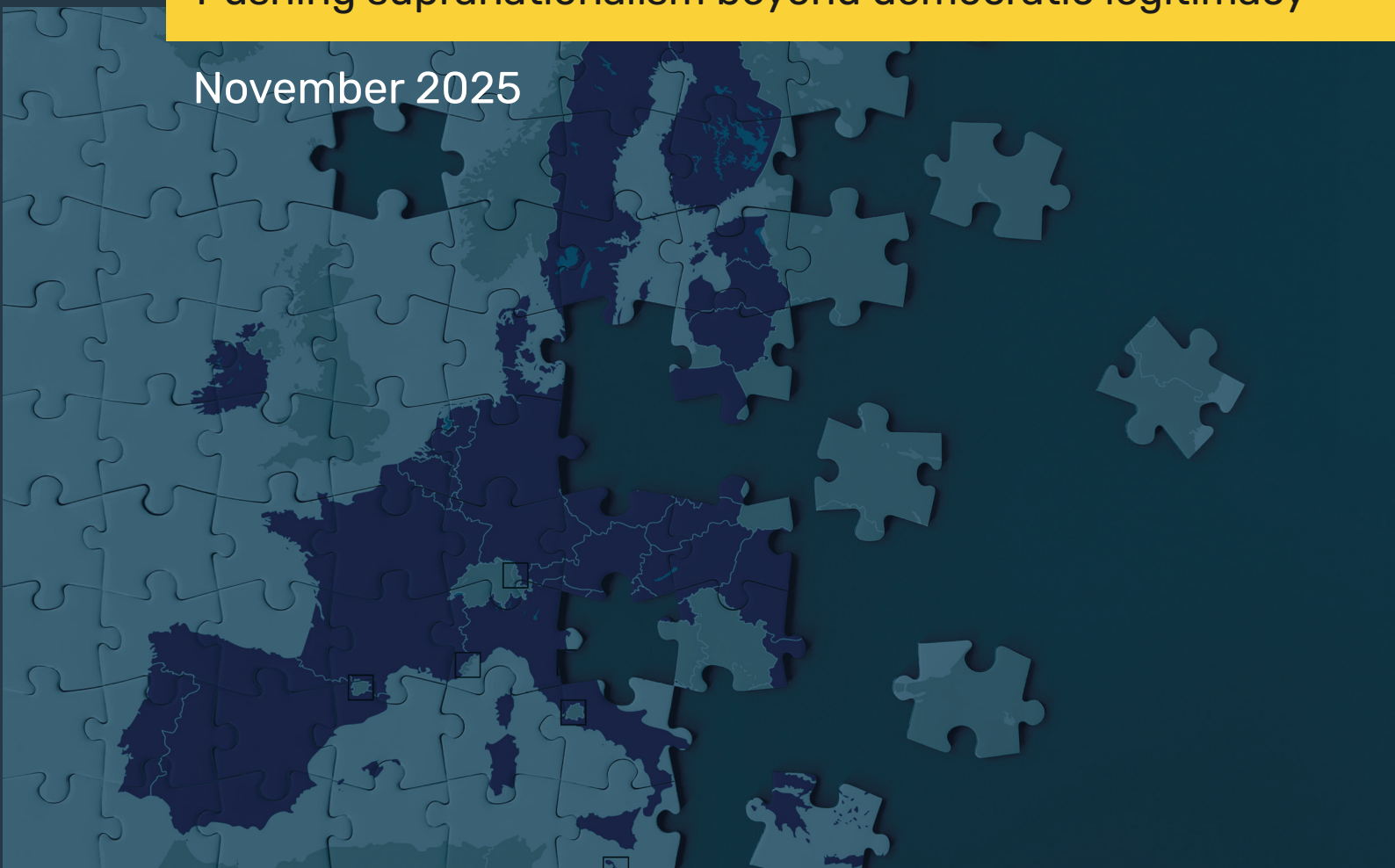
MCC BRUSSELS
MATHIAS CORVINUS COLLEGIUM

Empire of law

Dr Philipp Siegert

Pushing supranationalism beyond democratic legitimacy

November 2025



Empire of law: pushing supranationalism beyond democratic legitimacy

Dr Philipp Siegert

Contents

Executive summary

- The European Union has been set up by intergovernmental treaties that balance supranational integration with the protection of national identities and interests. However, the supranational institutions created by the treaties have systematically pushed for continuous integration and centralisation, and they have resorted to competence creep to circumvent treaty limitations. This has upset the balance the states wanted.
- The European Court of Justice (CJEU) plays a particularly important role in this and has a long track record of centralisation bias. It developed a number of judicial doctrines that severely limit the effectiveness of fundamental treaty principles – first and foremost, that of conferral, which is the EU's most basic building block. In doing so, the Court as well as the European Commission contribute to the declining functionality, acceptance and legitimacy of the EU as a whole, as has become evident especially with Brexit.
- The Council, for its part, has not only been unsuccessful in its attempts to install backstops against competence creep at treaty level but also contributes to it by prioritising political communication over decision. The steady repetition of the 'ever-closer union' phrase has been turned into a judicial dogma by the CJEU, with effects beyond the Council's aims; and the Council's more recent tendency to delegate decisions to the Commission instead of negotiating a compromise itself increases the problem of competence creep.

- In the medium term, possible remedies to this situation include limiting supranational competence creep by adding appropriate protocols to the European Treaties, stopping the CJEU from reshaping the treaties by placing its corresponding rulings under the proviso of the Council, and strictly reducing the use of administrative procedures that create ersatz legislation.
- In the long term, treaty reform is unavoidable, its only alternatives being further national 'exits' or an overall unravelling of the EU. Such treaty reform has to recalibrate the EU's multi-level governance system by fundamentally curtailing the supranational institutions' reach, (re-)placing interstate cooperation at the heart of it, and rebooting the entire EU legal system in the way that France (1804) and Germany (1900) did at their national levels.

Introduction

Competence creep indicates processes by which 'the EU somehow manages to legislate and/or otherwise act in areas where it has not been conferred a specific competence'.[1] This generally takes one of three forms.

The first is judicial: the European Court of Justice (CJEU[2]) extends the reach of EU law through 'creative' (literally) interpretation, broadening the scope of EU law beyond the treaties' or the legislation's intent.

The second is judiciary-induced, but legislative: a CJEU ruling opens up a new policy field for supranational legislation, though the treaties did not warrant for it.

The third is bureaucratic: the Commission or one of its agencies extends EU legislation – for example, by establishing application guidelines that go beyond that legislation's scope.

This report aims to identify the roots of competence creep and showcase its effects on the EU. It will therefore focus on CJEU decisions that are part of the problem – that is, that caused or enabled competence creep. This is not to say that the CJEU *only* takes 'creeping' decisions, as evidenced by cases such as *Tobacco Advertising* (2001)[3], *Omega* (2004)[4] and *Schrems* (2015, 2020).[5] But again, they lie outside this report's focus.

The analysis will start with an overview of the EU's evolution until 2007 (Lisbon summit), which is characterised by a 'zigzag' creep between the political and judicial tracks. It then proceeds to highlight some of the decisive waypoints of creep since 2007. This will be followed by a look at the consequences this has produced, before presenting suggestions on how to better limit competence creep. In short, the report advocates for stabilising the EU by returning to its founding principles.

1 From Rome to Lisbon

1.1 Roman Beginnings in 1957

Institutionally, the EU has three starting points. The first one was the European Coal and Steel Community (ECSC) of 1951, established by the BeNeLux states (Belgium, Netherlands, Luxemburg), France, Germany and Italy. These same six states signed the Roman Treaties in 1957, which established both the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). To manage these arrangements, they were outfitted with bodies of joint decision-making: councils of ministers, a commission (EEC and Euratom) or high authority (ECSC), some form of assembly, and supranational courts.[6]

The EEC Treaty stated a number of principles, two of which are of particular interest here: the 'ever-closer union' and the principle of conferral. The first one is in the treaty's preamble, where the states declare their determination 'to establish the foundations of an ever-closer union among the European peoples'.[7] Note that it speaks of a union 'among' and not 'of' Europeans; and it refers to the 'European peoples' in plural. Also, the treaty speaks of ever-closer ties between *the states* (Art. 2).

The second, conferral (or 'attribution'), means that the supranational structure has remit only in policy areas that the treaties explicitly confer upon it, and only to the extent that they do. It still is 'the main principle governing the competencies of the European Union'.[8] In legal terms, the supranational structure has no competency-competency. In other words, it cannot create new competencies for itself, unlike nation states. This limitation is precisely

what competence creep tries to circumvent, and one tactic for this is to utilise the principle of ever-closer union against the principle of conferral.

1.2 Early court rulings

Competence creep's 'judicial patient zero' is the *Fédération Charbonnière* decision (July 1956).[9] The CJEU held that rules laid down in the ECSC Treaty automatically 'presuppose the rules without which that treaty [...] would have no meaning or could not be reasonably and usefully applied'. By this, the CJEU applied the 'doctrine of implied powers' to the treaty, opening the legal door to competence creep based on functional arguments.

In *van Gend en Loos* (February 1963),[10] the CJEU ruled that the norms produced at the supranational level have 'direct effect', which means that they can be invoked by citizens, not just by the national governments (as is normal for intergovernmental treaties). Then, in *Costa/ENEL* (July 1964),[11] the Court decided that in the policy fields of the EEC Treaty, the treaty would supersede national law – and since this treaty established the CJEU, that its rulings would supersede the decisions of national courts. This became known as the 'doctrine of primacy'.[12]

These rulings are fundamental for the EU's recurring characterisation as a construct *sui generis*, a 'one-of-a-kind' international setup.[13] With the doctrines of implied powers, direct effect and primacy, three levers had been mounted onto the judicial machinery that are highly relevant to the judicial enabling of competence creep.

1.3 The Merger Treaty of 1965

With the Merger Treaty ('Brussels Treaty') of 1965, the entities that had been created with the Paris Treaty of 1951 and the Roman Treaties of 1957

were merged into the 'European Communities'. Their respective governing bodies were merged into one council of ministers, one court, one assembly and one commission. These unified bodies now had remit over all the areas covered by the ECSC, EEC and Euratom.

Shortly thereafter, the body of rules that had been produced so far at the supranational level became known as the *acquis communautaire* (roughly, 'that which the community has achieved' or 'established'). The term emerged during the accession negotiations with Denmark, Ireland and the United Kingdom in 1972. The *acquis* designates the totality of European supranational norms, which today is in the millions.[14]

1.4 Court Rulings after 1965

The now-unified court established further landmark decisions. One was *Handelsgesellschaft* (December 1970),[15] in which the CJEU upheld the supremacy of EU law even when colliding with national constitutional law. This produced a reaction from the German constitutional court in its 1974 *Solange* ruling. The constitutional court confirmed that it will retain oversight over EU law and CJEU jurisprudence as long as ('solange' in German) there are no fundamental rights guarantees at the supranational level that are at least equivalent to those of the German constitution.

The second relevant CJEU decision was *Cassis de Dijon* (February 1979),[16] where the Court established the 'principle of mutual recognition': a product legally brought into circulation on one national market cannot be excluded from the other national markets of the EEC, with very few exceptions. This is fundamental for the Court's systematic prioritisation of single-market functionality in later rulings. Then, in *Les verts* (April 1986),[17] the CJEU argued that the notion of 'rule of law' was fundamental to the entire EEC,

and it ranked the EEC Treaty as 'constitutional' – which none of the signatories, the states – had done.[18] But the CJEU claimed (and still upholds) that

> *neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the* [*EEC*] *Treaty.*[19]

1.5 The Single European Act of 1986

The Single European Act (SEA) committed the states to a series of political aims, including to 'create a united Europe', to 'strengthen [the Community's] cohesion [...] and intensify its action in areas hitherto insufficiently explored', to speak 'with a single voice in foreign policy, including political aspects of security', and to 'transform the whole complex of relations between [the] States into a European Union'.[20]

In more specific terms, the SEA committed the states to move from a common market to a 'truly' single market by the end of 1992; and

- extended the instances of majority decisions (instead of unanimity);
- added new policy fields, such as foreign policy;
- introduced the Commission's 'implementing powers' (more on that in section 2.2);
- established the 'cooperation procedure', which increased the EP's role in legislation.

Lastly, the first common budget plan or 'financial perspective' was established, precursor to today's Multiannual Financial Frameworks (MFFs).[21]

The SEA did have popular support, expressed in two successful referenda. The shifts of regulatory competence from the intergovernmental level (Council) to the supranational one (EP and Commission) were deemed at least acceptable, if not welcome. However, in light of the competence creep

that ensued, the Council would later try to step on the brake with the Treaties of Maastricht in 1992 and Lisbon in 2007 – unsuccessfully, as we will see.

1.6 Court rulings after 1986

The most impactful CJEU decision came with the negotiations of the European Free Trade Agreement (EFTA), which is not EU law. Asked for its opinion on EFTA-EU compatibility, the Court took the opportunity to digress and create 'enforcing obligations for itself', arguing that 'all future Community action might have to contribute to making concrete progress towards European Union'.[22]

Going far beyond the scope of the issue at hand, the CJEU pronounced that a) the EU states would have an *obligation* to progress towards an ever-closer union, and b) the CJEU itself has an obligation to enforce EU law to that specific end.[23]

1.7 Treaty Evolution from Maastricht to Lisbon

The fundamental treaty for today's European Union is the 1992 Maastricht Treaty ('Treaty on European Union'). It upgraded the EP to a co-legislator with the right to initiate legislation and subjected the Commission to EP approval. The treaty also paved the way to a common currency (though established separately by the Eurozone treaty) and set up rules on government debt. These include the limitation of the states' annual budget deficit to 3% of GDP and overall debt to 60% of GDP.

However, this would only be achievable with an annual GDP growth of 5%[24]– something that Western Europe had not seen since the oil-price shock of 1973. This assumption of 5% GDP growth was wishful thinking, induced by the Cecchini report[25]– the 1988 version of the 'more single market' poetry of the Letta and Draghi reports of 2024.[26] However, what

was realistic was the future application of measures that could be triggered for failing these criteria. Politically, this opened the road for the supranationally imposed austerity measures of the Greek debt crisis (see section 2.1) and supranational 'oversight' over national budgets (see section 2.5).

A third important item is that the Maastricht Treaty de facto included the provisions of the 1950 European Convention of Human Rights.[27] The ECtHR's interpretations of fundamental rights have thus become the standard. This is problematic for several reasons. For example, this court has gone *contra legem*, especially with regard to its rulings on Art. 3 ECHR,[28] flipping the 'must not' obligation that forbids torture into a 'must' obligation of providing social services, causing a situation that is both legally and politically untenable (see section 2.4).[29]

The 1997 Amsterdam Treaty introduced the possibility to sanction a state for 'serious and persistent breach' of basic EU principles, commonly referred to as 'Article 7 procedures' (more on that in section 2.5). The 2001 Nice Treaty essentially prepared the EU for the enlargement that eventually took place in 2004, with 10 countries joining the bloc.[30]

The last major 'update' to the Treaties was the 2007 Lisbon summit. Here, the European governments also dealt with the failed Constitutional Treaty of 2004, rejected by French and Dutch referenda. The EU basis established then, still in place today, is the 'duo' of the Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).

The EU was unified into a single legal personality with the ability to sign international agreements. The treaty also introduced a 'High Representative of the Union for Foreign Affairs and Security Policy' and incorporated the Charter of Fundamental Rights as full EU law.[31] While these were all extensions, the Lisbon Treaty also reiterated the importance of the limiting

principles (conferral, subsidiarity, etc),[32] established increased oversight of national parliaments over EU legislation, and created a procedure for exiting the EU.

1.8 Court rulings after 1992

Exceptionally, the first ruling to be considered here is a national one. When the Maastricht Treaty was challenged before the German constitutional court, the court upheld it – but clarified that the *Kompetenz-Kompetenz* remained with the nation states as masters of the treaties.[33] In case of a judicial conflict over fundamental constitutional provisions, the ultimate decision is not the CJEU's, but the constitutional court's to make.

In contrast, the CJEU reiterated its doctrine of EU law supremacy. In *Alliance for Natural Health* (July 2005),[34] it squarely placed single-market harmonisation above subsidiarity, and in September 2005,[35] it confirmed – in the same logic – the supremacy of EU environmental law even when it affects national criminal law. That already sounds strange in itself, but additionally, criminal procedure and criminal law are exclusively national competences – yet the CJEU decided that the EU may take measures that 'relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'.[36]

A fourth item was the *Vodafone* case (June 2010).[37] At play was the principle of proportionality, which stipulates that measures may only be taken at EU level if they pursue a legitimate objective regarding the European Treaties, and do not go beyond what is necessary (similar to the 'least restrictive measure' benchmark) to achieve the objective. In its ruling, the CJEU reduced the principle of proportionality to a protection against

'manifestly inappropriate' measures. To summarise and overstate: the verdict means that regulating something at EU level does not have to be the best possible way to do it, just not the inappropriately worst.

Overall, the position of the CJEU is perhaps most fittingly summed up by Koen Lenaerts, who already in 1990 wrote that, to his mind, there could be 'no nucleus of sovereignty that Member States can invoke as such against the Community'[38] – and that was even *before* the extensions of supranational powers in Maastricht. Lenaerts is today the CJEU president.

2 Competence Creep since Lisbon

2.1 Creep by circumvention: the Greek Debt Crisis

As explained, the basic assumptions that underlie the Maastricht Criteria and European Monetary Union (EMU) are untenable. The first countries to clash with it were actually Germany and France in 2003. Having sufficient political and institutional power in the EU, they could 'box out' each other of deficit procedures that they normally would have incurred.[39] That was not the case with Greece in 2010.

The country had already been in excess of the Maastricht criteria and Stability and Growth Pact limits at the time of joining the Eurozone in 2001, to which European decision-makers were happy to turn a blind eye.[40] However, the situation turned after the US financial crisis of 2007/08 hit Europe. For the year 2009, the Greek government had forecast a deficit of 3.7% of GDP, but in the end, it was over 15%. This led to creditors losing confidence in the country's ability to manage, let alone repay its debts. The yield for Greek 10-year bonds jumped to 35% interest.[41] Greece, hit by a triple shock of debt, banking and confidence crises, was broke.

To avoid officialising the default, an international intervention and lending programme was set up, politically pushed for in particular by the French and German governments – vehemently lobbied by their banks – which together held about 40% of Greek public debt.[42] The lending programme included severe, if not outright draconian, austerity measures that directly affected, for example, pension and tax policies, which are fields that under the European Treaties were the remit of the state. So, the EU could not act in these fields.

EU institutions bypassing EU law

And yet, the Commission and the European Central Bank drew up many of the austerity measures, including in these policy fields, that were implemented in Greece. To do this, they went 'outside' of the EU and formed the so-called Troika by teaming up with the International Monetary Fund (IMF). Since the IMF is not an EU body, the argument from the Commission and ECB was that they, too, would not act in their 'intra-EU' capacities, but as 'extra-EU' partners of a lending and austerity programme that was technically under international law.

The European governments set up two instruments, the ad-hoc European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), both under international law.[43] There were three reasons for going outside of the EU legal structure:

- first, the problem concerned the Eurozone countries, not all of the EU members;
- second, Germany wanted to avoid the creation of common EU debt in the form of 'Eurobonds';
- third, through the Troika, policies were imposed on Greece that were incompatible with the European Treaties (and produced socially devastating effects: in 2014, 44% of the population lived below the poverty line).[44]

In December 2011, the heads of state and government of the Eurozone countries issued a declaration on the reinforcement of the Economic and Monetary Union, followed by a treaty (the 'Fiscal Compact') signed on 2 February 2012 by all EU states except the UK and Czechia.[45] This treaty: replaced the EFSF with the ESM; established a majority vote for decisions in the ESM (85% quorum needed); required states to report *ex ante* on their

public debt issuance plans; and introduced budget oversight at the EU level over national budgets. Among other things, this meant that

> *Member States [were] obliged to transpose the above elements of the balanced budget rule into national law, preferably at the constitutional level, within one year of the new Treaty entering into force. The European Commission [would] report on compliance with this transposition requirement. Any signatory Member State [could] call upon the European Court of Justice to verify the transposition of the rules into national law, and the latter [could] impose financial sanctions of up to 0.1% of GDP to ensure compliance with its judgements.*[46]

Three games of *passe-passe* were played during the crisis.[47] First, the bailout for Greece was really a bailout for foreign banks (French and German mostly). The money just flowed through Greece.

Second, the countries of the Eurozone channelled money through the IMF to Greece, allowing it to be attached to conditions that could not be imposed by the EU.

Third, with the creation of the ESM, the governments created an instrument of common debt: the ESM may borrow money on international financial markets (up to €500 billion), guaranteed collectively by the European states.[48] These were, for most intents and purposes, Eurobonds in disguise.

These games of *passe-passe* entailed long-term consequences for the Greek state, such as:

1. Increases to VAT, impacting all Greeks but affecting those with lower incomes more significantly;
2. Cuts to the entire national pension system, to 'improve long-term sustainability';

3 Stripping unions and labour movements of their effectiveness by 'modernising' collective bargaining and industrial action, to align the Greek approach to labour with what is required by 'European best practices';
4 Privatising formerly public or government enterprises, resulting in the reduction of government pensions and benefits;
5 Selling off as many 'valuable Greek assets' as possible so as to 'monetise the assets through privatisation and other means';
6 Seemingly in response to the rise of an impermissibly leftist party like SYRIZA, the 'de-politicising [of] the Greek administration';
7 With regards to any rights to welfare or other benefits that were expanded prior to February 2015, 'amending legislations' that conflict with EU demands.[49]

These were either beyond EU competencies or against EU law. In the Troika format, the Commission and ECB, for instance, imposed limitations on the right to strike, which is not only excluded from EU legislation (Art. 153 TFEU), but is protected under the EU Fundamental Rights Charter, the ECHR and several UN Conventions.[50]

Conclusion

Legal scholars such as Andreas Fischer-Lescano have concluded that the EU institutions violated EU primary law as well as the Charter of Fundamental Rights, going both beyond the law (*ultra vires*) and against it (*contra legem*).[51] Only later, in its *Ledra* and *Mallis* rulings of September 2016, did the CJEU allow citizens (Cypriots, in this case) to challenge such measures before the courts, including itself.[52]

For both Greece and the EU competence creep performed during the crisis, this came, of course, too late. Greece exited its last bailout programme

in 2018. For almost a decade, the country had been only semi-sovereign, subject to Commission control beyond what it had conferred to the EU level through the European Treaties. With political support from several governments, including France and Germany, the Commission went around Treaty limitations and crept into the domain of social and tax policy, as well as budget oversight.

2.2 Void and creep: GMOs and glyphosate

The European Treaties give the Commission the possibility to take so-called implementing or delegated acts, sometimes referred to as 'tertiary EU law' (primary law being the treaties, secondary law being acts such as directives and regulations).

The *implementing* acts are devised in committees that unite EU and national civil servants, typically from the administrations concerned with the issue (eg, phytopharmaceuticals). Here, administrators from the EU and national levels work jointly ('comitology' in EU jargon).

The *delegated* acts are different in that they are solely the Commission's task. A piece of EU legislation can include a provision giving the Commission a delegated power to, so to speak, take care of the details.[53] Not legally, but de facto also part of tertiary law are Commission 'guidelines'. Neither implementing nor delegated acts – nor guidelines – are subject to the scrutiny of the European or the national parliaments.[54] They can therefore be a place where binding norms can be introduced without parliamentary oversight.

The Commission doesn't shy away from the opportunity. Between 2010 and 2020, the number of implementing acts taken each year has hovered around 1,600, but reached almost 2,100 in 2022. The number of delegated acts, where the Commission is solely responsible, went up from four (in 2010) to 197 (in 2022).

But this is only one side of the coin. The Council, too, increasingly resorts to this facility. Where the states want success in negotiations but have items on which no compromise can be found, they are tempted to kick the can down the road by leaving a void and introducing a provision that calls for implementing and/or delegated acts. The Commission is then expected to square the circle and find a 'technical' solution to an issue on which political compromise could not be reached.

Limited legislative scope, unlimited political effect

The Commission must use its implementing and delegated powers according to the piece of legislation at hand. That seems obvious, but there are counter-examples. For instance, the reform of the Common Agricultural Policy (CAP) after the Lisbon Treaty yielded a series of norms such as the Direct Payment and the Rural Development Regulations (2013).[55] With these, the Commission was in some instances empowered to take implementing as well as delegated acts.

And so it did, including on two highly controversial issues which were (and are) subject to hard-fought political and public debates: glyphosate and genetically modified organisms (GMOs). Glyphosate is an herbicide typically deployed so that fields yield more crops. It is, however, also classified as a carcinogen (cancer-causing agent) by, for example, the International Agency on the Research for Cancer.[56] GMOs, in turn, are modified crops that are more resistant to herbicides, but often sterile.

Decisions on GMOs and glyphosate are certainly pertaining to agriculture, but they are also issues of public health – and of food risk and dependency, especially when it concerns GMO crops that cannot produce fertile seeds: farmers are forced to buy new GMO seeds every year. Yet, in 2015–2016, the Commission decided on the authorisation of

GMOs in 16 instances and on glyphosate in a seventeenth instance, creeping into the role of an ersatz legislator 'due to a lack of clear majority among member states'[57] – the very indicator that these questions were politically *not* settled enough for legislation (secondary law), let alone for implementing acts (tertiary law).

Conclusion

The Commission adopted tertiary law outside of the supervision of national parliaments, introduced by the Lisbon Treaty precisely to avoid this, and took administrative decisions that due to their scope and impact should have been legislative and under scrutiny of the states.

The road for this competency creep was opened by the Council itself, which for the political purpose of being able to publicly speak of 'a successful compromise' left out substantive portions of the policy decisions it should have taken. It is also to note that once a policy has been left to either implementing or delegated acts, it takes considerable political and legislative energy to pull it back into the realm of normal legislation. The authorisation of glyphosate was taken by implementing act, and so was its prolongation (in 2023).[58]

2.3 Creep through 'add-ons': The DSA Guidelines

The Digital Services Act (DSA), together with the Digital Market Acts (DMA), forms the backbone of EU regulation of 'very large online platforms', VLOPs, and 'very large online search engines', VLOSEs. That is to say, 'Big Tech' – the likes of Alphabet (Google), Meta (Facebook), X/Twitter, and ByteDance (TikTok).

The DSA created the European Board for Digital Services (EBDS) – an 'independent advisory group' that is 'composed of the Member States'

Digital Services Coordinators and chaired by the European Commission'.[59] The coordinators bestow the 'trusted flagger' status upon entities within their respective states.[60] Trusted flaggers have privileged access to large platforms insofar as if they report something as disinformation or hate speech, it has to be treated with priority over other flaggings (and probably is more likely to be accepted by the platforms).

The 'independent advisory group' also may establish implementing acts and 'encourage' the creation of voluntary codes of conduct.

The DSA leaves an important number of items to the Commission, such as:

- implementing acts: content moderation transparency reports (Art. 15.3), monitoring and inspection of VLOPs and VLOSEs (Art. 83a), information sharing system (Art. 83.3);
- delegated acts: manage who's on the list of VLOPs and VLOSEs (Art. 33-2), the methodology for deciding whether a platform or search engine falls under the DSA's scope (Art. 24 and 33), and rules for audit (Art. 37.7), noting that 'delegated acts shall take into account any voluntary auditing standards', both European and international;
- guidelines: trusted flaggers reporting standards (Art. 22.8), security of minors (Art. 28.4), risk-mitigation measures (Art. 35.3).[61]

From voluntary to binding without proper authorisation

In October 2023, the Commission took a delegated act on audits.[62] In February 2025, it adopted the voluntary code of conduct on disinformation, originally established in 2018 by a Commission Communication,[63] into the DSA. Neither in 2023 nor 2025 were the European or national parliaments or the governments part of the decision-making process.

That is quite fascinating in light of its ramifications. Including the 'voluntary' code of conduct into the DSA subjugates it to the controls set out in the Commission's delegated act on auditing. In the same vein of creative linguistics, the code itself starts with a disclaimer that '[t]his document should not be considered as representative of the European Commission's official position'.[64] It then goes on to read:

> *The compliance of providers of VLOPs and VLOSEs with the commitments undertaken pursuant to the Code shall be assessed through an annual independent audit* (*Article 37 DSA*). *Among the commitments are the demonetisation of disinformation, the labelling of political advertising,* [*and*] *the commitment to ensure the integrity of services by fighting manipulation,* [...] *A Permanent Task-force* [*sic*] *is established, in which the signatories will participate. This 'multistakeholder forum', chaired by the Commission, shall strengthen cooperation between its members and contribute to the effectiveness and development of the Code. The Task-force will establish a 'Rapid Response System' (RRS) to be usedin special situations such as elections or crises* [...].[65]

The Commission's 'add-ons' to the DSA, the code of conducts on 'hate speech' and on 'disinformation', were not just technical in nature, but effectively amounted to ersatz legislation through administrative decisions. This criticism was also levelled by national parliaments – eg, the French Senate, which denounced this as *dérive normative* (meaning roughly, 'regulation that has got out of hand').[66] Furthermore, 'hate speech' and 'disinformation' are either insufficiently or inconsistently defined across EU law, opening additional doors for competence creep using malleable concepts to justify EU measures. It also contradicts a fundamental requirement to the rule of law, which is a clear definition of facts, actions and their legal consequences.

The Rapid Response Mechanism (Art. 36 DSA) is particularly worrying.[67] This provision gives the Commission the prerogative to 'unilaterally declare an EU-wide state of emergency', which is only tempered by the Council's addition of the formulation that such a declaration only allows for 'actions required [...] [being] strictly necessary, justified and proportionate' (Art. 36, point 3a) – all very flexible terms.

Conclusion

Notions like necessity, justification and proportionality are connected to limiting principles that the CJEU has already hollowed out. It can be expected that the Commission will clash with the nations on this emergency power rather sooner than later. Beyond this principled point, two further observations should be added.

First, when trying to assess the Commission's claim to be well-placed for establishing or validating 'good' codes, one should keep in mind, for example, the reprimand that the European Data Protection Supervisor issued against the Commission in 2024 for having 'unlawfully processed personal data, including sensitive information about users' political views and religious beliefs' for a campaign it had run in 2023 (to support its push for chat control).[68]

Second, the impact of the flagging system has creep potential in its own right: if an online post is deemed disinformation, harmful or hate speech in one EU country, it becomes illegal throughout the EU. Having different cultures, state A might consider harmful what state B does not; in turn, state B might consider harmful what state C does not, and so on. In this respect, the DSA is highly likely to create a vicious cycle, thus opening a race to the bottom regarding free speech.

2.4 Leverage and creep: human rights law

The EU started out as an economic cooperation, and early rights such as non-discrimination based on nationality flowed from the logic of the free movement of workers, not fundamental rights.[69] The CJEU began to shift this with *Stauder* (November 1969)[70] and *Nolde* (1974):[71] the Court declared that it would be bound by – and thus enforce – the protection standards of the states' constitutional traditions as well as the international obligations they had accepted (such as the UN Charter and ECHR).[72]

The CJEU considered the EU to be bound by fundamental rights common to the states' constitutions, but precluded supranational legislation in this domain into the 1990s.[73] The shift came with the 2001 Charter of Fundamental Rights (CFR), created as a non-binding document, but made binding at the 2007 Lisbon summit. And the ECHR also continues to exist.

As a result, human or fundamental rights can be brought before both the CJEU (on CFR) and the ECtHR (on ECHR) – allowing citizens, but also activist groups and political lobbies, to perform a 'pincer movement' on European states (but not on the Commission, as the EU is not itself party to the ECHR).[74] Such actors can leverage both jurisdictions against organisations or governments, and both have a track record of expansive interpretations, with the ECtHR known for considerable interrelations with 'progressive' NGOs even at the personnel level.[75]

The ECHR is not EU law, and the ECtHR is no EU institution. Still, they impact EU law in several ways.

Firstly, while EU law itself cannot by adjudicated by the ECtHR, the *implementation* of such law in the states can be (though the court is generally cautious with this).[76]

Second, EU states like France and Austria have given the ECHR quasi-constitutional rank.[77]

Third, national courts do apply both legal bodies together – for instance, Art. 47 CFR in conjunction with Art. 6 ECHR on fair trial.[78]

Fourth, ECHR provisions and ECtHR decisions can be 'adopted' into the *acquis communautaire* by EU legislation: the EU Return Directive, for instance, stipulates that the ECHR shall be applied if its rules are more favourable to a non-EU individual than the Directive itself.[79]

Fifth, they can also be adopted into the *acquis jurisprudentiel*[80] by the CJEU. In *Aranyosi* (April 2016)[81], for instance, the CJEU derived 'positive obligations' by combining CFR and ECHR provisions and disapplied a European arrest warrant due to prison conditions the persecuted individual would allegedly face if extradited.

Additionally, the CJEU relies on ECtHR interpretations of human rights when broadening the CFR in its own jurisprudence, with *Hungary* (*Transparency of associations*) (June 2020)[82] and *Poland* (*Régime disciplinaire des juges*) (July 2021) being two cases in point.[83] Here, the CJEU leveraged ECtHR case law via Art. 52 CFR into EU law, thus expanding it and in this case, invalidating a Hungarian transparency law on foreign funding for NGOs.

Conversely, states might be condemned by the ECtHR even when applying EU legislation and CJEU case law. One example is the ECtHR's *M.S.S.* ruling regarding a migrant in Belgium who, according to the EU Dublin regulation, should have been sent to Greece (the first point of entry into EU territory). This was denied by the ECtHR: it ruled that in light of detainment conditions in Greece, this would violate Art. 3 ECHR. Belgium could now either comply with EU law or the ECtHR ruling – this is one example of the politically and legally untenable situation mentioned at the very beginning of this report.

Conclusion

Nearly 15 years ago, Dutheil de la Rochère wrote that the CFR had to be

> *understood in the light of* [*CJEU*] *case law, and that means that the Charter might apply to Member States when they are acting within the scope of Union law. But even that remains unclear and uncertain because the boundaries of EU law depend on an evolution of the case law of the Court, which no one can anticipate.* [...] *The problem* [...] [*comes*] *from the uncertainty of the scope of EU law which still remains under the Lisbon Treaty.*[84]

A series of 'rebellions of the constitutional courts'[85] and one Brexit later, we can observe how the backstops the states wanted to establish in the early 2000s have failed. The (rather pious) wish of the states to limit competence creep – Art. 6.1 TEU states that 'the provision of the Charter [CFR] shall not extend in any way the competence of the Union as defined in the Treaties' – has not materialised. Conversely,

> *the instrumentalization of Article 52(3)* [*CFR*] *and the inconsistent use of ECtHR rulings fuel legal uncertainty. A direct clash* [*between CJEU and ECtHR*] *remains possible, particularly in cases where the ECtHR considers certain rights absolute, while EU law allows exceptions, such as in terrorism-related expulsion cases.*[86]

Governments are faced with a judicial 'stereo' creep not just regarding these two courts' rulings on their respective domains, but in the form of 'cross-rulings' that occur when the ECtHR judges the national implementation of EU law or when the CJEU leverages ECtHR case law into the EU's legal order.

2.5 Cloaking the creep: recovery and resilience funds

Conditionality as such is nothing new in EU law, at least in the external dimension: the democratic transformation of formerly socialist countries –

the 'Copenhagen criteria' – as a condition for EU accession showcased this very well. In contrast, the conditionality we will look at here is of a different kind.

It evolved in three steps. The first was the conditionality (with IMF participation) applied to Greece (see section 2.1), which led to a normalisation of EU-internal conditionality (without the IMF).[87] Case in point, the 2013 reform of the Multiannual Financial Frameworks broadened conditionality a lot to apply it to various policy goals – an approach that some have qualified as opening 'Pandora's toolbox'.[88]

The second step came with the post-Covid 'Next Generation EU' package and Regulation 2020/2092. While the 'traditional' conditionality of Art. 7 TEU has been around for decades, as have the infringement procedures of Art. 258–260 TFEU, the 'spending conditionality' introduced by this Regulation is different.

From strict budgetary to broad rule-of-law issues

To start with, it is not in the Treaties, but a product of EU legislation (secondary law). After its adoption, the Commission devised guidelines regarding its application (tertiary law).[89] The Regulation in question should have been devised to protect the EU budget, but from the start, the Commission saw it as a new tool to 'protect the values' of Art. 2 TEU. Even the title of the Commission's draft spoke of addressing 'generalised deficiencies as regards the rule of law' – not exactly a budgetary term.

As the Council's legal service pointed out, this proposal amounted to a poorly cloaked competence creep.[90] The Commission wanted to get around the unanimity needed for Art. 7 TEU by creating a parallel mechanism (based on Art. 322 TFEU) that could be activated without it. The Commission's proposed threshold for triggering the mechanism was 'a generalised deficiency as regards the rule of law in a Member State [that]

affects or risks affecting the principle of sound financial management or the protection of the financial interests of the Union' (Art. 3 of the draft), a very broad wording.

And the Commission went further: it wanted to introduce a 'reversed qualified majority', meaning that its decision regarding measures against a state would not be subject to Council adoption, but only absence of veto.[91] The Council struck this draft provision down, but not Art. 3's broad wording on conditionality – only adding a requirement of 'sufficiently direct impact' on EU financial interests – which did become EU law (now Art. 4 of the Regulation).[92]

Conditionality as a weapon

The third step of conditionality evolution followed with Regulation 2021/241 on post-Covid 'Recovery and Resilience'. It established procedures through which the states devise recovery and resilience plans, submit them to the Commission, and receive funds accordingly. The essential point here is that the Commission can introduce hurdles at its own discretion. The Regulation stipulates that

> *the Commission is responsible for assessing the national recovery and resilience plans, the approval of which is the precondition for the release of the funds. In doing so, the Commission, amongst others, also checks whether the RRPs contribute to 'effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations'.*[93]

The 'country-specific recommendations' (CSRs) are a tool introduced during the Greek debt crisis to coordinate economic policies among the states. These recommendations are established by the Commission and then adopted by the Council, with or without changes. Once they are, the Commission has considerable latitude to decide if a government properly implements them.

Consequently, it has a considerable margin regarding the conditioning of the release of recovery and resilience funds: the CSRs are often so general and vast[94] that theoretically any state can be at fault at any time, if the Commission wants it to be. It also can 'trap' governments in administrative back-and-forth games on their national recovery and resilience plans and delay the release of RRF funds this way. This enables the Commission to use administrative processes to pursue political aims.

Conclusion

The evolution of conditionality from a tool for external relations to internal governance has changed the nature of the EU. The use of budgetary oversight to enforce something different than financial compliance was manifestly the Commission's aim from the start when it drafted Regulation 2020/2092.

When challenged before the CJEU,[95] the Court resorted to the argument that the EU could 'not be criticised for implementing, *in defence of its identity*, which includes the values contained in Article 2 TEU, the means necessary to protect' the EU's budget and financial interests (emphasis added).[96] So, the Court brought in an 'EU identity' against the identities of states that constitute it[97] – which has ramifications way beyond the issue of spending.

Future CJEU rulings are almost certain to produce more 'face-offs' on the principle of constitutional identity, with destabilising potential for the EU as a whole.[98] Regarding the risk for political (mis)use of financial conditionality, former Commission president Jean-Claude Juncker was perhaps more prophetic than he himself thought when he stated that it would be 'poison for the continent'.[99] And there is a manifest risk that the CJEU and Commission fall into a 'defence of values that destroys the very values [they] aim to protect'.[100]

Conclusions

Competence creep contributes to the decline of EU acceptance. Compare, for instance, the referenda results. The 1986 Single European Act was opposed by the Danish government and the Irish supreme court, but accepted by popular vote in both countries. The 2004 Constitutional Treaty, however, was rejected by referenda in France and the Netherlands, and the British referendum of 2016 rejected the EU altogether.

As for the Council, especially at the level of heads of state and government (European Council), it has discovered that words are never gratuitous – see the consequences of Stuttgart 1983 and Nice 2001 (fundamental rights). The stopgaps introduced by the governments in treaty updates from Maastricht to Lisbon prove entirely insufficient given the willingness of successive Commissions to go around them, and the CJEU's rulings on conferral, proportionality and constitutional identity have almost completely neutralised these principles. Moreover, the CJEU now also increasingly leverages the 'principle of solidarity' in the same vein.[101]

The outcome is that instead of balancing the EU's principles, the CJEU constantly moves in a direction that places the 'widening' and centralising doctrines of implied powers, EU law supremacy and single-market efficiency over the limiting principles of conferral, subsidiarity and national identity. That is to say, it places technical functionality above political legitimacy.[102]

The competence creep described here runs deep. It faces growing backlash, from the 'rebellion of constitutional courts' against the CJEU[103] to the steady rise of not just EU-reformist, but outright EU-sceptic or pro-exit forces in national and EP elections. The problem with this creep

is not only its contents, which citizens and governments may be opposed to or in favour of, but the fact that citizens and governments are circumvented. The Commission's behaviour and the CJEU's 'centralist bias in judicial review'[104] might extend the EU's legal remit, but they damage its legitimacy – particularly under democratic and rule of law considerations. This is a dead end. Brexit should have been a more than clear signpost for this.[105]

Recommendations

The European project needs to undergo a profound overhaul. This includes strengthening the rails, accountability and transparency of the European Commission, strengthening the European Council, and revisiting the role of the CJEU to stop it from acting as an ersatz legislator (impacting secondary EU law) or even ersatz treaty party (impacting primary EU law). The EU needs to move away from its '(anti-)constitutional dimension' of integration.[106] Intermediate steps in this direction include:

Council

- To start with, the Council needs to cease to 'kick the can down the road' in the form of using delegated acts (Commission responsibility) as an alternative to finding a politically viable compromise itself (Council responsibility).
- The Council should establish a protocol (there already are several) on the way the CJEU has to interpret the TEU/TFEU, clarifying the hierarchy of EU principles and placing the principle of conferral first. While this might seem like stating the obvious, it would address more explicitly than the Treaties currently do the obligation of the Court to give primary consideration to this principle.
- Also, in the form of a protocol to the TEU/TFEU, the notion of 'ever-closer union' should be excluded from any *legal* applicability. That does not hinder the Council from moving ever closer on the areas that it wants to and has the democratic support for, and it simultaneously would remedy at least one aspect of judicial competence creep.

CJEU

- Rulings that impact EU primary law should be conditioned: such rulings need to be approved by the Council as the *collegium* that has popular and parliamentary support of Europeans, if at least two states consider this impact to be too significant to be left to the supranational judiciary (alone). If reviewed negatively, the Council would automatically have the obligation to either squarely place the issue at the national level (subsidiarity) or otherwise initiate EU legislation to address the issue that arose from primary law provisions affected by a CJEU ruling.
- This includes Art. 2 TEU (values) interpretation, which should be the remit of the Council alone, as the logic of Art. 7 TEU (conditionality requiring unanimity) supports.

Commission

- Implementing and Delegated Acts drafted by the Commission need to be submitted to the Council for approval before they can become effective.
- The Council often mandates the Commission to legislate on a matter without specifying which legal basis the Commission should do this on. This can, however, have significant impact, including on potential future competence creep. Thus, Council mandates to the EC should always fix the appropriate legal basis, to which the Commission would be bound when establishing its legislative proposal.

These are intermediate steps. But eventually, the EU needs much more profound reform and should become

> *a state system with less centralised and less hierarchical institutions and more space for democratic national self-determination. The European Commission would be something like a platform for technical support*

> *of projects of international cooperation, jointly chosen and voluntarily agreed between member states in different configurations. For this, the Commission would have to give up its aspiration to grow into a pan-European supranational executive; the same, mutatis mutandis, would apply to the EU Parliament, if it was needed at all. Also significantly reduced would be the role of the European Court of Justice: it would cease to be a constitutional legislator in disguise, in charge effectively of everything it* (*or its integrationist clientele*) *chooses for it to be in charge of, with the power to intervene almost at will in national states, national law, and national politics.*[107]

Aiming to overcome today's impossible normative jungle, this report adds the suggestion to reboot the *acquis communautaire* and *acquis jurisprudentiel* in a similar fashion to the refounding undertaken with the French *Code Napoléon* in 1804 or the German Civil Code (*Bürgerliches Gesetzbuch*) in 1900. Yes, the task is daunting. But it has become necessary.

End notes

1 Sacha Garben, 'Competence Creep Revisited', *Journal of Common Market Studies*, Volume 57, September 2017, p.1–18, p.1 doi.org

2 The court established with the EEC Treaty has been referred to as the European Court of Justice (ECJ) throughout the decades; since 1992, it is officially called the Court of Justice of the European Union (CJEU), but the old abbreviation and name have stuck. For the sake of readability, this report will use the 'CJEU' designation throughout. For the same reason, 'CJEU' will encompass also its 'General Court' sitting and will always refer to 'decisions' for all types of decisions, except opinions.

3 Case 376/98. The CJEU decided that the EU had overstepped its bounds for legislating, annulling for the first time ever an EU Directive (Directive 98/43 in this case). The CJEU has revised its position since, namely with the *Vodafone* judgement of 2005. See Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after *Tobacco Advertising*, *German Law Journal*, Volume 12, March 2011, p.827–864 doi.org

4 Case 36/02. The CJEU approved of limitations to the free movement of services and goods if these are imposed following considerations of national fundamental values and public policy. However, here too, the CJEU revised its standing, in particular with the 'Baby Sara' case in 2021 (case 490/20): the Court ruled that Bulgaria has to recognise parenthood to a girl by a lesbian couple, although same-sex parenting is unconstitutional in Bulgaria.

5 Cases 362/14 (ruled in October 2015) and 311/18 (July 2020). In these rulings, the CJEU invalidated agreements between the EU and the US and Canada on the transfer of private data outside of the EU. For some background, see, for example, the 'At a Glance' notes of the EPRS on these two rulings: 'The CJEU's *Schrems* ruling on the Safe Harbour Decision', October 2015 europarl.europa.eu and 'The CJEU judgment in the *Schrems II* case' September 2020 europarl.europa.eu
A *Schrems III* case is currently on its way. The CJEU decision of 3 September 2025 (*Latombe*, case 553/23) on the US-EU framework for data transfer suggests that the CJEU's decision will perhaps be different from the *Schrems* and *Schrems II* rulings.

6 The ECSC also had a Consultative Committee with representatives from labour, capital and trade, which evolved into today's European Economic and Social Committee.

7 The original treaties were not in English (no English speaking country was present), but there is an official translation: 'Treaty establishing the European Economic Community (Rome, 25 March 1957)', CVCE cvce.eu

8 Luigi Corrias, *The Passivity of Law. Competence and Constitution in the European Court of Justice* (Dodrecht/ Heidelberg/ London/ New York: Springer, 2011), p.2.

9 Case 8/55.

10 Case 26/62.

11 Case 6/64.

12 EPRS Briefing PE 762.361, '*Costa v Enel* judgement: 60 years on'; europarl.europa.eu

13 For a discussion of the *sui generis* character, see eg, Fernando Lusa Bordin, Andreas Müller, Francisco Pascual-Vives (eds.), *The European Union and Customary International Law* (Cambridge: Cambridge University Press, 2022), especially p.1–64 doi.org

14 When searching the EUR-Lex database and limiting the results to the treaties, 'consolidated documents', 'EU legal acts' and case law, it shows over 398,000 results. Almost all of these are not one norm, but contain many norms, so the number multiplies considerably (the TFEU, for instance, contains over 300 articles). And all of this still does not include the norms that are found in EFTA documents or international agreements of the EU, such as the free-trade agreement with Canada (CETA), which has over 1,000 pages.

15 Case 11/70.

16 Case 120/78.

17 Case 294/83.

18 In doing so, the CJEU extended the reasoning of its 1970 *Handelsgesellschaft* ruling, in which it had stated that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice' and that this 'must be ensured within the framework of the [EEC]'.

19 See 'Judgment of the Court of Justice, *Les Verts*, Case 294/83 (23 April 1986)' cvce.eu

20 All stated in the preamble: 'Solemn Declaration on European Union (Stuttgart, 19 June 1983)' cvce.eu

21 For a short historical overview, see eg, 'EU budget in the past', European Commission commission.europa.eu

22 Barbara Brandtner, 'The "Drama" of the EEA. Comments on Opinions 1/91 and 1/92', *European Journal of International Law*, Volume 3, August 1992, p.300–329, here p.308 doi.org

23 Ibid., p.300.

24 Kristóf Lehman, Dániel Palotai, 'Maastricht Criteria: 20th Century rules in the 21st

Century', *Növekedés*, 3 December 2019 novekedes.hu

25 Paolo Cecchini, 'The European Challenge 1992', 1988. A summary is available here: penguincompaniontoeu.com

26 Enrico Letta, 'Much More than a Market', 2024 consilium.europa.eu; and Mario Draghi, 'The Future of European Competitiveness', 2024 commission.europa.eu

27 Article F(2): 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.' See eg, europarl.europa.eu

28 On the ECtHR's interpretation of Art. 3 ECHR, see in particular Marc Bossuyt, 'The Court of Strasbourg Acting as an Asylum Court', *European Constitutional Law Review*, Volume 8, June 2012, p.203–245 doi.org. See also the general assessment of ECtHR migration rulings produced by the European Centre for Law and Justice, 'Condemned for Protecting its Borders', 15 July 2025 eclj.org

29 See the open letter of May 2025 to the ECtHR echr-cpt.com

30 Cyprus, Czechia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia.

31 Czechia, Poland, and the UK opted out of the CFR, and Ireland and the UK retained the right to future opt ins or outs of all and any policy within the 'justice and home affairs' pillar.

32 Art. 3b of the Lisbon Treaty reads: '(1) The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. (2) Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. (3) Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...]. (4) Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

33 Case 2 BvR 2134/92, ruled upon on 12 October 1993.

34 Case 233/94 and cases 154/04 and 155/04.

35 Case 176/03.

36 See Luigi Corrias, op. cit., p.8.

37 Case 58/08.

38 Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism', *American Journal of Comparative Law*, Volume 38, Spring 1990 doi.org

39 See eg, 'Deficits and Defiance', *The Economist*, 2 September 2003 economist.com

40 'How 'magic' made Greek debt disappear before it joined the euro', BBC News, 3 February 2012 bbc.com

41 A good timeline of the Greek sovereign debt crisis is provided by Pierre-Olivier Gourinchas, Thomas Philippon, Dimitri Vayanos, 'The Analytics of the Greek Crisis', *NBER Macroeconomics Annual*, Volume 31, 2017 journals.uchicago.edu

42 French banks held 25% of Greek government debt, German banks 14%. See econcrises.org

43 The treaty is available here: esm.europa.eu

44 Eurostat numbers, cited in Jane Lethbridge, 'Effects of austerity on Greece: Financing of government debt and Troika intervention', Public Services International Research Unit (PSIRU), 24 October 2013 psi-can-greece.org

45 'Statement by the Euro Area Heads of State or Government', European Council, 9 December 2011 consilium.europa.eu

46 ECB Bulletin of March 2012, p.102 ecb.europa.eu

47 As it would go beyond this report's scope, the complex questions related to the buying-up of state debt by the ECB – which the European Treaties forbid it to do – will be discarded here.

48 On the ESM borrowing capacity and the ESM instruments, see 'What is the ESM's lending capacity?', European Stability Mechanism esm.europa.eu and 'ESM Borrowing Guidelines', 1 December 2016 esm.europa.eu

49 Yannis Tsesmelis, 'The Disassembly of the Greek Welfare State under the Troika', *Athens Journal of Law*, Volume 7, April 2021, p.211–232, here p. 228 athensjournals.gr

50 Protected by the ECHR, the Charter of Fundamental Rights (which binds the EU institutions), and UN bodies such as the International Labour Organisation (ILO).

51 Andreas Fischer-Lescano, *Human Rights in Times of Austerity Policy* (Baden-Baden: Nomos 2014), p.60 uni-bremen.de

52 Cases 8/15 and 10/15, decided jointly upon.

53 Based on Art. 290, 291 TFEU. The aim of both is to 'create uniform conditions for the implementation of the legislative act in question, if

and when this is necessary'. See 'Implementing acts', EU-Lex eur-lex.europa.eu

54 The 'regulatory procedures with scrutiny', which can to some extent be considered the precursors to the implementing and delegated acts post-Lisbon, is not considered in this report. For this, see eg, 'New alignment of regulatory procedure with scrutiny (RPS) measures - 2016/0400B(COD)', Legislative Train Schedule, European Parliament europarl.europa.eu

55 A good overview of the legislation and the changes it entailed was provided by the Council: 'Common agricultural policy: the reform is approved by the Council', Council of the European Union, 16 December 2013 consilium.europa.eu

56 The IARC is an agency of the World Health Organisation. On the scientific discussion around glyphosate and its effects, see, eg, 'IARC Monograph on Glyphosate', IARC, 19 July 2018 iarc.who.int

57 Cécile Robert, *The Political Use of Expertise in EU Decision-Making: The Case of Comitology*, Report for the Greens/EFA Group, May 2019, p.21 greens-efa.eu

58 Resulting in 'Implementing Regulation 2023/2660', which renewed the approval of glyphosate eur-lex.europa.eu

59 'European Board for Digital Services', European Commission digital-strategy.ec.europa.eu

60 Who the respective coordinator is, is decided at the national level. In Croatia, it is the Network Industries Authority (HAKOM); in Czechia, it is the Telecommunication Office; in Luxemburg, it is the Competition Authority; and in the Netherlands, it is the Authority for Consumers and Markets. See 'Digital Services Coordinators', European Commission digital-strategy.ec.europa.eu

61 For the full list, see Julian Jaursch, 'Overview of DSA delegated acts, reports and codes of conduct', Interface, 12 September 2022 interface-eu.org

62 Delegated Regulation 2024/436 eur-lex.europa.eu

63 To be found here: 'Code of Practice on Disinformation', European Commission digital-strategy.ec.europa.eu

64 Read the LEGAL NOTICE on p.2, 'Code of Conduct on Misinformation', European Union, 2025 ec.europa.eu

65 'Commission and EBDS endorse the integration of the Code of Practice on Disinformation into the DSA', IRIS 2025–2:1/3, European Audiovisual Observatory merlin.obs.coe.int

66 French Senate Report n° 190 (2024–2025), '*Dérive normative* de l'Union européenne' senat.fr

67 It was hastily added in the last phase of legislation, which happened to take place in March 2022 – right after the invasion of Ukraine by Russia.

68 See 'European data watchdog finds EU Commission illegally targeted political ads on X', *PPC Land*, 13 December 2024 ppc.land

69 See eg, Jacqueline Dutheil de la Rochère, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty', *Common Market Law Review*, Volume 41, April 2004, p.346–347 doi.org

70 Case 29/69.

71 Case 4/73. See Jacqueline Dutheil de la Rochère, 'Challenges for the Protection of Fundamental Rights in the EU at the Time of Entry into Force of the Lisbon Treaty', *Fordham International Law Journal*, Volume 33, 2011, p.1776–1799 ir.lawnet.fordham.edu

72 See ibid.

73 CJEU opinion 2/94.

74 Clarified e.g. through the ECtHR's CFDT ruling on 3 February 1978.

75 See in particular the European Centre for Law and Justice's study of 2020, 'NGOs and the Judges of the ECHR, 2009 – 2019' blog.fdik.org

76 A relatively recent example where the ECtHR did indeed rule on the national implementation of EU law is the 2018 case of *Pirozzi v Belgium*. On the ECtHR's Bosphorus decision of 2005 and the 'Bosphorus presumption' it established, see eg, Sejla Imamovic, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine', *Utrecht Journal of International and European Law*, Volume 39, May 2024 utrechtjournal.org

77 See Giuseppe Martinico, 'Two Worlds (Still) Apart? ECHR and EU Law Before National Judges', in Vasiliki Kosta, Nikos Skoutaris, Vasilis Tzevelekos (eds.), *The EU Accession to the ECHR*, p.141–158.

78 See the comparative overview provided by Angela Schwerdtfeger, 'The Application of Article 47 of the Charter of Fundamental Rights by German Courts', in Matteo Bonelli, Mariolina Eliantonio, Giulia Gentile (eds.), *Article 47 of the EU Charter and Effective Judicial Protection, vol. 2: The National Courts' Perspectives* (Oxford/ London/ New York/ New Delhi/ Sydney, Hart, 2023), p.71–88.

79 Directive 2008/115/EC, Art. 4, which uses the malleable formulation of 'Community acquis relating to immigration and asylum'.

80 See Luigi Corrias, op.cit., p.X, who also

points towards the risk of the two types of acquis diverging from each other.

81 Joint cases 404/15 and 659/15.

82 Case 78/18.

83 Case 791/19.

84 Jacqueline Dutheil de la Rochère, art. cit., p.1785.

85 Csóngor István Nagy, 'The Rebellion of Constitutional Courts and the Normative Character of European Union Law', *International & Comparative Law Quarterly*, Volume 73, January 2024, p.65–101 doi.org

86 Guillermo Arranz Sanchéz,, 'A Tale of Two Courts: The Relationship Between the Court of Justice of the European Union and the European Court of Human Rights', European Student Think Tank, 19 March 2025 esthinktank.com

87 For a discussion of the Greek sovereign debt crisis in the light of conditionality, see in particular Sacha Garben (2017): 'The Constitutional (Im)Balance between "the Market" and "the Social" in the European Union', *European Constitutional Law Review*, Volume 13, March 2017, p.23–61 doi.org

88 Roland Bieber, Francesco Maiani, 'Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?', *Common Market Law Review*, Volume 51, August 2014, p.1057–1092 europeansources.info

89 Communication C (2022)1382 of 2 March 2022.

90 Council Legal Service Opinion 13593/18 data.consilium.europa.eu

91 'Article 5 of the proposal sets out the procedural framework for the adoption of the measures by means of an implementing act of the Council on the basis of a Commission proposal. [...] The decision is deemed to be adopted unless the Council decides, by qualified majority, to reject the Commission's proposal within one month ("reversed qualified majority").' Ibid., p.3.

92 For the evolution of the text from proposal to final regulation, see Antonia Baraggia, Matteo Bonelli, 'Linking Money to Values', *German Law Journal*, Volume 23, March 2022, p.133–141 doi.org

93 Thu Nguyen, 'How Much Money is a Lot of Money?', *Verfassungsblog*, 17 September 2021 verfassungsblog.de

94 Readers can get an impression of the breadth covered by recommendations – from tax to health to fiscal to employment policies – from the CSR database: ec.europa.eu

95 Cases 156/21 and 157/21, brought against the Commission by Hungary and Poland.

96 See Marco Fisicaro, 'Protection of the Rule of Law and "Competence Creep" via the Budget: The Court of Justice on the Legality of the Conditionality Regulation', *European Constitutional Law Review*, Volume 18, June 2022, p.334–356, here p.347 doi.org

97 Tímea Drinóczi, Pietro Faraguna, 'The Constitutional Identity of the EU as a Counterbalance for Unconstitutional Constitutional Identities of the Member States', *European Yearbook of Constitutional Law*, p.57–87 springer.com

98 For a (mild) outlook, see eg, Vilija Vėlyvytė, *Judicial Authority in EU Internal Market Law* (Oxford/ London/ New York/ New Delhi/ Sydney, Hart, 2024), esp. p.217–231 on the margin of appreciation and a wider interpretation of Art. 4 TEU which protects national identities.

99 Florian Eder, 'Juncker: German Plan to Link Funds and Rules Would be "Poison"', *Politico*,1 June 2017 politico.eu

100 Armin von Bogdandy, 'Principles and Challenges of a European Doctrine of Systemic Deficiencies', *MPIL Research Paper Series* n° 2019–14, p.1 mpil.de

101 See in particular Sacha Garben, 'The (slow) redress of the "solidarity deficit" in the EU and the emerging principle of solidarity in EU law', *Maastricht Journal of European and Comparative Law*, volume 31, issue 6, February 2025 journals.sagepub.com

102 For a deeper development of this point and the impact of the EU's evolution on democratic legitimacy, state functionality and the ideological hold over EU institutions detrimental to the EU itself, see Rodrigo Ballester et al, 'The Great Reset: Restoring Member State Sovereignty in the European Union', Mathias Corvinus Collegium and Ordo Iuris Institute, 2025 europeanstudies.mcc.hu

103 See Csóngo István Nagy, art. cit..

104 See the analysis by Vilija Vėlyvytė, 'Competence Creep in EU Free Movement Case Law', *European Law Review*, Volume 48, December 2023, p.636–661.

105 Vaughne Miller, '"Ever Closer Union" in the EU Treaties and Court of Justice case law', House of Commons Library, briefing paper number 07230, 16 November 2015 researchbriefings.files.parliament.uk

106 Christian Kreuder-Sonnen, 'Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance', *Journal for Common Market Studies*, Volume 54, November 2016, p.1350–1366 doi.org

107 Wolfgang Streeck (2024), *Taking Back Control*, p.202.

About the author

Dr. Philipp Siegert

Deputy research director, MCC Brussels

Dr. Philipp Siegert studied European history and political science/ International Relations in Germany, Romania, Hungary and France. He started his career as a postdoctoral researcher and assistant teacher at Sorbonne Nouvelle University, later headed the Hanns Seidel Foundation's office in France and then joined MCC Brussels in late 2023 as its deputy research director.

About MCC Brussels

At a time of unprecedented political polarisation, MCC Brussels is committed to providing a home for genuine policy deliberation and an in-depth exploration of the issues of our time.

MCC Brussels is committed to asking the hard questions and working with people of goodwill from all persuasions to find solutions to our most pressing problems. An initiative of MCC (Mathias Corvinus Collegium), the leading Hungarian educational forum, MCC Brussels was founded in the autumn of 2022 to make a case for celebrating true diversity of thought, diversity of views, and the diversity of European cultures and their values.

MCC BRUSSELS
MATHIAS CORVINUS COLLEGIUM

The European Union is fracturing under the strain of repeated attempts to centralise power. This damning report reveals how unelected supranational institutions systematically push continuous integration and centralisation, circumventing treaty limitations, eroding public legitimacy, and moving beyond democracy.

This is the reality of competence creep: the calculated process by which the European Court of Justice (CJEU) and the European Commission seize power – egislating in areas where competence was never conferred, bypassing national parliaments, and imposing policies that are legally and politically untenable. The CJEU, displaying a long track record of centralisation bias, has neutralized fundamental limiting principles like conferral, subsidiarity, and proportionality.

From the draconian austerity measures imposed during the Greek Debt Crisis to weaponizing financial conditionality to enforce 'values', this insidious expansion places technical functionality above political legitimacy.

The consequence? A decline in EU acceptance and functionality. The path is clear: without a profound overhaul to fundamentally curtail the supranational institutions' reach, the only alternatives are further national 'exits' or an overall unravelling of the EU.

MCCBrussels
@MCC_Brussels
@mccbrussels
brussels.mcc.hu