

EDITORIAL COMMENTS

The response to the war in Europe: A more power based EU and the challenge of ensuring that it remains rule and value based

The Versailles declaration

For the first time since World War II – depending on how we categorize the separate but related ethnic conflicts, wars of independence and insurgencies fought in former Yugoslavia in the 1990s – a war is taking place on the European continent. The European Union is directly concerned: this is happening at its borders, directly affecting its stability, security, economy, public finances. Welcoming on its territory millions of refugees, escaping the horrors of Russia’s aggression against Ukraine, requires a display of solidarity on an unprecedented scale. Moreover, once the current Russian aggression ends, the EU has every interest in providing massive aid for the reconstruction of Ukraine, in order to contribute to a lasting peace on the continent. More fundamentally, the direct threat to the EU’s stability and security that the war and its aftermath represent, forces the EU to review its policies and the values on which they are based. An examination of the rather bold Versailles declaration¹ adopted by the Member States’ Heads of State or Government (HoSG) during their informal summit on 10–11 March 2022 makes this clear. In many respects, this political document contains a blueprint for the EU institutions’ work for the years to come.² It outlines the HoSG views on how the EU should live up to its responsibilities and protect EU citizens, values, democracies and what they consider – though not defining it – to be “the European model”. The declaration condemns Russia’s aggression against Ukraine in the strongest terms, and defines ways for the EU to provide political, financial, material and humanitarian support to Ukraine and its people, bolster the EU’s own defence capabilities, reduce its energy dependencies, and build a more robust base for its economy.

1. Versailles declaration of 10–11 March 2022, available at <www.consilium.europa.eu/en/meetings/european-council/2022/03/10-11/>.

2. See e.g. the conclusions of the European Council of 24–25 March 2022, available at <www.consilium.europa.eu/en/press/press-releases/2022/03/25/european-council-conclusions-24-25-march-2022/>.

The following elements of the Versailles declaration, with their varying degrees of precision and use of overall rather muscular prose, deserve closer attention:

- On Russia's aggression:

HoSG stressed their determination to increase pressure on Russia (and Belarus) even further and ensure that the sanctions which the EU has already adopted will be fully implemented. They also announced that the EU was ready to move quickly with further sanctions.

- On the application for EU Membership of Ukraine and its neighbouring countries Moldova and Georgia:

HoSG referred to the fact that the Council has asked the European Commission to deliver opinions on the three countries' applications, as foreseen in Article 49 TEU – hiding, so it would seem, some degree of disagreement among them as regards the fundamental question whether these countries should accede and if so, at what pace and under what conditions, in contrast to the President of the European Commission's outspokenness in that regard.³

- On the EU's defence capabilities:

HoSG reaffirmed their commitment to take more responsibility for the EU's own security, to pursue a strategic course of action in defence, and to increase the EU's capacity to act autonomously, building on the December 2021 European Council conclusions.⁴ The EU leaders stressed that continued strong coordination on security and defence with partners and allies was key in this respect, including EU-NATO cooperation and “the principles set out in the Treaties . . . of inclusiveness, reciprocity and decision-making autonomy of the EU”.⁵ This appears to be above all a steer for the “defence summit” announced for May 2022, a dedicated, informal meeting of the European

3. See e.g. the statement of the President of the European Commission on the occasion of her visit to President of Ukraine in Kyiv on 8 April 2022, available at <ec.europa.eu/neighborhood-enlargement/news/statement-president-von-der-leyen-ukrainian-president-zelenskyy-occasion-presidents-visit-kyiv-2022-04-08_en>.

4. See e.g. the conclusions of the European Council of 16 Dec. 2021, available at <www.consilium.europa.eu/en/press/press-releases/2022/03/25/european-council-conclusions-16-december-2021/>.

5. Versailles declaration, para 8.

Council, operationalizing the priorities set by the so-called Strategic Compass for Security and Defence.⁶

- On the reduction of the EU's energy dependencies:

HoSG agreed on (i) reducing overall reliance on fossil fuels faster than undertaken so far at EU level, taking into account national circumstances (ii) diversifying supplies and routes, including through liquefied natural gas and biogas (iii) further developing an EU hydrogen market (iv) accelerating the development of renewables (v) improving the interconnection of European electricity and gas networks (vi) reinforcing EU contingency planning for security of supply (vii) improving energy efficiency and promoting circularity. The EU leaders invited the Commission to propose on that basis, by the end of May 2022, a so-called REPowerEU plan with the aim of making the EU independent of Russian fossil fuels. In addition, HoSG stated that the EU would continue to work on ensuring sufficient levels of gas storage and coordinated refilling operations, monitoring and optimizing electricity markets, channelling investments in energy systems, and enhancing connectivity in the immediate neighbourhood. Finally, HoSG called on the Commission to put forward, by the end of March 2022, a plan to ensure security of supply and affordable energy prices.

Preparation and follow up of the Versailles declaration

The European Council, the Council, and the European Commission actively prepared, but also followed up on, these elements of the Versailles declaration in accordance with the timetable set out therein, even if, strictly speaking, the declaration is no more than an informally agreed, intergovernmental document.⁷ For instance, the Council agreed on a fifth package of increasingly diverse restrictive measures, adopted in record time and including individual and economic sanctions, restrictions on media freedom, diplomatic measures,

6. See the Strategic Compass for security and defence, initiated by the High Representative of the Union for Foreign Affairs and Security Policy and approved by the Council on 21 March 2022, available at <www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-0_en>. The Strategic Compass provides a shared assessment of the strategic environment in which the EU is operating and of the threats the Union faces. The document contains concrete and actionable proposals, with a timetable for implementation, in order to improve the EU's ability to act decisively in crises and to defend its security and its citizens.

7. It is not clear why in Versailles the Heads of State or Government met informally rather than the European Council; in particular given that both the President of the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy also attended the meeting. Moreover, during the European Council on 24–25 March 2022, that followed closely the meeting in Versailles, it fully endorsed the declaration adopted by Heads of State or Government in Versailles.

as well as restrictions on economic relations with the non-government controlled areas of Donetsk and Luhansk oblasts, the objectives of these measures being in essence to weaken Russia's ability to finance the war and to impose clear political and economic costs on Russia's political elite, which the Council holds responsible for the invasion.⁸

At the end of February 2022, with Decisions (CFSP) 2022/338 and 339,⁹ the Council had already agreed to provide financial assistance in support of the Ukraine's Armed Forces, in the framework of the European Peace Facility.¹⁰ The objective of these assistance measures is to contribute to strengthening the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine and to protect the civilian population against the military aggression. In order to achieve these aims, the Decisions finance the provision of equipment, platforms and supplies, designed to deliver both lethal and non-lethal force. After the Versailles declaration, and in view of the increased Russian aggression on Ukrainian territory, the Council went a step further and on 23 March 2022 adopted Decision (CFSP) 2022/471, amending Decision (CFSP) 2022/338, for the supply of military equipment, and platforms, designed to deliver lethal force, increasing the financial reference up to approximately 1.5 billion euros and extending the duration of the assistance to two years.¹¹

The EU's High Representative for Foreign Affairs and Security Policy (HR) designed these measures carefully, often in close cooperation with the

8. An overview of the packages of restrictive measures so far adopted is available at <www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>. A sixth package is in preparation at the time of writing. See also <ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en>; <www.consilium.europa.eu/en/press/press-releases/2022/04/08/eu-adopts-fifth-round-of-sanctions-against-russia-over-its-military-aggression-against-ukraine/>. Noteworthy is in particular the so-called "DeSWIFTing" of a series of Russian banks, the freezing of the Russian national bank's foreign assets, sanctions directly aimed at President Putin, Foreign Minister Lavrov and some of their relatives, as well as the temporary ban on broadcasting by Russian State owned outlets such as Sputnik and Russia Today of "disinformation", as discussed further below. See for a commentary, Challet et al., "The EU in the wake of Russia's attack on Ukraine", *EU Law live* blog, special issue of 5 March 2022, available at <www.eulawlive.com>.

9. O.J. 2022, L 61/1 et seq.

10. The European Peace Facility is an off-budget instrument aimed at enhancing the Union's ability to prevent conflicts, build peace, and strengthen international security. It enables the financing of operational actions under the Common Foreign and Security Policy that have military or defence implications. See for its legal basis Council Decision (CFSP) 2021/509, O.J. 2021, L 102/14-62.

11. O.J. 2022, L 96/43-44.

European Commission.¹² Noteworthy were also his political coordination activities, leading him e.g. to provide a single reply to the letters which Russia's Foreign Affairs Minister sent to all twenty seven Member States just before the start of the Russian invasion, in which he demanded from each of them "security guarantees".¹³ The HR has also been chairing a record number of Foreign Affairs Councils, which appear to have been key in terms of coordination and which delivered strong statements addressed to Russia. Furthermore, he was actively involved in G7-Foreign Ministers consultations, helped to ensure coordination between NATO and the US, and paid a visit to Ukraine on 8 April 2022, together with the President of the European Commission. After the discovery of the massacre perpetrated by Russian armed forces during the Battle of Bucha,¹⁴ the HR decided, in agreement with the President of the European Council and the President of the European Commission, to make use for the first time of the possibility under Article 9 of the Vienna Convention on Diplomatic Relations to expel Russian diplomats accredited to the EU. In addition, he updated a series of EU CFSP missions to Ukraine in order to facilitate the investigation and prosecution of international crimes in parallel with the expansion of the European Union Border Assistance Mechanism (EUBAM).¹⁵ These initiatives are not without importance, and are an indication that the HR is gradually meeting some of the expectations engendered by the creation of his office twelve years ago, through the ratification of the Lisbon Treaties.¹⁶

For its part, the European Commission, in a reaction to the Bucha massacre, made a proposal to amend Regulation (EU) 2018/1727 of the European

12. See the HR's right of initiative under Art. 30 TEU in relation to restrictive measures, which, once adopted, are implemented through regulations proposed by the Commission under Art. 215 TFEU. In practice, especially in a war situation as now, both steps are *de facto* prepared simultaneously and require an excellent cooperation between the HR and the European Commission, of which he is a Vice President.

13. See the HRVP statement regarding his reply to Minister Lavrov, available at <www.eeas.europa.eu/eeas/russia-statement-high-representative-eu-response-minister-lavrov%E2%80%99s-letters_en>.

14. See the OSCE report of 13 April 2022 on violations of international humanitarian and human rights law, war crimes and crimes against humanity committed in Ukraine since 24 Feb. 2022, prepared by W. Benedek, V. Bilkova and M. Sassoli, available at <www.osce.org/files/f/documents/f/a/515868.pdf>.

15. See e.g. the amendment of the EU Advisory Mission for Civilian Security Sector Reform (HR (2022) 91), whereby the European Advisory Mission (EUAM) was given additional tasks to "support the Ukrainian authorities to facilitate the investigation and prosecution of international crimes". The legal basis of EUBAM is the Memorandum of Understanding signed by the European Commission and the Governments of Ukraine and Moldova on 7 Oct. 2005.

16. To be noted that, in the meantime, the HR was – for the first time – granted leave to intervene in a case before the ECJ, by Order of 3 March 2022 in Case C-551/21, *Commission v. Council*, pending, EU:C:2022:163; this potentially strengthens the HR's institutional position.

Parliament and the Council, as regards the collection, preservation and analysis of evidence relating to genocide, crimes against humanity and war crimes at Eurojust.¹⁷ It had, moreover, anticipated the Versailles declaration by publishing, on 8 March 2022, under the name “REPowerEU: Joint European action for more affordable, secure and sustainable energy”, a communication sketching the main features of a plan to make Europe independent of Russian fossil fuels before 2030, starting with gas.¹⁸ The Commission Communication also outlined a series of measures to respond to rising energy prices in Europe and to replenish gas stocks for next winter. As indicated earlier, the Versailles declaration endorsed the thrust of the Communication and invited the European Commission to come forward, by the end of May, with an elaboration of this REPowerEU plan. In the meantime, the Commission delivered on other, related “homework” it received in Versailles. In particular, on 23 March 2022, it published a communication with concrete options for immediate measures in order to enhance security of supply and secure affordable energy prices,¹⁹ as well as a proposal for a European Parliament and Council regulation amending existing legislation, aimed at safeguarding the security of gas supply and setting conditions for access to natural gas transmission networks.²⁰ On the same day, the Commission also adopted the so-called Temporary Crisis Framework (TCF), enabling Member States to use a certain flexibility foreseen under State aid rules in order to support their economies suffering from the consequences of Russia’s invasion of Ukraine. The TCF is based on Article 107(3)(b) TFEU, recognizing that the EU economy is experiencing “a serious disturbance” in the sense of that Treaty article.²¹

One day later, the European Council met for a strategic debate on security and defence, building on the Versailles declaration. It reaffirmed the Versailles declaration as regards Ukraine’s application for membership of 28 February 2022, acknowledging its “European aspirations and the European choice”, as reflected already in the 2016 Association Agreement, and reiterated the invitation to the European Commission to submit an Opinion on the application and that of Moldova and Georgia. The European Council also addressed the impact of increased energy prices and discussed options mitigating it, based on the aforementioned proposals from the European Commission. In that context, it politically greenlighted a Commission proposal to consider legislation whereby Member States would tax

17. COM(2022) 187 final of 25 April 2020.

18. COM(2022)108 final of 8 March 2022.

19. COM(2022)138 final of 23 March 2022.

20. COM(2022)135 final of 23 March 2022.

21. O.J. 2022, C 131/1-17.

temporarily the windfall profits energy companies are making from recent gas price spikes, and would invest the revenue in renewable energy and energy-saving renovations. Furthermore, it invited the Commission to continue to make best use of its State aid TCF. Noteworthy in this context was that, although it failed to agree on EU-wide price regulation, the European Council felt a need to express (obviously legally non-binding) views on the way the Commission should exercise its direct powers under the Treaty State aid rules in relation to national measures of that type. In paragraph 16 of its conclusions, it went as far as identifying the criteria the Commission should use in that respect and the speed at which it should assess the compatibility of emergency temporary measures in the electricity market notified by Member States, including mitigating the impact of fossil fuel prices in electricity production.

The EU's display of power

There is little doubt that the current crisis calls for urgent and unprecedented action; this largely explains the EU's display of power as described, at least in part, above, and leaving aside the highly controversial question whether the power effectively used is timely and sufficient. Inherent in any crisis of such magnitude is the trend for executive powers to lead the action. A wish for a more resilient EU in an increasingly complex and unstable world transpired already from its stated objective to strive towards strategic autonomy; since 2020 that has translated into a series of initiatives, creating, however, tensions with its own internal market rules and obligations under the WTO agreements.²²

Neither is it new in times of crisis to see a trend towards a certain creativity, not to say flexibility, as regards compliance with a number of key principles of EU institutional law, such as the principle of conferred powers, the balance of power between institutions, the principle of proportionality, and decision-making procedures including voting rules. The perception of these principles as too much of a straitjacket sometimes prompts HoSG in exceptional circumstances to take recourse to a subtle mix of actions, agreed

22. See Editorial comments, "Keeping Europeanism at bay? Strategic autonomy as a constitutional problem", 59 CML Rev. (2022), 313–326. See also, by way of illustration, the recent, much European Council driven legislative proposals of the European Commission regarding an anti-coercion instrument, foreign subsidies screening, a chips act and an international procurement instrument. Compare in the same spirit para 20 of the European Council conclusions of 24–25 March 2022: "The European Council calls for work to be taken forward on the implementation of the Versailles Declaration on building a more open and robust economic base, notably by reducing our strategic dependencies in the most sensitive areas such as critical raw materials, semi-conductors, health, digital and food, and by pursuing an ambitious and robust trade policy, as well as by fostering investment."

by HoSG meeting in the context of the European Council or in a more “informal” setting, and then formally decided and implemented within the EU legal order or on the basis of agreements between Member States *inter se* having a strong *nexus* with the EU legal order.²³ Typical examples of what could be called an “institutional fudge” are some of the measures that were taken in order to address the sovereign debt crisis after 2008 and the migration crisis following the Syrian war from 2015 onwards.²⁴ Understandable as these trends may be on grounds of urgency, they do raise the question whether the political and judicial checks and balances which the EU Treaties entrust to, in particular, the European Parliament, the European Court of Justice and Member States’ judiciaries, remain sufficiently effective in order to avoid any abuse or excess of power by the executive institutions and bodies of the EU in such turbulent times.²⁵

An interesting illustration of that issue is the Order of the President of the General Court of 30 March 2022 in Case T-125/22 R, *R(ussia) T(oday) France (RTF) v. Council*.²⁶ The President rejected the application by RTF for interim measures to suspend the EU sanctions imposed on it by Council Decision 2022/350 (CFSP) and Council Regulation 2022/351 of 1 March 2022. RTF is listed in the Annex of both the Decision and the Regulation as an entity which is no longer allowed to exercise broadcasting activities in the EU, up until 31 July 2022. The President of the General Court denied the urgency of the application, as the applicant had not substantiated that it would incur a grave and irreparable prejudice.²⁷ In particular, the President held there were no

23. See on agreements between Member States *inter se* Smulders, “Sources, structure and evolution of EU law” in Kuijper et al. (Eds.) *The Law of the European Union* (Kluwer International Law, 2018), p. 193; Martinelli, “Intergovernmental action above, below and alongside the Union – The law and practices of partial and parallel agreements between Member States”, PhD, European University Institute, February 2022. As pointed out earlier, it remains unclear why HoSG opted for the format adopted in Versailles, undeniably contributing to an “institutional fudge”; the fact remains that from a strictly legal point of view there is little to object to, given the subsequent endorsement of the Versailles declaration by the European Council in its formal conclusions.

24. See Editorial comments, “From euro crisis to asylum and migration crisis: Some legal and institutional considerations about the EU’s current struggles”, 52 *CML Rev.* (2015), 1437–1450.

25. See for a rather extreme example of a “constitutional fudge” the so-called EU-Turkey Statement, concluded in the margins of the European Council on 18 March 2016, which according to the Order of the General Court of 28 Feb. 2018 in Case T-192/16, *NF v. European Council*, EU:T:2017:128, could not be regarded as a measure adopted by the European Council or by any other institution, body, office or agency of the EU, and to the extent it could be considered an agreement concluded by the HoSG was not an act subject to judicial review under Art. 263 TFEU.

26. Order of the President of the GC of 30 March 2022 in Case T-125/22 R, *RT France v. Council*, EU:T:2022:199.

27. See paras. 25–57.

concrete indications that the RTF would have to close its business, as the measure is limited to 31 July 2022, and RTF is able to continue broadcasting outside the EU. Turning to the balance of interests, the President weighed the private interest of the applicant in favour of suspending the sanctions against the public interest invoked by the Council in order to maintain them. As regards the interests pursued by the Council, the President stated that the recitals of the contested acts refer to the need to protect the Union and its Member States against disinformation and destabilization campaigns carried out by the media under the control of the leadership of the Russian Federation and which threaten the public order and security of the Union, in a situation of military aggression against Ukraine. “*Il s’agit ainsi d’intérêts publics qui visent à protéger la société européenne*”, and these public interests are part of an overall strategy to put an end to the aggression against Ukraine as quickly as possible.²⁸ The President went on to state that, since propaganda and disinformation campaigns are likely to undermine the foundations of democratic societies and are an integral part of the arsenal of modern warfare, the immediate suspension of the contested acts would risk compromising the Union’s pursuit of the objectives, in particular the peaceful ones, which it has set itself in accordance with Article 3(1) and (5) of the TEU, at the cost of irreparable material and immaterial damage every day.²⁹

The President found that these interests weighed heavier than the interests of a private company, the main activity of which is temporarily prohibited and which could claim damages if such a prohibition was found to be illegal in the main proceedings. This reasoning allowed the President to reject the application without having to examine whether there was *fumus boni iuris*. The main case will, however, be dealt with in an accelerated procedure.

Although of course the Order does not pre-empt the future judgment of the General Court (or a possible future appeal to the ECJ), it provides interesting indications about the position of the President on important legal questions. A number of elements should be noted in particular. First, there is an important distinction between different categories of fundamental rights. While some (such as human dignity, the prohibition of inhuman treatment and torture) cannot be restricted, others (such as free speech or the right to conduct a business) are subject to limitations in the public interest, provided these are proportionate to the aim pursued. Second, misinformation is seen as an integral part of modern warfare and linked to the EU’s goals to preserve peace at home and in the world (Art. 3(1) and (5) TEU). This means that fighting

28. Para 61 (unofficial translation from the French).

29. Para 62 (unofficial translation from the French).

disinformation pursues a goal of considerable importance, which allows restrictions to fundamental rights, such as the right to pursue a media business. Third, the link with modern warfare is made in the “context of a military aggression against Ukraine”. The Order is in line with previous ECJ rulings,³⁰ according to which sanctions are accepted as part of an EU “global strategy” to pursue the safeguarding of international peace and security, including ending armed aggression. Hence, in its final judgment the General Court might well uphold the prohibition challenged by RTF, as it affects a Russian company with strong links to the Russian decision-makers who are targeted by the current sanctions. Conversely, in the case of sanctions against non-Russian media outlets, which miss this specific link, the assessment might be different. Fourth, the temporary nature of the sanction is considered important: if a measure prohibited the activity of a Russian media outlet indefinitely, this could change the weighing and balancing of competing interests. Fifth and finally, it remains open whether the current prohibitions affecting media outlets engaged in disinformation would also be legal outside the context of an ongoing war.

One can hardly overestimate the importance of effective legal remedies of this type being available for a rule and value based European Union, even when faced with threats of such nature and where the speed of action is of the essence. Another dimension of this phenomenon follows from the latest European Council conclusions,³¹ where the EU – again in a rather overt display of power (“The European Council calls on all countries to align with those sanctions. Any attempts to circumvent sanctions or to aid Russia by other means must be stopped”) – is putting considerable pressure on third countries such as the UK, Switzerland and Norway to adopt similar restrictive measures against Russia. In some cases in these countries, this leads to concerns about the compatibility of such measures with the protection of fundamental rights in their jurisdictions. If these countries nevertheless follow the EU in relation to e.g. measures restricting media freedom as discussed above, interesting case law may well develop in those jurisdictions, since it could deviate from the EU’s own case law. Something similar cannot be ruled out as regards the European Court of Human Rights, were it to be called to rule on a complaint about the way Member States implement measures adopted by the EU in this context, requiring the ECtHR to apply its *Bosphorus* doctrine.³²

30. See e.g. Case C-72/15, *PJSC Rosneft v. Her Majesty’s Treasury et al.*, EU:C:2017:236.

31. See para 4 *in fine* of the European Council conclusions of 24–25 March 2022.

32. European Court of Human Rights judgment of 30 June 2005 in Case *Bosphorus Hava Yollari Turizm v. Ireland*, Appl. No. 45036/98, (2006) 42 EHRR.

... so what about Member States' adherence to the EU's fundamental values during the war in Ukraine?

Parallel to the Ukraine crisis, the EU is facing a rule of law crisis in an increasing number of its Member States, which has been building up over a considerable period of time.³³ How deep that crisis actually is emerges from the two cases which are pending before the Council under Article 7 TEU, raising a series of structural rule of law issues in Poland and Hungary. A further indication is offered by the ever increasing case law of the ECJ, creating, through a set of highly refined landmark rulings, a clear framework for assessing a great variety of concrete cases for their compatibility with, in particular, Articles 2 and 19 TEU as well as Article 47 CFR. This has enabled the European Commission to launch a large number of infringement cases, many of which are still pending, and recently to activate the Rule of law conditionality Regulation against Hungary.³⁴ Finally, there are also a series of interim measures ordered by the European Court of Human Rights, based on Article 6 ECHR, which remain unimplemented.³⁵ The European Parliament especially has expressed concern, for instance in a resolution adopted on 10 March 2022,³⁶ about the risk that the Ukraine crisis and the challenges in terms of solidarity and social-economic sacrifices which certain Member States and their population are facing as a result, is used as a pretext for lowering the pressure on these Member States to comply with the rule of law, and in particular with a series of ECJ judgments and orders in that area.³⁷ The fear more concretely is that there may be a temptation on the side of the executive institutions of the EU to refrain from drawing from such failure to comply with the rule of law, the budgetary consequences under the Recovery and Resilience Facility set up in the context of Next Generation EU fund.³⁸ However, one simply fails to see how a Member State's ability to bear the

33. See e.g. Editorial comments, "Clear and present danger: Poland, the rule of law and primacy", 58 CML Rev. (2021), 1635–2021. A comprehensive overview can be found in the European Commission's annual report on the situation of the rule of law in the EU, attached to which are 27 country reports, COM(2021)700 final of 20 July 2021.

34. See Regulation (EU, Euratom) 2020/2092 of the European Parliament and the Council on a general regime of conditionality for the protection of the Union budget, O.J. 2020, L 433 I/1 et seq.

35. ECtHR Order of 14 April 2022 in Case *Stepka v. Poland* (Appl. No. 18001/22) and Order of 8 Feb. 2022 in Case *Wróbel v. Poland* (Appl. No. 6904/22).

36. Resolution of the European Parliament on the rule of law and the consequences of a judgment of the EU Court of Justice (2022/2535(RSP)) of 10 March 2022, text available at <www.europarl.europa.eu/doceo/document/TA-9-2022-0074_EN.html>.

37. See e.g. Case C-791/19, *Commission v. Poland*, EU:C:2021:596; Order of 27 Oct. 2021 in Case C-204/21 R, *Commission v. Poland*, EU:C:2021:878.

38. See Art. 19(3)(b) of Regulation (EU) 2021/241 of the European Parliament and the Council establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17 et seq.

burden of certain consequences of the war in Ukraine, leading e.g. to a massive inflow of refugees on its territory, would be negatively affected by fully complying with the rule of law, one of the EU's most fundamental values and indispensable for its proper functioning. Rather the contrary. If anything, the cause of democracy, fundamental rights, and the rule of law, which at the same time drives the population of Ukraine to resist so courageously the Russian army, should be an extra reason for the EU's Member States to adhere effectively to these values.

Faced with an external threat of such magnitude, one can nevertheless imagine a certain willingness to maintain the internal cohesion of the EU *coûte que coûte*. Equally, the rule of law issues within the EU might appear (wrongly) to some to be relatively trivial in the face of Russian aggression and massive breaches of international humanitarian law. This may seem an understandable attitude at first sight, but the Ukraine crisis and the rule of law crisis co-exist, and both pose threats, albeit of a different nature, to the EU. One should not avoid the necessary reckoning, based on a fundamental discussion about essential membership obligations.³⁹ Moreover, one can only hope that Member States will also adhere to other Article 2 values, not just the rule of law, such as human dignity and non-discrimination, not only when continuing to welcome the millions of refugees from Ukraine so far, but also when dealing in parallel with persons from other, more remote, countries and cultures, also seeking international protection on their territory.⁴⁰ Last but not least, and leaving aside the temptation to be guided exclusively by power-related geopolitical considerations, when assessing the current

39. See Editorial comments "Compromising on the general conditionality mechanism and the rule of law", 58 *CML Rev.* (2021), 267–281.

40. See, however, the puzzling ruling of the Hungarian Constitutional Court of 10 Dec. 2021 on a motion of the Minister of Justice, who requested an abstract interpretation of the Hungarian Constitution, suggesting that an ECJ judgment conflicted with Hungary's constitutional identity. The Minister claimed that by requiring Hungary to provide the guarantees laid down in the Qualification Directive (also) for the entry of third-country nationals into its territory, Hungary lost control over the population, which would be a serious violation of its constitutional identity. In Case C-808/18, *Commission v. Hungary*, EU:C:2020:1029, the ECJ had ruled that the Hungarian procedure for granting international protection and returning illegally staying third-country nationals was incompatible with EU law. The Hungarian Constitutional Court held "that where the joint exercise of competences is incomplete, Hungary shall be entitled, in accordance with the presumption of reserved sovereignty, to exercise the relevant non-exclusive field of competence of the EU, until the institutions of the European Union take the measures necessary to ensure the effectiveness of the joint exercise of competences". Furthermore, the Hungarian Constitutional Court drew conclusions from the "[constitutional] right to self-determination stemming from one's traditional social environment". Hence, the question arises, whether this means that Hungarians have the right to live in a more or less homogeneous country, where people are not too different from one another. See for a comment *Verfassungsblog* of 15 Dec. 2020, available at <verfassungsblog.de/full-steam-back/>.

applications for EU membership, the sustainability of the EU, which depends so much on its Member States' adherence to fundamental values, also requires that candidate-countries must clearly meet the accession conditions (including the Copenhagen criteria, with their reference to Art. 2 values) laid down in Article 49 TEU, by the time the EU decides that they can accede.⁴¹

*The values and identity of the EU and the power, if not duty, to defend:
Towards an overriding EU public interest?*

The recent ECJ judgments on the validity of the Rule of law conditionality Regulation⁴² are a source of wisdom in many respects. The four paragraphs quoted here are of exceptional importance in clarifying the way in which the EU's fundamental values, its identity, legal order and power to defend them are inextricably linked:⁴³

“124 In that regard, it should be pointed out that, under Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States and that, under Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union

125... once a candidate State becomes a Member State, it joins a legal structure that is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, the common values contained in Article 2 TEU, on which the European Union is founded. That premise is based on the specific and essential characteristics of EU law, which stem from the very nature

41. Note that e.g. Serbia's refusal to follow EU sanctions against Russia appears to go against any candidate pre-accession commitment to adapt, or at least gradually converge, its foreign policy towards the EU's CFSP. With a view to a successful application, it will also be interesting to see how much progress Ukraine has been able to make in terms of fighting corruption and adhering to the rule of law in light of of Art. E of the Decision of the Heads of State or Government of the 28 Member States of the European Union, meeting within the European Council, on the Association Agreement between the EU and the EAEC and their Member States, of the one part, and Ukraine, of the other part, annexed to the European Council conclusions of 15 December 2016: “The fight against corruption is central to enhancing the relationship between the Parties to the Agreement. Under the Agreement, the Parties will cooperate in combating and preventing corruption both in the private and public sector. Cooperation between the Parties related to the rule of law is aimed in particular at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption.”

42. Cited *supra* note 34.

43. See Case C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, emphasis added. Corresponding paragraphs can be found at paras. 142–145 of Case C-157/21, *Poland v. Parliament and Council*, EU:C:2022:98.

of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law....

126 It follows that compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State Compliance with those values 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 after its accession.

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.”

It does not seem far-fetched to derive from these two judgments the authority to claim that there is such a concept as an “interest of the Union” to defend its “very identity” as “a common legal order” determined by the “common values contained in Article 2 TEU”. Equally relevant is paragraph 61 of the above-mentioned Order of the President of the General Court, explicitly referring to the “interest [of protecting] the Union and its Member States against disinformation and destabilization campaigns . . . which threaten the public order and security of the Union”, adding that “these are thus public interests aimed at protecting European society” (unofficial translation).

For its part, in the cases brought by Hungary and Poland, the ECJ rejects the applicants’ arguments based on alleged *ultra vires*, by referring to a “need to defend” the EU’s fundamental values.⁴⁴ “Public interest”, “public order”, “security” and “identity” are notions usually invoked by Member States, in particular to justify exceptional measures that violate the EU’s internal market freedoms. Here, it seems we are witnessing a trend towards “Europeanization” of these notions. Arguably, this is a way of reconciling a more power based EU with a rule and value based EU, which needs to defend itself in an increasingly dangerous world, and which at the same time must come to grips with threats to its foundations from the inside, and is therefore compelled to explore the limits of the powers conferred on it by the Treaties. In other words, the EU’s own constitutional order is maturing further, notwithstanding the attempts of those who claim that “constitutional pluralism” can be a ground to set aside EU law where it conflicts with their

44. See Case C-156/21, *Hungary v. Parliament and Council*, para 127 and Case C-157/21, *Poland v. Parliament and Council*, para 145.

interpretation of national constitutional identity.⁴⁵ The threats to that identity, whether they come from within the Union (e.g. due to the rule of law crisis in Poland and Hungary), or from outside (e.g. Russian aggression towards the EU's neighbour Ukraine) may indeed become so serious that what is now a *right* of the EU to defend its identity may even become a *duty* to do so.⁴⁶

Mutual defence

Regrettably, one cannot rule out a further escalation of the Ukraine crisis, which may lead to an armed aggression on the territory of one of or more EU Member States, many of which have direct borders with Russia. This forces us also to recall the nature and content of Article 42(7) TEU (the “mutual defence clause”), introduced into primary law by the Lisbon Treaty.⁴⁷ France invoked it for the first time following the terrorist attacks in Paris on 13 November 2015: a request for assistance from the other Member States pursuant to this provision was presented during the Foreign Affairs Council on 17 November 2015. Ministers of all EU Member States expressed their unanimous and full support to France and their readiness to provide assistance pursuant to this provision.⁴⁸

Article 42(7) is a unique Treaty provision in that it does not provide for any explicit role of an EU institution, either in relation to determining when it is to be applied or in relation to its implementation. It does not lay down any explicit EU procedure that must be followed either, and it does not involve the adoption or application of any EU legal instruments, including those relating to the Common Foreign and Security policy.⁴⁹ However, once the conditions

45. See for a reflection of such views Grabenwarter, Huber, Knez and Ziemele, “The role of the constitutional courts in the European Judicial Network”, (2021) EPL, 43–62.

46. See, by analogy, how in the context of even less exceptional circumstances, such as enlargement and withdrawal, it can be noted that both in law and in practice, the EU institutions are given a far-reaching empowerment to pursue one essential goal: to preserve the constitutional integrity of the Union (cf. Hillion, “Withdrawal under Article 50 TEU: An integration-friendly process”, 55 CML Rev. (2018), 29–56).

47. See for an excellent analysis of Art. 42(7) TFEU: Fischer and Thym, in Blanke and Mangiameli (Eds.), *The Treaty on European Union. A Commentary* (Springer, 2013).

48. Art. 42(7) bears similarities to Art. V of the modified Brussels Treaty, establishing the Western European Union (WEU). In addition, Art. 42(7) TEU refers to the commitments of some EU Member States under the North Atlantic Treaty Organization, which includes Art. 5 of the North Atlantic Treaty. However, Art. 42(7) is a distinct and autonomous legal provision, applicable to all EU Member States, which must be interpreted and applied in its own context within the overall framework of the EU Treaties. See on the French case: <www.ceps.eu/wp-content/uploads/2015/11/CH%20&%20SB%20Tous%20pour%20un%20CEPS%20Commentary_0.pdf>.

49. Art. 42(7) TEU must be distinguished from Art. 222 TFEU (the “solidarity clause”). First, the circumstances that trigger the latter clause are different: it applies “if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster” For instance,

for its application are met, Article 47(2) creates a legal obligation of assistance between each Member State and the victim Member State(s), and a mutual obligation between all Member States to comply with this provision. All Member States are under an “an obligation of aid and assistance by all the means in their power”; from Article 3 of the Irish Protocol, however, it follows that each Member State has a discretion in deciding on the nature of the aid and assistance it will provide. Hence, such assistance may be of a military or civilian nature, and may comprise different kinds of aid and assistance. However, this discretion cannot be so wide that the obligation to assist becomes empty; and it could be argued, therefore, that there must be some correlation between the requirements of the victim Member State(s) and the assets and resources at the disposal of a Member State in view of the required assistance. However, a Member State is not obliged to provide a particular kind of assistance, since this would be contrary to the specific character of its security and defence policy, including policies of neutrality. In addition, the aid and assistance provided by EU Member States that are members of NATO, must be consistent with their NATO obligations.

However, before determining the scope of the obligation to assist, it must be determined that there has been an “armed aggression” against a Member State. The term “armed aggression” means an armed attack within the meaning of Article 51 UN Charter and international law generally. Whether conduct constitutes such an aggression should therefore be determined in accordance with international law, on a case-by-case basis. For some years, at the insistence of its Baltic Member States, the EU has been concerned about hybrid threats from Russia.⁵⁰ If they materialized, it would be necessary, to determine, on the basis of Article 42(7), whether in a given case the level and nature of the use of force against a Member State reaches the threshold necessary to constitute an armed attack and, where relevant, whether e.g. a cyberattack qualifies as such.

Finally, Article 42(7) TEU requires that the attack must have occurred on the territory of a Member State, as defined in Article 355 TFEU. Arguably, Article 42(7) therefore does not seem to cover attacks against ships or aircraft, or armed forces outside the territory of Member States, in particular where they are of an incidental nature; this interpretation would have the merit of limiting the risk of an unwarranted escalation of a conflict. In the absence of

it does not seem to cover an armed attack by a third State, which would be covered by Art. 42(7). Second, unlike Art. 42(7) it imposes obligations on the Union as such as well as on Member States. Third, it provides for the adoption of detailed procedures for implementation of the clause by the Union with specific responsibilities conferred on Union institutions and bodies.

50. See e.g. European Commission and HR joint communication “Joint Framework on countering hybrid threats: a European Union Response”, Joint (2016)18 final of 6 April 2016.

a specific procedure for the implementation of Article 42(7) and of any role of the EU institutions, it is for Member States to determine how to implement it.

Final considerations

More than anything, a war at its borders, such as the one which is currently devastating Ukraine and posing many threats to the EU and its Member States, shows how much the destinies of different countries are intertwined, and how a threat posed to one represents a threat to the other. Facing what has gradually become a genuine and serious threat to the values for which the EU and its Member States commonly stand, and which determine the very identity of the EU, requires not only solidarity between them but also the capacity of each of them to defend these values effectively. This is an overriding public interest, both from an EU and an individual Member State perspective, which can only be properly served if the institutional framework set by the EU Treaties is adequate. Experience so far seems to confirm that this is actually the case. Moreover, the TEU itself provides, in a horizontal clause (Art. 13 TEU), that the EU “shall” have an institutional framework, which “shall” aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States. By virtue of Article 8 TEU, the EU has a duty to develop a special relationship with neighbouring countries, such as Ukraine, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union. This helps the EU in determining in concrete cases the powers attributed to it and, consequently, the use it *can* make of them in order to define its response to the war. The adequacy of the EU institutional framework should also encourage HoSG to refrain from acting outside it. It is submitted here that, ultimately, the success of the EU response depends on the *actual* use made of those powers, with the requisite wisdom and courage, and not on the lack of power at EU level. A small consolation amidst such a cruel and senseless war.

