CONCLUSIONS AND PLENARY DEBATES

FOCUS ON THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

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FOCUS ON THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

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Do Europeans share a common identity? If so, what does it consist of? Is the lack of a European demos an obstacle to creating a European identity? How does European identity, if there is one, relate to the national identities of the Member States?

Those questions – which clearly surpass the purely legal debate about the constitutional identity of the European Union and that of its Member States and which have significant political, economic and historical repercussions – underpin all the topics debated during the XXXth FIDE Congress, as underlined by Alexander Arabadjiev, President of FIDE 2021-2023, in his opening speech. It is this common thread that ties together by design the various legal discussions held throughout the congress into one overarching topic: Europe's identity.

The plenary discussions during opening and closing sessions of the Congress, which are reproduced in the present volume, featured a number of visionary keynote speeches and interventions from leading policy makers at EU and national level, judges, economists and political scientists.

As Guy Verhofstadt, Member of the European Parliament, Co-Chair of the Conference on the Future of Europe, observed in his opening address, the war raging on the very borders of the EU throws the concept of the Union's identity into sharp focus. It emphasizes the need to designate the role of the European Union on the world stage and the reforms to be introduced in order to regain the trust of Europe's citizens.

But are the characteristics that traditionally establish an identity – common linguistic, historical, ethnic, spiritual (or religious) homogeneity – lacking in the EU? The first plenary panel discussion, chaired by Alexander Kornezov, Judge, President of the VIIIth Chamber of the General Court of the EU, addressed that question through the lens of the political, economic and social physiognomy of the European Union. It emerged from that discussion, which included contributions from Takis Tridimas, Professor of European Law, King´s College London; Gabriel Glöckler, Principal Adviser at the European Central Bank; Daniel Gros, Director of the Centre for European Policy Studies; and Ulla Neergaard, Professor of EU Law, University of Copenhagen that those traditional characteristics of a nationhood are not necessarily an obstacle to the emergence of a European identity. Indeed, looking ahead, we need to reflect upon the possibility of constructing a European identity based on shared common values. The case for European solidarity was underlined in responses to the financial crisis and the COVID-19 pandemic. The success of the euro has created a new common language in which we express material value. Thus, young Europeans see the euro simply as their currency, rather than a great goal or historical achievement of European integration. We thus may already be witnessing the beginning of a process of making Europeans.

The plenary panel on the constitutional identity of the European Union and its Member States was clearly one of the highlights of the Congress. The panel was chaired by Koen Lenaerts, President of the Court of Justice of the EU. Contributions to the panel discussion were made by Pavlina Panova, President of the Bulgarian Constitutional Court, Stephan Harbarth, President of the German Federal Constitutional Court, Véronique Malbec, Judge at the French Constitutional Council and Elena-Simina Tănăsecu, Judge at the Romanian Constitutional Council. For his part, Koen Lenaerts emphasised that the defence of the values on which the Union is founded, amounts to protecting 'the very identity of the EU as a common legal order'. Whether national constitutional identities clash with that of the Union was the subject of a vigorous debate and a frank exchange of views. Koen Lenaerts explained that whilst the CJEU fully respects the role and competences of the constitutional courts of the Member States, those courts must guarantee not only the principle of judicial independence, but must also comply with the obligation to refer questions on the interpretation or validity of EU law to the CJEU. He underlined that national identity within the meaning of Article 4(2) TEU, must be in accord with the values enshrined in Article 2 TEU. In his view, national identity cannot call into question the equality of Member States – that is to say that all provisions of EU law must have the same meaning and are to be applied in the same manner throughout the Union. In that respect, the CJEU is the only court within the EU legal order that ensures the uniform interpretation of EU law. Consequently, when interpreting EU law, the CJEU takes national identities into account. Thus, pursuant to Article 4(2) TEU, the CJEU is able to allow room for diversity reflecting national constitutional identities, while ensuring the primacy of EU law. Accordingly, Koen Lenaerts emphasized that a Member State cannot unilaterally rely on its national identity to challenge the primacy of EU law. Likewise, he considers that the EU judicature rightly rejected the *ultra-vires* doctrine, which in his view, suggests that a constitutional court may second-guess and depart from the interpretation of EU law established by the CJEU without requesting a reference for a preliminary ruling under Article 267 TFEU. President Lenaerts emphasised that where a national constitutional court harbours doubts about the compatibility of EU legislation with the concept of national identity expressed in Article 4(2) TEU, it is obliged to refer such questions to the CJEU.

Those views were challenged by some of the participants in the panel discussion, notably by Stephan Harbarth, President of the German Federal Constitutional Court. In his opinion, the precedence of EU law applies only to the extent that German constitutional provisions permit or provide for a transfer of sovereign powers. As a result, it is incumbent on national constitutional courts to uphold domestic constitutional limits by conducting a review on the basis of their constitutional identity (a review on the basis of the *ultra vires* doctrine). Such an *ultra-vires* review examines

whether the domestic act of approval respects the limitations imposed under national rules governing constitutional identity, as well as assessing whether specific acts of the EU institutions are covered by the act of approval or whether they transgress the boundaries set by the national legislator. Pavlina Panova, Véronique Malbec and Elena-Simina Tănăsecu also mentioned a number of domestic mechanisms or examples aimed at protecting a Member State's constitutional identity.

The debate ended on a conciliatory note, as Stephan Harbarth indicated that despite the differences of view, national constitutional courts and the CJEU are working towards a common goal where the rule of law prevails.

The constitutional importance of the values enshrined in Article 2 TEU were also discussed in the context of accession to the European Union. In an emotionally charged speech, Serhiy Holovaty, Chief Justice of the Constitutional Court of Ukraine, presented a first-hand account of the devastating toll that the war has taken in his country. He reminded us of the need to remain vigilant and to safeguard actively the principles that underpin democracy, in particular that it is essential to uphold the rule of law.

In addition, the plenary panel, chaired by Alexander Arabadjiev, Judge and President of the First Chamber of the CJEU, and President of FIDE, discussed North Macedonia's and Albania's efforts made to align their respective national legal systems with the principles of the constitutional identity of the EU, notably, the rule of law, as witnessed by the contributions from Marsida Xhaferllari, Judge at the Constitutional Court of the Republic of Albania and Darko Kostadinovski, Judge at the Constitutional Court of the Republic of North Macedonia.

The conclusions by the general rapporteurs on the three main topics of the XXXth FIDE congress - mutual trust, mutual recognition and the rule of law; the new geopolitical dimension of EU competition and trade polices, and the European Social Union – focused also on the issue of the Union's identity. Thus, Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor at the School for Transnational Governance, European University Institute, general rapporteur for the first topic, observed in his concluding remarks that the underlying assumption of mutual recognition is the common constitutional identity of the Member States as to the values enshrined in Article 2 TEU. That provision cannot be perceived merely as a statement of policy guidelines or intentions, but contains values which are part of the very identity of the Union as a common legal order, and which are given concrete expression in principles containing legally binding obligations for the Member States.

The need to establish an EU "economic" identity was illustrated forcefully in the concluding remarks by Jean-François Bellis, Founding Partner, Van Bael & Bellis; Visiting Prof., ULB and Isabelle Van Damme, Partner, Van Bael & Bellis; Visiting Prof., College of Europe, general rapporteurs for the second topic, who demonstrated

that the Union is on the verge of a new era regarding its policies on competition, trade and direct foreign investment.

The European Social Union is part of the fabric of the European project, as emphasised in the concluding remarks by Sophie Robin-Olivier, Professor of Law at the Sorbonne School of Law, general rapporteur for the third topic. She recalled that the European Social Union is crucial for creating a European identity which would resonate with European citizens. It could be argued that achieving a 'Social Europe' is the only viable way to achieving a European identity.

FIDE Congresses do not however take place in ivory towers. This was poignantly recalled in the keynote speech by Ivan Krastev, Chairman, Centre for Liberal Strategies and Permanent Fellow, Institute for Human Sciences, IWM Vienna, who reflected on the immediate impact of the on-going war in Ukraine and its future ramifications for the EU as well as globally. His words were echoed by Věra Jourová, Vice-president of the European Commission in her closing speech. She summed up the need to establish a European identity centred on those founding values, which unite us all.

The XXXth FIDE Congress was a visionary congress. It mapped the process of gradually creating a multi-faceted European identity – socio-political, economic, as well as legal. It was a witness of an emerging feeling of belonging to one and the same family of shared values, aspirations and objectives.

Alexander Arabadjiev
President of FIDE 2021–2023

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PRÉFACE DES ÉDITEURS

Les Européens partagent-ils une identité commune ? Si tel est le cas, en quoi consiste-t-elle ? L'absence d'un demos européen est-elle un obstacle à la création d'une identité européenne ? Comment l'identité européenne, si tant est qu'il y en ait une, s'articule-t-elle avec les identités nationales des États membres ?

Ces questions, qui dépassent clairement le débat purement juridique autour de l'identité constitutionnelle de l'Union européenne et de ses États membres et qui ont d'importantes répercussions politiques économiques et historiques, sous-tendent l'ensemble des différentes thématiques débattues lors du XXX^{ème} congrès de la FIDE, comme l'a souligné Alexander Arabadjiev, Président de la FIDE 2021-2023, dans son discours d'ouverture. C'est ce fil conducteur qui lie, de manière conceptuelle, les différentes discussions juridiques ayant eu lieu tout au long du congrès en un seul et même sujet : l'identité de l'Europe.

Les discussions plénières des séances d'ouverture et de clôture du congrès, reproduites dans ce volume, ont donné lieu à un certain nombre de discours et d'interventions avant-gardistes de décideurs politiques européens et nationaux de premier plan, de juges, d'économistes et de politologues.

Comme l'a souligné Guy Verhofstadt, membre du Parlement européen et coprésident de la conférence sur l'avenir de l'Europe, dans son discours d'ouverture, la guerre sévissant aux frontières de l'UE remet en question le concept d'identité européenne. Cette situation accentue la nécessité de définir le rôle de l'UE sur la scène mondiale ainsi que de préciser les réformes à mettre en œuvre afin de regagner la confiance des citoyens européens.

Cependant, les caractéristiques définissant traditionnellement une identité, à savoir une homogénéité linguistique, historique, ethnique, spirituelle (ou religieuse), font-elles réellement défaut au sein de l'UE ? La première discussion plénière, présidée par Alexander Kornezov, juge, président de la VIII^{ème} chambre du Tribunal de l'UE, a permis d'aborder cette question sous l'angle de la physionomie politique, économique et sociale de l'Union européenne. Cette discussion, à laquelle ont participé Takis Tridimas, professeur de droit européen au King's College de Londres ; Gabriel Glöcker, conseiller principal à la Banque centrale européenne, Daniel Gros, directeur du Center for European Policy Studies, et Ulla Neergaard, professeur de droit européen à l'université de Copenhague, a révélé que les caractéristiques traditionnelles d'une nation ne constituent pas nécessairement un obstacle à l'émergence d'une identité européenne. En effet, dans une perspective tournée vers l'avenir, nous devons réfléchir à la possibilité de construire une identité européenne basée sur le partage de valeurs communes. Les réponses apportées à la crise financière et à la pandémie de COVID-19 ont mis en évidence la nécessité d'une solidarité européenne. Le succès de l'euro a créé

un nouveau langage commun permettant d'exprimer une valeur matérielle. De ce fait, les jeunes Européens considèrent l'euro simplement comme leur monnaie, plutôt que comme un grand objectif ou une réalisation historique de l'intégration européenne. Il se pourrait donc que nous assistions déjà au début d'un processus visant à faire des Européens, des citoyens à part entière.

Le débat en séance plénière consacré à l'identité constitutionnelle de l'Union européenne ainsi que de celle de ses États membres a manifestement été l'un des temps forts du congrès. Ce débat fut présidé par Koen Lenaerts, président de la Cour de justice de l'UE. Pavlina Panova, Présidente de la Cour constitutionnelle bulgare, Stephen Harbarth, Président de la Cour constitutionnelle fédérale allemande, Varonique Malbec, juge au Conseil constitutionnel français ainsi que Elena-Simina Tănăsecu, juge au Conseil constitutionnel roumain ont contribué à la discussion. Koen Lenaerts a quant à lui souligné que la défense des valeurs sur lesquelles l'Union européenne est fondée consiste à protéger "l'identité même de l'UE en tant qu'ordre juridique commun". La question de savoir si les identités constitutionnelles nationales s'opposent à celle de l'Union a fait l'objet d'un débat vigoureux ainsi que d'un échange de points de vue animé. Koen Lenaerts a expliqué que si la CJUE respecte pleinement le rôle des cours constitutionnelles des États membres et les compétences attribuées à celles-ci, ces dernières doivent non seulement garantir le principe de l'indépendance judiciaire, mais également satisfaire à l'obligation de soumettre à la CJUE les questions relatives à l'interprétation ou à la validité du droit de l'UE. Le Président Lenaerts a souligné que l'identité nationale au sens de l'article 4, paragraphe 2 TUE doit être compatible avec les valeurs consacrées par l'article 2 TUE. Selon lui, l'identité nationale ne peut remettre en cause l'égalité des États membres, c'est-à-dire que toutes les dispositions du droit communautaire doivent avoir une signification similaire et être appliquées de manière uniforme dans l'ensemble de l'Union. A cet égard, la CJUE est la seule juridiction de l'ordre juridique de l'UE qui assure l'interprétation uniforme du droit de l'UE. Par conséquent, lorsqu'elle interprète le droit de l'UE, la CJUE tient compte des identités nationales. Ainsi, en vertu de l'article 4, paragraphe 2 TUE, la CJUE peut accorder une place à la diversité correspondant aux identités constitutionnelles nationales, tout en garantissant la primauté du droit de l'UE. En conséquence, Koen Lenaerts a souligné qu'un État membre ne peut pas unilatéralement s'appuyer sur son identité nationale pour contester la primauté du droit de l'UE. De même, il considère que la juridiction de l'UE a rejeté la théorie de l'*ultra-vires* qui, selon lui, suggère qu'une cour constitutionnelle peut remettre en cause et s'écarter de l'interprétation du droit de l'UE établie par la CJUE sans introduire un renvoi préjudiciel au titre de l'article 267 TFUE. Le Président Lenaerts a souligné que lorsqu'une Cour constitutionnelle nationale nourrit des doutes quant à la compatibilité de la législation de l'UE avec le concept d'identité nationale visé à l'article 4, paragraphe 2 TUE, elle est tenue de soumettre de telles questions à la CJUE.

Cette position fut contestée par plusieurs participants à la discussion, notamment par Stephen Harbarth, président de la Cour constitutionnelle fédérale allemande. Selon lui, la primauté du droit communautaire ne s'applique que dans la mesure où les dispositions constitutionnelles allemandes autorisent ou prévoient un transfert de pouvoirs souverains. Par conséquent, il incombe aux Cours constitutionnelles nationales de préserver les limites constitutionnelles nationales en procédant à un contrôle sur la base de leur identité constitutionnelle (contrôle sur la base de la doctrine *ultra vires*). Un tel contrôle *ultra-vires* consiste à examiner si l'acte national d'approbation respecte les limites imposées par les règles nationales régissant l'identité constitutionnelle, ainsi qu'à évaluer dans quelle mesure les actes spécifiques des institutions de l'UE sont couverts par l'acte d'approbation ou s'ils transgressent les limites fixées par le législateur national. Palvina Panova, Véronique Malbec ainsi que Elena-Simina Tănăsecu ont également évoqué un certain nombre de mécanismes ou d'exemples nationaux visant à protéger l'identité constitutionnelle d'un État membre.

Le débat s'est achevé dans une tonalité conciliante, Stephen Harbarth indiquant qu'en dépit des divergences de point de vues, les Cours constitutionnelles nationales et la CJUE œuvrent à la réalisation d'un objectif commun, à savoir la primauté de l'État de droit.

L'importance constitutionnelle des valeurs inscrites à l'article 2 TUE a également été évoquée dans le contexte de l'adhésion à l'Union européenne. Dans un discours empreint d'émotion, Serhiy Holovaty, président de la Cour constitutionnelle d'Ukraine, a présenté un récit de terrain sur le bilan dévastateur de la guerre dans son pays. Ce dernier a rappelé l'importance de rester vigilant et de sauvegarder activement les principes qui sous-tendent la démocratie, en particulier la nécessité de faire respecter l'État de droit.

En outre, la discussion plénière, présidée par Alexander Aabadjiev, juge et président de la première chambre de la CJUE et président de la FIDE, a mis en avant les efforts déployés par la Macédoine du Nord et l'Albanie afin d'aligner leurs systèmes juridiques nationaux respectifs sur les principes de l'identité constitutionnelle de l'UE, notamment l'État de droit, comme en témoignent les contributions de Marsida Xhaferllari, juge à la Cour constitutionnelle de la République d'Albanie, et de Darko Kostadinovski, juge à la Cour constitutionnelle de la République de Macédoine du Nord.

Les conclusions des rapporteurs généraux sur les trois principaux thèmes du XXX^{ème} congrès de la FIDE à savoir la confiance mutuelle, la reconnaissance mutuelle et l'État de droit ; la nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE ainsi que l'Union sociale européenne, ont également porté sur la question de l'identité de l'Union. Ainsi, Miguel Poiares Maduro, doyen de la Católica Global School of Law (Portugal) et professeur à STG, Institut universitaire européen, rapporteur général pour le premier thème, a souligné dans ses conclusions que la reconnaissance mutuelle repose sur l'identité constitutionnelle commune des États membres en ce qui concerne les valeurs inscrites à l'article 2 TUE. Cette disposition

ne peut être perçue comme une simple déclaration d'orientations politiques ou d'intentions mais renferme des valeurs inhérentes à l'identité même de l'Union en tant qu'ordre juridique commun, qui trouvent leur expression concrète dans des principes comportant des obligations juridiquement contraignantes pour les États membres.

La nécessité d'établir une identité "économique" européenne a été soulignée avec vigueur dans les remarques finales de Jean-François Bellis, associé fondateur, Van Bael & Bellis ; professeur invité, ULB et Isabelle Van Damme, associée, Van Bael & Bellis ; professeure invitée, Collège d'Europe, rapporteurs généraux pour le deuxième thème, qui ont démontré que l'Union est à l'aube d'une nouvelle ère en ce qui concerne ses politiques en matière de concurrence, de commerce et d'investissements étrangers directs.

L'Union sociale européenne est une composante du projet européen, comme l'a souligné dans ses conclusions Sophie Robin-Olivier, professeure de droit à la faculté de la Sorbonne, rapporteuse générale pour le troisième thème. Elle a rappelé que l'Union sociale européenne est cruciale pour la création d'une identité européenne qui trouverait un écho auprès des citoyens européens. On pourrait alors affirmer que la réalisation d'une "Europe sociale" est l'unique moyen viable de parvenir à une identité européenne.

Les congrès de la FIDE ne se déroulent toutefois pas dans des tours d'ivoire. C'est ce qu'a rappelé de manière poignante Ivan Krastev, président du Center for Liberal Strategies et membre permanent de l'Institut des sciences humaines de l'IWM de Vienne, dans son discours d'ouverture, en évoquant l'impact direct de la guerre actuelle en Ukraine et ses répercussions futures pour l'UE et le reste du monde. Ses propos ont été repris par Věra Jourová, vice-présidente de la Commission européenne, dans son discours de clôture. Elle a résumé la nécessité d'établir une identité européenne centrée sur les valeurs fondatrices qui nous unissent tous.

Le XXX^{ème} congrès de la FIDE fut un congrès visionnaire. Il a dessiné le processus de création progressive d'une identité européenne disposant de multiples facettes – sociopolitique, économique et juridique. Il a témoigné de l'émergence d'un sentiment d'appartenance à une seule et même famille de valeurs, d'aspirations et d'objectifs partagés.

Alexander Arabadjiev	**Professeur associé Alexander Kornezov**
Président de la FIDE 2021–2023	Principal coordinateur scientifique du FIDE 2021–2023
Juge, Président de la 1ère chambre, CJUE	Juge, Président de la 8ème Chambre, Tribunal de l'UE

VORWORT DER HERAUSGEBER

Haben die Europäer eine gemeinsame Identität? Falls ja, woraus besteht sie? Wenn nicht, ist das Fehlen eines europäischen Demos ein Hindernis für die Entwicklung einer europäischen Identität? Wie verhält sich die europäische Identität, wenn es sie denn gibt, zu den nationalen Identitäten der Mitgliedstaaten?

Diese Fragen, die sowohl deutlich hinausgehen über die rein juristische Debatte über die verfassungsmäßige Identität der Europäischen Union und ihrer Mitgliedstaaten als auch erhebliche politische, wirtschaftliche und historische Auswirkungen haben, unterfangen alle auf dem XXX. FIDE-Kongress diskutierten Themen, wie Alexander Arabadjiev, Präsident der FIDE 2021-2023, in seiner Eröffnungsrede betonte. Es ist dieser rote Faden, der die verschiedenen rechtlichen Diskussionen, die während des Kongresses geführt wurden, zielgerichtet zu einem übergreifenden Thema zusammenführt: Europas Identität.

Die Plenardiskussionen während der Eröffnungs- und Abschlusssitzungen des Kongresses, die im vorliegenden Band wiedergegeben sind, enthielten eine Reihe visionärer Grundsatzreden und Beiträge von führenden politischen Entscheidungsträgern auf den Ebenen der EU und der Mitgliedsstaaten, von Richtern, von Wirtschaftswissenschaftlern und von Politikwissenschaftlern.

Wie Guy Verhofstadt, Mitglied des Europäischen Parlaments und Co-Vorsitzender der Konferenz über die Zukunft Europas, in seiner Eröffnungsrede anmerkte, rückt der Krieg, der an den Grenzen der EU tobt, das Konzept der Identität der Union in den Fokus. Er unterstreicht die Notwendigkeit, die Rolle der Europäischen Union auf der Weltbühne zu bestimmen und jene Reformen in die Wege zu leiten, die erforderlich sind, um das Vertrauen der europäischen Bürger zurückzugewinnen.

Aber fehlen in der EU die traditionell identitätsbegründenden Merkmale – zu denen gemeinsame sprachliche, historische, ethnische und spirituelle (oder religiöse) Homogenität zählen? Die erste Plenardiskussion unter dem Vorsitz von Alexander Kornezov, Richter, Präsident der VIII. Kammer des Gerichts der Europäischen Union (EuG), befasste sich mit dieser Frage unter dem Blickwinkel der politischen, wirtschaftlichen und sozialen Physiognomie der Europäischen Union. Die Diskussion, zu der auch Takis Tridimas, Professor für Europarecht am King's College London, Gabriel Glöckler, Chefberater der Europäischen Zentralbank, Daniel Gros, Direktor des Centre for European Policy Studies, und Ulla Neergaard, Professorin für Europarecht an der Universität Kopenhagen, beigetragen haben, ergab, dass jene traditionellen Merkmale nationaler Identitäten nicht unbedingt ein Hindernis für das Herausbilden einer europäischen Identität darstellen. Vielmehr müssen wir mit Blick auf die Zukunft über die Möglichkeit nachdenken, eine europäische Identität zu schaffen, die auf gemeinsamen Werten fußt. Der Wert der europäischen Solidarität wurde in den Reaktionen auf die Finanzkrise und die COVID-19-Pandemie

unterstrichen. Der Erfolg des Euro hat eine neue gemeinsame „Sprache" geschaffen, in der wir materielle Werte ausdrücken. So sehen junge Europäer den Euro einfach als ihre Währung an, und nicht als ein großes Ziel oder eine historische Errungenschaft der europäischen Integration. Möglicherweise bezeugen wir also bereits den Beginn eines Prozesses der Europäer hervorbringt.

Die Plenardiskussion über die Verfassungsidentität der Europäischen Union und die ihrer Mitgliedstaaten war eindeutig einer der Höhepunkte des Kongresses. Den Vorsitz führte Koen Lenaerts, Präsident des Europäischen Gerichtshofs (EuGH). Beiträge zur Podiumsdiskussion kamen von Pavlina Panova, Präsidentin des bulgarischen Verfassungsgerichts, Stephan Harbarth, Präsident des deutschen Bundesverfassungsgerichts, Véronique Malbec, Richterin am französischen Verfassungsrat und Elena-Simina Tănăsecu, Richterin am rumänischen Verfassungsrat. Koen Lenaerts betonte seinerseits, dass die Verteidigung der Werte, auf die sich die Union gründet, gleichbedeutend ist mit dem Schutz der „Identität der EU als gemeinsame Rechtsordnung". Die Frage, ob die nationalen Verfassungsidentitäten mit jener der Union kollidieren, war Gegenstand einer lebhaften Debatte und eines offenen Meinungsaustauschs. Koen Lenaerts erklärte, dass der EuGH die Aufgaben und Kompetenzen der Verfassungsgerichte der Mitgliedstaaten vollumfänglich respektiere, diese aber nicht nur den Grundsatz der richterlichen Unabhängigkeit gewährleisten, sondern auch der Verpflichtung nachkommen müssen, Fragen zur Auslegung oder zur Gültigkeit des Unionsrechts dem EuGH vorzulegen. Er betonte, dass die nationalen Identitäten im Sinne von Artikel 4 Absatz 2 EUV mit den in Artikel 2 EUV verankerten Werten in Einklang stehen müssen. Seiner Ansicht nach können die nationalen Identitäten die Gleichheit der Mitgliedstaaten nicht in Frage stellen – was einschließt, dass alle Bestimmungen des EU-Rechts dieselbe Bedeutung haben müssen und in der gesamten Union auf dieselbe Weise anzuwenden sind. Diesbezüglich sei der EuGH das einzige Gericht innerhalb der Rechtsordnung der EU, das eine einheitliche Auslegung des Unionsrechts gewährleiste. Folglich berücksichtigt der EuGH bei der Auslegung des Unionsrechts die nationalen Identitäten. So kann der EuGH, selbst wenn er den Vorrang des Unionsrechts sicherstellt, gemäß Artikel 4 Absatz 2 EUV Raum für die Vielfalt der nationalen Verfassungsidentitäten lassen. Dementsprechend betonte Koen Lenaerts, dass sich ein Mitgliedstaat nicht einseitig auf seine nationale Identität berufen könne, um den Vorrang des Unionsrechts in Frage zu stellen. Auch die „Ultra-vires-Doktrin", die er dahin versteht, dass ein Verfassungsgericht die vom EuGH festgelegte Auslegung des Unionsrechts in Frage stellen und davon abweichen kann, ohne ein Vorabentscheidungsersuchen nach Artikel 267 AEUV vorzulegen, hat der EuGH seiner Ansicht nach zu Recht abgelehnt. Präsident Lenaerts betonte, dass ein nationales Verfassungsgericht, wenn es Zweifel an der Vereinbarkeit einer Bestimmung des Unionsrechts mit dem in Artikel 4 Absatz 2 EUV verankerten Konzept der nationalen Identität habe, verpflichtet sei, dem EuGH solche Fragen vorzulegen.

Diese Ansichten wurden von einigen Teilnehmern der Podiumsdiskussion hinterfragt, insbesondere von Stephan Harbarth, dem Präsidenten des deutschen Bundesverfassungsgerichts. Seiner Auffassung nach gilt der Vorrang des Unionsrechts nur insoweit, als die deutschen Verfassungsbestimmungen eine Übertragung von Hoheitsrechten zulassen oder vorsehen. Folglich obliegt es den nationalen Verfassungsgerichten, die innerstaatlichen verfassungsrechtlichen Grenzen zu wahren, die sich aus der Verfassungsidentität zwingend ergeben („Ultra-vires-Kontrolle"). Bei einer solchen Ultra-vires-Kontrolle wird sowohl untersucht, ob der nationale Zustimmungsakt jene Grenzen einhält, die sich aus den nationalen Vorschriften über die Verfassungsidentität ergeben, als auch, ob einzelne Akte der Unionsorgane durch den Zustimmungsakt gedeckt sind oder ob sie die vom nationalen Gesetzgeber gesetzten Grenzen überschreiten. Pavlina Panova, Véronique Malbec und Elena-Simina Tănăsecu erwähnten auch eine Reihe von nationalen Mechanismen und Beispielen, die auf den Schutz der Verfassungsidentität eines Mitgliedstaats abzielen.

Die Debatte endete mit einer versöhnlichen Note, da Stephan Harbarth hervorhob, dass die nationalen Verfassungsgerichte und der EuGH trotz dieser Meinungsverschiedenheit auf ein gemeinsame Ziel, die Rechtsstaatlichkeit zu gewährleisten, hinarbeiten.

Die verfassungsrechtliche Bedeutung der Werte, die in Artikel 2 EUV verankert sind, bilden auch den Kontext für einen Beitritt zur Europäischen Union. In einer emotionsgeladenen Rede berichtete aus erster Hand Serhiy Holovaty, Oberster Richter des Verfassungsgerichts der Ukraine, über die verheerenden Folgen des Krieges der in seinem Land tobt. Er erinnerte uns daran, dass wir wachsam bleiben und die Grundsätze, auf denen die Demokratie fußt, aktiv verteidigen müssen und insbesondere, dass es entscheidend ist die Rechtsstaatlichkeit zu gewährleisten.

Darüber hinaus erörterte das Plenum unter dem Vorsitz von Alexander Arabadjiev, Richter und Präsident der Ersten Kammer des EuGH und Präsident der FIDE, die Bemühungen Nordmazedoniens und Albaniens, ihre jeweiligen nationalen Rechtssysteme an die Grundsätze der Verfassungsidentität der Union anzupassen, insbesondere die Rechtsstaatlichkeit, wie die Beiträge von Marsida Xhaferllari, Richterin am Verfassungsgericht der Republik Albanien, und Darko Kostadinovski, Richter am Verfassungsgericht der Republik Nordmazedonien, bezeugten.

Die Schlussfolgerungen der Generalberichterstatter zu den drei Hauptthemen des XXX. FIDE-Kongresses – gegenseitiges Vertrauen, gegenseitige Anerkennung und Rechtsstaatlichkeit, die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik sowie die Europäische Sozialunion – konzentrierten sich ebenfalls auf die Frage der Identität der Union. So stellte Miguel Poiares Maduro, Dekan der Católica Global School of Law, Portugal, Professor am Europäischen Hochschulinstitut und Hauptberichterstatter für das erste Thema, in seinen abschließenden Ausführungen fest, dass die gemeinsame Verfassungsidentität der Mitgliedstaaten, geprägt von den in Artikel 2 EUV verankerten Werten, die Grundlage der gegenseitigen Anerkennung

ist. Diese Bestimmung könne nicht lediglich als Erklärung politischer Leitlinien oder Absichten aufgefasst werden, sondern enthalte Werte, die Teil der Identität der Union als gemeinsame Rechtsordnung sind und die ihren konkreten Ausdruck in Grundsätzen finden, die rechtsverbindliche Verpflichtungen für die Mitgliedstaaten enthalten.

Die Notwendigkeit, eine „wirtschaftliche Identität" der EU zu schaffen, wurde eindrücklich dargelegt in den abschließenden Ausführungen von Jean-François Bellis, Gründungspartner, Van Bael & Bellis, und Gastprofessor an der Freien Universität Brüssel, und von Isabelle Van Damme, Partner, Van Bael & Bellis, und Gastprofessorin am Europakolleg, Brügge, den Hauptberichterstattern für das zweite Thema, die aufzeigten, dass die Union an der Schwelle zu einer neuen Ära ihrer Politik in den Bereichen Wettbewerb, Handel und ausländische Direktinvestitionen steht.

Die Europäische Sozialunion ist Teil des Gefüges des europäischen Projekts, wie Sophie Robin-Olivier, Professorin für Rechtswissenschaften an der Universität Sorbonne und Hauptberichterstatterin für das dritte Thema, in ihren abschließenden Ausführungen betonte. Sie erinnerte daran, dass die Europäische Sozialunion von entscheidender Bedeutung für die Schaffung einer europäischen Identität sei, die bei den europäischen Bürgern Anklang finden könne. So lasse sich vertreten, dass die Verwirklichung eines „sozialen Europas" der einzige gangbare Weg zur Verwirklichung einer Europäischen Union ist.

Bei alledem finden FIDE-Kongresse nicht in Elfenbeintürmen statt. Daran erinnerte prägnant Ivan Krastev, Vorsitzender des Center for Liberal Strategies und Permanent Fellow am Institut für die Wissenschaften vom Menschen, IWM Wien, in seiner Grundsatzrede, in der er auf die unmittelbaren Auswirkungen des andauernden Krieges in der Ukraine und seine künftigen Folgen für die EU und die weitere Welt einging. Seine Worte wurden von Věra Jourová, Vizepräsidentin der Europäischen Kommission, in ihrer Abschlussrede aufgegriffen. Sie betonte die Notwendigkeit, eine europäische Identität zu schaffen, die sich auf die Grundwerte stützt, die uns alle vereinen.

Der XXX. FIDE-Kongress war ein visionärer Kongress. Er zeichnete den Prozess der allmählichen Entwicklung einer vielschichtigen europäischen Identität nach – sowohl in sozio-politischer und wirtschaftlicher, als auch in rechtlicher Hinsicht. Er bezeugte eine aufkommendes Gefühl der Zugehörigkeit zu ein und derselben Familie gemeinsamer Werte, Bestrebungen und Ziele.

Alexander Arabadjiev	**Assoc. Prof. Dr. Alexander Kornezov**
Präsident der FIDE 2021-2023	Wissenschaftlicher Hauptkoordinator der FIDE 2021-2023
Richter, Präsident der Ersten Kammer, EuGH	Richter, Präsident der Achten Kammer, EuG

CONGRESS PROGRAMME

Сряда, 31 май 2023 г.

10:00	18:00	**Семинар за млади научни изследователи в областта на правото на Европейския съюз (Young FIDE Seminar)** *Място на провеждане: Софийски университет „Св. Климент Охридски"* Пълната програма на семинара е достъпна на https://www. fide-europe.org/congresses/next-congress/
12:00	18:00	**Регистрация на участниците в конгреса** *(*ранна регистрация)* *Място: Национален дворец на културата (НДК)*
12:30	14:00	**Посрещане на членовете на управляващия комитет на FIDE** *(*само за представителите на националните асоциации, членове на FIDE)* *Място: НДК*
14:00	16:00	**Заседание на управляващия комитет на FIDE** *(*само за представители на националните асоциации, членове на FIDE)* *Място: НДК*
20:00	22:00	**Прием – посрещане на участниците на конгреса** *Място: Национален исторически музей / Осигурен транспорт от НДК в **19:30 ч.*** *Приветствие от **доц. д-р Бони Петрунова**, директор на Националния исторически музей*

Четвъртък, 1 юни 2023 г.

8:30	9:30	**Пристигане на участниците, регистрация, кафе/чай** *Място: НДК, зала 3, етаж 7*
9:30	10:15	**Церемония по откриване** Приветствени речи: ***Александър Арабаджиев,** председател на FIDE 2021—2023,* *председател на Първи състав на Съда на Европейския съюз* ***Румен Радев,** президент на Република България* ***Koen Lenaerts,** председател на Съда на Европейския съюз* ***Marc van der Woude,** председател на Общия съд на Европейския съюз*
10:15	11:00	**Пленарни речи:** ***Serhiy Holovaty,** председател на Конституционния съд на Украйна* ***Guy Verhofstadt,** депутат в Европейския парламент, съпредседател на Конференцията за бъдещето на Европа*
11:00	11:30	Кафе и чай пауза
11:30	12:45	**Пленарна дискусия:** **Политическата, икономическата и социалната идентичност на Европейския съюз** ***Takis Tridimas,** професор по Европейско право, King's College London* ***Gabriel Glöckler,** Главен съветник в Европейската централна банка* ***Daniel Gros,** директор на Центъра за Европейски политически изследвания (CEPS)* ***Ulla Neergaard,** професор по Европейско право в Университета в Копенхаген* *Модератор: **Александър Корнезов,** съдия, председател на Осми състав в Общия съд на Европейския съюз*
12:45	14:00	Обяд
14:00	15:30	**Паралелни работни групи — Първа сесия (I)**

Тема 1: Взаимно доверие, взаимно признаване и върховенство на закона	Тема 2: Новото геополитическо измерение на политиката на ЕС в областта на конкуренцията и търговията	Тема 3: Европейски социален съюз
Панел: Взаимно доверие, върховенство на закона, конституционна идентичност на ЕС и на държавите членки: нормативни основи	**Панел: Подходът на Европейския съюз в търсене на стратегическа независимост: размиване на границите между вътрешен пазар, конкуренция, индустриални и търговски политики**	**Панел: Продължаващата дискриминация на мигриращите работници: анализ и перспективи**
Модератор: **Paul Craig,** професор по английско право в Университета в Оксфорд **Miguel Poiares Maduro,** декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия **Clemens Ladenburger,** заместник генерален директор на Правната служба на Европейската комисия **Jonathan Tomkin,** Правна служба, Европейска комисия **Йона Маринова,** Правна служба, Европейска комисия	*Модератор:* **Laurence Gormley,** професор в Колежа на Европа и в Университета в Гронинген **Jean-François Bellis,** съдружник във Van Bael & Bellis, преподавател в Брюкселския свободен университет **Isabelle Van Damme,** съдружник във Van Bael & Bellis, преподавател в Колежа на Европа **Ben Smulders,** заместник генерален директор на ГД „Конкуренция" на Европейската комисия	*Модератор:* **András Tamás,** началник на отдел в Правната служба на Европейския парламент **Sophie Robin-Olivier,** професор по право в Сорбоната, Париж **Sacha Garben,** преподавател по право на ЕС в Колежа на Европа в Брюж
15:30 **16:00** Кафе/чай пауза		
16:00 **17:30** **Паралелни работни групи — Втора сесия (II)**		
Тема 1: Взаимно доверие, взаимно признаване и върховенство на закона	**Тема 2:** Новото геополитическо измерение на политиката на ЕС в областта на конкуренцията и търговията	**Тема 3:** Европейски социален съюз
Панел: Инструменти и механизми за защита на принципите за върховенството на закона в държавите членки	**Панел: От „невидимата ръка" към откритата индустриална политика: контрол върху концентрациите, държавни помощи и регулация на чуждестранните субсидии**	**Панел: Демографски предизвикателства и „изтичане на мозъци" като резултат от свободното движение**
Модератор: **Carsten Zatschler,** SC, адвокатска колегия на Ирландия **Miguel Poiares Maduro,** декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия **Clemens Ladenburger,** заместник генерален директор на Правната служба на Европейската комисия **Йона Маринова,** Правна служба, Европейска комисия	*Модератор:* **Kate McKenna,** съдружник в Matheson LLP, Дъблин **Jean-François Bellis,** съдружник във Van Bael & Bellis, преподавател в Брюкселския свободен университет **Isabelle Van Damme,** съдружник във Van Bael & Bellis, преподавател в Колежа на Европа **Ben Smulders,** заместник генерален директор на ГД „Конкуренция" на Европейската комисия	*Модератор:* **Damjan Kukovec,** съдия в Общия съд на Европейския съюз **Sophie Robin-Olivier,** професор по право в Сорбоната, Париж **Sacha Garben,** преподавател по право на ЕС в Колежа на Европа в Брюж
20:00 **22:30** **Коктейл на младите европейски юристи** *Място: Съдебна палата* *Приветствено слово от* ***Maciej Szpunar,*** *първи генерален адвокат в Съда на Европейския съюз*		

Петък, 2 юни 2023 г.

8:30	**9:30**	**Пристигане на участниците – кафе/чай** *Място: НДК*
9:30	**11:00**	**Паралелни работни групи — Трета сесия (III)**

Тема 1: Взаимно доверие, взаимно признаване и върховенство на закона	Тема 2: Новото геополитическо измерение на политиката на ЕС в областта на конкуренцията и търговията	Тема 3: Европейски социален съюз
Панел: Върховенството на закона на ниво ЕС и по отношение на институциите на ЕС	**Панел: Споразуменията за устойчивост и член 101 ДФЕС: изместване на фокуса отвъд пазара, оценка за пазарна ефективност и увеличаване на потребителската база**	**Панел: Експлоатацията на командировани работници: следва ли да се предвидят нови ограничения за командироването на работници в рамките на свободното предоставяне на услуги в името на Европейския социален съюз?**
Модератор: **Richard Crowe,** началник на отдел, Правна служба на Европейския парламент	*Модератор:* **Mario Siragusa,** SC, Cleary Gottlieb, преподавател в Колежа на Европа в Брюж	*Модератор:* **Luca Visaggio,** директор на Правната служба в Европейския парламент
Miguel Poiares Maduro, декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия **Clemens Ladenburger,** заместник генерален директор на Правната служба на Европейската комисия **Jonathan Tomkin**, Правна служба, Европейска комисия	**Jean-François Bellis,** съдружник във Van Bael & Bellis, преподавател в Брюкселския свободен университет **Ben Smulders,** заместник генерален директор на ГД „Конкуренция" на Европейската комисия	**Sophie Robin-Olivier,** професор по право в Сорбоната, Париж **Sacha Garben,** преподавател по право на ЕС в Колежа на Европа в Брюж
11:00	**11:30**	Кафе/чай пауза
11:30	**13:00**	**Паралелни работни групи — Четвърта сесия (IV)**

Тема 1: Взаимно доверие, взаимно признаване и върховенство на закона	Тема 2: Новото геополитическо измерение на политиката на ЕС в областта на конкуренцията и търговията	Тема 3: Европейски социален съюз
Панел: Представлява ли предимството на правото на Съюза съставна част от принципа за върховенство на закона	**Панел: Създаването на "Европейски шампиони" и правото за защита на конкуренцията**	**Панел: Европейският стълб на социалните права и възраждането на социалното законотворчество в ЕС: анализ на актуалното състояние – твърде фрагментирано или твърде повърхностно?**
Модератор: **Allan Rosas,** преподавател в Колежа на Европа в Брюж, бивш съдия в Съда на Европейския съюз **Miguel Poiares Maduro,** декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия **Clemens Ladenburger,** заместник генерален директор на Правната служба на Европейската комисия **Йона Маринова**, Правна служба, Европейска комисия	*Модератор:* **Savvas Papasavvas,** заместник председател на Общия съд на Европейския съюз **Jean-François Bellis,** съдружник във Van Bael & Bellis; преподавател в Брюкселския свободен университет **Ben Smulders,** заместник генерален директор на ГД „Конкуренция" на Европейската комисия	*Модератор:* **Eugenia Dumitriu-Segnana,** директор, Правна служба на Съвета на ЕС **Sophie Robin-Olivier,** професор по право в Сорбоната, Париж **Sacha Garben,** преподавател по право на ЕС в Колежа на Европа в Брюж
13:00	**14:15**	Обяд
14:15	**15:45**	**Паралелни работни групи — Пета сесия (V)**

Тема 1: Взаимно доверие, взаимно признаване и върховенство на закона	Тема 2: Новото геополитическо измерение на политиката на ЕС в областта на конкуренцията и търговията	Тема 3: Европейски социален съюз
Панел: Принципът на взаимно доверие и ценностните граници в областта на пространството на свобода, сигурност и правосъдие и отвъд тази област	**Панел: Геополитиката в регулирането на веригите за доставки и устойчивостта на предприятията**	**Панел: „Социализацията" на европейския семестър: какво означава това за националните социални политики и политиките на ниво ЕС?**
Модератор: **Corinna Wissels,** държавен съветник към административния отдел на Държавния съвет на Нидерландия	*Модератор:* **Екатерина Русева,** Правна служба, Европейска комисия	*Модератор:* **Catherine Jacqueson,** професор по право на ЕС в университета в Копенхаген
Miguel Poiares Maduro, декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия **Clemens Ladenburger,** заместник генерален директор на Правната служба на Европейската комисия **Jonathan Tomkin,** Правна служба, Европейска комисия	**Isabelle Van Damme,** съдружник във Van Bael & Bellis, преподавател в Колежа на Европа **Ben Smulders,** заместник генерален директор на ГД „Конкуренция" на Европейската комисия	**Sophie Robin-Olivier,** професор по право в Сорбоната, Париж **Sacha Garben,** преподавател по право на ЕС в Колежа на Европа в Брюж

15:45	16:15	Кафе/чай пауза
16:15	17:45	**Паралелни работни групи — Шеста сесия (VI)**

Тема 1: Взаимно доверие, взаимно признаване и върховенство на закона	Тема 2: Новото геополитическо измерение на политиката на ЕС в областта на конкуренцията и търговията	Тема 3: Европейски социален съюз
Панел: Взаимодействието в правото на Съюза на принципите на върховенството на закона, демокрацията и защитата на основните права	**Панел: Бъдещето на механизма на ЕС за скрининг на чуждестранните инвестиции : в търсене на баланса между компетентностите на Съюза и на държавите членки**	**Панел: Сериозен поглед върху понятието за „справедлив преход": каква е необходимата промяна на Европейската социална политика?**
Модератор: **Panagiotis Perakis,** председател на Съвета на Европейските адвокатски колегии (CCBE)	*Модератор:* **Frank Hoffmeister,** директор Общи въпроси и Главен правен експерт в Европейската служба за външна дейност	*Модератор:* **Sacha Prechal,** съдия, председател на втори състав в Съда на Европейския съюз
Miguel Poiares Maduro, декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия **Clemens Ladenburger,** заместник генерален директор, Правна служба, Европейска комисия **Йона Маринова,** Правна служба, Европейска комисия	**Isabelle Van Damme,** съдружник във Van Bael & Bellis, преподавател в Колежа на Европа **Ben Smulders,** заместник генерален директор на ГД „Конкуренция" на Европейската комисия	**Sophie Robin-Olivier,** професор по право в Сорбоната, Париж **Sacha Garben,** преподавател по право на ЕС в Колежа на Европа в Брюж

20:00	23:00	**Гала вечеря** *Място: НДК, зала 3* *Приветствени слова от министъра на правосъдието на Република България и от председателя на Върховния касационен съд на Република България*

Събота, 3 юни 2023 г.

8:30	9:00	**Пристигане на участниците – кафе/чай** *Място: НДК*
9:00	9:45	**Представяне на заключенията на работните групи от генералните докладчици** *Модератор:* ***Daniel Sarmiento,*** *преподавател по административно и право на ЕС в университета Complutense в Мадрид* ***Miguel Poiares Maduro,*** *декан на Юридическия факултет на Португалския католически университет и преподавател в Европейския институт в Италия* **Jean-François Bellis,** съдружник във Van Bael & Bellis, преподавател в Брюкселския свободен университет **Isabelle Van Damme,** съдружник във Van Bael & Bellis, преподавател в Колежа на Европа **Sophie Robin-Olivier,** преподавател по право в Сорбоната в Париж
9:45	11:15	**Пленарна дискусия:** **Конституционната идентичност на държавите членки и на Европейския съюз** ***Koen Lenaerts,*** *председател на Съда на Европейския съюз* ***Павлина Панова,*** *председател на Конституционния съд на България* ***Stephan Harbarth,*** *председател на Германския федерален конституционен съд* ***Véronique Malbec,*** *съдия във Френския конституционен съвет* ***Elena-Simina Tănăsescu,*** *съдия в Румънския конституционен съвет*
11:15	11:35	**Пленарна дискусия:** **Върховенството на закона и разширяването на Европейския съюз** ***Marsida Xhaferllari,*** *съдия в Конституционния съд на Република Албания* ***Darko Kostadinovski,*** *съдия в Конституционния съд на Република Северна Македония* *Модератор:* ***Александър Арабаджиев,*** *съдия, председател на Първи състав, Съд на ЕС*
11:35	12:00	Кафе/чай пауза
12:00	12:30	**Пленарни речи: Отношенията на ЕС със света в контекста на войната на Русия в Украйна** ***Иван Кръстев,*** *председател на Центъра за либерални стратегии и изследовател в Института по хуманитарни науки, IWM Виена*
12:30	12:50	**Заключителна реч:** ***Věra Jourová,*** *заместник председател на Европейската комисия*
12:50	13:10	**Представяне на XXXI FIDE конгрес в Полша и заключителни слова** ***Maciej Szpunar,*** *председател на FIDE 2023—2025, първи генерален адвокат в Съда на Европейския съюз* ***Ewa Jarosz,*** *заместник ректор на Университета в Силезия в Катовице* ***Jerzy Woźniak,*** *заместник кмет на град Катовице* ***Александър Арабаджиев,*** *председател на FIDE 2021—2023, председател на Първи състав, Съд на ЕС*

** Работните езици на конгреса са английски, немски и френски език. Осигурен е симултантен превод на тези езици, както и на български език.*

Wednesday 31 May 2023

10:00	18:00	**Young FIDE Seminar** *Venue: Sofia University "St. Kliment Ohridski"* See the full programme on https://www.fide-europe.org/congresses/next-congress/
12:00	18:00	**Registration of Participants in Congress Venue** *(*optional early registration)* *Venue: National Palace of Culture*
12:30	14:00	**Welcome Coffee/Tea and Lunch for the Steering Committee** *(*only for the representatives of the member associations of FIDE)* *Venue: National Palace of Culture, Hall 3.2, floor 8*
14:00	16:00	**Meeting of the FIDE Steering Committee** *(*only for the representatives of the member associations of FIDE)* *Venue: National Palace of Culture, Hall 10, floor 8*
20:00	22:00	**Welcome Reception** *Venue: National Museum of History / Pick-up time* ***19:30*** *at the National Palace of Culture* *Welcome speech by* ***Assoc. Prof. Dr. Bonni Petrunova,*** *Director of the National Museum of History*

Thursday 1 June 2023

8:30	9:30	**Arrival of participants, registration and welcome coffee** *Venue: National Palace of Culture, Hall 3, floor 7*
9:30	10:15	**Opening Ceremony** Welcome addresses ***Alexander Arabadjiev,*** *President of FIDE 2021-2023, President of the 1st Chamber of the Court of Justice of the EU* ***Rumen Radev,*** *President of the Republic of Bulgaria* ***Koen Lenaerts,*** *President of the Court of Justice of the EU* ***Marc van der Woude,*** *President of the General Court of the EU*
10:15	11:00	**Keynote speeches** ***Serhiy Holovaty,*** *Chief Justice of the Constitutional Court of Ukraine* ***Guy Verhofstadt,*** *Member of the European Parliament, Co-Chair of the Conference on the Future of Europe*
11:00	11:30	Coffee and Tea break
11:30	12:45	**Plenary panel discussion:** **The Political, Economic and Social Physiognomy of the European Union** ***Takis Tridimas,*** *Professor of European Law, King's College London* ***Gabriel Glöckler,*** *Principal Adviser at the European Central Bank* ***Daniel Gros,*** *Director of the Centre for European Policy Studies* ***Ulla Neergaard,*** *Professor of EU Law, University of Copenhagen* *Moderator:* ***Alexander Kornezov,*** *Judge, President of the 8th Chamber of the General Court of the EU*
12:45	14:00	Lunch
14:00	15:30	**Parallel Working Groups – Session (I)**

Topic 1: Mutual Trust, Mutual Recognition and the Rule of Law	Topic 2: The new geopolitical dimension of the EU competition and trade policies	Topic 3: European Social Union
Panel: Mutual Trust, Rule of Law, Constitutional Identities of the EU and of its Member States: normative foundations	**Panel: The design of the European Union's search for strategic autonomy: blurring the lines between its internal market, competition, industrial and trade policies and laws**	**Panel: Enduring discrimination against mobile workers: assessment and perspectives**
Moderator: **Paul Craig,** Emeritus Professor of English law, University of Oxford	*Moderator:* **Laurence Gormley,** Professor, College of Europe, University of Gronningen	*Moderator:* **András Tamás,** Head of Unit, Legal Service, European Parliament
Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor STG European University Institute **Clemens Ladenburger,** Deputy Director General, Legal Service, European Commission **Jonathan Tomkin,** Legal Service, European Commission **Yona Marinova,** Legal Service, European Commission	**Jean-François Bellis,** Founding Partner, Van Bael & Bellis; Visiting Prof., ULB **Isabelle Van Damme,** Partner, Van Bael & Bellis; Visiting Prof., College of Europe **Ben Smulders,** Deputy Director General of DG for Competition, European Commission	**Sophie Robin-Olivier,** Professor of Law at the Sorbonne School of Law **Sacha Garben,** Professor of EU Law, College of Europe, Bruges

15:30	**16:00**	Coffee and Tea Break
16:00	**17:30**	**Parallel Working Groups – Session (II)**

Topic 1: Mutual Trust, Mutual Recognition and the Rule of Law	Topic 2: The new geopolitical dimension of the EU competition and trade policies	Topic 3: European Social Union
Panel: Instruments and Mechanisms for Protecting the Rule of Law in the Member States. Litigating Rule of Law in national courts	**Panel: From 'invisible hand' to overt industrial policy: EU merger control, State aid, and regulating foreign subsidies**	**Panel: Demographic Challenges and Brain Drain as a Result of Free Movement**
Moderator: **Carsten Zatschler,** SC, The Bar of Ireland	*Moderator:* **Kate McKenna,** Partner at Matheson LLP, Dublin	*Moderator:* **Damjan Kukovec,** Judge at the General Court of the EU
Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor STG European University Institute **Clemens Ladenburger,** Deputy Director General, Legal Service, European Commission **Yona Marinova,** Legal Service, European Commission	**Jean-François Bellis,** Founding Partner, Van Bael & Bellis; Visiting Prof., ULB **Isabelle Van Damme,** Partner, Van Bael & Bellis; Visiting Prof., College of Europe **Ben Smulders,** Deputy Director General of DG for Competition, European Commission	**Sophie Robin-Olivier,** Professor of Law at the Sorbonne School of Law **Sacha Garben,** Professor of EU Law, College of Europe, Bruges

20:00	**22:30**	**Young European lawyers event** *Venue: Court House (Palace of Justice)* *Opening speech by* ***Maciej Szpunar,*** *First Advocate General at the Court of Justice of the EU*

Friday 2 June 2023

8:30	**9:30**	**Welcome Coffee and Tea** *Venue: National palace of Culture*

9:30 11:00 Parallel Working Groups – Session (III)

Topic 1: Mutual Trust, Mutual Recognition and the Rule of Law	Topic 2: The new geopolitical dimension of the EU competition and trade policies	Topic 3: European Social Union
Panel: The Rule of Law at the EU level and with regard to EU institutions	**Panel: Sustainability agreements and Article 101 TFEU: Thinking outside the market, quantifying efficiency gains, and including more consumers**	**Panel: Exploitation of posted workers: should there be new restrictions to posting of workers within the framework of free provision of services in the name of European social Union?**
Moderator: **Richard Crowe,** Head of Unit, Legal Service, European Parliament	*Moderator:* **Mario Siragusa,** Senior Counsel, Cleary Gottlieb, Professor, College of Europe	*Moderator:* **Luca Visaggio,** Director of the Legal Service, European Parliament
Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor STG European University Institute **Clemens Ladenburger,** Deputy Director General, Legal Service, European Commission **Jonathan Tomkin,** Legal Service, European Commission	**Jean-François Bellis,** Founding Partner, Van Bael & Bellis; Visiting Prof., ULB **Ben Smulders,** Deputy Director General of DG for Competition, European Commission	**Sophie Robin-Olivier,** Professor of Law at the Sorbonne School of Law **Sacha Garben,** Professor of EU Law, College of Europe, Bruges

11:00 11:30 Coffee and Tea break

11:30 13:00 Parallel Working Groups – Session (IV)

**As every year sirens will sound across Bulgaria for two minutes at noon on June 2nd, 2023 in honour of the memory of the Bulgarian national hero and poet Hristo Botev, who died in 1876 in the struggle against Ottoman rule, as well as in tribute to all who died for the freedom of Bulgaria. Traditionally, when the sirens sound, all pedestrians and vehicles should stop for two minutes and stand still. Participants in the FIDE Congress are kindly requested to respect this tradition.*

Topic 1: Mutual Trust, Mutual Recognition and the Rule of Law	Topic 2: The new geopolitical dimension of the EU competition and trade policies	Topic 3: European Social Union
Panel: Is Primacy of EU Law a Rule of Law Requirement?	**Panel: Building European Champions through competition law**	**Panel: The European Pillar of Social Rights and the renaissance of EU social law-making: analysis of the state of play - too fragmented or too broad?**
Moderator: **Allan Rosas,** Professor, College of Europe, Former Judge at the Cour of Justice of the EU	*Moderator:* **Savvas Papasavvas,** Vice-President of the General Court of the EU	*Moderator:* **Eugenia Dumitriu-Segnana,** Director, Legal Service, Council of the EU
Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor STG European University Institute **Clemens Ladenburger,** Deputy Director General, Legal Service, European Commission **Yona Marinova,** Legal Service, European Commission	**Jean-François Bellis,** Founding Partner, Van Bael & Bellis; Visiting Prof., ULB **Ben Smulders,** Deputy Director General of DG for Competition, European Commission	**Sophie Robin-Olivier,** Professor of Law at the Sorbonne School of Law **Sacha Garben,** Professor of EU Law, College of Europe, Bruges

13:00	**14:15**	Lunch
14:15	**15:45**	**Parallel Working Groups – Session (V)**

Topic 1: Mutual Trust, Mutual Recognition and the Rule of Law	Topic 2: The new geopolitical dimension of the EU competition and trade policies	Topic 3: European Social Union
Panel: The principle of Mutual Trust and its values-related limits in the Area of Freedom, Security and Justice and beyond	**Panel: The geopolitics of regulating supply chains and corporate sustainability**	**Panel: The "socialization" of the European semester: what does it mean for national and EU social policies?**
Moderator: **Corinna Wissels,** State Councillor at the Administrative Jurisdiction division of the Council of State of the Netherlands	*Moderator:* **Ekaterina Rousseva,** Legal Service, European Commission	*Moderator:* **Catherine Jacqueson,** Professor in EU law, University of Copenhagen
Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor STG European University Institute **Clemens Ladenburger,** Deputy Director General, Legal Service, European Commission **Jonathan Tomkin,** Legal Service, European Commission	**Isabelle Van Damme,** Partner, Van Bael & Bellis; Visiting Prof., College of Europe **Ben Smulders,** Deputy Director General of DG for Competition, European Commission	**Sophie Robin-Olivier,** Professor of Law at the Sorbonne School of Law **Sacha Garben,** Professor of EU Law, College of Europe, Bruges

15:45	**16:15**	Coffee and Tea break
16:15	**17:45**	**Parallel Working Groups – Session (VI)**

Topic 1: Mutual Trust, Mutual Recognition and the Rule of Law	Topic 2: The new geopolitical dimension of the EU competition and trade policies	Topic 3: European Social Union
Panel: The interaction between the Rule of Law, Democracy and Fundamental Rights in EU law	**Panel: The future of FDI control: balancing EU and Member States' competences**	**Panel: Taking the notion of "fair transition" seriously: what transformation of EU social policy is needed?**
Moderator: **Panagiotis Perakis,** President of the CCBE	*Moderator:* **Frank Hoffmeister,** Director for General Affairs and Chief Legal Officer of the European External Action Service	*Moderator:* **Sacha Prechal,** Judge, President of the Second Chamber, Court of Justice of the EU
Miguel Poiares Maduro, Dean, Católica Global School of Law, Portugal and Professor STG European University Institute **Clemens Ladenburger,** Deputy Director General, Legal Service, European Commission **Yona Marinova,** Legal Service, European Commission	**Isabelle Van Damme,** Partner, Van Bael & Bellis; Visiting Prof., College of Europe **Ben Smulders,** Deputy Director General of DG for Competition, European Commission	**Sophie Robin-Olivier,** Professor of Law at the Sorbonne School of Law **Sacha Garben,** Professor of EU Law, College of Europe, Bruges

20:00	**23:00**	**Gala Dinner** *Venue: National Palace of Culture, Hall 3* *Welcome speeches by the Minister of Justice and the President of the Supreme Court of Cassation of the Republic of Bulgaria*

Saturday 3 June 2023

8:30	9:00	**Welcome Coffee and Tea** *Venue: National Palace of Culture*
9:00	9:45	**Reports on the Working Group Sessions by the General Rapporteurs** *Moderator:* ***Daniel Sarmiento,*** *Professor of Administrative and EU Law, Complutense University of Madrid* ***Miguel Poiares Maduro,*** *Dean, Católica Global School of Law, Portugal and Professor STG European University Institute* ***Jean-François Bellis,*** *Founding Partner, Van Bael & Bellis; Visiting Prof., ULB* ***Isabelle Van Damme,*** *Partner, Van Bael & Bellis; Visiting Prof., College of Europe* ***Sophie Robin-Olivier,*** *Professor of Law at the Sorbonne School of Law*
9:45	11:15	**Plenary Panel Discussion:** **The Constitutional Identity of the Member States and of the European Union** ***Koen Lenaerts,*** *President of the Court of Justice of the EU* ***Pavlina Panova,*** *President of the Bulgarian Constitutional Court* ***Stephan Harbarth,*** *President of the German Federal Constitutional Court* ***Véronique Malbec,*** *Judge at the French Constitutional Council* ***Elena-Simina Tănăsescu,*** *Judge at the Romanian Constitutional Council*
11:15	11:35	**Plenary Panel Discussion:** **The Rule of Law and the Enlargement of the European Union** ***Marsida Xhaferllari,*** *Judge at the Constitutional Court of the Republic of Albania* ***Darko Kostadinovski,*** *Judge at the Constituional Court of the Republic of North Macedonia* *Moderator:* ***Alexander Arabadjiev,*** *Judge, President of the 1st Chamber of the Court of Justice of the EU*
11:35	12:00	Coffee and Tea break
12:00	12:30	**Keynote speech: The EU relations with the World in the context of Russia's War in Ukraine** ***Ivan Krastev,*** *Chairman, Centre for Liberal Strategies and Permanent Fellow, Institute for Human Sciences, IWM Vienna*
12:30	12:50	**Closing address** ***Věra Jourová,*** *Vice-president of the European Commission*
12:50	13:10	**Presentation of the XXXI FIDE Congress in Poland and final acknowledgements** ***Maciej Szpunar,*** *President of FIDE 2023-2025, First Advocate General at the Court of Justice of the EU* ***Ewa Jarosz,*** *Vice Rector of the University of Silesia in Katowice* ***Jerzy Woźniak,*** *Deputy Mayor of the City of Katowice* ***Alexander Arabadjiev,*** *President of FIDE 2021-2023, President of the 1st Chamber of the Court of Jurstice of the EU*

* *The working languages of the congress are English, German and French. There will be simultaneous interpretation in these languages, as well as in Bulgarian.*

Mercredi 31 mai 2023

10:00	18:00	**Séminaire Jeunes FIDE** *Lieu : Université de Sofia "St. Kliment Ohridski"* Consultez le programme complet sur https://www.fide-europe.org/congresses/next-congress/
12:00	18:00	**Inscription des participants sur le lieu du congrès** *(*inscription anticipée facultative)* *Lieu : Palais national de la culture*
12:30	14:00	**Café/Thé de bienvenue et déjeuner pour le Comité directeur** *(*uniquement pour les représentants des associations membres de la FIDE)* *Lieu : Palais national de la culture, salle 3.2, étage 8*
14:00	16:00	**Réunion du Comité directeur de la FIDE** *(*uniquement pour les représentants des associations membres de la FIDE)* *Lieu : Palais national de la culture, salle 10, étage 8*
20:00	22:00	**Réception de bienvenue** *Lieu : Musée national d'histoire / trasnnport organisé - **rdv à 19:30 h** au Palais national de la culture* *Discours de bienvenue de la **Professeure Associée, Madame Bonni Petrunova**,* *Directrice du Musée National d'Histoire*

Jeudi 1er juin 2023

8:30	9:30	**Arrivée des participants, inscription et café de bienvenue** *Lieu: Palais national de la culture, salle 3, étage 7*
9:30	10:15	**Cérémonie d'ouverture** Discours de bienvenue ***Alexander Arabadjiev,** Président du FIDE 2021-2023,* *Président de la 1ère chambre de la Cour de justice de l'UE* ***Rumen Radev,** Président de la République de Bulgarie* ***Koen Lenaerts,** Président de la Cour de justice de l'UE* ***Marc van der Woude,** Président du Tribunal de l'UE*
10:15	11:00	**Discours** ***Serhiy Holovaty,** Président de la Cour constitutionnelle d'Ukraine* ***Guy Verhofstadt,** député au Parlement européen, Coprésident de la conférence sur l'avenir de l'Europe*
11:00	11:30	Pause café/thé
11:30	12:45	**Table ronde plénière :** **L'idéntité politique, économique et sociale de l'Union européenne** ***Takis Tridimas,** Professeur de droit européen, King´s College Londres* ***Gabriel Glöckler,** Conseiller prinicpal à la Banque centrale européenne* ***Daniel Gros,** Directeur du Centre d'études de la politique européenne* ***Ulla Neergaard,** Professeure de droit de l´UE, Université de Copenhague* *Modérateur : **Alexander Kornezov,** Juge, Président de la 8ème chambre du Tribunal de l'UE*
12:45	14:00	Déjeuner
14:00	15:30	**Groupes de travail parallèles – Session (I)**

Thème 1 : Confiance mutuelle, reconnaissance mutuelle et état de droit	Thème 2 : La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE	Thème 3 : Union sociale européenne
Sujet : Confiance mutuelle, état de droit, identités constitutionnelles de l'UE et de ses États membres : fondations normatives	**Sujet : La conception de la recherche d'autonomie stratégique de l'Union européenne : estomper les frontières entre marché intérieur, concurrence et politiques et lois industrielles et commerciales**	**Sujet : Discrimination persistante à l'encontre des travailleurs mobiles : évaluation et perspectives**
Modérateur : **Paul Craig,** Professeur émérite, Droit anglais, Université d'Oxford	*Modératrice :* **Laurence Gormley,** Professeure, Collège d'Europe, Université de Gronningen	*Modérateur :* **András Tamás,** Chef d'unité, Service juridique, Parlement européen
Miguel Poiares Maduro, Doyen, Católica Global School of Law, Portugal et Professeur à l'Institut universitaire européen **Jonathan Tomkin,** Service juridique, Commission européenne **Yona Marinova**, Service juridique, Commission européenne	**Jean-François Bellis,** Associé fondateur, Van Bael & Bellis; Professeur invité, ULB **Isabelle Van Damme,** Associée, Van Bael & Bellis; Professeure invitée, Collège d'Europe **Ben Smulders**, Directeur général adjoint de la DG de la concurrence, Commission européenne	**Sophie Robin-Olivier,** Professeure de droit à l'Université Paris I Panthéon-Sorbonne **Sacha Garben,** Professeure de droit de l'UE, Collège d'Europe, Bruges

15:30	**16:00**	Pause café/thé
16:00	**17:30**	**Groupes de travail parallèles – Session (II)**

Thème 1 : Confiance mutuelle, reconnaissance mutuelle et état de droit	Thème 2 : La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE	Thème 3 : Union sociale européenne
Sujet : Instruments et mécanismes de protection de l'état de droit dans les États membres. Le contentieux de l'état de droit devant les juridictions nationales	**Sujet : De la «main invisible» à la politique industrielle ouverte : contrôle des concentrations dans l'UE, aides d'État et réglementation des subventions étrangères**	**Sujet : Défis démographiques et fuite des cerveaux comme conséquence de la libre circulation**
Modérateur : **Carsten Zatschler,** SC, Barreau d'Irlande	*Modératrice :* **Kate McKenna**, Associée à Matheson LLP, Dublin	*Modérateur :* **Damjan Kukovec,** Juge au Tribunal de l'UE
Miguel Poiares Maduro, Doyen, Católica Global School of Law, Portugal et Professeur à l'Institut universitaire européen **Clemens Ladenburger**, Directeur général adjoint, Service juridique, Commission européenne **Yona Marinova**, Service juridique, Commission européenne	**Jean-François Bellis,** Associé fondateur, Van Bael & Bellis; Professeur invité, ULB **Isabelle Van Damme,** Associée, Van Bael & Bellis; Professeure invitée, Collège d'Europe **Ben Smulders**, Directeur général adjoint de la DG de la concurrence, Commission européenne	**Sophie Robin-Olivier,** Professeure de droit à l'Université Paris I Panthéon-Sorbonne **Sacha Garben,** Professeure de droit de l'UE, Collège d'Europe, Bruges

20:00	**22:30**	**Evénement Jeunes FIDE** *Lieu: Palais de justice* *Discours d'ouverture de* ***Maciej Szpunar,*** *Premier avocat général à la Cour de justice de l'UE*

Vendredi 2 juin 2023

8:30	**9:30**	**Café/Thé de bienvenue** *Lieu: Palais national de la culture*
9:30	**11:00**	**Groupes de travail parallèles – Session (III)**

Thème 1 : Confiance mutuelle, reconnaissance mutuelle et état de droit	Thème 2 : La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE	Thème 3 : Union sociale européenne
Sujet : L'État de droit au niveau de l'UE et à l'égard des institutions de l'UE	**Sujet : Accords de durabilité et article 101 du TFUE : Penser en dehors du marché, quantifiification des gains d'efficacité et inclusion d'un plus grand nombre de consommateurs**	**Sujet : Exploitation des travailleurs détachés : faut-il prévoir de nouvelles restrictions au détachement des travailleurs dans le cadre de la libre prestation de services au nom de l'Union sociale européenne?**
Modérateur : **Richard Crowe,** Chef d'unité, Service juridique, Parlement européen	*Modérateur :* **Mario Siragusa,** SC, Cleary Gottlieb, Professeur, Collège d'Europe	*Modérateur :* **Luca Visaggio,** Directeur du service juridique, Parlement européen
Miguel Poiares Maduro, Doyen, Católica Global School of Law, Portugal et Professeur à l'Institut universitaire européen **Clemens Ladenburger**, Directeur général adjoint, Service juridique, Commission européenne **Jonathan Tomkin**, Service juridique, Commission européenne	**Jean-François Bellis,** Associé fondateur, Van Bael & Bellis; Professeur invité, ULB **Ben Smulders**, Directeur général adjoint de la DG de la concurrence, Commission européenne	**Sophie Robin-Olivier,** Professeure de droit à l'Université Paris I Panthéon-Sorbonne **Sacha Garben,** Professeure de droit de l'UE, Collège d'Europe, Bruges

11:00	11:30	Pause café/thé
11:30	13:00	**Groupes de travail parallèles – Session (IV)** * *Comme chaque année le 2 juin à 12 h des sirènes vont sonner pendant 2 minutes en hommage du Héros national Bulgare et poète Hristo Botev, décédé en 1876 dans la lutte contre la domination ottomane ainsi qu'en hommage à tous morts dans la lutte pour la liberté de la Bulgarie. Traditionnellement, lorsque les sirènes sonnent, les piétons et les véhicules doivent s'arrêter et rester immobiles pendant 2 minutes. Les participants au congrès FIDE sont priés de respecter cette tradition.*

Thème 1 : Confiance mutuelle, reconnaissance mutuelle et état de droit	Thème 2 : La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE	Thème 3 : Union sociale européenne
Sujet : La primauté du droit de l'Union est-elle une exigence découlant de l'état de droit?	**Sujet : Construire des champions européens par le droit de la concurrence**	**Sujett : Le socle européen des droits sociaux et la renaissance du droit social de l'UE : analyse de la situation — trop fragmentée ou trop générale?**
Modérateur : **Allan Rosas,** Professeur, Collège d'Europe, Ancien Juge à la Cour de justice de l'UE	*Modérateur :* **Savvas Papasavvas,** Vice-Président du Tribunal de l'UE	*Modérateur :* **Eugenia Dumitriu-Segnana,** Directrice, Service juridique, Conseil de l'UE
Miguel Poiares Maduro, Doyen, Católica Global School of Law, Portugal et professeur à l'Institut universitaire européen **Clemens Ladenburger**, Directeur général adjoint, Service juridique, Commission européenne **Yona Marinova**, Service juridique, Commission européenne	**Jean-François Bellis,** Associé fondateur, Van Bael & Bellis; Professeur invité, ULB **Ben Smulders**, Directeur général adjoint de la DG de la concurrence, Commission européenne	**Sophie Robin-Olivier,** Professeure de droit à l'Université Paris I Panthéon-Sorbonne **Sacha Garben,** Professeure de droit de l'UE, Collège d'Europe, Bruges

13:00	14:15	Déjeuner

14:15 15:45 Groupes de travail parallèles – Session (V)

Thème 1 : Confiance mutuelle, reconnaissance mutuelle et état de droit	Thème 2 : La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE	Thème 3 : Union sociale européenne
Sujet : Le principe de confiance mutuelle et ses limites liées à la protection des valeurs au sein même et en dehors de l'espace de liberté, de sécurité et de justice	**Sujet : La géopolitique de la réglementation des chaînes d'approvisionnement et durabilité des entreprises**	**Sujet : La «socialisation» du semestre européen : qu'est-ce que cela signifie pour les politiques sociales nationales et européennes ?**
Modératrice : **Corinna Wissels**, Conseillère d'État à la division de la juridiction administrative du Conseil d'État des Pays-Bas	*Modératrice :* **Ekaterina Rousseva,** Service juridique, Commission européenne	*Modératrice :* **Catherine Jacqueson,** Professeure de droit européen, Université de Copenhague
Miguel Poiares Maduro, Doyen, Católica Global School of Law, Portugal et Professeur à l'Institut universitaire européen **Clemens Ladenburger**, Directeur général adjoint, Service juridique, Commission européenne **Jonathan Tomkin**, Service juridique, Commission européenne	**Isabelle Van Damme,** Associée, Van Bael & Bellis; Professeure invitée, Collège d'Europe **Ben Smulders**, Directeur général adjoint de la DG de la concurrence, Commission européenne	**Sophie Robin-Olivier,** Professeure de droit à l'Université Paris I Panthéon-Sorbonne **Sacha Garben,** Professeure de droit de l'UE, Collège d'Europe, Bruges

15:45 16:15 Pause café/thé

16:15 17:45 Groupes de travail parallèles – Session (VI)

Thème 1 : Confiance mutuelle, reconnaissance mutuelle et état de droit	Thème 2 : La nouvelle dimension géopolitique des politiques de concurrence et de commerce de l'UE	Thème 3 : Union sociale européenne
Sujet : L'interaction entre l'état de droit, la démocratie et les droits fondamentaux dans le droit de l'Union	**Sujet : L'avenir du contrôle des IDE : mise en équilibre entre les compétences de l'UE et celles des États membres**	**Sujet : Prendre au sérieux la notion de «transition équitable» : quelle transformation de la politique sociale de l'UE est nécessaire?**
Modérateur : **Panagiotis Perakis,** Président du Conseil des barreaux européens	*Modérateur :* **Frank Hoffmeister,** Directeur des affaires générales et Directeur juridique du service européen pour l'action extérieure	*Modératrice :* **Sacha Prechal,** Juge, Présidente de la deuxième chambre, Cour de Justice de l'UE
Miguel Poiares Maduro, Doyen, Católica Global School of Law, Portugal et Professeur à l'Institut universitaire européen **Clemens Ladenburger**, Directeur général adjoint, Service juridique, Commission européenne **Yona Marinova**, Service juridique, Commission européenne	**Isabelle Van Damme,** Associée, Van Bael & Bellis; Professeure invitée, Collège d'Europe **Ben Smulders**, Directeur général adjoint de la DG de la concurrence, Commission européenne	**Sophie Robin-Olivier,** Professeure de droit à l'Université Paris I Panthéon-Sorbonne **Sacha Garben,** Professeure de droit de l'UE, Collège d'Europe, Bruges

20:00 23:00 **Dîner de gala**
Venue : Palais national de culture, salle 3
Allocution de bienvenue du ministre de la justice de la République de Bulgarie et de la présidente de Cour de Cassation de la République de Bulgarie

Samedi 3 juin 2023

8:30	9:00	**Café/Thé de bienvenue** *Lieu : Palais national de la culture*
9:00	9:45	**Rapports des différentes sessions de groupes de travail par les rapporteurs généraux** *Modérateur :* ***Daniel Sarmiento,*** *Professeur de droit administratif et européen, Université Complutense de Madrid* ***Miguel Poiares Maduro,*** *Doyen, Católica Global School of Law, Portugal et Professeur à l'Institut universitaire européen* ***Jean-François Bellis,*** *Fondateur associé Van Bael & Bellis; Professeur invité, ULB* ***Isabelle Van Damme,*** *Associée à Van Bael & Bellis; Professeure invitée, College d'Europe* ***Sophie Robin-Olivier,*** *Professeure de droit à l'Université Paris I Panthéon-Sorbonne*
9:45	11:15	**Table ronde plénière :** **L'identité constitutionnelle des États membres et de l'UE** ***Koen Lenaerts,*** *Président de la Cour de Justice de l'UE* ***Pavlina Panova,*** *Présidente de la Cour constitutionnelle bulgare* ***Stephan Harbarth,*** *Président de la Cour constitutionnelle fédérale allemande* ***Véronique Malbec,*** *Juge au Conseil constitutionnel français* ***Elena-Simina Tănăsescu,*** *Juge au Conseil constitutionnel roumain*
11:15	11:35	**Table ronde plénière :** **L´état de droit et élargissement de l'UE** ***Marsida Xhaferllari,*** *Juge à la Cour constitutionnelle de la République d'Albanie* ***Darko Kostadinovski,*** *Juge à la Cour constitutionnelle de la République de Macédoine du Nord* *Moderateur :* ***Alexander Arabadjiev,*** *Juge, Président de la 1ère chambre de la Cour de Justice de l'UE*
11:35	12:00	Pause café/thé
12:00	12:30	**Discours : Les relations de l'UE avec le monde dans le contexte de la guerre russe en Ukraine** ***Ivan Krastev,*** *Président, Centre pour les stratégies libérales et membre permanent à l´Institut des sciences humaines, IWM Vienne*
12:30	12:50	**Discours de clôture** ***Věra Jourová,*** *Vice-présidente de la Commission européenne*
12:50	13:10	**Présentation du XXXI congrès de la FIDE en Pologne et remerciements finaux** ***Maciej Szpunar,*** *Président du FIDE 2023-2025, Premier avocat général à la Cour de justice de l'UE* ***Ewa Jarosz,*** *Vice-rectrice de l'Université de Silésie à Katowice* ***Jerzy Woźniak,*** *Adjoint au maire de la ville de Katowice* ***Alexander Arabadjiev,*** *Président du FIDE 2021-2023, Président de la 1ère chambre de la Cour de justice de l'UE*

* *Les langues de travail du congrès sont l'anglais, l'allemand et le français. Une interprétation simultanée sera assurée dans ces langues, ainsi qu'en bulgare,*

Mittwoch, 31. Mai 2023

10:00	18:00	**Junges FIDE-Seminar** *Veranstaltungsort: Universität Sofia „St. Kliment Ohridski"* Das vollständige Programm finden Sie unter https://www.fide-europe.org/congresses/next-congress/
12:00	18:00	**Registrierung der Teilnehmer am Kongressort** *(*optionale Voranmeldung)* *Veranstaltungsort: Nationaler Kulturpalast*
12:30	14:00	**Begrüßungskaffee/Tee und Mittagessen für den Lenkungsausschuss** *(*nur für die Vertreter der Mitgliedsverbände der FIDE)* *Veranstaltungsort: Nationaler Kulturpalast, Saal 3.2, Stockwerk 8*
14:00	16:00	**Sitzung des FIDE-Lenkungsausschusses** *(*nur für die Vertreter der Mitgliedsverbände der FIDE)* *Veranstaltungsort: Nationaler Kulturpalast, saal 3, Stockwerk 8*
20:00	22:00	**Willkommensempfang** *Veranstaltungsort: Nationalmuseum für Geschichte / Uhrzeit für die Abholung :* ***19:30 Uhr*** *am Nationalen Kulturpalast* *Begrüßungsrede von* ***Priv. Doz. Dr. Bonni Petrunova,*** *Direktorin des Nationalmuseums für Geschichte*

Donnerstag, 1. Juni 2023

8:30	9:30	**Ankunft der Teilnehmer, Registrierung und Begrüßungskaffee** *Veranstaltungsort: Nationaler Kulturpalast, Saal 3, Stockwerk 7*
9:30	10:15	**Eröffnungsfeierlichkeiten** Willkommensansprachen ***Alexander Arabadjiev,*** *Präsident der FIDE 2021-2023, Präsident der Ersten Kammer des Gerichtshofs der Europäischen Union* ***Rumen Radev,*** *Präsident der Republik Bulgarien* ***Koen Lenaerts,*** *Präsident des Gerichtshofs der Europäischen Union* ***Marc van der Woude,*** *Präsident des Gerichts der Europäischen Union*
10:15	11:00	**Programmatische Ansprachen** ***Serhiy Holovaty,*** *Oberster Richter des Verfassungsgerichts der Ukraine* ***Guy Verhofstadt,*** *Mitglied des Europäischen Parlaments, Co-Vorsitzender der Konferenz zur Zukunft Europas*
11:00	11:30	Kaffee- und Teepause
11:30	12:45	**Podiumsdiskussion im Plenum:** **Die politische, wirtschaftliche und soziale Physiognomie der Europäischen Union** ***Takis Tridimas*** *, Professor für Europarecht, King's College London* ***Gabriel Glöckler,*** *Hauptberater der Europäischen Zentralbank* ***Daniel Gros,*** *Direktor des Zentrums für Europäische Politikstudien* ***Ulla Neergaard,*** *Professor für Europarecht, Universität Kopenhagen* *Moderator:* ***Alexander Kornezov*** *, Richter, Präsident der Achten Kammer des Gerichts der Europäischen Union*
12:45	14:00	Mittagessen
14:00	15:30	**Parallele Arbeitsgruppen – Sitzung (I)**

Thema 1: Gegenseitiges Vertrauen, Gegenseitige Anerkennung und Rechtsstaatlichkeit	Thema 2: Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik	Thema 3: Europäische Sozialunion
Panel: Gegenseitiges Vertrauen, Rechtsstaatlichkeit, Verfassungsidentitäten der EU und ihrer Mitgliedstaaten: normative Grundlagen	**Panel: Die Ausgestaltung des Strebens der Europäischen Union nach strategischer Autonomie: Verwischung der Grenzen zwischen Binnenmarkt-, Wettbewerbs-, Industrie- und Handelspolitiken und Gesetzen**	**Panel: Anhaltende Diskriminierung mobiler Arbeitnehmer: Einschätzung und Perspektiven**
Moderator: **Paul Craig,** Emeritierter Professor für Englisches Recht, Universität Oxford **Miguel Poiares Maduro,** Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz **Clemens Ladenburger,** Stellvertretender Generaldirektor, Juristischer Dienst, Europäische Kommission **Jonathan Tomkin,** Juristischer Dienst, Europäische Kommission **Yona Marinova,** Juristischer Dienst, Europäische Kommission	*Moderator:* **Laurence Gormley,** Professor, Europakolleg, Brügge, Universität Groningen **Jean-François Bellis,** Gründungspartner, Van Bael & Bellis; Gastprofessor, Freie Universität Brüssel **Isabelle Van Damme,** Partner, Van Bael & Bellis; Gastprofessorin am Europakolleg, Brügge **Ben Smulders** , Stellvertretender Generaldirektor der GD Wettbewerb, Europäische Kommission	*Moderator:* **András Tamás,** Referatsleiter, Juristischer Dienst, Europäisches Parlament **Sophie Robin-Olivier,** Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris **Sacha Garben,** Professorin für Europarecht, Europakolleg, Brügge

15:30 **16:00** Kaffee- und Teepause

16:00 **17:30** **Parallele Arbeitsgruppen – Sitzung (II)**

Thema 1: Gegenseitiges Vertrauen, gegenseitige Anerkennung und Rechtsstaatlichkeit	Thema 2: Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik	Thema 3: Europäische Sozialunion
Panel: Instrumente und Mechanismen zum Schutz der Rechtsstaatlichkeit in den Mitgliedstaaten. Prozessführung im Bereich der Rechtsstaatlichkeit vor nationalen Gerichten	**Panel: Von der „unsichtbaren Hand" zur offenen Industriepolitik: EU-Fusionskontrolle, staatliche Beihilfen und die Regulierung ausländischer Subventionen**	**Panel: Demografische Herausforderungen und intellektueller Aderlass als Folge der Freizügigkeit**
Moderator: **Carsten Zatschler,** Senior Counsel, Barrister, Irland **Miguel Poiares Maduro,** Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz **Clemens Ladenburger,** Stellvertretender Generaldirektor, Juristischer Dienst, Europäische Kommission **Yona Marinova,** Juristischer Dienst, Europäische Kommission	*Moderatorin:* **Kate McKenna,** Partner bei Matheson LLP, Dublin **Jean-François Bellis,** Gründungspartner, Van Bael & Bellis; Gastprofessor, Freie Universität Brüssel **Isabelle Van Damme,** Partner, Van Bael & Bellis; Gastprofessorin am Europakolleg, Brügge **Ben Smulders**, Stellvertretender Generaldirektor der GD Wettbewerb. Europäische Kommission	*Moderator:* **Damjan Kukovec,** Richter am Gericht der Europäischen Union **Sophie Robin-Olivier,** Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris **Sacha Garben,** Professorin für Europarecht, Europakolleg, Brügge

20:00 **22:30** **Veranstaltung für junge europäische Anwälte**
Veranstaltungsort: Gerichtsgebäude (Justizpalast)
Eröffnungsrede von ***Maciej Szpunar,*** *Erster Generalanwalt am Gerichtshof der Europäischen Union*

Freitag, 2. Juni 2023

8:30	**9:30**	**Willkommenskaffee und Tee** *Veranstaltungsort: Nationaler Kulturpalast*
9:30	**11:00**	**Parallele Arbeitsgruppen – Sitzung (III)**

Thema 1: Gegenseitiges Vertrauen, gegenseitige Anerkennung und Rechtsstaatlichkeit	Thema 2: Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik	Thema 3: Europäische Sozialunion
Panel: Die Rechtsstaatlichkeit auf EU-Ebene und im Hinblick auf die Institutionen der EU	**Panel: Nachhaltigkeitsvereinbarungen und Artikel 101 AEUV: Über den Markt hinaus denken, Effizienzgewinne quantifizieren und mehr Verbraucher einbeziehen**	**Panel: Die Ausbeutung entsandter Arbeitnehmer: Sollte es im Namen der Europäischen Sozialunion neue Beschränkungen für die Entsendung von Arbeitnehmern im Rahmen der Dienstleistungsfreiheit geben?**
Moderator: **Richard Crowe,** Referatsleiter, Juristischer Dienst, Europäisches Parlament **Miguel Poiares Maduro,** Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz **Clemens Ladenburger,** Stellvertretender Generaldirektor, Juristischer Dienst, Europäische Kommission **Jonathan Tomkin,** Juristischer Dienst, Europäische Kommission	*Moderator:* **Mario Siragusa,** Senior Counsel, Cleary Gottlieb, Professor, Europakolleg, Brügge **Jean-François Bellis,** Gründungspartner, Van Bael & Bellis; Gastprofessor, Freie Universität Brüssel **Ben Smulders,** Stellvertretender Generaldirektor der GD Wettbewerb der Europäischen Kommission	*Moderator:* **Luca Visaggio,** Direktor des Juristischen Dienstes des Europäischen Parlaments **Sophie Robin-Olivier,** Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris **Sacha Garben,** Professorin für Europarecht, Europakolleg, Brügge

11:00	**11:30**	Kaffee- und Teepause
11:30	**13:00**	**Parallele Arbeitsgruppen – Sitzung (IV)** **Wie jedes Jahr werden am 2. Juni 2023 mittags in ganz Bulgarien zwei Minuten lang Sirenen ertönen, um des bulgarischen Nationalhelden und Dichters Hristo Botev zu gedenken, der 1876 im Kampf gegen die osmanische Herrschaft starb, und um alle zu ehren, die für die Freiheit Bulgariens gestorben sind. Wenn die Sirenen ertönen, müssen traditionell alle Fußgänger und Fahrzeuge für zwei Minuten stehen bleiben. Die Teilnehmer des FIDE-Kongresses werden gebeten, diese Tradition zu respektieren.*

Thema 1: Gegenseitiges Vertrauen, gegenseitige Anerkennung und Rechtsstaatlichkeit	Thema 2: Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik	Thema 3: Europäische Sozialunion
Panel: Ist der Vorrang des EU-Rechts eine Anforderung der Rechtsstaatlichkeit?	**Panel: Das Aufbauen europäischer Champions durch das Wettbewerbsrecht**	**Panel: Die europäische Säule sozialer Rechte und die Renaissance der EU-Sozialgesetzgebung: Analyse der Sachlage – zu fragmentiert oder zu weit gefasst?**
Moderator: **Allan Rosas,** Professor, Europakolleg, Brügge, ehemaliger Richter am Gerichtshof der Europäischen Union	*Moderator:* **Savvas Papasavvas,** Vizepräsident des Gerichts der Europäischen Union	*Moderatorin:* **Eugenia Dumitriu-Segnana,** Direktorin, Juristischer Dienst, Rat der Europäischen Union
Miguel Poiares Maduro, Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz **Clemens Ladenburger,** Stellvertretender Generaldirektor, Juristischer Dienst, Europäische Kommission **Yona Marinova,** Juristischer Dienst, Europäische Kommission	**Jean-François Bellis,** Gründungspartner, Van Bael & Bellis; Gastprofessor, Freie Universität Brüssel **Ben Smulders,** Stellvertretender Generaldirektor der GD Wettbewerb der Europäischen Kommission	**Sophie Robin-Olivier,** Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris **Sacha Garben,** Professorin für Europarecht, Europakolleg, Brügge

13:00	**14:15**	Mittagessen
14:15	**15:45**	**Parallele Arbeitsgruppen – Sitzung (V)**

Thema 1: Gegenseitiges Vertrauen, gegenseitige Anerkennung und Rechtsstaatlichkeit	Thema 2: Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik	Thema 3: Europäische Sozialunion
Panel: Das Prinzip des gegenseitigen Vertrauens und seine wertebezogenen Grenzen im Raum der Freiheit, der Sicherheit und des Rechts und darüber hinaus	**Panel: Die geopolitischen Bezüge des Regulierens von Lieferketten und der Nachhaltigkeit von Unternehmen**	**Panel: Die „Sozialisierung" des Europäischen Semesters: Was bedeutet sie für die nationale und die EU-Sozialpolitik?**
Moderatorin: **Corinna Wissels,** Staatsrätin in der verwaltungsgerichtlichen Sektion des Staatsrates der Niederlande	*Moderatorin:* **Ekaterina Rousseva,** Juristischer Dienst, Europäische Kommission	*Moderatorin:* **Catherine Jacqueson,** Professorin für Europarecht, Universität Kopenhagen
Miguel Poiares Maduro, Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz **Clemens Ladenburger,** Stellvertretender Generaldirektor, Juristischer Dienst, Europäische Kommission **Jonathan Tomkin,** Juristischer Dienst, Europäische Kommission	**Isabelle Van Damme,** Partner, Van Bael & Bellis; Gastprofessorin am Europakolleg, Brügge **Ben Smulders,** Stellvertretender Generaldirektor der GD Wettbewerb, Europäische Kommission	**Sophie Robin-Olivier,** Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris **Sacha Garben,** Professorin für Europarecht, Europakolleg, Brügge

15:45	**16:15**	Kaffee- und Teepause

16:15 17:45 Parallele Arbeitsgruppen – Sitzung (VI)

Thema 1: Gegenseitiges Vertrauen, gegenseitige Anerkennung und Rechtsstaatlichkeit	Thema 2: Die neue geopolitische Dimension der EU-Wettbewerbs- und Handelspolitik	Thema 3: Europäische Sozialunion
Panel: Die Wechselwirkungen zwischen Rechtsstaatlichkeit, Demokratie und Grundrechten im EU-Recht	**Panel: Die Zukunft der Kontrolle ausländischer Direktinvestitionen: das Austarieren der Zuständigkeiten der EU und der Mitgliedstaaten**	**Panel: Ernstnehmen des Begriffs des „fairen Übergangs": welche Transformation der EU-Sozialpolitik ist erforderlich?**
Moderator: **Panagiotis Perakis,** Präsident des Rates der Anwaltschaften der Europäischen Gemeinschaft (CCBE)	*Moderator:* **Frank Hoffmeister,** Direktor für Allgemeine Angelegenheiten und Chief Legal Officer des Europäischen Auswärtigen Dienstes	*Moderatorin:* **Sacha Prechal,** Richterin, Präsidentin der Zweiten Kammer, Gerichtshof der Europäischen Union
Miguel Poiares Maduro, Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz **Clemens Ladenburger,** Stellvertretender Generaldirektor, Juristischer Dienst, Europäische Kommission **Yona Marinova,** Juristischer Dienst, Europäische Kommission	**Isabelle Van Damme,** Partner, Van Bael & Bellis; Gastprofessorin am Europakolleg, Brügge **Ben Smulders,** Stellvertretender Generaldirektor der GD Wettbewerb, Europäische Kommission	**Sophie Robin-Olivier,** Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris **Sacha Garben,** Professorin für Europarecht, Europakolleg, Brügge

20:00 23:00 Galadinner
Veranstaltungsort: Nationaler Kulturpalast, Saal 3
Begrüßungsrede des Justizministers und des Präsidenten des Obersten Kassationshofs der Republik Bulgarien

Samstag, 3. Juni 2023

8:30 9:00 Willkommenskaffee und Tee
Veranstaltungsort: Nationaler Kulturpalast

9:00 9:45 Berichte der Generalberichterstatter über die Arbeitsgruppensitzungen
Moderator: ***Daniel Sarmiento,*** *Professor für Verwaltungs- und Europarecht, Universität Complutense Madrid*
Miguel Poiares Maduro, *Dekan der Católica Global School of Law, Portugal, und Professor an der Fakultät für transnationales Regieren des Europäischen Hochschulinstituts, Florenz*
Jean-François Bellis, *Gründungspartner, Van Bael & Bellis; Gastprofessor, Freie Universität Brüssel*
Isabelle Van Damme, *Partner, Van Bael & Bellis; Gastprofessorin am Europakolleg, Brügge*
Sophie Robin-Olivier, *Professorin für Rechtswissenschaften an der juristischen Fakultät der Universität Sorbonne, Paris*

9:45 11:15 Podiumsdiskussion im Plenum:
Die verfassungsmäßigen Identitäten der Mitgliedstaaten und der Europäischen Union
Koen Lenaerts, *Präsident des Gerichtshofs der Europäischen Union*
Pavlina Panova, *Präsidentin des bulgarischen Verfassungsgerichts*
Stephan Harbarth, *Präsident des Bundesverfassungsgerichts*
Véronique Malbec, *Richterin am französischen Verfassungsrat*
Elena-Simina Tănăsescu, *Richterin am rumänischen Verfassungsrat*

11:15 11:35 Podiumsdiskussion im Plenum:
Rechtsstaatlichkeit und die Erweiterung der Europäischen Union
Marsida Xhaferllari, *Richterin am Verfassungsgericht der Republik Albanien*
Darko Kostadinovski, *Richter am Verfassungsgericht der Republik Nordmazedonien*
Moderator: ***Alexander Arabadjiev,*** *Richter, Präsident der Ersten Kammer des Gerichtshofs der Europäischen Union*

11:35	12:00	Kaffee- und Teepause
12:00	12:30	**Programmatische Ansprache:** **Die Beziehungen der EU zur Welt im Kontext des russischen Krieges in der Ukraine** ***Ivan Krastev***, *Vorsitzender, Center for Liberal Strategies und Permanent Fellow, Institut für die Wissenschaften vom Menschen, IWM Wien*
12:30	12:50	**Schlussansprache** ***Věra Jourová***, *Vizepräsidentin der Europäischen Kommission*
12:50	13:10	**Präsentation des XXXI. FIDE-Kongresses in Polen und abschließende Danksagungen** ***Maciej Szpunar,*** *Präsident der FIDE 2023–2025, Erster Generalanwalt am Gerichtshof der Europäischen Union* ***Ewa Jarosz,*** *Vizerektorin der Schlesischen Universität Kattowitz* ***Jerzy Woźniak,*** *Stellvertretender Bürgermeister der Stadt Kattowitz* ***Alexander Arabadjiev,*** *Präsident der FIDE 2021-2023, Präsident der Ersten Kammer des Gerichtshofs der Europäischen Union*

** Die Arbeitssprachen des Kongresses sind Englisch, Deutsch und Französisch. In diesen Sprachen sowie in Bulgarisch wird es eine Simultanübersetzung geben.*

WELCOME ADDRESS BY ALEXANDER ARABADJIEV

President of FIDE 2021–2023, Judge, President of Chamber, Court of Justice of the EU

Esteemed colleagues, dear friends, ladies and gentlemen,

Welcome to the XXXth FIDE Congress, which it is my honor to open today.

I am delighted to welcome you to Sofia and, in particular, to the National Palace of Culture, which is the largest, multifunctional conference and exhibition centre in Southeastern Europe, constructed back in the 1980s, in celebration of Bulgaria's 1300th anniversary.

Firstly, I would like to emphasize the longstanding tradition of FIDE congresses that bring together bright minds to discuss the challenges faced by the European Union's legal order and to debate its future.

This year's congress is no exception, as it was conceived ambitiously and is set to be a visionary congress, encompassing some of the major developments in European Union law, analyzed by stellar (general and institutional) rapporteurs.

I am also particularly pleased to be joined on this occasion by an unparalleled line-up of speakers, including the President of the Court of Justice of the European Union, the President of the General Court, representatives of the European Commission, the European Parliament, professors and lecturers from some of the most renowned universities, leading lawyers from private practice and policymakers, and last, but not least, Presidents and members of the Constitutional Courts of several EU Member States and candidate countries, as well as from the Ukraine.

I am confident that this year's congress will be a successful continuation of the XXIXth FIDE Congress in the Hague, which was an inspiring and influential event.

As announced on the closing day of the Hague Congress, the focus of the 2023 edition of the Congress is the strategic development and the future of the Union. I firmly believe that this year's Congress will provide an excellent forum for discussion of some of the main legal challenges that face the EU.

At the very heart of the XXXth FIDE Congress lies the subject of the constitutional identity of the European Union, its economic model and social dimension.

I would like to outline briefly the key aspects of each of the three topics that will be discussed during the following two days.

The first topic aims to evaluate how the principles of mutual trust, mutual recognition and the rule of law have been applied by national jurisdictions in the Member States. These principles constitute the very cornerstones of the European legal order. European integration increases the interdependence between EU Member States, as well as the interdependence between the legal orders of these Member States and the EU legal order. As will be shown during the respective panel discussions, the principle of mutual recognition is a common feature of the constitutional identity of the Member States, especially with respect to the values enshrined in Article 2 TEU (democracy, the rule of law and fundamental rights). These values have become in addition, accession criteria for any candidate countries under Article 49 TEU. It is in that context that we will discuss what new instruments for the monitoring and enforcement of the rule of law and fundamental rights in the Member States have been introduced, as well as their effectiveness (for instance, the new conditionality mechanism, which is linked to observance of the principles of the rule of law). Also, the question of whether the EU is itself willing to be subjected to the same standards it is requiring from its Member States will be addressed andexamined.

The second topic will focus on the effectiveness of EU competition law, including merger control and state aid law, in dealing with anti-competitive practices of multinational companies, on the need to ensure Europe's technological sovereignty and the possibility to foster the emergence of European "champions". It will also examine the EU's readiness to set global standards, to make its own choices and to shape the world around an "open, sustainable and assertive trade policy", through leadership and engagement, reflecting the EU's strategic interests and values.

The post-pandemic conditions, in which the XXXth Congress is being held, leads us to reflect on the long-term challenges that result from past and present crises, which actually drive forward European integration.

Against that background, as indicated in the General report on this topic, crisis-related measures tailored to remedy supply shortages and vulnerabilities in supply chains, as well as crisis-related State aid measures, have redefined the EU's competition policy in such a way as to ensure the building of a stronger Single Market for Europe's recovery, coupled with a transition towards a green and digital economy. The urgency and the gravity of these circumstances have pushed the EU to reflect further on the future of the European legal order and the way in which we would like it to evolve for future generations.

In this context, the EU seeks to promote its open strategic autonomy – a concept which has an impact on EU's key policies such as trade and completion but also – more generally – on other policy areas.

The third topic aims at conceptualizing the idea of a European Social Union as a way of bringing the EU closer to its citizens and ensuring social cohesion and integration. It will allow us to discuss the development and strengthening of a true and meaningful EU social dimension. This topic also has the advantage of having interdisciplinary potential. A number of issues will be addressed, such as: the conflicts between free movement rights and social rights, the importance of the Charter-based "solidarity" rights, the impact of free movement on the demographic crisis and the adjacent "brain drain" phenomenon which has ravaged Eastern and Central Europe, as well as parts of Southern Europe, EU trade policy and labor rights protection, social justice and solidarity as common values of the Union. As suggested in the General report on this topic, European social values should be granted a more central role in the definition and protection of the rule of law principle in the EU – an idea that demonstrates the interaction of values and principles in different areas of the European Union's legal order.

While the discussions will centre around these three main topics, it is important to note that they are all united in one common thread: defining the constitutional, economic and social characteristics of the European Union.

We are convinced that the general, institutional and national reports fully correspond to our expectations and to our ambitions when announcing the programme of the Congress and that they provide an excellent basis for – as we expect – for constructive legal discussions, debates, an open exchange of ideas and visions for the development of EU law in the following days.

We also take pride in our effort, on the one hand, to continue the tradition of organizing the Young FIDE seminar, which took place yesterday at the University of Sofia, "St. Kliment Ohridski" and, on the other hand, to provide a platform for projects on EU law, developed by other organizations, to be presented during our Congress.

In this context, I would like to highlight one area for future improvement, which remains our standing commitment.

It is related to fostering closer relations and building on the cooperation with other EU Law Associations and stakeholders and – also – from candidate countries.

These are and remain objectives, which we take seriously and will discuss further at the level of FIDE's Steering Committee.

Finally, I would like to take the opportunity to thank some important institutions that have assisted us in hosting this event. I would like to express my special gratitude to the Court of Justice of the European Union, the European Commission, the National Institute of Justice of Bulgaria, and especially its Director, Miss Tacheva, Ciela Publishing House, the Academy of European Law (ERA) in Trier, the FIDE 2023 team and the Bulgarian Association of European Law, for having invested and contributed to the organization of this Congress. We truly appreciate your support, your valuable efforts and hard work. Without you, we would not be here today.

Ladies and gentlemen, I declare the XXXth FIDE Congress open and thank for your attention.

I very much look forward to our continued exchanges over the next few days and I wish you a pleasant stay in our beautiful capital.

The opening ceremony will continue with welcoming interventions by the President of the Republic of Bulgaria, Mr. Rumen Radev, the President of the Court of Justice of the EU, prof. dr. Koen Lenaerts, and the President of the General Court of the EU, Judge Marc van der Woude.

Since M President Radev is travelling to Moldavia today, in order to participate in a Forum of The European Political Community, we will watch and listen to his welcome address to the Congress by video link.

WELCOME ADDRESS BY RUMEN RADEV

President of the Republic of Bulgaria

Dear Mr President of the Court of Justice of the European Union,
Dear Mr President of FIDE,
Ladies and Gentlemen,

It is a privilege to welcome to Bulgaria all the participants in the 30th FIDE Congress. I would like to extend my sincere gratitude to FIDE for the invitation to join the opening ceremony of this event. For more than 60 years now, your organisation has been researching and stimulating the development of EU law, bringing together the viewpoints of practising lawyers, academics, and representatives of the European institutions.

Sofia is hosting the FIDE congress for the first time in its history and this is a great honour for the Bulgarian legal community. I hope the proceedings of the congress will contribute to enriching and deepening the scientific debates that are guiding the development of EU law and will provide an important impetus for safeguarding the rule of law within the framework of the EU as well as on a national level in the Member States.

On this occasion, I would like to mention the important role of the Bulgarian association for European Law in adapting the Bulgarian positive law to the requirements of EU law and in widening its place in the national legal education and science. The professional opinions that the Bulgarian association for European law provides in constitutional cases are highly estimated and they contribute to the harmonisation of this particularly conservative branch of national law with the principles of EU law.

Let me also congratulate the organisers for the decision to focus part of the congress's programme on the topic of solidarity as an integral part of the European Union's constitutional identity and the strengthening of its social dimension. I believe that we ought to mobilise the specific instruments of both the law and the politics in order to overcome the disparities between EU member states in safeguarding labour and social rights, in securing equal access to education and training for vulnerable social groups and in fighting poverty, especially when it concerns children.

I wish you all a fruitful and very successful congress.

WELCOME ADDRESS BY KOEN LENAERTS

President of the Court of Justice of the European Union

President Radev,
President Arabadjiev,
President Van der Woude,
Dear Colleagues,
Ladies and Gentlemen,

I would like to thank President Arabadjiev, the Bulgarian Association for European Law, and all the other organisers, for all their hard work in putting together this thirtieth FIDE Congress. I would also like to thank the members of the interpretation service of the Court of Justice without whom this event would not be possible.

The three themes examined and discussed during this Congress raise legal issues that are both novel and challenging, and have a close connection to the fundamental values and objectives of the Union as a dynamic, evolving project of European political integration.

Thus, the second theme will examine *EU competition and trade law* in their broader context, covering geopolitical constraints bearing on their development and their potential for reinforcing the EU's weight and influence as a rule-maker in global economic governance. Those matters are of vital importance to the economic well-being of our Union.

The third theme on the development of the *European Social Union* will touch, *inter alia*, on delicate issues of competence, on the balance to be struck between uniform standards and national diversity, on fair social conditions for mobile workers and on the fundamental social rights protected in the Charter. Such issues arise with increasing frequency in cases before the Court of Justice. A strong social dimension in European integration is essential to maintain the confidence of citizens in the Union. It represents a concrete test of its ability to deliver *solidarity* in practice, which is among the fundamental values set out in Article 2 TEU.

That value of solidarity offers a perfect transition to the first theme concerning *mutual recognition, mutual trust and the Rule of Law*, on which I will focus in

my introduction. In the judgments on the *Rule of Law Conditionality Regulation (2022)*, the Court, sitting as a full court, made clear that '[t]he values contained in Article 2 TEU have been identified and are shared by the Member States [and] define the very identity of the European Union as a common legal order '.[1] That provision 'is not merely a statement of policy guidelines or intentions' considering the fact that the values which it contains 'are given concrete expression in principles containing legally binding obligations for the Member States'.[2] Despite the presumption that Member States act in compliance with those values, the Court explained that that compliance cannot be reduced to an obligation which a candidate state must meet in order to accede to the European Union and which it may disregard following its accession.[3]

That last finding of the Court is crucial as it shows that mutual trust cannot be regarded as an outcome to be achieved by a certain date and then simply taken for granted. It requires constant vigilance, both at EU and national level, to ensure that the values on which the EU is based are – *and, moreover, continue to be* – upheld in practice. The judgments on the *Rule of Law Conditionality Regulation* demonstrate that that constant vigilance is necessary to preserve and foster solidarity between the Member States. The EU budget gives practical effect to that solidarity, which is based on 'the principle of mutual trust between the Member States in the responsible use of the common resources included in that budget'.[4] Moreover, as the Court already held in *Opinion 2/13* on accession of the EU to the ECHR, mutual trust implies and justifies that each Member State is equally committed to upholding the rule of law within the EU.[5] From these elements, the Court drew the logical conclusion that respect for the rule of law principles and the proper implementation of the EU budget are inextricably linked. Indeed, breaches of the principles of the rule of law may compromise the sound financial management of the EU budget and the EU financial interests, in so far as they may prevent expenditure covered by the Union budget from complying with the financing conditions laid down by EU law and thereby from meeting the objectives pursued by the European

[1] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 127, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 145.

[2] Judgment in *Hungary v Parliament and Council*, para. 232, and judgment in *Poland v Parliament and Council*, para 264.

[3] Judgment in *Hungary v Parliament and Council*, para. 126, and judgment in *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 144.

[4] Judgment in *Hungary v Parliament and Council*, para. 129, and judgment in *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 147.

[5] See, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014, EU:C:2014:2454, para. 191.

Union when it finances such expenditure.[6] It is against that background that the Court decided that the rule of law conditionality mechanism only applies to situations that are relevant to the effective implementation of the EU budget and thus falls within the scope of EU competence.[7]

Let me now address three other aspects of mutual trust that will undoubtedly be touched upon under the first theme of this Congress.

1. The ***first*** is the challenge arising from the ***interplay between mutual trust and mutual recognition, on the one hand, and the effective protection of fundamental rights and the rule of law principles, on the other hand***. Mutual trust underpins the mutual recognition, which lies at the heart of the key instruments of judicial cooperation that exist in the area of freedom, security and justice, notably the European Arrest Warrant. Put simply, mutual recognition entails automatic recognition of judicial decisions issued in another Member State. That automaticity aims to make judicial cooperation more effective, particularly in criminal matters. Such enhanced effectiveness is vitally important in minimising the risk that free movement of persons within the EU may create leeway for impunity, as criminals flee across open borders in order to escape justice. In order for a national court to recognise a decision of a court of another Member State to issue an EAW, it must be able to trust that the fundamental rights of the person concerned have been respected in the requesting Member State and will continue to be respected following execution of the EAW. Difficulties have emerged, however, in situations where courts in the executing Member State entertained serious doubts in that regard. That gives rise to a dilemma: how can one reconcile the principles of mutual recognition and respect for fundamental rights in situations where they are in conflict?

The *Aranyosi and Căldăraru*[8] judgment explicitly recognised the possibility for executing judicial authorities to refuse the execution of an EAW when there is a real risk of breach of the right of the requested person not to be subjected to inhuman or degrading treatment in the issuing Member State. That said, a real risk of inhuman or degrading treatment by virtue of *general conditions of detention* in the issuing Member State cannot lead, in itself, to a refusal to execute an EAW. The Court developed a well-known – and now settled – two-step test, which

[6] Judgment in *Hungary v Parliament and Council*, para. 131, and judgment in *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 149.

[7] Judgment in *Hungary v Parliament and Council*, paras 144-145, and judgment in *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, paras 162-163.

[8] Judgment of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 et C-659/15 PPU, EU:C:2016:198).

ensures that derogations from the principle of mutual recognition underpinning the EAW Framework Decision remain exceptional. After concluding that such a 'general' risk exists, the executing judicial authority must make a specific and precise assessment as to whether there are substantial grounds to believe that the individual concerned will be exposed to a real risk of inhuman or degrading treatment because of the conditions of his or her detention envisaged in the issuing Member State.[9]

A few weeks ago, in *E.D.L.*,[10] the Court confirmed that that ground of refusal also applies when the serious risk of inhuman or degrading treatment in the issuing Member State results from the state of health of the person concerned. A manifest risk that the health of the person sought will be endangered justifies the temporary suspension of surrender and obliges the executing authority to ask the issuing authority for information on the conditions of detention. The refusal of execution based on a risk of inhuman or degrading treatment on such grounds must, however, be limited to exceptional circumstances, because impunity would affect the rights of victims and undermine the objective of the European Arrest Warrant.[11]

When it comes to the relationship between the EAW and rule of law issues that may arise in a Member State, the case-law requires, first, that serious deficiencies in the judicial protection offered in the issuing Member State be identified, and, second, that the specific circumstances of the case are such as to demonstrate that the person concerned is *in fact* exposed to the risk of being subjected to proceedings that violate his or her right to an effective remedy before independent courts. In *Puíg Gordi*, a judgment delivered on 31 January 2023,[12] the Court confirmed that the same methodology should also be applied when the doubts that arise concern the alleged lack of jurisdiction of the issuing judicial authority. Thus, the threshold is and remains high in all of these situations. If it were otherwise, the smooth and effective operation of the EAW Framework Decision would be seriously undermined. Considering the practical importance of that instrument, such an outcome would clearly compromise the Union's objective of developing an area of freedom, security and justice that functions properly.

[9] *Ibid*, para. 92.

[10] Judgment of 18 April 2023, *E. D. L. (Motif de refus fondé sur la maladie)* (C-699/21, EU:C:2023:295).

[11] A. WEYEMBERGH and L.PINELLI, « Detention Conditions in the issuing Member State as a Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead », *European Criminal Law Review*, 2022/1, p.25-52.

[12] Judgment of 31 January 2023, *Puig Gordi and Others* (C-158/21, EU:C:2023:57).

2. The second aspect that I would like briefly to discuss is the ***key role of the preliminary reference mechanism in protecting the rights conferred by EU law across the EU and thus in upholding the EU rule of law***.[13]

In the *Commission v. Poland* judgment of 15 July 2021,[14] the Court of Justice recalled the importance of the preliminary ruling mechanism and the independence of Member State courts. It found that the new disciplinary regime adopted in Poland concerning the judges of the Supreme Court and ordinary courts undermined their independence. That conclusion resulted, in particular, from the practice of disciplinary bodies showing that the new regime allowed disciplinary proceedings to be initiated against judges on the ground that they had decided to send requests for a preliminary ruling to the Court of Justice. In the later judgments in *Euro Box Promotion and Others*[15] and *RS*,[16] the Court of Justice drew an additional conclusion from the primacy of EU law and Article 267 TFEU: every national court must be allowed to leave unapplied decisions of a Constitutional Court that breach EU law, without risking disciplinary proceedings.

Subject of course to the conditions for admissibility of requests for a preliminary ruling being met, the dialogue between national courts and the Court of Justice can concern *any* issue of EU law that is relevant to the main proceedings, which therefore includes rule of law issues. The proper functioning of that dialogue is thus a crucial means for maintaining mutual trust between the courts of the Member States since it enables the Court of Justice to ensure adherence to the principles of the rule of law by all such courts.

3. A ***third and final aspect relates to the need for consistency in upholding the values enshrined in Article 2 TEU***, especially the effective protection of fundamental rights as guaranteed in EU law and respect for the rule of law. As I said, mutual trust is based on a presumption that Member States comply with the values contained in Article 2 TEU, including the rule of law and fundamental rights. Moreover, there must be trust that the EU itself respects those values.

While the cases that I have mentioned so far illustrate the need to preserve – and indeed to 'cultivate' – mutual trust among the Member States, it is essential that the EU and its institutions themselves inspire confidence in that regard. In

[13] That aspect will be covered in particular in the panel 'Litigating rule of law in the national courts'.

[14] Judgment of 15 July 2021, *Commission/Poland (Disciplinary regime for judges)* (C-791/19, EU:C:2021:596).

[15] Judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 262).

[16] Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)* (C-430/21, EU:C:2022:99, para. 88).

other words, the EU can only legitimately require from its Member States that they abide by the values set out in Article 2 TEU, and even adopt enforcement measures to that effect where necessary, if its own institutions, bodies, offices and agencies are themselves beyond reproach in that regard. A key aspect of the rule of law principles as applied to the EU relates to the availability of effective judicial review against any EU measure that entails legal effects. In *Kadi I*,[17] a ruling delivered 15 years ago, the Court of Justice essentially ruled out the existence of a 'political questions' doctrine in EU law, under which the Court would itself 'carve out' part of the jurisdiction granted to it by the Treaties and regard it as 'non justiciable', by reason of the highly sensitive or political nature of the EU measure being challenged. In a nutshell, the pursuit of legitimate objectives of foreign policy by the Council when it adopts restrictive measures against natural or legal persons does *not* justify ruling out proper judicial review, in full compliance with the right to an effective remedy guaranteed by Article 47 of the Charter. That key dimension of our conception of the rule of law in Europe is one of the features which distinguishes us from many other legal systems in the world and should be a source of pride. It is also a regular source of novel, challenging legal issues for EU courts.

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As the great French scientist Louis Pasteur once explained, '[i]n the fields of observation chance favours only the prepared mind.'[18] Bearing those wise words in mind, I very much look forward to hearing the enriching exchanges of views on all these issues that will take place in the coming days. FIDE is always an excellent opportunity to make all of us, as EU lawyers, better prepared to build together the future of Europe. This congress will doubtless be no exception.

Thank you for your attention.

[17] Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission* (C-402/05 P and C-415/05 P, EU:C:2008:461).

[18] L. Pasteur, Inaugural lecture delivered in Douai on 7 December 1854, for the installation of the *Faculté des lettres* of Douai and the *Faculté des sciences* of Lille, available at : https://louispasteurinfo.weebly.com/speech-on-spirit-of-science-1854.html

WELCOME ADDRESS BY MARC VAN DER WOUDE

President of the General Court of the European Union

Last year the European Union (EU) and the Court of Justice of the EU (CJEU) celebrated their 70th birthday. Whatever may be said about the EU, it is a tremendous success story. A period of 70 years of peace between countries that were for long irreconcilable enemies, is unequalled in the history of Europe. While many factors have contributed to this success, one of the key factors has undoubtedly been legal in nature. By participating in the EU, its Member States pooled part of their powers in a new legal order, shaped by rules discussed in meetings rooms and applied by national authorities and courts with the assistance of the Court of Justice. The rule of law thus replaced the law of the strongest.

Another specific feature of the EU concerns the nature of its activities. Although they primarily consist of developing rules that are implemented by national administrations, the EU institutions, agencies and bodies are actors in their own right. They take decisions that affect not only Member States and their constituent parts, but also natural and legal persons residing in those Member States or, in certain cases, residents of third States. Conflicts that in a normal intergovernmental setting would oppose countries and would be brought before international arbitration tribunals have been partly replaced by disputes involving the EU institutions. Such disputes are often brought before the General Court.

The judicial architecture of the EU that deals with such conflicts, essentially relies on two procedures: Firstly, on the preliminary reference procedure laid down in Article 267 TFEU, in cases where EU law is applied at national level; and, secondly, on the legality review procedure laid down in Article 263 TFEU when those rules are directly applied by the institutions themselves.

Over the years, this system of judicial protection has been adapted to deal with the increasing activities of the EU. In this respect, the proposal on the transfer of powers from the Court of Justice to the General Court offers the latest example of such adjustment.[1] Under current conditions, the Court of Justice bears the full impact of the expansion of EU law. Given that nowadays, every aspect of societal life has a European dimension and hence an EU legal component, the questions brought before the Court of Justice for preliminary rulings reflect this diversity.

[1] Request submitted by the Court of Justice pursuant to the second paragraph of Article 281 of the Treaty on the Functioning of the European Union, with a view to amending Protocol No 3 on the Statute of the Court of Justice of the European Union.

A similar development affects the General Court, for the simple reason that the cases which are brought before that court reflect the activities of the EU institutions, agencies and bodies. To put it differently, everything the EU does will be reflected in our docket. This mirroring effect can occur relatively quickly in times of crises, as we have seen during the banking crisis of 2008, the coronavirus crisis of the last two years and, currently, with the war in Ukraine.

The war in Ukraine has deeply affected the geopolitical context in which the EU seeks to position itself. This change implies a paradigm shift for the EU. In particular, concepts such as free trade and multilateral interdependence are gradually ceding their place to new concepts such as strategic autonomy. More fundamentally, the EU is now dealing with security and military issues, which is not so obvious for an entity that was set up as a peace project. Yet, with a surprising degree of pragmatism, the EU is now involved in defence projects and joint arms purchases.

This new geopolitical dimension also affects the work of the General Court. As mentioned before, the activities of the EU will, in one way or another, be reflected in court cases. As EU bodies increasingly have executive functions, more cases are likely to come before the General Court.

There are several examples that illustrate the impact of international conflicts on the work of the General Court. In the first place, restrictive measure cases, which are an obvious example of such impact, as sanctions adopted against Russia and Belarus account for a considerable percentage of incoming cases. Secondly, cases involving staff employed by security missions organized by the EU outside its territory are another example of how the EU's security issues may end up on the judge's desk. Thirdly, there are cases involving the purchase of goods that are used for both civil and military purposes (*e.g.*, satellites and drones), some of which deal exclusively with military goods (*i.e.,* when they relate to projects financed by the European Defence fund). Finally, it is worth mentioning that the General Court will be called upon to assess new trade defence cases under the new tools such as the Foreign Subsidies Regulation.[2]

With regard to security issues, the question arises as to what the role of the General Court, as an administrative review court, should be.

First, the General Court must be competent to rule on security matters. In this regard, reference should be made to Article 24 TEU, which provides that the Court

[2] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market.

of Justice of the EU shall not have jurisdiction to rule on common foreign and security policy (CFSP) issues. However, like any rule, Article 24 has its exceptions. One of these exceptions concerns Article 275 TFEU, which authorizes the EU Courts to review the legality of restrictive measures. Contrary to other exceptions, which are usually interpreted narrowly, the Court of Justice has interpreted this exception broadly. In a community of law, individuals and entities listed by the Council are entitled to full judicial review before EU and national courts, as illustrated by the cases *Kadi,*[3] *Kala Naft,*[4] *Rosneft,*[5] as well as to seek compensation for damages for undue listing, as can be seen in *Safa Nicu.*[6]

The case law leaves no room for doubt in recognising that individuals and entities listed on the sanctions list are entitled to the same kind of review as any other natural or legal person. Yet, these cases are not ordinary intra-EU cases. They concern the security of the EU, which may in itself be a reason justifying restrictions to fundamental rights, as the General Court held in *RT France v. Council.*[7] Moreover, in the context of CFSP matters, the evidence on which the Council relies may be scarce or kept secret. If this evidence is insufficient to justify the reasons for the listing, the General Court will have no other choice but to annul the listing.

Second, in addition to the exceptions that are explicitly listed in Article 24 TEU, the EU Courts are held to be competent to rule on disputes between staff and the EU agencies or entities that employ them in the context of missions abroad, as in the case of police missions in Bosnia or Kosovo. Similarly, the right to proper judicial protection of individuals also prevails in this case.

It is relevant to note that the Court of justice has drown a distinction between, on the one hand, the CFSP decision to deploy a mission and, on the other hand, the internal staff management decisions. The question now arises as to where precisely this line should be drawn. In a series of cases, the General Court refused to grant compensation claimed by the applicants in the context of crimes perpetrated against their immediate family during the Kosovo crisis in 1999.[8] The applicants

[3] Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v. Council and Commission,* Joined Cases C-402/05 P and C-415/05, ECLI:EU:C:2008:461, para 326.

[4] Judgment of 28 November 2013, *Council v. Manufacturing Support & Procurement Kala Naft*, C-348/12 P, ECLI:EU:C:2013:776, para 65.

[5] Judgment of 28 March 2017, *Rosneft*, C-72/15, ECLI:EU:C:2017:236, para 106.

[6] Judgment of 30 May 2017, *Safa Nicu Sepahan v. Council*, C-45/15 P, ECLI:EU:C:2017:402, paras 47-49.

[7] Judgment of 27 July 2022, *RT France v. Council*, T-125/22, ECLI:EU:T:2022:483, para. 81.

[8] Judgment of 10 November 2021, *KS and KD v. Council and Others*, T-771/20, not published, under appeal.

held the defendants liable for various acts and omissions during the conduct of the Eulex Kosovo mission. The General Court dismissed the action as manifestly lacking jurisdiction, since the contested behaviour of the defendants did not concern staff management. The applicants, together with the Commission, lodged an appeal against that judgment before the Court of justice.

A further liability issue is raised in case T-600/21, which is currently pending before the General Court. It consists of an action for damages brought by refugees against the EU's Border and Costal Guard Agency, Frontex, for not having respected the non-refoulement principle. The applicants consider that Agency failed to properly oversee the asylum procedure and the conditions under which they were returned from Greece to Turkey. This is yet another example where the General Court is called upon to assess the conduct of the EU on the ground.

The common feature of listings, staff cases and refugees is that they primarily concern natural persons. In the light of Article 1 of the Charter of Fundamental Rights of the European Union, it is not surprising that the Court of justice insists on full judicial review, if and when the dignity of the individual is threatened.

On the contrary, a question to be asked is whether legal persons, States or economic actors should be entitled to the same degree of judicial protection. While no explicit answer to this question can yet be found in the case law, it can be deduced from the Court's case law in trade defence matters that the answer is probably in the negative. The Court of justice has given clear signals that the General Court should not go too far in exercising its judicial review. At the same time, it has underlined the need for the Commission to have room for manoeuvre when dealing with trade defence matters, as shown in *Commission v. Hubei.*[9] This leeway is often granted on the grounds that the case at hand raises, rightly or wrongly, complex issues of assessment.

This brief overview shows that the General Court is regularly confronted with delicate issues involving the security and autonomy of the EU. It has to find the right balance between granting adequate judicial protection and leaving the institutions sufficient leeway in ensuring the security of the EU. It will have to reconcile *l'État de droit*" and la *Raison d'État*.

In striking this balance, a distinction should, in my view, be made between the judicial protection of natural persons and the protection of other interests, such

[9] Judgment of 20 January 2022, *Commission v. Hubei Xinyegang Special Tube*, 891/19 P, ECLI:EU:C:2022:38, paras 35-36.

as the commercial interests of companies from third States or the interests of these states themselves. It might indeed be argued that the security of the EU and the peace that it seeks promote are higher values than mere financial or commercial interests.

SLAYING THE RABID LEVIATHAN: UKRAINE'S QUEST FOR THE RULE OF LAW, MUSCOVITE RECIDIVISM AND THE IMPACT ON EUROPEAN VALUES

Keynote Speech by Serhiy Holovaty, Acting Chief Justice of the Constitutional Court of Ukraine

Your Honour Alexander Arabajiev, President of FIDE

Your Honour Koen Lenaerts, President of the Court of Justice of the European Union

Your Honour Marc van der Woude, President of the General Court of the European Union

Dear Congress participants,

Ladies and gentlemen,

I am deeply honoured to have been invited to participate in this gathering of eminent jurists. Your role in the preservation of democracy and the Rule of Law in Europe is a beacon for me and my fellow judges in Ukraine.

Let me start with today –1st of June 2023, or rather with today's news. The EU Ambassador to the Ukraine, Mr Matti Maasikas, has just *tweeted* the following: "… 'Children's day' started tragically in Kyiv, where Russian air attacks killed at least 2 children early this morning".

And now, I will continue with a reference to yesterday.

Yesterday, 31st of May 2023, marked precisely 800 years to the day in 1223, when the Mongol army destroyed the army of *Kyivan Rus*' along the *Kalka* River, in what is in contemporary terms, the Donets'k region of Ukraine. This battle demonstrated the superiority of Mongol military prowess over European martial forms and paved the way for a rapid conquest of Eastern and Central Europe by Genghis Khan. It was the precursor to the full Mongol invasion of *Kyivan Rus*' that took place 15 years later with the result that *Rus*', as a European Grand Princedom, with Kyiv as its ancient capital, lost its political independence and completely disappeared from the world stage.

Moreover, exactly a century later, in May of 1323, another historic battle took place, this time along the *Irpin*' River on the outskirts of Kyiv. This battle marked the beginning of the actual liberation of Kyiv from the Mongols. When the contemporary descendants of the Golden Horde invaded Ukraine again, in February 2022, the *Irpin*' River, just as in the Middle Ages, thwarted the plans of the invaders "to seize Kyiv in three days".

The parallels between seven and eight hundred years ago with today's circumstances are striking. In both instances, ancient and present-day Ukraine were at the epicentre of the destruction of the prevailing world order by forces bent on the subjugation and colonisation of a European State. However, the slaughter of the residents of Kyiv by the Mongols paled in comparison to the massacres of Ukrainians by the Russian army in occupied Bucha, Mariupol, Chernihiv, Izium, and Kherson.

The Muscovite State was constructed on the foundations of the Mongol Tatar yoke, and Russia's leaders became the heirs to the Mongol Khan.

This is not just my own conclusion. At the end of the XIX century Karl Marx observed:

> *"The bloody mire of Mongolian slavery, not the rude glory of the Norman epoch, forms the cradle of Muscovy, and modern Russia is but a metamorphosis of Muscovy*[1]*…*
>
> *The Tatar yoke lasted from 1237 to 1462 – more than two centuries; a yoke not only crushing, but dishonouring and withering the very sole of the people that fell to its prey. The Mongol Tatars established a rule of systemic terror, devastation and wholesale massacre forming its institutions".*[2]

A century and a half before that, Jean Jacques Rousseau in *The Social Contract*, described the efforts of Peter the Great to *civilise* Russia. He wrote: "Russia will never be really civilised …"[3]

Pre-Mongol *Kyivan Rus*', and *Muscovy* differ not only in name. *Kyivan Rus*' formed an integral part of the European body politic from its inception in the VIII century, whereas *Muscovy* did not emerge as a State until the XIV century based on the foundations of Tatar Statehood.

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[1] Secret Diplomatic History of the Eighteen Century by Karl Marx. Edited by his Daughter Eleanor Marx Aveling. – London: Swan Sonnenschein & Co., Limited, Paternoster Square, 1899. – P. 77.

[2] *Ibidem.* – P. 78.

[3] *Jean Jacques Rousseau.* The Social Contract *and* Discourses / translated with introduction by G.D.H. Cole. – New York: Dutton, 1950. – Book II, Chapter VIII, [5].

Moreover, they are distinguished by different traditions for the forming of a State. The term "Russia" did not emerge until 1721 when Peter I appropriated the name and history of *Kyivan Rus'*, proclaiming that henceforth Muscovy will be renamed "*Russia*" and the Muscovites will be known as "*Russians*".

This is not just an issue of nomenclature. By stealing the *Kyivan State*'s name, Peter I fundamentally challenged the identity and existence of the Ukrainian people. The policies of the Russian empire toward Ukrainians since then have culminated in the two main postulates of Putin's genocidal war against Ukrainians today. First, that Ukraine is not a State, and that Ukrainians do not constitute a separate nation, but are actually Russians or proto-Russians (*pachti russkiye*). Second, that Ukrainians deserve to be exterminated if they consider themselves to be Ukrainians and not Russians.

I fully share the author Anne Applebaum's view, that the Muscovite historic recidivism of occupation "belongs to the equally old, equally ugly traditions of Russian imperialism and Soviet genocide. Moscow wants to obliterate Ukraine as a separate country, and *Ukrainian* as a distinct identity".[4]

Historically and culturally, Muscovy was always more receptive to absolutism, which manifests itself in policies driven by brutality. In essence, the Muscovy State for centuries, was and still now is nothing but a brutal *Leviathan.* Today's *Kremlin Leviathan* is a terrorist tyranny, aptly expressed as "*rushism*" – a specific modern form of fascism rooted in the brutality of *Bolshevik* totalitarianism.

The experience of Ukraine is quite different: like many colonised nations, the historical struggle of Ukrainians for freedom against oppressors has conditioned them to pursue a more liberal direction. Thus, there always existed fertile soil to sow the seeds of the Rule of Law.

One of the remarkable features of the ancient *Kyivan State*, as a major European civilisation, was the early direction of its laws towards justice and respect for human life. The death penalty, martyrdom, mutilation, or other similar types of punishment were all absent from the laws of the Land.

And, there is another feature.

[4] See: "They didn't understand anything, but just spoiled people's lives". By Anne Applebaum and Nataliya Gumenyuk. *The Atlantic.* February 14, 2023.

At the start of the XVIII century, the previously free Ukrainian *Cosaticam gentem* (the *Kozak people*), who had organised themselves into a *Kozak Republic,* were subjugated by Muscovy's absolute rule. In response, the *Kozaks* adopted a testament of freedom, which is unique in Ukrainian legal and political culture. It is widely known as *The Constitution of Pylyp Orlyk of 1710* and predates both the American Declaration of Independence (1776), the US Constitution (1787), as well as the French Declaration of the Rights of Man and Citizen (1789). Nevertheless, the philosophy and political goals set out in the Ukrainian document are closely related to and may have indeed informed those documents. By its origin and nature, it is akin to the *Magna Carta* (1215).

The preamble to the Ukrainian document clearly outlines its two main tasks and goals. On the one hand, Pylyp Orlyk, the newly elected Hetman (Leader) of the Zaporozhian Host, took upon himself the duty to liberate *gentem antiquamque Cosacicam* (the "ancient Kozak people") from the external despotic power, e.g. *iugo Moscorum* ("the Muscovite yoke"). Thus, the document became a constitutional programme for future generations and a magisterial act for all Ukrainian people, exhorting them to achieve an overriding goal unchanged to this day – "*to liberate our Motherland from the yoke of Muscovite slavery*".[5]

In this respect, the Ukrainian document is very close to the spirit and ideology of the American Declaration of Independence (1776).

Another task of singular importance was to free the *Kozak people* from domestic tyranny. Several previous Hetmans had attempted despotic rule and had usurped power acting under the principle: SIC VOLO, SIC IUBEO ("My wish is my command"). Thus, Pylyp Orlyk, developing the document, noted: "*the Kozak people have always spoken out against autocracy*"[6]. Since "*the Rule of Man was not inherent in the Motherland and in the Zaporozhian Host*"[7] and the despotic way of ruling by some Hetmans in the past had led, in particular, "*to violation of rights and liberties*"[8], the document was designed to prevent the abuse of power in the future.

[5] See Chapter I of the *Pacta et Constitutiones* of the *Pacta et Constitutiones legum libertatumque Exercitus Zaporoviensis* ("Agreements and Resolutions on the Rights and Liberties of the Zaporozhian Host") … *1710.*

[6] See *Pritsak O.* The Pylyp Orlyk Constitution: *The First Constitution of Ukraine by Pylyp Orlyk, 1710.* – Kyiv: Veselka, 1994. P. 4 (*In Ukrainian*).

[7] See Chapter VI of the *Pacta et Constitutiones legum libertatumque Exercitus Zaporoviensis* ("Agreements and Resolutions on the Rights and Liberties of the Zaporozhian Host") … *1710.*

[8] Ibidem.

This desire to curb the unfettered power of one-man rule makes the document similar to the French Declaration of the Rights of Man and of the Citizen (1789).

This document from 1710 is *the conceptual origin of the Ukrainian constitutional tradition,* providing the framework for the acceptance several centuries later by our national culture of Western values.

These values were not practised in colonial-ruled Ukraine, yet they were accepted without question when Ukraine became a member of the Council of Europe in 1996. Also, these values had not yet entered the European political consciousness, until they were enshrined in post-WWII statutory documents as values upon which the Council of Europe and the European Union were founded.

There was nothing deterministic or inevitable about the development and acceptance of these values in Europe. Indeed, the horrors of the XXth century militated against them. Instead of brining lasting peace to Europe, the Treaty of Versailles of 1919 proved to be only a temporary truce before the outbreak of WWII. The creation of the United Nations in 1945 renewed hope of achieving permanent global peace and guaranteed security. Again – failure. Indeed, by letting the fox in among the chickens, from its vantage point as a permanent member of the Security Council, Russia (in both its Soviet and current incarnations) weaponised the international rule-based order to mount a series of aggressions abroad and close to its borders, the most terrible of which is against Ukraine.

The United Nations and the Council of Europe were founded in response to the horrors of the second World War under the slogan "*Never Again!*". However, it did happen again! And again! Unfortunately, international law did not prevent the war against Ukraine and it is incapable of controlling the consequences of the aggression. That is why the words of Winston Churchill – one of the Founding Fathers of the Council of Europe – are so relevant today. In a speech at the University of Zürich in 1946, he stated:

> *"The League [of Nations] did not fail because of its principles or conceptions. It failed because those principles were deserted by those States which brought it into being, because the governments of those States feared to face the facts and act while time remained. This disaster must not be repeated".*[9]

Unfortunately, that disaster has repeated itself.

[9] Winston Churchill, speech delivered at the University of Zurich, 19 September 1946. Source URL: https://www.cvce.eu/obj/address_given_by_winston_churchill_zurich_19_september_1946-en-7dc5a4cc-4453-4c2a-b130-b534b7d76ebd.html

And it continues.

Ironically, both countries encountered the same possibility for democratic development after the fall of the Soviet Union. Both Ukraine (in 1995) and Russia (in 1996) became members of the Council of Europe, separately undertaking the *obligation* to adhere to its foundational values pursuant to Article 3 of the CE Statute. At that time, as post-Soviet entities, the state of democracy and the rule of law was almost identical in both countries.

There emerged in Europe a belief that the break with the totalitarian past in these countries was irreversible.

This proved to be a fatal illusion. The speed with which the paths of the two States radically diverged seemed to confirm an almost fundamental genetically determined historical and cultural Muscovite receptiveness to totalitarianism.

At the same time, Ukraine continues to struggle for freedom as a liberal democracy governed by the Rule of Law.

Inevitably, in 2022 Russia was expelled from the Council of Europe, while in the same year Ukraine was granted candidate-member status for accession to the EU.

Truly speaking, the advancement of Ukraine into the common space of European values was not a path covered in roses. Each President of the country since independence tried to arrogate maximum executive power to his position. This included, to varying degrees, attempts to subjugate the judiciary, especially the Constitutional Court, under his control. Ultimately, the Ukrainian people, being historically and culturally predisposed to the ideals of freedom and democracy, saved their country from the emergence of a domestic *Leviathan*.

The *2004 Orange Revolution* prevented President Leonid Kuchma from establishing an autocratic regime in Ukraine.

The *2014 Revolution of Dignity* or *EuroMaidan*, forced pro-Moscow President Viktor Yanukovych to flee the country. His rule between 2010–2014 was characterised by accelerated personalised rule ("the Rule of Man"), where power was concentrated in the hands of a leader who exercised virtually total control over the Parliament, the Cabinet, Judiciary, and the Constitutional Court. The massive protests claimed victims as well – more than 100 people, known as the "*Heavenly Hundred*"[10] were killed during the *Revolution of Dignity*. Their sacrifice

[10] "*Heavenly Hundred*" is a symbolic collective name of the dead protesters during the *Revolution of Dignity* which is also called *Euromaidan*.

saved Ukraine's democratic prospects, preventing threats to democracy at the cost of human lives by forcing citizens to resolutely protest against tyranny.

Both Ukrainian revolutions proved that the mighty formula of the Preamble to the Universal Declaration of Human Rights (1948) formulates an essential postulate:

> *"[...] it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"*[11].

The attempts to undermine the constitutional structure of the State demonstrated that the authoritarian model of governing cannot work in Ukraine. The Ukrainian people see no other future for themselves other than in the community of European nations where they share common values.

Therefore, winning the war against Putin's attempts to subjugate the Ukrainian people[12] and "to destroy Ukraine as a nation"[13] is the most immediate task.

What does it mean – "to win the war"? Most elementally, it means to restore Ukraine's sovereignty to its 1991 territorial borders. But, that will not stop Moscow from firing missiles and shells onto sovereign Ukrainian territory. Nor will it stop Russia's preparations for a new war.

The only guarantee of peace, stability, and security in the region is for all seven countries on Ukraine's borders to share common values upon which are based societies governed by the Rule of Law.[14]

Muscovy's war against Ukraine is a war of enforcing the past versus realising the prospects for the future. As such, Russia's war of aggression is doomed to defeat. Prof. Timothy Snyder of Yale University rightly notes that "Ukraine Holds the Future" and that "this war is about establishing principles for the twenty-first century". That "it is about policies of mass death and about the meaning of life in politics." That "it is about the possibility of a democratic future".[15]

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[11] Universal Declaration of Human Rights (1948). Preamble.

[12] See "Preliminary Lessons in Conventional Warfighting from Russia's Invasion of Ukraine: February–July 2022" by Zabrodskyi et al. – London: RUSI (Royal United Services Institute for Defence and Security Studies), 2022. P. 7.

[13] See *Wayne Jordash.* Genocide in Ukraine. *Ukrainska Pravda.* 28 March 2023 (In Ukrainian).

[14] See *Yuriy Khrystenzen.* In the Russian law 'On veterans' the war against Ukraine is the "jubilee", the fortieth. *Glavkom.* 8 March 2023 (In Ukrainian).

[15] See Timothy Snyder. Ukraine Holds the Future. The War between Democracy and Nihilism. In *Foreign Affairs.* September/October 2022. Source URL: https://www.foregnaffairs.com/ukraine-war-democracy-nihilism-timothy-snyder

Ukraine will win in any format of war – short-term, long-term, or an ultra-long one. This struggle for freedom gives Ukraine the opportunity to root European values in the fertile Ukrainian soil. And to remind European nations of the meaning and importance of these values. This struggle is not limited in time. The Ukrainian people will fight for as long as it takes to achieve their goal – victory. As Anne Applebaum observes, "this summer, this autumn, Ukraine gets a chance to alter geopolitics for a generation"[16].

"To win the war" means not only restoration in Europe of peace and the rule-based international order.

"To win the war" means also to "not lose the peace".

Today, the pressing task for Ukrainians is also to preserve our democracy. Victory for us should be a process – the process of winning. The Ukrainian word for 'victory' is *peremoha*. It has meanings that are not found in many other languages. *Peremoha* means defeating not only the external enemy, but also overcoming the challenges within us. It means to find a new ability within oneself, the capacity of each of us to root our democracy in the Rule of Law and to meet the Copenhagen criteria.

Since before the defeat of the Mongol Horde at *Kalka* 800 years ago, on May 31st, the Ukrainian State – when free to choose – has always chosen a European, not a Eurasian path. For this we have been attacked for centuries by a colonising recidivist neighbour. Having won our democracy and a clear path into the EU, we must avoid a scenario where liberal democracy morphs into a model of "Orban.ua", where certain countries backslide on their commitment to democratic rule and the Rule of Law. We must ensure that our political classes will not be tempted by authoritarianism.

We must remain vigilant – so that after Ukraine defeats the external monster, a domestic *Leviathan* does not take up residence in the home of a Free and Independent Ukraine.

Thank you very much for your attention.

[16] See *Anne Applebaum and Jeffrey Goldberg.* The Counteroffensive. In *The Atlantic.* May 1, 2023. .

KEYNOTE SPEECH BY GUY VERHOFSTADT

Member of the European Parliament, Co-Chair of the Conference on the Future of Europe

In 1948, the Belgian Minister of Foreign Affairs, Paul-Henri Spaak, held a speech that went around the world. At the United Nations General Assembly, he famously tore into Soviet Union saying, "la base de notre politique, c'est la peur". What guided Europe in those years, he explained, was fear. Fear of the Soviet Union. Fear of its intentions towards Europe. Fear of its autocracy. And that went hand in hand with another fear within post-war Europe, fear of ourselves. The years before had shown what could happen if the worst emotions within our societies were unleashed. How populist and extremist politics could lead to war and downright evil.

It was this feeling that made Spaak's generation turns towards European Union and European integration. It was the only way to safeguard their liberties, the democracy, and our sovereignty. Political integration was needed to uphold the rule of law internally. A unified European bloc was needed to promote the rule of law internationally.

And it was our way to find freedom from fear. Last year, when we concluded the Conference on the Future of Europe, I recognised, in fact, similar thinking in citizens from across Europe, a deep concern that led them to action. And the invasion of Ukraine happened right when we started to discuss the role of the European Union in the world. And especially young people were concerned with the deterioration of rights and liberties within the European Union. There was a very strong sense that we needed more Europe. A realisation that we needed a different kind of Europe to deal with these challenges, to stop the pervasive fear in all societies by improving our institutions and our politics.

What we have seen since the invasion of Ukraine is again what I call the interaction between internal and external policies. Big steps have been taken to try to make the European Union a stronger player: we have financed weapons and training through the peace facility; we have painstakingly put together ten packages of sanctions, and the eleventh is under way, is coming.

We have linked arms on energy and economic issues, like access to key materials, such as microchips. But we have been able to take further necessary steps because of our internal weaknesses. Sanctions are slow. Solidarity with Ukraine remains insufficient, I think. Our defence integration is not even close to where it should

be and we are still dependent on the United States. Fragile towards Russia, split on China. So Europe is falling short of its real goal: the assuaging of the fears of our people. And the reason for that, I think, is our politics. We are clinging to an outdated idea of national sovereignty that is already hollowed out by global events.

We hold on to an unworkable idea of unanimity that undermines our ability to act and, certainly, to act quickly. Our heads of state keep grabbing the limelight while their real power is undone by what I call a new age of empires, where there exists a competition between massive geopolitical entities – like the US, like China, like India. This brushes aside the nation states of the past. So like Spaak warrants, thinking small in a bigger and bigger world is making Europe weak. And the background to your discussions is, I believe precisely that: how do we reform Europe to regain trust? And between its citizens, force cooperation among its politicians and reinforce our democracies against threats both from within and from without.

I will give you three work strengths. First, rule of law. Precisely in countries where elites undermine the rule of law, Europe is most popular for defending it. And we need to do better. Thanks only to European Parliament, the bar was raised on tying EU funding to rule of law safeguards. But that fight is far from won, and the Council and Commission have to go further in politically isolating the breakers of [the] rule of law. That leads me to the second endeavour, the second challenge: unanimity. Europe cannot be credible unless it acts swiftly, and it cannot act swiftly unless it updates its rulebook. Unanimity on sanctions, on defence, on foreign policy, and even on migration, means, in fact, deadlock, even irrelevance. We cannot face the 21st century with 19th century's ideas of national sovereignty. The veto of Member States needs to be abolished. And third, these issues are only possible in a wider context of EU reform: what kind of Europe do we need to face or challenges and how do we bring it about?

Those are the real questions raised by the Ukraine invasion: its broader impact and the new world order it sees to be born. The European Parliament has triggered a convention to openly debate this, and we are following it up with a detailed report on where and how we see the reform of the European Union. We have one year to go until the European elections, and this is the time to talk about the bigger story of Europe and the number one question our citizens and voters want us to answer: how do we make hope, not fear, the basis of our politics again?

Thank you very much, and I wish you a great success with your conference.

CONCLUSIONS OF THE GENERAL RAPPORTEURS

CONCLUSIONS ON TOPIC I: MUTUAL TRUST, MUTUAL RECOGNITION AND THE RULE OF LAW

Miguel Poiares Maduro

Dean, Católica Global School of Law, Portugal, and Professor, School of Transnational Governance, European University Institute

The first panel focused on the normative foundations for the rule of law, democracy and fundamental rights protection in the European Union legal order. Two stages were identified: what the moderator of the panel (Paul Craig) identified as the foundational period and the post-charter period. The foundational period focused on the risk that the new powers given to European institutions might undermine the fundamental rights, rule of law and democracy usually guaranteed in its Member States. In other words, the fear was that the (then) European Communities could challenge the fundamental rights, rule of law and democratic dimensions of the constitutional identities of its Member States. It was consensual that the EU was effective in answering these challenges. The Court played a crucial role with respect to fundamental rights with its well known *Internationale Handelsgesellschaft*[1] line of cases establishing the fundamental rights review of the acts of EU institutions. This was then followed up by the political process that enshrined the judicial approach in the Treaties (today Article 6 TEU) and, later, developed a Charter of Fundamental Rights.

The Court of Justice as also played a crucial role in establishing the principle that all EU actions (susceptible of having legal effects) must take place under the rule of law. This was affirmed, in the first instance, in the also well known Les Verts v. European Parliament.[2]

At the same time, the democratic challenge was addressed at the political level through the introduction of new democratic dimensions in the European Union. The democratic character and the powers of the European Parliament were substantially increased. New instruments of citizens participation and accountability of Eu institutions were also added. Also important has been the attempts to develop a more truly European political arena via steps such as the politization of the Commission (with its growing accountability to the Parliament and reflective of European elections) or the promotion of European "parties".

[1] Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 112.

[2] Case 294/83, Parti Ecologiste Les Verts vs European Parliament [1986] ECR 1339

The democratisation of European integration is also reflected in the Treaty of the European Union. Most notably, Articles 10 and 14 TEU now express this fundamental requirement with regard to representative democracy and the elections and functioning of the European Parliament.

These three values (democracy, rule of law and fundamental rights) are now recognised as foundations of the European Union in Article 2 TEU.

The second stage identified was, as mentioned, the post-charter period, when the focus of fundamental rights and rule of law protection has shifted from EU institutions to Member States. In other words: the fundamental issue has become the protection of the values enshrined in Article 2 TEU at the level of the Member States when they act within the scope of EU law.

To a large extent, the rule of law and fundamental rights debates have now shifted from EU institutions to Member States. A discussion took place on what helps explain this shift in focus and several reasons were advanced:

The Fundamental Rights Charter has reduced information costs and gave visibility to fundamental rights in the EU legal order. This was bound to impact on use of EU fundamental rights also at the national level (national courts even refer to the Charter in purely internal situations).

The expansion of EU competences and policies has had a two-fold effect: 1) increased interdependence between Member States and between them and the EU legal order both expands the scope of application of EU law and the requirement of mutual trust which is, in turn, dependent on the guarantee of the fundamental values of Article 2 by all Member States; 2) some of the new areas of EU law (such as the AFSJ) are more likely to bring into the fore fundamental rights and rule of law issues.

Successive enlargements have increased the diversity of the EU. The higher the number of Member States the more important it becomes to formalize and guarantee the instruments that provide for the necessary common constitutional identity which is reflected in Article 2 TEU.

The second part of the panel focused on the normative foundations that can justify the role that the European Union is increasingly called to play in protecting these fundamental values in its Member States.

We discussed the three possible normative foundations, identified in my general report, that I summarise in here.

The first normative foundation results from the moral and political externalities that violations of fundamental rights or the rule of law in a Member State may cause in another Member State when these States integrate a common political and economic Union. The concept of moral and political externalities is controversial but it can be argued that when Member States – and their citizens - commited themselves to share a certain political and economic space in the form of the European Union this is predicated on certain assumptions underlying such common endeavour that are now enshrined in Article 2 TEU. Violation of such values by a Member State is therefore a violation of the foundations on which the agreement with the other Member States was based.

A second normative foundation can be explained as a form of external constitutional discipline self-imposed by Member States on themselves. States may actually want to bind themselves to an external constitutional discipline on fundamental rights and the rule of law because either they do not have a domestic mechanism to guarantee such values and want to use the external mechanism to do it or because, in the face of past negative experiences, they want to add an external layer of constitutional discipline 'on top' of the domestic constitutional layer enshrined in their national constitution. International or supranational law instruments of these type are often a form of collective self-discipline that States impose upon themselves because past experience has showed that domestic mechanisms of countervailing powers and political and judicial control are not always effective in protecting the rule of law, fundamental rights and democracy. These two reasons certainly fit, for example, the case of the Council of Europe and the European Court of Human Rights. They can also be used, albeit not to the same extent (in the light of the initial objectives of European integration), in the case of the European Union.

There is a third normative foundation which is, in my opinion, particularly relevant in the case of the European Union. Perhaps the more relevant of the three normative foundations. As I wrote in my report, in the case of the European Union, Member States have entered into a form of integration generating such interdependence that violations of the rule of law, democracy, and fundamental rights in one Member State can, in fact, impose violations of the same fundamental values in the other Member States and the EU itself. This so for two reasons. First, EU law determines, in multiple instances, and particularly under the principle of mutual-recognition, that a Member State is often called to give effect or put

into effect decisions or rules of another Member State. If these decisions and rules have been adopted in violation of (or entail a) violation of the rule of law, fundamental rights or democracy, the Member State that applies or puts into effect such decisions and rules incurs itself in such a violation. This is why mutual recognition requires mutual trust and the latter assumes that all Member States share a set of common constitutional values, in particular those made explicit in Article 2 TEU.

A second reason is that the degree of interdependence generated by European integration does not only bond, in certain domains, national legal orders. It also bonds, in an almost existential manner, national legal orders and the EU legal order. This is so, in the first place, because national judicial and administrative systems are the ones implementing, in most instances, EU rules and decisions. If EU rules and decisions are implemented in a manner that violates the rule of law or fundamental rights of EU citizens it is the EU itself that is also incurring in such violations. But this existential bond also exists, in the second place, with regard to violations of those fundamental values at national level that may determine, in turn, a violation of those fundamental values by the decision-making processes of the European Union. For example, for EU institutions to be and act democratically it is necessary, in many respects, for certain democratic conditions to be satisfied at the national level in the first place.

The second panel reviewed the different instruments and mechanisms currently available for protecting the rule of law. What the institutional report defines as the toolbox for protecting the rule of law in the European Union. It was recognized that the EU now has a very wide array of both political and legal instruments. Among them:

– The rule of law dialogue and framework.

– The Conditionality Regulation and other provisions within the structural funds.

– Article 7 TEU.

– Article 2 which together with other legal bases can bring certain, otherwise purely internal, national measures and actions affecting the rule of law within the scope of EU law. This is already firmly established with regard to judicial independence on the basis of Article 2, the rule of law and Article 19 but,

as raised in my report, can also emerge from the relation between Articles 10 and 14 TEU and the protection of democracy or, even, from the relation between free movement and at least certain fundamental rights violations.

– Other specific EU legislation (such as on non-discrimination on certain grounds).

The existence of this wide toolbox is not, however, a silver bullet. On the one hand, were rule of law problems have gained a generalized and systemic nature in a Member State no single remedy will suffice. It's crucial to make an articulated and coherent use of all the instruments and even that may not be enough. On the other hand, the diversity of these instruments opens several other questions:

When should political or hard law instruments be used and are, respectively, more effective?

What is the correct balance between centralized enforcement (notably through infringement procedures) and decentralized enforcement (by preliminary references, including in the context of mutual recognition, i.e. horizontal enforcement through national courts)?

What is the standard to be used in infringement and preliminary rulings; in other words, how systemic and/or widespread and/or serious does the violation of the fundamental values of Art 2 needs to be?

What is the appropriate role for the Commission to play its role in the context, notably, of infringement actions and the conditionality regulation and should (and, if so, how much and which type of) political considerations should be taken into account by it?

A concern has also emerged (reinforced by recent developments) that the Commission and the Council may become prisoners of cross-issues political linkages in the EU political process in the role attributed to them by instruments such as the Conditionality Regulation. In other words, some Member States may use their political power in other EU policies to condition the Commission and/or Council in what is supposed to be an objective and legal assessment of the requirements imposed by instruments such as the Conditionality Regulation on Member States. This increases the pressure to transfer such powers to a non-politically dependent institution (such as the proposed "Copenhagen proposal").

The third panel focused on the protection of the rule of law with regard to EU institutions and the need to guarantee a coherent and consistent approach to the rule of law both in its internal dimension (with respect to EU institutions) and external dimension (with respect to the actions of Member States)..

The need for consistency in the approach adopted in protecting the rule of law with respect to EU institutions and Member States was stressed by all participants. This was well reflected and stressed in many national reports. First, even the simple perception that a different standard may be applyed at the EU level will ultimately undermine its legitimacy in monitoring the rule of law at the Member State level. Second, were it to be perceived to correspond to a lower level of protection of the rule of law with regard to EU institutions, it would also feed the claims that transfers of power to the EU undermine the protection of the rule of law what may, in turn, trigger some national high courts challenges to EU law primacy.

Two issues dominated this discussion and the assessment of the consistency of the EU approach to the rule of law and fundamental rights at the EU and national level:

First, a tension was recognized to emerge from the difference between the intergovernmental nature of EU decision-making (in particular in the Council) and the protection of the rule of law and fundamental rights as fundamental principles of the EU legal order.

The inter-governmental culture which still dominates, at least in part, the legislative process is dominated by trade-offs between national governments (which are often confused with the Member States themselves) that may, for example, enter into conflict with the principle of equality among EU citizens. It also frequent for the powers attributed to the Council to take place in a culture of opacity and informality that makes it difficult for accountability to be preserved. Examples given of this tension are the cases involving the European Public Prosecution Office (where the Council reverted substantive assessments of merit made by an independent panel without it being clear how such a deliberative process took place, what supported and, instead, in the light of the information made available by some Member States, simply as a consequence of political trade-off between national governments). This highlights a risk that decisions that, at national level, EU law would not accept to be taken under the control of national governments, may, instead and by virtue of the inter-governmental character of EU decision-making, be shaped by those at the EU level.

While this tension is, to a large extent, part of the current ADN of the Union, it was also recognized that it's crucial to reconcile it with the fundamental values of the rule of law, fundamental rights and democracy and, particularly, not to allow national governments to use the EU political level to bypass the constraints imposed on them by those values. what they can't do under those values at national level.

A second topic regarded the specific topic of the appointment of the members of the CJEU and, particularly, the justiciability of the decision of the governments of the Member States. Some, based on the principle of conferral, argued that there is no legal basis in the Treaty for the Court to review such decision (which is not, in itself, an act of an EU institution). Others, including myself, argued that such a position is difficult to reconcile both with the general recognition of the EU as a Union of law and with the recognition of the possibility, under Articles 2 and 19 (plus 47 Charter), to review national judicial appointments in order to protect the rule of law. It is at least controversial to argue that Article 19 gives the power (and corresponding jurisdiction) to EU Law to guarantee the rule of law in the appointments for national judiciaries because they apply EU law but not to guarantee the rule of law in the appointments for the CJEU itself?

The fourth panel focused on the link between primacy and the rule of law. It was recognised that the uniform application of EU law is inextricably (existentially even) linked with the rule of law as it is necessary to guarantee equality under the law.

Primacy was also considered to be a better concept than supremacy in order to distinguish between two things:

On the one hand, there is the question of ultimate authority between the EU legal order and national legal orders which ought to remain open as a consequence of the fact that the question of sovereignty in the European political and legal space should, itself, remain open. The topic of ultimate authority between the two legal orders and the corresponding sovereignty question are better suited to the language of supremacy and ought to remain an open question. On the other hand, the pluralism of political and legal authority that results from such open question does not need to lead to a lack of uniformity in the application of EU law if, even as a result of the application of different rules of recognition, the primacy of EU law would be guaranteed in practice. In other words, the primacy in practice of EU law does not require an agreement on the theory governing the relations between the EU and national legal orders and much less on the sovereignty or ultimate authority question.

We can say that, while constitutional pluralism reflects the reality of competing claims of ultimate legal authority and sovereignty in the EU political and legal space, it does not need to be conceived as a justification for constitutional conflicts but as a reason and incentive to prevent them.

For this paradox to be successful all the judicial actors need to agree into a judicial dialogue and practice that is governed by some common principles. Notably, it is necessary for all participants in this discourse to share the commitment to the common values of the rule of law, fundamental rights and democracy and to a common hermeneutic framework of principles of interpretation that guarantee the coherence and integrity of their respective legal orders.

Finally, it was noted that, while direct constitutional conflicts get most of the attention, there may be less explicit forms of challenge to EU law primacy and the rule of law that ought to deserve more attention, As pointed in some national reports, sometimes primacy is challenged by evasion instead of conflict. It is not uncommon for national courts to, de facto, evade the primacy of EU law by constructing a case before them as not involving a question of EU law or, even, in some cases, by misconstructing EU law itself. In spite of the case law of the CJEU making it clear that manifest violations of the EU law obligation to refer may lead to State liability, there continue to appear to exist several cases of this type.

The fifth panel focused on the principle of mutual trust and its value-related limits in the area of freedom, security and justice.

It was universally recognised that mutual recognition requires mutual trust. And that the latter is based on the common constitutional identity of the Member States and EU enshrined in Article 2 TEU (democracy, the rule of law and fundamental rights). If that mutual trust is lost then mutual recognition is in risk.

The LM case law can be seen as, on the one hand, promoting a decentralized and horizontal enforcement of the rule of law but, on the other hand, expanding the possibilities of non-enforcement of EAWs and increasing the risks of fragmentation. Ultimately, this tension was, however, recognized as the product of the need to protect the mutual trust necessary for the whole system to work. The overall assessment is that the application of the LM test has not led so far to put into question the entire EAW system.

A significant time was occupied discussing the difficulties in the two-step test of LM (systemic problem and individual risk) raised in many national reports.

Though the difficulties of the test were acknowledge it was also largely consensual that no better alternative has been put forward so far:

The high threshold protects the rule of law and fundamental rights without provoking a full stop of mutual recognition with a certain Member State. It's a reasonable way to attempt to balance the need to protect the rule of law with risks of fragmentation that would also put that rule of law in question.

It is also a product of the need to balance the protection of the rights of those subject to the EAW with the rights of victims of crime.

The final session addressed the interaction between the rule of law, democracy and fundamental rights in EU law. It was a common point throughout the session that even if they are conceptually different they are normatively united. This is reflected in Article 2 TEU that assumes this existential link between these three concepts.

They are so indissociably linked that they can be said to have today merged into an almost unitary concept of democracy, fundamental rights and the rule of law. It's interesting that both the Conditionality Regulation and the Commission framework on the rule of law,[3] include in the concept of the rule of law not only more classical elements such as judicial independence and legal certainty but also democratic and fundamental rights requirements.

On the one hand, as I noted in my original report, without democracy there can be no effective protection of fundamental rights and the rule of law. Only in a democracy is it possible to guarantee an effective recognition and protection of many of those rights and the political institutions embedded with the necessary culture to respect such rights. Additionally, a substantive conception of the rule of law requires for law-making processes to be democratic. Equality under the law requires equality in making the law. If the law would not be democratic then we would have rule by law but not rule of law.[4]

On the other hand, without fundamental rights and the rule of law there can be no real democracy. In fact, the deliberative, cognitive and epistemological conditions necessary for genuine democracy are predicted on certain fundamental rights.

[3] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget

[4] Allan Rosas, Democracy and the Rule of Law: Odd Bedfellows or Siamese Twins, in A Rosas, J Raitio and P Pohjankoski (eds), The Rule of Law's Anatomy in the EU: Foundations and Protections, Oxford, Hart Publishing, forthcoming June 2023.

Without the protection of those rights there will be no democracy. In addition, the equal political dignity of citizens, that is the core of democracy, requires the protection of the equal consideration of their interests, including by imposing certain limits on the political process.

It is this that creates an indissociable bond between the rule of law, fundamental rights and democracy. A bond that was even described as either a musical triangle or a trinity. I can conclude by saying that the different sessions demonstrated more than a blind faith in the trinity and that they expressed hope to make music and not noise with that triangle.

CONCLUSIONS ON TOPIC II: THE NEW GEOPOLITICAL DIMENSION OF THE EU COMPETITION AND TRADE POLICIES

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Introduction

Topic 2 of this year's FIDE conference focused on "The New Geopolitical Dimension of EU Competition and Trade Policies". We were invited in 2020 to work on this topic, reflecting the visionary thinking of the organising committee in respect of the future challenges facing the European Union's competition and trade policies. At that time, but also at the time of preparing the questionnaire for this topic, significant developments affecting the scope of this report had not yet occurred, including the COVID-19 pandemic and Russia's war in Ukraine and related high energy prices. Nor had we seen the Green Deal Industrial Plan or, for example, the tensions between the United States and the European Union on how to achieve industrial transformation at home, through subsidies, to achieve climate change objectives and maintain the competitiveness of their industries. The emphasis on protecting economic security in designing competition and trade policies is also a more recent development.

As general rapporteurs for Topic 2, we had the pleasure of closely collaborating, in the preparation of our general report and the six panels on this topic at the FIDE conference, with the institutional rapporteur. We are grateful to Mr Ben Smulders, Deputy Director-General, DG Competition (European Commission), for these deep and rich discussions. Likewise, we wish to thank the national rapporteurs and all panel participants for their insightful contributions.

Main conclusions

We started the first day of the conference with a conversation about (open) strategy autonomy as the central concept underlying today's EU policy initiatives in trade and competition. Faced with mounting geopolitical challenges, the European

Union is becoming more resilient and seeing its powers increase. In particular, it appears that foreign policy interests are increasingly protected through the Common Commercial Policy ("CCP") and security and economic interests are more and more intertwined.[1] At the same time, Green Deal interests are at the intersection of many of those policies. Those evolutions are not likely to change as the European Union is moving forward with initiatives to protect its economic security and develop an industrial policy to achieve the green and digital transition of its economy. Whilst the European Union remains a strong supporter of the rule of law and the multilateral trading system, undoubtedly also the European Union (and not solely its main trading partners) is seeking to expand its (unilateral) toolbox for defending trade and related interests and responding to (competitive) threats.

Against that background, the first panel focused on better understanding what (open) strategic autonomy means, in practice. We admit that we might not have fully succeeded in that task. Nevertheless, there was a common perception that the concept of strategic autonomy is to be defined in function of how the European Union responds to crises and as part of making the European Union ready for deglobalisation.

The second panel focused on how the new Foreign Subsidies Regulation (FSR) could be applied in practice. The discussion moved to the question of whether industrial policy was making a comeback and whether this was a good thing. We reminisced that, in the 1980s, the Commission applied an industrial policy of the most dirigiste kind, the "plan Davignon", in response to a major crisis in the European steel sector. New crises, such as climate change and the challenges of new geopolitical developments, fully justify this comeback of an EU industrial policy.

The third panel discussed sustainability agreements in the context of Article 101 of the Treaty on the Functioning of the European Union (TFEU). There was no consensus on whether the Horizontal Guidelines[2] adopted on the day prior that of the panel discussion went far enough to provide full support to the green transition. Without going into technical details which only competition lawyers find exciting, the essential questions were whether sustainability agreements that

[1] See European Commission, Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security", JOIN(2023) 20 final (20 June 2023), which was published after the FIDE conference.

[2] European Commission, Annex to the Communication from the Commission, Approval of the content of a draft of a communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C(2023) 3445 final.

result in higher prices for users should be allowed under EU competition law and whether Article 101(3) TFEU, as applied by the Commission in the new Guidelines, was the right legal basis for making this assessment.

The fourth panel considered the question of whether EU competition law should allow the creation of "European champions." There was a discussion about whether those champions were needed in the first place. It was agreed that European champions might be useful in certain industrial contexts and the example of Airbus was examined. But there was a consensus that a relaxation of EU merger control rules might not be the best way to create champions. There are other instruments, such as, for instance, State aid that can be used for this purpose.

On the second day of the conference, the discussions moved to EU initiatives and legislation impacting global supply chains and investments in (and from) the European Union. Increasingly, trade and investment policy and legislation are defined in function of the interests of the European Union and the Member States in sustainability and (national and economic) security.

The fifth panel focused on the European Union's intervention in global supply chains, in particular through the proposed Corporate Sustainability Due Diligence Directive. The trilogue in respect of that directive started this summer. It remains unclear whether that directive, having already a troubled history, will be adopted before the end of the term of the current Commission. During the discussion on this initiative, we looked into this intervention's burden for companies and whether the solutions offered in the Commission's proposal constitute an appropriate and proportionate response to the problems in respect of human rights, labour and environmental protection, at home and around the world. The debate centred on what the adoption of this new directive would mean for Member States (and their domestic legislation) but also for developing countries which eventually might find themselves excluded from the supply chains of European companies.

The final panel looked at the operation and future of investment screening, both inward and outbound. The assessment of the practical operation of the FDI Screening Regulation, and the fragmented regulation of that screening in the Member States, offered a springboard to reflect on the question of whether the FDI Screening Regulation should be used as a model for outward FDI screening. On balance, the model found in the FDI Screening Regulation, requiring revision, was considered not to be suited for screening outward FDI. Nor was it clear what the scope of the latter screening should be and how it could be enforced. Outward FDI screening is a central element of the Commission's position on an Economic

Security Strategy for the European Union, which was not yet available at the time of the FIDE conference. During this panel, we also returned to the question of the European Union's powers. Although the FDI Screening Regulation, as it stands today, seeks to find a balance between the Common Commercial Policy and the Member States' powers for national security and public order, there was a general understanding among the participants in the discussion that the status quo cannot be maintained and that the European Union will take a more active role in the future. That understanding was subsequently confirmed in the above-mentioned Economic Security Strategy.

To conclude, we witness a transformative moment in the design of the European Union's competition and trade policies, driven largely by the climate crisis, the need for digital transformation and geopolitical developments. Topic 2 enabled us to explore the depth, impact and context of that transformation. The insightful discussions during the six panels focusing on this topic demonstrated that these conversations will hopefully continue during future editions of the FIDE conference.

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CONCLUSIONS ON TOPIC III: EUROPEAN SOCIAL UNION

Sophie Robin-Olivier, Professor of Law at the Sorbonne School of Law

Topic 3 raised the question of a social Union. A Union closer to its citizens. A Union that protects the most vulnerable persons instead of doing away with pre-existing protections, be they based on law or other sources of solidarity. A Union that is able to invent, as it did in the past in other domains, concepts, methods or models to protect those adversely impacted by globalization, digitalization and climate change, to name only some of the most obvious factors of increased vulnerability, for the most vulnerable. And a Union that is not only social in fact, but perceived as social by its citizens.

In reading national reports, my impression was that there existed a gap between acknowledged developments of EU social policy (the "social acquis"), and the perception that the EU is a social Union. Rather, the substantial and perceptible impact on social rights and protections of other (non-social) policies was quite clear. A series of unpleasant associations give an idea of what is going on: free provision of services is associated with social dumping; free movement of workers with brain drain; the Economic and Monetary Union with austerity; Free trade with delocalization of production; and global supply chains with workers exploitation and forced labor.

Thus, if the development of EU social law does not contribute so much to make the EU more social in the eyes of its citizens (namely because the EU must struggle to find compromises, which lead to small steps rather than giant leaps in social matters), but what happens outside the domain of social law is affecting social rights in more significant ways, we need to take it from there and focus on "socialization" of other policies: the internal market, the EMU, the EU external policy, the Green Deal, and the rule of law, among others. I will take three examples, evoked in panels discussions, to illustrate what such "socialization" means.

Socialization of the EMU. This evolution has resulted, namely, from the adoption of the European Social Pillar, in 2017. The Pillar has been described by the European Commission as a way to socialize EMU. It is a new type of instrument, non-legally binding, but programmatic, seeking to supersede regressive convergence of economic policies of Member States by more progressive ones. Through the Pillar, consistency may be ensured between social policy developments and trajectories

of convergence designed for Member States within the EMU. A virtuous circle could be triggered. Take, for instance, the recent directive 2022/2041 on adequate minimum wages for the EU. The Pillar served as an impetus for such a bold legislation, which includes, as a core element, the requirement for Member States to support sectoral collective bargaining on remunerations (whereas, for years, during the economic and financial crisis, recommendations were made to Member States, under EMU rules, to cut wages and decentralize collective bargaining). If the EMU takes into account this outcome of the Pillar that the directive constitutes, as it should, Recommendations to Member States in the framework of the European semester, in particular, should press Member States to take action in order to foster branch collective agreements, and the participation of social partners, at sectoral level, in defining wage policies.

Socialization of EU Trade policy and global supply chains is already on its way too. The new generation of trade agreements concluded by the EU includes social clauses, and the Commission recently proposed that trade sanctions apply in case of violation, which would be a sign that the social dimension of international trade is taken seriously. Already, the conclusions of the panel set up to examine a dispute concerning the EU-Korea trade agreement has not only led to positive outcomes concerning Korea (which ratified ILO Conventions 29, 87 and 98 in April 2021), but possibly to the EU itself being prompted to develop policies ensuring protection of vulnerable workers, including self-employed (see namely the directive proposal on platform workers, and the European Commission guidelines excluding solo self-employed workers from EU antitrust rules). As far as global supply chains are concerned, directive 2022/2264 on corporate sustainability reporting (CSRD) and the directive proposal on corporate due diligence (on the verge of adoption), following legislative evolutions in France (2017) and, more recently in Germany, illustrate a transformation of corporate law aiming at protecting social rights, at a global level. In this context, the notion of social rights, their source, their beneficiaries, is profoundly transformed. In particular, the conception of "workers" to be protected by labor law needs to be revisited. This is where socialization of international trade and international activities of corporations, extensively conceived, leads us. This is what the future of EU as a defendant of social rights at the international level needs to deal with.

Socialization of the rule of law. This means, first and foremost, that social rights and their protection should be taken into account when respect of the rule of law by the EU and its Member states is considered, and assessed. Gender and racial discriminations, access to housing, to resources ensuring a decent living, right to

collective bargaining and collective action, among others, are concerned. Social values are at stake. Socializing the rule of law also means acknowledging the need for access to judicial remedies, and an independent justice in particular, to claim social rights, fundamental social rights, in particular. This is indeed a necessity for social Union to exist effectively. The recent *TP* case (C-356/21) decided last January by the Court of justice, concerning discrimination on sexual orientation in Polish legislation is a good example. The case raised by a Polish district court in Warsaw questioned the conformity of Polish law with EU directive 2000/78 prohibiting discrimination at work. The decision of the Court of justice, affirming the principle of non-discrimination on sexual orientation, illustrates the role of independence of national courts together with the preliminary ruling procedure in ensuring protection of core EU principles.

This last example suffices to show that panel discussions on a European Social Union were not dealing with narrow, technical issues of EU labor law, but touched at very hearth of EU integration, its values, and its future.

PLENARY DEBATES

THE POLITICAL, ECONOMIC AND SOCIAL PHYSIOGNOMY OF THE EUROPEAN UNION

Plenary Debate

Alexander Kornezov, *Judge, President of chamber, General Court of EU*

Takis Tridimas*, Professor of European Law, King´s College London*

Gabriel Glöckler*, Principal Adviser at the European Central Bank*

Daniel Gros*, Director of the Centre for European Policy Studies*

Ulla Neergaard*, Professor of EU Law, University of Copenhagen*

Alexander Kornezov:

It has become a tradition for FIDE Congresses to kick off with a plenary interdisciplinary panel, which forces us lawyers to think outside the legal box and takes us away from our comfort zone.

As organisers and hosts this year, we decided to start the FIDE Congress with a critical discussion about European identity.

One of the principal obstacles to European integration is said to be the lack of a European demos.

Thus, it is of utmost importance to examine whether it is necessary to help create a European demos, not as a substitute to national identity but as a complementary sense of belonging to a broader political, economic and social European identity.

I think that the European project will never be truly successful until a true and genuine European demos emerges.

An individual's sense of belonging to a community is traditionally influenced by a common language, history, ethnic origin, religion. But, in Europe these classical nation-building factors divide us: we all have different languages, we have all, at one time or another, even fought each other – so history tends to divide us, rather than unite us – we also have different ethnic origins and, often, different religions.

To paraphrase the German *Bundesverfassungsgericht* in its Maastricht judgment,[1] it is this linguistic, historical, ethnic, spiritual homogeneity that is lacking in the EU and that impedes the creation of a true European demos.

But is this so?

I take the view that that line of thinking, evidenced in the Bundesverfassungsgerich's Maastricht judgment, is outdated and fails to take account of the full spectrum of phenomena through which a sense of belonging, an identity, can emerge.

Indeed, in political science, it is considered that identities can emerge – beyond or despite the aforementioned classical factors of nation-building – through a civic dimension, which helps people to identify with a community based on a shared ideology or shared values.[2]

It is this civic dimension of identity-building which may prove decisive for the gradual emergence of a European identity.

I therefore turn to Takis Tridimas, Professor of European Law at King´s College London, with a simple, but fundamental question: What is the EU's political identity, what is its political project, what is its ideology, to put it simply? Can we build a European identity, a European demos around that ideology?

Takis Tridimas:

Those questions are profound and go to the heart of the European integration project. In attempting to answer them, it is first necessary to provide some definitions. I understand the term 'political identity' not as referring to any partisan orientation supporting the transient policies of one or another political party, but as referring to the fundamental premises of the EU as a legal and political entity. Thus understood, political identity is equated with constitutional identity. It refers to the defining features of the EU constitutional system, which include the fundamental rules governing its institutional structure, its competences, the relations between the Union and its constituent Member States, and the rights of individuals. In other

[1] Decision of the German Federal Constitutional Court of 12 October 1993 in Re Maastricht Treaty, Cases 2 BvR 2134/92, 2 BvR 2159/92. The full text in German is reported in 89 Official Court Reports 155 [BVerfGE 89, 155].

[2] See for example, Markus W. Gehring, 'Europe's Second Constitution Crisis, Courts and Community, pp 58 – 100, p.83 in '*Demos* Obstacles to European Constitutionalisation', published by Cambridge University Press, 2020 and Kimberley Twist, 'The Devil is in the *Demos*: the identification of European Citizens with Europe', p.6, published by the Centre for European Studies New York University, 2006.

words, it encompasses both principles of governance and a set of rights. These features taken collectively draw the contours of the integration model. On the basis of the above definition, the constitutional identity of the EU includes:

- respect for the values of Article 2 TEU;
- commitment to the institutional structures, the decision-making mechanisms, and the dispute resolution processes provided in the Treaties;
- respect for the Charter and the general principles of EU law;
- commitment to the principles of the economic constitution outlined in the Treaties;
- a certain idea of *civis europeus* as envisaged by the concept of Union citizenship.

The EU has both a political and an economic constitution. Indeed, given that economic activity is closely intertwined with the governance framework of a polity, the distinction between the two is very hard to draw. It is also important to note that respect for the system of judicial protection provided in the Treaties, as understood by the Court of Justice (CJEU), has been elevated by the case law to a constitutional virtue. It forms a core part of the principle of autonomy of EU law.[3]

Within the principles stated above, one can identify several more specific features of the EU paradigm. Some of them are discussed below, after a brief examination of the values clause of Article 2 TEU. Before exploring those issues, however, it is pertinent to make two preliminary remarks.

First, as a matter of law, the EU is not a state,[4] and there is no perceived collective will or intention by the national governments that it should replace the Member States. The Union does not have sovereignty in the way it is traditionally understood.[5] As the *Bundesverfassungsgericht* put it, the Union is a 'union of States' (*Staatenverbund*) not a federal State (*Bundesstaat*).[6] Nonetheless, the above come with caveats. There is no single form of federalism and various federal states exhibit different features. The Union does have distinct characteristics and it is

[3] See Opinion 2/13, *Accession of the Union to the ECHR*, EU:C:2014:2454 and its progeny, especially, Case C-284/16 *Achmea* [2018] EU:C:2018:158.

[4] As the Court of Justice has acknowledged, 'the EU is under international law, precluded by its very nature from being considered a State'. See Opinion 2/13, *Accession of the Union to the ECHR*, EU:C:2014:2454, para 156.

[5] In its classic conception, sovereignty is understood as the power to exercise supreme authority over people within a defined territory.

[6] See Bundesverfassungsgericht, judgment of 12 October 1993 (*Brunner case*), 2 BvR 2134/92 and 2159/92, 89 BverfGE 155, [1993] 1 CMLR 57; and judgment of 30 June 2009 (*Lisbon Treaty case*), 2 BvE 2/08, para 229.

supported by a highly sophisticated legal system that, in some respects, displays a greater degree of integration than some federal systems.

The second preliminary remark is that there is no universally shared grand plan of European integration. The Member States are committed to a set of processes relating to decision making and dispute resolution and also to a set of values. But they are not committed to reaching any specific ultimate end. The areas where the EU takes action and what action it takes depend on a variety of factors and the vicissitudes of politics. By the nature of things, EU law is inconstant. The key EU law developments of the last decade, far from being planned, have been reactions to crises or largely unpredictable events that befell on Europe and the world. The resulting legal landscape is dynamic, original, a mixture of principle and pragmatic, and by no means flawless.

Alexander Kornezov:

How would you identify the Union's political project? What is its political ideology?

Takis Tridimas:

The political ideology of the Union is defined by a set of values and constitutional principles which, since the end of the Second World War, are, broadly, shared by all western European democracies. These values are encapsulated in Article 2 TEU but, in recent years, have come under attack both from internal and external forces. The rule of law crisis in Poland and Hungary has brought to the fore the need to defend them. The war in Ukraine was a game changer, raising an unprecedented challenge to European security. The rule of law crisis has also exposed the fragility of the Union: its constitutional DNA being one of political consent, it has few effective legal means to enforce the values of Article 2.

Article 2 states as follows: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

The values stated therein are not simply aspirational but, as the CJEU has acknowledged, they have binding legal consequences. They are legally material in a number of respects.

First, they have a strong signaling and interpretational force, 'forming part of the very identity of the Union'.[7]

Secondly, adherence to those values is a *sine qua non* for the accession of a country to the EU.[8]

Thirdly, their breach may give rise to the special, albeit problematic and incomplete, enforcement procedure of Article 7 TEU.

Fourthly, the values of Article 2 have been used as one of the building blocks of a distinct model of EU law autonomy. This understands the exclusivity of the CJEU jurisdiction widely and imposes limitations on the competence of the Union and the Member States to conclude international agreements.[9] In this respect, Article 2 enhances the blocking effect of EU law although it is, in fact, difficult to find a direct link between Article 2 and the outcomes reached by the CJEU in applying the principle of autonomy.

Fifthly, since the seminal *Portuguese Judges* case,[10] the rule of law as an Article 2 value has been used, in combination with Article 19(1) TEU, to impose obligations on Member States regarding their system of governance, especially judicial independence.[11] Here, commitment to Article 2 creates governance expectations that permeate the national legal system and apply beyond the material scope of the Charter. The normative effect of Article 2 lies primarily in its empowering role. The judicial independence principles pronounced by the Court are based on the twin pillars of Articles 2 and 19. The former empowers the latter but its role is more than supportive, both provisions being on an equal footing and conjointly generating obligations.

Lastly, Article 2 has relative normative autonomy. Although it may not be easy to envisage a situation where a breach of Article 2 does not also entail a breach of another provision of the Treaties, the violation of Article 2 may be conceived as autonomous and not merely as derivative of the violation of another EU law provision. It could thus be envisaged that, in an enforcement action under

[7] *Hungary v Parliament and Council* C-156/21, ECLI:EU:C:2022:97, para 232; *Poland v. Parliament and Council*, Case C-157/21, EU:C:2022:98, para 264.

[8] Article 49 TEU.

[9] See Opinion 2/13, op.cit. and *Achmea*, op.cit.

[10] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117.

[11] See, e.g., *A.K. and Others*, Joined Cases C-585/18, C-624/18 & C-625/1, EU:C:2019:982; *Commission v Poland*, C-619/18, ECLI:EU:C:2019:531; Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the system of justice) LM*, EU:C:2018:586; *Repubblika v. Il-Prim Ministru,* Case C-896/19*,* EU:C:2021:311; *Eurobox Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 & C-840/19, EU:C:2021:1034.

Article 258 TFEU, the Court may make a finding that a national law or practice is in breach of another provision of the Treaties and also of Article 2. The Charter has already been used in that way [12] and the Commission is seeking such a ruling in enforcement proceedings currently pending against Hungary.[13]

European Union law adopts a substantive version of the rule of law understanding it not merely as imposing a set of procedural requirements but also as guaranteeing certain fundamental rights to the individual. The rule of law conditionality regulation (Regulation 2020/2092)[14] provides a comprehensive definition of the rule of law, which includes:

'the principles of legality, implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.'

Notably, the case law of the Court of Justice of the European Union, namely the Court and the General Court (GC), and that of the European Court of Human Rights (ECtHR) have, among other sources, provided inspiration for the development by the European Law Institute (ELI) of a set of Fundamental Constitutional Principles of a European Democracy.[15] The ELI has established a working group with the task of identifying and articulating in a Charter the constitutional principles, which form the foundations of a European liberal democratic state. The underlying premise is that such a state is based on majority rule, but is constrained by the obligation to respect the rule of law, including human rights. The objective is to map out key principles that represent the *sine qua non* elements of liberal democracy and encapsulate contemporary European constitutionalism. Although, historically, these principles have developed at the level of the nation state since the Enlightenment, they are not 'owed' by the nation state. Since the Second World War, supra national institutions, such as the Council of Europe and the EU, have made a major contribution to their

[12] *Commission v. Hungary*, Case C-235/17, EU:C:2019:432 (finding a breach of both Article 63 TFEU and Article 19 of the Charter); *Commission v. Hungary*, Case C-78/18, EU:C:2020:476 (finding a breach of both Article 63 TFEU and Articles 7, 8 and 12 of the Charter).

[13] Commission v Hungary, C-769/22, https://curia.europa.eu/juris/document/document.jsf?text=&docid=270405&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2062232

[14] Regulation 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/I/1.

[15] See https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/fundamental-constitutional-principles/

advancement, their understanding, and their enforcement. The objective of the ELI working group is to describe the fundamental constitutional principles as understood in European liberal democracies, as well as to articulate standards that are expected from any such genuine democracy. The idea is to address the needs of contemporary society and include principles and standards that may not receive express recognition in national constitutions. These include, for example, protection against disinformation, the obligation of public authorities to take effective measures to prevent and fight corruption, the right to environmental protection and sustainable development, and principles governing automated decision-making. It is important to stress that constitutional principles develop in the light of political experience and the social, economic, political and cultural features of each society. What may be appropriate in one state may not be in another. The challenge therefore is to provide concise statements at a level of abstraction that would convey the core message whilst allowing flexibility and recognising that there is a range of acceptable variations in their implementation, subject to respecting the essence of the principles.

Alexander Kornezov:

You refer to "liberal democracy" as the basis of Europe's political project. But, I wonder whether this concept can be seen as partisan or as favouring one political party over another and is thus likely to divide us rather than unite us. More recently, 'liberal' democracy has come under intense ideological criticism from within Europe. I also note, as is typical of a lawyer, that the Founding Treaties do not refer to "liberal" democracy as such.

Takis Tridimas:

The constitutional model of the EU has several features. Whilst many are shared with other polities, some are more pronounced in the EU and some appear distinct to its integration paradigm. The complex institutional structure and decision-making processes of the EU belong to the last category. I will focus here on six features but there is no intention to be exhaustive. These are the following:

- liberal democracy;
- a commitment to supra-nationalism;
- a rights-based system with sensitivity to certain rights;
- multi-dimensional balancing;
- the constitutionalisation of the economy; and
- a Roman as opposed to an Aristotelian conception of citizenship.

I will examine each of those in turn.

Liberal democracy refers to a political system in which the exercise of political authority is based on majority rule but is constrained by the obligation to respect the rule of law, including fundamental rights. The starting point is representative democracy. In EU law, this is expressly declared in Article 10(1) TEU. Fundamental policy choices must ultimately be made by the people through their elected representatives. In EU law, democratic legitimacy is said to emanate from a dual source. Most policy decisions are, generally, taken by two institutions acting together, the Council, which typically acts by qualified majority, and the European Parliament. The participation of the Council means that there is democratic legitimacy grounded on the citizens of the individual Member States since the national governments are democratically elected and accountable to their electorates. The participation of the European Parliament is an expression of democracy at pan-European level since Union citizens elect directly their representatives there. The limitations and pitfalls of the system are many but beyond the scope of this contribution. Here, the focus is placed on the adjective 'liberal' that accompanies the concept of democracy.

Liberal democracy refers to a system of government which recognises that political authority is exercised by the people's representatives elected by the majority, but is limited by rights which belong to individuals *qua* human beings. The term 'liberal' is not intended to express preference for the policies of any specific political party. It is instead used to indicate a polity that has political liberty and pluralism as its core values. It has essentially two attributes. It recognises that there are limitations on government; and that those limitations derive from the need to protect the liberty of the individual. It provides a system of governance that aims at controlling both those who govern and those who are governed. To put it in more graphic terms, the purpose of liberal democracy is to prevent human fallibility from causing havoc and suffering.[16]Although the EU Treaties do not expressly refer to liberal democracy, its spirit is potently encapsulated in the values of Article 2 TEU. Among its core aspects are freedom and pluralism, namely, the idea that many aspects of life are for each individual to determine and beyond the purview of the State. There is no singular version of good, but people may lead their lives as they think fit.[17] As stated above, the EU follows a substantive not a formal version of the rule of law, which includes

[16] For a discussion, see, among others, J.D. Kommers and WJ Thompson, Fundamentals in Liberal Constitutional Tradition, in J.J. Hesse and N. Johnson (eds), Constitutional Policy and Change in Europe (1995), 23–45.

[17] For an articulation of this, see W.A. Galston, The Idea of Political Pluralism, 49 (2009) Nomos, Moral Universalism and Pluralism, 95-124.

respect for human dignity and fundamental rights. Commitment to liberal democracy ensures ideological continuity. It is the golden thread woven into the fabric of the post-War western European Constitutions and it is difficult to see how the EU could depart from it. Two points follow from this. First, since national political systems provide legitimacy for Union action by anchoring EU decisions on the democracy of each constituent Member State, the EU has an interest in ensuring that those political systems are indeed true to their word. Lack of democracy at national level jeopardises democracy at EU level and thus, *in extremis*, may lead to a breach of Article 2 values.[18] Secondly, it is necessary to ensure that not only the Member States but the EU itself remains true to the values of Article 2. This applies to all its institutions including the CJEU.

Alexander Kornezov:

It is often said that the EU lacks a common European public space for political debate, as even today genuine political debate still happens most often at the national level. Would you agree that that is a major obstacle to creating a European civic identity?

Takis Tridimas:

Commitment to supra-nationalism is in the DNA of the Union. It means that legislative, executive and judicial functions are divided between the national and the EU level. In the Union legal order, supra-nationalism is distinct in that it is much more intense than that found in any other international organisation. It entails commitment to institutions and processes, including majority voting for taking important policy decisions. An illustration of this commitment is the duty of sincere cooperation provided in Article 4(3) TEU which has been used with creativity by the case law.

Supra-nationalism also engenders institutional dialogue. In this context, judicial cooperation is vital. Although the development of EU law is the result of the interaction of many political and institutional actors, no other relationship is, perhaps, as important as that between the CJEU and the national courts.[19] Their

[18] See M. Maduro, Mutual Trust, Mutual Recognition and the Rule of Law, General Report, XXX FIDE Congress, 2023.

[19] See among others, A. Arnull, Judicial Dialogue in the European Union, in J. Dickson & P. Eleftheriadis (Eds), The Philosophical Foundations of European Union Law, Oxford, 2012, pp 109-133; Cloots, Germs of pluralist judicial adjudication (2010) 47 CMLRev, 645 N. Walker: The idea of constitutional pluralism (2002) 65 MLR 317; G. de Búrca and J.H.H. Weiler (Eds), The European Court of Justice, Oxford, 2001; A-M Slaughter, A.

interaction is dialectical, full of circumspection and deference, albeit occasionally tense, and based on an incomplete and somewhat unstable political bargain.

National courts are the most important interlocutors for two reasons. Their cooperation is essential for the initiation of the preliminary reference dialogue, the enforcement of CJEU rulings, and more generally the application of EU law in national proceedings. Also, crucially, they provide the most effective oversight over the CJEU's activist tendencies. If the CJEU were to overstep its powers, Member States could envisage a number of measures, but all of them would be subject to important limitations. It would be difficult to reach agreement, they would take a long time to bear fruit, and their effect would be indirect and uncertain. By contrast, if national courts were to withdraw their cooperation, that would have a more immediate and direct impact on the CJEU. Viewed from that perspective, a successful relationship between the CJEU and national courts is the key that unlocks the integration door. The importance of the dialogue has been emphasised both judicially and extra-judicially by members of the CJEU and national courts.[20] Interaction occurs both directly and indirectly. Direct dialogue takes place through the preliminary reference procedure. Indirect dialogue takes place, more generally, through the process of adjudication. A national court may pronounce on the relationship between EU law and national law or apply or refuse to apply EU law or interpret EU law without making a reference.[21] Similarly, the CJEU may establish important principles concerning competence, institutional powers and rights in direct actions where there is no direct interlocution with national judicial actors. This dispersed body of case law establishes principles, draws boundaries, and determines the dialectical relationship between national and EU law through which EU law is shaped.

The importance of the judicial dialogue for the success of the integration project is one of the main reasons why the CJEU places so much emphasis on judicial independence. The other reason is related to the rule of law and liberal democracy

Stone Sweet and J H H Weiler (Eds), The European Courts and National Courts, Doctrine and Jurisprudence, Hart Publishing, 1998.

[20] See e.g. Opinion 1/09 *on the envisaged agreement on a unified patent litigation system*, ECLI:EU:C:2011:123; 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415; In *R (on the application of HS2 Action Alliance Limited) v Secretary of State for Transport* [2014] UKSC 3, a UK Supreme Court case, Lord Neuberger and Lord Mance viewed the 'all important dialogue' as having a 'vital role of interpreting and consolidating the role of European law.' (para 173); Judge Rosas states that the EU and national courts 'work together, being complementary parts in a shared legal sphere': See A. Rosas, 'The National Judge as EU Judge: Opinion 1/09' in: Cardonnel, Rosas, Wahl (eds.) Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh, Oxford 2012, 105 – 121.

[21] For an interpretation of the Charter in the context of the right to be forgotten which is not at ease with the CJEU's interpretation, see e.g. the judgments of the *Bundesverfassungsgericht* in 1 BvR 16/13 1 BvR 276/17.

and is not specific to the EU. The observance of the rule of law and the protection of fundamental rights presuppose an independent judiciary. In the absence of independent oversight, by a body with sufficient power to order appropriate remedies, constitutional guarantees risk becoming a dead letter.

Supra-nationalism also gives rise to tensions and problems. Suffice to identify two of them for the purposes of the present discussion.

There is an evident risk of conflict among judicial authorities. Although in the overwhelming majority of cases, the CJEU and national courts that stand at the apex of their legal system cooperate well, disagreements do arise. There have been a number of cases where national constitutional or supreme courts have expressed uneasiness or discord or have even defied EU law. They can be classified according to different criteria. One classification would be as follows:

– Conflicts pertaining to the limits of the coercive power of EU law and the fundamental rights of the individual.[22] Essentially, the issue here is whether EU law may compromise the protection of fundamental rights as understood under the national constitution.

– Conflicts pertaining to the constitutional identity of a State as understood by a national constitutional or supreme court. Such cases may raise issues of democracy, the powers of the national parliament, the fiscal sovereignty of a Member State, or the constitutional jurisdiction of national courts.[23] In practice, it is this kind of concern that has given rise to stronger dissonance.

– More recently, tensions have also arisen in situations which are the reverse of the first category described above. National courts have considered that the CJEU affords protection to EU rights, which is too extensive and may impair a State's core obligation to ensure public order.[24]

– Disagreements on the interpretation or effect of EU law which challenge the authority of the CJEU, but do not raise strategic issues and are of limited resonance.[25]

[22] See e.g. *Internationale Handelsgesellschaft* [1972] CMLR 177; Case C-399/11 *Melloni,* ECLI:EU:C:2013:107; Case C-105/14, *Taricco*, EU:C:2015:555; Case C-42/17, *M.A.S.,* EU:C:2017:936.

[23] See e.g. C-62/14 *Gauweiler,* EU:C:2015:400, and especially, *Weiss and Others*, Case C-493/17, EU:C:2018:1000 and its aftermath, Bundesverfassungsgericht, *Weiss*, Judgment of 5 May 2020, 2 BvR 859/15. See also C-441/14, *Dansk Industri (DI), acting on behalf of Ajos A/S*, EU:C:2016:278 and its aftermath: judgment of the Danish Supreme Court, UfR 2017.824H (Case no. 15/2014).

[24] See the data protection cases discussed below.

[25] See the *Landtová* litigation: Case C-399/09 *Landtová v Česká správa socialního zabezpečení*, judgment of 22 June 2011, and the subsequent judgment of the Czech Constitutional Court: Pl. ÚS 5/12, Judgment of 31 January 2012.

– Wholesale denial of EU primacy. There is one such head-on collision that resulted from the rule of law crisis in Poland. It was generated by the intransigent attitude of the new Constitutional Court of Poland appointed under procedures, which are generally perceived to fall well short of the guarantees of judicial independence.26

It is acknowledged that the classification provided above may not account for all conflicts and that there may be some overlap among the categories identified.

A second problematic feature of EU supra-nationalism is undue uncertainty about the source of authority. In any system of government where political authority is exercised at different levels, it is to be expected that uncertainty will arise as to the boundaries of the powers of the actors involved. It may be unclear in some cases whether a specific measure falls within the competence of the EU or the competence of the Member States. But, in recent years, a different kind of uncertainty has emerged. It is sometimes difficult to determine whether action is imputable to the Union or the Member States. This is not uncertainty about the division of constitutional competences, but a lack of clarity as to the authorship of a measure. As the EU's competence has expanded and the Union is called upon to participate in taking decisions in sensitive areas, in many cases the question arising is whether a decision has been taken by an EU body or a Member State authority.

This was sharply illustrated in the *NM*[27] case where the General Court held that an agreement with Turkey regarding the return of migrants arriving at the EU was concluded by the Member States collectively and not by the Union, despite the fact that many arguments pointed to the contrary. The *NM* case is not an isolated example. The EuroGroup provides a further illustration[28] and similar issues arise, among others in the context of CFSP and in the Banking Union.[29] Irrespective of whether one considers that the decisions arrived at in each of those cases was correct or not, it cannot be an attribute of a well-governing polity that there is such a degree of uncertainty as to the source of authority. For citizens to be protected, it must be readily ascertainable to which authority a decision affecting their rights is imputable.

[26] See Judgment of the Polish Constitutional Court (Trybunał Konstytucyjny) of 7 October 2021 (K 3/21).

[27] Case T-257/16 *NM v European Council*, EU:T:2017:130 and on appeal (rejected as manifestly inadmissible): *NF, NG and NM v European Council*, Joined Cases C-208/17 P to C-210/17 P, ECLI:EU:C:2018:705.

[28] *Council v K. Chrysostomides & Co and Others*, C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, ECLI:EU:C:2020:1028.

[29] See T. Tridimas, *Indeterminacy and legal uncertainty in EU law* in J. Mendes (Ed.), EU Executive Discretion and the Limits of Law, OUP, 2019, 40-63.

EU law is rights-based in that it recognises certain rights which are enshrined in primary law (the Charter, the Treaties and/or as general principles of law) and can thus be said to be 'constitutionally' protected. Both the Union and the Member States, where they act within the scope of EU law, must abide by them. On many occasions, individuals may derive a higher level of protection than that granted to them under national law. EU law also displays sensitivity towards certain rights. Since the Charter became binding as a result of the Treaty of Lisbon, the most oft-invoked rights are the principle of non discrimination (Article 21), the right to an effective remedy (Article 47), and the right to the protection of personal data (Article 8). All three have been concretised by Union legislation. The CJEU has shown the greatest degree of activism in relation to those rights. Both pre and post Charter case law provide testament to that activism.[30]

The right to the protection of personal data deserves special attention. In relation to no other right has the Charter made as much difference as in relation to that right. The protection of personal data has given rise to a large number of preliminary references and, in recent years, many of them have been heard by the Grand Chamber.[31] This, in turn, illustrates the importance attached to that right by the Court. The high level of protection afforded to that right by the CJEU has placed it in a trajectory of conflict with senior national courts. In most cases, the inquiry centres on whether a restriction on the rights of data subjects is justified by one of the permissible exceptions provided in EU law (e.g. the GDPR or the Directive on privacy and electronic communications). The issue is, essentially, whether the restriction meets the proportionality test . In *Quadrature*,[32] the CJEU held that Articles 7, 8 and 11 of the Charter preclude national measures which provide, on a preventative basis, for the purposes of combating serious crime and preventing serious threats to public security, for the general and indiscriminate retention of traffic and location data, although they allow for the targeted and expedited retention of data subject to certain safeguards. Despite concerns expressed by the Irish Supreme Court and the Federal Constitutional Court of Germany, in subsequent references, the CJEU essentially confirmed that position.[33] Notably,

[30] See e.g. C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission,* [2008] ECR I-6351; C-236/09, *Association Belge des Consommateurs Test-Achats* [2011] I-00773; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*, judgment of 8 April 2014.

[31] See e.g. *Google (De-referencing of allegedly inaccurate content)* C-460/20, ECLI:EU:C:2022:962; *GD,* Case C-140/20 EU:C:2022:258; *Spacenet*, Joined Cases C-793/19 and 794/19, EU:C:2022:702; *Google (De-referencing of allegedly inaccurate content)* C-460/20, ECLI:EU:C:2022:962; *Ligue des droits humains ASBL v Conseil des ministers*, C-817/19, ECLI:EU:C:2022:491.

[32] *Google (De-referencing of allegedly inaccurate content)* C-460/20, ECLI:EU:C:2022:962.

[33] *GD*, Case C-140/20 EU:C:2022:258; *Spacenet*, Joined Cases C-793/19 and 794/19, EU:C:2022:702.

data protection is also the only area where the CJEU has found a breach of the essence of a right.[34]

Why has the CJEU placed so much reliance on data protection? Collection of vast amounts of data, which reveal an enormous amount of information about an individual's life, has been made possible by technological development and is a necessary accompaniment of the sharing economy. Asymmetry in the relationship between citizens and corporations that have the technological ability and the commercial incentive to mine personal data, calls for close oversight.

Although in relation to many rights the CJEU has provided a higher level of protection than that traditionally allowed under national law, the belief that the EU is a champion of rights has come under strain, inter alia, following the expansion of EU competence and the introduction of the area of freedom, security and justice under the paradigm of mutual trust. In that area, mutual trust imposes two obligations.[35] First, when implementing EU law, Member States may be required to presume that fundamental rights have been observed by the other Member States, so that they may not demand a higher level of national protection than that provided by EU law. Secondly, save in exceptional cases, they may not check whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.

The first obligation is the corollary of the mutual recognition model and accords to EU law a maximalist effect. If a Member State could require another to comply with standards above those which are required by EU law, mutual recognition would be undermined and become hostage to national constitutional standards. In cross-border situations, the national human rights standard is displaced by the EU standard. A prime illustration of this is provided by *Melloni*,[36] where the Court projected an inclusive, centralised approach to the protection of fundamental rights placing the Charter at the apex of the edifice.

The second obligation differs from the first in that it does not pertain to the level of protection, but competence to verify whether that level is observed. It also differs in that it is cast in less absolute terms, being applicable 'save in exceptional circumstances'.[37]

[34] *Schrems I*, op.cit.
[35] Opinion 2/13, op.cit., para 192; *LM*, op.cit., para 37.
[36] *Melloni v Ministerio Fiscal*, Case C-399/11, EU:C:2013:107.
[37] Opinion 2/13, op.cit., para 192; *LM*, op.cit., para 36; *Poltorak*, C-452/16 PPU, EU:C:2016:858, para 26.

A rich case law has developed in relation to both obligations. Suffice it to state here, that the principle of mutual trust may lead to a lowering of the standards of protection that would apply under national law. Also, more recent case law suggests a less uncompromising approach on the part of the CJEU trimming away the harsher effects of the mutual trust doctrine.[38]

There is a category of rights in which the contribution of the case law is perhaps somewhat subdued. This is in the field of environmental protection. Although the CJEU takes the precautionary principle seriously,[39] it follows an interpretation favourable to environmental protection, and contributes to effective access to justice at the national level,[40] the restrictive approach to the standing of private parties under Article 263, paragraph 4, TFEU has inhibited the EU judiciary from having a greater say in shaping environmental rights.[41] By the design of the Treaties, environmental protection is not addressed as a constitutional right, but on the basis of the plethora of measures adopted by the Union.[42] Given the importance of the subject and also landmark judicial developments at national level, one can expect further developments at EU level.

A distinct element which derives from supra-nationalism is that the CJEU, like the ECtHR, engages in multi-dimensional balancing of interests. When the CJEU is called upon to interpret EU law in a preliminary reference, the underlying issue raised is often whether a national measure is compatible with EU law. The dispute may well involve a conflict between a State interest and an EU right. In such cases, the Court inevitably engages in a balancing exercise.[43] The balancing is multi-dimensional in that often the conflict is not only between two juxtaposing interests, i.e. between the public interest and the rights of the individual or between two competing rights. It is also between levels of government, namely whether and to what extent a right should be protected at EU level rather than at Member State level. This complicates the balancing act and may draw the CJEU into establishing a hierarchy. A fundamental right may be intrinsically important but less crucial for European integration and thus less deserving of protection at

[38] See *EDL*, Case C-699/21, ECLI:EU:C:2023:295.

[39] See e.g. *Case C-499/18P Bayer CropScience AG and Bayer AG v European Commission,* ECLI:EU:C:2021:367.

[40] *Deutsche Umwelthilfe,* C-873/19, ECLI:EU:C:2022:857.

[41] For recent confirmation of the restrictive interpretation of individual concern in environmental matters, see *Carvalho & others v European Parliament and Council*, C-565/19, ECLI:EU:C:2021:252; *Sabo and others v European Parliament and Council*, C-297/20 P, ECLI:EU:C:2021:24.

[42] For a review of recent cases, G van Calster, Significant EU Environmental Cases: 2021-2022, (2023) 35 Journal of Environmental Law 251.

[43] For a detailed discussion, see T. Tridimas, *Wreaking the wrongs: Balancing rights and the public interest the EU way* (2023) 29 Columbia Journal of European Law, 185.

Union level. The application of rights by the CJEU is coloured by the perceived exigencies of European integration. Thus, for example, the CJEU has been a lot more prescriptive in relation to the right to the protection of personal data than in relation to religious freedom, where more variation is allowed at Member State level. The CJEU may entrust national courts with reaching a balance and deciding the appropriate level at which a right must be protected not because that right is intrinsically of lesser importance but because, in the eyes of the Court, providing an EU wide outcome is not necessary.

A prime example of multi-dimensional balancing is provided by the *Animal Slaughter case*.[44] Islamic and Jewish organisations challenged a Flemish decree, which required the stunning of animals before killing, on the ground that it prohibited ritual slaughter and, thus, ran counter to religious freedom, as protected by Article 10(1) of the Charter. In the interests of animal welfare, Article 4(1) of Regulation No 1099/2009[45] requires the stunning of animals before killing, but Article 4(4) provides an exception in relation to slaughter prescribed by religious rites. In such a case, the requirement of prior stunning does not apply provided that slaughtering takes place in a slaughterhouse and certain requirements are complied with. Nonetheless, Article 26(2)(c) allows Member States to provide more extensive protection of animals in relation to slaughtering in accordance with Article 4(4). The applicants argued that the Member States cannot use the national variation clause of Article 26(2)(c) to render meaningless the derogation of Article 4(4).

The case involved tensions at two different levels. On the one hand, there was conflict between animal welfare and religious freedom, a new versus an old right. On the other hand, there was conflict between EU commands and Member State discretion. The Court came to the conclusion that the derogation of Article 4(4) operates without prejudice to the power of Member States to restrict it. In other words, the regulation made for an incomplete bargain. It provides for an exception which applies by default in the absence of a majoritarian choice at Member State level. The Court then went on to find that the interference of the Flemish decree with religious freedom was proportionate. The case provides an example of constitutional tolerance. In line with *Omega,*[46] it preserves the character of EU consensus as a minimum one at EU level. It contrasts with *Meloni*[47] and

[44] *Centraal Israëlitisch Consistorie van België, Unie Moskeeën Antwerpen VZW and Others v Vlaamse Regering*, Case C-336/19, ECLI:EU:C:2020:1031.

[45] Regulation (EC) No 1099/2009 on the protection of animals at the time of killing, OJ 2009 L 303/1.

[46] C-36/02 *Omega* [2004] ECR I-9609.

[47] Case C-399/11 *Melloni* [2013] ECR I-0000.

Coman[48] which favour EU-wide solutions, the first to preserve the effectiveness of the European Arrest Warrant and the second to preserve the integrity of free movement. In the *Animal Slaughter* case, there was no such overriding EU interest that required the equilibrium to be found at EU level.

The EU Treaties, along with many national constitutions, contain provisions pertaining to the economy. In fact, political and economic provisions are closely intertwined as economic activity is directly influenced by the rules governing the allocation of political power and the rights of citizens. Economic aspects are particularly prominent in the EU constitutional set up. The Treaties include, among others, provisions on the protection of property rights; the protection of the right to trade and economic freedoms; rules which outline the economic system of the Union and its Member States;[49] rules pertaining to the ECB and monetary policy; rules pertaining to the conduct of economic policy; revenue raising at EU level;[50] and constraints on State fiscal powers.[51]

Since the Maastricht Treaty, EU law has acquired a greater say in the management of the economy. This has been the result of the establishment of the EMU, the global financial crisis of 2008 and, especially, the ensuing Eurozone crisis. The latter exposed the close interdependence between states and markets and posed an existentialist threat to the euro. It necessitated extensive and robust intervention by the EU and the Member States acting collectively. There is now a complex system of EU rules governing EMU and the supervision of financial institutions. It is made up of Treaty rules, international agreements between Member States, and a dense body of EU legislation and other provisions. Many of those rules have constitutional or enhanced status either because they are contained in the EU Treaties or because, by virtue of the primacy of EU law, they take precedence over national law and cannot be changed at Member state level. The binding effect of many EU requirements is in practice enhanced by virtue of conditionality: ignoring them carries the risk of Member States being denied vital financial assistance. The net effect is that, following the eurozone crisis and the health pandemic, there has been an increase in the powers of EU institutions in the conduct of economic and

[48] *Coman*, Case C-673/16, ECLI:EU:C:2018:385.

[49] See Article 119(1) and (2) TEU which require economic and monetary policy to be conducted in accordance with the principle of an open market economy with free competition. See to the same effect Article 120 and Article 127(1) TFEU.

[50] See Article 311 TFEU and Council Decision 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU [2020], OJ 2020 L 424/1.

[51] These result, among others, from the prohibition of customs duties and discriminatory taxation in intra-EU trade, from conditionality, and also, indirectly, from the plethora of economic governance measures introduced, among others, as a result of the so-called 'six pack' and 'two-pack' packages of measures.

monetary policy and in revenue raising. Also, the CJEU has been called upon to interpret Treaty norms pertaining to the powers of the ECB and the allocation of competences between the Union and the Member States in relation to sovereign lending and the management of public finances. This, in turn, has led to a strong juxtaposition between the Court of Justice and the *Bundesverfassungsgericht*.[52]

These developments mean that Union constitutional law plays a particularly important role in the conduct of economic affairs.[53] Its role is elevated both by comparison to earlier years in the development of EU law and also by comparison to the role of constitutional law and courts at Member State level. The constitutionalisation of the economy, i.e. the situation where many rules which pertain to economic matters acquire constitutional or enhanced legal status, has been a prominent feature of contemporary EU law. This in turn brings to the fore the need to ensure, first, legitimacy in decision making, and, secondly, flexibility. The legal system cannot be so rigid as to stultify progress or be unable to meet the desired objectives. The more powers that are transferred to the Union, the greater the need to ensure that the law does not lose its elasticity. This means that, where necessary, there should be a margin for differentiation among Member States as their circumstances may vary. It also means that the interpretation of Treaty provisions should leave a sufficient margin for the future development of the law and not become unduly prescriptive.

Alexander Kornezov:

The notion of 'identity' also implies a sense of uniqueness, by opposition or by comparison to other identities. This is also an important building block in creating a European demos: how is the European political model different from that of other peers, for example the US?

Takis Tridimas:

Following its introduction by the Treaty of Maastricht, Union citizenship gradually came to be recognised as an autonomous source of rights. Although the ground had been prepared by previous cases, the break came in *Zambrano*.[54] Reiterating that citizenship of the Union is intended to be the fundamental status of nationals of the Member States, the CJEU held that Article 20 TFEU precludes

[52] See *Gauweiler*, op.cit.,; *Weiss*, op.cit.
[53] See G. Gerapetritis, New Economic Constitutionalism in Europe, Bloomsbury, 2021.
[54] C-34/09 *Zambrano* [2011] I-1177.

national measures which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.[55] Although the Court referred to *Rottman*[56] as authority for that finding, the truth is that it introduced a new and broader principle. In *Zambrano* the Court did not base its reasoning on the Charter but on the interpretation of Article 20 TFEU on EU citizenship.[57] The judgment expands the substantive content of citizenship and brings within the ambit of EU law situations which do not involve inter-state movement and also expands the scope of application of EU fundamental rights. The case law has since gone through corrective readjustments.[58] Although the case law on citizenship has contributed to the establishment of a nascent form of European demos, the additional rights that it offers are hesitant and qualified. Also, as a concept, citizenship is reversible and fragile in that it remains subject to the sovereign wish of a State to belong to the Union.[59] But, the most important point for our purposes is that Union citizenship is first and foremost a juridical concept. It is defined by reference to a bundle of rights rather that a political one defined by reference to participation in a common political process which remains stubbornly and intensely national. In this respect, it is Roman rather than Athenian in its attributes.[60] The absence of trans-national political parties for elections to the European Parliament and the apathy of voters towards the European Parliament elections suggest that we are far from having a political demos. This reflects the asymmetry between decision making in the EU which has strong features of inter governmentalism and the EU system of judicial control which has strong federal elements.

This contribution sought to identify certain attributes of EU constitutionalism. The constitutional identity of the European Union rests on common principles, inspired by the post war liberal democratic tradition of Western Europe, common institutions, and common processes for reaching outcomes. It is intensely cooperative in nature, supported by a sophisticated legal framework, yet fragile and full of tensions. The following observations may serve as concluding

[55] *Zambrano*, op.cit., para 42.

[56] C-135/08 *Rottman*, [2010] I-1449.

[57] Cf the broad view of the scope of application of fundamental rights proposed by Sharpston AG in her Opinion.

[58] See e.g. C-434/09 *McCarthy*, [2011] I-03375, Cases 304/14 *CS*, EU:C:2016:674; C-165/14 *Rendón Marín*, 13.9.2016; EU:C:2016:675; C-133/15 *Chavez-Vilchez* EU:C:2017:354.

[59] See *Silver and Others v Council*, C-499/21 P, ECLI:EU:C:2023:479 and *Schindler v Council*, C-501/21 P, ECLI:EU:C:2023:480, where the CJEU held that withdrawal of a Member State from the Union automatically results in its nationals losing their Union citizenship rights.

[60] For the ancient Greek and Roman conception of citizenship, see R. Balot, Revisiting the Classical Ideal of Citizenship in Ayelet Shachar, Rainer Bauböck, Irene Bloemraad, and Maarten Vink (eds), The Oxford Handbook of Citizenship, 2017, Chapter 2.

remarks. The first observation is not original but it is rather important. The value of human rights must be stressed. Historical experience suggests that regression is possible. It is important to be aware of the cascading effect of regression. Constitutional rights do not stand alone but form a system. There is a significant risk that regression in one will be accompanied by regression in others and, if it remains unchecked, it will sooner or later lead to the emasculation of the rule of law. Fundamental rights must be upheld both against the Member States and against the EU institutions. The more the powers of the Union expand and intensify, the greater the need to call it to account. Although one may not agree with all its pronouncements, there is no doubt that the CJEU has increased the protection of the citizen. Such protection is not limited to the cases where the outcome is favourable to the citizen on the specific facts. Even where this is not the case, judgments may transmit messages of good governance which influence decision-makers' future actions. Nonetheless, we need to bear in mind that courts cannot right all wrongs. Fundamental rights cannot be guaranteed solely by the judiciary. Their protection and adherence with democratic values is the concern of all government institutions and all citizens.

Alexander Kornezov:

I wonder whether the European economic model, or, to put it differently, its 'political economy', can contribute to creating a European civic identity.

I now turn to Daniel Gros, Professor and Director of the Institute for European Policy making at Bocconi University.

What kind of economy is the European project supposed to build? Are we building a capitalist economy? Or, as Art 3(3) of the TEU provides, a 'highly competitive social market economy'? What does that mean exactly?

Daniel Gros:

The European Union is in principle agnostic about the economic model that Member States pursue. It is not the Union, which determines most elements of economic life. Article 3(3) TEU thus provides only that the Union "**shall work for ……., a highly competitive social market economy"** At the time of the original Treaty of Rome some Member States, for example France, had a model that was very much centred on state planning and intervention. However, that

model did not perform so well in the longer run and France converged towards the European average. I would not call the term 'a highly competitive social market economy' used in the Treaty a model because there are still significant differences between the so-called Nordic model, highly competitive small economies and the Rhenanian model of cooperation between social partners. During the early years of European integration, the forces of market integration required Member States to limit their interventions in the economy. Over the last years, that tendency has reversed as social tensions have built up.

Alexander Kornezov:

Europe's economic model is often described as 'open', 'free-trade', or a 'liberal' economy with little State intervention, but I wonder whether this is still true or whether that is beginning to change with more and more protectionist measures in place. There is also a marked 'securitisation' of European trade policy, and more generally, of European foreign policy. So, is Europe's economic model still 'open', 'free trade' and 'liberal'?

Daniel Gros:

It is difficult for the EU to become protectionist towards the outside and subordinate, as well as abandoning its basically free trade approach to foreign and security policy considerations. First of all, the EU cannot simply contravene the principles of the global trade rules as enshrined by the World Trade Organisation. This would be difficult politically, as the EU tends to defend rules-based systems. Moreover, the EU economy depends much more on exports than other big powers like China or the US. Finally, there are always many different competing foreign and economic interests, which render it difficult to formulate a unified EU foreign policy. Strong EU action in support of Ukraine is more likely to constitute an exception, rather than the rule, that is to say the harbinger of a new era in EU foreign policy. There was some fear of 'Fortress Europe' emerging at the time of the Single Market Programme, but this did not materialise for all of those reasons.

Alexander Kornezov:

I now turn to Gabriel Glöckler, Principal Adviser at the ECB, and Visiting Professor at the College of Europe, Bruges.

In my understanding, a 'social market economy' implies social cohesion between the different classes or layers of society, a fair redistribution system. In other terms, it implies solidarity. But in the EU solidarity has yet another dimension: solidarity between the Member States.

That was made plain during the European sovereign debt crisis. In this regard, Joseph Stiglitz wrote in 2016 that 'there is no "solidarity", no real sense of social cohesion in the EU. Germany says repeatedly that the Eurozone is not a "transfer union"" – that is, an economic grouping in which one country transfers resources to another, even temporarily in a time of need.'

Would you agree with that statement?

Gabriel Glöckler:

The short answer is: 'No', for a variety of reasons.

To start off – and this applies particularly to the 20 countries that form the euro area – the single currency is much more than what was written down in the Treaty, which was indeed short on 'solidarity'.

The first ECB President, the late Wim Duisenberg, when receiving the Charlemagne prize (Karlspreis) on behalf of the euro in 2002, thought of the euro as embodying a triple contract.[61] Current ECB President Christine Lagarde recently recalled that concept when she spoke at the event marking the 25th anniversary of ECB.[62] What are these three contracts?

First, it is a social contract between the peoples of the euro area countries, as any fiat money is. After all, 'all money is a matter of belief', as Adam Smith, the father of the market economics is said of have noted. And, by accepting the euro as *their* money, 346 million Europeans in the countries of the euro area buy into this shared belief, this contract.

Second, it is a constitutional contract. A contract between the people and the institutions empowered and entrusted with managing the currency, foremost the

[61] Duisenberg, W. F. 2002, Acceptance speech for the International Charlemagne Prize of Aachen for 2002, 9 May, https://www.ecb.europa.eu/press/key/date/2002/html/sp020509.en.html (accessed 4 July 2023).

[62] Lagarde, C. 2023, *Twenty-five years of the ECB*. Opening remarks at the celebration to mark the 25th anniversary of the ECB, Frankfurt am Main, 24 May, https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230524~4e026cefbc.en.html (accessed 4 July 2023)

common central bank – the European Central Bank (ECB) – but also economic policy-makers in the Member States and in the EU.

Third, it is a contract between the countries of the euro area, to make the currency a lasting success. This is the aspect where Joseph Stiglitz got it wrong.

By only looking at the second contract, he did not take into account the 25 years of implicit evolution of the kind that already Robert Schuman had predicted: '*des réalisations concrètes créant d'abord une solidarité de fait*'.[63]

However, the critique of Stiglitz – and many others – is right insofar as the original Maastricht design of the European Monetary Union enshrined the 'Keep your own house in order'-doctrine:[64] if only individual countries and institutions behaved responsibly and according to the commonly agreed rules, first and foremost the fiscal rules which were specified in astonishing detail[65] for a constitutional text, then the euro area as a collective would thrive. This edifice of common rules, the set of the right incentives for each constituent unit and policy maker in this monetary union, and was overseen by common institutions, was thought to create real constraints on politics, so that everyone would be compelled, by the force of the law, to do the 'right' thing. The idea was to make 'the law the guardian of economic wisdom.'[66]

In hindsight, doing so, does not seem to have been particularly wise.

The success of the past 25 years of the euro, and its sheer survival in the face of existential crises, rests on the willingness of all concerned to bring solidarity into a system that was not designed for it. Decision-makers in the euro area ended up honouring that third implicit contract, not because of, but *despite*, that second, explicit constitutional contract.

Numerous examples of public policy interventions to bring stability and a joint vision for the future of the euro area were based precisely on this, i.e. to go beyond what was written down in the law at the time. Here, only two examples illustrate that point:

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[63] Robert Schuman Declaration, 9 May 1950.

[64] Yiangou, J.; O'Keeffe, M. & Glöckler, G., 2013, *'Tough Love': How the ECB's Monetary Financing Prohibition Pushes Deeper Euro Area Integration*, Journal of European Integration, 35:3, 223-237.

[65] Art. 126 TFEU; Protocol (No 12) on the Excessive Deficit Procedure.

[66] Herdegen, M.J. 1998. *Price stability and budgetary restraints in the economic and monetary union: the law as guardian of economic wisdom*. Common Market Law Review 35, no.1: 9–3.

First, in the course of the European sovereign debt crisis, policy-makers, aiming to preserve stability in the euro area and organise financial solidarity among the member countries, agreed to set up the Greek Loan Facility (GLF) in early 2010 through which the euro area countries provided bilateral loans to Greece. Later that year, they created the European Financial Stability Facility (EFSF), and eventually, in 2012, founded the European Stability Mechanism (ESM). Common to all three of these is that they are based on considerable legal creativity, not to say legal acrobatics. How else could one describe the fact that the German signatory to the GLF was not the Federal Republic of Germany or the Finance Ministry, but rather the state-owned *Kreditanstalt für Wiederaufbau*? Or the fact that the EFSF was incorporated as a private law company under Luxembourg law? Or that the ESM was founded as an intergovernmental organisation under an international treaty, outside the EU treaty framework, even though both were created to safeguard the public good of financial stability and preserve one of the most supranational elements of the EU, the single currency?

Second, the controversy over the ECB's unconventional policy measures, with Mario Draghi's 'whatever it takes' at its heart. Whether or not the actions, centred around the ECB's instrument of 'outright monetary transactions'[67] are actually legal and within the competence of the ECB required a judicial decision from the Court of Justice of the European Union.[68] Whether or not the matter is also considered to be resolved legally in those places where the original challenge came from,[69] is for another discussion.

In sum, policy-makers in the euro area had to innovate over the past 25 years, to make sure that the idea of the constitutional contract – a genuine single currency – was actually sustained: once people or markets start to look at an Italian euro differently than a German euro, which had happened during the euro crisis – we are at the end of the single currency. That was successfully averted, by upholding the third contract, and going beyond the existing legal construction.

The latest, and so far most significant step beyond the 'keep your own house in order'-doctrine was the response to the hardship of the Covid-19 pandemic, which could not possibly be blamed on individual countries. It gave life to that

[67] European Central Bank, 6 September 2012, Technical features of Outright Monetary Transactions, https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (accessed 4 July 2023)

[68] European Court of Justice, Judgement of 16 June 2015, Case C-62/14, *Peter Gauweiler and others v. Deutscher Bundestag*.

[69] German Federal Constitutional Court/Bundesverfassungsgericht, Judgement of 21 June 2016, Case 2 BvR 2728/13.

promise of upholding the triple contract and created *"solidarité de fait"*: with what some have called the Hamiltonian moment [70] of agreeing the Next Generation EU programme and to common debt issuance at large scale.

Finally, to think of 'solidarity' exclusively in terms of public sector transfers between countries is far too narrow.

The experience of other fiscal unions, like the United States, shows that private sector risk-sharing via integrated capital markets can be much more powerful and more adaptable to the needs of a modern economy.[71] Private sector risk-sharing refers to the phenomenon that when an economic downturn or unemployment hit a particular region of the euro area, people and companies tend to try to cushion the effects for themselves: but not by waiting for transfers from the centre, from Brussels; rather by buying, holding or selling assets in other regions of the euro area where the economy is doing better.

The money that flows across borders in this way has nothing to do with governments or supranational funds. These are private funds. But, they can only flow if there are functioning integrated capital markets – hence the urge, by many euro area policy-makers, including the ECB,[72] to complete the capital markets union.

Alexander Kornezov:

Yet, two of the three contracts that you mentioned are not really a matter of law but rather, as you said, a matter of trust: on the one hand, between the Eurozone Member States whose common objective to make the euro a 'lasting success' based on '*solidarité de fait*' and, on the other hand, between the peoples of the Eurozone to put their trust in the euro.

But I wonder whether that social contract can indeed be a lasting success, if European citizens do not feel involved, or even represented, in economic decision-making at EU level.

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[70] Scholz, O. 2022 Speech at the Charles University in Prague, 29 August, https://www.bundesregierung.de/breg-en/news/scholz-speech-prague-charles-university-2080752 (accessed 5 July 2023)

[71] Giovannini, A. Ioannou, D. Stracca, L. 2023, *A problem shared is a problem halved – the benefits of private and public risk sharing*, The ECB Blog https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230329~ec0166ef99.en.html (accessed 5 July 2023).

[72] De Guindos, L. 2023, *Banking Union and Capital Markets Union: high time to move on*. Speech at the Annual Joint Conference of the European Commission and the European Central Bank on European Financial Integration in Brussels, 7 June. https://www.ecb.europa.eu/press/key/date/2023/html/ecb.sp230607~eaf4f8b47a.en.html (accessed 5 July 2023).

Indeed, European economic governance has been criticised for lack of transparency and legitimacy. This brings me back to the question of whether there is a genuine common European public space for political debate in the area of economic policy? And is that, in your view, an obstacle to the emergence of a European civic identity?

Gabriel Glöckler:

The absence of a shared conversation within a common public space is indeed one of the great deficiencies of European integration, and this lacuna is sorely felt in one of the areas that is most tightly integrated, namely the monetary union. That said, the European sovereign debt crisis engendered a big leap forward, a '*saut qualitatif*', also in this field.

When the EMU and its governance framework were originally set up, many economists, political scientists, and lawyers had long questioned whether the mere Treaty prescription that Member States were to treat their '*economic policies as a matter of common concern*'[73] could actually function; whether the instrument of peer pressure was sufficiently powerful to sustain a system to mutually constrain national political discretion. Those with experience inside the machinery of EU economic governance, with its multitude of committees and councils have confirmed: it did not work.[74] No-one, apart maybe from the European Commission as guardian of the common European interest and the ECB with its euro area-wide policy outlook, really cared about what happened in other countries. Member States focused on domestic concerns, and rarely took the euro area dimension of their policy decisions into account. Peer pressure among Members States had morphed into a 'non-aggression pact', because governments were wary of being too intrusive in their joint oversight of each other's economic policies, in recognition – and maybe anticipation – that each of them may want to get off more lightly in the future, in the event that they themselves were seen as transgressing the rules.[75]

But, all that changed during the euro crisis and the creation of financial assistance instruments tied to conditionality and the implementation of reform programmes. This was chiefly because everyone suddenly felt they had skin in the game. To

[73] Article 121 Treaty on the Functioning of the European Union.

[74] Begg, I. 2023, *Completing a Genuine Economic and Monetary Union*, Cambridge Eléments- Economics of European Integration, p. 40.

[75] Bini Smaghi, L. 2011. *European democracies and decision-making in times of crisis*. Speech at the Hellenic Foundation for European and Foreign Policy, Eighth European Seminar 2001, Adjusting to the Crisis Policy

encapsulate that sense, and exaggerate for effect (but only a little), one could say that the first time anyone, for example, in Germany – policy-makers, media and the electorate at large – were seriously interested in, say, Greek pension reform, or the governance of the Spanish banking sector, was when they were bound by financial solidarity; when they realised that they would not 'see their money back' unless those reforms in Greece or Spain or elsewhere were actually implemented. And when they were justifiably worried that the whole edifice of the euro – which was also the basis of their own prosperity – might come crashing down.

It is this deeper level of interdependence that moved the notion of the euro as a '*Schicksalsgemeinschaft*' (a 'community with a common destiny') from Sunday speeches to applied politics. A realisation that we are truly 'in this together' and that self-interest and solidarity are actually pushing in the same direction, because 'caring for the welfare of our neighbours […] makes eminent economic sense.'[76]

Alexander Kornezov:

When we look at the financial assistance provided, there is indeed evidence of mutual support. But, any funds were tied to tough conditions. And there is no denying that the public support for the EU, and its institutions, especially in the crisis countries, suffered a lot. This was, by the way, also the case in the so-called creditor countries, where people felt they were being made to pay for somebody else's mistakes. Does this kind of solidarity actually end up destroying the sense of community?

Gabriel Glöckler:

Your question recalls that some observers had likened the euro to the infamous "Hotel California", where you can check out anytime but never leave. This is just plain wrong. During the past 25 years, including the various crises, some Europeans might have dreamt of 'checking-out' of the responsibilities of sharing the euro, but if you asked them directly (e.g. in a variety of surveys), very few actually wanted to leave.[77]

Choices and Politics in Europe, Poros, 8 July, http://www.bis.org/review/r110712c.pdf (accessed 4 July 2023).

[76] Draghi, M. 2013 *The policy and the role of the European Central Bank during the crisis in the euro area*. Speech at the Katholische Akademie in Bayern, Munich, 27 February, https://www.ecb.europa.eu/press/key/date/2013/html/sp130227_2.en.html (accessed 4 July 2023).

[77] Roth, F. Jonung, L. 2019, *Public support for the euro and trust in the ECB: The first two decades*, VoxEU Column, https://cepr.org/voxeu/columns/public-support-euro-and-trust-ecb-first-two-decades (accessed 6 July 2023).

If anything, the crisis hammered home that one does not want to be alone when the going gets tough. Even those intent on revolutionary change to euro area governance, like the government of Alexis Tsipras in Greece in 2015, when confronted with the alternative option of exiting the common currency came to the same conclusion: that being inside the club, with all its rights and obligations, is preferable to being outside.

Possibly, the most astonishing, and unexpected, development of an emerging European public space emerged during the times of the Covid-19 pandemic. It was then that prime ministers appealed to the electorates of other countries directly to make the case for solidarity, for example, with opinion pieces in nation-wide newspapers,[78] or prime time TV appearances in other countries. Or when Italian mayors published an open letter in German newspapers addressed to their "dear German friends".[79]

Something was changing. The silos of national discourses had become a bit more permeable.

But, to make that sense of a common conversation and shared destiny more resilient and give it a deeper, more permanent expression, we need a shared forum in Europe: a common political space. Not the space we have right now: where a gigantic machinery administers a complicated governance framework of over specified rules that tries to turn politics into technocratic procedures.

We need a space where politics can play out, where the real controversies that people care about actually happen, for all to see. Where the big questions of politics get addressed: who gets what; who to tax and how to spend; how to steer the economy; how to organise our economic institutions and financial markets; or how to prioritise geopolitics or green goals over other objectives.

In the Maastricht Treaty, the European constitutional legislator – legitimised by the peoples of Europe – stipulated a rather specific way of looking at the economy in great detail – even specifying precise numbers, like the 3% deficit limit, or 60%

[78] See, for instance *"A response to the corona crisis in Europe based on solidarity", a*rticle of 5 April 2020, by Heiko Maas, Federal Minister of Foreign Affairs, and Olaf Scholz, Federal Minister of Finance, on the corona crisis in Europe, published n Les Echos (France), La Stampa (Italy), El País (Spain), Público (Portugal) and Ta Nea (Greece). https://www.auswaertiges-amt.de/en/newsroom/news/maas-scholz-corona/2330904 (accessed 10 July 2023).

[79] As reported, for instance, by Der Standard, 1 April 2020, "Italien bittet "liebe deutsche Freunde" um Hilfe in Corona-Krise: Italienische Politiker, darunter der Bürgermeister von Bergamo, fordern die Deutschen auf, ihnen mehr zu helfen" (https://www.derstandard.de/story/2000116378881/italien-bittet-liebe-deutsche-freunde-um-hilfe-in-corona-krise) accessed on 10 July 2023.

debt-to-GDP ceiling. They had agreed that rules were superior to policy discretion. In fact, rules were seen as a substitute for mutual trust that was missing.

These last 25 years have shown that it was discretion, not rules, and institutional innovation and policy experimentation that kept the euro alive. They have also shown that common institutions are better equipped to handle changing economic paradigms. This is because rules 'cannot be updated quickly when unforeseen circumstances arise, whereas institutions can be dynamic and employ flexibility in their approaches [especially] when underlying parameters and economic relationships change – as they often do.'[80]

That is what economist call 'model uncertainty'.[81] We do not all agree how the economy functions, how precisely the various policy levers affect economic outcomes. To cope with this uncertainty and continuously adapt, we need a continuous process to debate it and legitimise the choices we collectively make. That is the nature of politics, of domestic politics. It is time not to be afraid of the return of politics, but this time at the supranational level, proper *European* domestic politics.

The absence of this space where politics plays out is an obstacle to creating a common identity. Certainly for now, though it should also be mentioned that in some circles, say, financial markets and commentators, we are already there: they see the whole euro area as a single economy. For example, the members of the ECB's top decision-making body, the Governing Council, are no longer perceived as national policy-makers: big financial news agencies report on the Bundesbank President by referring to 'the ECB's Joachim Nagel'.

Much has been written and said how common identity is based on common language. At least in the euro area, we already share a common language, regardless of the tongue we speak in. Our common language to express material value is in euro and cents, regardless of whether we are Portuguese, Estonian or Irish.[82] The common currency also creates a sense of belonging and indeed a sense of pride of being part of the zone of monetary stability, of having escaped from the exploitative

[80] Draghi, M. (2019) *Sovereignty in a globalised world*, Speech at the Università degli Studi di Bologna, 22 February, https://www.ecb.europa.eu/press/key/date/2019/html/ecb.sp190222~fc5501c1b1.en.html, accessed on 11 July 2023.

[81] Draper, D., Hodges, J. S., Leamer, E. E., Morris, C. N. and Rubin, D. B. (1987) A research agenda for assessment and propagation of model uncertainty. Report N-2683-RC. Rand Corporation, Santa Monica.

[82] Otero-Iglesias, M. (2017), *The euro as a social bond: why do Eurozone citizens still back the single currency?*, (Elcano, Madrid), https://www.realinstitutoelcano.org/en/analyses/the-euro-as-a-social-bond-why-do-eurozone-citizens-still-back-the-single-currency/ (accessed 5 July 2023).

monetary regimes that were prevalent of the past in a number of countries that now make up the euro area. A further element is the sense of accomplishment to share the world's second most widely used international currency:[83] just like a dollar bill is accepted anywhere in Latin America and indeed widely across the globe, these days also euro banknotes are widely sought after, from Turkey to Thailand. That was not the case with Portuguese escudos or Belgian Francs, or other legacy currencies of the euro, maybe with some small exceptions like the Deutschmark.

If one thinks of a currency as a creator of identity, the fact that almost 80% of Europeans according to latest Eurobarometer[84] support the single currency means much progress has been achieved. However, thinking ahead, it is time to reframe this. Around a third of Europeans today are of an age where they have no conscious memory of national legacy currencies of the euro. They only know the euro. If the survey asks them 'Do you support the euro?', that seems odd. It would be akin to asking Americans 'Do you support the dollar?' US citizens would probably be irritated, since the dollar is just their currency. In all likelihood, young Europeans see it the same way – the euro is simply their currency. Full stop. It is only a matter of time before there will be a majority of Europeans who think of the euro exclusively in those terms: not as a great goal or historical achievement of European integration, but as a *means* to an end, an everyday tool to fulfil their life projects.

This emerging majority will see the common currency, as economists would classify it, in purely functional terms, as a means of exchange, unit of account and store of value, which is shared by 346 million Europeans. For young people today, it is already part of the 'natural order of things' in their daily lives, just like travelling, studying and working across the Union.[85]

For them, this part of 'identity creation' can be considered a mission accomplished. They want a currency of works, and that works for them – founded and buttressed by a functioning triple contract.

[83] See European Central Bank (2023), *International role of the euro*, 21 June ; https://www.ecb.europa.eu/pub/ire/html/ecb.ire202306~d334007ede.en.html, accessed on 11 July 2023

[84] European Commission, Spring 2023 Standard Eurobarometer (EB 99) – Public opinion in the European Union, First results (fieldwork conducted in May-June 2023), July 2023.

[85] ECONOMIST (2015) *What Europe means to the young*, 5 September, https://www.economist.com/europe/2015/09/05/what-europe-means-to-the-young, accessed on 12 July 2023

Alexander Kornezov:

This brings me to Europe's social model and I turn to Ulla Neergaard, Professor of EU Law at the University of Copenhagen and Former President of FIDE.

I have the impression that the idea of a true European 'social' union has always taken the back seat in European integration, and that the social aspects of European integration have been traditionally conceived as an annex or an accessory to economic integration. At the same time, the European welfare state and social acquis is often hailed as unique in the world and as a model for social cohesion.

Do you recognise this impression of the social dimension taking the back seat? How can it be explained? And, what are the implications of that, as well as of Union citizenship for European identity-building?

Ulla Neergaard:

As to *the first* question, it is indeed the dominant narrative that the social dimension has taken a backseat. Also, a related narrative is that which criticises the secondary role of the social dimension. That is, for instance, clearly the point of view taken by the institutional reporter on Congress Topic 3, Sacha Garben.[86] In addition, part of the dominant narrative is often also about 'wanting more'.[87] Yet, of course, not all share the implicit criticism, which for instance could be observed during the road eventually leading to 'Brexit', and which to some degree is also reflected in the national reports related to Topic 3.[88]

[86] Sacha Garben, 'Institutional Report. European Social Union', in Alexander Kornezov (ed.): European Social Union, The XXX FIDE Congress in Sofia, 2023, Congress Publications, Vol. 3, Ciela Norma, 2023, p. 80, who e.g. refers to the 'stagnant state of the European Social Union and the "crisis of regulation"… in EU social law..' and 'Social Europe's previously depressed state', and for instance cherishes a 'current reinvigoration' and refers to 'EU social legislation… once again flourishing..'

[87] See e.g. Sacha Garben, 'Institutional Report. European Social Union', in Alexander Kornezov (ed.): European Social Union, The XXX FIDE Congress in Sofia, 2023, Congress Publications, Vol. 3, Ciela Norma, 2023, p. 111, who states: 'As the EU matures further into a constitutional order, it is natural that the social dimension becomes more firmly entrenched both in the hierarchy of its norms and values and throughout the breadth of its exercise of authority…. [T]his means that European Social Union is no longer a question (if it ever was) but part of the EU's constitutional identity, and furthermore crucial for that identity to resonate with European citizens. It could be posited, then, that 'Achieving Social Europe'… is the only viable way to Achieving European Union.'

[88] See Sophie Robin-Olivier, 'General Report. European Social Union', in Alexander Kornezov (ed.): European Social Union, The XXX FIDE Congress in Sofia, 2023, Congress Publications, Vol. 3, Ciela Norma, 2023, p. 51, stating: 'However, one lesson can be learnt from national reports: there is a remaining gap between the developments taking place at EU level, concerning social issues, and the perception of the EU as a social Union. To be sure, from a substantive point of view, all national reports acknowledge that social matters are

Regarding *the second* question, the reason why the social dimension has been confined to the backseat is rather obvious: it can first and foremost be explained by a reference to history.[89] It is simply very much in accordance with the original intentions of the 'founding fathers', which led to a legal construction where the distribution of competences aimed at the Member States being – so to speak – the chauffeurs – rather than the EU – driving the social car.

Turning to *the third question* I would like to start by saying that the theme of this panel immediately made me think of the Italian politician and author, Massimo d'Azeglio, who in the 19th century wrote: 'We have made Italy. Now we must make Italians.'[90]

So one could ask whether we are now discussing something like: We have made the European Union. Now we must make Europeans?

To a degree, the answer to that question is apparently: 'Yes'.

However, in contrast to what happened during the nation-buildings years of the 18th and 19th centuries, the attempt to build a European identity is now based primarily on Law, rather than on the basis of a common history, common culture, or a common language as was previously the case with regard to the concept of the nation State.[91]

The Danish Professor Marlene Wind has referred to the nation-building of the past as 'fabricated tribalisations'.[92] To her – and to others – the construction of nations did not develop naturally. Rather, they were contrived, through elements apart from Law. Importantly, although they were constructed artificially, nations should not be considered to be less real or less authentic. It is also crucial to

profoundly determined by EU law and acts in many fields, and, in particular, in the domain of labour law… However, in stark contrast, there are very few reports indicating that the EU is perceived as a social, and not mostly economic, integration. Oftentimes, this is not considered a problem, but a fact: only rare reports insist on the need for further development of EU law, in the field of social policy. A number, on the contrary, mention critics and resistance to EU legislation, when it is considered to encroach excessively upon national preferences…'

[89] See e.g. Ulla Neergaard: 'Europe and the Welfare State – Friends, Foes, or…?', Oxford Yearbook of European Law, 2016, pp. 1-41

[90] Quoted from Marlene Wind: 'The Tribalization of Europe. A Defence of Our Liberal Values', Polity, 2020, p. 12.

[91] Possibly the initiative which Professor Takis Tridimas referred to in his intervention, namely the draft report of the European Law Institute (ELI): 'Fundamental Constitutional Principles of a European Democracy'; see <FCPReport.pdf?dl=0> and <europeanlawinstitute.eu/projects-publications/current-projects/current-projects/fundamental-constitutional-principles>, could to some degree be viewed as an example thereof.

[92] Marlene Wind: 'The Tribalization of Europe. A Defence of Our Liberal Values', Polity, 2020, p. 15.

understand that it has always been the social and educated elites, who have been at the forefront of nation-building movements.[93]

Thus, one could ask whether at the European level, it might be possible to conceive of something similar. In other words, is it possible to construct – with reference to the famous book – the original version dates from 1983 by the British historian Benedict Anderson – an imagined European community or identity, however mainly through Law?[94]

In that regard, one could also refer to the concept of constitutional patriotism, which is often associated with the German philosopher and social theorist, Jürgen Habermas. This could be understood as the idea that people should form a political attachment to the norms and values of a pluralistic liberal democratic constitution rather than to a national culture.[95] Thus, it is also a matter of building on something, which to some degree is already there. That may be possible through identifying common principles and values.

Taking these insights as a stepping-stone, it might be argued that it would be significantly more controversial and difficult to construct a European identity through the social dimension. That remains the case, even though the social dimension may be considered to be key. As I mentioned before, the social dimension has always been seen mainly to be a matter of national competence. That might have been so for a reason, For instance, there are many different national welfare state models in force, and some like the ones in the Nordic countries are by many viewed to be rather idealistic models.

To go further in this regard would eventually require national welfare states to become more alike. So maybe time is not yet there for a fully-fledged substitute of national welfare states into a common European one with redistribution organised centrally.

The same could be said regarding Union citizenship, which of course intuitively has an important role to play in creating 'genuine Europeans' with a common identity. However, the difficult part would, be to seek to substitute the national or

[93] As it may as well in all likelihood be said to be the case again in relation to the 'European identity-building'.

[94] Benedict Anderson: 'Imagined Communities. Refelctions on the Origin and Spread of Nationalism', Verso, 2016.

[95] See e.g. Jan-Werner Müller and Kim Lane Scheppele: 'Constitutional Patriotism: An Introduction', International Journal of Constitutional Law, 2008, pp. 67-71.

regional identities and citizenships, such a goal within a reasonable time probably is not realistic. Rather, a more realistic aim – at least in the shorter term – seems to be to focus on constructing an additional layer, thereby complementing and respecting the national layers.

Alexander Kornezov:

Solidarity is often presented as a key concept in relation to the social dimension of Europe, but how could this concept be viewed as relating to 'European identity' in itself?

Ulla Neergaard:

EU law may be viewed as an important framework for translating solidarity values into legal concepts and realities.[96] In other words, EU law can provide an architectural design within which solidarity could take place.[97]

As is well-known, Europe emerged from the ashes of the Second World War, and is an experiment that is exceptional in its width and its collective basis.[98] The famous Schuman declaration of 9 May 1950, which is considered to be the first truly political manifesto of European integration, is a clear result of that.[99] As it may be recalled, the declaration states that: 'Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity'. Solidarity has thus always been considered to be closely aligned to a process of integration.

In terms of development, a significant increase in the express use of solidarity and the importance accorded to it in the Treaties, case law, etc., over the years is

[96] Pieter Van Cleynenbreugel: 'Typologies of solidarities in EU law: a non-shifting landscape in the waking of economic crises', in Andrea Biondi, Eglé Dagilyté & Esin Küçük (eds.): 'Solidarity in EU Law. Legal principle in the making', Edward Elgar, 2018, p. 17.

[97] Pieter Van Cleynenbreugel: 'Typologies of solidarities in EU law: a non-shifting landscape in the waking of economic crises', in Andrea Biondi, Eglé Dagilyté & Esin Küçük (eds.): 'Solidarity in EU Law. Legal principle in the making', Edward Elgar, 2018, p. 18.

[98] Nathalie Karagiannis: 'Chains of Solidarity. Violence and Debt', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 64.

[99] Andrea Biondi, Eglé Dagilyté & Esin Küçük: 'Introduction: European solidarity – what now?', in Andrea Biondi, Eglé Dagilyté & Esin Küçük (eds.): 'Solidarity in EU Law. Legal principle in the making', Edward Elgar, 2018, p. 2.

evident. This is not at all surprising given the close connection between integration and solidarity.

When comparing 'solidarity" to "identity', it appears that both concepts to some extent are attempted created or enforced through law. Their presence or intensity will increase once integration is enhanced. At the same time, solidarity is also one of the essential values or principles that forms the basis upon which a European identity can be built.

As a brick laid down in the building of a European identity, solidarity has many notable attributes, because in Europe it has such a very long history, which begins much, much earlier than the establishment of the EU or the EEC. In fact, it predates the EEC by at least a couple of thousand years. Thus it is at the conceptual level, genuinely something that is shared among Europeans, which can be seen as reflected in the second sentence of Article 2 TEU.

Despite its long existence, it is in no way an easy task to define solidarity, because over time, it has had various meanings, and it has been conceptualised different ways. Even today, it remains indeterminate.[100]

The roots of European solidarity may (in part) be traced, for instance, in religion; and in the laws of nation States. A certain understanding of solidarity may also be established by reference to the word's etymology, as well as through different political movements throughout history. Even today, solidarity can at times serve as a political catchword. The campaigns led by young people to save the climate for future generations – which have given the concept new vitality – is one such example.[101]

Concurrently, solidarity has been analysed and discussed theoretically in many different academic disciplines, besides law, for at least a century, by now.

The power of the word probably stems from its many different roots, which engenders flexibility, durability and emotional intensity.[102]

[100] Antoni Abat I Ninet, 'Transnational Claims in the European Union and the Founding Principle of Solidarity', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 208.

[101] Sven-Eric Liedman: 'Solidarity A Short History from the Concept's Beginnings to the Present Situation', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 11.

[102] Sven-Eric Liedman: 'Solidarity A Short History from the Concept's Beginnings to the Present Situation', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 14.

Thus, solidarity may easily serve as an important building brick in the construction of a European identity, and it is seen by many now – as so brilliantly expressed by Advocate General Sharpston – as 'the lifeblood of the European project'".[103]

Alexander Kornezov:

Solidarity seems to be emerging – slowly but surely – as an over-arching principle in European integration. Do you think this principle is of relevance also in other areas of law?

Ulla Neergaard:

In answering this question, attention may first be paid to a keynote speech delivered by President Donald Tusk in 2019, where he said that: '[S]olidarity… is something that cannot be enforced – either it's there, or it isn't', and that the term 'the obligation of solidarity' constitutes an 'obvious oxymoron'.[104]

However, shortly after, the outbreak of the Covid-19-pandemic occurred, and when it had – more or less – finally calmed down, the Russo-Ukrainian war started to rage in Europe bringing with it other significant ramifications in its wake, often referred to as the 'pluri-crisis' confronting us.

Due to the scale and gravity of the unprecedented problems, unsurprisingly, the debate on solidarity in the EU has reignited, gaining renewed political and academic attention as well as an increasing presence in the case law of the CJEU.[105]

As to the case law, reference may in particular be made to the judgment in the *Opal* Case (about a gas pipeline in relation to rules on third-party access and tariffs), which was delivered in 2021.[106] Here, the Grand Chamber of the CJEU importantly rejected the often alleged abstract or non-binding nature of the principle of solidarity. That case may, thus, be seen as a culmination of a long line of case-law embracing the concept of solidarity.

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[103] See Opinion of Advocate General Sharpston in Joined Cases C-715/17, C-719/17 and C-719/17, *European Commission v Republic of Poland, Republic of Hungary, and Czech Republic*, ECLI:EU:C:2019:917, Paras. 253-254.

[104] Keynote speech by President Donald Tusk at the opening ceremony of the 2019/2020 academic year at the College of Europé, <coleurope.eu/sites/default/files/speech-files/speech_donald_tusk.pdf?download=1>.

[105] See e.g. Dagmar Schiek: 'Solidarity in the Case Law of the European Court of Justice Opportunities Missed?', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): "Transnational Solidarity. Concept, Challenges and Opportunities" (Cambridge University Press, 2020).

[106] Case C-848/19 P, *Federal Republic of Germany v European Commission*, ECLI:EU:C:2021:598.

The *Opal* case has signalled clearly that the principle of solidarity entails rights and obligations both for the EU and for the Member States. This could, in all likelihood be seen to be in contrast with the statement of Tusk referred to before.[107]

Also, it has become clear that the principle of solidarity may – at least for the time being – be viewed as consisting of sub-categories of a general principle of solidarity, as the *Opal* judgment was concerned with 'only' 'energy solidarity'. Thus, depending on the context at issue it may conceptually be more useful and correct to refer to solidarities (in the plural). Other sub-categories of a general principle of solidarity, such as 'AFSJ solidarity' – perhaps with a different understanding – may thus exist in parallel.[108]

In addition to the *Opal* Case, one could also refer to the principle of sincere cooperation enshrined in Article 4(3) TEU, which is often referred to by the CJEU as a kind of almost magic amplifier of solidarity.[109]

Nevertheless, both the substance and legal status of European solidarity have remained controversial and complex. Therefore, solidarity remains an EU legal conundrum and is likely to stay that way for a long time.

Alexander Kornezov:

In a process of furthering European 'identity-building', where is European solidarity possibly heading at?

Ulla Neergaard:

When wanting to look at the future, sometimes it may be helpful first to look back.

[107] Case C-848/19 P, *Federal Republic of Germany v European Commission*, ECLI:EU:C:2021:598, Para. 49.

[108] See e.g. Opinion of Advocate General Campos S. Sánchez-Bordana in Case C-848/19 P, *Federal Republic of Germany v European Commission*, ECLI:EU:C:2021:218, Para. 97.

[109] The CJEU has in that regard stated in Case C-514/19, *Union des industries de la protection des plantes*, ECLI:EU:C:2020:803, Para. 49, that: '[U]nder the principle of sincere cooperation enshrined in Article 4(3) TEU, the European Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which arise from the Treaties. In that regard, the Court has held, inter alia, that that principle not only obliges the Member States to take all the measures necessary to guarantee the application and effectiveness of EU law but also imposes on the EU institutions mutual duties to cooperate in good faith with the Member States (judgments of 4 September 2014, *Spain* v *Commission*, C-192/13 P, EU:C:2014:2156, paragraph 87, and of 19 December 2019, *Amoena*, C-677/18, EU:C:2019:1142, paragraph 55).'

It then becomes clear that solidarity in the context of EU Law so far has – in simplified terms – mainly manifested in two main ways. Each of which display different 'degrees of intensity' and can, in principle, be viewed as related to a given level of development of the EU as to 'maturity'; the assumption implicitly being that the EU may increasingly move in the direction of resembling the organization and institutionalization of solidarity in complex national societies.[110]

The first manifestation is not underpinned by many commitments, as it is mainly concerned with cooperation and harmonisation. In other words, this type of solidarity is concerned with the most common kind of EU action aiming at deepening European integration. Here, importantly, there is no significant transfer of resources or burden-sharing taking place. Therefore, although solidarity exists, it is after all not connected with a high degree of obligations.

The second manifestation includes more obligations than the first. It would require redistribution at some level. Here, a more intense supranational, positive regulatory action to the detriment of national political and redistributive competences takes place. This manifestation of solidarity is likely to be reciprocity-based so that regulatory redistribution of advantages and disadvantages across Member States occur.[111] The EU citizenship entitlements for individuals, social security entitlements and labour conditions across the Member States, possibilities for a common European research and development framework, a European industrial policy and an enhancement programme for peripheral regions in Member States are examples of such action.[112]

However, a *third manifestation* of *solidarity* can also be identified.

This manifestation of European solidarity could be viewed as including EU action at a very sophisticated level. It thus reflects the idea that the EU has 'matured' to the extent that it has moved, or will move, towards having at least most elements of idea of a 'transfer union' as put forward by the Nobel-prize winning economist Joseph Stiglitz. It could, in other words, be seen to be genuinely based on an

[110] The presented framework was first presented at the lecture "European Solidarities: Evolution and Multi-Dimensional Facets in Times of Emergence of a Pluri-crisis" at the XX Jean Monnet Seminar on: "The Challenges of Solidarity Resurfacing in the EU" on 25–28 April 2023 at the Inter-University Centre, Dubrovnik, Croatia.

[111] See in that direction Pieter Van Cleynenbreugel: 'Typologies of solidarities in EU law: a non-shifting landscape in the waking of economic crises', in Andrea Biondi, Eglé Dagilyté & Esin Küçük (eds.): 'Solidarity in EU Law. Legal principle in the making', Edward Elgar, 2018, p. 21.

[112] See in that direction Pieter Van Cleynenbreugel: 'Typologies of solidarities in EU law: a non-shifting landscape in the waking of economic crises', in Andrea Biondi, Eglé Dagilyté & Esin Küçük (eds.): 'Solidarity in EU Law. Legal principle in the making', Edward Elgar, 2018, p. 21.

expanded version of the original Roman civil law concept, '*obligatio in solidum*'. However, that is now in a constitutionalised form, requiring Member States, in principle, to be responsible in an – imagined – similar manner.

Joseph Stiglitz understands the term 'transfer union' with regard to the Member States transferring resources to each other, even temporarily, in a time of need.[113] An example would be the recovery package provided in the wake of the Covid-19 crisis. In principle, such a manifestation of solidarity would in other words imply an obligation on all Member States to be held responsible in any given case. Solidarity could thereby become solidarity among strangers, helping others in need, and thereby not necessarily be reciprocity-based.[114] It would be all for one and one for all.[115]

In other words, the essential question, which needs to be asked is whether it is desirable to move further in the direction of a 'transfer union' and/or a kind of a constitutionalised '*obligatio in solidum*'. Put more concisely: does Europe now want an even stronger solidarity commitment?[116]

Advocate General Eleanor Sharpston seemed not to be in much doubt about that, as she has stated: 'Sharing in the European "demos" …also requires one to shoulder collective responsibilities and (yes) burdens to further the common good.'[117]

Others would however, claim that the prospects of further institutionalising solidarity within the EU are dependent on obtaining sufficient public support

[113] See Joseph Stiglitz: 'The Euro and Its Threat to the Future of Europe', Penguin Random House, 2016, p. 22: 'When a group of countries shares a common currency, success requires more than just good institutions... For reforms to work, decisions have to be made, and those decisions will reflect the understandings and values of the decision-makers. There have to be common understandings and values of the decision-makers of what makes for a successful economy and a minimal level of 'solidarity', or social cohesion, where countries that are in a strong position help those that are in need. Today, there is no such understanding, no real sense of social cohesion. Germany says repeatedly that the Eurozone is not a 'transfer union' – that is, an economic grouping in which one country transfers resources to another, even temporarily in a time of need.'

[114] Hauke Brunkhorst: 'Democratic Solidarity Between Global Crisis and Cosmopolitan Hope', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 43.

[115] Hauke Brunkhorst: 'Democratic Solidarity Between Global Crisis and Cosmopolitan Hope', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 43.

[116] Sacha Garben: 'Dignity- and reciprocity-based solidarity as the normative framework of the EU's constitutional settlement', in Ann-Christine Hartzén, Andrea Iossa & Eleni Karageorgiou (eds.): 'Law, Solidarity and the Limits of Social Europe. Constitutional Tensions for EU Integration', Edward Elgar, 2022, pp. 180-181.

[117] See Opinion of Advocate General Sharpston in Joined Cases C-715/17, C-719/17 and C-719/17, *European Commission v Republic of Poland, Republic of Hungary, and Czech Republic*, ECLI:EU:C:2019:917, Paras. 253–254.

from EU citizens.[118] They would also say that such a development is unlikely for the simple reason that Europe lacks the requisite relative homogeneity, and that such homogeneity would depend on viewing others as good people and, equally important, as likeminded on matters such as reciprocity and fairness.[119]

To sum up, some would remain antagonistic to further strengthening EU solidarity, not finding it desirable at all. On the contrary, others would support such a development.[120] In any event, the conceptual framework and the degree of intensity sought – according to which such discussions may take place – would gain from solidarity being defined as a first step.

[118] Christian Lahusen: 'Civic Solidarity in Transnational Spaces. Organisation and Institutionalisation of Solidarity Within the European Union', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): 'Transnational Solidarity. Concept, Challenges and Opportunities' (Cambridge University Press, 2020) p. 310.

[119] Alexander Somek, 'Postnational European Democracy Aristotelian Caveats', in Helle Krunke, Hanne Petersen & Ian Manners (eds.): "Transnational Solidarity. Concept, Challenges and Opportunities" (Cambridge University Press, 2020) pp. 250–251.

[120] Pieter Van Cleynenbreugel: 'Typologies of solidarities in EU law: a non-shifting landscape in the waking of economic crises', in Andrea Biondi, Eglé Dagilyté & Esin Küçük (eds.): 'Solidarity in EU Law. Legal principle in the making', Edward Elgar, 2018, p. 21.

THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

Plenary Debate

Koen Lenaerts, President of the Court of Justice of the European Union

This panel discussion explores the interplay between the constitutional identity of the Member States and the identity of the Union itself, as a common legal order between the Member States. Three issues are to be addressed. First, the founding values of the EU reflected in Article 2 TEU are essential to grasp the relationship between national identities and EU identity (I). Second, Article 4(2) TEU cannot call into question primacy of EU law and justify *ultra vires* doctrines and national identity claims that unilaterally seek to call into question the uniform interpretation of EU law put forward by the Court of Justice (II). Third and last, contrary to what is sometimes argued, the Court of Justice *does* take national identities into account when interpreting both EU primary and secondary law, and that a constructive dialogue with national courts is essential in this respect (III).

I. EU Identity and National Identities

The EU is a Union of values. Those values are not the result of a 'top-down' approach, by which the authors of the Treaties decided to impose certain values on the Member States. On the contrary, they stem from the constitutional traditions common to the Member States. As I recalled in my introductory speech on Thursday, the Court explained in the *Rule of Law Conditionality* judgments that '[t]he values contained in Article 2 TEU have been identified and are shared by the Member States [and that] they define the very identity of the European Union as a common legal order', which implies that 'the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties'.[1] The defence of those values has, in my view, three implications that are relevant for our topic.

First, as the Court of Justice held in *Repubblika*, a candidate State for EU membership must align its own constitution with the values on which the EU is

[1] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 127, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 145.

founded. The so-called Copenhagen Criteria – which are now set out in Article 49 TEU – imply, *inter alia*, a strict control of those values.[2] As the Court of Justice held in *Euro Box Promotion and Others* as well as in *RS*,[3] EU law does not impose a 'particular constitutional model', for example concerning the organisation of the judiciary. There are however certain limits to Member States' discretion, as it cannot undermine the effectiveness of EU law or the values on which the EU is founded. For example, the EU must respect the choice of a Member State to establish a Constitutional Court whose decisions are binding upon ordinary courts. But in such case, that Constitutional Court must offer all guarantees of independence required under EU primary law, since only respect for that independence ensures effective judicial protection of EU rights,[4] as well as respect its obligation to refer questions on the interpretation or validity of EU law to the Court of Justice.

If a State fails to align its constitutional arrangements, Article 49 TEU bars it from becoming a member of the EU.[5] Acquiring the status of 'Member State' is, therefore, a 'constitutional moment' for the State concerned since at that very moment, the legal order of the new Member State is deemed by the 'Masters of the Treaties' to uphold the values on which the EU is founded. The judgment of the Court of Justice in *Getin Noble Bank* illustrates this point.[6] In that case, the question arose whether the fact that a judge in Poland had been appointed by an undemocratic government in the Eighties could call into question his status as an independent and impartial tribunal previously established by law within the meaning of Article 19(1), second subparagraph, TEU and Article 47 of the Charter. The Court's answer was negative: that circumstance, at least *per se*, cannot do so because 'at the time the Republic of Poland acceded to the European Union, it was considered that, in principle, the [Polish] judicial system was compatible with EU law'.[7]

Second, respect for the values contained in Article 2 TEU is due as long as a Member State remains a member of the EU. There is thus 'no turning back the

[2] See, to that effect, judgments of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, EU:C:2021:311, paras 61 and 62, and of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paras 160 and 161.

[3] See also judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 229, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 43.

[4] See judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 230.

[5] That provision states that '[a]ny European State *which respects the values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union.' (Emphasis added). Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, EU:C:2021:311, para. 61.

[6] Judgment of 29 March 2022, *Getin Noble Bank*, C-132/20, EU:C:2022:235.

[7] Id., para. 104.

clock' when it comes to respecting them. This was made clear in the *Rule of Law Conditionality* judgments: '[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession'.[8] The Member States must respect those values 'at all times'[9] and, as the Court explained in *Repubblika*, the trend of constitutional reforms must always be towards strengthening that respect.[10] In other words, the EU legal order prohibits 'value regression', regardless of whether constitutional reforms or legislative measures seek to protect or promote national identity.

The defence of the values on which the Union is founded, amounts to protecting 'the very identity of the EU as a common legal order', an identity that draws, in turn, on the constitutional traditions common to the Member States.

Third and last, the defence of those values is not a political question that exclusively falls within the scope of Article 7 TEU. In the *Rule of Law Conditionality* judgments, the Court of Justice observed that those values pervade the entire body of EU law. It held that – and I quote – 'numerous provisions of the Treaties […] grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State'.[11] The EU legislature may, within the scope of its competences, provide for procedures protecting those values, provided that they are not interfering with the procedure laid down in Article 7 TEU. This was, for example, the case of the conditionality mechanism introduced by Regulation 2020/2092. The latter mechanism was indeed specifically designed to protect the EU budget and financial interests; it pursues an objective and provides for the adoption of measures that are different from those set out in Article 7 TEU.

[8] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 126, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 144.

[9] Judgments of 16 February 2022, *Hungary v Parliament and Council*, C-156/21, EU:C:2022:97, para. 234, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 266.

[10] Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, EU:C:2021:311, para. 63.

[11] Judgment of 16 February 2022, *Hungary* v Parliament and Council, C-156/21, EU:C:2022:97, para. 159, and of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98, para. 195.

II. National identity and the Principle of Equality of Member States before the Treaties

The intermediate conclusion we can draw from what I said so far is that national identity, within the meaning of Article 4(2) TEU, must comply with the values contained in Article 2 TEU, including the rule of law principles. Respect for the rule of law means, inter alia, that public authorities must not call into question the position taken by a court in a final decision. As the Court of Justice held in *Torubarov*, 'the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party'.[12] In the same way, the Court explained in *Deutsche Umwelthilfe* that 'the fact that the public authorities do not comply with a final, enforceable judicial decision deprives [Article 47 of the Charter] of all useful effect'.[13]

Similarly, the Court of Justice has the *final* say when it comes to the interpretation of EU law[14] and even the *only say* when it comes to the validity of that law.[15] If a possibility existed at the level of the Member States to second-guess the interpretation of EU law put forward by the Court of Justice, the rule of law within the EU would become no more than the rule of lawlessness.[16] I therefore welcome it with particular satisfaction when a supreme or constitutional court expressly acknowledges those principles, as the Italian *Corte Costituzionale* did in its judgment nº 67/2022.[17]

Respect for the rule of law also means respect for equality before the law and non-discrimination. The wording of Article 4(2) TEU is interesting in this regard. Before providing that the EU must respect the identities of the Member States, that Treaty provision states that the EU must respect their equality before the Treaties. Since *equality comes before identity*, one may argue that national identity may not call into question the equality of Member States before EU law. And since

[12] Judgment of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, para. 57.

[13] Judgment of 19 December 2019, *Deutsche Umwelthilfe*, C-752/18, EU:C:2019:1114 , para. 37.

[14] See, in this regard, judgments of 2 September 2021, *Republic of Moldova*, C-741/19, EU:C:2021:655, para 45, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 52.

[15] Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 71.

[16] See, on this point, K. Lenaerts, 'No Member State is More Equal than Others', in A. von Bogdandy and A. Peters, *German Legal Hegemony? MPIL Research Paper Series*, no. 2020-43, p. 37. See also Opinion of Advocate General Tanchev in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2020:1053, points 80-84.

[17] *Corte Costituzionale*, judgment 67/2022, Considerato in diritto nº 10.2, available at: https://www.cortecostituzionale.it/stampaPronunciaServlet?anno=2022&numero=67&tipoView=P&tipoVisualizzazione=O.

equality stems directly from the value of the rule of law, national identity must comply with it.

I have advocated that the principle of primacy itself is grounded in the principle of equality before the law.[18] That link can be seen already in *Costa*,[19] and was explicitly recognised by the Court of Justice in *Euro Box Promotion and Others* as well as in *RS*.[20] The underlying rationale can be summarised as follows. The principle of equality of the Member States before the Treaties means, in essence, that all provisions of EU law are to have the same meaning and to be applied in the same fashion throughout the EU, from Portugal to Estonia and from Malta to Poland. That is so regardless of conflicting provisions of national law. Three direct implications flow from the principle of 'equality of Member States before the Treaties'. First, the uniform interpretation and application of EU law are key for guaranteeing that equality. Second, the uniform interpretation of EU law needs to be ensured by one court and one court only, i.e. the Court of Justice. Third and last, the principle of primacy underpins the uniform interpretation and application of EU law. That law – as interpreted by the Court of Justice – is 'the supreme law of the land' as primacy guarantees that normative conflicts between EU law and national law are resolved in the same fashion. Primacy thus guarantees that both the Member States and their peoples are equal before EU law, a law common to 27 Member States.

Thus, in my view, the principle of primacy of EU law, the principle of equality of Member States before that law and the value of respect for the rule of law are closely intertwined. Without primacy, there is no equality, and without equality before EU law, there is no rule of law within the EU and therefore, as I already explained, no room for an EU 'identity'.

[18] See, for example, K. Lenaerts, 'Éditorial: L'égalité des États membres devant les traités: la dimension transnationale du principe de primauté', (2021) *Revue du droit de l'Union européenne*, nº 1, 1.

[19] Judgment of 15 July 1964, *Costa*, 6/64, EU:C:1964:66.

[20] See judgment of 21 December 2021, *Euro Box Promotion and Others*, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para. 249, and of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 55.

III. National Identity and the Primacy of EU law

This brings me to the last part, in which I want to demonstrate that the Court of Justice, when interpreting EU law, duly takes national identity within the meaning of Article 4(2) TEU into account, and emphasize the importance of a constructive dialogue with national constitutional or supreme courts in this respect.

Regarding first the **interpretation of EU primary law**, national identity has served to highlight the importance of the objectives pursued by a national measure that derogates from the fundamental freedoms. For example, in *Las*, the Court of Justice recognised that 'the Union must also respect the national identity of its Member States, which includes the protection of the official language or languages of those States'.[21] That was confirmed in the recent judgment in *Boriss Cilevičs and Others*, where the Court of Justice held that it was legitimate for a Member State to protect its national identity by adopting measures promoting and developing the use of the official language in higher education. That case concerned a Latvian law which, in principle, obliged higher education institutions to provide teaching solely in Latvian. The Constitutional Court of Latvia had doubts whether that law was compatible, in particular, with the freedom of establishment as guaranteed by the Treaties. The Latvian law amounted to a restriction to that freedom because the possibility for nationals of other Member States to provide higher education courses in Latvia was made subject to the obligation to provide those courses solely in Latvian, with only limited exceptions. However, the Court held that that restriction could be justified by the objective of promoting and encouraging the use of one of the official languages of a Member State, on condition that the policy at issue is implemented in a consistent and systematic manner. The most relevant part of the reasoning relates to proportionality. The starting point of that reasoning is indeed that the Member States enjoy 'broad discretion' when adopting the measures which they consider necessary to attain their objective of protecting and promoting their official language, 'since such a policy constitutes a manifestation of national identity for the purposes of Article 4(2) TEU'.[22] That said, fundamental freedoms cannot be rendered nugatory or illusory, and the Court thus made clear that exceptions must be provided, for example as regards education provided in the context of European or international cooperation, and education relating to foreign languages.

[21] Judgment of 16 April 2013, *Las*, C-202/11, EU:C:2013:239, para. 26.

[22] Judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, para. 83. However, in the same paragraph, the Court of Justice pointed out that that broad discretion could not 'justify a serious undermining of the rights which individuals derive from the provisions of the Treaties enshrining their fundamental freedoms'.

There is another interesting aspect to the Court's judgment. When assessing the existence of an overriding reason in the public interest, the Court suggests that a link exists between national identity and the fact that primary law requires the Union to 'respect its rich cultural and linguistic diversity'.[23] That link confirms that Article 4(2) TEU, if properly interpreted and applied, *does not contradict or undermine* the Union's own identity. On the contrary, in some cases, it can contribute to *defining* that identity. The importance of linguistic diversity as part of the Union's DNA is unambiguously reflected in the judgment *Spain v. Parliament* delivered in 2019 by the Court sitting as a Grand Chamber. The case concerned language requirements in EU staff recruitment procedures. The Court referred in particular to the Union's duty to respect linguistic diversity and the plurality of official languages of the EU to conclude that it is for the institution restricting languages that can be used to communicate with the organisers of the selection procedure to advance 'any grounds capable of demonstrating the existence of a legitimate objective of general interest in the framework of staff policy requiring [the ensuing] difference in treatment'.[24]

Next, national identity has also – more frequently – served to **interpret secondary EU law**. For example, in *Remondis*, a public procurement case, the Court of Justice decided that a reallocation or transfer of competence from one public authority to another does not meet all of the conditions required to come within the definition of 'public contract' for the purposes of Directive 2004/18. That was because Article 4(2) TEU protects the division of competences within a Member State. 'Since that division is not fixed', the Court of Justice wrote, 'the protection conferred by Article 4(2) TEU also concerns internal reorganisations of powers within a Member State'.[25] Accordingly, those internal reorganisations could not be subject to EU public procurement rules.

Last but not least, the Court of Justice has also interpreted the notion of national identity, within the meaning of Article 4(2) TEU, as *allowing room for diversity*. This means that 'the specific circumstances which may justify recourse to [a legitimate objective that is grounded in national identity] may vary from one Member State to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the

[23] *Ibid.*, para. 68. That paragraph refers in the first place to the fourth subparagraph of Article 3(3) TEU and Article 22 of the Charter.

[24] Judgment of 26 March 2019, *Spain v Parliament*, C-377/16, EU:C:2019:249, paras 36 and 51.

[25] Judgment of 21 December 2016, *Remondis*, C-51/15, EU:C:2016:985, paras 40 and 41.

Treaty'.[26] That is in line with *pluralism*, which Article 2 TEU mentions among the essential features of the society in which the Union develops.

That said, as the *Coman* case illustrates, such a margin of discretion is not absolute. The Court of Justice held that it is for each Member State, according to its own identity, to decide on the meaning of the institution of marriage. EU law is neutral as to whether that meaning should include same-sex couples or not. However, the exercise of such a margin of discretion cannot go so far as to adversely affect the free-movement rights of same-sex couples that got legally married in another Member State. Within the meaning and for the purposes of the relevant provisions of EU law, those couples are to be considered 'spouses' and thus members of the same family.

The preliminary reference made by the Administrative Court of the City of Sofia in the '*Pancharevo*' case[27] confirms that balanced approach. In that case, the Court of Justice held that, as EU law currently stands, it is for each Member State, according to its own identity, to decide on the meaning of the institution of marriage and parenthood. The Member States are thus competent to decide whether or not to allow marriage and parenthood for persons of the same sex under their national law. Nevertheless, in exercising that competence, each Member State must comply with EU law, in particular the freedom of all Union citizens to move and reside within the territory of the Member States. The latter must therefore recognize, *for that purpose*, civil status of persons that has been established in another Member State in accordance with the law of that other Member State.[28] More particularly, a Member State is obliged to issue a passport to a child who is a national of that Member State, who was born in another Member State and whose birth certificate issued by the authorities of that other Member State designates as the child's parents two mothers. That does not undermine the national identity of that Member State, as the latter is not required "to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents."[29]

[26] See, in this regard, judgments of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, para. 31 and the case-law cited, and of 22 December 2010, *Sayn-Wittgenstein*, C-208/09, EU:C:2010:806, para. 87.

[27] Judgment of 14 December 2021, Stolichna obshtina, rayon 'Pancharevo', C-490/20, EU:C:2021:1008.

[28] *Ibid.*, para. 22.

[29] *Ibid.*, paras 56 and 57.

The Court of Justice has thus interpreted the notion of national identity, within the meaning of Article 4(2) TEU, as allowing room for diversity, while ensuring the primacy of EU law. Dialogue with national courts is key to allow the Court to fulfil that function. In particular, Supreme or Constitutional Courts must enter into a dialogue with the Court of Justice in order to clarify whether certain overriding principles of their own legal order must be taken into account in the interpretation or application of EU law. For example, in *M.A.S. and M.B.*, a case concerning VAT fraud, the *Corte Costituzionale* stressed the importance that the principle that criminal offences and penalties must be defined by law has within both the EU and Italian legal orders. It also brought to the attention of the Court of Justice the fact that, under Italian constitutional law, rules on limitation form part of substantive criminal law. The Court of Justice recalled that in accordance with Article 325 TFEU, the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonisation, it is for the Member States to adopt rules on limitation applicable to criminal proceedings relating to such cases. This means that while a Member State must impose effective and deterrent criminal penalties in cases of serious VAT fraud, it is free to consider, for example, that rules on limitation form part of substantive criminal law. If that is the case, the Member State concerned must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter which corresponds to Article 7(1) ECHR.[30] Accordingly, even where the rules on limitation at issue prevent the imposition of effective and deterrent criminal penalties in a significant number of cases of serious VAT fraud, the national court is under no obligation to disapply those rules *in so far as* that obligation *is incompatible with Article 49 of the Charter*. However, the margin of appreciation enjoyed by Italy in qualifying rules on limitation as substantive criminal law could not lead to maintaining the *status quo*. Whilst national courts did not have the obligation to disapply those rules, the Italian legislature had to amend the rules on limitation so as to avoid impunity in a significant number of cases of serious VAT fraud, undermining the EU's financial interests.

These examples show that judicial dialogue is an appropriate means of drawing the *contours* of the margin of appreciation that the Member States enjoy under the concept of 'national identity', within the meaning of Article 4(2) TEU. However, the same cannot be said in respect of judicial unilateralism. That is why in *RS*, the Court of Justice expressly rejected that a Member State may unilaterally rely on its national identity in order to call into question the primacy of EU law. The Court

[30] Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, para. 55.

held that Article 4(2) TEU 'has neither the object nor the effect of authorising a [C]onstitutional [C]ourt of a Member State, in disregard of the obligations under, in particular, Article 4(2) and (3) and the second subparagraph of Article 19(1) TEU, which are binding upon it, to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national [C]onstitutional [C]ourt'.[31] In the same way, the Court of Justice rejected the so-called *ultra vires* doctrine, according to which a Constitutional Court may second-guess and depart from the interpretation of EU law contained in a judgment of the Court of Justice,[32] without referring the matter to the Court of Justice with a view to obtaining an answer from that Court binding upon 27 Member States in an equal manner.

The *RS* judgment thus contains two powerful statements ruling out judicial unilateralism. Still, those two statements must be read in light of judicial dialogue. That is why in the same judgment, the Court of Justice indicated the path that a Constitutional Court must follow when having doubts as to the compatibility of secondary EU law with the concept of 'national identity' laid down in Article 4(2) TEU. That path requires from the Constitutional Court concerned that it refers a preliminary question of validity to the Court of Justice.[33]

Similarly, judicial dialogue may also serve national courts as a means of urging the Court of Justice to reconsider its previous findings. For example, in *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*,[34] the referring court asked the Court of Justice to clarify the consequences that flow from finding a national legislation to be incompatible with the principle of proportionality of penalties set out in an EU Directive. It asked whether that principle could produce direct effect and if so, whether the principle of primacy required it to set aside the national legislation at issue as a whole or only the part necessary to enable the imposition of proportionate penalties. Following the Opinion of AG Bobek, the Court held that the principle of proportionality of penalties was unconditional and sufficiently precise to produce direct effect. The Court reasoned that that principle was not qualified by any condition. Nor was it subject, in its implementation or effects, to the taking of any measure either at EU or at national level. On the contrary, the principle of proportionality of penalties imposes on the Member

[31] Judgment of 22 February 2022, *RS (Effect of the decisions of a constitutional court)*, C-430/21, EU:C:2022:99, para. 70.

[32] *Ibid*., para. 72.

[33] *Ibid*., para. 71.

[34] Judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168.

States in unequivocal terms a precise obligation as to the result to be achieved. It is worth noting that, in paragraph 29 of that judgment, the Court of Justice expressly overruled its previous findings in *Link Logistik N&N* in which it had reached the opposite conclusion.[35] Moreover, the Court of Justice held that the national legislation at issue had to be set aside only to the extent that it prevented the imposition of proportionate penalties, whilst ensuring that those penalties remain effective and dissuasive.[36]

In the context of that dialogue, the Court of Justice is thus *not* afraid of rectifying its case law. As AG Bobek wrote, 'to find, in a system that defines itself as being based on judicial dialogue, a dialogue partner that is never wrong may perhaps be rather surprising and occasionally frustrating'.[37] However, the Court of Justice is not such a dialogue partner, but one who leaves the door open for reconsideration in the light of concerns and doubts raised by national courts and, in particular, by national constitutional courts.

IV. Concluding remarks

The rule of law and the principle of judicial independence form an essential part of the constitutional identity of the European Union, as much as they are an essential part of the constitutional identity of the Member States. In that sense, EU identity seeks to ensure that EU law remains a 'common legal order' where the Member States may express their own identities. It is of utmost importance that national courts and the Court of Justice work together as allies to uphold that principle and in so doing, the rule of law within the EU. National identity, within the meaning of Article 4(2) TEU, is therefore to be built in keeping with the values listed in article 2 TEU. Its *contours* and effects have to be elucidated on the basis of a constructive dialogue between the Court of Justice and national courts, in particular constitutional courts, that revolves around upholding common values.

I thank you for your attention.

[35] Judgment of 4 October 2018, *Link Logistik N&N*, C-384/17, EU:C:2018:810.

[36] Judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paras 40 and 41. In this regard, the Court of Justice observed that the 'combination of various characteristics' of the national legislation at issue made it disproportionate (e.g. the accumulation of pecuniary penalties without an upper limit of fines). However, this was not the case when those characteristics were taken in isolation (e.g. the fact that the amount of pecuniary penalties varied according to the number of workers affected by violations of certain obligations in the field of employment law was not, in itself, disproportionate).

[37] Opinion of Advocate General Bobek in *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2021:759, point 141.

THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

Plenary Debate

Pavlina Panova, President of the Bulgarian Constitutional Court

Today the debate about the constitutional identity centres alongside the European Union – EU Member States axis, with primary EU law serving as its prime reference. Article 4(2) of the Treaty on European Union (TEU) provides that the Union shall respect the equality of the Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional.

Apparently, paragraph 2 employs the term "national identity" as a comprehensive notion of identity that verges on each EU Member State's fundamental political and constitutional structures, inclusive of national and local self-government, that aim to ensure their territorial integrity, maintain law and order, and safeguard national security. That is, this provision points clearly *where* to look for this identity and *why* we need it but fails to give a clear answer as to *what* it is. It is the case-law of the CJEU and Member States' national courts as well as the legal theory that shed light on the substance of the notion of national identity. However, these, at least to date, do not offer a uniform understanding of this notion, neither content-wise nor even terminology-wise.

Since the founding treaties serve as the Union "constitutional charter",[1] at hand is a process of constitutionalisation of the Member States' national identities on primary EU law level. Thus, we are talking about identity not as a feeling of national and cultural belonging but rather as the identity that is encoded in the fundamental constitutional structure of the individual Member States.

Thus, throwing a bridge across national constitutional law and EU law, Article 4(2) TEU serves as a girder in the compound constitutional structure of the Union. Hence this provision may be considered the portal that lets EU law into national law.

Unilateral recourse to Article 4(2) TEU by the constitutional courts as a ground to pronounce a certain act of the Union not applicable in the national legal order

[1] The CJEU uses this expression in its judgment of 23 April 1986 *Les Verts v European Parliament*, Case 294/83, p. 23; *Kadi and Al Barakaat International Foundation* v *Council and Commission*, judgment of 3 September 2008 in joined cases C-402/05 P and C-415/05 P, p. 81; Opinion 2/15 of the Court etc.

may affect rather negatively both the unity and integrity of the EU legal order, and legal certainty altogether, particularly so considering two factors. First, the exclusive competence of the Court of Justice to interpret the founding treaties (including Article 4(2) TEU) would be at stake. Second, the situation is further complicated by the quite different understanding of the constitutional courts as to what constitutes "national identity".

It is widely shared that the national identity protection clause laid down in Article 4(2) TEU has the necessary normative potential to shed light on the heated controversy about the nature and limits of the primacy of EU law. However, constitutional identity does not stop short of the EU – Member States playing field. The ultimate objective is to preserve those fundamental values and principles that form the countenance of the respective constitutional order.

The principle enshrined in Article 4(2) TEU may be applied in practice only through cooperation between the Court of Justice and the Member States' constitutional courts. The national courts shall define the national identity they insist on preserving, while the Court of Justice shall interpret the (secondary) EU law which, according to the national Constitutional Court, violates the constitutional identity, and shall establish how, when and to what extent the Member State's claim for respect of its identity takes precedence over the other principles of EU law.

Article 4(2) TEU is meant as the linchpin of EU law and Member States' constitutional laws. It is for the Court of Justice to establish the notion of "national identity", however not in isolation but in a dynamic cooperation with the Member States' constitutional courts and while making a curtsy to the "constitutional" understanding of identity. Perhaps, the most correct way would be to consider the CJEU and Member States' constitutional courts as the peaks of the legal systems of the EU and the respective Member State. The point is not which one will prevail over the other in terms of height but rather whether they are looking in the same direction, which they should, and more often looking at each other.

The elements outlining the profile of the constitutional identity should be doubtlessly found in the Constitution of the respective Member State. The identity is "constitutional" since it is laid down in the Constitution. The fundamental nature of the values and principles that mold it justifies their engravement in the basic law of the country. Thus, it is feasible to define the substance of the Bulgarian national identity by reference to the very text of the Bulgarian Constitution and the way it is being interpreted and applied.

The difficulty to determine the core values and principles stems from the fact that the current Bulgarian Constitution does not comprise a notion such as constitutional identity. This should not be viewed as an omission but rather as a manifestation of the living constitutionalism capable of adapting to the dynamics of socio-economic and political relations.

Traditionally, the constitutional identity of a state hovers on the axis of the stable or invariable notions laid down in a constitution. The cumbersome procedure for amending the basic law is a guarantee against conjunctural moods and renders the elements of its identity intransient.

According to the German Federal Constitutional Court, the constitutional identity is a legal concept that comprises the core values enshrined in the German Constitution, and as such it is not subject to amendments. This understanding rests on consistent traditions of the German legal doctrine.

The Constitution of the Republic of Bulgaria of 1991 comprises no catalogue of "timeless clauses"; however, it provides for a two-track procedure for Constitutional amendments. In Bulgaria, this objective is attained differently in line with the constitutional tradition. There are two types of constitutional provisions: amendable and hard to amend. Pursuant to Article 153, the National Assembly shall be free to amend all provisions of the Constitution except those within the prerogatives of the Grand National Assembly. This guarantees a balance between the need to establish a lasting and principal regulation of public relations, while at the same time provide for flexible mechanisms to adapt to changes in the public, economic and political environment that have occurred in the meanwhile.

The Grand National Assembly (GNA) and the issues it deals with are the intersection of the constitutional identity comprising key elements and fundamental characteristics of the basic law but also specificities that form its authentic and unique character in comparative terms.

What comes closest to the notion of constitutional identity as a core of traditional and fundamental values, principles and institutions are those matters deemed particularly important for the general public and the State that are subject to revision under complex qualified terms and procedure by a specially convened Grand National Assembly. Article 158 of the Bulgarian Constitution defines the exclusive competence of a Grand National Assembly. In particular, a Grand National Assembly shall: 1) adopt a new Constitution; 2) resolve on any changes in the territory of the Republic of Bulgaria and ratify any international treaty

envisaging such a change; 3) resolve on any changes in the form of State structure or form of government; 4) resolve on any amendment to Article 5, paras 2 and 4 and Article 57, paras 1 and 3 of this Constitution; and 5) resolve on any amendment to Chapter Nine of the Constitution. The constitutional identity of the Bulgarian Constitution of 12 July 1991 may be established through interpretation of the provision of Article 158, which regulates matters related to the constituent elements of the State, its form, the form of State structure and form of government, the direct effect of the Constitution and the primacy of international treaties over national law, the irrevocability of fundamental rights and their possible limitation in case of emergency, as well as the overall or partial revision of the Constitution.

Two notions: parliamentary form of government provided in Article 1, para 1 of the Constitution ("Bulgaria shall be a republic with a parliamentary form of government"), and unitary state with local self-government provided in Article 2, para 1 of the Constitution ("The Republic of Bulgaria shall be a unitary state with a local self-government") hold a special place among the elements of our constitutional identity.

Further to that, the elements of the constitutional identity of the Bulgarian Constitution may and should comprise: the values enshrined in the Preamble of the Constitution that are the epitome of the official idea of public good, the republic as a state form, the parliamentary form of government and the unitary form of state government, the direct effect of Constitutional provisions that ensures respect for individual fundamental rights and freedoms as well as the constitutional guarantees for those irrevocable human rights that remain outside the realm of the authorities even in cases of emergency. In a wider context the elements of national constitutional identity may be extended to include the provisions regarding the Bulgarian language as the official language in the country (Article 3) and the special place and role of the Eastern Orthodox Christianity as the traditional religion in Bulgaria (Article 13, para 3).

Presented in this way, the constitutional identity of the Republic of Bulgaria helps build up and strengthen the common European constitutional heritage. The national sovereignty, primacy of the basic law, separation of powers, rule of law, constitutional legal status of the person are among the elements of the constitutional identity and practice of other European constitutional jurisdictions.

Finally, the last word on the matter of constitutional identity is reserved for the Constitutional Court as the guardian of the Constitution.

In 2002 the Constitutional Court was seized with a request for binding interpretation of Article 158, item 3 as regards the meaning of the wording "form of state structure and form of government" as well as when there are "any change" in these.

According to the interpretation of the Court,[2] the form of government is determined not only by the type of state being parliamentary or presidential republic or monarchy but also by the system of all basic constitutional institutions established by the Grand National Assembly that further develop the parliamentarism, their existence and place in the respective power as well as the organization, terms, modality of establishment and their term of office. The form of state government further includes the activities and powers entrusted to these institutions while preserving the balance between them and respecting the fundamental principles of state formation such as national sovereignty, political pluralism, separation of powers and rule of law.

Thus, decision no. 3 of 10 April 2003 of the Constitutional Court in constitutional case no. 22/2002 (promulgated SG no. 36/2003) provides a good basis to clarify and formulate the concept of Bulgaria's constitutional identity. The Constitutional Court has in turn the responsibility and right to determine the core traditional values and foundations that the society has agreed upon to build Bulgaria's future and that define her constitutional identity while reaffirming the citizens' expectations about their common future.

The effective interaction of the European and constitutional legal orders is impossible in case of subordination. Dialogue and cooperation between the different legal systems are the only premise that may ensure their due accord and balance.

The constitutional identity of every State is synthesized by its unique individual experience. It may not be conjured or changed by a willful decision, nor may be imported by force. The identity comprises historical, cultural, and social factors reflected in the law. It is not frozen but is formed through dialogue involving ideas and beliefs from every country's historical past that are re-examined in every new era. It may be established, and constitutional justice is the best means for that.

[2] Decision no. 3/2003 in constitutional case no. 22/2002.

THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

Plenary Debate

Prof. Dr. Stephan Harbarth, LL.M. (Yale),

President of the German Federal Constitutional Court

I. Introduction

Dear President Lenaerts,

Madam President Panova,

Justice Malbec,

Justice Tănăsescu,

Ladies and Gentlemen,

Peace, freedom, democracy, the rule of law: none of these would be possible in Europe without the process of European integration and one of its central achievements – the creation of a European community of law (*Rechtsgemeinschaft*). And none of them would be possible without the substantial contributions made by the courts in Europe.

One of the key questions that arise in connection with this community of law concerns the relationship between the EU and the Member States within our multi-level legal system. It is thus an important topic to discuss today and I would like to thank Mr Arabadjiev and Mr Kornezov for inviting me to contribute to this panel discussion. I would also like to extend my thanks to our Bulgarian hosts.

Few issues have occupied German constitutional jurisprudence and constitutional scholarship as intensely as the question of the nation-state's integration within the European and international framework, in particular the question of Germany's "participation in the development of the European Union" with a "view to establishing a united Europe", to quote Art. 23(1) first sentence of the Basic Law.

Yet initially, during the early years of the newly-established Federal Republic of Germany, attention was mainly centred on the protection of fundamental

rights – this being regarded as a uniquely important achievement.[1] Here I simply refer to the Federal Constitutional Court's *Solange* case-law, which introduced a kind of division of labour between the Federal Constitutional Court and the CJEU in terms of the protection of fundamental rights (also see IV.2. below).

With the establishment of the European Union, the challenges associated with European integration came into clearer focus. Member States began placing greater emphasis on the protection of their sovereignty and their constitutional identity within the European multi-level system. The Federal Constitutional Court was involved in this integration process from the outset, addressing the relevant issues of constitutional law and ensuring that Germany's integration rested on secure constitutional foundations. Standards that were largely developed by the Federal Constitutional Court in its judgments on the Maastricht Treaty and the Treaty of Lisbon were pressed into action in cases dealing with the various EU measures to contain the financial crisis. Given the enormous political and economic significance of these measures, it was perhaps unsurprising that the related proceedings attracted great public attention.

II. Precedence and limits of the application of EU law

Art. 23 of the Basic Law – the central plank of German constitutional law on the European Union – is regarded in the Federal Constitutional Court's established case-law as containing a commitment to recognise and enforce EU law. This implies that when the relevant domestic act of approval is adopted, EU law is afforded precedence of application over domestic law. In principle, the Federal Constitutional Court also regards this precedence as being applicable when EU law conflicts with German constitutional law – a position reaffirmed in its 2021 decision on the Unified Patent Court, for example.[2]

Yet this precedence of EU law only applies to the extent that the Basic Law and the domestic act of approval permit or provide for a transfer of sovereign powers.[3] This is because the precedence of EU law in Germany is based on, and limited by, the order giving effect to EU law at the domestic level. And this order, which is contained in the act of approval, must adhere to the applicable constitutional

[1] cf. P. Huber, Verfassungsstaat und Finanzkrise, 2014, p. 11.

[2] cf. Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 158, 210 <239 et seq. para. 73>.

[3] cf. BVerfGE 158, 210 <239 et seq. para. 73 with further references>.

framework.[4] It is incumbent upon the Federal Constitutional Court to uphold the resulting constitutional limits, in particular by conducting a review on the basis of constitutional identity ("identity review"), a review on the basis of the *ultra vires* doctrine ("*ultra vires* review"), or a review on the basis of the so-called *Solange* doctrine.

Such review can result in EU law being declared inapplicable in specific cases in Germany. Given these legal consequences and in order to protect the proper functioning of the EU legal order, the Federal Constitutional Court is the only court in Germany authorised to exercise such powers of review. Other German courts may not disapply EU law without referring the matter to the Federal Constitutional Court.[5]

III. Identity review

By recognising the general precedence of application of EU law, the Basic Law authorises the legislator to transfer far-reaching sovereign powers to the European Union. At the same time, however, the Basic Law makes this authorisation subject to the condition that sovereign individual statehood be preserved on thebasis of a European integration agenda that respects the constitutional identity of the Member States and adheres to the principle of conferral. Whenever a German act of approval gives effect to EU law, it must comply with the standards enshrined in the Basic Law.[6] Numerous other Members States of the European Union have similar provisions aimed at protecting their own constitutional identities. What is more: the idea of a constitutional core that is beyond the reach of constitutional amendment has spread around the world.[7]

According to the Basic Law, a transfer of sovereign powers to the European Union must not encroach upon the Basic Law's core – its constitutional identity –, which enjoys absolute protection under Art. 79(3) of the Basic Law and is beyond the reach of European integration. The legislator is generally not permitted to alter this core identity when amending the Constitution. It follows that it cannot authorise the European Union to do so either. Thus, when the Federal Constitutional Court carries out an identity review, it examines adherence to the principles that are declared inviolable by the Basic Law itself

[4] cf. BVerfGE 123, 267 <402>.

[5] cf. BVerfGE 123, 267 <354> re identity/*ultra vires* review.

[6] cf. BVerfGE 123, 267 <347>.

[7] cf. Roznai, Unconstitutional constitutional amendments, Structure p. 21 et seqq., Conclusion p. 37 et seq. (citing the 2019 paperback edition).

under Art. 79(3) and, regarding European integration, under Art. 23(1) third sentence in conjunction with Art. 79(3) of the Basic Law – namely human dignity in Art. 1(1) and the principles of federalism, democracy, the social state and the rule of law in Art. 20 of the Basic Law.[8]

The instrument of identity review not only serves to rule out any constitutionally impermissible transfer of sovereign powers to the EU, it also prevents EU bodies from implementing measures that, in terms of their legal implications, would be equivalent to the transfer of such powers.[9]

From an early stage, the Federal Constitutional Court exercised its responsibility with regard to European integration by giving concrete shape to the constitutional identity of the Basic Law. The Basic Law's constitutive elements that define its identity include the core of human dignity and the structural principles of Germany as a federal, democratic and social state under the rule of law. It follows from the principle of democracy, in particular, that the German *Bundestag* must retain tasks and powers of substantial political weight.[10] As the Federal Constitutional Court made clear in its judgment on the Lisbon Treaty, the Member States must be left with sufficient political leeway to shape the economic, cultural and social conditions of life.[11]

In essence, the possibility of identity review is also implied in Art. 4(2) first sentence of the Treaty on European Union (TEU).[12] That being said, there are substantial differences between identity review under Art. 79(3) of the Basic Law and the review carried out by the CJEU under Art. 4(2) first sentence TEU. The provision of Art. 4(2) first sentence TEU obliges the institutions of the EU to respect national identity. This is based on a concept of national identity that goes much further than the concept of constitutional identity.[13] However, given that the respect for national identity required under Art. 4(2) first sentence TEU can be weighed against other interests in the balancing process,[14] it does not enjoy the absolute level of protection afforded to the inviolable core of the Basic Law within the meaning of Art. 79(3) of the Basic Law.[15]

[8] cf. BVerfGE 158, 210 <232 para. 54 with further references>.
[9] cf. BVerfGE 142, 123 <195 et seq. para. 139>.
[10] cf. BVerfGE 123, 267 <330, 356>.
[11] cf. BVerfGE 123, 276 <357 et seqq.>.
[12] cf. BVerfGE 142, 123 <196 et seq. para. 140>.
[13] cf. BVerfGE 134, 366 <386 para. 29 with references to CJEU case law>.
[14] cf. BVerfGE 134, 366 <386 para. 29 with references to CJEU case law>.
[15] cf. BVerfGE 134, 366 <386 et seq. para. 29>.

By contrast, while Art. 23 of the Basic Law places Germany's constitutional identity beyond the reach of European integration, Art. 79(3) of the Basic Law limits this identity to a core of the Constitution. Nonetheless, this core represents an "ultimate limit"[16] which may not be subject to any balancing whatsoever. Thus, the instrument of identity review serves to examine whether acts of EU institutions violate the principles enshrined in Art. 1 and Art. 20 of the Basic Law,[17] which are declared inviolable in Art. 79(3) of the Basic Law.[18] This protection is the task of the Federal Constitutional Court.[19]

IV. Ultra-vires review and Solange doctrine

1. When conducting an ultra vires review, the Federal Constitutional Court not only examines whether the domestic act of approval respects the limitations imposed by the constitutional identity of the Basic Law, it also examines whether specific acts of the institutions, bodies, offices and agencies of the European Union are covered by the domestic act of approval, or whether they transgress the boundaries of the framework set by the domestic legislator. Since the (rare) cases of a manifest exceeding of competences affect the principles of democracy and the rule of law enshrined in the Basic Law, thereby interfering with Germany's constitutional identity, ultra vires review amounts to a special form of the general protection afforded by the Federal Constitutional Court to constitutional identity. Nevertheless, the instruments of ultra vires review and identity review are based on different standards.[20]
2. According to the Federal Constitutional Court's established case-law, the precedence of application of EU law – which prevents the Court from conducting a review on the basis of the fundamental rights of the Basic Law – is only recognised subject to the reservation that sufficiently effective protection must be afforded by the EU fundamental rights that apply instead. The level of protection under the Charter must essentially be equivalent to the fundamental rights protection regarded as indispensable under the Basic Law and must generally serve to guarantee the essence of German fundamental rights. The Federal Constitutional Court's determination of whether the level of protection is equivalent depends on the specific fundamental right in question and is based on a general assessment of the level of protection in place at EU level.[21]

[16] cf. BVerfGE 123, 267 <348>; 134, 366 <386 para. 29>; 142, 123 <203 para. 153>.
[17] Established case-law; cf. BVerfGE 158, 210 <232 et seq. para. 54> for a more recent example.
[18] cf. BVerfGE 123, 267 <343>.
[19] cf. BVerfGE 134, 366 <386 para. 29>.
[20] cf. BVerfGE 142, 123 <188 et seqq. paras. 121 et seqq.>.
[21] cf. BVerfGE 152, 216 <235 et seq. para. 47>.

V. Conclusion

The decisions reached by the Federal Constitutional Court regarding the constitutional core that is beyond the reach of European integration can be summarised as follows:

First: EU law enjoys precedence of application over domestic law in the specific case. In principle, this precedence also applies to conflicting provisions of domestic constitutional law.

Second: EU legal acts or measures of EU institutions that affect the German constitutional identity are not capable of overriding conflicting German law. In accordance with Art. 4(2) first sentence TEU and – for Germany – with Art. 23(1) third sentence in conjunction with Art. 79(3) of the Basic Law, the German Constitution has a core that is beyond the reach of European integration, just like the constitutions of other Member States. Within this core, conflicting EU has no claim to applicability.

Third: Even if the Federal Constitutional Court and the CJEU have different conceptions of the relationship between EU law and the domestic law of the Member States, both institutions are united by the common goal of working within our unique multi-level framework – a framework where conventional judicial categories of hierarchy, supremacy and subordination are no longer sufficient to describe the relationship between the CJEU and the national constitutional courts – to ensure that the rule of law prevails.

THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

Plenary Debate

Véronique Malbec, Juge au Conseil constitutionnel de la République française

Monsieur le président de la cour de justice de l'Union européenne,

Madame, monsieur les présidents et juge,

Chers collègues,

Le thème choisi pour cette table ronde de l'identité constitutionnelle des Etats membres et de l'Union européenne est particulièrement intéressant et je suis certaine que des échanges très riches vont compléter les propos que nous aurons pu tenir individuellement.

Je traiterai ainsi de la façon dont nous concilions en France notre Constitution, référence ultime des juges nationaux, avec le principe de primauté du droit de l'Union et le rôle de la Cour de justice du Luxembourg garante de l'interprétation uniforme de ce droit et de sa conformité aux traités constitutifs.

Lorsqu'il est saisi de dispositions législatives qui se limitent à reprendre des textes issus du droit de l'Union européenne, le Conseil constitutionnel est confronté à une difficulté particulière qui réside dans le fait qu'à travers l'examen de la constitutionnalité de ces dispositions législatives, c'est en réalité à l'examen de la constitutionnalité d'un texte européen qu'il lui est demandé de procéder.

Or, la compétence pour connaître de la régularité des textes européens appartient, Monsieur le président Lenaerts, à la Cour de justice de l'Union européenne (CJUE).

En France, l'articulation de l'ordre juridique propre à l'Union et l'ordre juridique propre à notre pays s'appuie sur les articles 54 et 88-1 de notre Constitution.

L'article 54 prévoit que *"Si le Conseil constitutionnel, saisi par le Président de la République, par le Premier ministre, par le président de l'une ou l'autre des assemblées ou par soixante députés ou sénateurs, a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de*

ratifier ou d'approuver un engagement international en cause ne peut intervenir qu'après modification de la Constitution".

Nous en avons fait usage de cet article à plusieurs reprises et à chaque fois notre Constitution a été révisée:

– En 1992 pour le traité de Maastricht,
– En 1997 pour le traité d'Amsterdam,
– En 2004 pour le traité établissant une constitution pour l'Europe
– EN 2007 pour le traité de Lisbonne.

Par ailleurs, pour résoudre cette difficulté de l'articulation entre le droit de l'Union et notre Constitution, notre Conseil a, sur le fondement de l'article 88-1 de la Constitution, développé une jurisprudence spécifique qui lui permet, à travers la notion de règles ou de principes inhérents à l'identité constitutionnelle de la France, tout à la fois de respecter la compétence de la Cour du Luxembourg et de s'assurer de la protection des droits constitutionnels.

Cet article 88-1 qui n'est pas normatif énonce "*La République participe à l'Union européenne constituée d'Etats qui ont choisi librement d'exercer en commun certaines de leurs compétences en vertu du traité sur l'Union européenne et du traité sur le fonctionnement de l'Union européenne, tels qu'ils résultent du traité signé à Lisbonne le 13 décembre 2007*".

La doctrine a ainsi pu voir dans cette jurisprudence un *"accommodement raisonnable"* permettant de concilier la primauté du droit de l'Union européenne et la suprématie constitutionnelle[1].

La consécration de l'identité constitutionnelle comme clause de sauvegarde de compétence dans le cadre de la jurisprudence sur les lois de transposition du droit de l'UE

- Depuis deux décisions rendues en 2004 et 2006, le Conseil constitutionnel a développé une jurisprudence spécifique aux lois ayant pour objet de transposer en droit interne une directive de l'Union européenne.

[1] *"le Conseil constitutionnel a réussi, par la mobilisation de l'article 88-1 à sortir du conflit irrésoluble entre primauté du droit de l'Union européenne et primauté constitutionnelle pour concilier ces deux réalités normatives en une règle, constitutionnelle, de primauté du droit de l'Union européenne, préservant ainsi à la fois la suprématie constitutionnelle (la Constitution demeure, du point de vue de l'ordre juridique interne, la source des sources) et la primauté du droit de l'UE (dans la limite, très restreinte, de dispositions expresses inhérentes à l'identité constitutionnelle de la France). Il a ainsi trouvé un accommodement raisonnable"* (Baptiste Bonnet, "Les rapports entre droit constitutionnel et droit de l'Union européenne, de l'art de l'accommodement raisonnable", *Titre VII*, n° 2 – avril 2019).

Selon cette jurisprudence, s'il résulte de l'article 88-1 de la Constitution une exigence constitutionnelle de transposer les directives, *"la transposition d'une directive ne saurait aller à l'encontre d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France, sauf à ce que le constituant y ait consenti"*. En l'absence de mise en cause d'une telle règle ou d'un tel principe, le Conseil constitutionnel n'est pas compétent – ni en contentieux *a priori*, ni saisi d'une question prioritaire de constitutionnalité (QPC) – pour contrôler la conformité à la Constitution de dispositions législatives qui se bornent à tirer les conséquences nécessaires de dispositions inconditionnelles et précises d'une directive de l'Union européenne.

- Cette jurisprudence, que l'on retrouve également devant le juge administratif lorsqu'il est saisi de dispositions réglementaires transposant une directive européenne, vise ainsi à assurer la cohérence entre l'ordre juridique interne et l'ordre juridique de l'Union européenne.

Lorsqu'une méconnaissance des droits et libertés protégés par la Constitution trouve son origine dans un acte de l'Union européenne alors que ces droits et libertés sont également protégés par l'ordre juridique européen, le Conseil constitutionnel laisse aux juges de droit commun du droit de l'Union – c'est-à-dire aux juridictions administratives et judiciaires françaises et, le cas échéant, à la CJUE – le soin d'en assurer le respect. Si, en revanche, sont en cause des règles et principes inhérents à l'identité constitutionnelle de la France, c'est au Conseil constitutionnel lui-même qu'il revient d'en assurer le respect.

En somme, le contrôle auquel le Conseil est susceptible de se livrer à l'égard de dispositions de transposition fait, conformément à l'esprit même de l'article 88-1 de la Constitution, *"l'objet d'une délégation européenne, assortie d'une clause de sauvegarde"* tenant en l'occurrence au respect des règles ou principes inhérents à l'identité constitutionnelle de la France. Si un tel principe est en cause, le Conseil constitutionnel est compétent pour examiner, au moyen de cette *"clause de sauvegarde"* que pratiquent d'autres cours constitutionnelles européennes, le respect par les dispositions contestées, et à travers elles, en réalité, par la directive, de ce principe.

Cela signifie concrètement, que le Conseil constitutionnel s'autorise à laisser inappliqué le droit de l'Union dans une telle hypothèse. Autrement exprimé par le rapporteur public devant notre Conseil d'Etat, M. Lallet *"Cette clause de sauvegarde n'est pas l'instrument d'un repli nationaliste, d'un réflexe idéologique de souveraineté ou d'une fierté juridictionnelle qui n'a pas lieu d'être, elle est d'abord un outil pour faire respecter la norme fondamentale dont tout procède, y compris le*

choix de l'Etat de participer à la construction européenne ; elle est aussi une garantie d'efficacité du dialogue des juges sur la base d'un rapport de force équilibré".

Cette réserve de compétence s'appuie sur l'article 4§2 du traité sur l'Union européenne, qui prévoit que *"l'Union respecte l'égalité des États membres devant les traités ainsi que leur identité nationale, inhérente à leurs structures fondamentales politiques et constitutionnelles"*.

Mais quels sont les critères d'identification d'une règle ou d'un principe inhérent à l'identité constitutionnelle de la France ?

Les règles et principes inhérents à l'identité constitutionnelle de la France peuvent être conçus comme recouvrant l'ensemble des règles et principes qui fondent notre ordre constitutionnel et qui ne sont pas garantis par le droit de l'Union européenne, de sorte que la Cour de justice ne peut, par elle-même, en assurer le respect.

Le Conseil constitutionnel a déjà eu, depuis 2004, à connaître de la question de savoir si une règle ou un principe est inhérent à l'identité constitutionnelle de la France.

Dans une décision prise le 29 juillet 2004, il a jugé que des dispositions relatives à la brevetabilité de certaines inventions se bornaient à tirer les conséquences nécessaires des dispositions inconditionnelles et précises d'une directive et que le grief tiré de ce qu'elles méconnaissaient l'article 11 de la Déclaration de 1789, protégeant la liberté d'expression et de communication, ne pouvait dès lors être utilement invoqué dans la mesure où *"cette liberté est également protégée en tant que principe général du droit communautaire sur le fondement de l'article 10 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales"*[2].

De même, dans une autre décision du même jour, le Conseil a jugé que ne peut pas être utilement présenté le grief tiré de l'atteinte au respect de la vie privée invoqué contre des dispositions qui se bornent à tirer les conséquences nécessaires des dispositions inconditionnelles et précises d'une directive.

Enfin, dans une décision du 26 juillet 2018, le Conseil a écarté la qualification de règle ou principe inhérent à l'identité constitutionnelle de la France en ce qui concerne:

[2] Décision n° 2004-498 DC du 29 juillet 2004, *Loi relative à la bioéthique*, cons. 6.

– le principe d'égalité devant la loi, au motif que *"Ce principe est également protégé par le droit de l'Union européenne, notamment par l'article 20 de la Charte des droits fondamentaux de l'Union européenne"*;

– la liberté d'entreprendre, au motif que *"cette liberté est également protégée par le droit de l'Union européenne, notamment par l'article 16 de la Charte des droits fondamentaux de l'Union européenne* "*également protégés par le droit de l'Union*";

– ou encore la liberté d'expression et de communication au motif cette fois que *"Cette liberté est également protégée par le droit de l'Union européenne, notamment par l'article 11 de la Charte des droits fondamentaux de l'Union européenne"*.

En revanche, dans cette même décision, le Conseil constitutionnel n'a pas tranché la question de savoir si l'article 9 de la Charte de l'environnement ou le principe de participation des travailleurs ont le caractère de règle ou principe inhérent à l'identité constitutionnelle de la France, en considérant que, *"en tout état de cause"*, les dispositions contestées ne les méconnaissaient pas.

- C'est dans la décision QPC du 15 octobre 2021 que le Conseil a, pour la première fois, identifié un principe entrant dans cette catégorie. Il a ainsi considéré que l'interdiction de déléguer à des personnes privées des compétences de police administrative générale inhérentes à l'exercice de la force publique nécessaire à la garantie des droits, fondée sur l'article 12 de la Déclaration des droits de l'homme et du citoyen de 1789, constituait un principe inhérent à l'identité constitutionnelle française.

Par cette même décision, il a explicité le critère matériel d'identification jusqu'alors sous-jacent: est qualifié d'inhérent à l'identité constitutionnelle de la France le principe *"ne trouvant pas de protection équivalente dans le droit de l'Union européenne"*. Il s'en déduit que l'équivalence de protection est à rechercher dans le droit primaire de l'Union européenne (traités et actes assimilés, Charte des droits fondamentaux) et dans les principes généraux du droit de l'Union tels que dégagés et interprétés par la jurisprudence de la CJUE.

Le Conseil constitutionnel a, dans cette même décision, écarté la qualification de règle ou principe inhérent à l'identité constitutionnelle de la France pour le droit à la sûreté, le principe de responsabilité personnelle et le principe d'égalité devant les charges publiques.

La doctrine s'accorde par ailleurs à rattacher à cette catégorie juridique le principe de laïcité et la forme républicaine de gouvernement, de même que le droit d'asile énoncé au quatrième alinéa du préambule de la Constitution mais notre Conseil n'a pas encore eu formellement à en connaître.

Je vous remercie

THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION

Plenary Debate

Elena-Simina Tănăsescu, Judge,
Constitutional Court of Romania

The Constitution and its identity

The concept of constitutional identity is one of those vague concepts that make law a science and an art at the same time, an indeterminate concept that refers to meta-legal aspects rather than strictly normative ones.

Thus, in the US, where it was born, the concept of constitutional identity refers to historical, political, cultural aspects, to everything that "surrounds" the text of a Constitution. For instance, for Lawrence Tribe the concept of *constitutional identity* remains eminently subjective and cannot be deduced objectively[1]. According to him, the only reality with which a lawyer can operate with is the *identity of the Constitution*, which can be determined by means of interpretation and application of the rules it contains, whereas the constitutional identity of a community of people cannot be inferred from the norms and rules of behaviour that the respective community bestows upon itself because such norms and rules can either be codifications of past practices, or they may seek to prescribe new patterns of human behaviour. However, it is difficult to distinguish between conservative and innovative legal approaches, and therefore difficult to specify what the constitutional identity of that community would be. Moreover, both approaches are likely to relativise the concept of constitutional identity, especially when confronted with social practice. Hence, even when a constitution wishes to be militant[2] and attempts to defend constitutionalist achievements against backsliding, while at the same time proposing to change the social order in which it manifests itself, the "lack of docility"[3] of collective experiences makes the relationship between the norms that would legally prescribe a constitutional identity and the concrete way in which social life unfolds more of an approximation than a simple conformity of reality to norms. Conversely,

[1] L.Tribe, *American Constitutional Law*, Foundation Press, New York, 2000, Third Edition, Volume One, p.70 et seq. et p.110. Also see Laurence Tribe, "A Constitution We are Amending: In Defense of a Restrained Judicial Role", *Harvard Law Review* 1983 vol.97, p.433.

[2] K.Loewenstein, "Militant Democracy and Fundamental Rights, I", *American Political Science Review* 1937 (3) vol.31, pp. 417-432.

[3] G.J.Jacobsohn, "The Formation of Constitutional Identities", Tom Ginsburg, Rosalind Dixon (ed.), *Comparative Constitutional Law*, Edward Elgar, Cheltenham (UK), Northampton (USA), 2014, p.131.

when a constitution aims to maintain the *status quo* and not to produce changes in collective behaviour, it is the evolution of society that leads to changes in attitudes and practices, which may no longer be correlated with constitutional norms. Such a situation would highlight the possible lack of adaptation of the fundamental law to the concrete reality, without revealing the constitutional identity of the respective human community.

Quite differently, Gary Jacobsohn deems that the constitutional text is usually a critical component of constitutional identity but "not coterminous with it"[4]. For him, constitutional identity seems to be relevant for understanding some of the meta-legal characteristics that encircle the constitutional phenomenon itself (constitutional norms). Blending a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past[5], constitutional identity deals rather with the legal culture[6] within which a constitution operates. It is "changeable but resistant to its own destruction, and it may manifest itself differently in different settings"[7].

In any event, the concept of constitutional identity is based on the sociological and anthropological notion of identity, which refers to what one perceives as being his/her own individuality, a self-expressed self-conception. Therefore, a collective identity refers to traditions and values, including legal ones, considered to embody the essence of the respective group of people or rather to the underlying and/or foundational elements of those traditions and values. A collective identity is not static, it may be dynamic and construed or even imagined[8]. A homogeneous group of people is not a necessary pre-condition of national or constitutional identity, but their social cohesion based on common values may be able to generate one. Thus, in legal terms, constitutional identity refers to the core content of the legal aspects highly considered by a community of people. Or, in the words of the Supreme Court of India, "the Constitution is a precious heritage; therefore, you cannot destroy its identity"[9].

[4] G.J.Jacobsohn, *Constitutional Identity*, Harvard University Press, Cambridge, Massachusetts, 2010, p.78

[5] G.J.Jacobsohn, "Constitutional Identity", *The Review of Politics* 2006(3), vol.68, p.361-397.

[6] See L.M.Friedman, *The Legal System: a Social Science Perspective*, Russel Sage Foundation, New York, 1975 or D.Nelken (ed.), *Comparing Legal Cultures*, Dartmouth Publishing Company, Brookfield, 1997.

[7] G.J.Jacobsohn, *Constitutional Identity*, Harvard University Press, Cambridge, Massachusetts, 2010, p.7

[8] A. Schnettger, "Article 4(2) as a Vehicle for National Constitutional Identity in the Shared European Legal System", C.Calliess and G. van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, CUP, 2020, p. 9.

[9] Supreme Court of India [1980] in Minerva Mills Ltd. v. Union of India (Writ Petition n°356/1977)

The EU and constitutional identity

It is interesting to note that with this last understanding the concept of constitutional identity has reached the European continent. Indeed, in various European states the concept of constitutional identity is either juxtaposed to that of the identity of the Constitution[10] or it connects the characteristics of the fundamental law with other types of identities specific to a community of people, such as national, ethnic, linguistic, religious, ideological, institutional etc.[11] The first approach highlights social cohesion through common core values that function as a *genus proximum*. The latter emphasises particularities and differences, the *differentia specifica* of each individual Constitution; it allows comparison, but also makes cosmopolitanism more difficult and, paradoxically, calls into question the universal vocation of modern constitutionalism as it finds its source and resources of dynamism in endogenous specificities. "In other words, an inquiry into identity goes beyond describing constitutional content, by focusing on how such content is animated by its context in a fundamental way."[12]

In the specific case of the European Union, the Declaration on Western European Union appended to the Treaty of Maastricht mentioned "a genuine European security and defence identity", while article F of the Treaty referred to "the national identities of its Member States" that have to be respected by the Union. However, the concept of national identity of Member States was discussed mainly by scholarship and went rather unnoticed at the level of EU institutions until 2009, when it has been explicitly and extensively articulated in Article 4 paragraph 2[13] of the Lisbon Treaty.

I will not go here into the analysis of the differences between the concepts of national identity and constitutional identity[14], nor into the history of their

[10] Dieter Grimm, "Comments on the German Constitutional Court's Decision on the Lisbon Treaty – Defending Sovereign Statehood against Transforming the European Union into a State", *European Constitutional Law Review* 2009(5), p.353-373.

[11] Michel Rosenfeld, "Constitutional Identity", Michel Rosenfeld &, Andras Sajo, (ed.) *The Oxford Handbook of Comparative Law*, OUP, 2012, p.765.

[12] G. van der Schyff, "Constitutional Identity of the EU Legal Order: Delineating its Roles and Contours", *Ancilla Iuris* 2021, p.3.

[13] Which states: "2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government."

[14] S. Martin, "L'identité de l'Etat dans l'Union européenne: entre "identité nationale" et "identité constitutionnelle"", *Revue française de droit constitutionnel* 2012(3) vol.91 pp. 13-44 ; A. Levade, "Identité nationale ou constitutionnelle ?", (dir.) M. Fatin-Rouge Stéfanini, A. Levade, V. Michel et R. Mehdi, *L'identité à la croisée des Etats et de l'Europe. Quels sens ? Quelles fonctions ?*, Bruxelles, Bruylant, 2015, pp. 187-206.

codification in the EU treaties. And I will not even mention the various uses[15] and possible misuses[16] of those concepts in the institutional practise of various states and in the case-law of different jurisdictions. Legal scholarship is profuse with in-depth scrutiny of these practices, as it is abundant with theoretical approaches of all related concepts. The reports prepared for the FIDE Congress of 2023 confirm this in great detail and with admirable accuracy[17].

It is sufficient to take note that, at least over the past 20 years, constitutional identity has become an essential element of the constitutional reasoning, both at national and supranational level. The European Court of Justice (ECJ) has famously used the concept of EU constitutional identity[18] in its judgments of February 2022[19] pertaining to the rule of law conditionality[20] attached to funds provided from the EU budget and it set off a new debate across Europe: is there such a thing as EU constitutional identity and what can possibly be its relation with MS national identities?

For my part, I believe that if we agree that EU treaties are constitutional in function, we also have to agree that they are able to possess a functional constitutional identity and they are capable of expressing basic core and foundational values of the European people(s), while at the same time protecting the common traditions of the member states of the EU. Thus, the relationship between EU and national constitutional identities may be construed as inclusive and harmonious. True to the integrative function of the European Union as a supranational organisation,

[15] Among many other see C.Calliess and G. van der Schyff (eds), Constitutional Identity in a Europe of Multilevel Constitutionalism, Cambridge, CUP, 2020 ; F.-X. Millet, *L'Union européenne et l'identité constitutionnelle des Etats membres*, Paris, LGDJ, 2013 ; L. Burgorgue-Larsen (dir.), *L'identité constitutionnelle saisie par les juges en Europe*, Paris, Pedone, 2011.

[16] Among many other see Julian Scholtes, "Abusing Constitutional Identity", *German Law Journal* 2021 vol.22, pp. 534 – 556; T.Drinoczi, "Constitutional Identity in Europe : The Identity of the Constitution. A Regional Approach", *German Law Journal* 2020 vol.21, pp.105-130 ; M. Claes and J.H. Reestman, "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case", *German Law Journal* 2015 vol.16, pp. 917-970

[17] See A.Kornezov (ed.), *Mutual Trust, Mutual Recognition and the Rule of Law*, The XXX FIDE Congress in Sofia, vol.1, Ciela Norma, Sofia, 2023.

[18] ECJ, C-156/21 paragraph 127 : "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties." And also, paragraph 232: "In that regard, it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States."

[19] See ECJ, judgments of 16 February 2022 in Cases C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council*

[20] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

the EU constitutional identity considers the people of the EU in the first place and deals with Member States as instruments of that European people. The specifics of the European integration, with all its complexity and challenges, rely on the fact that EU law takes precedence over national law, but also on the fact that EU values are not supreme or imposed on Member States from outside or above, but they are an integral part of the national/constitutional identity of those Member States – otherwise EU integration, which has those very values as core element, could never have happened in the first place.

Formal and substantive constitutional identity

However, implicit in this type of reasoning is the fact that the concept of constitutional identity has a substantive and not only a formal content, and that the core content of the legal aspects highly considered by a community of people may safeguard that community from dangers stemming both from inside and outside.

In fact, the "basic structure" doctrine specific to countries such as India[21] or the "eternity clauses"[22] doctrine developed on the basis of article 79(3) of the German Basic Law go beyond and improve the theory – generally attributed to Carl Schmitt[23] – of a merely formal conception of constitutional identity.

According to this last theory, the content of constitutional identity is determined by the basic decision made by the constituent power (*pouvoir constituant originaire*) with regard to the form and structure of the political entity and embodied in a specific Constitution. This foundational decision is considered not to be subject to constitutional amendment. In other words, the function of constitutional identity is to protect the *pouvoir constituant originaire* by placing limits on the powers of the *pouvoir constituant dérivé*. Nevertheless, those limits may be circumvented if that specific Constitution is supressed by a new *pouvoir constituant originaire* that enacts another Constitution with a different constitutional identity, i.e. a different decision with regard to the form and structure of the respective political entity. In other words, the limits placed by the concept of constitutional identity on the *pouvoir constituant dérivé* are merely procedural, *i.e.* a revision of the Constitution can only be performed through a pre-determined and demanding procedure. Nevertheless, this says nothing about the content of that constitutional identity,

[21] Supreme Court of India [1973], *Kesavananda Bharati Sripadagalvaru v. State of Kerala* (Writ Petition n°135/1970)

[22] U.Preuss, "The Implications of "Eternity Clauses": The German Experience", *Israel Law Review* 2011(3) vol. 44 , pp. 429 – 448.

[23] C.Schmitt, *Théorie de la Constitution*, Paris, PUF, 1993, pp.213-233.

which represents the main limitation of this theory and a potential danger for the core values embedded in a Constitution as they may not be subject to amendments, but they may be affected by total revisions.

The main tenets of the "basic structure" and/or the "eternity clauses" doctrine(s) pose that, if formal constitutional amendments challenge the fundamental core of a Constitution, they are considered *ultra vires* and thus unconstitutional. In considering that there is also a substantive conception of constitutional identity, and not only a formal one, these doctrines make possible the effective legal protection of the core tenets of collective identity from dangers stemming from within the state.

This brings along another difficulty, namely what is the binding normative substance of that constitutional identity, particularly if the Constitution contains no explicit provisions in that respect. One may argue that constitutional identity is at stake when a constitutional amendment would be able to prevent the Constitution from being the kind of Constitution it was previously, but who and how can ascertain this remains a challenge for any legal order. In an ideal world, this type of question falls within the jurisdiction of constitutional courts, particularly of those who have an explicit mandate to interpret the Constitution, and it becomes a relatively easier task if the fundamental law at stake provides for eternity clauses. In practise, there is a wide variety of institutional arrangements.

In the European context this substantive doctrine, aiming to operate with constitutional identity as a safeguard against challenges from inside the state, has been used also with regard to challenges from outside, namely in order to protect the (national) constitutional identity of Member States from European integration. With this additional (endogenous) function ascribed to constitutional identity comes also a twist in its meaning, which no longer refers to the core content or foundational values of the collective identity of the respective group of people. Indeed, this innovative exploitation of the concept of constitutional identity emphasizes rather the distinctiveness of a Constitution when compared to its peers; in extreme cases, it may lead to "contemporary parochialism"[24]. In this approach, the relationship between EU and national constitutional identities may be interpreted as frictional and even antagonistic.

[24] G.J.Jacobsohn, "The Exploitation of Constitutional Identity", Kriszta Kovács (ed.), *The Jurisprudence of Particularism. National Identity Claims in Central Europe*, Hart Publishing 2023, p.56.

Who can define the constitutional identity?

All the above leads us to another question, which has been put forward rather rarely: who defines/ascertains the constitutional identity, be it of member states or of the EU?

I will not pretend to solve this issue here and now, particularly not in the limited amount of time available. However, as usually, comparative law is useful to better understand one's own national legal system. And comparative law shows that there is often a real competition between different actors who can contribute to the definition of this concept.[25] Thus, there are several cases in comparative law, all of which have their respective merits.

If we think of the referendum through which Great Britain parted with the EU, and if we remember that this decision was taken in order to better protect what has always been perceived as the core/specific insularity of Great Britain, it becomes clear that we have witnessed a divorce by referendum, thus a definition of constitutional identity by the people directly. Ireland too seems to be a place where popular sovereignty may prevail over legal limits for constitutional amendment powers as it celebrates people's unfettered right of constitutional amendment through the constitutional referendum process, which is the only explanation for such cultural shifts as the abolition of the ban on abortion and the constitutionalisation of the same-sex marriages.

In some cases, it is the text of the Constitution that provides for eternity clauses and this allows constitutional courts to interpret those provisions. Such is the case of the Czech Republic, Germany, Italy or Romania to name just a few examples in alphabetical order. But we have to remember that Constitutions are drawn up by constituent powers and those are composed of the political representatives of the people, that is to say, politicians. Thus, politicians can establish eternity clauses in which they may focus on core elements of a Constitution, such as fundamental rights or substantive checks on popular democratic excess. Only afterwards, it is the task of (constitutional) courts to infer the content of constitutional identity through the interpretation of decisions made by politicians. A strong constitutional court may efficiently constrain politicians acting as *pouvoir constituant dérivé* only in as far as the *pouvoir constituant originaire* allows it to do so.

[25] The following analysis is based especially on the country studies presented in C.Calliess and G. van der Schyff (eds.), *Constitutional Identity in a Europe of Multilevel Constitutionalism*, Cambridge, CUP, 2020.

And there are also examples of weak apex or constitutional courts faced with strong parliaments (e.g. Denmark, the Netherlands), where constitutional identity draws rather on tradition and history than on case-law. In such cases, the role of politicians or even of civil servants cannot be neglected.

These few examples seem to suggest that constitutional courts are not necessarily the only or uncontested authorities when it comes to the definition of constitutional identity. Also, the absence of eternity clauses in a Constitution does not preclude the emergence of a constitutional identity just as constitutional identity may not be limited only to those specific constitutional provisions where they exist in the text of the fundamental law. Once again, the doctrine of the "basic structure" of the Constitution developed by the Supreme Court of India in the absence of an eternity clause in the fundamental law may be usefully reminded, just as the case law of various European constitutional courts putting forward the distinctiveness of their judicial systems or social conceptions with regard to family or adoption despite the fact that those elements are missing from the eternity clauses of their respective Constitutions may be equally relevant.

Against this general background, I would like to elaborate a bit on the Romanian example. Also, I would like to compare the situation in Romania to the Italian one in order to highlight what they have in common but also what sets them apart.

Romanian constitutional identity

Romania joined the European Union on the 1st of January 2007. A constitutional revision, accomplished already in 2003, prepared the EU accession and granted constitutional standing to the principle of primacy of EU law in article 148.[26] The post-accession conditionality imposed through the Cooperation and Verification Mechanism established by the Decision 2006/928/EC of 13

[26] Article 148 [*Integration into the European Union*] provides: "(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union. (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented. (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval."

December 2006 was meant to assess the progress made by the new member state in the areas of judicial reform and fight against corruption based on a set of specific benchmarks.

The Romanian Constitutional Court (RCC) has discovered the concept of constitutional identity[27] only upon Romania's accession to the EU and it located in the eternity clause enshrined in article 152 of the Constitution[28]. It may be relevant for this discussion that the eternity clause existed in the Constitution since its adoption, in 1991, and it has not been altered during the 2003 revision. On that occasion, the RCC[29] noticed that sovereignty is not covered by the eternity clauses of the Romanian Constitution, unlike the independence of the state, "*although the independence is an intrinsic dimension of national sovereignty irrespective of the fact that it is self-consecrated in the text of the fundamental law*". EU accession being a decision taken by the Romanian state in full independence and "*not imposed on Romania by an external entity*" the constitutional revision consisting in the addition of article 148 to the text of the fundamental law "*does not infringe the limits of the revision of the Constitution*".

Although mentioned in few sparse decisions, the concept of constitutional identity has never been clearly articulated in the case law of the Romanian Constitutional Court[30]. Thus, in decision 964/2012 the RCC declared that the legal status of MPs belong to the constitutional identity. In other decisions (683/2012 and 64/2015) the Court stated that EU law takes precedence on Romanian law as long as "*it does not infringe upon the national constitutional identity*". And in decisions 887/2015 and 104/2018 the RCC ruled that "*Romania cannot adopt a normative act contrary to the obligations it undertook as member state of the EU*", but "*all these have a constitutional limit expressed in what the Court has defined as <<national constitutional identity>>*".

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[27] Legal scholarship has attempted to identify other basic elements in the Romanian Constitution, such as pluralism, which grant the fundamental law an integrative function. See E.S.Tanasescu, "Despre identitatea constituțională și rolul integrator al Constituției", *Curierul Judiciar* 2017(5), pp.243-247.

[28] Article 152 [*Limits of revision*] provides: "(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime."

[29] RCC, decision 148/2003.

[30] For a critical view of the lack of active role of the RCC in defining constitutional identity see M. Guțan, "Este Curtea Constituțională a României un port-drapel al identității constituționale naționale ? [Is the Romanian Constitutional Court a Flagship of National Constitutional Identity?]", *Revista română de drept european* 2022 (1), pp.28-45.

In this context it is worth mentioning that, when in doubt with regard to the meaning and impact of the word "spouse" in the case of same-sex couples for the free circulation of persons, the RCC sent a preliminary question to the European Court of Justice (ECJ). Upon receipt of the ECJ judgment[31], it declared constitutional the article of the Romanian Civil Code, which forbids the recognition of same-sex marriages, but interpreted it as not precluding the free circulation of persons within EU, without mentioning the concept of constitutional identity[32].

However, in a case dealing with the fight against corruption and involving judicial organisation, specifically a special prosecutorial section meant for the investigation of crimes committed only by magistrates, the RCC seized the opportunity to elaborate on the concept of constitutional identity. In a nutshell and leaving many other aspects aside, in decision 390/2021 a majority of judges of the RCC stated that the primacy of EU law applies only to ordinary national legislation and not to the Romanian Constitution because it cannot be conceived as "*suppressing or ignoring the national constitutional identity, as provided by article 11(3) corroborated with article 152 of the fundamental law and which must not be relativized in the EU integration process*". For the first time the RCC further explained that "*by virtue of this constitutional identity the Constitutional Court is empowered to guarantee the supremacy of the fundamental law on the territory of Romania (see* mutatis mutandis *the judgement of the German Constitutional Court of 30 June 2009,2 BvE 2/08)*". It also proclaimed that national courts do not have the power to examine the compliance with EU law of national provisions deemed constitutional by the Court in the light of article 148 of the Romanian Constitution. Two judges signed a separate opinion stating that the aforementioned conclusions contradict not only binding EU law and the established case law of the European Court of Justice, but also article 148 of the Romanian Constitution, which provides for the systematic and compulsory primacy of EU law over national law.

The answer of the European Court of Justice has been clearly articulated in its judgment *RS* (C-430/21) of 22 February 2022. In short and letting go a lot of the substance of this landmark ruling, the ECJ reiterated that ordinary courts cannot be prevented from assessing the compatibility with EU law of national legislation which a constitutional court has found consistent with a national constitutional provision providing for the primacy of EU law. More importantly for the topic here discussed, the ECJ stated that, although it is true that article 4(2) TEU does

[31] ECJ, Case C-673/16, *Relu Adrian Coman and Others*, Judgment of the Court (Grand Chamber) of 5 June 2018.

[32] RCC, decision 534/2018.

protect the national identity of Member States, "*that provision has neither the object nor the effect of authorising a constitutional court of a Member State […] to disapply a rule of EU law, on the ground that that rule undermines the national identity of the Member State concerned as defined by the national constitutional court*" (paragraph 70). And it invited the RCC, when in doubt, to resort to the mechanism of the preliminary ruling because a *"constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Article 267 TFEU, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court*" (paragraph 72).

The situation described above may not seem different from the one existing in other member states of the EU and it has often been described as a "judicial dialogue"[33] between national and supranational jurisdictions. But then again, if a comparison can be drawn between the situation in Romania and elsewhere it is probably the Italian case that can be used as referential. And this is because the situation in Italy and in Romania resemble and differ a lot at the same time.

Thus, the "Taricco saga"[34] presents an Italian Constitutional Court rather delicate in its approach (dare I say confrontation?) with the ECJ, acknowledging the primacy of EU law and underlining the common values on which the EU integration is grounded. Decision 390/2021 of the RCC, an *accident de parcours* as it may well be, displays a different approach of the RCC towards the supranational organisation and its jurisdiction. Unlike its Romanian counterpart, the Italian Constitutional Court has presented arguments in favour of the European integration and it has repeatedly addressed preliminary questions to the ECJ in order to clarify an issue that had the potential to become a disruption for the European integration but ended up as a fruitful exercise in judicial dialogue. The RCC not only did not refer the matter to the ECJ, but explicitly and emphatically refused to do so.[35]

[33] A number of articles and books have dealt with the topic of judicial dialogue, among which see A. Nollkaemper, "Conversations Among Courts: Domestic and International Adjudicators", C.Romano, K.Alter and Y.Shany (eds.), *The Oxford Handbook of International Adjudication*, Oxford, 2013; T.Tridimas, *The ECJ and the National Courts: Dialogue, Cooperation, and Instability*, Oxford, 2015; E. Ferrer Mac-Gregor, "What Do We Mean When We Talk About Judicial Dialogue?: Reflections Of A Judge Of The Inter-American Court Of Human Rights", *Harvard Human Rights Journal* 2017, vol. 30, pp.89-127.

[34] G.Piccirilli, "The 'Taricco Saga': the Italian Constitutional Court continues its European journey Italian Constitutional Court", *European Constitutional Law Review* 2018(14) p.814 et seq.

[35] The RCC asserted that "it remains at the discretion of the Constitutional Court to apply the judgments of the Court of Justice of the European Union in the context of constitutionality review or to ask itself preliminary questions in order to determine the content of the European rule" (decision 104/2018 paragraph 83).

Who can define the Romanian constitutional identity?

Coming back to the issue of the actor best placed to define the constitutional identity of a Member State of the EU it is interesting to note that in Romania we have witnessed a sharp discrepancy between the position adopted by the RCC and the one unanimously expressed by political authorities. Just like it happened in Italy all along the "Taricco saga", in Romania as well MPs and the Government[36] made known their attachment to the European project and stressed the importance of the principle of the primacy of EU law[37]. Especially after the press release posted on the website of the Constitutional Court in December 2021 without any signature[38], and which expressed an even more EU hostile position than decision 390/2021[39], Romanian political authorities hastened to position themselves in favour of European integration and to claim the European identity of Romania. For a moment, it seemed that the constitutional identity defined by political actors is different from the constitutional identity defined by the constitutional jurisdiction. Whose version should prevail?

It is thought-provoking how chameleonic the concept of constitutional identity can be. If the RCC were to use the eternity clauses in the Romanian fundamental law in order to protect its constitutional identity against a constitutional amendment intended by political actors it would have merely performed its constitutional duty. Indeed, were those political actors to oppose or disapply such a type of ruling of a constitutional court, they would be liable for disregard to the rule of law.

Yet, since the RCC interpreted the eternity clauses in the Romanian fundamental law in order to safeguard the constitutional identity against European integration, it overstepped its powers because EU accession represents a fundamental decision made by political actors not just since the country has formally joined the EU (on the 1st of January 2007), but since the revision of the Constitution in 2003, as the RCC itself had acknowledged in decision 148/2003. Indeed, upon validating article 148 into the Romanian Constitution, which "*has not been imposed on Romania by an external entity*"[40], the RCC has accepted that the constitutional identity of Romania is reunited with EU core values, i.e. with the constitutional identity of the EU. Therefore, the RCC can no longer manoeuvre with constitutional identity in order to limit the primacy of EU law or, indeed, in order to oppose a structural

[36] https://www.g4media.ro/premierul-nicolae-ciuca-despre-disputa-ccr-cjue-privind-supermatia-dreptului-european-asupra-legislatiei-nationale-prevalenta-dreptului-uniunii-europene-e-inscrisa-in-constitutia-romaniei-ccr-a-dat.html

[37] https://spotmedia.ro/stiri/opinii-si-analize/cum-ne-scoate-ccr-din-ue-miza-ratata

[38] https://www.ccr.ro/comunicat-de-presa-23-decembrie-2021/

[39] https://www.ft.com/content/8974c833-e57c-4aba-849f-9000bf31888f

[40] RCC, decision 148/2003.

and fundamental decision already taken by political actors. Such a manipulation of constitutional identity would only emphasize the parochial distinctiveness of the collective identity and not its core foundational values.

And so, it is stimulating to ponder the impact of the relationship between the constitutional identity of the EU and the constitutional identity of Member States, which becomes functional only if the concept of *constitutional identity* employed in both cases refers to the common core values that shape the legal aspects highly considered by a community of people and not the constitutional peculiarities that singularise or particularise a specific group.

Conclusion

To conclude, it seems to me that the concept of constitutional identity is interesting not only for the vagueness surrounding its content, but also for the margin of appreciation that exists at state level with regard to the authority that can define its content. Although this is not the topic of my presentation, I think I have to pause and reflect: the same may be true of the EU constitutional identity as well.

THE RULE OF LAW AND THE ENLARGEMENT OF THE EUROPEAN UNION

Plenary Debate

Alexander Arabadjiev, *Judge, President of Chamber, Court of Justice of the EU*

Marsida Xhaferllari*, Judge at the Constitutional Court of the Republic of Albania*

Darko Kostadinovski*, Judge at the Constitutional Court of the Republic of North Macedonia*

Alexander Arabadjiev:

Both the Republic of Albania and the Republic of North Macedonia have been given the status of 'candidate States' to the European Union.

Article 49 TFEU provides that 'any European State which respects the values referred to in Article 2 and is committed to promoting them' may apply to be a member of the Union. This provision governs the accession of candidate States to the European Union. The requirement that a candidate State should respect 'the values referred to in Article 2' was introduced by the Treaty of Lisbon and refers to the "values of…respect for human dignity freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

As follows from the subject of this discussion, we shall confine ourselves to the essential conditions for accession, as set out in Article 49 TFEU.

As is often pointed out, the rule of law is at the centre of the EU's values. Respect for the rule of law is rightfully considered to be, in many ways, a prerequisite for the protection of all other fundamental rights and values listed in Article 2 TEU and for upholding all rights and obligations emanating from the EU legal order.

Article 49 TEU also states that 'the conditions of eligibility for accession agreed upon by the European Council shall be taken into account', which is considered to be a clear reference to the (so called) Copenhagen criteria. According to the first of those criteria, membership of the Union requires that any candidate State has

achieved stability within its institutions, guaranteeing democracy, the rule of law, human rights and respect for the protection of minorities.

The CJEU has – in its rich case-law, which has been much cited and discussed during these last three days, here at the XXX FIDE Congress – underlined in a number of its judgements that 'compliance with the values referred to in Article 2 TEU constitutes a precondition for the accession to the EU of any European State applying to become an EU member'.[1]

Countries applying to accede to the Union are to take the necessary measures to satisfy the conditions for accession in good time[2].

In this regard, the concept of the rule of law under the EU regime needs first to be defined. As a matter of fact, this is precisely the subject of Question I, discussed – extensively and profoundly – in the framework of the first Topic at the Congress.

In this respect, it should be noted that the EU legislator, in Article 2 of Regulation 2020/2092, the Conditionality Regulation[3] – has given its interpretation of the normative elements that are in any event included in the concept of the rule of

[1] Judgment of 21 December 2021, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034 , para 161.

[2] Here, it is worthwhile mentioning that unlike the other candidate States at the time, Bulgaria and Romania had not made sufficient progress in relation to the accession criteria in order to be able to accede to the EU in 2004. Consequently, the European Council noted these shortcomings and proposed January 2007 as the date for their accession.

As regards these two Member States, pursuant to Articles 37 and 38 of the Act of Accession, a mechanism was set up before their accession to continue monitoring certain deficiencies with regard to respect for the rule of law, requiring the Commission to regularly report on the situation. In that respect, the Commission adopted two decisions. The first of which was Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption and establishing a mechanism for cooperation and verification of progress (' the cooperation and verification mechanism established by Decision 2006/928 or the 'CVM'). Likewise, the Commission adopted Decision 2006/929/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crimeto establish specific benchmarks in the areas of judicial reform and the fight against corruption and organized crime. On the legal nature and effects of the CVM mechanism see C- 83/19, C-127-19, C-195/19, C-29119, C – 355/19 and C – 397/19, *Associatia "Forumul Judecatorilor Din Romania and Others*, paras 153- 177.

The CVM was conceived as a transitional measure to provide appropriate monitoring at EU level and to assist Romania and Bulgaria, which still had to make progress in the aforementioned sectors when joining the Union in order to remedy the shortcomings identified.

In October 2019 and November 2022, respectively, the Commission considered that the progress made by Bulgaria and Romania under the CVM was sufficient to meet their commitments made at the time of accession and terminated the monitoring and reporting under the CVM mechanism. Currently, the monitoring of the two countries continues within the framework of the rule of law mechanism, as for all Member States.

[3] 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.

law, pursuant to Article 2 TEU. As indicated in the Institutional Report for the first Topic, the Court of Justice has expressly ruled that the concept of the rule of law, defined in Article 2(a) of the Conditionality Regulation is not intended to provide an exhaustive definition, but merely sets out a non-exhaustive list of principles[4] – which are as follows:

- The principle of legality implying a transparent, accountable, democratic and pluralistic law-making process;
- Legal certainty;
- Prohibition of arbitrariness of the executive powers;
- Effective judicial protection, including access to justice by independent and impartial courts, also as regards fundamental rights;
- Separation of powers; and
- Non-discrimination and equality before the law.

I'll not elaborate on the different elements, but would rather suggest that we discuss whether the pre-accession process in Albania and North Macedonia addresses sufficiently robustly rule of law reform and takes as a point of reference some of those elements, namely the separation of powers and access to justice by independent and impartial courts.

One more observation – if I may – in this regard, which concerns the factors to be taken into account when assessing whether the rule of law is truly embedded in a candidate State. Some of these factors are not of a 'legal – institutional' character, but may concern social orientations and societal transformations needed for the rule of law to take root. I'm conscious of the impact of the prospects of accession on the societal orientations and transformations, but prefer not to address that aspect today.

That being so, I'll limit myself to emphasising that in this respect, the accession negotiations should not consist simply of ticking of boxes on the issue of the harmonisation of legislation. What is of greater importance is the quality of legislation that is adopted in the process of transposing the EU *acquis* into national law. *The quality and enforceability of this legislation i.e. its implementation and compliance are also to be taken into account.*

[4] Judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C- 156/21, paras 222-230. In point 227 of that judgment the Court explicitly underlines that Article 2(a) of the Regulation is not intended to provide an exhaustive definition of that concept but merely sets out, for the purposes of that regulation, a number of the principles that it covers.

So it is of crucial importance to determine and apply the key benchmarks against which progress will be judged. (Because even after 'ticking', some boxes may remain empty.)

Against that background, I turn first to Judge *Marsida Xhaferllari*, would you kindly present the state of play regarding the compliance of Albania with the values enshrined in Article 2 TEU, in particular with the principle of the rule of law and the elements that have been identified as a 'starting point' namely the separation of powers and access to an independent and impartial judge?

***Marsida Xhaferllari*:**

Dear colleagues and friends,

As outlined by the EU legislator, the rule of law is a multidimensional principle, which includes the law-making process, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, the separation of powers and the principle of non-discrimination.

The integration process of Albania within the EU has been a long-lasting dream for every Albanian citizen. When the communist regime collapsed in 1990, the loudest shout in the massive protests was "*We want Albania as a European country*". After more than 30 years, it's still a dream, which at times seems closer and other times seems to be an illusion.

Albania applied for EU membership in April 2009 and was granted EU candidate country status in June 2014. The EU held its first intergovernmental conference with Albania in July 2022. In its latest conclusions, which were adopted in December 2022, the Council welcomed Albania's progress on the rule of law, specifically by implementing a comprehensive justice reform and by strengthening the fight against corruption and organised crime. At the same time, the Council also emphasised that Albania needs to intensify its efforts to establish a solid track record on high-level corruption. On fundamental rights, the Council called for Albania to make tangible progress on freedom of expression and to consolidate property rights in a transparent manner.

In 2016 Albania embarked on far-reaching justice system reforms, which led to amendments to the constitution and the enactment of a number of essential statutes relating to, amongst other things, setting up a fully-fledged system of

vetting judges and prosecutors, establishing new institutions governing the judiciary, creating a special prosecution service and courts for the fight against corruption and organised crime, and substantially reforming existing institutions, including the Supreme Court, Constitutional Court and General Prosecutor's Office. The EU was a key partner in developing the relevant strategy and providing financial support and expertise.

By Decision no. 2 of 18 January 2017, the Constitutional Court decided to reject the grounds raised in the petition made by the opposition party's MPs, concluding that the Vetting Act complied with the constitution. It noted that the Vetting Act did not breach the principles of the separation of powers and legal certainty, while the restriction on fundamental human rights was justified by the public interest, in order to reduce the level of corruption and to restore public trust in the justice system, which in turn was connected to interests of national security, public order and the protection of rights and freedoms of others.

A former judge at the Albanian Constitutional Court, dismissed from her post in 2018 following the vetting process, and banned for life from re-entering justice system applied to the ECtHR claiming a breach of Articles 6 and 8 of the Convention.

Alexander Arabadjiev:

One – really last – observation from my part concerns information provided by Marsida about the judgements of the ECtHR in which various elements of the rule of law have been addressed and the rule of law has been highlighted as a foundational principle in cases related to the right to a fair trial (including the concept of an independent and impartial tribunal established by law); the principle of legal certainty; the preclusion of any interference by the legislature in the administration of justice; protection of arbitrariness on the part of the executive power. What is more, the violations of human rights in the caselaw of the ECtHR referred to, requalified as a clear indicator of actual social and developments in this country.

Marsida Xhaferllari:

The European Commission, representing the European Union, intervened as a third party in the process and submitted that the comprehensive justice reform adopted by Albania in 2016, aimed at restoring public trust and confidence in the justice system. The aim of the vetting process was to fight widespread

corruption, unprofessionalism and links with organised crime amongst judges and prosecutors, re-establish an independent and impartial judicial system and restore public trust in it. The involvement of the international community was considered crucial for the credibility of the process, which had been anchored in the constitution. Whereas it noted that the vetting process could create significant tension within a country's judiciary, the European Commission considered that its temporary nature was justified.

The Court held there was no violation of Article 6 § 1 of the Convention, noting that the bodies set up to vet serving judges and prosecutors to combat corruption objectively were independent and impartial tribunals, established by law. It considered that there was no violation of the principle of legal certainty, noting that it is not *per se* arbitrary, that the burden of proof had shifted to the applicant in the vetting proceedings. Likewise, there was no violation of Article 8 of the Convention, because the reform of the justice system had responded to a "pressing social need" and the applicant's dismissal had been proportionate. The lifetime ban imposed on the applicant and other individuals removed from office on grounds of serious ethical violations was not inconsistent with or disproportionate to the integrity of judicial office and public trust in the justice system. That was especially so within the national context of ongoing consolidation of the rule of law (*see Xhoxhaj v. Albania, no. 15227/19, 9 February 2021*).

It's worth mentioning that the relevant decision of ECtHR makes several references to the case-law of the Court of Justice of the European Union (the "CJEU"), specifically to the cases *Commission* v *Poland* (Independence of the Supreme Court, C-619/18) and *Commission* v *Poland* (Independence of ordinary courts, C-192/18), *A. K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court, C-585/18, C-624/18 and C-625/18)

Alexander Arabadjiev:

Darko, would you be so kind as to present the state of play regarding the compliance of North Macedonia with the values referred to in Article 2 TEU, in particular with regard to the rule of law?

Darko Kostadinovski:

Dear colleagues, dear friends, I'm delighted to take part in this panel called "The Rule of Law and EU Enlargement". Destiny wanted me to participate in both processes: in the process of EU accession of my country Macedonia, as well in

the efforts to build the rule of law in a different capacity. In those parallel but equally complementary and mutually dependent processes, I also witnessed one huge paradox. It's a phenomenon which continues to be a big challenge for my country. Let me tell you more.

The prolonged waiting in front of the doors of NATO and the EU for my country led to apathy, abuse by the political elites, a significant decline in progress in the political culture, and a resulting decline in the constitutional, legal culture, with the rule of law being the victim. The consequences in terms of building the rule of law have been devastating, as evidenced by the lack of public trust in the judicial system, which today is at 4%. This is precisely the phenomenon I pointed out at the beginning. If the essence of the EU integration process is the rule of law that drives that process, how is it possible for that same process to undergo such devastation, so that we are now once again in a phase of reaching the level we have already had and achieved? For me, this is the paradox of prolonged waiting, prolonged blockades, and the phenomenon of progression of hope. When hope for a better life, for membership of the EU, reaches its maximum without being realised, we are faced with the paradox of progression of disappointment and apathy. This is my personal evaluation.

In the past 4.5 years, my engagement has been reversed. So, for 18 years as a chief diplomatic advisor to the Presidents of North Macedonia, I contributed to the goal that was supposed to result in a stable order in which the law prevails, and in recent years, as a constitutional judge, I have been dealing with the consequences of that goal, building a rule of law again, which should facilitate and accelerate our integration into the EU. And I have already said that the consequences and challenges are serious

Alexander Arabadjiev:

What is the current situation in the context of judicial reform?

Could you describe further the role, which the Constitutional Courts of your respective countries play in upholding the rule of law? And how does the presence or absence of an individual constitutional complaint mechanism in your legal systems affect this matter?

Marsida Xhaferllari:

The implementation of the reform of the justice sector was quite a complex challenge. It resulted, *inter alia,* in the inability of the Constitutional Court and the Supreme Court to fulfil their respective mandates over a period of two years (2018–2020) due to the absence of a quorum. Only one member was in each court, due to resignations, retirements, and a vetting process that removed some of the sitting judges. The comprehensive transitional vetting of all judges and prosecutors continues to advance at a steady pace. The process is overseen by an International Monitoring Operation, deployed under the aegis of the European Commission. Overall, around 64% of the vetting dossiers processed so far have resulted in dismissal or termination due to resignations by those assessed or the fact that they have reached retirement age.

Today all the justice institutions are fully operational, but some challenges are still present as regards the rule of law and human rights. An effective (independent, high quality and efficient) judicial system and an effective fight against corruption are of paramount importance, as is respect for fundamental rights in law and in practice.

From this perspective, the length of proceedings, the low clearance rate and the high number of unresolved cases continue to affect the efficiency of the judicial system. The High Court has the highest backlog with over 35 822 cases, of which 27 843 are older than two years (77%). Appeal courts are hampered by the high number of judicial vacancies, with only 30 out of 78 appeal judges in office.

Currently, there are a number of citizens complaining that the unreasonable length of proceedings is an infringement of the fundamental right of due process, as guaranteed by Article 42 of the Albanian Constitution and Article 6 of European Convention of Human Rights. The ECtHR has accepted an application against Albania, and in the relevant judgement it emphasised "While not disregarding the understandable delay stemming from the far-reaching justice system reforms and the vetting process, the Court notes that States have a general obligation to organise their legal systems so as to ensure compliance with the requirements of Article 6 § 1, including that of a fair hearing within a reasonable time" and "the full burden of any delays caused by justice sector reforms should not be shifted to individual litigants" (see *Bara and Kola v. Albania*, nos. 43391/18 and 17766/19, §§ 70–71, 12 October 2021).

Following the same reasoning, the Constitutional Court has accepted a number of individual complaints, and at the same time is calling for the attention of legislator to undertake the necessary steps to address the situation overall.

Darko Kostadinovski:

Now, let me state what the key challenges are today:

Since the entry into force of our Constitution in 1991, until today, without any doubt, the Constitutional Court remains the most unreformed institution in our constitutional order, in terms of the legal framework that regulates it. The legal framework consists of the constitution and the Act of the Court. In such circumstances, the dilemma that arises is why and for whom is such a status quo of the constitutional judiciary in our country needed? This raises the question of whether the Constitutional Court has fulfilled the expectations of the past 32 years, specifically whose expectations have been fulfilled? And when the rule of law is faced with a challenge, without a doubt, the Constitutional Court, is the first to be called upon to stabilise the legal order. It is the first on that pyramid, which is called the rule of law. It should move the process forward. Regardless of the challenges it faces, it must restore the legal and constitutional culture that will restore the political culture, and put politics, which has been damaging and bullying the legal culture for years, into a legal framework.

The second task of the Constitutional Court is to remedy the situation of continuous violations of the fundamental constitutional value of the separation of powers. It has been objectively assessed that one of the branches of state power, the executive, has been characterised by disproportionate excessive power, usurpation, and influence on all other branches of state power throughout the entire period. Such a situation inevitably leads to continuous challenges and violations of the rule of law. The principle of "checks and balances" is displaced. All these findings have had manifestations and have a negative impact on social reality. The relationship between the rule of law and the fundamental value of the separation of powers is essentially causal, interdependent, and conditioned. The separation of powers into legislative, executive, and judicial, with clearly defined powers and responsibilities for their demarcation, but also for mutual control in accordance with the principle of "checks and balances," is a precondition for the rule of law, and vice versa, the rule of law is the fundamental value that ensures the limitation, the separation of powers. In this context, the Constitutional Court has two challenges: to fight for its own independence and autonomy, to guarantee and ensure the independence of the judicial system, without which the construction of the legal state in which the rule of law will prevail is unthinkable.

A special challenge for the rule of law and for the Constitutional Court is the introduction of constitutional appeal. For those who are not familiar with it, the Macedonian Constitution provides extremely limited direct constitutional

protection of human rights and freedoms, protecting only the freedoms and rights related to freedom of belief, conscience, thought, and public expression of thought, political association and action, and prohibition of discrimination against citizens on the grounds of gender, race, religion, national, social, and political affiliation. My question is why the introduction of this instrument, for example, is not a precondition for continuing Macedonia's Euro-integration process? If the rule of law is the cornerstone of EU integration, the introduction of this instrument would undoubtedly make a strong contribution to the rule of law. With direct constitutional judicial protection of all freedoms and rights guaranteed by the Constitution, with a constitutional judicial sanction of all acts of public authority (legislative, executive, judicial), such protection will undoubtedly provide unity in the constitutional legal order. Yet, the state will gain another effective authoritative filter before citizens' complaints end up at the European Court of Human Rights in Strasbourg. With such a constitutional instrument, another extremely important goal will be achieved – compliance with European standards for the protection of human freedoms and rights and compliance with the practice of the ECHR, because the decisions of the Constitutional Court will have to respect the practice and standards developed by Strasbourg.

Alexander Arabadjiev:

Could you point out any remaining challenges or points on which progress remains to be made regarding the compliance of your respective countries with the values referred to in Article 2 TEU, and in particular with the principle of the rule of law?

Marsida Xhaferllari:

The high backlog in the courts combined with other factors, such as the newly appointed judges and the considerable amount of newly approved legislation establish another risk – the pressing need for courts' decisions to be coherent, as a prerequisite of legal certainty. As the ECtHR has noted, it is of vital importance that domestic courts should be the ultimate guarantor of the rule of law.[5]

On the other hand, social-political developments, even in the light of recent events such as the COVID-19 pandemic and the war on European shores, the cyber-attacks on personal data and their correct administration, have re-dimensioned the exercise of public power. They have created situations that generate extraordinary measures and situations, which interfere with fundamental rights and put pressure

[5] *Topallaj v. Albania, 21/04/2016; § 77*

on society, demanding prompt decisions from the Constitutional Court itself to solve these situations.

The extension of Constitutional Court's jurisdiction in terms of individual constitutional complaints for all fundamental rights should transform the whole approach. Individual constitutional complaints should enable the court to elaborate further elements of the rule of law, always with a view to protecting fundamental human rights and freedoms.

To conclude, I would say that the rule of law is in a state of constant evolution. Without any doubts, an effective rule of law reduces corruption, boosts the economy and fights poverty, as well as protecting citizens from injustices. It is the cornerstone of justice, providing opportunities that support social peace, good governance, as well as respect for fundamental rights.

So many challenges are laid before the Constitutional Court, bearing in mind the European perspective of our country in the framework of the integration process, as well as the need to harmonise the domestic legal order, especially the constitutional order, with European Union law. The role to be played by the Constitutional Court is crucial, in view of the constitutional approach on the limits of state sovereignty in relation to the protection of national constitutional identity. Without any doubt its jurisprudence will be decisive.

Thank you for your attention!

Darko Kostadinovski:

Given everything I have said, it is essential that the political culture reaches the level necessary to allow the legal culture to advance. That will certainly lead to what was called long ago, by Habermas, constitutional patriotism. This means that politicians must be aware of the need for the Constitutional Court to obtain the position assigned to it by the authors of the constitution, to ensure its independence and autonomy with regard to legislative action and with an awareness of the quality and integrity of the judges who are put forward and selected. This is yet another sub-phenomenon within the phenomenon. These are mutually conditional processes, they nourish each other, and can only move in a complementary, never exclusive, manner. This means that the political culture must advance the legal culture, and at the same time the legal culture must advance the political. Failure in either of these two requirements only leads to maintaining the status quo or to stagnation. The same applies to the relationship between EU integration and the rule of law.

And finally, to be self-critical about the role and characteristics of judges in this process. For a proper understanding of politics and its bearers, it is necessary to recall what Max Weber pointed out as the qualities that the politician should possess – passion, responsibility, and a measured approach. For a proper understanding of the rule of law, the following key characteristics must be possessed by judges – conscience, independence, and an unwillingness to compromise. A commitment to these qualities will undoubtedly advance the political culture, affect the advancement of the legal and constitutional culture, and all of this will inevitably move us towards the desired goal – the rule of law. Only in this way will citizens regain trust in politics, the rule of law, in institutions as guarantors, not manipulators of their freedoms and rights. Only in this way will the process of EU integration achieve its essence. The absence of loyalty to these qualities is not only a "mortal sin," as Weber considers for the politician, I consider it to be even more so for the judges, it will hold us in the vortex of uncertainty and insecurity.

No one says it will be easy or fast. But it has to start again! Constitutions have to be written on hearts, not just papers, as Margaret Thatcher said.

CLOSING ADDRESS BY VĚRA JOUROVÁ

Vice-president of the European Commission

Dear President Lenaerts, dear President Radev, dear participants, ladies and gentlemen,

It is an honour to participate in the 30th edition of the Congress of the International Federation of European Law, and to speak about the rule of law in Europe.

I know the members of FIDE attach great importance to this topic. I am pleased to see it so high on the agenda of this conference. This congress is a great occasion to discuss rule of law among such high-level participants from across Europe.

The unjustified and illegal Russian aggression against Ukraine has been a stark reminder of why, more than ever, it is so important to fight to protect the values upon which the European Union is built and which are common to all its Member States. They are a defining part of our identity.

The war of aggression in Ukraine is not just a violation of international rules. It is a deliberate attempt to trample upon those rules. It is a tragic reminder of the consequences that the absence of respect for the values of freedom, democracy, the rule of law and fundamental rights can have, including for the international community as a whole.

The people of Ukraine are fighting exactly for those values that are at the core of our European identity.

As we work together to help Ukraine in defending its sovereignty and integrity, we can only remain credible if we protect these same values with the same intensity within the European Union.

As you very well know, the rule of law is only one of the common values set out in Article 2 of the Treaty on European Union:

Respect for human dignity; freedom; democracy; equality; human rights; and the rule of law are the values every Member State has agreed to uphold when joining the European Union.

These values are, as President Lenaerts recently put it, the "moral compass that helps Europeans navigate unchartered waters".

Among these values, the rule of law has a special role – it guarantees the protection of all other fundamental values. In other words, it is "the guarantee of guarantees".

Mutual trust and justice policy

While Member States have different national identities, legal systems and traditions, the core meaning of the rule of law is and can only be the same across the EU. The rule of law is about basic, common, principles and standards.

It guarantees the effective application of Union law. And the treaties entrust this task of application of EU law not only to the Court of Justice, but also to the national courts of the 27 Member States.

In fact, national judges are judges of EU law when they apply EU law, thus playing an essential role in safeguarding EU law and the rights which individuals derive from it.

This collective work of national and European courts to enforce this law that we have in common has been beneficial for the current level of protection of fundamental rights in the EU – including social rights, as I know you have had the chance to discuss.

By ensuring the effective application of Union law, the rule of law is therefore essential to ensure mutual trust in Europe, which is the driving force for the proper functioning of the Union and also the very foundation of cross-border judicial cooperation in the Union, in both civil and criminal law.

Every day, judges in every Member State are faced with practical questions about mutual trust, for example when deciding on European Arrest Warrants or cross-border child-custody cases.

Economic policy

At this congress, you had the chance to discuss, among other topics, "the new geopolitical dimension of the EU competition and trade policies". Here, as well, the rule of law is of essential importance.

In guaranteeing the effective application of Union law, the rule of law also plays a crucial role for the effective functioning of our internal market and for a business- and investment-friendly environment.

Well-functioning and fully independent justice systems are key for investment protection, and therefore contribute to productivity and competitiveness.

Effective justice systems are also important for ensuring the effective cross-border enforcement of contracts, administrative decisions and dispute resolutions, essential for the functioning of the single market.

The regulatory environment in the EU should give investors certainty and stability – including when they invest in a Member State, they are not based in.

This is why improving the efficiency, quality and independence of national justice systems continues to feature among the priorities of the European Semester – the EU's annual cycle of economic policy coordination.

Promoting and upholding the Rule of law

In recent years we have witnessed situations in which the rule of law has been challenged, and that show that the respect for our fundamental values cannot be taken for granted.

And because challenges to the rule of law in one Member State affect the legal order and the functioning of the EU as a whole, the Commission is committed to developing a true rule of law policy in the EU. Over the past years, we have strengthened our instruments to address the rule of law challenges that have arisen.

On the one hand, we are invested in promoting the dialogue on the rule of law: The basis for this is our annual Rule of law report.

The report covers all 27 Member States on an equal footing and based on a transparent methodology. Its goal is to detect challenges at an early stage and prevent them from emerging or deteriorating. And also to exchange positive developments and good practices among Member States, generally improving the mutual knowledge of the respective systems in all Member States.

I am sure that you have also looked into its findings in the context of your discussion on the "Instruments and Mechanisms for Protecting the Rule of law in the Member States".

The 2022 report included for the first-time specific recommendations for each Member State, tailored to the specific circumstances in the Member States. These recommendations aim to support Member States in their efforts to take forward the necessary reforms. All Member States have areas where they can improve and learn from one another.

In the 2023 Report, which will be published in July, we will look into the follow-up that is being given to these recommendations.

While the Report provides for the Commission's independent assessment, and for a good basis for political dialogue and improvements, the Commission also has other instruments at its disposal where prevention is not enough.

The Commission can for example, as the guardian of the Treaties, launch infringement proceedings against a Member State.

As the Court of Justice of the EU has recalled, the fundamental values of Article 4(2) are not merely a statement of policy guidelines or intentions – they are an "integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States".

While it is true that the organisation of the justice system is a Member State competence, when exercising this competence Member States must comply with their obligations under the EU Treaties. And Member States can reform their systems only to reinforce rule of law and judicial independence, never to weaken them.

Upholding judicial independence is one of these obligations, as the Court of Justice has recalled multiple times in the past five years.

One of these tools is the conditionality regulation, which makes a link between respect for the rule of law and the protection of EU funds. It responds to longstanding demands to protect the EU budget against breaches of the rule of law and, as you are aware, the Commission has already resorted to this new instrument.

Rule of law in external context

Rule of law is also a guiding principle for the Union's international action. The EU is supporting third countries to carry out rule of law reforms ensuring the independence of the judiciary, full respect for fundamental rights, as well as an effective fight against corruption and organised crime.

The Union defends the same values with the same intensity both within and without its borders.

Respect for the rule of law is also becoming even more important for countries which want to join the European Union.

As I reach the end of my intervention, I would like to recall the essential role that your Congress, as well as the work led by the members of FIDE, play in creating a broad awareness and understanding of why the rule of law matters for our daily lives.

Promoting and upholding the rule of law is a key challenge of our time, which requires the commitment of all public institutions as well as society at large.

Together with EU institutions and Member States, courts, legal professionals, academics, as well as civil society organisations, have their role to play in this context.

I thank you for your engagement and for stimulating this debate, and I continue to count on your support.

EXTERNAL PUBLICATIONS

EU LAW LIVE – NEWS ALERTS

FIDE 2023 OPENING CEREMONY SPEECHES: MAIN TAKEAWAYS, 1 JUNE 2023[1]

On 1st June 2023, the 2023 FIDE Congress was officially inaugurated. This year the congress is structured around three topics: (i) Mutual trust, mutual recognition, and the rule of law; (ii) Geopolitical dimension of EU competition and trade law; and (iii) the European social union.

Following a reception hosted the previous evening at the National Museum of History, participants gathered for the opening ceremony, held at the National Palace of Culture. Welcome addresses were delivered by Alexander Arabadjiev, President of FIDE 2021-23 and President of the First Chamber of the Court of Justice ; Rumen Radev, President of the Republic of Bulgaria; Koen Lenaerts, President of the Court of Justice; and Marc van der Woude, President of the General Court. This was followed by two keynote speeches, delivered by Serhiy Holovaty, Chief Justice of the Constitutional Court of Ukraine; and Guy Verhofstadt, MEP and co-chair of the Conference on the Future of Europe.

Proceedings were opened by Judge Arabadjiev, who began by highlighting the long-standing tradition of FIDE congresses and their role in bringing together the leading legal minds in European Union law. He noted that this year's congress aims to address certain strategic developments in the Union's legal order and set out the main questions to be addressed in each of the three topics. The common thread in all of the above, he argued, was 'defining the constitutional, economic and social characteristics of the EU'. Finally, President Arabadjiev set out another of the Congress' main goals: namely, fostering closer relations with other EU law associations and stakeholders, including those from candidate countries.

His intervention was followed by that of President Radev, who highlighted the role of the Bulgarian Association for European Law in adapting Bulgarian positive law to that of the Union and in shaping the role of EU law in Bulgaria. He also called for the Union and its Member States to mobilize different instruments of EU law and politics in order to tackle social and economic inequality throughout

[1] EU Law Live, 1 June 2023, https://eulawlive.com/fide-2023-opening-ceremony-speeches-main-takeaways/

the Union.

President Lenaerts suggested that the 2023 FIDE Congress raises 'legal issues that are both novel and challenging', all of which go to the heart of the Union's legal order. His speech focused on the first topic addressed in the Congress: that of mutual trust, mutual recognition, and the rule of law. He reminded participants of some recent developments in the Court's case law – most notably, the Conditionality Judgments – and focused on three challenges which this topic raises. First, President Lenaerts honed in on the tension between mutual trust and mutual recognition, on the one hand, and the protection of fundamental rights, on the other. A particular emphasis was placed on the case law involving the Area of Freedom, Security and Justice (AFSJ), particularly in relation to the execution of European arrest warrants (EAW). He noted that, despite the delicate balancing exercise in the Court's case law, the threshold for suspending the execution of EAWs must remain high: anything else would compromise the effectiveness of both the EAW mechanism and of the AFSJ itself.

The second issue which President Lenaerts focused on was the key role played by the preliminary reference procedure in the EU's legal order. After focusing on some key judgments in this area, and on the important role played by national courts therein, he reiterated the centrality of judicial dialogue under Article 267 TFEU to the upholding of mutual trust between Member States and the Union. Finally, the President's speech highlighted that mutual trust also has a vertical dimension: in other words, it is essential that the EU itself inspires mutual trust and is seen to abide by the values set out in Article 2 TEU. It is this, he concluded, which distinguishes the European Union from other legal orders.

The final welcome address was provided by President Van der Woude, who focused on the General Court and on the second pillar of the EU's judicial architecture: direct actions under Article 263 TFEU. President Van der Woude noted that the Union's successive crises have both increased the Court's case law and transformed the nature of the cases before it. Indeed, the cases which the General Court has been faced with recently – involving, for example, staff matters, security cases, defence procurement or the Union's strategic autonomy in the context of foreign investment – would have been unthinkable a few years ago. He concluded by suggesting that, faced with such cases, the General Court has to strike a balance between ensuring the effective judicial review of EU legal acts and carefully respecting the limits of its competences.

Following the welcome addresses, the session moved on to the keynote speeches.

The first such speech was provided by President Holovaty, who traced Ukraine's historical links to Europe. After resoundingly denouncing Russia's illegal and unjustified invasion of Ukraine, and of highlighting some of the most recent atrocities carried out by Russia, he made the case for Ukraine's European future. Indeed, President Holovaty highlighted that, as well as winning the war, Ukraine and Europe must 'win the peace': such a peace, he concluded, will only be ensured by integrating Ukraine in the 'European community of nations.'

The morning session was concluded by Guy Verhofstadt, who set out the EU institutions' response to the Ukraine war, whilst arguing that the crisis had once again highlighted the limits of the Union's institutional architecture. Such an architecture, he noted, is based on the 'outdated notion' of national sovereignty. Mr. Verhofstadt concluded by calling for a profound institutional and constitutional reform: one which, among others, abolished unanimity to increase the Union's agility.

FIDE 2023 PLENARY PANEL DISCUSSION: DOES EUROPE HAVE AN IDENTITY?, 1 JUNE 2023[2]

Following the opening ceremony (covered here), FIDE 2023 held its plenary panel discussion, titled 'The Political, Economic and Social Physiognomy of the European Union'. The panel featured Takis Tridimas, Professor of European Law at King's College London; Gabriel Glöckler, Principal Legal Advisor at the European Central Bank; Daniel Gros, Director of the Centre for European Policy Studies; and Ulla Neergaard, Professor of EU Law at the University of Copenhagen. It was chaired by Alexander Kornezov, President of the Eight Chamber of the General Court of the European Union.

In essence, the panel addressed the existence (or otherwise), the manifestations and the implications of a 'European identity'. It was opened by Judge Kornezov, who highlighted the centrality of a European identity – a European demos – to the European project and queried whether such a 'civic identity' could be traced in the Union.

This question was first discussed, by reference to the Union's constitutional identity, by Professor Tridimas, who argued that the Union does have such a constitutional identity. In his intervention, Professor Tridimas traced a set of

[2] EU Law Live, 1 June 2023, https://eulawlive.com/fide-2023-plenary-panel-discussion-does-europe-have-an-identity/

common values and constitutional principles shared by all Western democracies, including those of the EU Member States. He also discussed some central aspects of said 'constitutional identity', such as the role of fundamental rights and of counter-majoritarianism; the notion of the rule of law, which was addressed in a comparative perspective, or the role and implications of supranationalism.

The panel then discussed the Union's economic identity. Mr. Gross traced the historical origins of this question. At its beginning, he argued, the EU lacked a defined economic model, and was instead underlaid by the tension between free-market tendencies and dirigiste ones. This tension has remained ever since. However, although the prominent role of 'negative integration' has led to a market economy, there is an undeniable social dimension to the Union. According to Mr. Gross, all Member States share the idea that some form of welfare state must be protected, although they differ as to how this is to be implemented in practice. These difficulties are compounded by the legal, political and economic difficulties which the Union faces when trying to step in in this area.

In discussing the role played by solidarity and cohesion in the Union's identity, the panel turned to the Union's economic governance. Mr. Glöckler traced some aspects of the Union's economic governance. A particular focus was placed on how the sovereign debt crisis was handled, and of the distrust to which it gave rise, both among creditor and among debtor states. It was argued that, although a risk of breakdown in solidarity was present during the Eurozone crisis, the Covid crisis showed a change in paradigm, exemplified by leading political figures in some Member States calling for solidarity through op-eds in other national newspapers. Two further interesting points were made. First, Mr. Glöckler called for a forum in which political issues – 'the beef and the bread and butter of politics' – could be discussed by European citizens. Second, he argued that the Eurozone does, to an extent, speak a common language: that of the Euro, which has decisively contributed to shaping a European common identity.

Finally, the panel turned to the European social model. Professor Neergaard acknowledged that the said model has traditionally taken a backseat in European integration, as was the obvious intention of the drafters of the Treaty. However, there was a clear evolution in how it was perceived by the Union. Indeed, she highlighted the horizontal role played by 'solidarity' in the laws and politics of the Union and its Member States, touching on areas as diverse as climate change, regional identity, or religion. Indeed, solidarity has become a central concept in the Court's case law, both in judgments concerning the European social union and beyond; as the Court has repeatedly manifested, it entails both rights and

obligations for the Union and the Member States. Professor Neergaard concluded by arguing that solidarity could play a central role in constructing a European identity, both in the European social union and beyond.

The panel was concluded by Judge Kornezov, who provided some reflections on the centrality of solidarity in the Union's legal order and on the importance of protecting it.

FIDE 2023: NORMATIVE FOUNDATIONS OF MUTUAL TRUST, THE RULE OF LAW, AND THE CONSTITUTIONAL IDENTITIES OF THE EU AND ITS MEMBER STATES, 1 JUNE 2023[3]

During the first day of panel discussions at the 2023 Fide Congress, the panel on Mutual trust, mutual recognition, and the rule of law discussed the normative foundations of mutual trust, the rule of law, and the constitutional identities of the EU and the Member States.

They began by presenting the results of the Young FIDE Seminar, which took place the previous day. The Young Rapporteur on the subject, Cecilia Rizcallah, described the three papers which had been presented during the seminar, noting how they touched on many of the issues raised by the panel and provided novel perspectives thereon.

The panel was structured around four substantive questions. The first such question concerned the definition of the rule of law . The General Rapporteur, Miguel Poiraes Maduro, argued that, across most Member States, the rule of law and democracy are 'inextricably linked' from a normative perspective, but are often conceptually different. He also addressed the role played, in this tension, by fundamental rights. This was followed by a presentation from the Institutional Rapporteurs –Clemens Ladenburger, Jonathan Tomkin and Yona Marinova– who made three main arguments. First, they argued that according to the Treaties, all the values contained in Article 2 TEU are placed on an equal footing. Second, they noted that the rule of law provides the strongest convergence among Member States, and that the Commission and the Council, when enforcing the rule of law, tend to focus on such 'core' aspects shared by the Member States (such as the right to an effective remedy). Finally, they argued that in their view, the rule of law and

[3] https://eulawlive.com/fide-2023-normative-foundations-of-mutual-trust-the-rule-of-law-and-the-constitutional-identities-of-the-eu-and-its-member-states/

democracy are inextricably linked.

The debate subsequently addressed the practical dimension of these arguments. The General Rapporteur, for example, argued that whilst this link between the rule of law and democracy existed conceptually, the national reports showcased a more mixed picture in practice. In response, it was noted by several participants that a detailed examination of different legal systems showed different understandings of what substantive rights the rule of law gives rise to.

The second question addressed by the panel concerned the role of fundamental rights in the Union's legal order. A particular emphasis was placed on the shift between the 'formative period' (in which concerns were voiced about whether the Union would respect Member States' standards and conceptions) and the contemporary one, which focuses on the extent to which the Union should play a role in protecting fundamental rights and the rule of law within the Member States. Reference was made to the Charter, both as an instrument which has led to EU legal acts being struck down and as one which has contributed to giving concrete meaning to the values set out in Article 2 TEU. The role played by the European Court of Human Rights (ECtHR) in such areas, and the extent to which a closer alignment between the ECtHR and the CJEU should be encouraged, were also debated.

The third topic discussed by the panel concerned the normative justifications behind the Union's involvement in the protection of fundamental rights in the Member States. Several such justifications were advanced, both by the rapporteurs and by participants. These included: the moral and political externalities derived from participating in a common legal space premised on certain foundational values; the external constitutional control of compliance with the said values; the degree of interdependence within the Union and the spillover effects which this gives rise to; and the fundamental role of mutual trust as a means through which to ensure compliance with fundamental rights.

Finally, the fourth discussion point concerned the justifications for the Union's legal enforcement of democracy in the Member States. In essence, two questions were raised. First, how long democratic backsliding can be tolerated within the Union's legal order; second, and insofar as such backsliding does not self-correct, the extent to which the Union must step in to enforce democracy. In discussing this, reference was made to the extent to which such measures fall within the scope of EU law; to the consequences this can have on the institutions, for example in relation to ensuring democratic European Parliament elections; and to the impact

which such enforcement can have on the role of the Court of Justice in the Union's institutional architecture.

FIDE 2023: EXPLOITATION OF POSTED WORKERS IN THE EUROPEAN SOCIAL UNION, 2 JUNE 2023[4]

During the second day of panel discussions at the 2023 FIDE Congress, the panel on the European Social Union debated the regulation of posted workers under European Union law. The session was chaired by Mr. Luca Visaggio, Director of the Legal Service at the European Parliament. The rapporteurs were Professors Sophie Robin-Olivier (General Rapporteur) and Sacha Garben (Institutional Rapporteur).

The moderator and rapporteurs began by outlining some of the central issues in this area. These include the perennial centre-periphery debate; the equally longstanding question of which standards to apply; and the role of fundamental rights in regulating this field. The Institutional Rapporteur also noted the 'multiple dimensions' which this debate spans: the left-right political axis; the EU-national dimension; the interaction between 'new' and 'old' Member States; and the question of whether it is for the judiciary or for the legislator to regulate this field.

The first substantive issue addressed by the panel was that of temporary agencies. This issue was returned to later in the session. In both instances, questions were raised about the impact which such agencies could have on the rights of posted workers; and about how said rights could be better enforced. Although the legal, factual and conceptual complexity of such scenarios was noted, participants agreed that this area required closer regulatory scrutiny.

The discussion then turned to what was labelled as the 'systemic exploitation' of posted workers in some Member States. Several points were raised. First, the panel called for the Union to step up the enforcement of such workers' rights, particularly where employers circumvent their legal obligation. Indeed, it was argued that the Union's legal framework had to engage with what was happening on the ground, which was often far removed from what the law assumed: on this issue, a particular emphasis was placed on the social security of such workers and on the proposed revision of the social security regulation. Second, some participants noted that the Union could potentially rely on economic arguments – for example, those related to fair competition and a

[4] https://eulawlive.com/fide-2023-exploitation-of-posted-workers-in-the-european-social-union/

level playing field – to push legislators towards attenuating the fraudulent situation which often surrounded posted workers. Finally, the role of the European Labour Authority in enforcing the rights of posted workers was discussed, as was the additional competences which the ELA would require in order to do so effectively.

This was followed by a debate on the Court's judgment in Rush Portuguesa (Case C-113/89). After noting the specific legal, political and factual context which gave rise to the Court's ruling, both the General and the Institutional Rapporteurs noted some of the problems which it had given rise to. Once again, a particular emphasis was placed on the enforcement of posted workers' rights, with participants highlighting some of the difficulties which this issue raised. Several arguments were provided for the Court to reconsider its judgment.

Questions raised by different participants allowed the panel to turn to other questions, including the role of private international law; the suitability of cohesion as a legal basis to regulate some wage-related aspects; the role of third-country nationals and of national immigration law; or the regulation of long-term posting. On the latter, the panel noted the improvements which the revised rules had given rise to.

Finally, the panel turned to certain constitutional issues. The rapporteurs pointed out that, in the Union's constitution, the free movement of companies is afforded greater protection than the fundamental rights of workers. According to the Institutional Rapporteur, both the Lisbon Treaty and the Charter of Fundamental Rights provide ample scope for the Court to reverse its case law on such questions. Similarly, she called for the Union to take greater account of the recommendations provided by the European Economic and Social Committee. Although the Court's role therein was acknowledged, there was widespread consensus about the role which the political process ought to play in regulating workers' rights. The debate concluded by addressing, among others, questions of delocalisation in the internal market.

FIDE 2023: BUILDING EUROPEAN CHAMPIONS THROUGH EU COMPETITION LAW, 2 JUNE 2023[5]

During the second day of panel discussions at the 2023 FIDE Congress, the panel on the new geopolitical dimension of EU competition and trade policy debated the role of competition law in the creation of European champions. The session was chaired by Mr. Savvas Papasavvas, Vice-President of the General Court of the EU. The rapporteurs were Mr. Jean-François Bellis (General Rapporteur) and Mr. Ben Smulders (Institutional Rapporteur).

The session was opened by the chair, who outlined some of the key legal, political and conceptual issues raised by this debate. This was followed by the Institutional Rapporteur, who discussed whether there was a legal basis for such European champions. According to Mr. Smulders, the Treaty could envisage the possibility of creating such champions through the legal basis set out in Article 107(3)(b) TFEU. However, this provision, which concerns 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State', sets very strict requirements. Overall, he concluded, the concept of 'European champions' was 'rather alien' to Union law.

Mr. Smulders' intervention was followed by that of Mr. Bellis, who noted that such question first arose in relation to regional and national champions and argued that there were some instances – for example, that of Airbus – in which such champions could be defensible. The rapporteurs then turned to specific crisis situations, such as Covid pandemic or the invasion of Ukraine, and queried whether such situations could provide a general interest justification for European champions to benefit from significant State aid.

The floor was subsequently opened to the audience. Participants debated issues such as the role of European solidarity in such cases or the proactive promotion of innovation by Member States. Once again, a particular focus was placed on the role of Article 107 TFEU in enabling such champions. Questions were also raised about the scope of the provision; about whether State aid could in fact greenlight European champions, or whether its nature was fundamentally national; and about the practical difficulties which this legal basis gave rise to.

Similarly, the need to ensure coherence between EU competition law and State aid law was discussed. On this question, some participants queried whether the Council should acquire a greater role in EU competition law to ensure this

[5] https://eulawlive.com/fide-2023-building-european-champions-through-eu-competition-law/

alignment; conversely, others pointed to the public interest exception contained in the EU Merger Regulation. Indeed, the role which State aid could (and should) play in this debate took up a large part of the panel's debate, as did the implications of the Siemens-Alstom merger proceedings.

The final rounds of questions from the floor raised four further issues. First, the role of cohesion, as set out in Article 174 TFEU, in understanding the desirability of European champions. Second, the implications of this debate for the digital and technological sectors, for example in relation to the European Chips Act. Third, a conceptual and practical debate as to what should comprise a 'European champion' and about how such champions would compete on the global stage: in relation to this, it was argued that a sector-specific analysis was required. Finally, the panel returned to the role which preemptive intervention should (or should not) play in justifying the greenlighting on such European champions.

FIDE 2023: PANEL CONCLUSIONS BY THE GENERAL RAPPORTEURS, 3 JUNE 2023[6]

The final day of the FIDE 2023 Congress kicked off with a presentation by the general rapporteurs of the main conclusions reached by each panel. The debate was chaired by Daniel Sarmiento, Professor of Administrative and EU Law at the Complutense University of Madrid.

The first rapporteur, Miguel Poiares Maduro, touched on the main issues raised in the panel on mutual trust and the rule of law. First, participants discussed the normative foundations of the rule of law, mutual trust, and the constitutional identity of the EU and Member States. In debating this, they focused on the spillovers to which EU law gives rise, which requires all Member States, and the Union itself, to uphold the role of law. On the Union's toolbox for the protection of the rule of law in the Member States, the rapporteur highlighted the need to understand the relationship between the different instruments, as well as the implications of their application in each specific context. The third debate focused on the need for the Union to uphold – and to be seen to uphold – Article 2 TEU: as the rapporteur noted, a particularly heated topic concerned the appointment of the members of the Court of Justice, as well as the Court's jurisdiction in addressing such questions.

[6] https://eulawlive.com/fide-2023-panel-conclusions-by-the-general-rapporteurs/

Finally, three hugely contested topics were debated by participants. On the one hand, the link between primacy and the rule of law, on which the rapporteur provided an overview of the different theories discussed by the panellists. On the other, the principle of mutual trust and its limits in the Area of Freedom, Security, and Justice (AFSJ), on which the rapporteur noted that, although the limits of the so-called 'two-step test' were repeatedly pointed out, no better approach to this delicate balancing act was found. Third, participants addressed the interaction between democracy, the rule of law, and fundamental rights.

The floor was then given to Jean-François Bellis and Isabelle van Damme, the rapporteurs on the competition and trade law topic. The first panel focused on the concept of 'strategic autonomy', a topic which the rapporteurs linked to the Union's response to global crises and to the trend of deglobalisation. Subsequently, the Union's industrial policy was discussed: as the rapporteurs noted, some historical parallels were pointed out by participants. On the role of Article 101 TFEU in sustainability agreements, the rapporteurs noted that there was no consensus on whether the Commission's guidelines went far enough in facilitating the green transition, nor on when such agreements would be incompatible with EU competition law. On the question of 'European champions', participants agreed that a relaxation of EU merger control rules should not be the way to create such champions, and that State aid would have to be relied on instead. On global supply chains, the focus lay on the tension between protecting labour and environmental standards and the burden which the proposed legislation would place on European undertakings. Similarly, the impact of such legislation on the Global South was addressed. The final panel focused on the FDI screening regulation.

Regarding the panel on the European Social Union, general rapporteur Sophie Robin-Olivier touched on some of the questions addressed throughout the FIDE Congress. First, she highlighted the complex definitional debates which the concept of a 'European Social Union' gives rise to. A focus was also placed on the gap between the rapid developments taking place within the ESU and the widespread perception that the Union does not adequately protect social rights. Other aspects debated by the panel included the need to 'socialise' the Economic and Monetary Union or the role of the European Pillar of Social Rights. Additionally, the posting of workers within the Union or the 'socialization' of trade agreements gave rise to lively legal, political, and normative discussions. Finally, the panel discussed the need to 'socialise' the rule of law, reading certain social rights into the Union's understanding thereof.

The panel was closed by Professor Sarmiento, who thanked the general rapporteurs, the institutional rapporteurs and the organisers for putting together this year's FIDE Congress.

FIDE 2023: PLENARY PANEL DISCUSSION ON THE CONSTITUTIONAL IDENTITY OF THE MEMBER STATES AND OF THE EUROPEAN UNION, 3 JUNE 2023[7]

Following the rapporteurs' presentations, a final panel discussion was held on the constitutional identity of the Member States and of the European Union. The panel was formed by Pavlina Panova, President of the Bulgarian Constitutional Court; Stephan Harbarth, President of the German Federal Constitutional Court; Véronique Malbec, Judge at the French Constitutional Council; and Elena-Simina Tănăsescu, Judge at the Romanian Constitutional Council. It was chaired by Koen Lenaerts, President of the Court of Justice of the European Union.

President Lenaerts began by addressing the interaction between Article 2 TEU, which sets out the Union's founding values; and Article 4(2) TEU, which constitutionalises the equality of the Member States while mandating the respect for their national constitutional identities. He then proceeded to argue that theories developed by national constitutional courts can never lead to unilateral national interpretations of EU law, nor can they result in national identity claims being opposed to the concept of primacy.

Subsequently, President Lenaerts focused on the importance of judicial dialogue as a cornerstone the Union's legal order, and on the risk which ultra vires claims based on unilateral interpretations of national constitutional identities pose to said legal order. In making this point, a particular emphasis was placed on the pan-European debates on EU law which said judicial dialogue enables: as President Lenaerts highlighted, preliminary references issued by national courts lead to debates such involving the Member States, the Union's institutions and, as the final interpreter of EU law, the Court of Justice itself. He concluded by noting that the judicial dialogue between the Court of Justice and national constitutional courts is 'extremely constructive'.

The floor was subsequently given to President Panova, who highlighted that Article 4(2) TEU provides a bridge between the different national legal systems which make up the Union's legal order, on the one hand; and European Union law,

[7] https://eulawlive.com/39661-2/

on the other. She also defended the prerogative of the Court of Justice to provide definitive interpretations of EU law, including of Article 4(2) TEU. According to this provision, the legal systems of the Member States and that of the Union must be understood not in isolation, but in cooperation with one another. To illustrate this, President Panova relied on an analogy: if the CJEU and national constitutional courts are the 'peaks' of their respective legal systems, 'the point is not which one will prevail over the other in terms of height', but rather 'whether they look in the same direction.' Some of the defining features of the national constitutional identity of Bulgaria were subsequently illustrated by President Panova, who highlighted how said features align with Article 2 TEU and therefore fit in within the complex jigsaw puzzle that is the Union's legal order.

Her intervention was followed by that of President Harbarth, who noted that 'few issues' have occupied German constitutional doctrine and scholarship as much as the integration between the German and EU legal orders. As the President illustrated, a key role is played by Article 23(1) of the Basic Law, which contains a commitment to recognize and enforce Union law but which subjects this commitment to certain criteria aimed at protecting Germany's own constitutional identity. The mechanism of identity review, he continued, prevents the Union from implementing measures which would trespass the balance set out in Article 23, and therefore constitutes but a specific manifestation of Article 4(2) TEU. His focus then shifted to the 'inviolable core' of national constitutional identities, a core which is beyond European integration and which Union law cannot trespass. Nor can this core cannot be defined by the Union, President Harbarth concluded: instead, it can only be addressed by the respective national constitutional courts. After highlighting the 'different theoretical approaches' between the German and EU legal systems when responding to these issues, President Harbarth concluded by noting that he was 'optimistic' about the future judicial dialogue between their respective courts.

Judge Malbec, of the French Constitutional Council, emphasized the Council's commitment to the principle of primacy and to judicial dialogue. She highlighted the role played by Articles 53 and 88(1) of the Constitution in governing the interaction between the legal orders of France and of the Union, and touched on some of the specific difficulties which her Court faced in responding to the many issues raised by the previous speakers. In particular, Judge Malbec focused on two such issues: the role played by the ordinary courts in addressing such conflicts; and how the Council addressed the possible conflicts between the French legal order and that of the Union. These debates were illustrated by reference to several

recent cases which the Council had been faced with. Judge Malbec concluded by highlighting what the Constitutional Council understood France's national constitutional identity to entail.

Finally, Judge Tănăsescu, of the Romanian Constitutional Council, took the floor. In her speech, she provided her perspective on the questions discussed by the previous speakers. A particular focus was once again placed on the notion of 'constitutional identity'. According to Judge Tănăsescu, the existence of such an identity is an inherent feature of the Treaties. Her address also highlighted the 'harmonious relationship' between the national legal systems and that of the Union: in this sense, the Article 2 TEU values are not 'imposed' on the Member States, but instead form part of their very constitutional orders as a result of the multipolar interaction between the different legal systems. Judge Tănăsescu provided a theoretical overview of different ways in which the 'national constitutional identity' of a polity can be understood; in focusing on how Romanian constitutional doctrine understood this provision, she argued that the notion of 'eternity clause' played a central role therein. She concluded that, while the concept of constitutional identity provides fertile ground for legal and normative debate, it also allows a community to understand the elements which brought it together.

The floor was then opened to the audience, which gave rise to a debate about how different Member States identify the specific elements which form part their constitution's inviolable 'core'. The panel was concluded by President Lenaerts, who summarized – and responded to – the main points raised by the speakers, highlighting the convergence between the Union's constituent legal systems and showcasing his optimism about the future of judicial dialogue in the European Union's 'common legal space'.

ADAPTING TO A CHANGING LANDSCAPE: REFLECTIONS ON THE FUTURE OF STATE AID AT THE XXX FIDE CONGRESS IN SOFIA, EUROPEAN STATE AID LAW QUARTERLY (ESTAL)[8]

Daniela Gschwindt & Julia Zöchling[9]

I. Introduction

The 30th Congress of the International Federation for European Law (FIDE) took place in Sofia, Bulgaria, from 31 May to 3 June 2023. The FIDE Congresses are considered the most important and prestigious conferences on EU law, dealing with issues of competition and institutional law. This year's congress had the following three main themes: (i) mutual trust, mutual recognition and the rule of law, (ii) the new geopolitical dimension of the EU competition and trade policies, on which this report focuses, and (iii) European Social Union.

In recent years, crisis-related State aid measures, vulnerabilities and supply shortages, as well as calls for a more digital and greener Europe have redefined EU competition policy, including State aid policy. In addition to increasing case law, State aid policy has been further refined through renewed guidelines and block exemption rules.[10] As mentioned in one of the opening speeches of the President of the General Court of the EU, Marc van der Woude, crises are directly reflected in the work of the courts, which is also true for the COVID-pandemic that led to numerous State aid cases before the European courts. As a result, there is a paradigm shift where old concepts are replaced by new ones or need to be changed and adapted.

There was a consensus throughout the conference that State aid control is of great importance in building a resilient Europe, both by providing support when the situation requires it and by preserving competition in the internal market. Accordingly, the official FIDE Report on the Topic II stated that State aid control in the future must focus on ensuring that measures comply with the European Green Deal and the various guidelines,[11] the revised General Block Exemption

[8] Published in European State Aid Law Quarterly (EStAL), vol. 22, iss. 2, pp. 225 – 229.

[9] Daniela Gschwindt, LL.B. LL.M. and Mag. Julia Zöchling are both doctoral candidates and research assistants at the Department of European, International and Comparative Law at the University of Vienna

[10] Cf A Kornezov (ed.), *The New Geopolitical Dimension of the EU Competition and Trade Policies* (FIDE Report Vol II, 2023, Sofia) 63.

[11] For an overview see European Commission, 'A European Green Deal' < https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en> accessed 27 June 2023.

Regulation[12] (GBER) and the rules for Important Projects of Common European Interest[13] (IPCEI) that are part of it.[14] Additionally, instruments such as the COVID-19 Temporary Framework[15] and the Ukraine-related Temporary Crisis Framework[16] were important testing grounds for flexibility.

The panels on State aid discussed forthcoming and pending legislation, whether and how modern trade and competition policy is reflected at MS level, and what challenges are perceived in its implementation. The first panel discussed the design of the EU's search for strategic autonomy and the blurring of lines between internal market industrial and trade policies and laws. The second panel dealt with EU merger control, State aid and the regulation of foreign subsidies, from the invisible hand to overt industrial policy. The final panel on State aid (panel 4 on topic II), in turn, covered the building of European champions through competition law.

II. Session 1: The design of the European Union's search for strategic autonomy: blurring the lines between its internal market, competition, industrial and trade policies and laws

The first session of Topic II dealt with the EU's strategic autonomy in the areas of the internal market, competition, industrial and trade policy and law. It was chaired by Prof. Laurence Gormley. After opening the panel, Prof. Gormley handed over to Ben Smulders, Deputy Director-General of DG COMP and institutional rapporteur for Topic II of the FIDE congress.

Smulders stressed that it is important to keep in mind that open strategic autonomy is another name for the concept of sovereignty. The EU has various instruments at its disposal to further the goal of open strategic autonomy, e.g.

[12] Commission Regulation of 23 June 2023 amending Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty, C(2023) 4278 final.

[13] Art 107(3)(b) TFEU; see also Communication from the Commission Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest [2021] C528/10.

[14] A Kornezov (ed.), *The New Geopolitical Dimension of the EU Competition and Trade Policies* (FIDE Report Vol II, 2023, Sofia) 2 et seq.

[15] Communication from the Commission Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak [2020] OJ CI91/1.

[16] Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2023] OJ C101/3.

the Foreign Subsidies Regulation[17] (FSR) and the Carbon Border Adjustment Mechanism[18] (CEBAM). As regards State aid more specifically, Smulders referred to the Temporary and Transitional State aid Frameworks[19], which have a strategic aspect that is new in State aid law. Moreover, the promotion of the digital and green transitions are another way to boost strategic autonomy. Smulders stated that the concept of strategic autonomy can now be found throughout all policies, including State aid, and that the EU's different policies merge into one.

A big part of the discussion subsequently revolved around the Green Deal Industrial Plan, the EU's response to the US-American Inflation Reduction Act[20] (IRA). Smulders particularly stressed the importance of the second pillar of the Green Deal Industrial Plan[21], which allows for the relaxing of State aid rules in specific sectors. Aside from these specific tools, in Smulders' opinion, a true EU Capital Markets Union could unlock the investments necessary for achieving the goals set out in the Green Deal Industrial Plan. Smulders concluded that in the end, the most important means to achieve open strategic autonomy will be the internal market and competition policies.

Isabelle Van Damme, partner at the Van Bael & Bellis law firm, visiting professor at the College of Europe and general rapporteur for Topic II, took over from Smulders. She observed, firstly, that the EU becomes more assertive and resilient in strategic sectors. Secondly, she noted that more and more power is given to the Commission, e.g. in FDI screening. Thirdly, there is some depart from the liberalisation (in the sense of free trade) paradigm. Lastly, she noted some tensions in the concept of open strategic autonomy, in particular between the notion's internal and external dimensions. Such a tension can be seen with regard to ensuring a global level playing field. On the one hand, the EU wishes to extend its jurisdiction and enforce international agreements abroad. In this context, Van Damme observed that the enforcement of rules in FTAs that mirror the EU's State aid provisions could be a new development in State aid policy. On the other hand,

[17] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] OJ L330/1.

[18] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism [2023] OJ L130/52.

[19] Cf Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia [2023] OJ C101/3.

[20] For an in-depth analysis of the IRA from a State aid law perspective, see P Staviczky, 'The European Answer to the Inflation Reduction Act: Has Unleashing State Aid Control Any Potential to Enhance the European Competitiveness' (2023) 22/1 EStAL 78.

[21] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: A Green Deal Industrial Plan for the Net-Zero Age, COM(2023) 62 final.

the EU wants to protect itself against and responds to external threats, e.g. via the Green Deal Industrial Plan. She also suggested that open strategic autonomy could be another name for industrial policy in a global world.

During the discussion part of the session, one participant proposed that the IRA might be blown out of proportion and used as a pretext e.g. for the EU's relaxing of State aid rules. Smulders clarified that in his view, the Green Deal Industrial Plan is not just a reaction to the IRA, but that the EU would have come up with a similar plan even if the IRA did not exist. The IRA therefore worked only as a catalysator for ongoing developments at the EU level.

III. Session 2: From 'invisible hand' to overt industrial policy: EU merger control, State aid, and regulating foreign subsidies

Session 2 of Topic II, dealing with industrial policy considerations in EU merger control, State aid and foreign subsidy regulation, was chaired by Kate McKenna, Partner at Matheson LLP, Dublin.

A large part of the discussion revolved around the FSR. Smulders set the scene by referring to the history and legal bases of the FSR, which can be found in the trade (Art 207 TFEU) and internal market (Art 114 TFEU) chapters of the TFEU. The 2020 white paper by the Commission led to a 2021 legislative proposal and finally, to the adoption of the FSR in 2022. Since 12 October 2022, the notification obligations regarding concentrations[22] and foreign financial contributions[23] are in force. Now, there is an implementing Regulation planned regarding these obligations. Smulders reported that business reacted negatively to the administrative burden imposed by the notification obligation and the proposed implementing act. He clarified that all financial contributions need to be notified, not only subsidies, and that the notification is of utmost importance since it is the main source the Commission will have to base its decisions on, given that third countries will not report themselves which companies they subsidised. However, he stressed that under the FSR provisions that confer implementing and delegated powers on the Commission, the latter is required to limit the administrative burden for notifying parties and balance the different interests at stake. Smulders concluded that applying the FSR will be a trial and error exercise for the Commission.

[22] Art 21 FSR.
[23] Art 29 FSR.

Van Damme noted that the national reports for the FIDE Congress were overwhelmingly positive towards the FSR, with some limitations. Two of these limitations concern the Commission's powerful role in enforcing the FSR, as well as uncertainty regarding the relationship between State aid law and the FSR.

Jean-François Bellis, founding partner of Van Bael & Bellis, visiting professor at ULB and general rapporteur for Topic II alongside Van Damme, was last up in the panel. He pointed out that before the FSR was adopted, alternatives were discussed, e.g. narrowing down the scope of State aid law, an idea that was of course abandoned, not least because of the required Treaty change. He was of the view that the FSR is useful especially in bidding wars, and he pointed out the three pillars of the Regulation, the last one being investigation. Bellis sees a problem in particular in establishing a link between foreign subsidies and the level of prices and/or the market situation in the EU.

Smulders remarked that at this point, it is unclear how the Commission will exercise its *ex officio* powers under the FSR. As regards the relationship between State aid and the FSR, he stressed that WTO law prescribes a parallelism between the two instruments. Smulders also noted that the FSR is inspired by trade remedies.

The audience had many questions on the subject, e.g. on the articulation between the FSR and public procurement, or the new market definition notice. To a question on State aid in the military sector as a way to promote the EU industrial policy, Smulders pointed to the fact that State aid law does not apply in this sector[24], except if the goods are of dual (i.e. both military and non-military) use.

Bellis emphasised that the role of State aid law as a tool to promote industrial policy is limited, since the Commission's power is essentially negative and prohibitive. While it has the power to approve State aid, it is still for the MS to grant it in the first place. He wondered whether that could be a competitive disadvantage compared to the US or China which grant State aid without any constraints. He nonetheless pointed to the fact that the new State aid instruments and documents are a way to implement industrial policy. Smulders agreed and noted that the approval of State aid is subject to conditions, and that the design of these conditions can also shape industrial policy.

A question from the audience dealt with Next Generation EU, and whether the EU and its MS have come to the realisation that MS' pockets are not equally deep and therefore, they need to come together and spend money in a solidary way, i.e. centrally at the EU level. The panel seemed to agree with this view.

[24] See Art 346 para 1 lit b TFEU.

With a view to the challenges ahead and topics to be discussed at the next FIDE congress, the panel held that in the upcoming years, economists will examine the effectiveness of State aid law (as applied under the new frameworks) and other instruments such as the FSR in light of their objectives. Until such an analysis has been carried out, questions about the enforcement and effectiveness of the EU's tools will remain open. In this context, it will also be interesting to reflect on the results of the economic analysis of State aid spent during Covid, since it seems that there is a possible correlation between high State aid spending and a decline in GDP.

IV. Session 4: Building European champions through competition law

The fourth session of Topic II, chaired by the Vice-President of the General Court of the EU, Savvas Papasavvas, dealt with the existence, or the lack thereof, of European champions through competition law. The main question discussed was whether industrial policy considerations should take precedence over the traditional technical considerations of competition law in order to create European champions capable of competing with powerful non-European companies in international markets. Following the announcement of the new subsidy programme in the US, which is part of the IRA, and the continuous emergence of new markets, this debate is more relevant than ever in Europe.

For the institutional and general rapporteurs, it was clear that the most appropriate instrument to achieve European championship was the State aid rules under Arts. 107 and 108 TFEU. Art. 107(3)(b) TFEU plays an important role in this context, providing that aid to promote IPCEI or to remedy a serious disturbance in the economy of a MS may be considered compatible with the internal market. The aid granted must such that countries would not achieve the same results without the aid. There must also be spillover effects so that the aid benefits all MS involved in an IPCEI. On a similar note, in its conclusions of 9 February 2023, the European Council called for simpler, faster and more predictable State aid procedures, as well as targeted and temporary support in sectors that are strategic for the green transition and affected by foreign subsidies or high energy prices. It also aims to strengthen the competitiveness of SMEs through EU instruments such as IPCEI.[25]

The legal basis of Art. 107(3)(b) TFEU can prevent investments and production facilities needed to build strong European market players from being relocated outside the EU. An important question raised during the discussion in the fourth

[25] European Council, 'Conclusions of 9 February 2023' <https://data.consilium.europa.eu/doc/document/ST-1-2023-INIT/en/pdf≥ accessed 20 June 2023, pt 15.

session was whether such aid would actually have a European dimension or only build national or regional champions. The institutional rapporteur was convinced that the European character would be preserved, as the legal basis refers to a Community interest and requires spillover effects for the whole EU, i.e. the results and investments should be disseminated throughout the EU. This element of solidarity can be derived from the way in which the terms of Art. 107(3)(b) TFEU are interpreted beyond funding by the States.

As previous measures have shown, State aid rules are the most important to build European champions and cushion negative market impacts. A recent example is the already-mentioned Temporary Crisis and Transition Framework to promote support measures in sectors crucial for the transition to a net-zero economy, in line with the Green Deal Industrial Plan, and to enable MS to support the economy in the context of the Russian-Ukrainian war. Together with the amended GBER, it will accelerate investment and the production aid financing. The proposed European Sovereignty Fund would also go in this direction, as it aims to finance transnational projects of European importance for the green transition, reduce critical dependencies and counteract foreign subsidies.

In the panel discussion, the question was raised whether the proposed European Chips Act[26] would be able to create European champions, as positive effects are also needed here. Chips are strategic goods whose shortage would be dangerous for the EU. Hence, the EU must ensure that shortages do not arise, and having champions could be the answer. It was argued that the basis of Art. 107(3)(c) TFEU could also be used, as an EU need had been identified and it is likely that the Commission will issue guidelines in the future.

Resulting from the above, building European champions is more of a State aid law solution and less of a competition law solution. Art. 108(2) TFEU even provides for the possibility that the Council may waive State aid rules, which is not possible under competition law.[27] However, this possibility has little practical effect, as it is never used. Most MS do not provide for such a possibility and make very sparing use of it, if at all. There is a general consensus that MS are hostile to the idea of this special power of political bodies to overrule the decisions of competition authorities. State aid as trade and competition policy should be viewed from two different angles.

[26] Proposal for a Regulation of the European Parliament and of the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act), COM(2022) 46 final.

[27] See e.g. *Ministererlaubnis* in Germany according to §§35 et seq. GWB or *droit de dérogation reconnu au préfet* in France according to Décret nr 2020-412.

One problem that was raised was the fact that the MS do not see themselves as headquarters of these European champions. It was therefore proposed to go back to the older idea of the Treaties enshrined in Arts. 174 et seq. TFEU. In response, the European Innovation Council was mentioned to help identify and develop technologies and business plans and to fund start-ups and SMEs.

Despite the advantages of State aid in promoting European championship, public intervention eliminates competition. Moreover, the strict rules of EU competition law are an obstacle rather than a vehicle in this respect. The question therefore arises why the EU then wants European champions. Here, everyone agreed that the issue has a major geopolitical dimension and that threats from outside must be warded off (cf. Foreign Subsidies Regulation). The crucial question remained and gave food for thought beyond the conference: What is a European champion? And can it survive without (further) State aid?

V. Conclusion

The Topic II panels covering State aid dealt with the separate, but intertwined topics of open strategic autonomy, the EU's industrial policy and European champions respectively. The role of State aid in ensuring a level playing field in the internal market remains important, but the trend points to a more relaxed approach to State aid control in the future to tackle competitive disadvantages vis-à-vis third states such as the US and China. Examples of this strategy include the Temporary Crisis and Transition Framework and the Green Deal Industrial Plan. At the same time, this modified approach to State aid enforcement could lead to tensions e.g. with the new EU Regulation on foreign subsidies, as WTO law requires parallelism between the two instruments. Building European champions that are competitive in international markets can be achieved through the rules of the Treaty and the pursuit of common European projects between MS. Frameworks such as the Temporary Crisis and Transition Framework have proved helpful in this respect, as they allow for support measures for a green transition, but also for emergency situations such as pandemics or wars, in order to reduce overall dependencies. The overarching message was the importance of a comprehensive and coherent State aid framework that promotes fair competition, encourages innovation, supports strategic industries, and safeguards European interests. By incorporating the insights gained from the conference, the EU can refine its approach to State aid and promote a competitive and resilient European economy in the midst of a rapidly evolving global landscape.