in the space that has come to be called the West, a united Europe took a decisive step towards forging its own identity.

Between 1989 and the mid-2010s, international political and economic cooperation prevailed. Globalisation took hold and dialogue among the chief countries or groups of countries meant that major worldwide challenges could be addressed, or at least debated, jointly. There was a considerable spread of democracy.

Former foes—the United States and the Russian Federation—struck up an ongoing dialogue, not without its ups and downs. The People's Republic of China kept growing politically and economically. The EU continued to make great strides, resulting in the Lisbon Treaty, enlargement and the aspiration to become a major world power. The BRICS group formed, and they demanded a place at the table.

Nevertheless, wars—like the one in Iraq started by President George W. Bush in 2003, acting outside international law—remain a reality, even on European soil (the former Yugoslavia); regional historical conflicts persist, or new ones arise; new threats appear, such as international terrorism; the liberalisation of international trade stall, poverty and underdevelopment refuse to go away, and the United Nations -an essential organization- still needs a renovation.

Gradually, that period of international association began to be replaced by another marked by confrontation once more. Like so often in history, it is impossible to put a precise date on the start of the new era or a finger on one single cause.

It is what we call today “new geopolitics”.

We have moved from an uneasy calm to practically outright confrontation between international powers, which strive to have their own global and regional way.

The greatest source of friction is the war in Ukraine, triggered by the Russian Federation’s invasion of the country in flagrant violation of international law. Yet there are many more, like the one pitting the United States against China.

Moreover, the conflict in the Middle East has worsened with extraordinary gravity, with a terrible toll of civilian casualties and the generation of an enormous potential for regional and global instability.

Looking beyond specific conflicts, the future correlation of forces on an international level, both politically and economically, is currently in play. Such is the degree of tension that the threat of resorting to nuclear weapons is making a comeback.

The world today is mired in uncertainty after enduring the terrible COVID-19 pandemic and the ensuing economic crisis.

Democracy and authoritarianism, respect for or violation of international law, the desire or lack of to live in a rules-based world stand face to face. But political hegemony, economic preeminence or territorial domination are also in dispute.

The United States is clear about its blueprint, at least during Joe Biden’s presidency. Its foreign policy is straightforward again, with the goal of fully restoring the country’s role of global leadership. The firm response to Russia’s invasion of Ukraine and its growing confrontation with China leave no room for doubt.

Standing opposite is the Russian Federation, incapable of matching Washington in a trial of strength, clinging to its status as a nuclear power as a final handhold—it is no longer a power in any other sense—and facing likely political instability following its disastrous military intervention in Ukraine.

China, for its part, remains committed to continuing its economic growth -for which it needs international political tranquility and continuity in globalisation-, that is the essential basis of its aspiration to be a power based on soft power as well as hard power.

The Global South (with Brazil, India, Indonesia, Mexico and South Africa leading the way) is openly resistant to a dynamic of international confrontation. That will not solve its problems, on the contrary, and there is no desire to speak up for any of the powers in the fray. Its voice goes unheard on so many other issues after all.

In the new geopolitics, the European Union must assert itself and act as a major global civil power. It must be capable of defining its interests and choosing the policies and allies to pursue them, on the basis of its own foreign policy identity. This is written clearly in black and white in its Treaty.

The Union is not, nor has it ever wanted to be, a traditional power, sustained by military might. Hence the term “civil” to define itself as a major global power (which does not preclude it from having military means as a necessary tool). On the contrary, it has always based its global authority on being a beacon of freedom, prosperity and solidarity; a champion of international law; contributing to the peaceful and negotiated resolution of conflicts, preventing them and building and keeping the peace; promoting international trade; combating climate change; fostering sustainable development; heading cooperation and fighting poverty.

That is why it is necessary to be able to base and argue the EU’s action on the global stage - from the war in Ukraine to the conflict in the Middle East, through the rest of the present or future challenges - on the European identity and on the communitarian trajectory.

## European identity

The Lisbon Treaty literally inherited from the European Constitution drafted by the Convention (2023 marks the 20th anniversary of its conclusion) a precise definition of the EU’s identity, expressed in values, principles and goals, particularly where its international relations are concerned.

The Union, reads the Treaty, is founded on the values of respect for human dignity, freedom, democracy,



equality, the rule of law and respect for human rights. Its aim is to promote peace, its values and the well-being of its peoples.

In its relations with the wider world, it goes on, the Union shall uphold and promote its values and interests and contribute to peace, security, the sustainable development of the planet, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, as well as to the strict observance and the development of international law, particularly the principles of the United Nations Charter.

Something the Treaty specifies and elaborates on in great detail when addressing the provisions on foreign policy:

"The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

- a) safeguard its values, fundamental interests, security, independence and integrity;
- b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
- d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
- f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
- g) assist populations, countries and regions confronting natural or man-made disasters; and

h) promote an international system based on stronger multilateral cooperation and good global governance."

In addition, the Treaty is also very clear on defining the common security and defence policy and detailing the missions that can be performed outside the Union:

"The common security and defence policy shall be an integral part of the common foreign and security policy. It shall provide the Union with an operational capacity drawing on civilian and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. The performance of these tasks shall be undertaken using capabilities provided by the Member States."

"The tasks referred to in Article 28 A(1), in the course of which the Union may use civilian and military means, shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories."

In light of this constitutional mandate, the EU's roadmap in the new geopolitics could not be clearer. In its global action, the EU has allies with whom it shares values, objectives and interests, starting with the United States, NATO and its non-EU member countries.

But we do so with our own European identity, which must not be diluted by or confused with the identity of our allies. Allies, moreover, that are not exclusive. This sends an important message to the Global South, with whose countries we must establish and develop relations of partnership and cooperation based on shared principles and goals.

In addition, the fact that the European Constitution and the Treaty of Lisbon are quite recent mean their content is not only progressive but also notably modern, addressing issues that the more longstanding constitutions of the member states could not even imagine providing for.

But what operational concept can we work with in this new era of international relations?

## Open strategic autonomy

The EU's response in the new geopolitics is to ensure its open strategic autonomy - on which the Spanish Presidency of the Council has worked intensively in 2023 - understood as the ability to establish both its own long-term objectives and the way and means to achieve them independently, based on the political will of European citizens and the objective needs of the Union, with alliances, coincidences, discrepancies and, in any case, interactions with other countries and international organizations.

To be strategically autonomous implies contemplating a dialectic in which to coincide with those who consider themselves closest (such as the allies mentioned above) in search of a correlation of forces favourable to the Union. And to recognize the ability of all to independently establish their foreign policy within the framework of respect for international law.

The EU's open strategic autonomy is directly linked to the promotion of cooperative multilateralism, which should continue to guide the EU's external action.

## Questions and answers

The questions raised by the new geopolitics call for answers based on the European identity as defined in the Treaties and by the EU's history, building its open strategic autonomy. Find a concise list of possible answers below:

1. Peace and security: they should be indivisible goals for the EU and mean building a shared security architecture in the continent;
2. World order: it should be based on rules, essentially those set forth by international law;
3. Military spending: its usefulness should be maximized by promoting synergies between those of each of the Member States of the Union and allocating the necessary resources in the Community budget for the common security and defense policy;
4. Nuclear weapons: if using them is inconceivable, we must advocate their total prohibition and the dismantlement of all existing arsenals;
5. Multipolarism: the EU must not promote a unipolar world, but one that operates under cooperative multilateralism;
6. Globalisation: regulated globalisation is imperative to development; recreating two parallel economic worlds is inconceivable at this point;
7. International trade: its promotion must take place according to rules set by the WTO;
8. Democracy and human rights: for the EU, promoting them must be as inalienable as their universal nature, so every treaty or agreement signed by the EU must provide for mechanisms to defend them;
9. Climate change: it is an absolute priority and the EU must call on its friends and partners for action;
10. Global South: the EU must make the utmost effort to further dialogue and strengthen the alliance with its leading exponents;
11. Mediterranean: key region for the EU in which to continue strengthening and improving the regional association initiated with the Barcelona Process, bilaterally articulated with the Neighbourhood Policy and institutionalized in organizations such as the Union for the Mediterranean;
12. Middle East: the EU must continue to demand respect for international law and defend the two-state solution, living together in peace and security;
13. Development: we must continue to champion sustainable and not unequal development; reducing poverty must be a priority for the EU;
14. Regional conflicts: the difficulty in finding a solution to the most longstanding examples does not free the EU from involvement in achieving it, observing international law;
15. Double standards: every instance of double standards is as reprehensible as it is damaging to the Global South's trust in the EU;
16. Historical memory: Europe must shoulder its responsibility for colonialism, the consequences of which continue to hamper many countries' present and future development;
17. International law: it must be the touchstone of European foreign policy;
18. United Nations: so essential that its reform must be undertaken once and for all, starting with the Security Council;

19. Relations with the United States: it is the EU's main ally, with which it must work on an equal footing - including responding clearly to those decisions that the Union considers wrong, such as the IRA - to jointly define global objectives, starting with the challenges to peace, security and a rules-based order, economic growth or climate change;
20. NATO: an allied organization, obviously different in nature from the EU (of which the vast majority of EU states are part), with different tasks which, in various fields, can be complementary to those of the Union;
21. Russia: a country bent on not respecting a rules-based international order - as it has demonstrated with its illegal invasion of Ukraine - whose policy must be responded to by the EU in all fields to defend international law and Community values and interests;
22. Ukraine: the EU must maintain its commitment to the country, in the face of the Russian invasion;
23. Relationship with China: for the EU it is not an adversary, but a competitor with which to cooperate and trade while claiming to work for a rules-based order, to respect human rights and to establish a fair economic relationship.

## Recommendations

- The EU's response to the new geopolitics involves reaffirming its identity as a relevant global power due to the attractiveness of its model - democracy and solidarity - and its political and economic collaboration of an open and universal nature, with a foreign policy particularly focused on conflict prevention and crisis management and integrated, sufficient and effective defense spending to ensure security.
- The EU must preserve its decision-making capacity on the basis of open strategic autonomy.
- Allies - such as the United States and NATO - and partners are indispensable, always on an equal footing and on the basis of their own identity.
- The Union is a well-defined reality committed to the maintenance of a rules-based international order.

- The Union must promote the definition of a European framework of shared security, with effective dispute settlement mechanisms and disarmament-oriented.
- The EU's identity is the opposite of what Europe meant for much of the world: colonialism. The Union must succeed in being seen as a part of the developed world committed to sustainable development and the fight against climate change, through fair trade and cooperation. Considering the global South as a partner must be the European option.
- The Union must opt for cooperative multilateralism.
- For the EU to act with open strategic autonomy, it must continue its political deepening, providing itself with more competences and resources and improving its decision-making procedures, extending qualified majority voting in foreign policy. The reform of the EU Treaty is, for all this, necessary.
- The Spanish Presidency of the Council of the EU 2023 is a great opportunity to advance in all these directions.

## Abbreviations

- WTO: World Trade Organization.
- NATO: North Atlantic Treaty Organization.
- EU: European Union.

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# Improving European governance and the future of Europe

José Candela Castillo

Continental tension and the aftermath of the global health crisis turned European Union (EU) attention away from matters of governance, and politico-institutional affairs in general, in 2022. The one—exemplary—exception was the European Parliament, Commission and Council’s follow-up of the citizens’ proposals that arose from the Conference on the Future of Europe (henceforth abbreviated as CoFE).

Civil society (organised or not) had the opportunity to have its say in the decision-making process to improve the quality of European governance thanks to this model exercise in participatory democracy, even if the structure and functioning of the Conference left something to be desired in certain aspects (*Aldecoa Luzárraga, F., 2022: passim*).

Below, we provide a brief outline of the CoFE proposals on improving European governance and summarise the European Commission, Parliament and Council’s follow-up of these proposals to date. Lastly, we briefly explore the advisability and feasibility of a new European convention to amend the treaties.

## How the 2022 Conference on the Future of Europe proposed to improve European governance

The CoFE concluded its work on 9 May 2022 with the release of its report on the final outcome (*European Commission, 2022a*).

The most practical part of the report is a list of **49 proposals** for action submitted to the EU institutions. They are spelled out through **326 measures** pursuing concrete objectives covering **9 topics** relating to European policy on which the EU has the power to intervene: climate change and the environment; health; a stronger economy, social justice and jobs; EU in the world; values and rights, rule of law, security; digital transformation; European democracy; migration; and education, culture, youth and sport (*European Commission, 2022a 43 ff.*).

In June 2022, just a month after the conclusion of the CoFE, the Commission published a detailed assessment of what is needed for the EU to follow up on the Conference’s proposals (*European Commission, 2022b*).

The Union has provided four different types of response to the CoFE’s 49 proposals.

First, regarding existing legislative initiatives that address the issues raised in the CoFE proposals. For instance, the European Climate Law, the circular economy package, the EU global health strategy, the New European Strategy for a Better internet for Kids, or the Youth Action Plan in EU External Action.

Second, on legislative initiatives already proposed by the Commission and which must be adopted by the European Parliament and Council of the European Union. For example, the New Pact on Migration and the Media Freedom Act.

Third, on anticipated action to implement the ideas directly stemming from the Conference (a review of animal welfare legislation, for instance).

Lastly, regarding new initiatives inspired by Conference proposals that fall within the scope of the European Commission's competences (for example, a future initiative on mental health).

As we shall see below, implementing some of the CoFE's ideas requires a reform of the Union's treaties.

In keeping with this chapter's title, here we shall address just six of the Conference's proposals: numbers 22 (transparency of the EU and its relations with citizens), 36 and 37 (citizens information, participation and youth), 38 (democracy and elections), 39 (EU decision-making process) and 40 (subsidiarity).

Suitably framed in the EU's Principles of Good Governance (*European Commission, 2001: 7 and 8 and Candela Castillo, José, 2005: 180-183*), these six proposals concern the EU principles of openness and transparency (proposals 22, 36 and 37), participation (36 and 37), legitimacy (38 and 39) and effectiveness (39 and 40).

## Improving transparency

In Proposal 22, measure 1, the CoFE simply suggested "strengthening links with citizens and local institutions to improve transparency, reach the citizens and communicate and consult better with them about concrete EU initiatives and at the international level."

This proposal provides no functional idea, nothing that adds value to what the EU institutions and bodies already do in terms of transparency. However, the recommendation to increase the institutional transparency of the Common Foreign and Security Policy (CFSP), according to some one of the community policies most in need of improvement as far as the transparency principle is concerned, does hit the mark.

## Improving participation

Under the heading "European democracy", CoFE Proposals 36 and 37 are geared towards improving participatory democracy in the EU.

The ideas with most added value are:

- holding **citizens' assemblies** periodically, on the basis of a legally binding EU law, in which participants are selected randomly, based on representa-

tiveness criteria and on condition that if the institutions do not take the outcomes of the assemblies on board this should be duly justified;

- **increasing the frequency of online and offline interactions** between EU institutions and its citizens through different means of interaction;
- creating a **mechanism to monitor policy and legislative initiatives** that have emerged from participatory democracy processes and
- creating an **integrated official website** that summarises all the information about the participatory spaces existing in the EU.

The Council of the European Union, for its part, published a detailed assessment of the possible implementation of these CoFE proposals (*Council of the European Union, 2022: 208 ff.*).

## Improving legitimacy: transnational lists in Euro

The CoFE addressed the purely institutional issues affecting both the Union's governance and structure in Proposals 38 and 39, under the headings "Democracy and elections" and "EU decision-making process", respectively.

Proposal 38 takes a forward-looking stance stemming from an institutional debate that, thanks to resolute support from the European Parliament, has been running for several years now, namely improving the Union's legitimacy through the creation of two new instruments: transnational candidate lists for the European Parliament elections and an EU-wide referendum.

Given its importance and significance, find below the CoFE's proposal on transnational lists in its entirety:

"Amending EU law to harmonise electoral conditions (voting age, election date, requirements for electoral districts, candidates, political parties and their financing) for the European Parliament elections, as well as moving towards voting for Union-wide lists or '**transnational lists**' with candidates from multiple Member States, having taken into account the views expressed among citizens across the EU Member States on this issue.

Some of the Members of the European Parliament should be elected through a European Union-wide list, the rest being elected within the Members' States.

This reform should also aim at facilitating digital voting possibilities and at guaranteeing effective voting rights for persons with disabilities." (*European Commission (2022a: 81)*).

Introducing a voting system based on "Union-wide lists or 'transnational lists'" does not require amending the treaties.

A European Parliament proposal of 3 May 2022 for a Council Regulation on the election of the members of the European Parliament by direct universal suffrage includes a series of harmonisation measures, including transnational lists (*Council of the European Union, 2022:223*).

The Council of the European Union examined the Parliament proposal in October 2022, but the legislative procedure that should conclude with introduction of transnational lists had not been completed at the time of writing (*European Parliament, 2023*).

### Improving legitimacy: a European referendum

The CoFE included the introduction of an EU-wide referendum, a clarion call of the most fervently pro-European for some years now, in Proposal 38.2. It expressed a need for "conceiving an EU-wide referendum, to be triggered by the European Parliament, in exceptional cases on matters particularly important to all European citizens".

On this matter, the Council of the European Union recalled in November 2022: "The Treaties already allow for a large degree of direct involvement of citizens in the decision-making process of the institutions through the European Citizens' Initiative, as well as consultations of the citizens, representative associations and civil society, pursuant to Article 11 TEU." It also stated: "The right to petition to the European Parliament (Article 20(2)(d) TFEU) could be used to adopt measures with the aim of

satisfying this, and existing instruments like the European Citizens' Initiative (Article 11(4) TEU and Article 24 TFEU) could be improved to this effect."

The Council added, lastly: "However, EU-wide referenda to be triggered by the EP are not possible under the current Treaties. Providing for such referenda would require Treaty change" (*Council of the European Union, 2022:222*).

In conclusion, the deeply pro-European idea of an EU-wide referendum was once again shelved pending a possible European Convention.

### Improving the effectiveness of the Union: generalising qualified majority voting

CoFE Proposal 39.1 says this on the matter: "All issues decided by way of unanimity should be decided by way of a qualified majority. The only exceptions should be the admission of new membership to the EU and changes to the fundamental principles of the EU as stated in Art.2 TEU and the Charter of Fundamental Rights of the European Union."

This is one of the most forward-looking proposals to date on improving the voting system that governs the decision-making process in the Council of the European Union and European Council.

Apart from the "*passerelle*" clauses currently in existence, if the CoFE's radical request is to be met, voting by unanimity should be abolished in 25 of the 27 cases in which unanimity is required to adopt decisions (18 related to the European Council and nine to the Council of the European Union). But, as the joint response to the CoFE from the three institutions recalls, it would require a Treaty change (*Council of the European Union, 2022: 229*).

So the voting system in the Council, a key cause of controversy among the Member States on the topic of Union effectiveness, has been put aside once again pending a possible future Convention. Such a resolute stance on the part of the CoFE, however, provides valuable impetus for the clarification of the matter.



## Improving the effectiveness of the Union: subsidiarity

We believe two extracts from the text of CoFE Proposals 40 and 39, respectively, are important.

The first one refers to the national and regional parliaments and states: “The EU should review the mechanism allowing **national parliaments** to assess whether new legislative proposals at the European level do not intrude on their legal competences and to be granted the possibility to suggest a legislative initiative to the European level. Such mechanisms should also be enlarged to all **regional parliaments** in the EU that have legislative power.”

The second refers to the **European constitution** and calls for: “Reopening the discussion about the constitution, where applicable, to help us align better our values. A constitution may help to be more precise, as well as involve citizens and agree on the rules of the decision-making process.”

Regarding the proposal on national parliaments, the CoFE’s idea was already put into practice in 2018, by the European Commission in particular. Like the whole set of actions and improvements comprising the EU’s Better Regulation agenda, it continues to be refined, particularly as far as the application of the subsidiarity principle is concerned.

Concerning the CoFE proposal on regional parliaments, however, the Council made it clear the measure would only be possible through a reform of the treaties. Remember, moreover, member states themselves are free to make changes to the form and extent of these parliaments’ power to take part in the Union’s legislative process, in accordance with the corresponding constitutional system (*Council of the European Union, 2022:235*).

On the subject of the proposal regarding the constitution, the Council’s response is illuminating: the Lisbon Treaty incorporated the essence of the failed European Constitution project of 2005 and the debate on the constitution in the Union is a “political process... no need for treaty changes” (*Council of the European Union, 2022: 233*).

## The Parliament, Council and Commission’s joint response to the CoFE proposals and a general assessment of the CoFE as an exercise in participatory democracy

At a citizens’ feedback event on 2 December 2022, the EU presented the full work carried out by its three institutions to follow up the CoFE proposals.

As well as the Council’s responses to the institutional and governance proposals put forward by the CoFE outlined here, the Council document presented at the information event gathers the Union’s detailed response to each and every one of the CoFE’s 49 proposals and 326 specific measures. (See: *Council of the European Union, 2022*)

The principles of European governance say a political decision is good if the three stages of the process -its conception, its execution and its application- are sound.

According to the European Commission, and in the absence of other precise measurements that would have to be made after a reasonable time, perhaps periodically, to examine application, at the end of 2022 “a considerable amount of the CoFE’s proposals were already implemented”.

Given this, it seems reasonable to compare the CoFE and its follow-up with other recent exercises in participatory democracy, like the one that took place in France in 2019 and 2020 under the name “Citizens Convention on Climate”, for instance. This is not the place to make a proper, quantified comparison of the two exercises, particularly in terms of results and application of the citizens’ proposals. But, given the different political dimensions (national in the French case, international in the European one), it seems reasonable to rate the CoFE as a much more important exercise in participatory democracy than the French one and, as far as we know, perhaps the greatest international exercise in participatory democracy in the world to date.

## Advisability and feasibility of a European Convention

Outside the participatory sphere of the CoFE now, and after two unanswered European Parliament calls for



a European Convention, provided for in Article 48(3) TEU, allowing an amendment of the treaties, the European Commission, through its president, Ursula von der Leyen, also requested a Convention from the member states in her State of the Union address in September 2022. She put it like this:

“I believe that it is time to enshrine solidarity between generations in our Treaties. It is time to renew the European promise. And we also need to improve the way we do things and the way we decide things. Some might say this is not the right time. But if we are serious about preparing for the world of tomorrow we must be able to act on the things that matter the most to people. And as we are serious about a larger union, we also have to be serious about reform. So as this Parliament has called for, I believe the moment has arrived for a European Convention.” (*Von der Leyen, U., 2022: in fine*).

With the global pandemic still ongoing and a war started by a nuclear power at the gates of the Union, then, the president of the European Commission chose both the bravest and smartest option in terms of political consistency: continue the political deliberation over the two fundamental and naturally related issues of Union enlargement and the future of Europe.

Previously, the European Parliament had struck a chord of consistency in the debate on the future of Europe by pointing out that “especially following the most recent crises, the Treaties need to be amended urgently to make sure the Union has the competence to take more effective action during future crises”. The Parliament centred its call for specific amendments to the Treaties around specific Union policies, but also around matters of European governance in a non-exhaustive list of six actions, namely:

1. enhance the Union’s capacity to act by reforming voting procedures, including allowing decisions in the Council by qualified majority voting instead of unanimity in relevant areas, such as the adoption of sanctions and so-called *passerelle* clauses, and in the event of an emergency;
2. adapt the competences conferred on the Union in the Treaties, especially in the areas of health and cross-border health threats, in the completion of the energy union based on energy efficiency and renewable energies designed in line with international

agreements to mitigate climate change, in defence, and in social and economic policies;

3. ensure the European Pillar of Social Rights is fully implemented and incorporate social progress in Article 9 TFEU, linked to a Social Progress Protocol into the Treaties;
4. support strengthening the competitiveness and resilience of the EU economy, with special attention paid to small and medium-sized enterprises and competitiveness checks, and promote future-oriented investments focused on the just, green and digital transitions;
5. provide Parliament with full co-decision rights on the EU budget, and with the right to initiate, amend or repeal legislation, and
6. strengthen the procedure for the protection of the values the EU is founded on and clarify the determination and consequences of breaches of fundamental values (Article 7 TEU and the Charter of Fundamental Rights of the European Union). (*European Parliament, 2022*).

Following these calls for a Convention from the Parliament and the Commission, the European Council has not debated the issue in the corresponding (French, Czech and Swedish) six-month presidencies on the grounds that Article 48 TEU stipulates no deadline for a response. The Czech presidency, at least, drew up the Council’s response to the CoFE’s proposals, ensuring it was very well attuned to the Commission and Parliament’s responses.

Understandably, given the state of considerable continental tension in the Union since February 2022 because of the war, three consecutive presidencies have all thought it wiser for now to refrain from triggering any political debate among the member states in which the terms “treaty reform” or “convention” might appear.

It seems unlikely the Spanish presidency of the EU in the second half of this year will take the political initiative to revisit the debate on the advisability of a European Convention requested, remember, by the Parliament on two occasions and more recently by the president of the Commission. It would be a risky move and perhaps one doomed to failure given the attitude of several member states in the Council, among other issues. This prospective low profile on the part of the Spanish presidency,

however, does not necessarily stem from a conservative stance, rather, in this case, a sensible calculation of the likelihood of success of a sufficiently ambitious Convention capable of encompassing all the calls for reform of EU primary law arising from it.

## Conclusion

In view of the analysis above, we can only give a positive appraisal of the Union's performance on politico-institutional matters in 2022. The Union has carried out or is implementing a considerable amount of the CoFE proposals on improving European governance that do not require treaty reform.

If the Spanish presidency of the Council of the European Union were to heed the Parliament, Commission and civil society, it should propose to the member states the calling of a European Convention to amend the Treaties.

## Recommendations

- After remedying some of its organisational shortcomings and in view of its results, the Conference on the Future of Europe that concluded its work in 2022 should now be considered one of the world's finest examples of participatory democracy.
- The Spanish Presidency of the Council of the EU in the second half of 2023 should consider putting it to the European Council to hold a political debate on whether to join the European Parliament and European Commission in declaring that it is time to call a European Convention.

## Abbreviations

- CoFE: Conference on the Future of Europe 2022.
- TFEU: Treaty on the Functioning of the European Union.
- TEU: Treaty on European Union.

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# Perspectives for future enlargements of the Union

José Enrique de Ayala

Ever since six European countries signed the Treaty of Rome in 1957 which created the European Economic Community, this or its successor, the European Union, has been enlarged seven times. Sometimes this involved just one country, such as the last addition so far, Croatia, in 2013; others have been for two or three countries; and the most important, in 2004, when ten new States were accepted, mainly from Central or Eastern Europe, totalling 28 members, that became 27 when the United Kingdom left in 2020, as the only country to ever do so.

According to article 49 of the Treaty on the European Union (TEU), any European State that respects the democratic values mentioned in the article 2, and that commits to promoting them, can apply to become a member of the Union. When a new country requests to join the EU, the European Council, based on a Commission report, decides whether to accept the candidacy and opens negotiations. The new member may join the EU if these negotiations are successful, and its candidacy is approved by all States already part of the Union. In June 1993, the European Council agreed on the criteria required to make a candidacy feasible, known as the Copenhagen criteria, named after the city where the meeting took place. These criteria are a stable democracy, Rule of Law, a working market economy and acceptance of all EU legislation, including the Euro.

Although negotiations with each candidate are exhaustive – including the 35 chapters of *acquis* that must be completed and approved individually – some new Member States have caused certain political or eco-

nomic problems for the rest since they joined the Union. When Greece required a financial bailout in 2010, some member states accused Athens of hiding its real financial situation before joining the EU. As for Bulgaria and Romania, which joined in 2007, problems arose due to corruption issues and administration deficiencies. Some new members in 2004, such as Poland and Hungary, find it hard to respect the rule of law and the division of power, as conceived by the other members and the common organisations, including the EU Commission and the Court of Justice, to the point that Poland has been hit by economic sanctions for not respecting judicial independence and Hungary for violating the rule of law. In another area, Hungary has significantly distanced itself from EU politics regarding the Russian invasion of Ukraine, and the consequent sanctions imposed on Russia, somewhat damaging the cohesion of the common position, otherwise solid on this matter.

Some European States – either full members or candidates – are highly interested in the economic aspects of the Union, which attempt to draw weaker economies closer to more prosperous ones, although not so interested in politics, as they consider that this meddles with their own sovereignty. The Copenhagen criteria requirement to accept all community legislation includes article 1 of the TEU which points towards an increasingly closer union between the peoples of Europe. Furthermore, this is not just about the economy. New members joining the EU should not only share the democratic principles but also the political goals of European integration.

On the other hand, the fact that unanimity is currently required to adopt determined decisions, such as in Common Foreign and Security Policy, gives each Member State extraordinary power to veto the will of the rest, thereby prejudicing the majority. As membership grows, so does the chance that unanimity will cause problems. In Strasbourg on 9<sup>th</sup> May, Europe Day, the German Chancellor Olaf Scholz called for institutional reforms before the EU accepts new countries, which would imply abandoning unanimity in favour of majority voting.

This is a good solution to prepare the incorporation - that cannot be denied according to the TEU - to any European State that meets the conditions, which could paralyse the EU with the current system, due to the eventual difficulty of coming to an agreement. Furthermore, problems with some current members, as mentioned above, have demonstrated that the EU must be more rigorous and stricter when approving new members, because if they are not ready, this might drag the whole group down and create difficulties within the common project.

There are currently eight European States with candidate status wishing to join the Union. In order of their application time, these are: Türkiye, North Macedonia, Montenegro, Serbia, Albania, Ukraine, Moldova and Bosnia-Herzegovina. Furthermore, Georgia is a potential candidate as it must still meet several conditions, and Kosovo has also requested candidacy, although this does not seem feasible. by the time being

Negotiations with each candidate State are in different phases and run at different rates, according to each country's characteristics and possibilities. In some cases, they have even come to a halt, as we will see later. The problems that some candidates have, either at home, or with their neighbours, might be insurmountable obstacles to their membership if left unresolved. Below, we will analyse each one's current incorporation perspectives, case by case.

## Türkiye

Türkiye is far and away the longest-standing candidate. It asked to join the European Economic Community in 1987, although it signed an association agreement with

the EEC back in 1963. It was awarded candidate status in 1999, in other words 24 years ago. Countries that began their negotiations the same year, even without officially being candidates, such as Slovenia or that were part of the Soviet Union when Türkiye requested membership, such as Lithuania, became Member States in 2004, while Ankara continued to wait its turn.

Membership negotiations with Türkiye did not begin until 2005, six years after it was accepted as a candidate and they were always weighed down by the reluctance of some European countries, some of which – Austria repeatedly and France occasionally for example – have asked for the application to be thrown out. In 2016, only 16 out of the 35 negotiating chapters had been opened and only one had been closed. That same year, the refugee agreement between the EU and Türkiye gave the accession negotiation a fresh push, although short-lived. The tough repression that followed the attempted coup in 2016 led to the first proposal to paralyse the negotiations in the European Parliament. The Turkish constitutional referendum in 2017, which led to a presidential system with wide-ranging powers, was considered in Brussels to be a cause of ineligibility as it did not fit the Copenhagen criteria. Finally, in June 2018, the EU General Affairs Council resolved that conditions were not right to continue negotiations, given the growing lack of democracy in the candidate country, and so negotiations have been suspended ever since with no planned date to revisit them.

Türkiye's candidacy has faced and continues to face many different problematic issues. Perhaps the most persistent issue has been its internal political situation which means it cannot meet the political aspects of the Copenhagen criteria. Military supervision over the government, lurking in the shadows, was unacceptable for the EU for many years, although the Armed Forces have been completely controlled by civil power since 2010, at least in theory. There have also been periods of political instability, sentences from the European Court of Human Rights due to repression of Kurd separatists and frequent economic recessions. This has made Türkiye's path to fully joining the EU extremely difficult.

Even so, the most important obstacle to Türkiye's accession is Cyprus. In the 1960s, shortly after its independence, there was growing conflict between the

Greek-Cypriot majority and the Turkish-Cypriot minority. A coup took place in July 1974, led by the Greek-Cypriots who announced that they intended to unite the country with Greece. Five days later, the Turkish army invaded the north of the island and remains there to this day. In November 1983, the Turkish Republic of Northern Cyprus was declared, only recognised by Türkiye, and the island has been divided in two ever since, occupied by the Turkish army in the north. There have been many attempts to reunify Cyprus as a single state, but to date this has not been successful, and the Greek-Cypriot authorities, who hold the Republic's only international representation, blame Türkiye for this. However, Cyprus joined the EU in the 2004 enlargement and, as we stated in the introduction, the entry of any new state requires approval from all EU Member States, so it seems clear that while this problem is unresolved, it will be practically impossible for Türkiye to join.

On the other hand, Türkiye has undertaken more proactive foreign policy since Recep Tayyip Erdogan became president in 2014, after a previous phase as prime minister when he tried to approach the EU, and above all since the attempted coup in 2016. It has even worked independently from NATO, which it joined in 1952, both in Syria and in Libya, trying to get resources from areas of the eastern Mediterranean that are not under its jurisdiction. In the war in Ukraine, Erdogan has unsuccessfully attempted to mediate between the two sides and promote a negotiation, but he has not applied sanctions against Russia as agreed by its allies in NATO and by the EU, and Moscow is clearly able to get around some of these sanctions through Türkiye. It seems that, having been rejected by Europe, he has chosen another path that he believes will be better to defend his interests, although it inevitably distances the country from joining the EU to the point that since Erdogan's re-election in May, Manfred Weber, leader of the European Popular Party in the European Parliament, declared that the negotiations for Türkiye's membership should cease.

Türkiye has 86 million inhabitants. If it joined the Union, it would be the Member State with the largest population and consequently would have a highly significant weight in the qualified majority voting where this parameter counts, at the same level as Germany. On the other hand, barely 3% of Turkish territory is located in

the continent of Europe, although 14% of its population lives there. Türkiye is increasingly projecting towards the Middle East and Central Asia which distances it from Europe. For precisely that reason, if its application is not successful in the end, as seems likely, the EU will have to seek a reinforced associations formula that suits both sides, as suggested by the former French president Nicolas Sarkozy, that might be developed within the framework of the recent initiative from the European Political Community, which we will mention later.

## Western Balkan States

In the early 1990s, as a consequence of wars between Yugoslavia's federal states, it was divided into five independent states: Bosnia-Herzegovina, the Republic of Croatia, the Republic of Slovenia, the former Yugoslavian Republic of Macedonia - subsequently known as North Macedonia -, and the Federal Republic of Yugoslavia - which later became known as Serbia and Montenegro. When Montenegro became independent in 2006, this made six countries, and with the unilateral declaration of independence in Kosovo, in 2008, they became seven *de facto* countries, although Serbia has never recognised the independence of its former province.

The two most developed republics, and closest politically and culturally to Western Europe, are already full members of the Union: Slovenia in 2004 and Croatia in 2013. The other four States: Bosnia-Herzegovina, North Macedonia, Montenegro and Serbia, plus Albania - the remaining country on the Balkan mainland - are all candidate countries. Kosovo is excluded because, in addition to internal problems with the Serb minority, it is not a member of the United Nations and five EU States do not recognise its independence and will clearly not approve its application at this point. This will probably not happen without an agreement between Serbia and Kosovo.

The current candidates from the Western Balkans also have another type of relationship with the EU, through the Stabilisation and Association Agreements that, except in the case of Serbia, pre-date their candidate status: North Macedonia 2004, Albania 2009, Montenegro 2010, Serbia 2013, and Bosnia-Herzegovina 2015. These

agreements are separate and not directly related to the accession process, although the progress that they promote undoubtedly influences the political and economic progress of these states and so also their chances of meeting the criteria required to fully join the EU.

It is worth mentioning that the five candidates from the Western Balkans are not in the same position, or in the same phase of negotiations, and their chances of achieving integration differ widely. North Macedonia, Montenegro and Albania, already NATO members, have few major obstacles to completing negotiations, although they still have to make democratic and administrative reforms of various types. On the contrary, Serbia and Bosnia-Herzegovina are facing several types of issues that will block the success of their incorporation progress unless they can be resolved. Let's look at each of them in detail, from the longest to the shortest candidacy.

### **North Macedonia**

North Macedonia asked to join the Union in March 2004 and the European Council agreed to award it candidate status in December 2005. The Commission recommended opening accession negotiations in October 2009, although made these talks subject to democratic reforms. In turn, in June 2019, the Council agreed on the negotiation calendar but required progress in the fight against corruption, judicial reform, the reform of the intelligence and security services and public administration reform. Finally in March 2020, the European Council agreed to start negotiations that really opened in the intergovernmental conference at ministerial level, also known as the Accession Conference, in July 2022. There do not seem to be any serious issues impeding the success of the process, except for completion of the required reforms that have still not been implemented. However, negotiations have only just begun and only three chapters have been opened so far.

### **Montenegro**

Montenegro asked to join the EU in December 2008. It was awarded candidate status by the European Council in December 2010, which also approved opening of negotiations in June 2012. Fourteen conference meetings have been held since the first accession conference, which took place that same month. To date, negotiations have begun on thirty-three chapters, three of which have already been provisionally closed. This is therefore the country furthest ahead, with the best perspective for integration. It does not present severe issues either, although a few political and administrative reforms remain outstanding.

### **Serbia**

Serbia asked to join the EU in December 2009. In March 2012, it was awarded candidate status by the European Council, which also approved, in June 2013, opening of negotiations for integration. These negotiations began in January 2014, in the first meeting of the accession conference at ministerial level. Thirteen meetings have been held since, and 22 chapters have been opened, two of which have been provisionally closed.

However, Serbia, alongside Bosnia-Herzegovina, is the Balkan country which currently seems to have the most obstacles to joining the EU. Firstly, this is due to the political stance of its population, largely anti-West because it has not forgotten the unilateral secession of Kosovo, supported by Western powers, or the bombing of Belgrade by NATO in 1999. The resentment is still there and is largely, alongside strong historical and economic ties, the cause for the majority support for the Russian invasion of Ukraine, that leads it even further from the European project. Russia was the only power which supported Serbia's territorial integrity and vetoed the recognition of Kosovo's independence in the Security Council, because many Serbs considered Kosovo to be the roots of their homeland.

Sixty-three percent of Serbs believe that the West is responsible for war breaking out between Russia and Ukraine and three quarters think that the Russian leaders were forced to go to war due to NATO's expansion policy,



according to a survey by the Open Society Foundation. This leads to a situation where 80% of the population is against applying sanctions against Russia because of the war, 82% is against Serbia joining the Atlantic Alliance and over 50% does not want to join the European Union. When the more political chapters are opened, these perceptions will come to light, and it will be the Member States who eventually have to decide whether they might accept a country that has refused to sanction Russia, although it did condemn the violation of Ukraine's territorial integrity.

Anyway, the main obstacles for Serbia's accession are issues with its neighbours, Bosnia-Herzegovina (BiH) and Kosovo, where Serb minorities live, and recognition of the latter's independence, plus the normalisation of relations between them. The Serbs in BiH make up slightly more than 30% of the population and they constitute the Republika Srpska (RSK), one of the two entities making up this State. The other entity – Federation of Bosnia-Herzegovina – has accused the RSK of institutional disloyalty and increasing separation from the common state to get closer to Serbia. Although Belgrade has reiterated that it respects the sovereignty and unity of BiH, it is true that the RSK signed a "special ties" agreement with Serbia in September 2006, to promote institutional and economic cooperation between them, and many political leaders, including the Republic's current president Milorad Dodik, have expressed their wish to proclaim independence and join Serbia. That would cause a political earthquake which would prevent Serbia entering the EU.

In Kosovo, the Serb minority – 6% of its population – is mainly grouped in the North Kosovo region, separated from the rest of the country by the Ibar River that divided the city of Mitrovica. They do not recognise the independence of Kosovo, neither its constitution nor its institutions and they cause frequent conflict with the Kosovar authorities. The latest skirmish in May also caused conflict with KFOR, a multinational military force led by NATO which is on a peacekeeping mission in the country. They were governed by their own Assembly, until the governments of Serbia and Kosovo signed an initial agreement to normalise their relations, in Brussels in April 2013. In this agreement, Serbia withdrew its support for the Assembly and both parties agreed to

set up a Community of Serb Municipalities, which failed as Pristina blocked it. Many Serb leaders, including the president, have come out in favour of the Serb community separating from Kosovo. A land exchange was even suggested, where North Kosovo would join Serbia in exchange for the Presevo valley, currently in Serbia, although inhabited by Albanians. However, other countries fear that this exchange might open up a Pandora's box concerning territorial and ethnic claims in the region.

This is just one of the contentious aspects between Kosovo and Serbia, which refuses to recognise the sovereignty of its former province. Normalisation of relations between the countries has been raised by the EU as an essential point to accept Serbia's entry into the Union. France and Germany presented a plan in 2022 that Brussels considers to be realistic. It has already been accepted by Kosovo, but not by Serbia. If this normalisation came about, it would clear the way for Serbia to join the EU and with it, probably, definitive pacification of the unstable Western Balkan region.

## **Albania**

Albania requested to join the EU in April 2009, and it was granted candidate status by the European Council in June 2014. The Council approved the negotiation calendar in June 2018, highlighting the need for continuous progress in areas such as judicial reform and fighting corruption and organised crime. The European Council agreed to open the negotiation process in March 2020. The first accession conference was held in July 2022. To date, three negotiation chapters have been negotiated. Albania does not hold any particularly contentious issues with its neighbours, and it only has to improve transparency and control of its administration and strengthen its Rule of Law to complete the process.

## **Bosnia-Herzegovina**

Bosnia-Herzegovina asked to join the EU in February 2016. In December 2022, it was awarded candidate status, on the condition that it would implement the

Commission's recommendations, from October of that year, to strengthen the Rule of Law, fight corruption and organised crime, control emigration and respect fundamental rights. No date has been decided yet to open negotiations, as these requirements have still not been met.

Acceptance of BiH's application can only be understood for the purpose that it is not left as the only State in the Western Balkans without this status, apart from Kosovo that, as mentioned previously, is not yet eligible because some EU members have not recognised its independence. BiH is not even a completely sovereign state as it is overseen by the Office of the High Representative (OHR), to ensure compliance with the Dayton Agreement (1995) which brought the war to a close, created the current state of BiH and gave it a constitution. In turn, the OHR is led and supported by the Peace Implementation Council (PIC) which has a Steering Board made up of 12 countries plus the EU. In 2008, the PIC set the goals for BiH to meet as a condition for closing the OHR. Furthermore, Eufor Althea (a European multinational military force with participation from other countries) is deployed in the country to ensure that the agreements are met.

On the other hand, BiH is dangerously close to becoming a failed State right now, as the complicated institutions set up by Dayton to achieve a peaceful balance between the three "constituting peoples" that live together in the country: Bosnians, Croats and Serbs, are not working at State level, particularly as the Bosnian Serbs refuse to participate in the common government because, as a majority, they prefer to separate from BiH and join Serbia as explained above in the section on Serbia. It is likely that their only reason for not separating is fear of the international reaction, particularly from the EU.

BiH is divided into two entities: the Federation of Bosnia-Herzegovina and the Republika Srpska (RSK), plus the District of Brcko that does not belong to either of these two and is completely autonomous. Each entity has a president, two vice-presidents from different ethnic groups, a prime minister, government, a legislative power (one chamber in RSK, two chambers in the Federation), Supreme Court, judicial system, police, customs service and their own postal service. These are governed by the common institutions, another two-chamber par-

liament at state level, in which each ethnic group can invoke the "vital national interest" of their community to veto any law. The Head of State is a collective body, made up of three members, one from each "constituting people" that rotate the Presidency every eight months, although any decisions must be taken by consensus. The Executive Power at state level lies with a Council of Ministers, led by a President and two Vice-Presidents, each representing one of the ethnic groups. The same formula is used for the Minister of Defence.

It is easy to deduce that this system can only succeed if the ethnic groups really want it to work, which is currently not the case. A possible accession negotiation between the EU and BiH is likely to find that commitments from the state government might not be accepted or implemented by the entities, particularly the RSK. In conclusion, it is not possible to incorporate BiH into the EU under current circumstances, and this will not happen without real reconciliation between the three ethnic groups within the country, with a consolidated political system that allows the State to work effectively with all its prerogatives, including dissolving the OHR and ending Operation Althea (formally Eufor), which still seems a long way off today.

## Eastern Europe

Ukraine asked to join the EU on 28<sup>th</sup> February 2022, four days after the Russian army began to invade the country. The European Council awarded it candidate status on 23rd June, mentioning that new steps would be decided when the candidate met the conditions specified in the Commission's report of 17th June, which include judicial power reforms, fighting corruption, legislation against money laundering and the oligarchy, media independence and the child protection law.

The decision to approve the candidacy of Ukraine was clearly political, motivated almost exclusively by its painful circumstances then, and now. The six candidacies we have analysed so far clearly demonstrate that the time between application for accession and receiving candidate status varies between 19 months for North Macedonia and 12 years for Türkiye, an average of 60 months, while in the case of Ukraine, not even four

months passed between these two events. This does not exempt Ukraine from the negotiation process for all 35 chapters as for all other candidates, and this process is yet to begin. Some Member States are advocating swift action, while others maintain the accession process should be as complete and rigorous as in other cases.

Ukraine's candidacy also led to an application from Moldova, which requested membership of the EU on 3<sup>rd</sup> March 2022 and was awarded candidate status in the same European Council meeting as Ukraine, on 23<sup>rd</sup> June. Likewise, the decision regarding the next steps is conditioned by meeting measures recommended by the Commission's ruling, which are similar to Ukraine, although also requesting reform of the administration, improving control of public finances and reinforcing respect for human rights.

In the same meeting, the European Council studied the possibility of Georgia joining the Union, presenting this request at the same time as Moldova. However, in this case, the internal political situation is so unstable and polarised that the European Council was only prepared to give it candidate status if it met the priorities highlighted by the Commission in its ruling that, in addition to recommendations similar to Ukraine and Moldova, requires guarantees that all institutions will be run with transparency and accountability, improving the electoral procedures, and strengthening gender equality and the fight against gender violence.

These two candidates and the pre-candidate have a prior relationship with the EU through the Association Agreement, signed within the framework of the Eastern Partnership, of which all three are members, alongside Armenia, Azerbaijan and Belarus (suspended). Georgia and Moldova signed the agreements in 2016 and Ukraine in 2017. Although they are not related to the membership process, the progress that has been made and that is still to be made in developing these agreements will doubtlessly ease the negotiation and the chances of reaching full integration.

These three countries have a lot in common, as well as the similar political and legal deficiencies mentioned by the Commission. All three were part of the Soviet Union, and all three have Russian or Russophile minorities, that have declared their region independent, leaving them de facto outside the control of their respective

governments: in Georgia, since its independence, Southern Ossetia and Abkhazia; in Moldova, Transnistria, also since its independence; and in Ukraine, Donbas – the self-proclaimed People's Republics of Donetsk and Luhansk – since 2014. Russia intervened in Georgia in 2008, to stop Tbilisi taking control of Southern Ossetia and Abkhazia by force, and Moscow recognised them as independent. In 2014, it slyly intervened in Ukraine to support the separatists who rebelled as a result of the Maidan revolution, in Donbas and in Crimea, annexing the latter. Later, in February 2022, it invaded Ukraine with the excuse of defending the separatists and preventing Ukraine from joining NATO, provoking a cruel, illegal and unfair war that is still raging. For the time being, only Moldova has been saved because since July 1992 it has never attacked Transnistria, where the Russian military forces are based – theoretically on a peace mission, although it is under pressure from Russia, particularly in terms of energy supplies.

Russia's interests in these countries are mainly related to security and protection of Russian or Russophile minorities. It radically opposes them becoming members of NATO, although it has few arguments against joining the EU, even for internal consumption, and its opposition is weaker, plus it does not seem to have enough force to impose this stance should it wish to exert it. However, this aspect must also be considered, and it is wise to remain extremely prudent because if States enter the EU that do not have sovereignty over their whole territory, plus latent conflicts which could be rekindled at any time, this might destabilise the European integration process and become a serious problem for all Member States. Although there is the precedent of Cyprus, whose territorial problem remains unresolved despite belonging to the EU, this is controlled due to Türkiye's candidacy status.

On the other hand, Ukraine, Moldova and Georgia have very serious political, social and legal issues, highlighted by the Commission, that have not prevented the former two from achieving candidate status in record time, although it would probably have been delayed in other circumstances. The decisions to award this status are understandable – particularly in the case of Ukraine – as an act of European solidarity in the light of Russia's attack. However, that cannot force the European

institutions, or future negotiators, to be less rigorous or soften criteria applied to these candidates in the accession negotiations. As the war will finish one day, we hope with the best possible outcome for Ukraine, the EU might find that it has incorporated countries that were not ready which might cause it serious difficulties.

## The European Political Community

There are 49 sovereign states on the continent of Europe, including the Eurasian countries, Russia, Türkiye, Cyprus and the Southern Caucasus: Armenia, Azerbaijan, Georgia and excluding any without international recognition, such as Kosovo. Of these countries, 27 are members of the EU. Another three, Iceland, Liechtenstein and Norway, form part of the European Economic Space, in other words they have access to the EU's internal market. Furthermore, the EU has specific treaties with Switzerland and the United Kingdom. Out of the remaining 18, four are micro-states which depend on their neighbour states for everything except internal administration: Andorra, Vatican City, Monaco and San Marino, and eight, as we have seen, are candidates to join the EU. The five missing from the list are Russia, Belarus and the three Southern Caucasus countries. All these states, except Russia, Belarus and the Vatican – which holds an observer role – also form part of the Council of Europe, which aims to protect human rights, democracy and the Rule of Law.

In May 2022, the French President, Emmanuel Macron, proposed a new pan-European initiative, the European Political Community (EPC), although – like the Council of Europe – it would exclude Russia and Belarus. In fact, the initial goal was political coordination throughout the continent, including eastern countries, to oppose Russia's attack on Ukraine and any pressure that Russia might put on other countries. Although some candidate countries were initially reticent, wary that this might represent an alternative to their accession, this initiative did not intend to interfere with that process. It rather responds to the fact that accession for candidates, and others in the future such as the Caucasus countries,

will surely take a long time, and in some cases – such as Türkiye – might never happen. Furthermore, other countries maintain economic relations, either through the European Economic Space or bilaterally, although there is no European political and strategic organisation that includes all of them.

For the time being, the EPC does not plan to institutionalise or set up its own structure. It merely intends to act as a forum for debate and informal, flexible agreements, with two meetings a year: one in the country holding the presidency of the EU and the other in a candidate country. The first summit was held in Prague in October 2022, attended by all the EU States, including Kosovo, except for Andorra, Monaco and San Marino, and – of course – neither Russia nor Belarus was there, a total of 44 countries plus the presidents of the European Council and the Commission. This meeting outlined the fields of interest for this forum, summarised as security, including energy security and communications and information security, and connectivity, both for infrastructures and digital and economic connectivity. In practice, this is an attempt to unite the EU with the other European countries against Russia and Belarus.

The second summit took place on 1st June 2023 in Bulboacă, Moldova. In addition to the previous attendees, Andorra, Monaco and San Marino were also present, bringing the total to 47 states, reflecting the same composition of the Council of Europe, plus Kosovo, which is not part of it. This meeting focused on support for Moldova, political help against any coercion from Russia and economic support to help it with Ukrainian refugees, and on asserting the intention to continue backing Ukraine in all aspects, in its prevention against the Russian invasion.

To a certain extent, the EPC duplicates the Council of Europe although its aims differ. The new initiative is geopolitical and closely related to the continent's current crisis. Consequently, it is worth asking whether it will still be necessary when the war ends and the current or future candidates join the Union, or whether it will seek to survive by redefining its areas of interest.

## Recommendations

- Negotiations with the candidate countries for EU membership must be extremely rigorous in order to avoid problems such as those experienced by some of the current members. A key aspect to be assessed is the political readiness to embrace increasingly closer integration and to promote the EU's strategic autonomy.
- There must be no shortcuts to the accession of any new member, no matter how much there may be a desire to compensate for an anomalous or painful situation, as in the case of Ukraine, which will always be temporary.
- Before proceeding to further enlargement, it will be necessary to tackle the necessary reforms to abolish unanimous decisions, in those matters where they still exist, to prevent a single country from being able to veto the decision of the whole.

## Abbreviations

- BiH: Bosnia-Herzegovina.
- EPC: European Political Community.
- EUFOR: European Force for the Stabilisation of Bosnia-Herzegovina.
- KFOR: Kosovo Stabilisation Force.
- OHR: Office of the High Representative in Bosnia and Herzegovina.
- NATO: North Atlantic Treaty Organisation.
- PIC: Peace Implementation Council for Bosnia and Herzegovina.
- RSK: Republic of Serbian Krajina.
- TEU: Treaty on European Union.
- EU: European Union.

## Conclusion

In principle, as outlined in the TEU, all European states that meet the conditions can choose to join the EU. However, rigour must be stepped up in the negotiations to avoid problems at a later date.

We have seen that all the candidate countries still have serious issues in essential matters such as Rule of Law, separation of powers, fighting corruption and oligarchies. In its opinion on Ukraine's candidacy, the Commission stated that "the accession process remains based on established criteria and conditions. This allows any country in the process to progress based on its own merits but also means that steps towards the EU can be reversed if the underlying conditions are not met anymore," which is all well and good, but steps cannot be reversed once the candidate is a Member State. It must be stated that some enlargements, such as in 2004 and 2007, have included countries that theoretically met the criteria but subsequently did not meet them entirely and therefore their integration has weakened the EU more than strengthened it.

It is necessary and good for the EU, and the country in question, to strictly require full compliance with the criteria. It also means not hurrying the negotiation, for other reasons, as preferred by some Member States, in cases such as Ukraine and Moldova, because there will be consequences to pay for this urgent approach.

Furthermore, concerning technical criteria, incorporating a new country means considering its foreign policy stance to avoid any discrepancies which might weaken the EU, as they do not always share the same geopolitical perception. For example, when the European Council agreed in Reykjavik, on 17<sup>th</sup> May, that Russia must pay for any destruction in Ukraine and implemented a register of damage, six countries distanced themselves from the decision, including one EU Member State, Hungary, and three accession candidates: Bosnia-Herzegovina, Serbia, and Türkiye. It is not possible to move forward towards the chosen strategic autonomy of the EU without solid internal unity.

The growing number of members, and their diversity, means that before further enlargements, reforms should be made as required to prevent a single country – big or small – from conditioning the policy of the whole or requiring some kind of compensation in return.

Only by adopting these reforms and maintaining the strict requirement to meet the accession criteria, can future enlargements meet the goal of contributing to a larger and stronger Union for the benefit of all Europeans.



# Situation of the Rule of Law in the European Union. The Annual Mechanism

Francisco Fonseca Morillo

## Introduction

On 5 July 2023, the Commission adopted its 4th Annual Report on the Rule of Law in the European Union. The report starts by identifying the rule of law as a central political, economic and institutional vector of the EU's action and its legitimacy with respect to its citizens:

"The rule of law stands alongside democracy and fundamental rights as founding values of the Union. It is common to all Member States and a bedrock of the Union's identity. It is a core factor in Europe's political stability and economic prosperity. In recent years, these founding values have come under attack around the world, testing the resilience of the EU and its Member States. The Russian war of aggression against Ukraine serves as a tragic reminder that these values can never be taken for granted. Constant proactive action is needed to safeguard these values and protect European society in the face of evolving challenges."<sup>1</sup>

In other words, this is not an annual evaluation ritual but instead goes to the very core of the future and survival of the EU. The Annual Rule of Law Mechanism should be seen as a requirement of constitutionality, one that is essential to the adequate operation of the

internal market and the economic prosperity of the EU. It should establish parameters which go beyond peer evaluation and the "name and shame" method, and be binding on Member States. It is not just about promoting the EU's values and, in particular, respect for the rule of law, but is also about providing a framework for respecting and applying the rule of law, through specific mechanisms at the service of the EU and its institutions.

In my chapter in the Report on the State of the European Union 2022, published by Fundación Alternativas and the Friedrich Ebert Stiftung, I offered a general analysis of the situation and of the mechanisms at the EU's disposal to defend its values and, in particular, to ensure respect for the rule of law. I would therefore like to focus this chapter on three aspects which I identified as essential last year. (The toolbox available to the EU in this area is described in more detail in last year's report.)

I concluded my chapter of last year's report by stating that, "2022 can be considered the starting point for a much more proactive policy with more appropriate instruments to defend the rule of law resolutely and coherently in the EU.

In this respect, three developments in the institutional life of the EU must be the elements that mark this change of course in 2022:

- The implications of the judgment pending from the Court of Justice on Case 204/21, Commission/Poland.

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<sup>1</sup> COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: "2023 Rule of Law Report". COM(2023) 800 final.



- The development of the budget conditionality mechanism following the Court of Justice judgment of 16 February 2022 dismissing the actions for annulment brought by Hungary and Poland.
- The implementation of the recommendations to the states in the third annual report on the Rule of Law in the EU of 13 July 2022.”<sup>2</sup>

While acknowledging that the procedures in course against Poland and Hungary, opened within the framework of article 7 of the Treaty of the European Union (TEU), continue to “sleep the sleep of the just”, these three instruments have constituted a turning point in how European institutions address respect for the values of article 2 TEU as a central element of the EU’s action and legitimacy, both internally and in its role as a global player in international relations.

The central objective of this essay will be to examine the Rule of Law Mechanism which, since 2019, has constituted a mechanism of collective supervision which inspires institutions and states to promote a legislative agenda with concrete proposals to guarantee a shared framework of respect for the values of a strengthened article 2; to argue for the use of all possible tools including the jurisdictional activity of the CJEU and the application of budgetary rules; and, finally, to contribute to serious debate on the best way to halt the erosion of the European constitutional consensus.

As the Report on the Rule of Law 2023 states:

“The rules-based order is central to the credibility of the EU and a broader toolbox has been developed over recent years to safeguard respect for the rule of law. Infringement procedures, institutional mechanisms such as Article 7 proceedings, and policy drivers such as the Recovery and Resilience Facility all have significant rule of law dimensions. The general regime of conditionality offers a targeted tool to protect the EU budget where breaches of the rule of law affect or seriously risk affecting its sound financial management or the EU’s financial interests. These tools seek to ensure that the rule of law is not just a principle, but a tangible reality

on which each and every person and business in the EU can rely.

The rule of law and a rules-based international order are a key protection against the spread of authoritarian regimes and the violation of international law. Upholding the rule of law is therefore a crucial element of the EU’s external action, alongside consolidating democratic structures and protecting human rights. It is central to the EU’s engagement with candidate countries and potential candidates through the enlargement process, its work with partners in the neighbourhood, and broader EU engagement with countries worldwide.”<sup>3</sup>

## The fourth rule of Law Report

### *A well-designed instrument with its own space*

In the fourth report, adopted by the Commission on 5 July 2023, it is clear from a methodological perspective that the procedure is well grounded and occupies an important position in inter-institutional planning and activity.

Firstly, with respect to the structure of the report itself, its articulation into four pillars has been consolidated since 2019, and now constitutes a well-established, agreed, pan-European format for the elements to be taken into consideration in the 27 Member States to evaluate the health of the rule of law in the European Union as a whole. These four pillars, as defined in the report itself, are:

- “Justice systems in the Member States, focusing on their independence, quality and efficiency. These are key parameters to ensure that the application and enforcement of EU law is effective and that the rule of law is upheld. Well-functioning and fully independent justice systems are crucial for ensuring that justice works to the benefit of citizens and of businesses. They are also essential for judicial cooperation across the EU, as well as for the functioning of the Single Market and the EU’s legal order as a whole.

2 FONSECA MORILLO, Francisco: “The Rule of Law Situation in the European Union”; in LÓPEZ GARRIDO, Diego (director): THE STATE OF THE EUROPEAN UNION. Reforming Europe in a time of war. Fundación Alternativas and Friedrich Ebert Stiftung, Madrid 2022, p. 55 and ss.

3 COM(2023) op. cit., 800 final, p.1-2.



- Anti-corruption frameworks, focusing on the effectiveness of national anti-corruption policies and assessing different key areas of action taken by Member States to prevent and fight corruption. Effective anti-corruption action, transparency and integrity help ensure the strength and reliability of state power and are essential to citizen and businesses' trust in public authorities.
- Media freedom and pluralism, focusing on core areas including the independence of the media regulatory authorities; transparency and concentration of media ownership; transparency and fairness in the allocation of state advertising; the safety of journalists and access to information; and the governance of public service media. These are essential to how the media exercises its role in a healthy democracy.
- Institutional issues related to checks and balances, focusing on areas of key importance for the rule of law, such as: the quality and inclusiveness of the national legislative process; the role of Constitutional Courts and independent authorities such as the Ombudsperson, equality bodies and national human rights institutions; and the role of civil society organisations in safeguarding the rule of law.”<sup>4</sup>

Secondly, and from the perspective of its insertion in the inter-institutional mechanics of the EU, this report sits within the annual rule of law cycle which, with regard to this fourth report, began when the third report was adopted by the Commission in July 2022, with a focus on monitoring and implementing the recommendations addressed to the 27 Member States and developed in subsequent stages.

- Approval and launch by the Commission in autumn of an updated questionnaire, based on the recommendations of the third report and addressed to a target audience of organisations and bodies recognised for their work in the area of the rule of law, with questions linked to the four major blocks that constitute the structure of these reports: national justice systems, anti-corruption frameworks, media freedom and pluralism, and institutional issues related to checks and balances.
- This public consultation was open from 14 November

2022 to 20 January 2023 and while it was aimed at key national stakeholders (specialist NGOs, associations of judges and prosecutors, legal professionals, media associations, academia etc.), it was also open for national administrations to present their own points of view by responding to the questionnaire.

- Next, having analysed the contributions, the Commission embarked upon the country visit stage from February 2023 to April 2023. These visits, which were conducted virtually, provide an opportunity to explore questionnaire responses in greater depth and to hold exchanges with national administrations and key stakeholders, to resolve any questions the Commission might have in developing the recommendations addressed to individual states.
- Finally, and before final adoption of the report, in June 2023 the Commission transmitted the relevant chapters of the report to each state, giving them the opportunity to submit observations before the report's final approval by the Commission.

### **A strengthened, autonomous added value of the Mechanism**

Beyond this technical work, led by the Commission as guardian of the Treaties and defender of general interests, what is the added value of this fourth report in terms of the requirement for EU constitutionality and as an expression of a *minima moralia* of the legitimacy of the EU itself, as defined by Julio BAQUERO CRUZ?<sup>5</sup>

A first innovation in this respect consists in the inclusion of an inter-institutional dimension in the annual rule of law cycle, which translates into an inter-institutional cooperation mechanism by means of which the Council and the European Parliament will discuss this report and the implementation of its recommendations, in a dialogue throughout autumn 2023, in parallel to their discussion at the national level by national governments and parliaments.<sup>6</sup>

5 BAQUERO CRUZ; Julio: “Minima moralia: el Estado de Derecho, el método comunitario y el presupuesto de la Unión Europea”. *Revista de Derecho Comunitario Europeo*, vol. 72, 2023, pp. 431 and ss.

6 For more details, see point 3.1 “Dialogue and follow-up to the Rule of Law report”, COM(2023) 800 final op. cit., pp. 27 to 29.

4 Idem, p. 2–3.

In itself, this dialogue means that debate of the annual report already forms part of the political priorities of the Council of General Affairs of the EU and of the central agenda of the European Parliament. And this means, in turn, that this exercise will move from being a significant naming and shaming exercise to a political examination of constitutionality which guarantees the process of European integration set out in the founding treaties. As J. BAQUERO CRUZ says: “The Treaties should be understood as an inter-generational constitutional pact: previous generations were bound by them and they will also bind current and future generations, for reasons that are important and well understood. The Union entails this constitutional self-limitation or it loses its *raison d’être*”.<sup>7</sup>

The Spanish Presidency of the Council of the Union is aware of this responsibility and the need to evaluate, from now to the end of 2023, how the Rule of Law Mechanism is working and which recommendations should be included in it in the form of conclusions of the Council of General Affairs, as were included in the conclusions of the Finnish Presidency of 19 November 2019, following a meeting of the Council of General Affairs.<sup>8</sup> In its programme for the current Presidency, it states that, “During the second half of 2023, priority will be given to evaluating the Rule of Law Mechanism and reaching a consensus on Conclusions”.<sup>9</sup>

Independently of the political compromises that have to be negotiated by the Spanish Presidency, it seems clear that this Annual Rule of Law Mechanism already constitutes a political and institutional priority that cannot be ignored, despite the fact that it is not formally binding.

Respect for the rule of law forms part of the obligations of all states, acquired upon joining the EU, to respect the common values of article 2 of the TEU. The consequence of this commitment, freely and voluntarily acquired, is – as the CJEU clearly states in its judgement of 20 April 2021 in the *Repubblika* case – that “A Mem-

ber State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU... The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.”<sup>10</sup>

And this is the meta-constitutional value of the mechanism: to constitute the point of collective evaluation, analysis and recommendation which all Member States are required to fully respect as “a condition for the enjoyment of all of the rights deriving from the application of the Treaties”.<sup>11</sup>

Does the report of 5 July 2023 reflect these requirements? In my view, with respect to the value and applicability of the recommendations contained in the annual reports, we face a situation similar to that of the proclamation of the Charter of Fundamental Rights of the European Union at the European Council of Nice in December 2001. Although it was only the entry into force of the Treaty of Lisbon in 2010 that would give the Charter a binding legal character with “the same legal value as the Treaties” (article 6.1 TEU), from the moment of its proclamation the CJEU treated it as a key element in interpreting its decisions and the general principles of EU law.

Could this mechanism play a similar meta-constitutional role? I think the judgement in the *Repubblika* case points in that teleological direction. A separate question is whether we can place all the responsibility of guaranteeing respect for article 2 TEU on the shoulders of the Court, bearing in mind that the sanctions procedure established in article 7 has been shown to be inoperable to date, because it is an intergovernmental mechanism which is blocked *ab initio* by the requirement for unanimity, and approached from a standpoint more typically associated with public international law than with the supranational integration law of the EU.<sup>12</sup>

<sup>7</sup> *Idem*, p. 438.

<sup>8</sup> Council of the European Union, doc. 14173/19.

<sup>9</sup> Programme of the Spanish Presidency of the Council of the European Union, second half of 2023: “Europe, closer”, p-15. <https://spanish-presidency.consilium.europa.eu/media/e4ujaagg/the-spanish-presidency-programme.pdf>

<sup>10</sup> C-896/19, EU:C:2021:311, paragraphs 63 and 64.

<sup>11</sup> *Idem*, paragraph 63.

<sup>12</sup> BAQUERO CRUZ, J. op. cit., pp. 441-442.

## Opening up a new path

In any case, and within the limitations of the exercise, the maturation of this Rule of Law Mechanism has meant that European institutions, following EU methods, have proposed new initiatives to defend the rule of law and the application of the recommendations adopted in two of the four pillars on which the mechanism focuses, where the EU has competencies, demonstrating the importance of the approach that actions speak louder than words.

In the area of national anti-corruption frameworks and their efficacy both in preventing and combating corruption (which is essential for citizens and business to have trust in the authorities), to ensure legal security, the Commission proposed an anti-corruption Directive on 3 May 2023, strengthening the European legal and institutional framework, and this proposal has now entered the legislative process.<sup>13</sup>

This proposal modernises the European legal framework in three areas:

- Prevention of corruption and creation of a culture of integrity, by conducting information and awareness-raising campaigns and developing research and education programmes to reduce risks (1); ensuring public sector accountability in line with the highest standards, imposing on Member States the obligation to adopt effective standards on open access to information of public interest, regarding the management of conflicts of interest in the public sector, the verification of assets of public servants, and regulating interaction between the public and private sectors (2); and creating bodies specialised in the fight against corruption, with adequate resources and training for the authorities responsible for preventing and combating corruption (3).
- Encoding all the crimes and sanctions with regard to corruption, by harmonising definitions of crimes classified as corruption, including not just bribery

but also embezzlement or improper appropriation of funds, trafficking in influence, abuse of functions, obstruction of justice and illicit enrichment related to crimes of corruption(1); stiffening criminal sanctions on individuals and legal entities, and harmonising aggravating and attenuating circumstances (2).

- Guaranteeing the effectiveness of the investigation and trial of corruption. Member States must ensure that the security forces and legal officers have adequate instruments to investigate corruption (1); and must ensure that privileges and immunity can be suspended during corruption investigations through an effective, transparent process, established by law and on a timely basis (2). Also relevant here are minimum standards on periods of prescription, so that there is sufficient time to bring crimes of corruption to trial.

With respect to strengthening media freedom and pluralism, independence, security and access to information, and governance of the media; essential elements for the good health of our democracies, the Commission proposed the European Media Freedom Law on 16 September 2022.<sup>14</sup> The Council recently adopted its common position, on 21 June 2023, and is currently negotiating its adoption with the European Parliament, under the ordinary legislative procedure, with completion of this as one of the priorities of the current Spanish Presidency.

This proposal constitutes a new set of rules and mechanisms to promote the pluralism and independence of the media throughout the EU, in particular with respect to:

- the protection of editorial independence;
- firm measures to protect the rights of providers of media services, including the effective protection of employees and their families, and safeguards against the use of spy programs against the media, journalists and their families;
- adequate, stable and transparent funding of public media services;
- the obligation to evaluate the repercussions of concentration in the media market on the pluralism and editorial independence of the media;

<sup>13</sup> Proposed Directive on combating corruption, replacing the Framework Decision 2003/568/JAI of the Council and the convention on the fight against acts of corruption involving officers of the European Communities or the Member States of the European Union, modifying Directive (EU) 2017/1371 of the European Parliament and the Council. COM(2023) 234 final.

<sup>14</sup> Proposal for a Regulation establishing a common framework for media services in the internal market. COM(2022) 457 final.

- transparent and non-discriminatory state advertising;
- safeguards against the unjustified removal of content from online media.

The Regulation project also proposes the creation of a new independent European Media Services Committee; and proposes establishing strengthened mechanisms for cooperation between the national regulatory authorities and bodies of Member States.

### **Defence of the rule of law beyond dialogue. The arsenal beyond the procedure of article 7 TEU**

From this perspective, the annual Rule of Law Report constitutes the most advanced political and institutional statement of the trends, challenges, progress and threats with regard to the rule of law within the EU in spheres in which the capacity to improve the situation through use of the regulatory arm is more difficult in the absence of competencies attributed by the Treaties. And in the absence of an effective sanctions procedure, the conditions for which are not currently provided by article 7 TEU, we need to turn to political arbitration mechanisms based on dialogue.

Clearly, when we discuss issues that are key to national sovereignty, such as the organisation of judicial powers or establishing institutional counterweights, and which are a major focus of pillars 1 and 4 of the report, this political dialogue and constitutional loyalty is fundamental, constituting the maximum expression of the *minima moralia* referred to above, and which finds expression in the framework of the specific recommendations addressed to the 27 Member States. And these recommendations are more than a mere rhetorical exercise because, as the Commission explained when presenting the report in July 2023, 65% of the recommendations adopted in the third report of 2022 have been addressed in full or in part by Member States.<sup>15</sup>

Despite the justified criticism of the true scope of this mechanism (and the risk of creating false expecta-

tations<sup>16</sup> by presenting this as a mechanism backed by sanctions when the only recourse is the procedure of article 7 TEU, a Gordian knot which still has to be cut), it is an excellent example of the capacity of the EU to use common approaches which go beyond the strict definition of competencies to respond to existential threats to the European constitutional consensus for which the Treaties have not provided adequate solutions. As J. Baquero Cruz asks: "...when several Member States begin to dismantle the Rule of Law in broad daylight... should the Union remain impassive, as if it was none of its business?".<sup>17</sup>

In any case, it is important to stress the major legislative activity under way as a result of the analysis and recommendations contained in these reports. This in itself already constitutes a positive dimension of this mechanism, and to some extent demonstrates that the Commission's caution in invoking article 7 TEU, adding a series of instruments to avoid pressing the "nuclear button", has helped to establish inter-institutional mainstreaming which has strengthened both mutual trust and the legislative ambition to protect the values of article 2 TEU.<sup>18</sup>

A different question, and one which merits further consideration, concerns the recommendations in the first pillar of the report regarding justice systems and, in particular, the issue of shared criteria of judicial independence and, to a lesser degree, in the fourth pillar, consideration of the system of institutional counterbalances. It is not surprising that the main concerns of the European Commission and of the vast majority of the stakeholders involved are concentrated in this area of the annual dialogue cycle.

In particular, with respect to the mechanisms for appointing and dismissing judges and their statutory conditions, it is vital that the Mechanism becomes not just an institutional reference but that its recommendations

<sup>15</sup> Available: <https://digital-strategy.ec.europa.eu/es/news/rule-law-report-2023-progress-65-recommendations-further-action-needed>

<sup>16</sup> PECH, Laurent & BARD, Petra: "The Commission's Rule of Law Report and the EU monitoring and enforcement of Article 2 TEU values". Study requested by the LIBE and AFCO committees of the European Parliament, 2022, pp. 66 and ss.

<sup>17</sup> BAQUERO CRUZ, J.: op. cit., p. 437.

<sup>18</sup> With regard to criticism of the Commission for being "fearful", the following article remains pertinent. MANGAS MARTÍN, Araceli: "Polonia en el punto de mira: ¿Sólo riesgo de violación grave del estado de derecho?" Revista General de Derecho Europeo no. 44 (2018), pp. 1 and ss.

be complied with and the necessary reforms be implemented. The added value of these reports is that they constitute a reference point not just for political censure and an instrument of collective discipline which makes it possible to look beyond the short-term frameworks of national politics, but they also operate both as an evaluation mechanism for the CJEU when censuring political structures which threaten this judicial independence and thus contradict the respect required for the values of article 2, and also for application of the budget conditionality mechanism, in the sphere of Regulation 2020/2092 on budgetary conditionality,<sup>19</sup> and when it comes to approving and implementing national recovery and resilience plans in the framework of Next Generation EU.<sup>20</sup>

The paradox consists in the fact that, in flagrant cases of violation of the values of article 2 TEU and the inability to apply sanctions under article 7 TEU, as demonstrated by the blockage of the procedures opened against Poland and Hungary, as I explained in detail in my contribution to last year's report,<sup>21</sup> the constitutional system based on the partial pooling of sovereignty has operated more effectively than in the grey zone of deficiencies or the need for improvements to different constitutional practices, in order to create a pan-European rule of law system that is essential to the continuation of the integration process.

And this has been because in the case of flagrant violations that affect mutual faith in the capacity to respect mutually agreed European rules, the method of community integration has demonstrated its real added value, through the vital role of the Court of Justice in its long list of decisions referring to Poland and Hungary<sup>22</sup> and also, with respect to Hungary, through the brave exercise of "sincere cooperation" between the Institutions

and the states which has concluded with the adoption, endorsed by the CJEU itself, of the Conditionality Mechanism Regulation and the powers conferred on the European Commission when approving national recovery, resilience and transformation plans, with reference to respect for the values of article 2 TEU, and the power to freeze or delay payments.

As evidence of this, and without going over the same ground as that covered in last year's report, the following is sufficient:

In the case of Poland, in the judgment of the Grand Chamber in case 204/21 of 5 June 2023,<sup>23</sup> starting with the clear affirmation that the value of the rule of law is "an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States" (paragraph 67), the CJEU finally upheld the appeal of the Commission supported by five states (Belgium, Denmark, Finland, the Netherlands and Sweden), considering that the reform of the Polish judicial system of December 2019, violates the Law of the Union:

- In attributing competencies to the Disciplinary Chamber of the Polish Supreme Court, whose independence and impartiality are not guaranteed, to pronounce on issues which directly affect the statute of judges and the exercise of legal functions in the application of the Law of the Union, thus directly affecting judicial independence, in contradiction of article 47 of the Charter of Fundamental Rights (Right to an effective remedy and to a fair trial).
- Furthermore, by imposing on judges the obligation to submit a written declaration stating their membership of associations, non-profit foundations and past political affiliations, the Polish legislation violates the right to a private life and protection of personal data, and is thus contrary to articles 7 and 8 of the Charter and the General Data Protection Regulation 2016/679.<sup>24</sup>

19 Regulation of the European Parliament and of the Council of 16 December 2020, on a general regime of conditionality for the protection of the Union budget (OJEU L 433I of 22.12.2020, pp 1-10.

20 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. OJEU L 57, of 18.02.2021, pp. 17 to 75.

21 See note 2.

22 See an interesting analysis and development of this subject in SANZ CABALLERO, Susana: "Las violaciones del Estado de Derecho en la UE y el rol del Tribunal de Justicia de la Unión Europea: Problemas y soluciones ¿posibles?" in BAR CENDÓN, Antonio and MARTÍNEZ LÓPEZ-SÁEZ, Mónica (coordinators): "La Unión Europea ante la crisis. Derechos, Valores, Seguridad y Defensa". Aranzádi 2023, pp. 25 and ss.

23 Commission v. Poland "independence and private life of judges. ECLI:EU:C:2023.442.

24 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJEU L 119 of 4.5.2016, pp. 1 and ss.

In addition to the significance of this judgement in contributing to European constitutional jurisprudence, the ruling also constitutes an example of how, as a result of the Commission's submission of infringement procedures for breaching EU law, the Court has made itself the guarantor of respect for EU law and the principle of the right to effective remedy in the spheres covered by EU law, and is capable of applying effective financial sanctions, in accordance with article 19.1 TEU.

From 15 July 2021, Poland was subject to a coercive fine of 1 million euros per day, until 20 April 2023, reduced to 500,000 euros per day from 21 April by ruling of the Vice-president of the Court of Justice, and which remains in force until the date of the definitive judgement. This means that, 170 million euros have been withheld from funds allocated to Poland in the EU budget for 2021, 365 million euros for 2022 and, at the time of writing, 132.5 million euros for 2023. If Poland does not suspend its legislation, in accordance with the Court judgement, it seems likely that the Commission will request the imposition of new provisional measures in accordance with article 260 TFEU.

These coercive fines are significant and, while they represent slightly less than 2% of the EU funds allocated to Poland between 2021 and 2023, they show that the work of the Court is very important but is not sufficient in itself to deal with grave violations of the values of article 2 TEU and, in particular, with the rule of law. What is important is that, when the Commission approved the Polish National Recovery and Resilience Plan in June 2022 (Poland will have an additional 36 billion euros until 2027), it was clearly established that the Commission will not approve any payment until the 2019 legislation undermining the principle of judicial independence is modified.

And this is the major supplementary weapon that is institutionally available without the requirement to activate article 7 TEU or the fear that this will be impossible to apply. This is the new regime of budgetary conditionality established by Regulation 2020/2092 which I analysed in my contribution to last year's report.<sup>25</sup>

This is the mechanism that has been applied for the first time to Hungary via Council Implementing Decision

2022/2506 of 15 December on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary.<sup>26</sup> In this decision, the Council has imposed **measures** to protect the budget of the EU against the consequences of the violation of the principles of the rule of law by Hungary with respect to public procurement, the effectiveness of legal action and the fight against corruption in Hungary, suspending **approximately 6.3 billion euros in budgetary commitments, representing around 55% of the credits of EU budget programmes affected by the suspension.** This suspension will be lifted when Hungary adopts the corrective measures established in the Decision, and to this end the Commission will submit quarterly reports to the Council until it believes that the suspension can be lifted.

In accordance with the procedure established in Regulation 2020/2092, this procedure was launched by the Commission on 27 April 2022 by formal notification of the Hungarian government so that it could respond to the critical elements identified by the commission; and following a series of exchanges in which the Hungarian government did not, in the Commission's view, provide satisfactory responses with respect to the adoption of corrective measures, the Commission formally proposed the Implementing Decision procedure on 18 September 2022. In the Council's December Decision, a qualified majority ruled that Hungary had to adopt formal legislative measures in the following areas:

- systemic irregularities, weaknesses and gaps in public procurement, with unsatisfactory functioning of the national authorities implementing the EU budget in the context of public procurement procedures (for example, participation of a single bidder, allocation of contracts to specific companies with a significant market share, grave weaknesses in the attribution of framework agreements, etc.);
- public interest trusts: these are not subject to EU Directives on public procurement, and there are recurring problems related to conflicts of interest and transparency (for example, members of the trust not subject to requirements on conflicts of interest, rules on conflicts of interest not applicable to members of

<sup>25</sup> See note 2, in particular pages 66 to 68.

<sup>26</sup> OJEU L 325 of 20.12.2022, pp. 94 and ss.



- parliament, ministers and other government officers, who are able to operate as members of the management boards of these trusts);
- limitations on the effective investigation and prosecution of alleged criminal activities, the organisation of public prosecutors, and the lack of a functioning and effective anti-corruption framework (for example, lack of effective legal resources available to an independent legal body for deployment against decisions of the prosecutor's office not to investigate or prosecute alleged cases of corruption, fraud and other crimes that affect the EU's financial interests, or the lack of an obligation to explain causes of fraud and corruption attributed or reassigned);
  - lack of a general anti-corruption strategy which also encompasses the most important spheres of corruption prevention; underuse of the whole range of preventive instruments to support the investigation of corruption; and a general lack of prevention and effective repression of fraud and crimes of corruption.

The importance of this mechanism is its capacity to respond both politically and institutionally with larger financial sanctions than the coercive fines imposed by the Court of Justice. If to this we add the possibility of withholding payments within the framework of the National Recovery and Resilience Plans, it is clear that this mechanism is highly effective.

### The need for a global diagnosis

But what is the diagnosis? And is it sufficient? Apart from the flagrant cases of Poland and Hungary, in which innovative strategies have been applied, the Rule of Law Mechanism must continue to gain prominence as a regulated metaconstitutional instrument, with all states sustaining their efforts in this area.

In this respect, the annual Rule of Law Report constitutes a privileged observatory which can detect and publicly scrutinise progress and weaknesses.

This report is not the place for a detailed study of the situation, progress and improvements between the third and fourth report, even in the most recalcitrant countries such as Poland and Hungary, but even a superficial reading of the report is sufficient to reveal significant

progress with respect to the most sensitive area: legal systems and their independence. Although these are fundamentally questions that can only be resolved within the internal constitutional framework –, the *minima moralia* to which I have already referred – the creation of an obligatory pan-European common framework of values, as we are constantly reminded by the Court of Justice, has made qualitative progress.<sup>27</sup>

This is obvious in the case of Spain, where the recommendations do not censure the principles of the Spanish system but instead criticise the way that the incapacity to reach compromises and find consensus demonstrates the weak points of the system and the need for supplementary reforms. In the Recommendations addressed to Spain, it states:

“On this basis, and considering other developments that took place in the period of reference, and in addition to recalling the commitments made under the national Recovery and Resilience Plan relating to certain aspects of the justice system, it is recommended to Spain to:

- Strengthen the statute of the Prosecutor General, in particular regarding the separation of the terms of office of the Prosecutor General from that of the Government, taking into account European standards on independence and autonomy of the prosecution.
- Proceed with the renewal of the Council for the Judiciary as a matter of priority and initiate, immediately after the renewal, a process in view of adapting the appointment of its judges-members.
- Proceed to adopt legislation on lobbying, including the establishment of a mandatory public register of lobbyists.
- Step up efforts to address the challenges related to the length of investigations and prosecutions to increase the efficiency in handling high-level corruption cases, including by finalising the reform of the Code of Criminal Procedure.
- Strengthen the rules on conflicts of interest and asset declarations of persons with top executive functions by reinforcing the sanctioning power of the Office for Conflicts of Interest.

<sup>27</sup> A complete list of this progress and margins of improvement appears on pages 4 to 11 of the Report. Communication cited in note 1.

- Advance with strengthening access to information, in particular via revision of the Law on Official Secrets, taking into account European standards on access to official documents”.

This is the strength of this mechanism if Member States operate on the basis of the principle of sincere cooperation and mutual trust. In Spain’s case, it is clear that this process of collective discipline has helped to noticeably improve aspects such as the need to reduce delays in the length of proceedings, rules governing conflicts of interest and lobbyists, or official secrets legislation. In all these areas, there is pressure for Spain to conclude the reforms under way, which the pan-European dimension has placed at the centre of Spanish political and institutional discourse.

The other two recommendations are more horizontal, in particular regarding the renewal of the Council for the Judiciary. Although EU language is extremely cautious, it is clear that urgent compliance with this recommendation must be a priority objective for the executive and the legislature, and the same is true of the changes requested regarding the statute of the Prosecutor General. I have no doubt that there will be a qualitative intensification of political, institutional and even jurisdictional pressure, based on the need to guarantee the principle of effective remedy, if this is not done.

## Conclusions

My main conclusions are as follows:

- The EU has two well-established instruments to combat breaches or non-compliance with the values of article 2 TEU, which are “principles containing legally binding obligations”: the work of the Court of Justice guaranteeing the principle of effective remedy and the budget conditionality mechanism.
- Moreover, the Rule of Law Mechanism, both from the institutional perspective and in terms of meta-constitutional collective control, goes well beyond a bureaucratic exercise and will increasingly be the instrument used to assess whether to undertake concrete action against states which breach their obligations under article 2 TEU.
- However, we should recognise that these instruments are of limited scope and that the Gordian knot is still the inadequacy of the procedure provided in article 7 TEU to sanction serious and persistent violations of the values of article 2, or the risk of such violations. And the objective solution is simple, even if it may appear politically impossible: to convert the article 7 procedure, which is currently a mechanism of Public International Law based on sovereignty, into one that is more in accordance with common approaches in an EU based on the partial pooling of sovereignties.
- In sum, if respect for article 2 TEU is a constitutional requirement when joining the EU (article 49 TEU), this constitutional requirement must be maintained throughout membership of the EU, and article 7 TEU is not fit for this purpose. There has to be a weapon of last resort, where neither the Court, nor the conditionality mechanism, nor the Rule of Law Mechanism are able to act if all the preventive, evaluation and recommendation phases fail.
- And this is not a maximalist demand; it is a demand to prevent the deterioration of the European political integration process, which is facing unprecedented challenges, both internally and externally.

## Abbreviations

- CJEU: Court of Justice of the European Union.
- TEU: Treaty on European Union.
- EU: European Union.

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# European defence in the aftermath of the war in Ukraine: is strategic autonomy a genuinely shared and realistic objective?

Mercedes Guinea Llorente

## Introduction

Russia's war of aggression against Ukraine has once again placed the European Union's need to have military tools at its disposal to defend the territorial integrity of its Member states and the security of its citizens at the top of the EU's agenda. In the words of the Heads of State and Government of the EU: "Russia's war of aggression constitutes a tectonic shift in European history. At our meeting in Versailles, we discussed how the EU can live up to its responsibilities in this new reality, protecting our citizens, values, democracies, and our European model." (2022:3)

This war enables us to see the effects of a deteriorating international environment, one in which rules and multilateralism are being replaced by power politics, in which connectivity has ceased to be a driver of cooperation and has instead become a source of conflict (Leonard 2022), and where the weight of hard power is once again decisive. If the EU is serious about protecting its citizens and their way of life, it cannot ignore this reality. The war has also shown beyond any doubt that Europe's

defensive capabilities are not up to the demands of a high-intensity, prolonged conflict.

The development of a Defence Union has been a highly controversial issue within the context of the integration process, and also a disappointing one in which, as Borrell notes, there has been a significant gap between declarations and actual outcomes (Borrell 2023a: 147). This can be explained by the influence of a range of factors: the issue of state sovereignty, the differing strategic cultures, perceptions and priorities of Member states, suspicions among some Member states of the leadership of other states, discrepancies regarding the use of force, and the inevitable question of the EU's relationship with NATO and, by extension, the United States. It is also important to remember that defence policy is tied to national interests, and that both overall approaches and specific procurement decisions are often determined by the desire to favour particular domestic companies or to protect certain international alliances. As a result, and despite the fact that in 2016 we talked of "awakening the Sleeping Beauty", the process of constructing a Defence Europe is proving more difficult, complex and slower than we might have hoped.

Although “the diagnosis and the prescriptions are clear, there has been a lack of political will” (Borrell 2023a: 163).

In 2023, it is worth asking how the return of the spectre of war to the European continent has affected the development of the Common Security and Defence Policy (CSDP) and the achievement of the genuine strategic autonomy that was established as an EU objective (EEAS 2016). At present, the arguments run in two opposing directions. On the one hand, it can be argued that the war and the existential threat posed by Putin’s policy towards the EU are a stark reminder to Member states of the need to share sovereignty in defence and to construct a genuine common security and defence policy worthy of the name (Raik, Blockmans *et al.* 2023:37). On the other hand, there is the view that the war once again demonstrates that NATO is indispensable to the defence of the European continent and that it is not, therefore, a driver of the development of the CSDP (Pirozzi 2023:2). Once again, we find ourselves facing the eternal dilemma that confronts Member states with regard to European integration: sovereignty vs. effectiveness. In Monnet’s view, the solution to this dilemma was that Europe would be formed in periods of crisis, and that it would be the sum of the solutions we developed in response to these crises (Monnet 1976: 488).

In this chapter, we will analyse the political developments that have occurred in the course of the sixteen months of war in an attempt to answer, in so far as is possible, the question of whether the Ukraine crisis has had the effect of strengthening the EU’s defence policy. We will begin by providing a brief overview of the CSDP and the existing cooperation in defence issues between Member states, to identify the starting point and the conditioning factors. In the second section, we will address the concept of strategic autonomy with respect to defence, as proposed since 2016, and we will consider what progress has been made. In the third section, we will analyse developments over the last year, both in terms of the strategic documents that have been approved – the Versailles Declaration and the Strategic Compass – and the action taken, so that we consider not just statements of intent but also outcomes as we assess whether there has been a paradigm shift. We will end with the conclusions and some recommendations for action.

## **The Common Security and Defence Policy: coordination in the hands of Member states**

The European integration project was born with a specific ideological DNA, based on the Kantian idea that, by promoting “commerce between different peoples (...) [I]n this way the peoples would be at first brought into peaceful relation with one another (...) even with their most distant neighbours.” (Kant 2011: 81). It starts from the assumption that it is possible to abolish war by generating interdependencies – and thus shared interests – between states. As a result, Maastricht did not see hard power as one of the tools the EU needed to have its disposal in order to become an international player. As one observer noted, “the EU was not created to wage war.”

Ever since its creation, the EU has co-existed with NATO, an organization in which the majority of EU Member states participate, and one that has provided the means by which the United States has acted as the guarantor of European security<sup>1</sup>. This has meant that Europeans have been able to allocate their resources primarily to social and welfare policies, and have grown unaccustomed to the need to invest in defence (Cottey 2013:11). This explains why security and defence were only belatedly included in European integration, after 2003. And it also reflects the reality, a source of constant recrimination by the United States that Member states do not invest enough in their defensive capabilities,<sup>2</sup> that they do so in a fragmentary manner<sup>3</sup> and that it is the first sector to be cut when they are hit by economic crisis.<sup>4</sup>

1 As of 30 June 2023, the EU and NATO shared 22 Member states, pending the ratification of Sweden’s application for membership by Turkey and Hungary, which would increase the total to 23. There are four neutral or non-aligned EU states which are not members of NATO: Austria, Cyprus, Ireland and Malta. When Sweden is admitted, 96.5% of the European population will be covered by NATO’s guarantees.

2 On aggregate, the Member states allocated just 1.5% of their GDP to defence, a long way short of the figure of 2% established as a threshold by NATO (European Commission 2022: 1).

3 Although the Member states themselves had proposed allocating 35% of their defence spending to collaborative projects with other Member states, in 2021 this figure was only 11% (European Commission 2022: 1).

4 So, for example, the financial crisis which began in 2008 had a global effect of cuts to the defence budgets of the 27 Member states, reducing them by 12% by 2014. These budgets did not return to the 2007 pre-crisis levels until 2018. Meanwhile, powers such as Russia and China multiplied their expenditure by a factor of 3 or 4 (EDA 2021:4).

The treaties since Maastricht include the possibility that the EU might develop a Common Foreign and Security Policy, “including the progressive framing of a common defence policy that might lead to a common defence” (art. 24 TEU) in a gradual approach which, in its final stage, must be ratified by Member states in accordance with their internal constitutional rules. It is designed as an intergovernmental policy, which implies that the EU does not have its own competency in this area but instead acts as a forum in which Member states coordinate their national policies and decide on joint actions. It thus follows the traditional rules of intergovernmentability: unanimity of the Council,<sup>5</sup> non-participation of EU institutions, decisions that are not legally binding, and prohibition on the funding of military spending through the EU budget.

The clearest consequence of its being an area of cooperation is the decision not to provide the EU with its own military capabilities but instead for actions to be implemented through joint operations based on “capabilities provided by the Member States” (art. 42.1). The Treaty also reflects the variety of the security and defence policies of Member states, embodying both the commitment to “respect” the obligations deriving from the NATO Treaty for those Member states which belong to that organization (art. 42.2), and the desire to include neutral and non-aligned states in a policy which also provides for the use of civilian capabilities (art. 42.3).

The Treaty of Lisbon, which arose out of the political initiative of the European Convention, represented a step forward in so far as it overcame the crisis management approach of previous treaties, implemented since 2003. The new turn towards a defence policy aimed both to promote cooperation between Member states to deliver excellence in military capacities and to procure mutual aid and defence (Guinea 2011: 655). With respect to the first of these aims, the Treaty established a European Defence Agency with the goal of determining operational requirements, strengthening the industrial and technological base, and participating in defining a European policy on capabilities and arms. It sought to

tackle both the problem of fragmented expenditure and planning conducted solely at the national level, and also the lack of investment in key technologies (Common Action 2004/551/CFSP). In light of the obvious need, Member states did not wait until the Treaty came into force, and instead created the agency in 2004, embarking from the early years on collaborative projects to promote innovation and implement a common defence market.

With the same aim, article 42.6 of the TEU creates permanent structured cooperation for “[t]hose Member states whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area”. This institution was designed with the idea of permitting variable groupings of Member states who would cooperate on a pragmatic basis to develop specific projects to enhance their capabilities. It introduces a degree of shared obligation in so far as, once the project has been established, participants take decisions by qualified majority and, in the event that a Member state fails to comply with its commitments, it can be expelled, which constitutes a sanction of a kind. Article 42.7 also includes a mutual aid and assistance clause between Member states in the event of armed aggression, which could convert the EU into a defensive alliance. So far, however, this clause has been nothing more than fine words as Member states have not developed it legislatively and nor have they established the institutional procedures or political capacities necessary for its implementation. It appears that they do not wish to compete with NATO, instead preferring to respect that organization’s monopoly in guaranteeing the collective defence of Member states, in a kind of division of labour (Guinea 2023).

Finally, it should be noted that on separate occasions two Member states obtained exceptions in defence issues, due in both cases to the rejection of treaty ratification at the referendum stage. These were Denmark in 1992, as part of the Maastricht Treaty ratification process (European Council 1992: Part B), and Ireland in 2008, to implement the Treaty of Lisbon (European Council 2008: Annex I). Both countries obtained arrangements not to be bound by Treaty obligations in this regard, although there is nothing to prevent them from voluntarily adhering to specific institutions or CSDP

5 It is important to note that this unanimity is an insuperable requirement, as TEU article 30.4 expressly prohibits the possibility of applying a qualified majority to any decision which has repercussions in the military or defence sphere.

commitments, or from deciding to enter into bilateral or multilateral cooperation in defence matters with other Member states. The war has changed the Danish position, as we will see below.

### **Strategic autonomy linked to defence: a (traditionally) controversial issue**

The Treaty of Lisbon, which came into force in 2009, introduced innovations to implement a defence policy, in addition to the existing security policy, but these were not applied in the years that followed. It would not be until 2016, a year which marked a turning point in European policy, that the European Council would make defence one of its priorities with the adoption of the objective of strategic autonomy. This new objective was set out in the Global Strategy for the Foreign and Security Policy of the European Union (EEAS 2016: 4) and developed by the Bratislava Roadmap (Heads of State and Government 2016:5). Strategic autonomy is defined as “the capacity to act autonomously when and where necessary and with partners wherever possible” (Council of the EU 2016).

We can ask what happened in 2016 to change the mentality and willingness of Member states. The international environment was becoming more unstable, and the demand for security was thus growing. Conflict and instability in the European neighbourhood were spreading, both in the east, following the first Ukraine war, and in the Mediterranean, with the various conflicts that arose out of the Arab Spring. Global politics had also become more bad-tempered and less cooperative, with the growing assertiveness of the emerging powers. And, finally, Trump’s election to the White House raised doubts as to whether NATO could continue to act as a guarantor of European security.

Within the EU itself there were other dynamics favouring the development of a defence policy: a significant change in European public opinion caused by the international situation, a much more political European Commission led by Juncker, who did not hesitate to assume a new role with a creative interpretation of the treaties, and the window of opportunity created by Brexit. The United Kingdom’s departure had a triple ef-

fect: it created a shortfall of capabilities, as the British army was the most powerful in the EU; that country’s traditional veto of the development of a distinctively European defence policy disappeared; and European leaders felt obliged to signal their commitment to the political future of the EU, in which defence was a powerful symbol (Guinea 2021: 166).

The European Defence Union, established between 2016 and 2017, is based on three pillars, described as “thinking, purchasing and acting together” (Tocci 2018: 135-137). The first step was taken in November 2016, when the European Commission drew up the European Defence Action Plan (European Commission 2016). This document assessed the existing security and defence deficits, established the objective of promoting efficiency in the military spending of Member states, sought to promote cooperation between Member states through financial incentives in the research and development of capabilities, and also emphasised the need to strengthen the competitiveness and innovation of the industrial base. As a result of this Action Plan, in 2018 the European Defence Industrial Development Programme was created, designed to strengthen research and development in military issues, supporting collaborative efforts both by Member states and by specific industries (Regulation (EU) 2018/1092). It sought to address one of the important deficits of European defence, namely the lack of public investment in critical technologies and the consequent shortfall in innovation when compared to other regions of the world.

As a consequence of this, it was decided to implement a pilot project using the EU budget to fund collaborative defence research efforts. This would be the Preparatory Action on Defence Research, designed to provide a limited test of some elements of a future European Defence Fund (European Commission 2023a). The Preparatory Action was applied during the two-year period 2017 to 2019, with a budget of 90 million euros. Under this initiative, 18 collaborative research projects were funded, selected through three separate calls for tender.

The Court of Auditors has recently presented the report evaluating this preparatory initiative (Court of Auditors 2023). This argues that it was only of limited effectiveness as a test process. With respect to the subject under discussion here – verifying the effectiveness

of the programme through the involvement of Member states – it finds that the success of the tender process was uneven with respect both to Member states and industries, with some in which scarcely any consortia participated. Participation was clearly concentrated in large Member states in western Europe with strong defence industries. France was a long way ahead both in the coordination of projects and in the numbers of public and private bodies taking part, followed at some distance by Italy and, a long way behind, by Germany and Spain. Eastern European and Nordic states did not lead any projects, while organizations from those countries participated in very few projects, suggesting little interest in joint defence investments. Indeed, the report identified a degree of resentment from this group of Member states towards a project which is led by the Franco-German axis and is perceived as exclusively promoting its interests.

In 2021, the European Defence Fund (EDF) was established on a permanent basis, within the existing Multiannual Financial Framework, with the aim of co-funding collaborative research and development projects between several Member states, and the joint purchase of defence equipment (Regulation (EU) 2021/697). Its objectives are to address deficits in the area of capabilities, to invest in research, to strengthen the industry at the European scale, and to generate inter-operability between the military capabilities of Member states. It received significant funding, totalling 7,953 million euros. Based on the legal provisions of the EU's industrial policy, the EDF broke two taboos: the prohibition on funding military spending through the EU budget, and the significant influence of the Commission, through its approval of calls for tender. The EDF does not alter the model of the existing CSDP, in so far as co-funded projects or the capabilities acquired will ultimately belong to the participating Member states or companies, who will in the last instance decide how they are to be used.

The Coordinated Annual Review on Defence (CARD) was established in 2017 to identify the defence capabilities of Member states and enable coordinated action. This process, conducted by the European Defence Agency (EDA), conducts a year-long evaluation of the European defence situation, analysing information from national defence plans from the perspective of the de-

velopment of European capabilities (EDA 2023). It aims to offer a diagnosis of joint needs, so that the instruments at the disposal of the EU (EDF, PESCO etc.) can be used to support collaborative projects between public and private organisations in Member states to address these limitations. Its long-term objective is to gradually align the planning and development of national capabilities, seeking the complementarity and Europeanisation of national defence policies.

At the same time, in December 2017, the Council approved the application of twenty-five Member states to activate Permanent Structured Cooperation (PESCO), to take on more binding commitments in relation to defence, and to launch collaborative projects between groups of Member states to develop both military and institutional capabilities (Decision (CFSP) 2017/2315). PESCO represents a major political innovation, in so far as it envisages flexibility so that Member states can decide which projects they wish to cooperate on and where they want to commit their resources, depending on their specific philosophies and interests. For example, neutral states might decide to participate in security projects. PESCO also represents the consolidation of an intergovernmental policy which imposes certain limitations on sovereignty, as the participants enter into legally binding commitments; the results are subject to evaluation; within the project, decisions are taken by qualified majority; and there is the possibility of sanctioning non-compliant states with expulsion. Following its recent referendum on defence, Denmark will join PESCO in May 2023, making Malta the only Member state not to participate (Decision (CFSP) 2023/1015).

At the time of writing, a total of 72 projects have been approved, with three closed at the decision of members (Decision (CFSP) 2023/995). These projects are very varied, ranging from the development of specific military equipment and munitions to the configuration of logistical or institutional structures to support operations, platforms for cooperation between Member states, and training structures. If we analyse all of these, it is clear that PESCO is currently pursuing four distinct objectives: reducing the number of existing armament systems; strengthening operational cooperation between Member states; using inter-operability to connect troops; and boosting industrial competitiveness



and innovation. As in the case of the EDF, the military capabilities developed in this way belong to the participants, who can decide whether to apply them within the framework of the EU or in other international operations with a UN or NATO mandate.

If we look at the funding side, some of the projects are very ambitious while others are more limited. Levels of participation also vary greatly, with the largest being the Military Mobility project, with all PESCO members as well as some non-EU states participating,<sup>6</sup> while there are several projects with only two participants. Commitment varies greatly from state to state, although here too it is clear that the large states have more resources to allocate to these projects and thus occupy leadership roles.

In the institutional evaluation of PESCO, the results are ambivalent (Recommendation 2022/C433/02). The Council calls upon Member states to put more effort into meeting their obligations in national defence investment, in accordance with their objectives with respect to the EU's needs, and into participation in CSDP missions and operations. It also expresses concern because a limited number of projects are failing to meet their objectives within the timeframe established, although it notes that the majority have done so. The Council is also hopeful that the renewed political commitment to defence since 2022, as a result of the war, will strengthen the resolve of Member states and will lead to better outcomes.

Finally, as a consequence of these changes, in June 2017 the European Council decided to create a permanent operational command centre to provide the EU with strategic capabilities – the Military Planning and Conduct Capability – and this was first activated for civil and mixed missions and subsequently for small executive (i.e., military) decisions (Decision (EU) 2017/971). This has already directed three non-executive operations: Somalia, Central African Republic and Mali. This contribution facilitated the transmission of information, and the adoption of political decisions, but requires more staff and resources (Reykers 2019). This aspect

is very important, and is the other element needed for common defence. It is not possible to deploy and use national forces in joint operations if the EU does not have the necessary capacities for command and control, intelligence, logistics, administration and training. This decision and other PESCO projects are gradually contributing to the construction of these capabilities.

Another equally important European Council decision was to fund the deployment of Battlegroups, paid for from shared resources (European Council 2017:5). Battalions established by Member states and available for deployment by the EU had existed since 2007 but have never been used. Now, the question is whether this approach will be replaced by the Rapid Deployment Force. Since 2016, there has been institutionalised cooperation between the EU and NATO, which has so far led to three joint declarations and the implementation of a solid framework for political dialogue and a substantial number of projects in the area of security, ranging from military mobility to maritime security and cybersecurity (EU-NATO 2022).

Evaluation of this stage of deployment of the European defence policy found that Member states are setting out on a path of cooperation, prioritizing industrial capabilities and aspects, but that there are still significant differences between them (Duke 2018) and they remain very resistant to thinking at a European level and moving away from a sovereignty-based approach to defence. As the Court of Auditors indicated, there are many ongoing challenges that must be overcome if these new initiatives are to have an impact on the EU's ability to defend itself (2019: 6-7): an effective planning process at the EU level, the effective participation of Member states, the impact on the need for real capabilities, and the governance and accountability framework. We agree with Katsoulis that significant progress has been made from the institutional perspective, but that Member states have not invested in capabilities and there is a lack of political will among Member states for joint action (2022: 102).

The next objective will be to try to ensure that Member states see the Defence Union as a priority, and effectively commit to its success, as they "play the central role in Europe's defence architecture" (Court of Auditors 2019:7). Since High Representative Borrell assumed his

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6 In this project, the Council has authorised the participation of some NATO members who had expressed their interest, including the United States, Canada, Norway and the United Kingdom, as Military Mobility is also one of the lines of action of EU–NATO cooperation.



mandate, he has emphasised the objective of taking the necessary steps to ensure the EU's capacity for collective action (Borrell 2023a: 151). He argues that the principal causes of the failure of the objectives presented by the CSDP and low national commitment have been the differing visions of what the CSDP should be, divergent strategic cultures and interests between Member states, and mutual suspicion. To address this, he proposes working to formulate a comprehensive approach to the CSDP, one that is agreed between governments and is designed to operate as an "action guide" to be implemented over the coming years. This is the Strategic Compass which, although it was approved after the start of the Ukraine war, reflected this earlier logic (Council of the EU 2022).

Its aim was to promote a shared strategic culture and a list of objectives to which Member states are committed, and to close the gap between expectations and results. It sought to achieve the first aim through the drafting process, with a first draft drawn up by experts and final wording agreed upon by Member states so that they would have ownership of the plan. The second objective was to be achieved by establishing deadlines for achieving milestones, and a "robust" monitoring and evaluation plan. The Russian invasion of Ukraine gave new meaning and purpose to this initial intention, and led to minor revisions of the document at the last moment.

### **Defence and strategic autonomy after the return of war to Europe. A turning point?**

Russia's invasion of Ukraine on 24 February 2022 had a brutal impact on the course of European integration, contributing to the development of the EU as a geopolitical actor (Guinea 2022). It affected how its policies were conceived, contributing to a more Hobbesian vision of the world and international relations. With respect to the politics of the Common Foreign and Security Policy (CFSP), it led to more supranational dynamics. And it contributed towards a reconsideration of those policies, with an emphasis on conflict and a weaponisation of economic and social instruments. Finally, it triggered the formulation of the whole political strategy, establishing

the objective of strategic autonomy as a cross-cutting vector of all European political action. And, on this new global political agenda, defence will take a prime position in the decision to assume our responsibilities and our security and to construct a "European sovereignty" (Heads of State and Government 2022: 3).

With respect to the CSDP, the war has influenced the European security context in a number of ways, leading to new calls for the development of a Defence Union. It radically changes both the international and the European security context, demonstrating that the normative framework of the post-Cold War period is no longer viable, that there is a real possibility that EU states could be the victims of aggression and that, given their capabilities, it is better for them to protect themselves together than to do so separately. At the same time, it also lays bare the current vulnerability of the EU, which has a significant deficit in hard power capabilities and is structurally dependent on the United States for its defence, through NATO. Thirdly, Ukraine is also an example of the hybrid forms of modern conflict, and raises the need to address other dimensions of defence, such as the cybersphere, the maritime sphere, and space.

Similarly, the fact that Ukraine has been a partner of the EU since 2014 has meant that it has been supported in every way possible, and has meant the country has de facto been included in the EU security space, which obliges the EU to provide political and military support both within the framework of the conflict and over the longer term (Biscop 2023). Member states' concrete military support for Ukraine, supplying arms and munitions, raises the need to replenish national stocks of military equipment, permitting the modernisation and Europeanisation of national military capabilities. Finally, the reorganisation of NATO and the New NATO Force Model represents an opportunity for greater cooperation between Member states, strengthening inter-operability, which could also indirectly affect the CSDP (Biscop 2023).

Recognition of the new geopolitical situation has also led to radical changes to the positions of Member states with respect to their own defence policies. In the first place, it is important to note the decision of Sweden and Finland to join NATO, renouncing decades of positioning themselves as civil powers. Finland is already a

member of the Atlantic Alliance, and Sweden hopes that tensions with Turkey can be resolved and its membership will be ratified by the Turkish and Hungarian parliaments. Similarly, on 1 June 2022, Denmark held a referendum to consult its citizens about its membership of the CSDP, renouncing its Maastricht opt-out. The result, supported by 67% of voters (Schaart 2022), came down in favour of CSDP membership. Even Ireland, which also has a formal opt-out, is an increasingly active participant in common defence initiatives.<sup>7</sup>

The conflict has also had an impact on public support for a common European defence policy. This support was already high and widespread (found in all Member states). However, the Eurobarometer taken just a year after the invasion found that 77% of respondents were in favour of a common security and defence policy, 80% supported the idea that the procurement of military equipment between Member states should be better coordinated, and 69% agreed that the EU needed to strengthen its production of military equipment (Standard Eurobarometer 2023).

In parallel, all Member states have significantly boosted their spending on defence, as a result of the war, with the result that Europe – with a rise of 13% – is the region increasing its military budget by the greatest amount over the past year (SIPRI 2023:1). This shows that Member states have embarked upon the long and difficult process of strengthening their national defence capabilities, which is essential if Europe is to improve its ability to safeguard its own security (Raik, Blockmans *et al.* 2023: 32).

Furthermore, European countries have announced that they will significantly expand their military expenditure over the next 5 to 10 years, reflecting the multi-annual projects they have initiated (SIPRI 2023:5). This shows that the aim is not just to spend more but to spend better on cooperative projects which strengthen joint defence. An example of this shift is Germany, which has expressly stipulated that this strengthening of national defence is designed to safeguard Europe's territorial integrity (Scholz 2023:24). It is clear, then, that the

war and the existence of a shared enemy have created a political will which did not previously exist.

All of this led the EU to adopt, just three weeks after the start of the war, its ambitious Versailles Agenda, in which it set out the objective of strategic autonomy in three specific areas of vulnerability exposed by the conflict: defence, energy and the economy (Heads of State and Government 2022). With regard to defence, it proposes a series of objectives: a) to substantially increase expenditure on defence, dedicating a significant portion to investment, focusing on strategic weaknesses detected, and developing defence capabilities on a collaborative basis; b) to create new incentives to stimulate collaborative investment by Member states in joint projects, and the joint acquisition of new defence capabilities; c) to increase investment in the capabilities needed to implement the full range of missions and operations, in particular strategic support elements such as cybersecurity and spatial connectivity; d) to promote synergies between civil, defence and spatial research and innovation, and to invest in critical and emerging technologies, and in innovation for security and defence; e) to adopt measures to strengthen and develop the defence industry, including small and medium-sized enterprises; f) to protect against the intensification of hybrid war, strengthening cyber-resilience, the protection of infrastructures, and combating disinformation; g) to improve the security and defence dimension of space industries and activities; h) to speed up work on military mobility throughout the EU.

Detailed analysis of the Versailles mandate shows there are no major innovations in terms of the model but, rather, an emphasis on constructing and consolidating the main elements designed to strengthen the CSDP with new commitments. All of this reflects the demands of the changing environment as demonstrated by the war, as noted above. In this respect, the format of this summit is important. It is not a European Council but a meeting of EU Heads of State and Government, indicating that they are acting beyond the competencies of the EU and undertake to address a series of shared challenges as a joint entity. The added value of Versailles is an increased political will, caused by the war, which states that it is conceived as a plan of action, providing for regular review of its status by the European Council.

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7 This country participates in the EDA and PESCO, despite its opt-out. And it also responded to France's activation of art. 42.7 in 2015, requesting assistance in its fight against international terrorism.

If one also takes note of the increased military spending by almost all Member states, the political message is the commitment of national leaders not only to spend more on military and security equipment but also to spend jointly on shared projects to ensure inter-operability and the common defence of the EU.

The Versailles Agenda has to be read in conjunction with the Strategic Compass, which was approved by the Council just two weeks later (Council of the EU 2022). We have seen that it reflects a different logic, one that predates the war, but the objectives are compatible. The Compass, in addition to providing a shared diagnosis of risks and threats, also includes an action plan, to be implemented by 2030, with a set of objectives and measures which provide an overview of security and defence, divided into four pillars. The first pillar, “Act”, seeks to strengthen the EU response to crises, proposing four major objectives: to improve crisis management, with a focus on missions, decision-making and funding, and promoting greater cohesion; develop a Rapid Deployment Capacity of up to 5000 troops; to generate its own capabilities for civil management of crisis; and to strengthen command and control structures, military mobility and joint exercises. The second pillar, “Secure”, seeks to improve resilience by strengthening the ability to anticipate in order to ensure a safe environment. Its objectives are: to boost intelligence capacities; to develop hybrid tool boxes to respond to threats of this kind, with particular emphasis on disinformation; and to strengthen the cyber, maritime security and space dimensions. The third pillar, “Invest”, is where there is the greatest overlap with the Versailles Agenda. The aim is to spend more and better to improve operational capabilities: to develop cutting-edge capabilities; to use PESCO and the EDF to develop critical capabilities on a cooperative basis; and to invest in innovation. The fourth and final pillar, “Partner”, seeks to strengthen strategic cooperation with NATO, the UN and other regional organisations; to develop bilateral partnerships with countries with similar values and principles; and to promote a Security and Defence Partnership Forum with all partners.

A number of observations can be made with respect to the Compass. Firstly, although there are elements specific to defence, it takes a broad view of security. It does not appear to offer any great innovations with respect to

CSDP, as there are many elements which were already being addressed. In other words, it is not an isolated commitment but instead integrates perfectly with the whole CSDP development and is fully compatible with the Versailles Agenda. The innovations can be significant, above all, those aimed at the EU’s own capabilities and their use, such as the Rapid Deployment Capability or improvement of institutional structures, such as intelligence or command and control. However, its added value derives from the fact that it does not simply switch to another model but instead seeks to effectively commit all Member states to its implementation. And this is where evaluation of its implementation will be key. At the same time, we must continue to stress that, although it alludes on several occasions to the “solidarity and mutual assistance” provided for in article 42.7 (Council of the EU 2022:2), it does not address either the normative development or operationality of such assistance, and nor does it tackle the challenge of the territorial defence of the EU, a matter which remains the remit of NATO.

### **Actions during the first year of a common response to war: a paradigm shift**

The Russian invasion of Ukraine has led Member states to change their national defence policies. The new strategic agenda also seems to display a clear political will to develop a common policy at the heart of the EU to increasingly delegate to this organisation “the defence of its citizens and of the Union” (Council of the EU 2022:5). However, in its efforts to construct a common defence, we have repeatedly confirmed the existence of the “capabilities-expectations gap” (Hill 1993). On the one hand, there is a raft of documents and declarations setting out objectives, and on the other there is a lack of effective implementation, due to a lack of political will and commitment on the part of Member states. Here, we will evaluate the developments of the last sixteen months and ask whether the war has had a significant impact on Member states and whether, in fact, they are working towards achieving the Versailles and Strategic Compass objectives.

The first question is whether use by the EU of instruments of the CSDP to support Ukraine militarily

represents an innovation. The EU had never previously planned to use CSDP resources to support one of the parties in an inter-state conflict. The European Peace Facility (EPF) was created in 2021 with the aim of funding the shared expenses of the EU's crisis management operations and assistance measures to third parties, states and international organisations, to strengthen their capabilities and crisis management operations (Decision (CFSP) 2021/509). It was reformed and allocated additional resources to fund the donation of ammunition, equipment and platforms, including lethal weaponry, to Ukraine (Decisions (CFSP) 2022/338). The High Representative recently announced the Council's decision to raise the provision of this Fund to support Ukraine to 10 billion euros (Borrell 2023c).

Given the Ukrainian government's urgent need for military equipment, this money will go to those Member states who issue materiel to Ukraine from their own arsenals. The first and principal suppliers have been the eastern European states, who had stocks of Soviet and Russian arms that the Ukrainians already knew how to operate. The effect of this measure is that the main beneficiaries of the Fund are these countries, and this is enabling them, in turn, to renew and modernise their own military equipment (Gros-Verheyde 2023). An indirect result of the EU's military support for Ukraine, then, has paradoxically been to update the military capabilities of Member states, and it is thus contributing to an improvement in the capacity for common defence. It would also be desirable if this money were to be spent on inter-operable equipment, manufactured in Europe, but data on the orders placed by Member states is not yet available.

The second innovative measure has been the implementation of the crisis management operation, EUMAM Ukraine (European Union Military Assistance Mission), under which participating Member states train members of the Ukrainian army to improve their combat skills (Decision (CFSP) 2022/1968). Not only is this the first time that an operation has been established to provide military support to a warring party (even if this is covered by the principle of legitimate defence); it is also the first time it has been conducted on the territory of Member states and not externally. In May 2023, High Representative Borrell reported that 20,000 soldiers had al-

ready been trained, and that this number was expected to reach 30,000 by the end of 2023, twice the number initially proposed, making the mission an "extraordinary success" (Borrell 2023c). The use of European capabilities to support Ukraine, such as geospatial intelligence information from the European Union Satellite Centre, is also new (SatCen 2023:28), even if it has limited impact on the development of a common defence.

Finally, the decision of the Council of 23 March on the implementation of a three-step mechanism to rapidly provide Ukraine with the munitions it needs, to jointly acquire replacement munitions, and to redouble European industrial capacity is a qualitative leap (Council of the EU 2023). The objective is the acquisition of one million 155 mm calibre artillery rounds within a period of twelve months, along with missiles if required. This has created a need for urgent action. The first pathway for this mechanism, which has already been approved, consists in allocating a further billion euros, charged to the EPF, to compensate Member states who urgently deliver land-to-land and artillery munitions, including missiles, to Ukraine (Decision (CFSP) 2023/810).

The second pathway is joint procurement of munitions by Member states, buying from industries in the EU or Norway, a mechanism in which 25 Member states have already expressed an interest (Borrell 2023c). To activate the third pathway, which consists of strengthening the manufacturing capacity of the European defence industry, the European Commission presented its proposed Act in Support of Ammunition Production (ASAP) in May 2023, and this now has to be approved by the co-legislators (European Commission 2023). This act contains a range of measures, including financial measures, to support European industrial manufacturing capacity.

It is logical to assume that this mechanism, although designed to help support Ukraine on a temporary basis, offers huge potential for common defence. Joint purchasing by Member states, if it proves to be speedy and effective, could establish a precedent that goes beyond ammunition. Another important aspect is the support and development of a European defence industry, whose innovative potential could benefit the competitiveness of the wider economy. However, it is important to note that the European industry consists primarily of

private companies, many of them SMEs, and these will only make major investments to strengthen their manufacturing capacity if sustained demand is guaranteed.

There is also a need to evaluate progress in developing the Versailles objectives, sixteen months later. As a consequence of the mandate of the Heads of State and Government, the Commission together with the EDA conducted an analysis of the defence capabilities of Member states and an action plan for coordinated national investment (European Commission/AR 2022). Starting with an evaluation of the principal weaknesses of the military capacities of Member states, it proposes that the defence spending of Member states be increased in a coordinated fashion, creating a far more solid technological and industrial base for the EU's defence, and increased conventional deterrence for every kind of potential adversary (European Commission/AR 2022:1). The aim, then, is for this increased funding to be spent "jointly" on collaborative projects, "better", in accordance with the priorities already agreed by Member states and set out in the Strategic Compass, and "with a European perspective", that is, "buying European" to promote a powerful common defence industry capable of guaranteeing strategic autonomy in the long term.

To achieve these objectives, the Commission and the High Representative have already created a Working Group on Joint Procurement to coordinate the purchase of defence equipment with Member states, with the major long-term aim being that the strategic planning and procurement of military equipment by Member states be conducted in concert. This objective encapsulates a broader ambition when we consider the symbiosis in many Member states between their Ministries of Defence and their national arms industries. Here, it is possible to detect what could become a paradigm shift, although it is one that exists at the level of vision rather than of action. The Commission's Communication stresses the possibility of adapting European legislation to incentivise the joint procurement of military equipment and thus strengthen the European defence industry, and to implement a European Defence Investment Programme to support the implementation of development projects which are beyond the capacity of individual Member states.

To develop this objective of promoting joint procurement, in July 2022 the Commission presented the European Defence Industry Reinforcement through Common Procurement Act (EDIRPA) (European Commission 2022). This creates an instrument backed by 500 million euros to fund the joint procurement of defence equipment by three or more Member states. It supports various objectives: to encourage Member states to work together, to improve the efficiency of defence spending, to support the replacement of stocks transferred to Ukraine, to promote the inter-operability of European armies, and to strengthen the European defence industry. This instrument is designed to be implemented in coordination with the Working Group on Common Procurement. On 28 June 2023 a political agreement was reached between the parliament and the Council, finally breaking the deadlock concerning the origin of the industrial suppliers (Council of the EU 2023). It was agreed that they must be based in the EU or the states of the European Economic Area, with clear requirements to ensure that no third party state can impose limits on their use. This criterion serves to protect the strategic autonomy of the EU.

It is also important to evaluate progress with implementation of the Strategic Compass. The High Representative presented a report identifying the activities undertaken during the first year of the Compass in each of the four pillars (Borrell 2023b). The ambitious response to the Ukraine conflict, and the implementation of two new crisis management missions in Armenia and Niger are particularly noteworthy. The report also describes the preparatory work for the creation of the Rapid Reaction Force, with the intention that this will be operational for 2025, and the consolidation of the Military Planning and Conduct Capability, the European HQ, to enable it to plan and direct joint operations and exercises. A first EU joint exercise has been planned for October 2023, with the objective of testing the inter-operability of European forces.

In the objective "Secure", it is worth noting the reinforcement of civil crisis management capabilities, the new Military Mobility Action Plan and the development of protocols, operational coordination and joint exercises in the cyber, hybrid, spatial and maritime scenarios. The "Invest" section identifies the increase in spending

by Member states, the need to coordinate and invest together, and all the initiatives that derive from Versailles, along with the decision to update the Capability Development Plan and to develop a European Defence Investment Programme. The “Partner” section sets out the close collaboration with NATO and the approval of a new joint agenda, with the United Nations, the African Union, and the special relationship with the United States and other partners. In this regard, the first Schuman Forum was held in March 2023, to provide a space for dialogue with partners who share our values and objectives as to how to tackle the existing challenges in security and defence.

The Report concludes by arguing that there has been significant, concrete progress, and that the gap between our aspirations and our actions is narrowing, making Hill’s thesis a thing of the past (Borrell 2023b:22). The brutal context of the war has changed the perceptions and commitment of Member states, driving a paradigm shift and giving institutions a clear mandate to develop a common defence. And this institutional development appears to be backed by the desire of Member states to participate in all these common initiatives.

We can also ask whether, in this year of war, the relationship between the EU and NATO has been affected in any way. This is a very important question, given that in the past the loyalty of some Member states to the Atlantic alliance hindered the development of the CSDP. The war, in this respect, has acted as a unifying element. As Katsoulis argues, the permanent friction between the EU and NATO has abated, at least for the medium term (2022: 103). The need to ensure effective management of the conflict has led to ongoing and fluid cooperation between the two organizations. This is exemplified by the way that the Council has regularly invited the Secretary General of NATO, Stoltenberg, to meetings of Ministers of Defence in order to maintain dialogue between the two organisations (Foreign Affairs Council 2023), that representatives of European institutions have participated in the NATO summit and the High Representative, Borrell, has also been invited to meetings of the Atlantic Council. A pragmatic approach has been applied, recognising the complementarity between the two organisations, and the importance of cooperation to construct security in

Europe, as shown by the third Declaration of Cooperation approved in January 2023.

The war in Ukraine has also had an unexpected effect: the coordination of political action between the United Kingdom and the EU, which have realigned to offer a common response to a shared threat (Whitman 2023). This is particularly noteworthy given the fact that conflicts in British internal politics led to the exclusion of any commitment in the area of security and defence from the Treaty of Mutual Cooperation. With respect to diplomatic and military support for Ukraine and the application of sanctions to Russia, the United Kingdom and the EU have coordinated their positions, and this desire to work together to guarantee European security is also seen in the willingness of the United Kingdom to join the European Political Community.

## Conclusions

In our analysis, we have seen how Russia’s invasion of Ukraine has acted as a powerful catalyst in the development of the CSDP, generating significant changes. Firstly, military support for Ukraine means that the EU can no longer be classified as a civil power: the Rubicon has been crossed. And some of the assistance measures have a fundamental if indirect impact on common defence. For example, the decision to use the EPF to fund the despatch of military equipment to Ukraine is leading to the de facto modernisation and improvement of the military capabilities of Member states. The three-step approach to rapidly provide Ukraine with ammunition has led to the establishment of joint procurement and investment in the manufacturing capabilities of the European defence industry. However, it is logical that companies will not commit to expensive efforts to expand their business if they do not have a predictable procurement environment. This means that the next step must be to create incentives for Member states to procure jointly on a stable basis from European companies, something that requires a commitment to joint planning by Member states and a capacity for innovation on the part of industry.

War has strengthened the political will of Member states, articulated in 2016, to work to develop capabili-



ties to enable the EU to safeguard European defence: in other words, strategic autonomy. And it appears to have allayed the suspicions of the Nordic states and those in eastern Europe regarding the excessive influence of the Franco-German axis. The most important effect is illustrated by analysis of the progress produced in the first year of war, which demonstrates real commitment both in terms of outcomes and the determination to close the gap between promises and capabilities. However, this political will must be sustained over the long term, when the threat of war is no longer present, and in a very delicate context, one characterised by differences between Member states in terms of perceptions and interests, the enormous resources required, and the tricky relationship with NATO.

Developments of the past year show that the existing CSDP model – which is based on coordination and a cooperative approach to guarantee the inter-operability of national capabilities, common investment, support for innovation and for the European defence industry – has not been abandoned. Rather, it has been strengthened through joint procurement and direct investment to reinforce European industrial capacity. While there is also a commitment to strengthening the capabilities of the EU itself in intelligence, operations direction etc., this remains low level. Despite the grandiloquent declarations of some leaders, there has been no move to create a European army.

However, while the model may remain the same, there has been a paradigm shift, which consists in moving beyond a purely intergovernmental approach and instead utilising all the advantages of common action. The European Commission, with the support of intergovernmental institutions – EDA and EEAS – has been charged with leading common policy; programmes and projects are covered by industrial legislation and approved using legislative procedures such as Regulations; and the EU budget has been used to fund the different instruments. Member states have shown that they prioritise effectiveness over sovereignty. The reality is that defence has shifted from being an intergovernmental policy to become a shared EU policy.

War has also delivered a lesson in realpolitik and humility. It has demonstrated that the capabilities that Europeans currently possess do not permit strategic au-

tonomy and the defence of Europe. As Ayala argues, one of the lessons the EU must learn from the war is that it is “essential to create a Europe of Defence which makes it possible to guarantee, under normal conditions, the security of Europeans against any aggression or coercion” (2022: 87). Although we have no choice but to continue to rely on NATO for collective deterrence and defence in recognition of our own weakness, in the longer term the commitment of the United States to Europe’s defence is not guaranteed, and it is thus important to continue to work to deliver strategic autonomy.

Leaving aside the war in Ukraine, security threats in the international environment continue to grow. Taken individually, Member states are too small to confront these on their own. Protecting the security and interests of Europeans can only be done on a cooperative basis. It is therefore time to leave behind the old dynamic of grandiose declarations and to continue, instead, to focus on results, consolidating the trends of the past year. The ball is in the court of Member states, who can freely choose which resources to allocate and whether or not to participate in collaborative projects under the umbrella of the EU. The war appears to have thrown up a new commitment to common action, but if this is to be successful then the impulse must be sustained over the decades to come. The dilemma is more pressing than ever: do we cling to old sovereignties or work together to create the capacity to act?

## Recommendations

- Maintain military support for Ukraine for as long as necessary, given that our partner is a key component of European security.
- Continue to work proactively on a consensus among all the Member States to design and build an inclusive CSDP that is responsive to the visions and interests of all and where the leaderships of particular Member States are not the object of suspicion.
- Uphold the political will of Member States to continue implementing the Versailles and Strategic Compass commitments as regards joint investment in capabilities and innovation, which means maintaining substantial defence spending after the conflict is

over, given the urgency of having European strategic autonomy to protect the EU and its citizens.

- Given the reinforcement of the CSDP, design mechanisms to strengthen democratic accountability, both to the European Parliament and to national parliaments.
- Ensure the coordination of all the institutions, programmes and projects developed and planned, so that they form a coherent policy; a concerted effort on the part of the Commission and the EEAS with the High Representative is key here.
- Continue to consider NATO as the forum for deterrence and the territorial defence of the EU, but accept that in the long term the EU will have to shoulder this responsibility itself. In order to do so, it needs competitive military capabilities, but also to develop normatively, institutionally and procedurally the mutual defence clause of Article 42.7 TEU.
- Foster strategic planning and joint procurement of military materiel and equipment by the Member States, with the aim of achieving increasingly interoperable European forces and economies of scale in defence investment.
- Emphasise bolstering the creation of the institutional capabilities needed to launch joint operations drawing on interoperable national forces and develop them successfully: a sufficiently robust command and control capability, intelligence, logistics, administration and common instruction.
- Promote commitments among the Member States to guarantee long-term purchases from the European defence industry, as this will be the only incentive for it to make major investments aimed at expanding its production capacity, which is necessary now, to help Ukraine, and into the future.
- Continue to support – both through existing instruments and through those planned in the Compass – research, technological innovation and competitiveness in the defence sector, as this the only way to ensure that the Member States continue to buy “European”.
- Maintain appropriate cooperation with NATO, without losing our autonomy in decision-making, in order to avoid duplication and overlapping and to make the most of the different capabilities of the two organisations, but also be prepared in the event that

a future US administration loses interest in the defence of Europe.

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# 2022-2023: Confederal progress compatible with federal deepening

Francisco Aldecoa Luzárraga

## Introduction

The 2022 report mentioned that the COFOE was not effective due to its composition and methods. However, President Macron used this line to propose that when the COFOE conclusions were presented in the European Parliament plenary session on 9th May, the European project should be enlarged to the confederal field. In addition, he committed to supporting the European Parliament proposal from 4th May which asked the European Council to convene the Convention by applying Article 48 to revise the Treaties. However, the European Council of 23rd and 24th June during the French Presidency came as a slap in the face, as not only did it not convene the European Convention, but it decided to award candidate status to Ukraine, Moldova and Georgia, although the latter came with conditions. This only made a revision of the Treaties even more necessary.

Ever since, in late 2022 and up to the time of writing in September 2023, progress has been made simultaneously along both channels: confederal and federal. The confederal initiative has been particularly developed, mainly by implementing the European Political Community, which met for the first time on 2nd October 2022 in Prague. On the other hand, the federal perspective has

clearly been expressed in the Constitutional Committee ruling approved on 28th August and signed by the leaders of the five main political parties, which raised the need for a Convention to tackle the revision of the Treaties in a clearly federal tone. This refers to reforming the institutions and considerably enlarging competences. There can be no doubt that its competences are federal as, if there had been any doubt, the second consideration is “bearing in mind the Ventotene Manifesto of June 1941”, which is clearly federalist.

This war of aggression has been raging for over 550 days and yet, as opposed to initial predictions, Russia has yet to meet its objectives. The invasion was expected to be fast, lasting barely a month, after which Russia would occupy 70% of Ukrainian territory. Russia is currently in the process of a gradual withdrawal and barely holds 10% of the country. On the other hand, Borrell reminds us in his book *The Year that the War Returned to Europe* that the aim of the aggression was not only to annex Ukraine, but also to divide and weaken the European Union. The aggression has clearly neither weakened the Union nor divided its Member States, rather more it has produced the opposite effect and accelerated confederal aspects by developing and deepening the federal rationale.

## The new European political cycle 2019-23 and its influence on the political process

The European parliamentary term (2019-2024) kicked off with a considerable rise (almost 10%) in participation in the 2019 elections to the European Parliament, thereby raising its democratic legitimacy. Just a few months after the mandate began, the Covid-19 pandemic struck, which required outstanding decisions to be made to address not only health issues, but also economic, political and social consequences, particularly the Recovery Plan and the New Generation Funds, an unprecedented *de facto* federal advance.

At the same time, the United Kingdom definitively left the European Union on 1st February 2020. While raising a great problem for some, this became an opportunity to considerably consolidate the European Union. If the United Kingdom had remained a member, progress would have been impossible, both in terms of approving the New Generation Funds, duplication of the Multiannual Financial Framework 2021-2027 and even measures concerning Covid-19 and the health passport which were quickly adopted with great repercussions, among other issues.

The Russian aggression against Ukraine from 2022 onwards also had adverse economic effects, although at the same time, it helped the European Union to take measures in unison, increase cohesion between Member States and strengthen its foreign policy considerably, particularly after the extraordinary Council of Europe meeting in Versailles on 10th and 11th May 2022. It is important to remember the relevance of the eleven sanction packages it approved, which left Russia in a very delicate economic position, isolated while the rouble crashed to below 1 cent of a US dollar on 1st September 2023.

The progress made during the 2022-2023 session has been less widely broadcast but, in my opinion, it is incredibly important: a) implementing the European Political Community in October 2022, in Prague; b) progressive communitisation of foreign policy and even defence policy during the second and third quarter of 2023; c) consideration of Ukraine, Moldova and, when appropriate, Georgia as candidates and reconsideration of enlargement to Balkan countries, among oth-

ers, in August 2023; d) the increase of sanction packages against Russia; e) improved economic and social cohesion during the Ecofin meetings; f) the chance to strengthen the New Pact on Migration and Asylum during the Spanish Presidency, and; g) renewal and intensification of CELAC-EU relations, among other aspects.

In other words, this session has complemented progress made in previous years and improved internal and international cohesion considerably; it has allowed communitisation of European foreign policy to go ahead. However, this has gone reasonably unnoticed in the media, which prefers to emphasise uncertainties rather than achievements. Above all, we have barely heard a whisper about the *de facto* federal progress made progressively over the last few years and months.

## Origin and development of the European Political Community

The European Political Community arose from Macron's speech on 9th May in the European Parliament plenary session in Strasbourg, with the goal of developing a confederal vision of Europe, in other words, this would be an instrument involving all democratic European states through a typically intergovernmental structure which imagines Europe beyond the EU, determining a community of interests (peace, security, interconnections, energy supply, food security, migration management, etc.) where sovereignty is not shared.

This does not intend to create a European political community to oppose the EU, nor will it be a precursor to enlargement for candidate countries, but it should establish an organisation beyond the EU, although with the EU, and make contact with countries which are not thinking about joining, at least for the time being (Norway, Iceland and the United Kingdom), plus others that are considering membership. To a large extent, they also have many types of agreements with these countries such as the Exclusive Economic Zone or the Association Agreements. Therefore, the plan is to include the EU 27, with the 8 enlargement candidates, the European Free Trade Association (Norway, Iceland, Lichtenstein, Switzerland, Monaco, Andorra, San Marino and the Vatican and the Faroe Islands), plus Turkey and surrounding



countries (Ukraine, Moldova, Georgia, Azerbaijan and Armenia).

On 6th October 2022, a meeting was hosted in Prague, capital of the Czech Republic, for 44 heads of State and Government from the democratic European countries, in what was considered the First Summit of the European Political Community. This new organisation, which, is a flexible, agile alliance with no legal formality for the time being, will operate in a similar way to the G7 or G20 meetings. It comprises the 27 EU Member States, and the other 17 democratic European countries, together encompassing over 700 million people. We are talking about all the countries on the continent of Europe except Russia and Belarus, not invited as they were not considered to be democratic, and the three micro-European States (Andorra, Monaco and San Marino) which were later admitted in the Moldova Summit.

The first meeting of the EPC was held on 2nd October in Prague during the Czech Presidency. The second was held in Iasi, in Bucharest (Romania) and the third will be in Granada, thereby giving this confederal project continuity. The fourth is planned to be held in London, and the fifth will be in Serbia. This thereby provides a balance between summits held in EU Member States and non-member States. The United Kingdom was in two minds whether to take part in the Summit as it feared this might be a way of drawing it back into the European Union.

This initiative was proposed by the President of the French Republic, Emmanuel Macron, in the session to deliver conclusions during the Conference on the Future of Europe, on 9th May 2022, in the European Parliament in Strasbourg. At the time, we did not see the relevance of this announcement. However, we now have the impression that this encounter represented a decisive step as it united the European community project, or in other words, supra-national Europe with a confederal perspective, as there are many common aspects to address between them.

Thus far, they had been seen as two different worlds (community and confederal); now it is possible to see them as two compatible and even complementary paths which strengthen the internal project, on both sides, and that even make it possible to picture the strength

of their unity on an international stage, as this presents a united Europe to the world, particularly in view of the crisis against the Russian Federation. Above all, it determines a common international outlook, even though they have two different ways of working. It is assumed that, among the 44 States which met in Prague, this political dialogue will be channelled through intergovernmental mechanisms.

### **First Summit in Prague (2nd October 2022)**

This meeting was extremely important because, for the first time, all 44 leaders from countries on the continent of Europe were meeting at a top level summit, to establish a political dialogue among the leaders of these countries and thereby address the most important topics and challenges affecting Europe as a whole, such as the Russian aggression against Ukraine and energy security and supply, among other topics included in the sessions held in early October. The main topics debated in the first session were infrastructure security, cybersecurity, energy and of course, the aggression against Ukraine, a theme which cut across the entire event.

It should be highlighted that this was not a one-off Summit. It was devised as a further step in the new political cycle which arose from European Parliament elections in May 2019. In addition, due to the success of the response to the EU's challenges, they have been taking federal steps. This initiative ties in European countries which are not part of the EU but that are open to working together optimally in some areas.

This is possible thanks to shared values, common interests and a similar world outlook, although separated by different decision-making methods. It suggests that this Summit is the start of a new phase of understanding between European States with two connections, federal and confederal, within a common intergovernmental or confederal framework; without limiting the European project in any way. Quite the contrary, it allows EU27 enlargement to include more members in the future, when appropriate.

Furthermore, to achieve this first aspect, the federal process must be deepened: and, secondly, the European

Convention announcement is more necessary than ever, as decision-making must be improved among the EU27 or at least for a group of these countries, when appropriate. On this occasion, the presidency was held by the Czech Republic which led the event very successfully. All 44 countries agreed that the next period would be presided over by a country which was not a member of the European Union, as in the case of Moldova, which held the session in its capital, Chisinau. The third Summit would be held in the second half of 2023 in Spain. It was surprising that the fourth meeting was arranged to be held in the United Kingdom, despite vast doubts expressed by the British Government in the run-up to the first Summit, fearing that attendance would bind it to the European Union.

### **The relevance of the Council of Europe Summit in Reykjavik (16th and 17th May)**

The Summit of Heads of State and Government of the Council of Europe was held on 16th and 17th May in Reykjavik, attended by the main leaders. This was the fourth time that Heads of State had met since it was set up in 1949 and this Summit was particularly relevant as it was held in the wake of increased political, economic and diplomatic support achieved by Ukraine as a result of its president's visits to major European capitals. This summit was held a few weeks before the second meeting of the EPC on 12th June in Moldova.

Important decisions were taken at said meeting in relation to support for Ukraine, specifically agreeing to devise a census to record the damage caused by the aggression. This decision was approved by 41 Member States, not all the members of the Council of Europe, as Hungary, Serbia, Armenia and Azerbaijan all abstained. Other decisions were made concerning the Council of Europe in terms of human rights and cultural issues,

More precisely, as presidents of the European Movement national councils, we signed an article published in *Le Monde*, written by Hervé Moritz, president of the French European Movement. In this article, we protest against Russian's war of aggression on Ukraine and show our support for the country. Furthermore, we propose to strengthen the relationship between the

European Union and the Council of Europe, specifically setting up a special Council of Europe court to address war crimes and crimes against humanity since the Russian aggression against Ukraine. Most importantly, we propose to set up a register to receive and investigate complaints from Ukraine.

### **Second EPC Summit at Mimi Castle, in Bulbaoca (Moldova) (12th June): a further step towards EPC consolidation**

Within the wave of meetings and declarations to support Ukraine in the light of the Russian aggression in May and June, such as the Reykjavik meeting of the Council of Europe (15th and 16th May) or the G7 meeting in Hiroshima a few days later (19th-21st May), we should highlight the Second European Political Community Summit (EPC), held in Mimi Castle, Bulbaoca, 50 km from Chisinau in Moldova. This meeting brought together the EPC's 44 heads of state, following on from the first meeting which took place in Prague, Czech Republic, in October 2022.

This second meeting was vastly important in political terms, in my opinion, for at least five reasons: a) it gave continuity to the EPC Summits, meaning that the Prague Summit did not look like a one-off; b) Moldova has been a candidate to join the European Union since June 2022, also in a very complicated political situation due to threats from Russia, and so, hosting the EPC there demonstrates significant support for this country; c) all heads of state attended the summit, plus the President of the European Council, Charles Michel, the President of the European Commission, Ursula von der Leyen, the President of the European Parliament, Roberta Metsola and the High Representative of the European Union for Foreign Affairs and Security Policy, Josep Borrell; d) no formal conclusions were drawn at the Summit, although it covered topics such as security, energy and connectivity of communications, among others; e) Zelensky, the Ukrainian president, also attended and received a standing ovation. Great support for Ukraine was shown in the meeting.

The EPC Summits became more relevant from Chisinau onwards. Its significance is being consolidated



internationally, because it is an informal group of 44 states which in turn represent more than 700 million inhabitants and this is the prime worldwide economic group, with great differences over the rest both in trade and in wealth. It is relevant for them to be seen together at head-of-state level. These same figures had met in Reykjavik two weeks earlier, within the framework of the Council of Europe, where they only talked about values, human rights and culture, while in this forum they began to address other topics such as energy or physical and technological networks, among others.

We should also mention that bilateral meetings were held in parallel to the conference concerning various political dialogues between the Heads of State of countries such as Azerbaijan or Armenia, that were at war, or Kosovo and Serbia, presided by Macron, and the heads of state of North Macedonia and Bulgaria concerning territorial claims with the aim of lifting the Bulgarian veto on North Macedonia joining the EU.

### **Europe-Latin America Summit (33+17) (16th and 17th July)**

The Euro-Latin American Summit took place for the first time in 7 years in Brussels, applying the 23-year strategic association between Europe and Latin America. This meeting attempted to strengthen this strategic association using various mechanisms. We mention this association here because, in one way or another, it is also inspired by a latent confederal vision and a strictly intergovernmental rationale although supported by some common interests, shared values and a similar vision of the world, so much so that it also has confederal aspirations.

In turn, to the extent that the future aim is not only to form a relationship between the EU and the CELAC, but also between Latin America and the Caribbean and Europe, perhaps the EPC should thereby also consider this perspective where the confederal aspect is applicable as well. It is important that the Ministers of the Economy from 3 CELAC countries will attend some sessions at the ECOFIN meeting on 15th September, alongside their EU27 counterparts.

### **Progress in communitisation in the Security and Defence Policy and in the sanctions**

In the case of the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP), the reverse effect is happening. In other words, we are seeing a shift from intergovernmental to community. Until now, it has been run of the mill to say that the CFSP and the CSDP were clearly intergovernmental and so also had a certain confederal aspiration. However, over the last few months and as a particular consequence of the EU's response to the Russian war of aggression against Ukraine, a different effect is emerging.

Consequently, we would go so far as to say that there is a certain communitisation in some elements of Foreign Policy. In other words, decisions that required unanimity until now are being passed using various tools which do not. This is the case of Hungary's constructive abstention regarding the 11 sanction packages against Russia, particularly the latest ones. Thanks to this interpretation, the sanctions can go ahead.

This novelty is also illustrated by applying Article 179 of the TFEU, an article intended to promote industry. By interpreting it broadly, the European Commission has proposed the purchase of munition for several million euros. I would even say that these are decisions which seemed unfeasible until now as they could only be approved unanimously. By applying this article, munition and weapons can only be bought from European countries.

### **The Verhofstadt Report's federal proposal (22nd August)**

It is important to remember how the European Parliament requested the revision of the treaties in its decision on 4th May and 11th June through the request to the European Council concerning a Convention to revise the Treaties by applying article 48 of the CJEU. It is common knowledge that the European Council has not done this to date. However, a motion was proposed by the Parliament, led by Verhofstadt and another 4 leaders from the main political groups on 22nd August 2023, signed by the speakers from the Constitutional Com-

mission, which insists on the need to revise the Treaties and convene the Convention and it even explains which articles should be amended. Specifically, it suggests 267 amendments to the Maastricht Treaty and the TFEU.

This document clearly lays out the request from the EP Committee on Constitutional Affairs to the European Council for it to convene the European Convention and start the revision of the Treaties. It also highlights that this is more necessary than ever because various European States are in the process of joining the Union and consequently, this must be addressed before the enlargement process begins.

It comprises two main parts. Firstly, regarding the revision of the Treaties, the topics that it addresses aim to give more powers to the EP and regulate its right as a legislative initiative, among other improvements in the decision-making process. On the other hand, it establishes the enlargement of the EU's exclusive competences in many fields, and they develop the way of making decisions by moving beyond unanimity in fields such as Foreign Policy and Defence, single market, budget, education, migration and many others. The document specifies all this in an appendix, where it presents more details including the 267 amendments to the Maastricht Treaty and the TFEU.

### **Conclusion: Confederal progress compatible with federal deepening projects**

Throughout this article, I have wished to highlight how there has been clear confederal progress during 2022 and 2023, particularly through the mechanism of the Summits where the Heads of European governments were able to meet face to face to address their daily challenges and the short-term outlook. At the same time, we have given many examples on this such as the EPC and others such as the Reykjavik meeting of the Council of Europe.

At the same time, we wished to highlight how, on the one hand, a certain *de facto* federalisation is happening

in the European project, in some cases communitisation such as in the CFSP and, particularly, proposals from the EP Committee on Constitutional Affairs regarding the revision of the Treaties that are very ambitious and clearly fall within the rationale of federal deepening. In other words, confederal progress is compatible with federal deepening and even, I might dare to add, for these proposals to get a result, it is necessary for federalisation to move forwards in not only *de facto* but also *de jure* federation, meaning that the treaty revision must be addressed as soon as possible.

The CFEME recently published the minutes from the Hague Congress in 1948 as part of its 75th anniversary celebrations. Careful reading of the Hague debates shows us that there was a clear clash between federalists and confederalists or unionists, but they eventually found ways, particularly federal and confederal ways, to lay the foundations for the European project that was in its very early days at the time.

In other words, our experience this year shows we have returned to the confederal question without, of course, abandoning federal deepening in the long term. In previous years, there has clearly been a two-sided debate but experience from 2022 and 2023 demonstrates the compatibility of both questions and not only that, but the need to address it at the same time, although while the confederal part has moved forward, the federal progress is either *de facto* or merely proposals. The challenge for 2024 and the years to come is to be included in the pending reform of the Treaties.

As mentioned previously, *de facto* federalisation has increased considerably due to the new political cycle. Now, during 2024 and as a consequence of the Convention, there should be a political agreement to revise the Treaties where the treaty progress is not merely *de facto* but also *de jure* and this Treaty revision should be developed federally, following proposals mentioned by the Constitutional Committee on 22nd August that will become an agreement in the coming plenary, possibly in November, as it is backed by the 5 major pro-European political parties.

## Abbreviations

- CELAC: Community of Latin American and Caribbean States.
- CFEME: Spanish Federal Council of the European Movement.
- COFOE: Conference on the Future of Europe.
- EPC: European Political Community.
- ECOFIN: Economic and Financial Affairs Council.
- G20: Group of 20.
- CSDP: Common Security and Defence Polic.
- EP: European Parliament.
- CFSP: Common Foreign and Security Policy.
- TFEU: Treaty on the Functioning of the European Union.
- TEU: Treaty on European Union.
- EU: European Union.



## II. THE POLITICS



# Five years with the Pillar of Social Rights: Europe's social situation in times of crises

Björn Hacker

With low economic growth and high inflation rates, the social stability of the EU is once again at risk in 2023. While the labour market is still relatively robust, the threat of poverty or social exclusion remains high, with vulnerable groups at increased risk of exposure. During the pandemic, the European Pillar of Social Rights (EPSR) – proclaimed in 2017 – experienced its first major challenge. To what extent has the EPSR been able to contribute to supporting social progress in the EU in the five years of its existence? In this chapter, I will outline the current socio-economic, employment and social situation of the EU. I will then go on to describe the EPSR and its role in the pandemic, and I will analyse developments in social indicators over the last five years.

## **Economic stagflation in the EU**

While the growth rate of real gross domestic product (GDP) in the EU in 2022 was still quite positive at 3.5 per cent compared to the previous year, the economic situation has clouded over again in 2023: with annual growth predicted to be only 1.0 per cent (European Commission 2023a). After the end of most restrictions to contain the Covid-19 pandemic, a clear catch-up effect in private consumption was noticeable. However, this increasingly slowed down from autumn 2022 onwards due to several factors. These included supply bot-

tlenecks that could not be resolved in certain sectors until the Chinese government lifted its zero-Covid strategy at the turn of the year 2022–23. Another factor was the further increase in the inflation rate, which led to falling disposable household income and thus reduced purchasing power. Inflation in the EU peaked in October 2022 with 11.5 per cent year-on-year price increases and has since fallen to 6.4 per cent by June 2023.<sup>1</sup> However, there are major differences between the Member states in the EU. While price increases in the energy sector could be contained by political measures, core inflation has become entrenched. Although the European Central Bank (ECB) has been resisting price increases with interest rate hikes since July 2022, this restrictive monetary policy, with a key interest rate of 4.25 per cent in August 2023, has hindered business investments.

The burden of stagflation – a combination of low economic growth and inflation rates still well above the ECB's inflation target in 2023 – comes at an inopportune time, as it does not allow the EU any breathing space after the string of severe economic crises over the past 15 years. It also complicates the necessary adjustments to the changed geopolitical environment, namely the partial decoupling or redirection of international trade flows by reducing international dependencies, in the context of the Russian war of aggression against

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1 All data from Eurostat unless otherwise indicated.

Ukraine. In addition, the socio-economic situation hinders the rapid transformation of European economies in the course of digitalisation and the targeted greenhouse gas reduction of 55 per cent by 2030 compared to 1990 levels, and climate neutrality by 2050.

### **Stable labour markets**

In the first quarter of 2023, a total of 216.1 million people were in employment in the EU, 5 million more than before the pandemic in the fourth quarter of 2019. In 2022, the EU reached a peak employment rate of 75 per cent among all 20–64-year-olds, just three percentage points away from the 2030 target of 78 per cent set out in the EPSR Action Plan launched at the 2021 Social Summit in Porto. This figure is already exceeded by some member states, with the Netherlands (83 per cent), Sweden and Estonia (both 82 per cent) leading the way. The Member states with the lowest employment rates – Italy (65 per cent), Greece (66 per cent) and Romania (69 per cent) – have also recently shown steady improvements in the labour market.

This development shows the stability of the employment sector, which has come through the pandemic far better than in the case of the economic slumps before in the euro and the financial crises, and has also outperformed the US labour market. It has done so with the help of the temporary European short-time work instrument Support to mitigate Unemployment Risks in an Emergency (SURE) (European Commission 2023b). So far, employment in the EU has defied the slowdown in economic growth. This is also due to the increased demand for goods and services after the end of the lockdowns and mobility restrictions, which, however, led to an increasing shortage of skilled workers.

This is reflected in the unemployment figures, with unemployment as a share of the labour force standing at 5.9 per cent in the EU in May 2023. This is a decrease, albeit a small one, of 0.2 percentage points compared to the previous year's value. However, differences in unemployment rates in May 2023 between Member states remain high, ranging from 2.4 per cent in the Czech Republic and 2.7 per cent in Poland on the one hand, to 12.7 per cent in Spain and 10.8 per cent

in Greece on the other. The employment gap between the sexes has narrowed slightly across the EU from 0.7 to 0.5 percentage points over the year. The youth unemployment rate for 15–24-year-olds remained broadly unchanged at 13.9 per cent in the EU between May 2022 and May 2023. For the broader definition of unemployed 15–29-year-olds, 2022 marks the lowest level since the data series began in 2009, at 6.3 per cent. The rate of young people aged 15–29 neither in employment nor in education or training (NEET) in the EU also fell to 11.7 per cent in 2022, almost one percentage point lower than before the start of the pandemic in 2019. But, given the declining economic growth, the European Commission expects these positive trends to reverse in 2023, or at least to enter a stagnant phase (European Commission 2023c).

Due to demand and inflation, labour costs in the EU have increased by 5 per cent in 2022 compared to the previous year, most of which is due to nominal wage increases. However, since these could not compensate for the much higher inflation, real wage losses have resulted for employees. Only in Bulgaria and Hungary was it possible to fully compensate for the inflation levels in 2022 through very high wage increases; in all other Member states real wage losses were recorded, ranging from –1.1 per cent in France to –8.3 per cent in Estonia, with the EU at –4.3 per cent compared to the previous year. This development is relevant from a socio-political point of view because inflation has a particularly heavy impact on the lower wage segment, as it increases the cost of living and leads to a worsening of real income inequality (Müller et al. 2023).

### **Persisting social divergences**

The higher costs of living also increase the risk of poverty or social exclusion, especially for low- and middle-income households. However, the lagging indicator of the at-risk-of-poverty or social exclusion (AROPE) rate shows only a small increase of 0.5 percentage points from its low of 21.1 per cent of the population of all EU countries in 2019 to 21.6 per cent in 2020, 21.7 per cent in 2021 and again 21.6 per cent in 2022. These values point to a relative stability of the AROPE in the EU and can be explained by the far-reaching policy in-



terventions at national and European level to support demand and extend social benefits in the pandemic and the energy crisis. In absolute terms, 95.3 million people are affected in 2022, which remains a high figure and is far from the perspective of a reduction of 15 million from 2019 levels to 77.2 million in 2030, as agreed at the Porto 2021 Social Summit. The high differences between the EU member states remain persistent: while the Czech Republic (11.8 per cent), Slovenia (13.3 per cent) and Poland (15.9 per cent) have the lowest figures in 2022, the south-eastern European countries of Romania (34.4 per cent), Bulgaria (32.2 per cent) and Greece (26.2 per cent) are at the top.

Children in the EU are at greater risk of poverty or social exclusion, with a vulnerability rate of 24.7 per cent of all under-18s in 2022, up almost two percentage points from before the pandemic. The vulnerability rate of young people aged 15-29 was also significantly higher than the general population, at 24.9 per cent in 2022. This is also true for people with disabilities, whose AROPE rate was 28.8 per cent in the EU in 2022.

As expected, after the start of the Russian war of aggression on Ukraine, there was a significant increase in energy poverty among the EU population, as measured by the indicator of the percentage of the population that could not keep their homes sufficiently warm. After a low of 6.9 per cent in 2021, this rate was 9.3 per cent in 2022, with a much larger increase among those at risk of poverty or exclusion, from 16.4 per cent to 20.2 per cent in 2022. Differences between Member states are also high here: while among those already at risk of poverty or exclusion, more than half suffer from energy poverty in Cyprus, the figure is barely 4 per cent in Finland. Above-average increases of varying intensity occurred in 2022 for this population group in France (+8.8 percentage points), Portugal, Romania, the Netherlands, Slovakia, Latvia, Germany and Ireland (+4.1 percentage points). It remains to be seen whether this problem has further intensified in 2023 or could be limited by political measures to reduce energy costs.

In the Social Scoreboard, which accompanies the EPSR, most of the indicators classified as 'critical' in the Member states point to the decline in disposable household income, the increase in the risk of poverty and exclusion among children, the sluggish reduction

of poverty through social security systems, and a high rate of early school and training dropouts. This shows how the crises of the last few years have consolidated inequalities and pose challenges to welfare states.

## The EPSR: introducing a new tool in 2017

In 2016, the Commission presented a first draft of the EPSR before it was officially proclaimed by the three EU institutions – Parliament, Council and Commission – at a social summit in Gothenburg, Sweden, on 17 November 2017. The document comprises three chapters: 'Equal Opportunities and Labour Market Access', 'Fair Working Conditions' and 'Social Protection and Social Inclusion'. As it can be seen in **Table 1**, it sets out a total of 20 principles covering, among other things, social benefits, working conditions, educational opportunities, and inclusion policies. And it advocates or requires that adequate access, quality and/or coverage be provided.

Despite the legal rights the EPSR proposes in the 20 principles, the Pillar is not legally binding EU law. It summarises parts of the social acquis of the Union (for example, on gender equality and anti-discrimination), but goes far beyond this by addressing areas that are the responsibility of the Member states (for example, on education, wage, or pension policy). Despite the unchanged distribution of competences, the EPSR has succeeded in creating a new point of reference for the discursive debate on a Social Europe in the years since its proclamation. The Commission has played a significant role in this because it uses the Pillar in its regulatory initiatives as a reference in all conceivable social policy contexts. Parliament and the Council usually take up these references to the EPSR, so that its principles appear as a topic-specific context of justification in European legislation. This applies, for example, to secondary legislation projects such as the regulation on the establishment of a European Labour Authority, which the Council adopted in June 2019, the recommendation adopted by the Council in June 2021 to introduce a child guarantee to combat child poverty, or the directive on adequate minimum wages in the EU, which the Council adopted in October 2022.

The ESSR also plays a role in distributive EU social policy. Here it has found its way into the programming

**Table 1.** The European Pillar of Social Rights: Themes of the 20 Principles

Chapter 1 Equal opportunities and Labour market access	Chapter 2 Fair working conditions	Chapter 3 Social protection and social inclusion
1. Education, training and lifelong learning	5. Secure and adaptable employment	11. Care and support for children
2. Gender equality	6. Wages and salaries	12. Social protection
3. Equal opportunities	7. Information on employment conditions and protection against dismissal	13. Unemployment benefits
4. Active support for employment	8. Social dialogue and employee involvement	14. Minimum income
	9. Reconciliation of professional and private life	15. Retirement income and pensions
	10. Healthy, safe and suitable working environment and data protection	16. Health care
		17. Inclusion of people with disabilities
		18. Long-term care
		19. Housing and assistance for homeless people
		20. Access to essential services

Source: European Commission (2017): *European Pillar of Social Rights*. Available at: <https://data.europa.eu/doi/10.2792/506887>

and administration of the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+), the Cohesion Fund and the Just Transition Fund (JTF). For the funding period 2021 to 2027, ‘a more social and inclusive Europe through the implementation of the European Pillar of Social Rights’ was identified as the fourth of five policy objectives. Member states are required to follow this when preparing programmes; the EU provides detailed areas of intervention and criteria to be considered. These refer to EPSR intentions on active labour market policies, gender equality, education and training, social inclusion and poverty reduction, or health and long-term care, for example. Accordingly, the Member states’ partnership agreements concluded with the Commission refer to their contribution to the fulfilment of the social objectives, and progress in implementing the EPSR is to be evaluated in the 2025 mid-term review.

With the European Semester, a well-established process for soft policy governance already existed that could be extended in the coordination of social policies. In order to operationalise the EPSR in the annual policy coordination cycle, it was equipped with an accompanying Social Scoreboard in 2017. This establishes 17 headline indicators (originally 14), which are supplemented by further sub-indicators, and forms the refer-

ence framework for the Commission to measure social progress. The indicators in the Social Scoreboard are structured according to the three chapters of the EPSR. Following a revision in 2021, 18 of the 20 principles are now covered by indicators. While the Commission immediately incorporated references to the EPSR into the 2017/18 European Semester cycle, using it in all reports and recommendations for which it was responsible, the Member states reacted cautiously. In the National Reform Plans (NRP) they submitted to Brussels in spring 2018, 16 of them refrained from mentioning the new instrument at all, while only four governments dealt with individual principles and indicators in more detail and related them to social development in their own countries (Hacker 2019).

### Using the EPSR in the pandemic

The first challenge for the ESSR came with the start of the Covid-19 pandemic in 2020. To contain this, it was necessary to coordinate health care policies at the European level. Above all, however, the EU had to react to the economic consequences of lockdowns. Unthinkable in previous crises, the Council suspended the Stability and Growth Pact with the escape clause in March 2020 to allow Member states the necessary budgetary

leeway for countermeasures. The NextGenerationEU (NGEU) package clearly turned away from the course pursued during the euro crisis, which had focused on the responsibility of individual Member states and prioritised austerity measures. Instead, the EU took a completely new path. EU borrowing makes it possible to provide a total of 750 billion euros in financial transfers and loans. The majority of this will be allocated to Member states through the newly established European Recovery and Resilience Facility (RRF), also according to criteria of socio-economic impact. The key condition to receive money from the RRF is the approval of a Recovery and Resilience Plan (RRP), coordinated with the Commission, which foresees investments and reforms until 2026. While action is obligatory in the fields of climate change and digitalisation, the RRP should also include the areas of social cohesion, health, education, and social resilience. Thus, the EU combines cyclical support with structural objectives in the disbursement of the allocated funding. The European Semester was chosen as the coordination instrument for the exceptional financial assistance.

During the pandemic, the social consequences of the economic slump of 2020 quickly became apparent. With a total volume of 100 billion euros on a loan basis, SURE complements national short-time work measures. In addition, it became apparent which population groups were particularly vulnerable in the pandemic (European Commission 2020). These include children and adolescents due to daycare and school closures; single parents due to the need for home-schooling; women due to the disproportionate number of child-rearing and caregiving tasks assigned to them as well as their often high share of part-time employment; people with disabilities due to their often insufficient integration into the labour

market; people with a migration background and people with a low level of education due to often precarious employment situations, poor digital equipment or lack of skills; and the self-employed without sufficient protection through social insurance.

With the Social Summit in Porto on 7 and 8 May 2021, the EU intensified its efforts to consider the social dimension in the pandemic and at the same time directed its attention to the further social challenges of the ecological and digital twin transformation. The Commission uses the EPSR as an instrument for this and is giving its implementation high priority in a corresponding Action Plan (European Commission 2021). In Porto, the Member states agreed on quantitative targets for the year 2030, which the Commission had proposed for three social headline indicators in the areas of employment, training, and poverty reduction, as reflected in **Table 2**.

By strengthening the EPSR, the Commission is raising the social dimension of EU crisis policy to a higher level, as the quantitative targets now complement those already in place in the areas of climate action and digitalisation for Member states' RRP. In the Porto Declaration, the heads of state and government commit to the EPSR as a fundamental element of crisis policy: 'The European Pillar of Social Rights is a fundamental element of the recovery. Its implementation will strengthen the Union's drive towards a digital, green and fair transition and contribute to achieving upward social and economic convergence and addressing the demographic challenges' (European Council 2021). With this additional strengthening in the crisis, the EU has succeeded in prioritising social issues retrospectively (Andor 2022).

This is also evident regarding the RRF, through which the lion's share of the funding of the NGEU package

**Table 2.** EU social headline objectives for 2030

	2016	2021	Target 2030
Percentage employment rate (20-to-64-year-olds)	69.6	73.1	78.0
Participation in continuing education in the last 12 months in per cent (20-to-64-year-olds )	43.7	-	60.0
Number of people at risk of poverty or social exclusion in thousands (AROPE)	103,556	95,387	77,201

*Source:* European Commission (2023c); Eurostat; own calculations. The number of people experiencing poverty or social exclusion is expected to be reduced by at least 15 million until 2030 compared to 2019 levels.

is allocated. The focus was on investments by Member states for the ecological and digital twin transformation. Here, the EU has set quantitative minimum targets of 37 per cent for climate action and 20 per cent for digitalisation in terms of expenditure per recipient country. However, even in the social sector, which had to manage without a quantitative target, it is evident that on average 28 per cent of the allocated funds from the facility are spent on social issues in the broader sense in the 27 EU countries. This is quite a high figure, which must be ranked in relation to the expenditure projections of 40 per cent for climate protection and 26 per cent for digitalisation that have been achieved in total so far. The frontrunners are Hungary with 46 per cent and Portugal with 44 per cent of planned social spending, while Denmark (3 per cent) and the Netherlands (13 per cent) bring up the rear. The exact measures in the social sector per country are difficult to record, as not all reforms can be precisely allocated by the Commission, or the Member states have set their own priorities and allocations in their RRP below the categories specified by the regulation. In addition, there is the breadth of the issues covered by the ESSR, which take into account not only the classic social policies, but also related sectors such as education or public services. According to the Commission's calculations, almost half of the states spend more than a third of the funds they are entitled to from the ARF on social issues; only four states invest less than a fifth here. Following a regulation on reporting social expenditure, the Commission assigns this expenditure to four categories, which unfortunately do not correspond to the chapter structure of the ESSR. According to this, 20 per cent of social expenditure from the national ARPs in the sum of all 27 states is allocated to policies in the areas of employment and skills, 33 per cent each to education and childcare as well as healthcare and long-term care, and 14 per cent to other social measures (European Commission 2023d).

### Developments in the Social Scoreboard

Looking at the three chapters of the EPSR separately and at the development of the EU averages of the 15 comparable social indicators between 2017 and the

2021 data published in 2022, a relatively positive picture of social development can be drawn (Hacker 2023). The four mappable social indicators from the first chapter of the EPSR ('Equal opportunities and labour market access') all show slight improvements between 2017 and 2021 in the unweighted average of all 27 EU countries. The share of early school leavers decreased by one percentage point, the NEET rate decreased by 0.75 percentage points, and the gender-related employment gap decreased by half a percentage point. The income quintile ratio, which uses the S80/S20 ratio to measure inequality in income distribution, remained relatively stable on average. Similarly, the four indicators of the second chapter of the EPSR ('Fair working conditions') show positive changes in the unweighted average of EU countries between 2017 and 2021. After the pandemic, which occurred during this period and was accompanied by job losses, the EU states were able to recover and increase employment rates by 2.6 percentage points on average. Unemployment (down 1.2 points) and long-term unemployment (down 1 point) fell accordingly. Disposable household income increased significantly during the crisis, among other things due to financial support programmes for workers or certain occupational groups, making a jump of almost 9 units. The third chapter of the EPSR ('Social Protection and Social Inclusion') also shows positive changes in all seven social indicators on average across all 27 EU Member states. The rates of risk of poverty or social exclusion, especially those for children, were reduced: however, they remain on average at a relatively high level of over 20 per cent in 2021. Social transfers (other than pensions) reduce the risk of poverty by almost 37 per cent on average in the EU – an increase of 2.6 percentage points since 2017. The disability-specific employment gap is slightly declining but remains very high at 24 per cent on average. Housing-related expenditure of over 40 per cent of disposable income applies to over 7 per cent of the EU citizens on average in 2021; again, a decrease of almost 2 percentage points. There is an increase of 2.8 percentage points in the proportion of children under three in childcare, which now stands at 35 per cent. Only slightly more than 2 per cent of the EU population on average complains about a lack of medical care due to money constraints, waiting lists or geographical distance.

A look at the social situation in the individual Member states as measured by the Social Scoreboard shows for 2021 that 18 of 27 states in the EU score above average on more than half of the indicators (**Table 3**). Not particularly surprising is the very good position of the Scandinavian states, the Netherlands, Austria and Belgium, which usually occupy the top positions in

comparative welfare state research as far as the social benefits provided are concerned. It is also obvious that the last three countries that have joined the EU – Croatia, Bulgaria, and Romania – have relatively bad results, as do the southern European countries of Italy, Spain and Greece, which have been hit hard by the euro crisis and also by the pandemic. In contrast, according to the

**Table 3.** Social Scoreboard aggregated indicator's change 2017/2021

Country	Number of above-average social indicators 2017	Number of above-average social indicators 2021	Change between 2017 and 2021
Slovenia	13	14	+1
Finland	12	12	0
The Netherlands	13	12	-1
Denmark	14	12	-2
Sweden	14	12	-2
Czech Republic	12	12	0
Austria	13	11	-2
Ireland	9	10	+1
Hungary	7	10	+3
Belgium	11	10	-1
Slovakia	9	9	0
Luxembourg	13	9	-4
Poland	9	9	0
Estonia	9	9	0
Latvia	7	8	+1
Malta	11	8	-3
France	11	8	-3
Portugal	8	8	0
Germany	10	7	-3
Cyprus	9	7	-2
Lithuania	9	7	-2
Croatia	4	6	+2
Bulgaria	4	4	0
Spain	2	3	+1
Italy	3	3	0
Romania	3	3	0
Greece	2	2	0

Source: EU Social Scoreboard, own calculations.

Social Scoreboard, Cyprus and Portugal seem to have succeeded in catching up with the European average again after severe economic crises. The mediocre position of the developed welfare states of Luxembourg, France and Germany is astonishing, as is the surprising top position of Slovenia.

Compared to the 2017 social indicator scores, Luxembourg (-4), France, Germany and Malta (-3 each) have deteriorated relative to the EU average on a significant number of indicators. All four countries were still in the group of very high-performing Member states in 2017 but have fallen back to European mediocrity with the pandemic. In total, eleven countries had more indicators below the EU average in 2021 than in 2017. Only six countries improved compared to the EU average in some indicators; these are Hungary (+3), Croatia (+2) as well as Spain, Ireland, Latvia, and Slovenia (each +1). In ten states, the relative position in the comparison remained unchanged. The countries of southern and south-eastern Europe, which are far from the median, have not deteriorated since 2017 despite the pandemic.

Overall, the overview of the 15 comparable indicators of the Social Scoreboard shows that the social situation has steadily improved since 2017 on an unweighted average of the Member states – despite the severe economic crisis caused by the pandemic. However, in the five years since the EPSR was introduced and the Social Scoreboard has been used, the overall picture is one of a relatively stable tripartite social structure in the EU. The first group of ‘best performers’ are Austria, Denmark, Sweden, Finland, the Czech Republic, the Netherlands and Slovenia. These countries have above-average values in a variety of indicators; Slovenia alone has managed to show an additional indicator above the EU average since 2017. The group of ‘worst performers’ consists of Greece, Bulgaria, Croatia, Spain, Italy and Romania, which have below-average scores in a variety of social indicators. Only Spain and Croatia have managed to jump above the EU average in several indicators since 2017. The third group of ‘average performers’ is the largest, with 14 countries. They all cluster around half of the 15 indicators above or below the EU average. This group has seen the most movement since 2017,

with many countries worsening, i.e. having more social indicators below the EU mean than four years earlier.

## Conclusion

During the pandemic, European measures such as SURE, social investments within the framework of NGEU and the suspension of the Stability and Growth Pact succeeded in limiting social distortions. The Social Scoreboard accompanying the EPSR shows in the aggregated view since 2017 that the social situation in the EU is slowly but steadily improving. This is especially true for the labour market data. Measured against the crisis events of recent years, the labour market situation is quite good on average in the EU. The short-time working rules in the pandemic, which were promoted by the EU through the SURE instrument, certainly contributed to this. Nevertheless, since the introduction of the EPSR, only very few Member states have managed to achieve above-average social results. Moreover, some indicators are at levels that are clearly in need of improvement. These include equal opportunities and labour market access as well as social protection and social inclusion in connection with the first and third chapters of the EPSR. Education, training and further education opportunities for children and young people do not appear to be sufficiently developed or are insufficiently utilised. The disadvantage of young people is also reflected in their high risk of poverty or social exclusion. This also affects the whole population to a large extent. Social transfers do little to alleviate the situation on average in the EU; at the same time, income inequality is high and further aggravated by recent inflation. In 2023, the resilience of European labour markets has come under increasing pressure from deteriorating economic growth. The recent sharp rise in the cost of living is leading to a widening of poverty risks and entrenched inequalities. The EPSR has passed its first test while its importance has grown in the pandemic. To play a central role in current and future economic crises, to limit the emergence of social problems, the EPSR should be permanently accompanied by financially backed instruments.

## Recommendations

- Underline the importance of the confederal element in Europe, especially with the development of the European Political Community.
- This in turn is compatible with the deepening of the federal element that is taking place. The best expression of this is the proposal from the European Parliament's Committee on Constitutional Affairs regarding calling a Third European Convention and the reform of the treaties.
- Over the course of 2022 and 2023, both dimensions – the confederal and federal – are proving compatible.
- The debate between widening (enlargement) and deepening has re-emerged once again, for example in the address by the President of the Commission on 13 September. It must happen at the same time, or, if in doubt, deepening before widening. This is a matter for the Spanish Presidency.

## Abbreviations

- AA: Association Agreements.
- AROPE: At Risk Of Poverty and Exclusion.
- ECB: European Central Bank.
- ERDF: European Regional Development Fund.
- ESF+: European Social Fund Plus.
- FTJ: Just Transition Fund.
- RRM: Resilience and Recovery Mechanism.
- NEET: Young unemployed people not in education or training.
- NGUE: NextGenerationEU.
- PESD: European Pillar of Social Rights.
- GDP: gross domestic product.
- NRP: National Reform Plans.
- PRR: Resilience and Recovery Plan.
- SURE: European Temporary Support Instrument to Mitigate the Risks of Unemployment in an Emergency.
- EU: European Union.

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# Migration and asylum policies

Elena Muñoz

This legislative cycle began with by announcing a New European Pact on Migration and Asylum in November 2019, intended to drive legislative reform of the Common European Asylum System (CEAS) which began in 2016, and will probably end without a global agreement on all the instruments.

The reform is based on new screening prior to entry (identity, health and safety, a preliminary examination of vulnerabilities and registering biometric data on Eurodac) for nationals of third countries at external borders who do not meet the entry conditions, to subsequently channel people requesting international protection towards the border procedure or ordinary asylum procedure and persons without protection needs towards the return procedure, either because they have not requested international protection or because they have been denied it. All these procedures mainly fall to the first country of entry, as the criteria to determine the Member State responsible for studying each asylum request have not varied essentially. In cases of crisis or force majeure, the responsible Member State is allowed to ease their obligations and the remaining Member States can increase their solidarity contributions in terms of distribution of asylum seekers and returns of people who do not need international protection.

All this is combined with the external dimension of migration, which includes strengthened cooperation with third countries when managing migratory routes to enter the European Union, readmission agreements with said states and technical cooperation agreements with clauses that condition many aspects, from development aid to collaboration at border control.

To design these complex inner workings, in 2020 the Commission presented the Proposal for a Screening Regulation, the Proposal to amend the Eurodac Regulation (on the 2016 proposal), the Proposal to amend the Procedures Regulation (on the 2016 proposal), the Proposal to amend the Qualification Regulation (on the 2016 proposal), the Proposal to amend the Reception Conditions Directive (on the 2016 proposal), the Proposal for a Regulation on Asylum and Migration Management, the Proposal for the Crisis and Force Majeure Regulation

However, three years later, seven since legislative reform began on the Common European Asylum System, negotiations are progressing very slowly, and time is pressing as the current legislative cycle comes to an end.

Although 2021 only saw agreement from the co-legislators to approve the recast of the Blue Card Directive and the Regulation setting up the new EU Asylum Agency (EUAA), in 2022 there has been scarce progress, despite efforts from the various rotating Presidencies of the Council of the European Union to unblock negotiations.

The French Presidency (1<sup>st</sup> January to 30<sup>th</sup> June 2022) proposed a gradual focus to move forwards, firstly in the negotiations for Agreement proposals that would be less controversial among Member States (Council of the European Union 2022)

Spain, Cyprus, Italy, Greece and Malta, all countries on the European Union's southern border (Med 5), accepted this gradual focus, on the condition that the principles of equal distribution of responsibility and solidarity were respected. Consequently, between June and

September 2022, the Council adopted a negotiation mandate on the Screening Regulation and the Eurodac Regulation, which, nevertheless, considerably increases responsibility and pressure for the border countries (Council of the European Union 2022a). In parallel, in June 2022, twenty-one States agreed on a Declaration on Solidarity and a Voluntary Solidarity Mechanism, (Council of the European Union 2022b), to offer a specific response to the migratory difficulties of Mediterranean Member States of first entry by relocating asylum seekers and refugees or through financial contributions (European Commission 2022). Although in the actual Declaration, the signing States demonstrated their intention for this voluntary mechanism to act as model for the permanent solidarity mechanism introduced by the Regulation on Asylum and Migration Management, what actually happened is that the Commission released a disappointing report on this mechanism at the end of the year. In the first seven months, only around five hundred people had been relocated (El País, 2023).

Under the Czech Presidency (1<sup>st</sup> July to 31<sup>st</sup> December 2022), the package approach was retrieved, backed by the European Parliament, that advocated for a reform of the Common European Asylum System which covered all the legislative proposals on the table.

On 7<sup>th</sup> September 2022, the European Parliament and the five rotating Presidencies of the Council of the European Union, France, Czech Republic, Sweden, Spain and Belgium, committed to making every effort to finalise the CEAS reform in the current legislative period, setting the start of the negotiations for the co-legislators as the end of 2022 at the latest so that they might be finished in February 2024. This roadmap includes the Proposal for a Regulation on Asylum and Migration Management, the Proposal for the Crisis and Force Majeure Regulation, the Proposal for the Screening Regulation, the Proposal for the Qualification Regulation, the Proposal for the Procedures Regulation, the Proposal to amend the Reception Directive, the Proposal to recast the Return Directive, the Proposal to recast the Eurodac Regulation and the Proposal for a Regulation on an EU Resettlement Framework.

On the other hand, throughout 2022, two proposals were debated that, although not part of the Agreement's legislative package, affect elements of it, such

as extended use of the border procedure. These are the Proposal for a Regulation on Instrumentalisation of Migration and the amendment to the Schengen Borders Code. It is particularly concerning that both have the primordial goal of introducing the concept of "instrumentalisation" of migration, as a mechanism available to the Member States to repeal the asylum rules, under certain circumstances, such as coping with a large number of persons at the EU borders, as happened at the Belarus border in 2021 (ECRE 2022). This would mean that the actions of a third country government that, according to the Member State's evaluation, uses people in need of international protection to destabilise the EU, would have repercussions on the rights of these same people, lowering the asylum standards in terms of reception, procedure and detention. Civil society and specialist NGOs qualify this proposal as out of proportion, counter-productive, unfair and unnecessary. A system of exceptions, permanently available to the Member States, undermines the actual concept of the Common Asylum System, already barely harmonised and where there are sufficient flexibility mechanisms to address changing events at its borders (ECRE 2022a).

During the Justice and Home Affairs Council on 8<sup>th</sup> December 2022 (Council of the European Union 2022c), a minority of Member States blocked the adoption of a common position on the Proposal for a Regulation on Instrumentalisation of Migration, although some of its provisions may be discussed in the Crisis Regulation.

In compliance with the roadmap devised in December 2022, it was finally possible to unfreeze the negotiations by opening a three-way discussion (trialogue) on the Eurodac Regulation. In addition, the co-legislators countersigned provisional agreements reached in 2018 on the Proposal to amend the recast Directive on Reception, the Proposal for Regulation on an EU Resettlement Framework and the Proposal for the Qualification Regulation. However, final adoption of these instruments will depend on progress in negotiations on other dossiers, from that package approach.

The aim of the recast Reception Directive continues to determine equivalent conditions in all Member States with the intention of avoiding secondary movements of people requesting international protection. The agreement reached (European Parliament 2022) improves ac-

cess to employment (six months after application, instead of the current nine) and training and protection of unaccompanied minors. However, the chosen Directive formula has proven ineffective for this harmonisation, giving the Member States a wide margin to design and manage these integration and reception processes. Consequently, in January 2023, the Commission began infringement procedures against Spain, Belgium, Greece and Portugal for not transposing the current Reception Directive.

Regarding the first Regulation for an EU Resettlement Framework (European Parliament 2022a), this is the only EU standard that opens a legal, safe line for refugees requiring protection in Europe. Although the EU's role is strengthened to determine priority regions or countries and two-year planning, the resettlement framework is based on the willingness of the Member States and there will be no mandatory quotas.

During the Czech Presidency, the Commission presented Action Plans for two of the main routes used by migrants to enter the European Union, with a series of operating measures to address immediate and current challenges whilst reaching an agreement on all the CEAS files, that might offer more structural solutions. Both plans are focused on the external dimension of migration, outsourcing migration screening to third countries and easing return of migrants. In the Justice and Home Affairs Council of December 2022, the Commission was invited to present Action Plans for the other routes to tackle this external dimension globally. (Council of the European Union 2022c)

The Action Plan on the Central Mediterranean (European Commission 2022a), presented on 25 November 2022, proposes twenty measures, revolving around 3 pillars, intended to reduce irregular and unsafe immigration, offer solutions to new challenges involving search and rescue at sea and strengthen solidarity, balanced with responsibility among Member States. However, it does not prevent the deficiencies detected in the past in terms of setting up safe and predictable landing mechanisms, stable relocations or cooperation with Libya, whose history of human rights infringements among migrants has been widely reported (UN Support Mission to Libya 2018).

The Action Plan for the Western Balkans (European Commission 2022b), presented on 6th December, focuses

on strengthening cooperation when managing migration and border controls with the Balkan States, on their path to joining the European Union. This refers to twenty measures grouped into five axes: strengthening border controls on the Balkan route, strengthening the asylum systems for the Balkan States, the fight against people trafficking, readmission and return agreements, and a visa policy in line with the European Union.

The negotiations to reform the CEAS continued their path under the Swedish Presidency (1<sup>st</sup> January to 30<sup>th</sup> June 2023), although with an excessive emphasis on increasing returns and pressuring third countries to cooperate in readmission of their nationals, using restrictions in the visa policy and conditionality in commercial agreements.

On 24<sup>th</sup> January 2023, the European Commission presented a new operating strategy for more effective returns (European Commission 2023), showing how the main operative goals were optimising the return processes in each Member State, always complying with fundamental rights; increasing voluntary returns and reintegration; maintaining a collaborative focus between Member States, Frontex and the Commission, taking into account the third countries; and improving data collection and statistics to build a more efficient return policy. Only a few days later, the Member States discussed this proposal in the Justice and Home Affairs Council (JHA), focusing on cooperation with third countries (Swedish Presidency of the Council of the European Union 2023). On 16th March 2023, the Commission published its Recommendation (EU) 2023/682 on mutual recognition of return decisions and expediting returns that aims to support a "faster, seamless migration process" with ties between asylum and return.

In turn, in April 2023, the European Parliament set its negotiation position, always taking the package approach, on the Proposal for the Asylum and Migration Management Regulation, the Proposal on the Procedures Regulation, the Proposal on the Screening Regulation and the Proposal for the Crisis and Force Majeure Regulation.

In general, it maintains the Commission's proposal with limited improvements regarding protection of human rights for people requiring international protection. It thereby reinforces the independent border su-

pervision mechanisms and states that it is no longer obligatory to apply the legal non-entry pretence, which considers that people subject to screening are not yet on European soil, seriously endangering the non-refoulement principle and respect for the European Human Rights Convention and the jurisprudence of the European Court of Human Rights which the States work from in terms of jurisdiction matters. It also eliminates the application of the control procedure for people who are living illegally in the territory, the concept of force majeure and clarifies the concept of crisis with clear indicators to determine when a Member State can break away from their obligations regarding procedure deadlines. Another positive aspect of the Parliament's negotiation position is maintaining the Temporary Protection Directive that has proved to be so useful to respond to a situation such as forced displacement from Ukraine. Regarding the balance between solidarity and responsibility, it eliminates return sponsorship as a way of contributing to the solidarity mechanisms and establishes mandatory relocation as the sole solidarity contribution possible to alleviate pressure on a Member State that is in crisis.

In the meantime, within the Council, the Member States have focused on attempting to find common ground on the Regulation of Asylum and Migration Management with a view to the Justice and Home Affairs Council in June 2023. However, new division vectors have appeared between the Member States. In addition to the classic negotiation between responsibility and solidarity, which caused the reform to run aground in 2019, there is now wide application of border procedures in exchange for the chance to repeal the asylum *acquis* in certain circumstances. The concept of adequate capacity has therefore been introduced, to determine how many cases will be processed by border procedure and, once this threshold has been reached, there will be a chance to break away from the asylum rules. This represents a total change of perspective regarding the Commission's stance, where the criteria to apply the procedure on the border were linked to nationalities with low recognition rates in the European Union as a whole. Regarding the possibility of repealing the asylum *acquis*, the Member States intend to recover this idea of the currently failed Proposal for a Regulation

on Instrumentalisation, although linking it to this new concept of adequate capacity.

According to the Swedish Presidency (Council of the European Union, 2023), there is broad support among the Member States to apply this concept of adequate capacity and the formula for calculating it, considering illegal entries and rejections at borders over the last three years. There is also an agreement to broaden the application of the border procedure and, therefore, detention in the border dependencies, for minors under 12 years old accompanied by adults and even unaccompanied minors who are considered a risk for the State's security or public order.

In this respect, the Spanish Presidency, which began on 1<sup>st</sup> July 2023, is crucial to move forward in the negotiations along five main lines: i. The principle of solidarity and shared responsibility among the Member States; ii. Full procedural guarantees and an individualised treatment of requests for asylum, regarding the non-refoulement principle; iii. A structural response to the crisis situations, based on access to the protection and on the guarantee of rights, among others, maintaining the Temporary Protection Directive; iv. A protection framework for the rights of persons on the borders; v. Legal and safe ways to access international protection.

All that comes at a stage in the negotiations which, at the close of writing this report, was as follows:

- **Proposal to amend the Eurodac Regulation.** On 22<sup>nd</sup> June 2022, the Council approved its negotiation mandate. By adopting the text proposed by the speaker Jorge Buxadé (ECR) in the Commission of Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, the *trialogues* began on 13<sup>th</sup> December 2022. It is worrying that the co-legislators have extended the scope of the Eurodac database to control migratory flows in the EU, including use of new biometric data such as facial recognition and its application on children from the age of six upwards, without sufficient safeguards and putting the minor's greater interests at risk by processing this data.
- **Proposal for a Regulation on Screening third country nationals at the external borders.** On 22<sup>nd</sup> June 2022, the Council approved its negotiation mandate, while the European Parliament adopted its position on 20<sup>th</sup> April 2023, by starting the *trialogues*

on that date. The most concerning questions include introduction of the “no-entry” legal pretence in article 4(1), the risk of deficient reception conditions and excessive use of detention, plus the delay in access to the international protection procedure and all its guarantees. On the other hand, the Regulation determines the creation of independent national mechanisms making sure that fundamental rights are respected at external borders, and that the guarantees and field of application of these rights have been strengthened by the position of the European Parliament.

- **Proposal for Regulation on Asylum and Migration Management:** This Regulation incorporates the Dublin III rules to determine the responsibility of studying asylum requests, maintaining the country of first entry’s criteria. It also determines a solidarity mechanism which is only mandatory in the event of migratory pressure and for arrivals after search and rescue operations. The latest Council presidencies are making an effort to move forward separately in the solidarity mechanism, with the pretension of consolidating a relocation quota minimum as the main contribution (Nielsen 2022), but also by means of return sponsorship and/or development of capacities in the external dimension. In this respect, the European Parliament’s negotiation mandate, approved on 20<sup>th</sup> April 2023, eliminates the concept of “return sponsorship” and prioritises relocation as the way of contributing to solidarity. Furthermore, it gives more weighting to other criteria to determine responsibility, making the first country of entry’s responsibility residual. The aim is to determine a Council position for summer 2023, and the European Parliament has announced that if it has not made enough progress on this Regulation by then, this might block the rest of the negotiations.
- **Proposal for Regulation on the Crisis and Force Majeure situations.** This Regulation devises a system for situations of migratory pressure or force majeure, making it possible for a Member State declared to be in a “crisis situation”, in determined circumstances, to set aside the regular asylum acquis, which might lead to extended border procedures, but also activate mandatory solidarity

contributions faster. It is worrying that its aim is to repeal the Temporary Protection Directive by creating the “immediate protection” status which has fewer guarantees. In this respect, the European Parliament’s position is very positive, as approved on 20<sup>th</sup> April 2023, which defended and protected Temporary Protection, eliminated the concept of “force majeure” and has managed to secure that in crisis situations, the only possible and mandatory solidarity contribution is relocation. However, there is a worrying risk of extensive application of exceptions to the procedural guarantees and suspension of the right to asylum proposed by some Member States within the Council, although its negotiation mandate has still not been reached.

- **Proposal to amend the Regulation establishing Common Procedure for international protection.** The European Parliament stated its position on 20<sup>th</sup> April 2023, while the Council only achieved a partial agreement in December 2022. This proposal came about due to the introduction of a new accelerated border procedure for asylum and return, and its link to Screening and the recast Return Directive. The key to the disagreements is the compulsory nature of the border procedure. There is also particular concern regarding the automatic suspension effect of the resources and the channelling of the asylum applications towards the border procedure depending on nationality, risking the respect for the principle of non-refoulement and individualised processing of asylum requests.
  - **Recast of the Return Directive.** The Council reached a partial agreement in June 2019, although the European Parliament still does not have negotiation positioning and in 2020, a new speaker, Tineke Strik was appointed (ALE). The most controversial aspects are the border return procedures, the definition of a flight risk, detention times and the increase in obligations for people subject to return procedures.
- The current situation demonstrates that difficulties remain to reach a consensus between the countries that lie on the EU external border, who require a fair balance between solidarity and shared responsibility, and the fight by the remaining Member States to strengthen migratory controls and transfer international protection

procedures to the external borders of the EU. Far from these disagreements, there seems to be the need to harmonise and properly implement the heritage of the CEAS, and even further still, that of building a protection framework in accordance with maximum respect for the right to asylum and human rights.

In this respect, the European Union's response to the forced displacement following the invasion of Ukraine has made it possible to manage the pressure on the European reception systems, demonstrating that effective resolution of the crisis involves guaranteeing rights and access to protection.

Activation of the Temporary Protection Directive for the first time in history is doubtlessly one of the milestones in this legislative cycle. Barely a few days after the Russian invasion of Ukraine on 24<sup>th</sup> February 2022, in the Extraordinary Justice and Home Affairs Council, the Member States demonstrated their support for activating the Temporary Protection Directive. Following the procedure from this Directive, on 2<sup>nd</sup> March the Commission proposed to activate it and the Council of the European Union agreed to this in its meeting on 3<sup>rd</sup> March, publishing the Implementing Decision (EU) 2022/382 next day for which a massive affluence of displaced persons from Ukraine was observed.

This made it possible to streamline awarding protection without putting a strain on the Member State's asylum systems with four million people, at the time of writing this report. Four million people obtained legal status, social care, healthcare, education, reception and all from successful community management, without the usual clashes and paralysis described above. Now, before the end of this legislation, it is urgent to extend this temporary protection as far as 2025 and prepare the medium-term response for these four million people, be it voluntary return in safe conditions if circumstances allow it or integration in reception Member States, facilitating access to residence permits once the maximum deadline of the Temporary Protection has expired.

To do this, it will be fundamental to negotiate the Proposal to Recast the Long-Term Resident Directive, that can count all the periods of legal residence, including any concerning temporary protection residence. In April 2023, the European Parliament agreed its negotiation mandate, where it proposed that the legal

residence time to access the Long-Term status would be three years, instead of five, which would facilitate access to this residence for people with temporary protection when it expires in 2025 (European Parliament 2023).

Political willingness to react to the conflict in Ukraine must not be exceptional, but should be taken as a reference, to respond to others conflicts or similar situations such as the earthquake in Syria and Turkey, and so that the Agreement's instruments lay the foundations for a truly common migratory and asylum policy, which makes guarantees and is capable of constructing a structural response to the European Union's current and future challenges.

## Recommendations

- In order to advance in the construction of a Common European Asylum System with a rights-based approach that prioritises the protection of people and the safeguarding of their rights, as well as solidarity and shared responsibility among the Member States, we at CEAR propose to:
- Guarantee a truly equitable distribution of shared responsibilities in asylum matters among the Member States; move beyond the country of first entry criterion through a new hierarchy of criteria to determine responsibility, one which gives greater importance to family ties in a broad sense and considers situations of serious illness and/or disability or other situations of vulnerability of asylum seekers.
- Promote the approval of a mandatory and permanent solidarity mechanism based on minimum mandatory relocation quotas as the only possible solidarity contribution; reject the alternative of return sponsorship or capacity support in the external dimension, bringing protection of people to the forefront.
- Protect rescue and rescue at sea against the criminalisation of humanitarian work, and adopt an agreement on a safe and predictable European disembarkation mechanism, with subsequent mandatory relocation.
- Oppose the compulsory nature of accelerated border procedures and reject the legal fiction of non-entry,



as they delay access to the international protection procedure and due process guarantees, as well as jeopardising respect for the principle of non-refoulement; reject the automatic issuance of a return decision together with the rejection of the asylum application and guarantee the automatic suspensive effect of appeals in all cases.

- Ensure an individualised and guaranteed treatment of asylum applications, as well as free legal assistance at all stages of administrative and judicial proceedings without exception; implement a mechanism for early identification and referral of people in vulnerable situations to reinforce the guarantees of protection for victims of trafficking, people with specific needs or children without family references.
- Reject broad derogations from the EU asylum acquis and eliminate the extension of the registration deadline for asylum applications and the mandatory asylum procedure at the border in crisis situations; ensure that the basis of the response to crisis situations is access to the international protection procedure with full guarantees and mandatory and shared solidarity.
- Defend the Temporary Protection Directive against the risk of its repeal and replacement by the “immediate protection” of the regulation on crisis situations, which is less protective, and promote its application to respond to situations similar to the one that occurred as a result of the invasion of Ukraine.
- Ensure that biometric data collection is never coercive and that it includes a child, protection and human rights perspective, and promote family reunification when the best interests of the child so determine.
- Promote and strengthen independent national mechanisms for monitoring respect for fundamental rights in all surveillance and control activities at external borders. These mechanisms should be equipped with guarantees to ensure their independence, involving national human rights institutions, the European Fundamental Rights Agency (FRA) and civil society organisations in their operation; and have a mandate to investigate any violation of fundamental rights at borders, as well as the capacity to impose sanctions.
- Promote the adoption of an ambitious resettlement mechanism with mandatory quotas for all Member

States; assume a greater commitment in relation to the adoption of legal and safe channels: promote the possibility of applying for asylum in embassies and consulates abroad, the issuance of humanitarian visas, make the requirements for family reunification more flexible, as well as facilitate access to labour or training mobility programmes in the European Union.

- Reject the concept of “instrumentalisation” and the standardisation of exceptions to asylum rules, provided for in the Instrumentalisation Regulation and in the amendment of the Schengen Borders Code; and instead, promote greater harmonisation of the rules of the Common European Asylum System.

## Abbreviations

- ALE: parliamentary group of the European Green Alliance.
- ECR: European Conservatives and Reformists Parliamentary Group.
- ECRE: European Council on Refugees and Exiles.
- EUAA: European Union Asylum Agency.
- FRA: European Union Agency for Fundamental Rights.
- FRONTEX: European Agency for Border and Coast Guard.
- LIBE: Parliamentary Committee on Civil Liberties, Justice and Home Affairs.
- NGO: Non-Governmental Organisation.
- EU: European Union.

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# The member states have to make some far-reaching decisions: What can a common European industrial strategy look like in the climate-neutral age? What principles should guide their external energy and trade policy?

Claudia Detsch

In the first half of 2022, many people – including Vladimir Putin – would not have bet on the EU member states staying together. The Russian government was clearly betting on driving a wedge between the Member States by cutting energy supplies and raising prices in the wake of the Russian invasion of Ukraine. But well-meaning people had their doubts too. However, the EU has stuck together. A number of initiatives have been set in motion that seemed difficult to implement only a short time ago, such as the joint purchase of gas.

So is everything fine, then? Unfortunately, that is not the case either. Centrifugal forces are becoming much more apparent. The disputes and tactical manoeuvring around the vote on the nature restoration law in the EU Parliament in the summer of 2023 provide a foretaste of this. We are probably only at the beginning of this debate. Tensions will increase. On the one hand, there seems to be no end to reports of record temperatures, storms and forest fires. Climate policy has been neglected for far too long with the result that massive

progress in phasing out fossil fuels and building up an energy supply and industrial production based on renewables would have to be achieved in a few years to even remain within reach of the 1.5-degree target. Even a limitation to 2 degrees is not achievable if we continue along the current path. All this means that it is time to get down to business. The envisaged reforms affect the houses and apartments, workplaces, holidays and transport of the citizens of the EU. Even if there is a widespread understanding that drastic reforms are required to contain climate change, fears arise as soon as 'people's own homes, work, everyday lives, and wallets are affected. The population is exhausted by the crises of the past years, unsettled by the loss of familiar certainties. The prospect of a massive restructuring of the economy and society does not contribute to a sense of calm and confidence.

There is also a psychological challenge for political leaders. Europeans need a new narrative, a new vision of the future while remaining honest and resisting the temptation to mask challenges and obstacles with flowery promises. That would only strengthen the disenchantment with democracy and ultimately damage the climate policy reforms. But what promises should be made to the population? The absence of the climate apocalypse is too little here. You don't lure people out from behind the gas-fired stove by drawing horror scenarios and then promising that with great efforts things won't be quite so dramatic. People need to have hope for something better.

## **Planning is good, executing is better**

The challenges are also enormous at the operational level. Even the immensely accelerated construction of wind turbines and solar modules is anything but a trivial matter. And yet it seems relatively simple compared to the remaining infrastructural expansion. In the past, the expansion of electricity grids and pipeline network was massively neglected, both at the national level in most member states as well as within Europe and with the neighbouring regions. Now we are paying the price for these shortcomings. They not only make it more difficult to secure supply in times of shortage - as for instance

after 'Russia's invasion of Ukraine - but also make stable supply in times of surplus more challenging. In May 2023, for example, more electricity was generated in the EU via solar plants than via coal-fired power plants for the first time. Even in coal heavy countries such as Germany and Poland, coal-fired electricity generation fell to an all-time low. Investment in solar installations increased by 10% last year. That is good news for the climate.

At the same time, however, it is also becoming evident that Europe urgently needs to step up the expansion of its electricity network as well as its storage capacities, and to become more flexible. Otherwise, there is a risk of network overloads and price fluctuations that could hinder the further expansion of renewables. If renewable energies are further expanded, this will lead in the future to electricity demand being completely covered by wind and solar energy in certain phases. According to the merit order principle that applies on the electricity market, this would lead to a sharp drop in electricity prices during these periods. Resulting strong price fluctuations would make investments in renewable energies uncertain and correspondingly expensive. In addition to a better developed power grid, energy storage facilities are therefore needed. Without them, the ecological transformation of the energy sector is not feasible. Stationary storage systems play a central role in a decentralised system based on renewables. However, grids and storage capacities have so far not kept pace with the expansion of renewables.

Accordingly, both at the European level and in numerous member states, approval procedures have recently been simplified and speeded up, and rights of objection have been limited to a more practicable level. While this is urgently needed, it is not sufficient. Additionally, the declarations of intent to reduce bureaucracy must now urgently be followed by corresponding practical steps.

## **A clear path instead of a labyrinth**

The growing pressure to act has initiated and accelerated far-reaching reform projects in recent months. Further funds to support ecologically motivated expansion

sion and conversion measures have been launched. As a result, however, there is now a cacophony of funding programmes as well as legislative projects at both the European level and in the Member States. Not all of these are well coordinated and some are in conflict with others. Given the magnitude of the task, this development is not surprising. Nevertheless, it is dangerous in two ways. Firstly, the sometimes erratic actions could hamper the success of the energy transition. And secondly, the hasty introduction and subsequent changes of far-reaching reforms, profoundly impacting everyday life, are leading to growing uncertainty and political frustration among the population. Cutting this Gordian knot will not be easy. There is a lot of political work in progress and the years of inactivity have massively increased the pressure on the current reform agenda. This poses an epoch-making challenge for political leaders.

The deep interconnection of policy reforms increases the scale of the challenge. It is not just a question of making a few adjustments here and there. Energy and climate policy are intimately linked to European industrial and economic policy, indeed to the future of European business per se. This link between energy, climate, industry and the economy may still be the most visible. However, security policy, trade policy, development policy and fiscal and tax policy cannot be separated from energy and climate policy either. Europe needs a new and comprehensive approach to mainstreaming climate transformation. The individual policy fields must be more deeply embedded in a common leitmotif that prioritizes climate-neutrality, innovation and competitiveness, and delivers greater participation by the workforce and the general public. As is often the case, this applies both at the level of the Member States as well as at the European level.

## Progress at Fit for 55

What is the state of the EU in terms of energy and climate policy in the second year after Russia's invasion of Ukraine? On the one hand, central points of the Fit for 55 programme have been specified and found expression in ambitious legislative projects. In addition, further reform projects such as the Net Zero Industry

Act and the Critical Raw Materials Act were formulated in a short time. While these may so far resemble ambitious drafts rather than concrete and financially secured projects, their significance as symbols for structural and pan-European policy should not be underestimated. They underline the need for a joint response to current challenges, which must be based on a close interaction between the state and the economy.

In 2023, the climate policy targets were also further refined. This includes an increased target for energy efficiency: By 2030, the EU must reduce its energy consumption by at least 11.7%. Additionally, more ambitious goals were set for the share of renewable energies in total energy consumption, with a target of 42.5% by 2030 and an additional 2.5% as a benchmark. For buildings, the minimum share of renewable energies was established at a minimum of 49% by 2030. A gradual increase of renewables in the generation of heating and cooling is also envisaged, with a binding increase of 0.8 % per year at national level until 2026 and of 1.1 % from 2026 until 2030.

The binding target for the use of green hydrogen in industry and transport is to be 42.5 % in 2030, rising to 60 % by 2035. Setting these targets is important as it provides perspective and clear policy direction. At the same time, however, the rollout of the necessary infrastructure must keep pace. At the moment, this is a bottleneck in the climate policy in Europe. One example is the production and supply of hydrogen. The corresponding market is only just being established. Networking within the EU and in neighbouring regions is still in its infancy. An additional Achilles' heel, as already described, is the sluggish expansion of the grid, which is also not in line with the ambitious transformation goals.

Reform of the European Emissions Trading Scheme (ETS) was also agreed upon. This involves reforming the existing scheme, establishing a separate emissions trading scheme for transport and buildings, creating a Climate Social Fund of over 80 billion euros, introducing the Carbon Border Adjustment Mechanism (CBAM) and rules for emissions trading in aviation and shipping. Belgium and Bulgaria abstained, while Hungary and Poland voted against the reform. The creation of an ETS2 for heat and transport was particularly controversial. As a compromise, the 80-billion-euro Climate Social Fund

will come into force as early as 2026. Critics fear, however, that this sum will not be sufficient. According to the agreement, all the revenue of EU Member States from emissions trading will flow into climate and energy-related projects and social mitigation of the energy and heat transition. The new Climate Social Fund is intended to support vulnerable citizens and small businesses with investments to increase energy efficiency.

## **Nuclear policy as a bone of contention**

Despite the agreement on more ambitious climate targets, the outlook is by no means all rosy. While 2022 was still largely driven by the desire to send a strong signal of European unity, 2023 increasingly reveals antagonisms between Member States. Nuclear energy is a constant point of conflict, with the issue being hotly contested at the European level and debates repeatedly slowing down legislation regarding important energy policy reforms. The demand for the promotion of nuclear energy is also back on the table. In 2023, a nuclear alliance initiated by France was formed in Europe. Members are Bulgaria, Croatia, the Czech Republic, Finland, France, Hungary, the Netherlands, Poland, Romania, Slovakia and Slovenia. Italy, after initial interest, has temporarily withdrawn, and Sweden initially took a low-profile position because of its presidency of the Council. The above-mentioned states have set themselves the goal of closer cooperation in the nuclear supply chain, but are also lobbying hard to open up European funding pots for nuclear energy.

The fact that France is acting so resolutely on this issue, of all things, reveals the weakness of the French nuclear industry. With an ageing nuclear fleet and shut-downs during periods of drought, France has run into rough waters and is looking for financial support.

Contrary to what is often rumoured, these debates at the EU level are not about dictating the energy mix of the Member States. Those who want to continue relying on nuclear energy can do so. Moreover, many of the currently loudly announced projects will not be realised anyway. In practice, the nuclear revival looks rather meagre - considerable delays during the construction phase and massive cost increases were the rule rather than the exception for the reactors that were connected to

the network in Europe in recent years. What is crucial is the question of financing. Member States are bound by the EU's jointly agreed climate targets. Nuclear energy does indeed have a lower CO<sub>2</sub> footprint than fossil fuels such as coal, oil or gas. Unfortunately, low-CO<sub>2</sub> power plants that will be connected to the grid in 20 years are of little use in the challenging next ten to 15 years. Consequently, such projects cannot be financed through the relevant European pots that have been set up for the energy transition. These funds are needed for the expansion of renewables and the development of complementary technologies such as storage and smart grids. These enable the energy transition now and not at some time in the distant future. The existing EU funds are nowhere near sufficient to make bets on the future. However, debates on this issue are likely to increase in the future.

The feared revival of coal, on the other hand, has largely failed to materialise in Europe. It is true that more and more coal-fired power plants had to be put back into commission and governments of some Member States are seeking to postpone the date for the final coal phase-out. But this question is by no means only politically influenced, as a rising CO<sub>2</sub> price and the competitive advantages of renewables will make adherence to the latest possible phase-out date obsolete.

However, a look at the rest of the world is worrying in terms of investments in fossil energies, and the Europeans are also playing an inglorious role here. In an effort to find a quick replacement for Russian energy supplies, agreements have been made with alternative states for the supply of oil and gas and investment commitments have even been made for the development of new production sites, for example in Africa or Latin America. Fossil fuel corporations are experiencing a bonanza that seemed unthinkable only a short time ago.

## **Quo vadis, European industry?**

The spectre of de-industrialisation is haunting Europe. Trade unions and industry associations fear a loss of competitiveness and the jobs associated with domestic production. But in retrospect, 2023 may prove to have been the very moment when European industrial policy



reached new heights. Structural and industrial policy in Europe is now experiencing a revival due to the fear of possible relocations of existing companies and entire industries and, even more important, the fear of not getting a slice of the beautiful green cake of clean technology industries.

The upheaval has already begun with Russia's invasion of Ukraine and the subsequent energy and price crisis. And the pace is being accelerated further by looking to the competitors. The economic heavyweights have set the pace. China has announced investments in clean technologies amounting to more than USD 280 billion. The US is mobilising more than USD 360 billion for similar projects through the Inflation Reduction Act (IRA), and as these are largely tax credits, the actual amount could be even higher. And Japan, India, the UK, Canada and South Korea have also announced similar programmes.

A European response was accordingly eagerly awaited. The EU Commission's Green Deal Industrial Plan, presented in spring 2023, includes a number of proposals concerning state aid, faster approvals, trade agreements and the promotion of the skills needed for the transition. Many of these instruments are already well-known, the eternally contentious question of financing could not be solved and some important aspects definitely require more attention. But overall, the direction is right.

The message is overdue and it fits the times: industrial and structural policy are experiencing a comeback in Europe. The financial, Euro- and Covid-19 crises have already changed the perception of the role of the state. The market does not settle everything, especially not in times of crisis. What matters, however, is the interplay between the state and the private sector. The stakes are high: jobs as well as Europe's sovereignty are at stake.

A simple copy and paste of the USA's IRA, for example, can obviously not be the solution. Europeans must find their own answers. Support is needed for the introduction of new technologies, for research and development and for ramping up production. Unlike in the past, the entire supply chain must be considered. It is clear that the supply chains should be shifted back to Europe and neighbouring regions in order to reduce dependency on difficult suppliers. Europe is still well positioned for groundbreaking innovations. But there is a need for clearer, more harmonized rules based on common ob-

jectives, and more cross-border industrial alliances. From the EU Innovation Fund to the European Battery Alliance, there are successful models to build on.

Some things can be learned from the IRA. Representatives of the business community like to point out that everything happens faster in the USA and that the opportunities are more in focus rather than the problems. The EU, on the other hand, is continually shifting its focus, which costs valuable time. This can be observed, for example, in the hydrogen ramp-up. While the Europeans are still engaged in doctrinal debates, the formerly unenthusiastic Americans are now making rapid progress. And the plethora of regulations and proposals, along with the multi-layered areas of responsibility, means that the business community does not have clarity, leading to a lack of certainty which is toxic for investments that are supposed to pay off over ten or fifteen years.

To show that it has learned the lesson, the EU Commission presented the Net Zero Industry Act as the first part of its Green Deal Industrial Plan in April. This is intended to drive European production of green technologies. The act focuses on key technologies, and specifically mentions batteries, wind turbines, heat pumps, solar panels, electrolyzers, and carbon capture and storage technologies. However, the fact that the Commission has taken a rather vague position on the decarbonisation of heavy industry has been criticised. The proposals are intended to kill two birds with one stone. The EU does not want to be left behind in the markets of the future while at the same time the massive expansion of renewables and hydrogen is needed in order to get back within striking distance of its competitors. Europe is far behind the USA in terms of energy costs, and this is likely to remain the case, constituting a double burden for industrial location.

Furthermore, in the context of the Net Zero Industry Act, approval procedures are to be tightened, incentives for cross-border projects created and bureaucracy reduced. This is sorely needed. Europe must not only boost the pace of ecological industrial policy but above all must do so collaboratively. Coexistence instead of cooperation wastes scarce resources, creates internal competition and even has mutually contradictory effects. This fragmentation weakens Europe in international competition.

However, in order to be able to compete with other big players, synergies have to be used and joint production lines have to be set up. In the market, size does matter, and here the Chinese and the Americans have an advantage. Accordingly, common goals and stronger coordination are necessary. Otherwise, there is a risk of further fragmentation of the internal market.

### **It's about jobs, stupid**

Another part of the IRA has also been somewhat overlooked in the European debate: the implications for workers and jobs. The IRA is among other things a response to the accusation that the Democrats no longer represent their former core support base. This is where the Biden administration wants to pull the plug on the populists. For a long time, the possible loss of jobs was at the forefront of public debate when it came to the ecological transition. But now it is about new, high-quality jobs in industries that represent the future. The US government, for instance, provides tax credits for companies that pay decent wages and hire apprentices through the IRA. They also want to tax share buybacks so that companies invest instead of making boards rich. Additionally, they are providing extra tax credits for clean energy projects in communities previously dependent on extractive industries. Europe should follow their example. This is the only way to achieve environmental and social parity.

Through the European Pillar of Social Rights, launched in 2017, the EU is actually starting from a much higher level than the US. In October 2022, the EU Directive on Adequate Minimum Wages was adopted, requiring collective bargaining and strengthening trade unions. The Green Industrial Plan now devotes an entire chapter to the development of skills. However, it is silent on the quality of jobs and the question of how collective bargaining could be strengthened through state aid or public procurement. That is a mistake. In times of a shortage of skilled workers, it will also be crucial for companies to be attractive to qualified employees.

The shortage of skilled workers affects the entire region. It leads to bottlenecks and backlogs in the economy and for some countries, such as Germany, it casts

doubt over the prospect for long-term economic development and competitiveness. At the same time, the tense current situation makes it difficult for trade unions and companies to forecast future needs and necessary re-training. The demands from both camps for a stable legal framework are correspondingly strong.

### **Deep pockets**

Fierce debates continue on the question of financing the green industrial plan. For the time being, the funds for EU industrial policy are supposed to primarily come from the Member States. The Commission therefore wants to temporarily ease the rules for state aid, which normally limit national subsidies. They are to include more technologies, be higher than before and also be granted over a longer period of time. Although, the Commission initially also sought to rely on Europe-wide solutions, this was not successful with the Member States.

An EU Sovereignty Fund was supposed to be the main source of funding for the industrial strategy but that is off the table for the time being. The climate-neutral restructuring of the European economy is still needed, but there will be no fresh 'European' money for it: the Member States are not playing along. Only an additional 10 billion euros will now be raised. Otherwise, existing programmes and funds are to be bundled and thus made more accessible under the title STEP - Strategic Technologies for Europe Platform. STEP includes not only clean technology but also deep tech and biotech. However, the Commission still hopes to reach 160 billion by reallocating from other sources, primarily the structural funds.

It is questionable whether this will be enough to compete with the USA and Asia as originally planned and to secure European sovereignty as envisaged. Doubts have already been raised. Firstly, the whole thing was announced with a completely different scope and depth: STEP now looks very modest in comparison. And secondly, there are warnings of a danger to the internal market if the climate-neutral transformation largely remains a matter for Member States. The capacities of the EU countries to grant state aid are very different (Germany and France have significantly greater capaci-



ties than smaller countries), which puts pressure on the internal market. In any case, closer cooperation is still necessary for this mega-task. Otherwise, there is a risk of wasting scarce resources by setting up parallel structures. It is thus important to jointly apply synergies and economies of scale in the newly emerging supply chains for green technologies.

Even with this Green Deal Industrial Plan, the EU is still a long way from the state interventionism and debt mutualization that critics have accused it of. It will not work without start-up financing and risk hedging. There is no risk that companies and industries will become uncompetitive as a result of permanent financial injections from the public sector. But without start-up funding, competitiveness quickly becomes a lost cause.

### **Energy as the key to sovereignty**

The Russian attack on Ukraine initiated an upheaval in European energy policy through the subsequent widespread cut-off of energy supplies. Since then, the EU has found itself in a geopolitical dilemma: on the one hand, it wants to maintain its model of largely open energy markets; on the other hand, it finds itself in a world in which the energy policies of many partners are increasingly determined by other goals. The challenge of harmonising long-term climate goals and short-term security of supply remains as well. Last but not least, the relationship between energy security and industrial policy will have to be rebalanced in the future. All of this will require the EU to pursue a coordinated external energy policy.

However, the Russian invasion of Ukraine has also made the tensions regarding energy policies between European governments more apparent. Each Member State decides on its own energy mix, a situation that has developed historically, makes economic sense in view of the very different domestic resources, external partners and specific preferences of different countries, and will remain so even if the Energy Union is deepened. Anything else would be unenforceable, either at government level or among the population. Accordingly, a European energy policy orchestrated in Brussels is not in sight.

The resulting differences, however, are already significantly complicating the implementation of the individual measures in the context of the Fit for 55 package. But stronger coordination will also be needed internally. A common European industrial policy is a long way off, but it is necessary. The current industrial policy structure in Europe and the potentials in the production of renewable energies do not match. Will it be possible to keep energy-intensive production, such as the ammonia and aluminium industries, in Europe? Or should Europeans focus on selected clean tech sectors and let go of those in which they have comparative disadvantages compared to other world regions?

It is not possible to argue for a purely market-based approach after the experience of the pandemic and the Russian war in Ukraine, with its disrupted supply chains and imports. The goals of security of supply and sovereignty are now generally shared. At the same time, financial resources are limited, partly because of the consequences of the pandemic and the war. What is it worth to Europeans to keep or build up central industrial sectors in the region? Is there a need for a European solar industry when significant capacities are now also being built up outside China in various economies such as the USA and India, so that a differentiated supply chain would presumably be guaranteed? Or should the EU, with its excellent research capacities, serve high-tech areas and leave mass production to economies with lower energy costs? Is it possible to at least better adapt Europe's industrial architecture to the potentials of the individual Member States in power generation, while securing the greatest possible autonomy in various sectors? So far, this debate has not been conducted strategically, either in Brussels or in individual Member States, let alone between Member States. And while it is true that such talks will not be easy, they are nevertheless necessary.

European state aid policy worked well as long as it was not primarily about industrial policy. But the starting conditions have changed massively. In future, aid should have a much stronger strategic component.

## The future is circular

The restructuring of European economies is not only about reducing CO<sub>2</sub> emissions; the more careful use of natural resources is important as well. The European economy has so far been characterised by a linear rather than a circular structure, as is usual in capitalism. In 2020, the share of circular materials used in the EU (the so-called circularity rate) reached only 12.8%. Only about 13% of the material resources used in the EU thus come from recycled waste materials.

The circular economy, on the other hand, is based on a changed production and consumption pattern. Existing materials and products are shared, leased, reused, repaired, refurbished and recycled for as long as possible. In this way, the life cycle of products can be extended and waste reduced to a minimum. The resources and materials continue to generate value even if the product itself can no longer be used.

Only by switching to a circular economy can security of supply and climate as well as environmental protection be combined. Material cycles also reduce dependencies on critical and imported raw materials, the distribution of which is becoming increasingly controversial. Overall, the circular economy opens up markets for high-quality recycled materials, efficient recycling processes, and new business models.

However, the transition to a circular economy requires a fundamental rethinking of the entire organisation of the economy. Importantly, the European circular economy is still in its infancy as the concept is not yet widely established. The transition needs to be thoroughly and fundamentally integrated into industrial policy at the European, national and regional levels. A central challenge in Europe in the coming years will be to make it clear that the circular economy involves much more than improved waste separation and technically optimised waste management.

## Critical raw materials are the new oil

For decades, oil and gas were at the centre of the global energy trade. In the future, critical raw materials will take their place. On the one hand, the transformation

of the European economy to a circular economy is enormously important here. The share of recycled raw materials must be steadily and rapidly increased, as this will protect the environment and make Europe more independent. But Europe will remain dependent on raw material imports for some time to come. Thus, the energy transition can only be secured through massive imports of raw materials. In view of the current structures in the extraction and processing of raw materials, Europe is threatened with new dependencies here, especially on the main supplier China. Europe has learned some lessons from Russia's attack on Ukraine, in particular the need to avoid excessive dependence on individual suppliers of strategic goods in the future.

There is widespread agreement that a raw materials strategy should provide a remedy. Critical raw materials are central. The EU aims to cover a significant share of its own needs by 2030. To achieve this, the EU Commission has presented the Critical Raw Materials Act. In the future, no more than 70% of a raw material is to be sourced from a single country: the focus here is particularly on China. Accordingly, new suppliers must be acquired. In the future, the European Global Gateway Strategy is to be used more specifically for this purpose. Through this global infrastructure programme, €300 billion are to be invested, especially in digitalization, energy and transport. By doing so, the EU wants to offer an alternative to China's New Silk Road.

Under these plans, 10% of the demand for critical raw materials is to be covered by local mining, and 15% from recycling. And between mining and recycling, the entire local value chain is also to be strengthened. Similar to wind and solar, permits for mining, processing and recycling are to be granted much faster than before. This is important, but nevertheless challenging, because Europe should continue to guarantee high environmental and social standards in mining. The steps mentioned are not only central to Europe's sovereignty and the energy transition. They also significantly advance the circular economy and conserve resources.

Japan is considered a possible role model in raw materials policy. The Japanese government relies on a new division of labour between the state and companies to secure raw materials. The needs of the companies as well as the current availability are precisely determined.

In addition, a raw materials agency has been established with branches in various mining countries. Furthermore, the activities of all ministries related to raw material procurement and recycling are coordinated. The companies themselves invest in the entire value chain and are also active in mining, for example. They receive extensive support from the raw materials agency Jogmec. High-risk investments in raw materials are financially supported.

### **The Global South: better offers and fewer appeals, please**

In an increasingly hostile geopolitical and geo-economic world, Europeans must carefully balance their strategic goals of security of supply, climate protection and competitiveness. Access to raw materials and energy imports plays a key role, as already described. Otherwise, there will be a threat to both economic prosperity and social peace. And the climate transition cannot be managed without them. The proverbial elephant in the room is China. Whether in Africa or Latin America, wherever the West goes in search of much-needed raw materials, China is already there. And China is here to stay. Other emerging economies are also reactivating or deepening their relations with the countries of the Global South. They are competitors in the race for the vital raw materials without which neither the energy transition nor digitalisation can be managed. Without supplies of raw materials and energy, it will be very difficult for the industrialised countries to maintain their industrial base and keep up with the development of competitive new industries.

The countries of the Global South have no interest in taking sides in the growing geopolitical polarisation. This attitude stems from their own convictions as well as their own interests. This may be disappointing from a European perspective, as was the case with the reactions to the Russian invasion of Ukraine. But the neutral stance of emerging and developing countries certainly pays off for them. If various potential trading partners are available, the best offer can be chosen. And here, not only the price is likely to play a role, but also the offers to build up their own local industries and to transfer technology.

A number of new partnerships in the energy sector are currently being sought and promised. Here, Europe must actually deliver and serve not only its own pressing interests but also those of its trading partners, especially since its competitors are also adjusting to the changing situation. China, for example, formerly had the reputation of only being interested in raw materials and agricultural products that were exported in their raw state to the People's Republic to be processed there, but the country is now responding to the wishes of its trading partners. The construction of a joint lithium-ion battery factory with a domestic company in Chile may provide a foretaste of what is to come.

For the Europeans, it is also important to honestly weigh up interests and be realistic about room for manoeuvre while developing a clear strategy in this field. Europe will have to practise a difficult balancing act in the future. On the one hand, it wants to meet its own high social and ecological standards in other parts of the world and thus promote its own values in the geo-strategic race. At the same time, Europeans can no longer seek to dictate to other countries how they should act if they wish to avoid accusations of neocolonialism.

This often involves balancing an apparent ambivalence. The interests of local communities around the extraction sites of sought-after raw materials are often different from those of their national governments. The former struggle with the negative impacts of resource extraction on health and livelihoods; the latter see the positive effects on national budgets and foreign exchange reserves. Ambitious social and environmental standards often have a reputation in the Global South as protectionism in disguise. Concluding the desired trade agreements and at the same time satisfying the EU's ecological and social demands is by no means a foregone conclusion.

### **European Green Deal 2.0 under challenging conditions**

The priorities of the next Commission are likely to include industrial policy as well as clean tech funding. This is even more likely in view of the failed efforts to establish an EU Sovereignty Fund in July 2023. Great-

er emphasis on social cohesion and social standards should also be placed more prominently on the agenda. In particular, the Inflation Reduction Act is fuelling the debate. Moreover, the Social Climate Fund will come into effect in 2027, so that the social aspect will not disappear from the EU's political landscape. The tension between common strategies for European energy and supply security on the one hand and nationally shaped energy and industrial policy goals on the other will remain as well.

Given the looming shift to the right in the EU parliamentary elections and the calls for a regulatory break in the climate agenda, this task is likely to become even more challenging. But there is no alternative. The catastrophic summer of 2023 once again highlights the consequences of climate policy inaction. At the same time, Europeans urgently need to agree on what future they have in mind for their industry. What are our industrial policy goals? What is the relationship between cost issues and strategic considerations? Which products do we want to produce in Europe and which ones would we rather import? What would a common European industrial architecture look like, one from which all Member States profit in the best possible way? What is the best way to secure jobs and welfare in Europe? These questions need to be answered together.

## Abbreviations

- CBAM: Carbon Border Adjustment Mechanism.
- EU: European Union.
- EU ETS: European Union Emissions Trading Scheme.
- STEP: Strategic Technology Platform for Europe.

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# The European Green Deal and the Carbon Pricing Policies to Reach a Net-Zero Economy: The Revised Emission Trading System and the Carbon Border Adjustment Mechanism

José Luis Escario

Following three years of intense negotiations among the European institutions, April 2023 saw the approval of climate legislation that lays the foundations of Europe's decarbonisation strategy for the coming decades. The directive amending the Emissions Trading System and the Carbon Border Adjustment Mechanism are two interconnected regulations that form part of the European Commission's flagship climate package, "Fit for 55". It aims to make Europe the first climate-neutral continent and lead the global charge against climate change.

The two pieces of legislation reviewed here will raise the price of polluting and lead to a reduction in emissions. But they will also ensure there is a just transition that takes account of the interests of the most vulnerable sectors.

To better appreciate the importance of the recently completed EU reform, we must rewind to the Paris Agreement, signed in December 2015 during the United Nations Climate Change Conference. The agreement established an ambitious decarbonisation agenda, one which most of the international community adopted. The commitment consists of keeping the increase in global temperature this century under 2 °C above pre-industrial (1990) levels and pursuing efforts to limit the temperature increase to 1.5 °C.

A second major milestone to understand the EU's reform was undoubtedly the approval of the European Green Deal (EGD). The current European Commission presented the EGD at the start of its term as its primary government programme for the coming years. Its scope, as we shall see, will extend far beyond the current legislative period.

The EGD is fully aligned with the decarbonisation goals of the Paris Agreement and adopts the deal's limit regarding temperature increase. It also sets the target of reaching a net-zero greenhouse gas (GHG) emissions economy by 2050, making the EU the zone with the most rigorous decarbonisation time frames globally.

The EGD charts a real road map for climate neutrality. It provides for phasing in a series of transformative policies that encompass not just reducing GHG emissions, but a broad array of other interconnected and mutually reinforcing matters, like supplying clean energy to the entire economy, preserving biodiversity, or the circular economy. It also affects issues closely linked to citizens' everyday lives, such as household energy consumption, food, road transport or buildings.

Ultimately, the EGD comprises a comprehensive long-term strategy to achieve the green transition of the entire economy, decoupling economic growth from the use of re-

sources. The EGD, then, goes much further than a sectoral climate policy, since its cross-cutting nature and its goals extend to all EU policy, both internally and externally.

Russia's invasion of Ukraine and the resulting increase in energy prices has provided a major incentive to quicken the pace of implementing the EGD policies. The EU's need to reduce its fossil fuel dependence and achieve strategic autonomy in the energy field, particularly as far as reliance on Russian imports is concerned, has never been clearer. The REPowerEU Plan, with an emphasis on both rapidly replacing Russian gas and speeding up the EU's energy transition, is a clear expression of this.

In the same vein, the Commission proposed a Green Deal Industrial Plan in January 2023 intended to cement a robust green industry in the EU. Through the plan, the Commission means to introduce an industrial policy for decarbonisation in Europe that ensures a secure supply of the raw materials needed for the energy transition, the rollout of green technologies and their export to the rest of the world. To this end, the Commission is proposing a whole array of measures to make it easier for green industry to access funding and attract the private investment needed to develop fully.

The Commission is also looking to address the risk of deindustrialisation in Europe, since in the next few years other major powers like the United States, China or Japan are planning to invest hundreds of millions of euros in programmes to develop their own green industries, in direct competition with the EU.

### **The Fit for 55 package, the expression of the EU's renewed ambition in the face of the escalating climate emergency**

Unlike the EGD industrial plan, several aspects of which have still to be agreed among the member states, a good part of the Commission's Fit for 55 legislative package is already being transformed into EU legislations.

The package, which the Commission put forward in July 2021, is the first attempt to turn the EGD's broad programme into law. It is, in fact, the embodiment in concrete proposals of the EU's greater ambition in the face of the escalating climate emergency.

Within the framework of the EGD's general target of achieving climate neutrality by 2050, the Fit for 55 plan places a demanding milestone for the EU along the way: reducing net carbon emissions by at least 55% by 2030, compared to 1990 levels.

The figures that explain this greater ambition on the part of the EU are indisputable. According to successive synthesis reports by the Intergovernmental Panel on Climate Change (IPCC), the UN body in charge of assessing the science related to climate change, the efforts countries have made to cut their emissions to date are not sufficient to achieve the Paris Agreement goal of limiting global warming to 1.5 °C or 2 °C in this century.

The World Meteorological Organization, moreover, announced in May 2023 that there is a 66% likelihood the average global temperature will temporarily exceed that 1.5 °C in the next five years.

A change in current climate policies is essential, then, to stop the internationally agreed targets from becoming completely out of reach. That means the "national energy and climate plans" the member states produce periodically, in which they establish their own decarbonisation goals, must set a much brisker pace of GHG emissions reductions from now until 2030. In addition, according to the IPCC's sixth assessment report published recently, every economic sector should contribute to achieving these more demanding goals.

On this topic, Spain's presidency of the EU starting in July 2023 must provide the required impetus to arrive at the next Conference of the Parties, in Dubai in December 2023 (COP 28), with the member states' energy and climate plans revised in line with the EU's new ambitions.

Remember that the EU already approved the European Climate Law in 2021 precisely to safeguard and give binding status both to the European commitment to becoming a climate-neutral continent by 2050 and to raising the intermediate (2030) emissions reductions target to 55%.

Similarly, the Fit for 55 plan will require bringing current European legislation on climate, energy, transport, land use and taxation into line with these new goals. The Commission has proposed an assortment of legislative instruments covering such different fields as the greater use of renewable energies (40% of the energy consumed); more energy efficiency (particularly regarding buildings); a swifter rollout of low-carbon modes of



transport and the infrastructure and alternative fuels to sustain them; or the conservation and enhancement of our natural carbon sinks.

In the next sections, given their importance as far as achieving a net-zero economy is concerned, we shall analyse two Fit for 55 measures that the European Parliament and Council approved in April 2023: the revision of the Emissions Trading System and the Carbon Border Adjustment Mechanism.

They are market-correcting instruments in that they send out price signals adapted to the internationally agreed decarbonisation goals.

### **The Emissions Trading System (ETS), a cornerstone of EU climate policy**

The ETS has been the EU's primary climate policy instrument since its creation in 2005 and its current reform is a key part of the strategy contained in the European Green Deal.

The EU is a pioneer in using the carbon markets as a means of driving the decarbonisation of the energy sector and industry. Several countries and zones in the world have gradually adopted (or are in the process of adopting) similar systems to the one established in Europe. Other countries meanwhile have opted to use different methods to achieve their decarbonisation goals. One example is the United States, which for the most part has favoured incentives and direct subsidies to reach the targets.

Primarily, the ETS seeks to encourage industry to switch to green technologies that contribute to the ecological transition. The ETS is also a further manifestation of the "polluter pays" principle laid down in Article 191 of the Treaty on the Functioning of the EU (TFEU), as it requires companies to pay an additional cost for every extra unit of CO<sub>2</sub> they emit.

The ETS puts a price on carbon in the framework of an EU-wide emissions market. It is a variable mode of price-setting, as the amount depends on the supply and demand for the emissions allowances in circulation at any given moment.

The ETS is based on a "cap and trade" system, in which the emissions market reacts to the price signals

from the EU. The EU first identifies a series of carbon-intensive industrial sectors (power stations or certain industrial facilities, like oil refineries or chemical and steel plants, for instance). Then the EU authorities determine the maximum carbon emissions (cap) each of these sectors can emit and issues permits or emissions allowances for the companies accordingly. Each sector's cap decreases every year, the idea being to move towards compliance with the EU's climate goals.

The companies concerned must purchase an allowance to cover each tonne of carbon dioxide emitted and if they exceed the allotted quota, they suffer a penalty or pay extra. Emitters are penalised, then, for polluting above the threshold the EU has established for their sector in each moment.

Conversely, companies whose emissions levels fall below these thresholds accumulate emissions allowances that they can then sell to other participants in the European market.

Emissions allowances are therefore tradeable on that market. Companies that emit more than their allowance can purchase extra allowances on the emissions market, while those that emit less can sell their surpluses. This creates an incentive to reduce emissions, since the companies that innovate and lower their emissions can sell the leftover allowances and obtain income from them.

### ***ETS performance evaluation***

The ETS has proven to be an effective means of lowering carbon emissions during its time in operation. In fact, the emissions of the sectors covered by the system have fallen by 41% since the EU launched it in 2005. Europe is the world region with the most demanding emissions allowance market and the one that has made most progress towards decarbonisation to date.

In the current circumstances, however, in which the escalating climate emergency has significantly increased the EU's ambitions, it became necessary to revise the ETS.

Under the previous scheme, the EU's new decarbonisation goals would have been unattainable. In fact, the sectors covered by the ETS would have to reduce their emissions by 62% to reach the 2030 goal. The ETS had

also failed to cover certain economic sectors with a considerable capacity to produce polluting emissions. These will now contribute to the climate goals.

Another shortcoming of the previous ETS scheme was that it had prompted a relatively modest performance from heavy industry compared to the emissions reductions achieved by the energy sector. That was largely because the former had benefitted from the proliferation of “free emissions allowances”. As we shall see below, phasing out these allowances is a key element of the reform.

### ***The revision of the ETS and the rise in the price of CO<sub>2</sub>. Special treatment for the most vulnerable groups***

In general terms, the reform approved in April provides for tightening the emissions trading system via a gradual increase in carbon prices and a reduction in the number of allowances issued on the emissions market.

The carbon price increase will come about through a decrease in the emissions caps established for the various sectors covered by the ETS. These gradual reductions in the caps have already been happening every year, but with the reform the pace of reduction will now step up considerably. The operators concerned will be able to emit fewer and fewer amounts of CO<sub>2</sub> without penalty.

The reform seeks to keep carbon prices at a high enough level to incentivise companies to pollute less. Carbon prices that are too low would make it impossible for the companies that opt for low-carbon new technologies to compete with the more carbon-intensive industries.

The EU’s decision to make the ETS more stringent is a politically risky one, particularly in circumstances like the immediate aftermath of the outbreak of the war in Ukraine, when energy prices in Europe hit all-time highs. These prices have since fallen considerably (gas is now nearly back at pre-war levels), though it will be necessary to remain very vigilant to their volatility for some time yet. Carbon prices currently stand at around 100 euros per tonne.

The high prices mentioned above nevertheless required the introduction of certain amendments during

the negotiations in order to cushion the impact of the ETS revision on more vulnerable groups.

First, separate and less exacting carbon markets are established for more socially sensitive sectors, like buildings and road transport. Second, a new Social Climate Fund has been created to minimise the adverse effects on more vulnerable groups. The fund will amount to 86.7 billion euros and should go to compensating low-income households and small enterprises for the carbon price increases the change in the law causes them.

Still, price limits on energy should mainly stem from a structural reform of a European electricity market that was the cause of serious inefficiency in the depth of the crisis. This measure would have a greater impact on energy prices and, contrary to what would happen if we weakened the ETS, it does not compromise achieving the decarbonisation goals. Nor would it jeopardise strengthening European energy autonomy, which pursues less EU reliance on fossil fuel imports.

### ***Extending the ETS to new sectors***

The recently approved ETS reform will extend the emissions market to new sectors that had been exempt until now, like shipping, buildings or road transport. The ETS, then, will cover virtually every major emissions-producing sector.

The reform, however, creates a different and separate emissions trading market for buildings and road transport (ETS II). There is particular social awareness regarding these sectors, given they directly affect citizens’ lives. Hence this special system provides for lower carbon prices and longer implementation timelines. The ETS II will not be operational until 2027, or even until 2028 should there be a sudden rise in carbon prices above 45 euros per tonne.

Yet these safeguards cannot obscure the fact that the two sectors have huge emissions reduction potential. According to UN data, the buildings sector is directly or indirectly responsible for 36% of energy related GHG emissions in the EU and accounts for over 34% of global energy demand. Road transport, meanwhile, is responsible for a fifth of the EU’s carbon emissions.

The reform also includes the maritime transport sector in the general emissions trading market (ETS I) from 2024. Emissions from this sector are higher now than in 1990.



Lastly, the system for the aviation sector will be tightened with the reform given its considerable polluting potential, and despite its inclusion in ETS I since 2012. The number of free emissions allowances allocated to this sector will be reduced over time and phased out completely by 2026. The use of sustainable fuels in the aviation sector will also be promoted.

### ***Removing free emissions allowances***

The phasing out of free emissions allowances was one of the key points in the EU negotiations leading up to the reform of the ETS. It was eventually agreed that the process will start in October 2023, reducing these allowances to nearly half by 2030 and completely removing them by 2034. The aviation sector, as we have seen, faces a more challenging reduction time frame.

Thanks to these free allowances, certain industrial sectors have managed to avoid paying anything for their carbon emissions since the European carbon market was established in 2005. There is no question their proliferation has been a major obstacle to achieving the desired progress towards the EU's decarbonisation goals.

To be fair, allocating free emissions allowances was initially conceived as protection against the phenomenon of "carbon leakage", that is, the risk of European production relocating to countries with laxer climate policies.

Indeed, the increase in climate ambition represented by the ETS meant that certain European companies under the scheme were tempted to shift production to jurisdictions with no carbon pricing at all (or lower prices), thereby cutting their energy costs. Carbon leakage is directly detrimental to the EU economy. In addition, instead of becoming cleaner, it prompts certain production processes to simply move outside European territory, circumventing the climate efforts laid down in EU law.

Granting free emissions allowances was intended to give producers, importers and traders from the energy intensive sectors or those sectors most commercially exposed to carbon leakage time to adapt. The fact that these free allowances have lasted to this day also has much to do with the effective lobbying from the sectors that benefit from perpetuating these exceptional treatment.

### **The Carbon Border Adjustment Mechanism (CBAM), a powerful EU geopolitical tool serving climate goals**

The CBAM is a standout feature of the climate legislation approved in April. It has major geopolitical repercussions and affects international trade. The function of safeguarding against carbon leakage performed by the free emissions allowances until now will gradually shift to the CBAM.

Yet unlike the free allowances, the CBAM will not slacken the pace of the EU's decarbonisation, far from it. As we shall see, this tariff will be a major spur for other regions of the world to raise their climate ambitions to the levels required to contribute effectively to achieving the globally agreed climate goals.

### ***How the CBAM works***

The CBAM will work as a tariff on imports of carbon-intensive goods from outside the EU. The importer will pay at the border, that is, in the moment they want their products to enter the single market.

Payment of the tariff will be made through the purchase of certificates. The amount will depend on the carbon content of the imported goods, the benchmark being the carbon price EU producers would pay for those same goods under the European emission trading system. Specifically, the price of the certificates will be calculated according to the weekly average auction price of EU allowances.

If the products made in the countries of origin have paid lower carbon prices than EU companies bound by the ETS would have paid, the purchase of certificates will also be required in order to make up the difference.

Under the CBAM, then, imports will be taxed in such a way that the emissions pollution cost of producing the same product inside and outside of the EU will be equal. The carbon price of goods purchased by Europeans in the single market will also be the same, regardless of whether they were produced inside or outside of the EU.

In short, the CBAM will serve to level the playing field between EU and non-EU producers. This new mechanism will prevent greater climate ambition on the part

of the EU from resulting in a competitive disadvantage for European companies compared to their counterparts from third states.

### ***Phasing in the CBAM***

The CBAM is scheduled to start taking effect in 2026 on a limited number of goods that are particularly vulnerable to the risk of carbon leakage, namely cement, steel, aluminium, fertilisers, electricity and hydrogen. The idea is that by 2034 the border tariff will extend to the same carbon-intensive products that are subject to the European emissions allowance system internally.

But the first stage stipulated in the recently approved EU reform is a transitional phase between October 2023 and December 2025. During that time, importers must obtain authorisation from the EU before beginning to purchase certificates for their carbon emissions.

In this preliminary phase, importers will merely provide information about their emissions. The idea is to give Europe's trading partners and the importing companies affected by the CBAM time to negotiate with the EU authorities and develop methods of measuring and certifying the emissions from their production processes.

### ***The CBAM and observance of World Trade Organisation (WTO) rules***

In principle, the CBAM will not contravene WTO rules on trade discrimination. As stated previously, this tariff seeks to levy the same carbon prices on imported products as those paid by European goods so that the cost borne by both types of products is equal.

That is not the case with the United States' new climate law, known as the Inflation Reduction Act, which through the selective granting of subsidies and tax breaks for its green industry gives "preferential" treatment to local production over imported goods (local content requirements).

True, to avoid any risk of breaching WTO rules on the part of the EU it is important that CBAM introduction goes hand in hand with the removal of the free allowances favouring certain European industrial sectors.

On this point, it is worth remembering that the reform approved in April provides for the phasing out of free allowances to begin in October 2023 and end in 2034. A swifter removal would have been preferable to ensure it remained in sync with the process described above.

It is important to underscore that the CBAM and free allowances cannot at any time apply to the same type of product. That would be tantamount to demanding a carbon price from non-EU producers while exempting European industry from payment. In this case, it would be a clear scenario of trade discrimination in contravention of WTO rules.

### ***The CBAM as a key instrument of the European Green Deal's external dimension with a view to raising global environmental standards***

Further evidence that the CBAM is not inherently discriminatory or protectionist lies in its main purpose. It is not to protect national producers, or even to obtain additional public resources, but to incentivise third states to raise their climate ambition in line with internationally agreed targets.

Indeed, the ideal outcome for the EU would be that nobody pays the CBAM. That would mean that other parts of the world had established carbon prices equivalent to the Europeans and, therefore, CBAM application had been "neutralised". On this point, nations such as New Zealand, Canada and India are currently considering creating similar domestic carbon markets to the European one.

Another means of avoiding the tariff is for the country in question to use a different method to carbon pricing, but which is equally effective when it comes to meeting international decarbonisation goals.

Either way, the high standards the EU has placed on itself, particularly since the reform approved in April, allow Europe to send out a strong signal to the rest of the world about the urgent need to raise the ambition of national climate policies and tackle the growing climate emergency.

And this is where the role of the CBAM is key, as it is designed to stimulate climate action from its trading partners. In this respect, the CBAM is a powerful geopo-

litical tool that illustrates the EU's increasingly important regulatory power in the world.

Europe's carbon border mechanism makes access to its strong single market conditional on companies from third countries meeting environmental standards that the EU has also set for its own producers. If importers wish to retain a competitive access to the single market, avoiding the penalty resulting from the application of this tariff, they will be forced to innovate and reduce the emissions generated in their production processes.

The CBAM, then, is a pillar of what has come to be called the European Green Deal's external dimension. The EU is aware that it alone will not be capable of meeting global climate goals, as it accounts for only 9% of the world's GHG emissions. So it must employ a strategy to encourage other countries to pursue sufficiently demanding decarbonisation policies.

True, the CBAM must go hand in hand with other climate diplomacy measures that take into consideration both the geopolitical context and the possible difficulties involved in applying it in other countries. The EU, then, must act as a constructive associate through the forging of green alliances with its trading partners.

The EU should give special treatment to developing countries so that CBAM application presents no insurmountable difficulties to exporting their products into the single market. The financial assistance the EU extends in the framework of its cooperation policy will play an important role here.

Ultimately, as the moment of application approaches, it remains to be seen whether the introduction of the CBAM prompts a significant reduction in global emissions. There is a risk that instead of incentivising greater decarbonisation from the EU's trading partners the CBAM will lead to a segregation of international markets and even to the outbreak of a series of trade wars. At worst, some countries could think that exporting to the EU with this new tariff will prove too costly for its industry and they will choose to look elsewhere to other, less environmentally demanding markets.

Only time will tell whether this innovative project encapsulated in the CBAM triggers a virtuous cycle in the battle against climate change or, on the contrary, adds further strife to the already delicate situation of international trade at present.

## Proposals

- All the legislative proposals contained in the "Fit for 55" package, which develop the policies provided for in the European Green Deal and raise the EU's climate ambition between now and 2030, must be rapidly adopted by the Member States and reach their full potential.
- The deadlines for the implementation of two key climate measures approved by the EU in 2023 must be particularly respected by European countries: (i) the reform of the European Emissions Trading System, which accelerates the rate of reduction of greenhouse gas emissions on EU territory and makes companies pay more for their carbon pollution; (ii) the introduction of a carbon border tax for importers from third countries so that the increase in carbon prices associated with the first reform does not penalise the global competitiveness of EU producers, nor prompt them to flee to territories with laxer environmental standards.

## Abbreviations

- CBAM: Carbon Border Adjustment Mechanisms.
- COP: Conference of the Parties.
- GHG: Greenhouse gases.
- IPCC: Intergovernmental Panel on Climate Change.
- WTO: World Trade Organisation.
- EVP: European Green Pact.
- ETS: Emissions Trading Scheme.
- EU: European Union.

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# Biographies

**Francisco Aldecoa Luzárraga.** Doctor in Political Science from the Complutense University of Madrid and with a degree in Economics, he has focused on the field of International Relations and European Integration. Professor of International Relations at the University of the Basque Country (1990-2000) and at the Complutense University of Madrid (2000-present). He was Vice-Rector and Acting Rector of the University of the Basque Country (1990-1992), Dean of the Faculty of Political Science and Sociology of the Complutense University (2002-2010) and President of the Spanish Association of Professors of International Law and International Relations (AEPDIRI). He is also holder of the Jean Monnet Chair since 1994. He has been President of the Spanish Federal Council of the European Movement since July 2018, and was previously Vice-President of the same. He was also Secretary General of the Basque Council of the European Movement from 1994 to 2002 and member of the Board of the International European Movement since November 2020. Furthermore, he was Representative of Spanish civil society at the Conference on the Future of Europe (2021-2022) and has been a member of the Federal Committee of the Union of European Federalists since 2019. In the last 40 years, he has participated in the publication of dozens of books, the latest being: *The European Union. From the utopian idea of Europe to the European Union as a world power* (Barcelona, Shackleton Books 2023). Likewise, in the Federal Council of the European Movement he has edited and collaborated in the last year in the following books: *The Congress of Europe* (The Hague, 1948); *The Birth of the European Union* (Madrid, Catarata, 2023); *Spanish Presidency of the Council of the European Union 2023. Proposals from the civil society*; (Madrid, Catarata, 2023); *Una Unión Europea necesitada de reforma. Towards the third European Convention* (Madrid, Catarata, 2022); *La Unión Europea frente a la agresión a Ucrania* (Madrid, Catarata, 2022); and *El Contubernio de Múnich sesenta años después. Europa, lugar de en-*

*cuentro entre los españoles* (Madrid, Catarata, 2022). His decision that has had the greatest impact was, as Dean of the Complutense University, to offer an Degree in International Relations (IR) for the first time in Spain, in 2009. Currently, there are more than 100 IR degrees in Spanish universities, including double degrees.

**José Candela Castillo.** Member of the European Affairs Council of Fundación Alternativas. He has been an active European Commission official from 1986 to 2014, as a member of the Cabinet of the Vice-President of the Commission and as head of the Community Law Implementation and Governance Units in the Secretariat General of the Commission. He participated in the group of Commissioners in charge of preparing the drafting of the Maastricht Treaty in 1992, chaired by Jacques Delors, and was drafter of the White Paper on European Governance in 2001 and assistant to the European Commission's representation at the Convention on the Future of Europe which drew up the draft European Constitution in 2003. He is a full professor of Philosophy of Law, Morals and Politics at the Faculty of Law of the Complutense University of Madrid.

**Carlos Carnero González.** Senior advisor at Vinces Consulting. Former Member of the European Parliament (MEP), he participated in the Convention that drafted the European Constitution. He was also Spain's Ambassador for European Integration Projects and vice-president of the European Socialist Party. At a regional level, has been a member of the Madrid Assembly, president of the Recovery Commission of the Madrid Assembly and member of the Advisory Council for European Affairs of Madrid. Moreover, he has been spokesman on Economy of the Socialist Group. He has been managing director of the Fundación Alternativas. Currently, he holds a seat on the Advisory Council of the Real Instituto Elcano and is a lecturer in the Master's Degree in European Union at the CEU San Pablo University. He has co-authored several books on European issues and writes

regularly in various media. He has received the Orders of Constitutional Merit and Civil Merit of Spain and the medal of the European Parliament. He holds a university diploma in Tourism.

**José Enrique de Ayala.** Army Brigadier General, retired. Diploma in General Staff and Joint Staffs. Diploma in Advanced International Studies from the Society of International Studies. Former military attaché at the Spanish Embassy in Germany and Chief of Staff of the European Army Corps. Analyst of international politics, specialized in the European Union, he collaborates with numerous written and audiovisual media. He is a member of the European Affairs Council of the Fundación Alternativas.

**Claudia Detsch.** Director of the Friedrich-Ebert-Stiftung (FES) Competence Center "Socially Just Climate Policy in Europe", based in Brussels. Her previous positions within FES include editor-in-chief of the IPG Journal and director of New Society. She has also headed the office of the FES in Ecuador. Claudia is a sociologist by training.

**José Luis Escario.** Consultant on international taxation and green taxation issues, member of the European Affairs Council of Fundación Alternativas and Fellow of the Aspen Institute Spain. Formerly, he has been a consultant to the European Parliament on tax issues (TAXE 1, 2 and 3 and PANA), tax expert at the European Economic and Social Council, associate researcher at the Carolina Foundation and head of "Taxation for the Private Sector" at Oxfam Intermón. Professor of International Taxation at the International University of La Rioja and author of the book *Paraísos Fiscales* (Catarata 2011), he has published numerous articles on topics related to the European Union, green transition, development cooperation, global governance and the fight against tax havens. @joseluisescario / LinkedIn

**Francisco Fonseca Morillo.** Professor of International Public Law at the University of Valladolid and Director of the Institute of European Studies at the UVA. He holds a PhD in Law from the University of Valladolid and a degree in Political Science and Sociology from the Complutense University of Madrid. He has been linked to

the European Commission since 1986, holding different positions in the Directorate General for Economic and Financial Affairs and within the cabinet of the former Commissioner for Justice and Home Affairs, Antonio Vitorino, or as Deputy Director General for Justice and Consumers. He was also director of the Representation of the European Commission in Spain. He has participated in the elaboration of many academic works on Community law and the European Union and is the author of numerous publications.

**Mercedes Guinea.** Professor of International Relations at the Complutense University of Madrid. A specialist in the study of European integration, her main lines of research are the political model of the European Union and European foreign policy. In 2016 she collaborated with Fundación Alternativas, together with Francisco Aldecoa, in the elaboration of the study *Renegotiation by the United Kingdom of its constitutional relationship with the European Union: Issues related to Sovereignty*, commissioned by the Committee on Constitutional Affairs of the European Parliament.

**Björn Hacker.** Professor of European Economic Policy at the Berlin University of Applied Sciences (HTW). He is a member of the academic board of the Institut für Europäische Politik (IEP). His main areas of research are European economic governance, European social policy and the comparative study of welfare state policies in the EU. Prior to 2014 he worked at the Friedrich-Ebert-Stiftung (FES) in Berlin. His latest main publications are: *Unequal Europe. Tackling Regional Disparities in the EU* (FES/FEPS Stockholm / Brussels, 2021) and *A European Social Semester? The European Pillar of Social Rights in practice* (ETUI Brussels, 2019).

**Elena Muñoz Martínez.** She is the State Coordinator of the Legal Service of the Spanish Commission for Refugee Aid. With a degree in Law and Political Science and Administration from the Carlos III University of Madrid, she is a lawyer specialising in Asylum Law, Statelessness and Human Rights, with more than sixteen years of experience in direct assistance to people in need of international protection and in strategic litigation before national and European Courts.



**Diego López Garrido.** Chair of the European Affairs Council of Fundación Alternativas. He is an economist, Professor of Constitutional Law and lawyer of the Spanish Parliament. He was Secretary of State for the EU from April 2008 to December 2011, and coordinated the Spanish presidency of the EU in 2010. He was spokesman for the Socialist Group in Congress (2006-2008) and a member of Parliament for six legislatures. He was a member of the convention that drafted the European Constitutional Treaty, the predecessor of the current Treaty of Lisbon, representing the Spanish Parliament (2002-2003). He has been vice-president of the NATO Parliamentary Assembly. He is the author of numerous books on human rights, economics, politics, contemporary history and European law. He is a regular contributor to the newspaper *El País*. His latest publications are *La Edad de Hielo. Europe and the United States in the Face of the Great Crisis: the Rescue of the Welfare State* (RBA, 2014), *The Ice Age. Bailing Out the Welfare State in the Era of Austerity* (London Publishing Partnership, 2015) and *Paraísos fiscales. Veinte propuestas para acabar con la gran evasión* (La Catarata, 2016); he has also directed together with D. Lucio Pegoraro and D. Marcos Massó *Derecho constitucional comparado* (Tirant Lo Blanc, 2017), as well as *Lecciones de Derecho Constitucional de España y de la Unión Europea* (Tirant Lo Blanc, 2018).

**Luise Rürup.** She has been working at the Friedrich-Ebert-Stiftung (FES) since the early 1990s. In September 2020 she was appointed FES representative in Spain. Prior to her position at FES Madrid, Luise headed the FES liaison office with the United Nations, the International Monetary Fund and the World Bank, located in New York (USA). Previously she held various positions at FES, including head of department at the headquarters in Berlin (Germany), country representative and executive director in Santiago de Chile (Chile), New Delhi (India), Erfurt/Thüringen (Germany) and Istanbul (Turkey). After studying Political Science, Regional Studies, Philosophy and Geography at the Free University of Berlin, the Università di Urbino (Italy) and the University of Hamburg, she graduated in Political Science with a diploma from the University of Hamburg. She complemented her education with a one-year vocational post-graduate program at the Center for Advanced Training in Rural Development/International Cooperation in Sustainable Development (SLE/Humboldt University) in Berlin. Prior to her engagement with FES, she was involved in multidisciplinary research and consulting in rural areas of Costa Rica and Tanzania. Luise is a long-standing member of the German trade union Ver.di and the social democratic SPD party.



The year 2023 has provided further proof of the importance of European unity. Even after – especially after – the attack on Ukraine in violation of international law, the European Union (EU) offers the most robust response to the current threats and, more than ever, the common promise of a brighter future in the 21st century. Against a multipolar international backdrop, one of growing rivalry among powers, tackling multiple crises like war, climate change, social inequality and the rise of populism poses the biggest challenge to have faced the EU since its inception. The European people will go to the polls in May 2024 to determine the composition of the European Parliament. In doing so, they will be deciding on the EU's political priorities and its capacity for action. A lot is at stake.