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# Is the EU a Non-Compliance Community?

## Towards “compliance for credibility” and EU action for the protection of democracy in Europe

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## **Is the EU a Non-Compliance Community? Towards “compliance for credibility” and EU action for the protection of democracy in Europe**

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# Is the EU a Non-Compliance Community?<sup>1</sup>

## Towards “compliance for credibility” and EU action for the protection of democracy in Europe

### Abstract

Non-compliance with EU policies is multiform and has recently happened at an increasing number of different levels, with increasing frequency on at least some of them; often, with great visibility to a broad audience and in fields of very direct relevance for both voters and politicians. All of this has contributed to the politicization of the EU's compliance problem, which was unknown in earlier phases of the integration process. This paper analyses the various forms of the EU's compliance problem and outlines why we should bother with this issue: In a situation of increasingly centrifugal forces and great instability, a growing perception that the EU might be a “non-compliance community” could indeed be disastrous. The conclusion is that it is not “all-over compliance” but rather “credibility” which is indeed crucial, but both are intertwined. If the EU wants to safeguard its reputation, then the commitments it makes must be seen to be real, and urgent action is imperative.

Bold policy recommendations are made in the final section. Both rule-oriented prescriptions based on sanctions and value-oriented measures connected to relevant beliefs can be usefully employed. Some suggestions may seem outrageous in light of the longstanding ideas of democracy and the rule-of-law being located first and foremost in “sovereign nation states.” However, this may no longer be sufficient as national politics are ever more prone to instability and populism. The great potentials of the EU for collaboration and discourse should be turned into a resource to uphold and strengthen the rule-of-law in Europe.

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<sup>1</sup> A very much shorter and in parts different version will be published as the Annual Review Lecture in the Journal of Common Market Studies, online first: August 2013 (<http://onlinelibrary.wiley.com/doi/10.1111/jcms.12051/abstract>). The Annual Review editors, Nathaniel Copey and Tim Haughton, have provided very stimulating and in-depth comments. My research was in part carried out during a visiting professorship in Paris, at Sciences Po and LIEPP, the Interdisciplinary Research Centre for the Evaluation of Public Policies. I am grateful for feedback and support to, inter alia, Christopher Bickerton, Renaud Dehousse, Jean Leca, Christian Lequesne, Imola Strehö, Desmond King, Olivier Rozenberg. Helpful feedback was also given by Michael Nentwich, and during presentations of parts of this paper, e.g. in Panel 548 on “Judicial policy-making as a mode of EU Governance”, 6th General Conference of the European Consortium for Political Research, University of Iceland, Reykjavik; at the conference “Europeanization: Do we still miss the big picture?”, Université Libre de Bruxelles, May 2012 (I owe the expression “non-compliance community” to Stella Ladi during the discussions there) and at the Amsterdam CES conference June 2013 (thanks to commentator Tanja Dannwolf). Thanks for research support to Stephanie Liechtenstein and Veronika Pollak and for language revisions to Whitney Isaacs. The usual disclaimer applies.

## I. Non-compliance with EU policies: Why bother?

In recent years, non-compliance<sup>2</sup> with EU policies has received ever more attention in both public debates and scholarly writings. But why should we worry about it? No policy has ever been implemented exactly to the letter of what appears to be intended from a reading of the policy as it appears “on the books”. In the absence of data comparing the national with the supranational level, there is no way to verify in a quantitative sense if the EU’s compliance deficiencies are actually worse than the average at the national level. What is more, not even the most law-abiding society performs without any breaches of rules, so why should the EU – especially as a ‘compound’ polity (Schmidt, 2004) at a greater distance from the daily lives of its citizens and their businesses. It could be argued that non-compliance is no more – or in fact even less – of a problem with EU rules compared to the rules of any lower-level polity, and therefore that there is no danger.

Several arguments speak against this benign perspective:

First, the EU’s landmark function is ‘integration through law’ and the *rule of law* is the very foundation stone on which the community has been built. If the law visibly degenerates into a “dead letter”, then the project loses its basic function. Therefore, even if the EU’s non-compliance rate were as good or bad as the national average, this still implies that the phenomenon is more critical for the Union’s survival.

Second, the EU’s legitimacy is less solidly anchored than most other political systems’, both on the level of a constitution that might serve as point of identification and with regard to deeply founded feelings of belonging within “its society”. De-legitimization of its basic function (integration through law) will therefore endanger its continued existence more profoundly than would be the case with a typical “nation state”.

Third, the EU’s compliance problems seem to have multiplied in recent times, at least in terms of the kinds and levels of rules affected. Even the constitutional level has been infringed and basic democratic values have been affected. This was previously unknown within the EU and merits serious attention.

Fourth, the EU is currently in a state of turmoil. Many hold that it is even at a decisive moment in its history. Tensions are mounting as the financial market crisis affects some

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<sup>2</sup> I.e., failure to comply with the rules.

countries over-proportionally while others are reluctant to share the burden in times of economic downturn. The EU's leaders cannot find a consensus with regard to interpreting the sources of the crisis, not to mention effective solutions. What makes things worse is that internal homogeneity was always low in the EU but has recently shrunk even more and continues to do so for various reasons. Enlargement has imported ever more disparate economic, social, legal and political systems into the Union. Additionally, deals that were struck in earlier phases are currently put into question. The UK wants to keep the advantages of the Internal Market without accepting the joint standards that were agreed upon in parallel. In a situation of increasingly centrifugal forces and great instability, a growing perception that the EU might be a non-compliance community could indeed be disastrous.

But what exactly is the problem in terms of the rule of law? This article will discuss in-depth the various forms and levels of what I call the EU's compliance problem (see below II). I argue that rather than perfect compliance, "credibility" is indeed crucial: the EU needs to restore the confidence that its commitments are both real and binding. The EU being a credible actor, including to the outside world, and the continued social legitimacy of European integration on the part of its citizens, are in fact closely related. Credibility implies that the EU's policies need to be effective, even if each and every detail of all policies ever adopted may not always be implemented exactly as originally formulated. On the basis of a renewed trust in the EU's goal achievement and hence its reliability overall, a modicum of continuing slack in policy implementation will certainly not endanger the success of European integration as a whole.

## **II. Elements of the EU's compliance problem**

Non-compliance with EU rules has recently happened at an increasing number of levels; with increasing frequency on at least some of them; with great visibility to a broad audience; and in fields of very direct relevance for virtually all citizens and politicians. All of this has contributed to a degree of politicization of the EU's compliance problem that was unknown in earlier phases of the integration process, notwithstanding the fact that not all of the non-compliance phenomena are indeed novel. Although there is no theory available to predict when and how non-compliance develops from a minor weakness into a systematic danger to any political system, these indicators suggest that the EU's 'compliance deficit' should be taken rather seriously and that efforts are needed to prevent the situation from possibly reaching a 'tipping point'.

Politicization has happened not only in the Member States, where some fear that their own commitment to the rule of law is not fully matched elsewhere (an argument that is unfortunately exploited heavily by populist parties or practices that have been gaining ground basically everywhere in the EU); it has even reached the very peak of the EU's polity. One indicator that the problem is perceived to have become quite serious is that it was a major subject in EU Commission President Manuel Barroso's 'State of the Union 2012 Address' to the European Parliament (speech/12/596, 12 September 2012). The EU executive's leader discussed two elements of the EU's non-compliance problem: (1) non-compliance with summit decisions; and (2) non-compliance with the EU's basic democratic values. Not mentioned were further layers of non-compliance with EU policies that are nonetheless virulent, which are: (3) multiple deviations from agreed rules regarding EMU; (4) failures to implement and adequately enforce EU law in the Member States; (5) non-respect for ECJ judgments and even penalization proceedings; (6) abuse of EU funds; and, finally, (7) non-compliance with deals struck in the past as incorporated in the present EU integration mode (in other words, the UK's stated desire to withdraw from earlier compromise solutions).

All these phenomena deserve attention as they form part of the EU's overall compliance problem. This paper will cover them one by one, in brief.

## 1. Summit decisions

Among the problems mentioned by Commission President Barroso, one is that Heads of State and Government publicly question the solutions adopted at summits, even directly afterwards.

'On too many occasions, we have seen a vicious spiral. First, very important decisions for our future are taken at European summits. But then, the next day, we see some of those very same people who took those decisions undermining them. Saying that either they go too far, or that they don't go far enough. And then we get a problem of credibility. A problem of confidence.' (Speech/12/596: 2)

Indeed, this kind of 'non-compliance' gave the press ample room for putting disunity on display in recent times, particularly at the European Council meeting of June 2012. At the Euro area summit at the fringes of the European Council meeting of 29 June 2012, heads of state or government have, according to various press sources<sup>3</sup> and the official European Council website, decided, inter alia, "that EFSF<sup>4</sup>/ESM<sup>5</sup> funds can be used flexibly to buy

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<sup>3</sup> See even the German weekly *Der Spiegel* (<http://www.spiegel.de/politik/ausland/angela-merkel-erleidet-bei-eu-gipfel-niederlage-a-841653.html>).

<sup>4</sup> European Financial Stabilisation Mechanism.

<sup>5</sup> European Stability Mechanism.

bonds for Member States ....”<sup>6</sup> After a seemingly successful conclusion of the meeting, President Herman Van Rompuy remarked that “It was a difficult European Council and Eurozone summit but it was a fruitful one... So ... if you can be happy in politics, for the upcoming hours, ... I am a happy man.”<sup>7</sup> The financial markets reacted positively and for ECB president Mario Draghi, the June summit “was a key event.”<sup>8</sup>

However, no more than two days later, the deal was already challenged and the markets’ “post-summit euphoria was dealt a blow ... after a senior Finnish official briefed journalists in Helsinki about the government’s position... A report outlining the Finnish government’s position delivered to the parliament on Monday said: Due to intervention of Finland and, among others, the Netherlands, the possibility of ESM operations in the secondary markets was blocked.”<sup>9</sup> The Finnish government declared on its website that “At the euro area summit in Brussels on 28-29 June, Prime Minister Jyrki Katainen stated, in the context of the discussion on the euro area summit statement, that Finland will not approve operations in the secondary markets because experience has shown them to be ineffective and because the EFSF and ESM resources are limited. Finland’s position was reported in public on Friday.”<sup>10</sup>

It is hard to find reliable information on such sensitive and behind-the-scenes processes. In any case, the official “Euro area summit statement”<sup>11</sup> does not include the statement regarding buying bonds although the latter was published on the European Council’s website<sup>12</sup> and spread all over that day’s media reports. Various readings seem possible, all of which related to non-compliance in one way or another:

<sup>6</sup> This citation was originally on the European Council’s main website (in my text copy without the word “flexibly”), (<http://www.european-council.europa.eu/council-meetings>), by the date of the event, as reported on the internet archive (<http://web.archive.org/web/20120629212236/http://www.european-council.europa.eu/council-meetings>), accessed 3.3.2012. It is by 2.3.2013 also remnant on the European Council’s website at (<http://www.european-council.europa.eu/home-page/highlights/summit-impact-on-the-eurozone>). However, the official conclusions of the June 2012 European Council (<http://www.european-council.europa.eu/council-meetings/conclusions?lang=en>), do not include this statement although mentioning a commitment to “using the existing EFSF/ESM instruments in a flexible and efficient manner in order to stabilise markets » ([http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/de/ec/131398.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/de/ec/131398.pdf)).

<sup>7</sup> Brussels, 29 June 2012, EUCO 128/12, PRESSE 309, PR PCE 110 ; ([http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/131390.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/131390.pdf)). Diplomats had reported that “The atmosphere is horrid” (FT, 29.6.2012) since Italy and Spain had blocked growth measures which they supported in principle in order to pressurize for short-term interventions to curb their lending costs.

<sup>8</sup> FT 13.12.2012.

<sup>9</sup> (<http://euobserver.com/economic/116848>), (<http://euobserver.com/institutional/116818>) accessed 10.3.2013.

<sup>10</sup> Government Communications Department, Press Release 223/2012, (<http://www.finland.eu/Public/default.aspx?contentid=252828&nodeid=35742&culture=en-US>), accessed 2.4.2013.

<sup>11</sup> ([http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/131359.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf)), accessed 3.3.2013.

<sup>12</sup> See already FN 3 and the way back archive of the internet (<http://www.european-council.europa.eu/council-meetings>), accessed 3.3.2012.

- Either these governments were actually outvoted in the European Council, which would have been non-compliance with the Treaty regarding the Summit decision-making rules.<sup>13</sup> If that had happened, this development would have been grave for Finland since its representatives had already disliked the possibility of being outvoted under the ESM – which, however, was already ratified by Finland at the time of the June 2012 European Council meeting. In any case, the ESM was not yet functional when the European Council met and, at that time, the financial markets needed calming measures. One could hypothesize that the ESM's decision rules were actually somehow anticipated in that situation.
- Or alternatively, the European Council decided unanimously on something that was later not accepted by the Finnish and, less noticeably,<sup>14</sup> the Dutch governments. That would have been non-compliance with summit agreements. One reason could be negative press and parliamentary criticism at home. One possible course of events is that nobody disagreed (or continued to disagree) the moment the decision was taken at the European Council, but the next day, the Finnish government realised that this would be hard to sell at home.<sup>15</sup> The President of the European Council, Herman van Rompuy, stated in any case “that all decisions had been taken unanimously and no other type of decision was possible”.<sup>16</sup> German Chancellor Angela Merkel stressed as well that during a summit, one always needs to find unanimous agreement, and that this had happened.<sup>17</sup>
- A third option is only theoretical: one could hypothesize that the insecurity actually concerned the decision rules at the Euro Summit, not the overall European Council. In the Euro Summits, euro area leaders discuss matters of interest to the common currency area. To agree on concerted action for fighting the debt crisis, they first met in Paris in October 2008. Further summits followed in Brussels in May 2010, March

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<sup>13</sup> Article 15.4 TEU fixes that “the European Council decides by consensus, except if the Treaties provide otherwise.” For the case at hand, nothing else is provided. See also: [http://europa.eu/about-eu/institutions-bodies/european-council/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/european-council/index_en.htm).

<sup>14</sup> It needs mentioning that the Dutch have meanwhile asked for establishing an exit clause from the euro, to be available for all Member States without having to exit the EU at the same time (Frankfurter Allgemeine Zeitung 30.11.2012).

<sup>15</sup> Consequently, it may have publicly “vowed to block the ESM from actually buying bonds in the secondary market” (<http://www.globalpost.com/dispatch/news/regions/europe/120702/netherlands-and-finland-stunt-eu-summit>). Article 18 of the Treaty Establishing the ESM states that the Board of Directors shall decide by mutual agreement to initiate operations on the secondary markets. Under qualified majority, by contrast, the voting rights in the ESM work according to capital subscriptions, and Finland (even with the Netherlands and further Member States) can be outvoted. The Commission reportedly stated that Finland could be outvoted if the ESM was used to buy bonds (Agence Europe 3.7.2012), possibly via the emergency proceedings (which, however, would need at least German approval...).

<sup>16</sup> Agence Europe 4.7.2012.

<sup>17</sup> „Genau das ist in der Nacht von Donnerstag zu Freitag passiert“ (Exactly that happened during the night of Thursday), Merkel reportedly said, quoted in the German daily Tageszeitung 5.7.2012 (<http://www.taz.de/!96731/>)

2011, July 2011, and October 2011. “During 2012, euro area issues were mainly dealt with at European Council level, in meetings with all EU leaders.”<sup>18</sup> As of 2013, there will be – if needed – two Euro Summits annually since the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union provides for this. Article 12 reads: “The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in the meetings. The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time the European Council elects its President and for the same term of office.”<sup>19</sup> With regard to decision rules, the striking feature is that under the Fiscal Pact the Euro Summit is “informal”! This seems to imply that no formal decisions can be taken. Since there was no Treaty basis for the Euro Summits at all before the Fiscal Pact, it should have taken even fewer formal decisions. In fact, this consideration is hardly useful for solving the conundrum: the Euro Summit is not for making formal decisions at all, let alone decisions without unanimity.<sup>20</sup> For sure, the EU’s leading politicians have recently been attending so many meetings held under different rules that procedures may have been confounded<sup>21</sup>.

- Additionally, it comes to mind that both of the two camps could have informed the media of their perceived and/or desired outcome, based on discussions that had brought only a less than perfectly clear consensus and that the different versions told to the public allowed for all of them to appear as the winner. The course of events may have been less than fully unintended since it was possibly the sole way to let both camps appear to have won the battle.<sup>22</sup>
- A final scenario is that all was only a major misunderstanding due to the enormous pressures on all people involved in EU summitry. They work around the clock, including the negotiators and the press officers who feed the websites and the media.

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<sup>18</sup> (<http://www.eurozone.europa.eu/summits/history/>, 2.3.2013)

<sup>19</sup> ([http://europa.eu/rapid/press-release\\_DOC-12-2\\_en.htm](http://europa.eu/rapid/press-release_DOC-12-2_en.htm)) (2.3.2013)

<sup>20</sup> This seems to explain why the statement published in connection to the June 2012 Euro Summit is without letter head, without document number, without names or signatures. ([http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/131359.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/131359.pdf)), accessed 2.3.2012.

<sup>21</sup> Desmond Dinan referred to the ‘surfeit of summits’ in his contribution to last year’s Annual Review Dinan, 2012.

<sup>22</sup> Euro group leader Jean-Claude Juncker is said to have welcomed the compromise found at the summit and is cited „I am sure that, if we give a coherent statement of the decisions, this will acquiesce the markets” (translation from German GF, cited in Austrian daily Die Presse, 29.6.2012).

Crucially, the problem is by no means singular. A second incident from the same EU summit is that “many in the financial markets and in ... EU countries believed (that the summit had led, GF) to a transfer of Irish and Spanish bank debt to the balance sheet of the ESM.”<sup>23</sup> Again, developments occurred after the summit, e.g. “attempts to claw back the June deal” by finance ministry officials, which reportedly even angered German and Finish leaders.<sup>24</sup> German finance minister Wolfgang Schäuble reportedly attempted to play down disunity, stressing that the deal would hold; however, he had to add: “That’s harder done than agreed.”<sup>25</sup> With the benefit of hindsight, it certainly seems that during and after the subsequent October 2012 European Council, German insistence to set up the banking union beforehand and apply tough conditions have put the issue on the back burner.

These examples show how non-transparent the proceedings and even the outcomes<sup>26</sup> of the important and widely publicised EU summits actually are. It is not important here to discuss which of the versions is most plausible. It suffices to show that on yet another level, a problem of non-compliance has become a matter of debate. In the future, a problem of credibility may result from such incidents, not only with regard to the much-feared markets but also with respect to the EU’s media and citizens.

Regarding these very citizens, another calamity is happening at the time of writing. The March 2013 European Council and the surrounding finance ministers and euro group meetings have had to deal with the near-insolvency of Cyprus and its oversized banking sector. During what must have been truly difficult negotiations, the EU’s leaders initially disrespected what they had repeatedly promised during previous years: €100,000 per saver would be guaranteed in case of insolvency. The urgency measures the Cypriot government first tried to have adopted in its parliament, based on a deal with the EU,<sup>27</sup> was an extraordinary tax of varying percentage levied on all accounts, including the smallest. The interim brought the Cypriot people on the streets and may come to be seen as a great leadership failure on the part of the EU since it did not authoritatively demand that its longstanding agreement on bank savings guarantees should be respected both in the letter and the spirit of the law. The proposed tax was technically outside these rules but would have had the same effect on the holder of a small bank account – and in future crises,

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<sup>23</sup> FT 8.10.2012.

<sup>24</sup> FT 8.10.2012.

<sup>25</sup> Citation from FT 8.10.2012.

<sup>26</sup> The EU institutions could apply a quick, hands-on strategy and disseminate widely future summit communiqués, ideally in all official languages at the same time – but this only touches the most superficial level of the problems involved and could actually bring about detrimental secondary effects since the leaders would be well aware of this.

<sup>27</sup> Euro group leader Jerome Dijsselbloem “said he took full responsibility for the idea of a tax on savings, and regretted ... he didn’t issue any further statements about the tax – which is seen as an attack on the EU’s €100.000 savings guarantee” (Agence Europe 22.3.2013).

citizens no longer trusting their leaders and afraid to lose their money may consequently produce the much feared “bank run”...

## 2. EMU

This, Honourable Members, reveals the essence of Europe's political crisis of confidence. If Europe's political actors do not abide by the rules and the decisions they have set themselves, how can they possibly convince others that they are determined to solve this crisis together?

(Commission President Barroso, Speech/12/596: 2)

It is undisputed common knowledge that multiple deviations from agreed rules regarding the EMU occurred over time. This section very briefly summarizes a couple of issues.<sup>28</sup>

### Convergence criteria and statistical reporting

Whenever a parameter such as the convergence criteria becomes a core element of public policy, measurement becomes crucial. Without reliable data, no comparisons and no assessments of whether relevant indicators are actually being complied with or not can be made. Eurostat, the Commission's department for collecting and publishing official data, witnessed repeated debates about the quality of its data even before the 1990s, since statistics have been an indispensable part of the EU's workings since its inception. EMU, however, clearly made remaining doubts or weaknesses even more problematic.

Regarding the Maastricht Treaty's convergence criteria for joining the Euro (which set targets regarding price stability, government finances, exchange rates, and long-term interest rates<sup>29</sup>), many if not all Member States made their statistics look better, and the Maastricht Treaty's definition of relevant deficits as opposed to overall deficits seems to have promoted this (IMF 2012<sup>30</sup>). Greece obviously did so to a particularly severe extent and it seems hardly possible that the other governments could not have noticed.<sup>31</sup> Reportedly, one of the largest investment banking and securities firms globally, Goldman Sachs, was instrumental to the Greek government in legally circumventing the Maastricht rules and masking the true extent

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<sup>28</sup> This section can be brief since the matter has been documented very well, see e.g. (Segers and Van Esch, 2007, Schelkle, 2004, Eichengreen, 2012).

<sup>29</sup> For details see ([http://europa.eu/legislation\\_summaries/other/l25014\\_en.htm](http://europa.eu/legislation_summaries/other/l25014_en.htm)), accessed 10.3.2013.

<sup>30</sup> « European Fiscal Union: A Vision for the Long Run » By Carlo Cottarelli, Director, Fiscal Affairs Department, International Monetary Fund Presentation at the November 1-2 Gerzensee Conference, <http://www.imf.org/external/np/speeches/2012/110112.htm>, last accessed 20.2.2013).

<sup>31</sup> Greek Finance Minister Yannis Stournaras: “It's not a secret that Greece did not behave according to the rules of a fixed exchange rate system...” (cited in Agence Europe 12 September 2013).

of the Greek deficit.<sup>32</sup> In 1998, the deficit may have been lowered by 0,14% via a hidden credit from Goldman Sachs<sup>33</sup> and later again via a derivatives deal<sup>34</sup> which other EU countries<sup>35</sup> have possibly used too.<sup>36</sup> It needs mentioning that the relevant EU documents remain closed to the public since the European Union General Court in Luxembourg announced that the European Central Bank is allowed to refuse access with reference to potential negative consequences on the financial markets.<sup>37</sup>

In 2004, at the very latest, the EU partners must have been highly alarmed since creative accounting practices understating the budgetary deficit problem were discovered in an external audit.<sup>38</sup> Nonetheless, the Commission's 2005 proposals to extend Eurostat's powers were blocked by a number of Member State governments, including the German,<sup>39</sup> who did not want to subject their statistical offices to EU scrutiny.<sup>40</sup> When the ECOFIN Council was confronted with 'renewed problems in the Greek fiscal statistics' in November 2009, it invited the Commission to prepare a report and suggest remedies.<sup>41</sup> The Commission admitted that "recent developments, in particular, the inaccuracy of the Greek government deficit and debt statistics, have ... demonstrated that the system for fiscal statistics did not sufficiently mitigate the risk of substandard quality data being notified to Eurostat" and it "expressed the need to grant Eurostat extended powers in the field of fiscal

<sup>32</sup> For example, see the German weekly « Der Spiegel », 8.2.2010, (<http://www.spiegel.de/international/europe/greek-debt-crisis-how-goldman-sachs-helped-greece-to-mask-its-true-debt-a-676634.html>), accessed 10.3.2013.

<sup>33</sup> German weekly « Die Welt » (<http://www.welt.de/politik/ausland/article111959153/Wie-die-Griechen-sich-in-den-Euro-schummelten.html>), accessed 10.3.2013.

<sup>34</sup> See the British public TV program BBC (<http://www.bbc.co.uk/news/world-europe-17108367>), accessed 10.3.2013. Though not outright illegal in terms of EU rules the Greek deal seems to have been still exceedingly expensive: BBC reports that for 2,8bn borrowed from Goldman Sachs the country had to pay 1bn in interests, which helped to make the deal more widely known since Greek leaders in subsequent governments protested. Another worrisome bit of information in the BBC program mentioned above is that Greek university professors had informed the EU beforehand but their complaints were reportedly not followed up.

<sup>35</sup> For example, Italy has reportedly used similar swap models in earlier years, see the German weekly « Der Spiegel » online 8.2.2010 (ibid). The same source holds the problem is not restricted to a few countries and particularly concerns the Mediterranean ones: "Around 2002 in particular, various investment banks offered complex financial products with which governments could push part of their liabilities into the future".

<sup>36</sup> Der Spiegel 8.2.2010, ibid. Particularly noteworthy is the Economist's tongue-in-cheek description of the Italian deal in its 2004 Christmas Special edition hailed "the greatest trade ever": "Italy used a swap to defer interest payments on an issue of \$1,7 billion of yen-denominated bonds that it had made in 1995, at the same time taking an up-front payment for the swap that was later repaid with interest. Thus was Italy able to make it into the euro, merely at the price of a big repayment on the swap in 1998 ... Of course, it was ... thoroughly dodgy – had it been done by a company, the management would probably be in prison for cooking the books – though the Italians have always maintained that it exploited weak rules, rather than broke strong ones." ([www.economist.com/node/3490654/](http://www.economist.com/node/3490654/)), accessed 23.3.2013. Thanks to Zdenek Kudrna for sharing this with me.

<sup>37</sup> CJE 12/165, ([http://europa.eu/rapid/press-release\\_CJE-12-156\\_en.htm](http://europa.eu/rapid/press-release_CJE-12-156_en.htm)) accessed 10.3.2012, see also German weekly Die Welt (<http://www.welt.de/politik/ausland/article111959153/Wie-die-Griechen-sich-in-den-Euro-schummelten.html>), accessed 10.3.2013.

<sup>38</sup> ([http://en.wikipedia.org/wiki/Greek\\_financial\\_audits,\\_2009%E2%80%932010](http://en.wikipedia.org/wiki/Greek_financial_audits,_2009%E2%80%932010)), accessed 3.3.2013.

<sup>39</sup> See Angela Merkel's Bruges speech (thanks to Renaud Dehousse for pointing that out to me), <http://www.bundesregierung.de/Content/DE/Rede/2010/11/2010-11-02-merkel-bruegge.html>, accessed 25.3.2013

<sup>40</sup> (<http://www.tagesschau.de/wirtschaft/eurofinanzminister106.html>), accessed 3.3.2013).

<sup>41</sup> COM (2010) 1 final, page 3, Report on Greek Government Deficit and Debt Statistics ([http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/COM\\_2010\\_REPORT\\_GREEK/EN/COM\\_2010\\_REPORT\\_GREEK-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/COM_2010_REPORT_GREEK/EN/COM_2010_REPORT_GREEK-EN.PDF)), accessed 3.3.2013.

statistics. These powers were granted by the Council in August 2010.<sup>42</sup> The improvements in data quality management procedures<sup>43</sup> have reportedly already brought about somewhat more leverage for the Commission to check data, e.g. the Bulgarian data in preparation for that country's potential euro membership.<sup>44</sup>

In any case, much time and credibility had been lost before rather evident shortcomings were addressed. In the eyes of the citizens, it may also have harmed the EU's reputation that the EU's statistics office itself was part of a major scandal around forged tenders and paybacks in the early 1990s.<sup>45</sup> And, what is even more, because of its poor record in investigating corruption cases such as the "multi-million scandal surrounding Eurostat,"<sup>46</sup> Commission President Romano Prodi subsequently also needed to reform the EU's own anti-fraud unit. This suggests that while criticism may seem in place with regard to reporting, compliance, and corruption at the Member State level, the very same is unfortunately not unknown at the EU level.

Generally, the trustworthiness of public debt statistics has been called into question by the IMF.<sup>47</sup> It seems that for 10 countries studied, including several from the EU, almost 25% of the stated increase in public debt between 2007 and 2010 arose from earlier statistical under-reporting. Still at this point, there seems to be ample room for improvement since even the most recent reporting standards are less than satisfactory. "At the euro area level, the new Budget Frameworks Directive rightly emphasizes more regular and comprehensive publication of Member State data. However, while the Directive calls for independent audit of the quality of government accounts, it does not prescribe the accounting standard to be used by the auditor in determining whether such accounts represent a true and fair view of the government's financial position. The reporting requirements could be made more stringent by asking Member States to produce, possibly after a transition period, accounting information that complies with internationally recognized standards."<sup>48</sup>

<sup>42</sup> COM(2011) 211 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Towards robust quality management for European Statistics, 2.

<sup>43</sup> For details, see COM(2011) 211 final, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, Towards robust quality management for European Statistics, ([http://epp.eurostat.ec.europa.eu/portal/page/portal/quality/documents/COM-2011-211\\_Communication\\_Quality\\_Management\\_EN.pdf](http://epp.eurostat.ec.europa.eu/portal/page/portal/quality/documents/COM-2011-211_Communication_Quality_Management_EN.pdf)) accessed 3.3.2013.

<sup>44</sup> (<http://www.tagesschau.de/wirtschaft/eurofinanzminister106.html>), German TV program's news of 8.6.2010, accessed 3.3.2013).

<sup>45</sup> In 2003, all directors were replaced. See e.g. (<http://www.stern.de/wirtschaft/news/maerkte/affaere-bereich-euch-510460.html>), accessed 3.3.2013.

<sup>46</sup> The Telegraph 16.11.2003, (<http://www.telegraph.co.uk/news/worldnews/europe/1446869/Prodi-turns-on-EUs-failing-fraud-squad.html>), accessed 3.3.2013.

<sup>47</sup> Der Standard, 6.11.2012.

<sup>48</sup> « European Fiscal Union: A Vision for the Long Run » By Carlo Cottarelli, Director, Fiscal Affairs Department, International Monetary Fund Presentation at the November 1-2 Gerzensee Conference, <http://www.imf.org/external/np/speeches/2012/110112.htm>, last accessed 20.2.2013).

## Budget deficit ceilings, fiscal pact, bailout clause

Once the EMU was in force, compliance with the criteria specified in the Maastricht Treaty did not significantly improve. For example, the annual budget deficit ceilings were by no means always respected, not even by the prosperous countries, and partly without the severe economic downturns that might have made that justifiable.<sup>49</sup> The Commission tried, largely in vain, to make the governments enforce the rules of their so-called “Stability and Growth Pact” (originally from 1997) against themselves, even in ECJ proceedings.<sup>50</sup> There is no need to discuss the details here since there is abundant economic writing and discussion in the media.<sup>51</sup> It seems evident that if these criteria had always been respected, the financial and budgetary crisis might have hit less badly as it did.<sup>52</sup> In any case, promoting economic and budgetary convergence has by 2013 become a priority of the EU.

It was the financial crisis that finally put great pressure on the Heads of State and Government to design new means to convince the markets that their budgetary reforms would hold in the future. Most importantly, the inter-governmental Treaty on Stability, Coordination and Governance (TSCG, or “fiscal pact”) was signed by 25 EU Member States (all but the UK and the Czech Republic) in March 2012 and entered into force on 1 January 2013.<sup>53</sup> The novel feature is that it requires its signatory states to enshrine key provisions of the EU’s stability and growth pact in permanent national law, preferably of a constitutional character. Its efficiency cannot be judged as of yet. What is of relevance here, however, is that the fiscal pact seemed problematic in legal terms to renowned experts. Paul Craig<sup>54</sup> from

<sup>49</sup> Latest data: ([http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Government\\_finance\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Government_finance_statistics)), accessed 13.3.2013.

<sup>50</sup> The Council failed to follow up on Commission reproaches against countries such as Germany, France, and Italy. The Commission took the Council to court (C-27/04) concerning the enforceability of the stability and growth pact (see e.g., Dutzler and Hable, 2005).

<sup>51</sup> One account concludes, in brief: “the Council of Ministers failed to apply sanctions against France and Germany, while punitive proceedings were started (but fines never applied) when dealing with Portugal (2002) and Greece (2005) ... In March 2005, the EU Council, under the pressure of France and Germany, relaxed the rules; the EC said it was to respond to criticisms of insufficient flexibility and to make the pact more enforceable” ([http://en.wikipedia.org/wiki/Stability\\_and\\_Growth\\_Pact](http://en.wikipedia.org/wiki/Stability_and_Growth_Pact)), accessed 16.3.2013.

<sup>52</sup> Corrections of weaknesses may bring further problems in the near future. For example, a significant flaw in the overall debt calculation of several countries seems to have been that Eurostat’s focus has long been on the sector of general government, neglecting that other national, regional and local authorities may execute budgets of sub-sectors of the general government and – most importantly – that parts of public sector deficits may have been transferred into the accounts of extra-budgetary bodies, corporations, and non-profit institutions and other similar bodies or into the accounts of social security funds. See e.g. COUNCIL REGULATION (EU) No 679/2010 of 26 July 2010 amending Regulation (EC) No 479/2009 as regards the quality of statistical data in the context of the excessive deficit procedure, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:198:0001:0004:EN:PDF>, accessed 4.4.2013).

<sup>53</sup> See e.g. summary at ([http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm)), accessed 16.3.2013. As the 19<sup>th</sup> of 25 signatories, Sweden ratified the fiscal pact on 7 March 2013, see Newsletter 13.3.2013 Fondation Robert Schuman (<http://www.robert-schuman.eu/lettre.php?num=570&lg=de>) accessed 13.3.2013.

<sup>54</sup> See Craig, 2012.

Oxford University, to give one example, questioned if and to what extent a treaty outside the confines of the Lisbon Treaty can confer new powers on EU institutions, and whether existing powers of EU institutions can actually be used in such a context.<sup>55</sup>

Be that as it may, it seems that further ad-hoc agreements and day-to-day practice of EMU rules might want to aim for caution. In terms of public acceptance, the EU would certainly not want to appear as a political system that regularly casts doubt upon the respect of its own constitutional and other rules.

One more case in point which underlines the relevance of that argument is the controversy about the “no bailout clause” of the EU Treaties. Article 123 TFEU (ex Article 101 TEC) states that “any ... type of credit facility with the European Central Bank or with the central banks of the Member States ... in favour of ... governments... shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.” Most recently, however, the ECB chose a pathway that is seen by some as non-conformity with the ‘no bailout – provision’ of the Treaty with its “Covered Bond Purchase Programmes.”<sup>56</sup> By autumn 2012, the President of the EU Commission Barroso held that the “ECB cannot and will not finance governments. But when monetary policy channels are not working properly, the Commission believes that it is within the mandate of the ECB to take the necessary actions, for instance in the secondary markets of sovereign debt.”<sup>57</sup> In essence, the debate is – not least because the German constitutional court had stressed that aspect on 12 September 2012 – being shifted away from a ban of one instrument (bailing out countries) towards a framing where the legality of its use depends on the intentions of those who use it. If they employ the instrument in order to reach a goal that is according to the Treaties (particularly, the primary objective of the European System of Central Banks, price stability; Art. 127 TFEU), what may amount to a bailout could indeed be legal.

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<sup>55</sup> The ECJ (C 370/12, summarized in e.g. Agence Europe 28.11.2012) and national constitutional courts have thus far sided with the mainstream positions and have upheld, at least in essence, what the EU's polity had agreed upon. In the case of the German constitutional Court, the position was agreed to but with strings attached and the final verdict still pending. The German government could only sign up to the Fiscal Pact after specifying more clearly than before the conditions for the German participation in a protocol declaration. The agreed limit to the country's viability with 190 billion Euro is not to be exceeded without agreement of the German Bundestag, and the confidentiality provisions of the ECB must not prevent full information for the German parliament (e.g., Frankfurter Allgemeine Zeitung 4.10.2012, 13.9.2012). It should also be mentioned here that the German court case comes in line with earlier challenges to EU Treaties and principles in Karlsruhe. Most importantly, after the Lisbon Treaty, the Bundesverfassungsgericht agreed that the Treaty was in agreement with the German constitution, but asked for more powers for the Bundestag and formulated limits for the progress of integration in terms of the German constitution.

<sup>56</sup> The ECB states: “the Eurosystem has launched two Covered Bond Purchase Programmes (CBPP, which ended in June 2010 and CBPP2, which started in November 2011) in order to purchase euro-denominated covered bonds and, since 10 May 2010, it has conducted interventions in debt markets under the Securities Markets Programme (SMP)” (<http://www.ecb.int/mopo/implement/omo/html/index.en.html>), accessed 16.3.2013).

<sup>57</sup> Speech/12/596: 2, 12.9.2012. Very similar statements exist, e.g. by Mario Draghi cited in FAZ 14.9.2012 or in FT, 13.12.2012; by Commissioner Viviane Reding, see Frankfurter Allgemeine Zeitung 18.9.2012.

This is not the place to go into any detail of this truly complex and political matter. In general, desperate times may call for desperate measures. From the perspective of compliance, however, it needs mentioning that harm is already being done if the world sees EU actors such as the ECB, the Commission, Member State governments, EP members, the Bundesbank etc. choosing opposing interpretations. In short, the question here is not which version is the “right” one. What matters for the sake of this text is that the public legitimacy of the EU may be in danger if such debates and relevant law suits keep continuing.

The risk is all the higher if this is not the one and only contentious issue but if, as discussed in the section to follow, very basic values and principles of the EU are also openly put at risk.

### **3. Basic EU principles: How to enforce them?<sup>58</sup>**

The 1992 Treaty on European Union's Article 6(1) provided that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States” (emphasis added). Under the Lisbon Treaty, in Article 2, the new formulation lists instead “the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

A possibility of action by the Union in the event of a serious and persistent breach of common values by a Member State was first introduced in the 1997 Amsterdam Treaty.<sup>59</sup> The Nice Treaty (2001) added a prevention mechanism for the case of a risk of a breach. After the Lisbon Treaty's most recent small procedural changes, Article 7 of the TEU now outlines that a risk of a breach of values may trigger the prevention mechanism and a ‘serious and persistent breach’ of values, the penalty mechanism. In case of ‘a clear risk of a serious breach’ of values mentioned, the Council may, according to Article 7 TEU, address appropriate recommendations to that State.<sup>60</sup> After inviting the government of the Member State in question to submit its observations, the Council<sup>61</sup> - meeting in the composition of the

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<sup>58</sup> Special thanks to Stephanie Liechtenstein for help with the research for this section.

<sup>59</sup> [http://europa.eu/legislation\\_summaries/human\\_rights/fundamental\\_rights\\_within\\_european\\_union/l33500\\_en.htm](http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l33500_en.htm).

<sup>60</sup> On the basis of a reasoned proposal by one-third of the Member States, by the European Parliament or by the Commission, the Council acts by a majority of four-fifths of its members after obtaining the assent of the European Parliament.

<sup>61</sup> Acting by unanimity on a proposal by one-third of the Member States or by the Commission, and after obtaining the assent of the European Parliament, without taking into account the vote of the representative of the

Heads of State or Government - may determine the existence of a “serious and persistent breach” by a Member State of values mentioned in Article 2. Based on that determination, the Council<sup>62</sup> may decide to suspend certain rights deriving from the TEU, including the voting rights of the representative of that Member State government in the Council.

The procedural rule for determining a breach of the EU’s basic values is unanimity, without taking the vote of the Member State in question into account. It is therefore no big surprise that the procedure has not been used in full – notwithstanding the fact that in the year 2012, controversies about the state of democracy in Hungary and Romania took place.

### Case 1: Hungary

In Hungary, Victor Orban’s national-conservative Fidesz party came to power<sup>63</sup> with a two-thirds majority of representatives after a landslide victory in the elections of 25 April 2010. In 2011, a new constitution was adopted with haste, in part in the middle of the night, that attracted considerable criticism both nationally and internationally. The same applied to various sweeping legal provisions whose revision would also need a two-thirds vote in the future, not an easy task under less clear electoral outcomes. Critics hold that democratic checks and balances were undermined, that the new government entrenched elements of its power to exceed its four-year term, that Fidesz loyalists were installed to head powerful councils overseeing the media, the judiciary, and the budget, for nine-year terms, and that the EU’s democratic values were undermined.<sup>64</sup>

Several Hungarian rules of relevance in the field of rule of law, basic rights, and separation of powers were questioned by the EU Commission for collision with EU secondary law, most importantly:

- The new National Agency for Data Protection (replacing the previous Data Protection Commissioner’s Office as of 1 January 2012) was questioned for providing insufficient independence under the EU Directive on Data Protection (Directive 95/46/EC). In the view of the Commission, Hungary also violated the independence of the supervisory authority by ending the term of office of the Data Protection Commissioner two years

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government of the Member State in question. The latter provision was not included when the Amsterdam Treaty introduced the procedure.

<sup>62</sup> Acting by a qualified majority.

<sup>63</sup> Technically in a coalition with the Christian Democratic People’s Party, often described as a satellite party; e.g. by Batory, 2010.

<sup>64</sup> See for example, Dawson and Muir, 2012. The Venice Commission, the Council of Europe’s advisory body on constitutional matters, (<http://www.venice.coe.int/webforms/documents/?country=17&year=all>) accessed 4.3.2013; Letter by Neelie Kroes, Vice President of the European Commission, to Tibor Navracsics, Minister of Public Administration and Justice, 17.1.2012, Ares (2012) 54649, available at: (<http://blogs.r.ftdata.co.uk/brusselsblog/files/2012/01/KroesHungaryLetter1.pdf>)

and 9 months early. The European Commission seized the ECJ in April 2012 after only partial amendments by Hungary were announced.<sup>65</sup>

- Further legal concerns were raised by the Commission with regard to the new Hungarian constitution and the law on the early retirement of judges, compared to EU standards on equal treatment in employment (Directive 2000/78/EC) prohibiting discrimination at the workplace on grounds of age. Hungary's cut in the retirement age of judges, prosecutors, and notaries from 70 to 62 years would have meant an earlier than foreseen departure of nearly 10% of all judges within just one year.<sup>66</sup> 25% of public notaries are said to have also been affected. The Commission referred to the ECJ on 25 April 2012 and, in view of urgency and the imminent retirement of 236 judges, asked the Court for an expedited procedure. By 6 November 2012, the ECJ decided that Hungary indeed was in breach of the relevant EU law.<sup>67</sup>
- Regarding the independence of the central bank,<sup>68</sup> the Commission identified several breaches of primary law (Article 130 TFEU stipulating full independence of the central bank, Article 127.4 TFEU requiring consultation with the ECB on any draft legislative provisions in its field of competence) and of Article 14 of the Statute of the European System of Central Banks and of the ECB. The first stage of EU infringement proceedings was launched with a letter of formal notice sent to Budapest on 17 January 2012. After the issue also created a stumbling block to new IMF negotiations for much-needed financial support (FT 24.1.2012), Hungary changed its legislation and provided additional commitments and clarifications and the Commission closed this case.<sup>69</sup>

The controversy involving the potentially greatest danger to basics of Hungarian democracy touches the freedom of press in recent Hungarian media laws.<sup>70</sup> This was particularly tricky since normal infringement proceedings could not easily be employed and broader principles were at stake.

<sup>65</sup> See European Commission Press Release, IP/12/395, Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary, 25 April 2012, available at: (<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML>), accessed 5.3.2013.

<sup>66</sup> Ibid., ([http://europa.eu/rapid/press-release\\_IP-12-395\\_en.htm](http://europa.eu/rapid/press-release_IP-12-395_en.htm)), Pt 3.

<sup>67</sup> Agence Europe 7.11.2012.

<sup>68</sup> European Commission Press Release, IP/12/24, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary, 17 January 2012, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24&format=HTML&aged=1&language=EN&guiLanguage=fr>

<sup>69</sup> See *ibid.*, European Commission Press Release, IP/12/395.

<sup>70</sup> See the website and relevant archive of the Central European University in Budapest, Center for Media and Communication Studies (<http://cmcs.ceu.hu/resources-new-media-laws-in-hungary-0>), accessed 4.3.2013.

Between July and December 2010, the Hungarian parliament passed a series of laws revising the print, broadcast, and online media regulation. For example, the “Media Council” was empowered to fine, suspend, and shut down media for breaches to stipulations, including a number of controversial new content regulations. The law specifies sanctions for content that does not provide “balanced coverage,” infringes upon human dignity, offends public morality, or fails to report on events of public interest. The law also set up a body to manage public service media under a new centralized system. In the so-called “media constitution”, content regulations were introduced on all media as well as requirements for media outlets to provide “balanced” coverage. EU Commissioner Neelie Kroes expressed concerns and, on 21 January 2011, sent a letter to Budapest stating that the media law was not compatible with EU law and the Audiovisual Media Services Directive (2010/13/EU). The Commission Vice President requested changes and reserved the right to launch infringement proceedings (that has, however, never been taken up).<sup>71</sup>

The Hungarian parliament passed amendments to the media laws in accordance with EU recommendations on 7 March 2011 but insufficiently so. The Council of Europe, the OSCE, and NGOs such as Amnesty International were not satisfied and some even criticized the lack of action by the European Commission. It should be noted that Hungary happened to hold the EU Presidency during the first half of 2011 (Ágh, 2012).

The Commission finally set up a High Level Group on Media Freedom and Pluralism<sup>72</sup> that first met in October 2011 (see also section IV of this paper) and studied the situation, suggesting that Hungary “put itself in a position of potential danger to media freedom and the Government would be wise to consider how to get out of it”<sup>73</sup>. When the Hungarian Constitutional Court ruled “that the media law unconstitutionally limited freedom of the written press”<sup>74</sup> on 19 December 2011, Kroes urged the Hungarian authorities to respect and rapidly implement this ruling.

On 9 February 2012, Commissioner Kroes revealed the Commission’s strategy. She asserted clearly that Hungary was out of sync and hence alluded to the Article 7 proceedings:

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<sup>71</sup> See Letter by Neelie Kroes, Vice President of the European Commission, to Tibor Navracsics, Minister of Public Administration and Justice, 21.1.2011, D (2011) 71111, ([https://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC\\_lettertoHungary\\_2011Jan21.pdf](https://cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf)) accessed 4.3.2013.

<sup>72</sup> The group was fully independent and chaired by the former President of Latvia, Professor Vaira Vīķe-Freiberga. The other members were Herta Däubler-Gmelin, Luís Miguel Poiares Pessoa Maduro and Ben Hammersley. The group’s mandate was to draw up recommendations for the respect, protection, support and promotion of pluralism and freedom of the media in Europe. See (<http://ec.europa.eu/digital-agenda/en/high-level-group-media-freedom-and-pluralism>) accessed 12 May 2013.

<sup>73</sup> Speech 12/80 to the European Parliament Civil Liberties, Justice and Home Affairs Committee, Brussels, 9 February 2012, available at ([http://europa.eu/rapid/press-release\\_SPEECH-12-80\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-80_en.htm?locale=en)), accessed 4.3.2013.

<sup>74</sup> Ibid.

“A recent study indicates that Hungary’s media laws go beyond European practices and norms. In particular when you look at their overall scope and effect: when you look at the combination of provisions about the Media Authority’s independence and centralised structure, its powers - in particular the power to sanction - and the wide scope of application of the media laws: application to audiovisual, radio, online and print.”<sup>75</sup>

However, she did not announce proceedings under the TEU but rather referred matters to the Council of Europe:

“The Council of Europe has been setting standards to protect fundamental rights in Europe for over 50 years. And that is why the Commission is cooperating closely with them on a range of issues – including on the issue of media freedom. ... The Commission expects two key things from the Hungarian government. ...

1) First, the Hungarian Government should explicitly and transparently ask the Council of Europe for a comprehensive opinion on the compliance of the media legislation, and its application in practice, with fundamental values as enshrined in benchmark texts such as the European Convention on Human Rights.

2) Second, and just as importantly, the Hungarian authorities should accept and implement any concrete recommendations that would be made by the Council of Europe.

The Deputy Prime Minister promised these two things to me in our meeting two hours ago... The Commission will not be satisfied with the overall situation until any concerns that may be raised by the Council of Europe are properly and fully addressed.”<sup>76</sup>

On 11 May 2012, the Council of Europe issued 66 recommendations with regard to the Hungarian media law.<sup>77</sup> Commissioner Kroes continued to pressurize via the media, but did not initiate proceedings on the EU level. In her (to date) last relevant letter to Hungary, dated 17.1.2012, she thanked the government for information regarding recent developments in connection with the Hungarian media regulation and stressed that “the respect of media

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Expertise by Council of Europea Experts on Hungarian media legislation, available at ([https://docs.google.com/viewer?a=v&q=cache:KoShhhiGaxgJ:hub.coe.int/c/document\\_library/get\\_file%3Fuuid%3Dfbc88585-eb71-4545bc5db727e35f59ae%26groupId%3D10227+&hl=de&gl=at&pid=bl&srcid=ADGEESjQ8ZNsOr5Y\\_2YlooGtLfscQPhfNE4I3bvWu5jrVt4raTotlNZixj18gvAT\\_GLjxklsztuczqHFAXPpn9xWYgtLy4nPFjNKhOES73A1F\\_AwDCM\\_Pj7vZZ2Mvc2BoyA7jKlvw7&sig=AHIEtbTZH8mP0lonrX65\\_23iTk\\_vNWYUQQ](https://docs.google.com/viewer?a=v&q=cache:KoShhhiGaxgJ:hub.coe.int/c/document_library/get_file%3Fuuid%3Dfbc88585-eb71-4545bc5db727e35f59ae%26groupId%3D10227+&hl=de&gl=at&pid=bl&srcid=ADGEESjQ8ZNsOr5Y_2YlooGtLfscQPhfNE4I3bvWu5jrVt4raTotlNZixj18gvAT_GLjxklsztuczqHFAXPpn9xWYgtLy4nPFjNKhOES73A1F_AwDCM_Pj7vZZ2Mvc2BoyA7jKlvw7&sig=AHIEtbTZH8mP0lonrX65_23iTk_vNWYUQQ)), accessed 4.3.2013. See also e.g. (<http://www.politics.hu/20120607/eus-kroes-says-changes-to-hungarys-media-law-disappointing-embarrassing/>) accessed 4.3.2013.

freedom and media pluralism is not only about the technically correct application of EU and national law but also, and more importantly, about implementing and promoting these fundamental principles in practice. The Commission will remain particularly vigilant on both aspects."<sup>78</sup> She also added that although criticisms of IOs like OSCE and Council of Europe "concern aspects outside the current scope of EU law, they should be adequately addressed, in order to dispel doubts about Hungary's full adherence to European values."<sup>79</sup>

Soon thereafter, amendments were agreed upon to the Hungarian Media Law, covering "all four issues where Vice-President Kroes had expressed serious doubts that the current law, adopted on 21st December 2010, was not compliant with EU law. These four issues comprise disproportionate application of rules on balanced information, application of fines to broadcasters legally established and authorised in other Member States, rules on registration and authorisation of media service providers and rules against offending individuals, minorities or majorities."<sup>80</sup> Kroes was "very pleased" and announced to "continue to monitor the situation and work closely with the Hungarian authorities to ensure that the agreed changes are now incorporated into Hungarian law and that the revised law is consistently applied in practice".<sup>81</sup>

All in all, it seemed at first that the Commission's strategy would work out rather well: instead of triggering an internal proceeding with an uncertain outcome, intense cooperation with the Council of Europe was initiated.<sup>82</sup> Since the Council of Europe clearly could be expected to be an outspoken ally in the field of freedom of the press, the Commission could actually exercise significant pressure via the much publicized admonitions. It did not give up the "nuclear option" of Article 7 TEU proceedings (while it had to give up the option to sue Hungary under EC Media Services Directive) but used it only as a potential threat. On the level of specific legislative projects, in any case, important changes took place. It helped that

<sup>78</sup> Letter by Neelie Kroes, Vice President of the European Commission, to Tibor Navracsics, Minister of Public Administration and Justice, 17.1.2012, Ares (2012) 54649, available at: (<http://blogs.r.ftdata.co.uk/brusselsblog/files/2012/01/KroesHungaryLetter1.pdf>), accessed 4.3.2013.

<sup>79</sup> Ibid.

<sup>80</sup> European Commission Press release, Commission Vice President Kroes welcomes amendments to Hungarian Media Law, 16.2.2011, MEMO/11/89, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/89>), accessed 4.3.2013.

<sup>81</sup> Ibid.

<sup>82</sup> "EU President Barroso referred the issue of media freedom to the Council of Europe, since the existing standards on freedom of expression based on the European Convention of Human Rights apply to Hungary as a member state of both the EU and the Council of Europe." Press Release DC010(2013), available at ([http://hub.coe.int/en/web/coe-portal/press/newsroom?p\\_p\\_id=newsroom&\\_newsroom\\_articleId=1329709&\\_newsroom\\_groupId=10226&\\_newsroom\\_tabs=newsroom-topnews&pager.offset=0](http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1329709&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&pager.offset=0)), accessed 4.3.2013.

the Hungarian Constitutional Court annulled some provisions.<sup>83</sup> The Council of Europe welcomed the improvements.<sup>84</sup>

However, Victor Orban reportedly has said to give in only to power, not to arguments.<sup>85</sup> What is more, most of the controversial new constitutional provisions have been newly adopted in Hungarian Parliament, restoring “many of the most contentious elements of the new basic law.”<sup>86</sup> Even the powers of the Hungarian Constitutional Court were curbed so it can no longer annul amendments that reintroduce measures previously deemed unconstitutional (*ibid.*). And it certainly does not seem as if the Orban government would stop what seems to commentators as “motive legislation” and/or a danger to the fiduciary principle and hence the rule-of-law. Recent topics of controversy include pre-registration requirements in order to exercise one’s right of vote, paying bursaries only to students staying in the country twice the time of their studies, reduction of the number of officially recognized churches, potentially discriminatory treatment of foreign enterprises and citizens in Hungary<sup>87</sup>, human rights of the Roma, penalties for homeless, nationalization of parts of the banking system, retroactive legal changes to land ownership contracts concerning particularly foreigners and tampering with the land title register<sup>88</sup>, etc.

At the March 2013 European Council, Orban seems to have been harshly reprimanded by Commission President Barroso. In a letter to the Commission, a number of EU countries’ European Affairs ministers (including the German) even asked to adopt new tools, e.g. freezing of structural fund money, to sanction any movement away from the fundamental values of the EU.<sup>89</sup> During summer 2013, Article 7 TEU and a potential suspension of EU membership rights were the matter of quite heated debate. A clash occurred in the EP when, for the third time in two years, a resolution was adopted “denouncing the Hungarian government’s attacks on European values”<sup>90</sup> while rejected by the EPP that considered it to go beyond the EP’s remit.<sup>91</sup> The EP’s group of socialists and democrats, by contrast, plans to demand use of Article 7 TEU “if Hungary does not produce results” (Agence Europe 10 July 2013). Viktor Orban’s Fidesz government, in turn, likened

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<sup>83</sup> E.g. Agence Europe 2.1.2013.

<sup>84</sup> Press Release DC010(2013), available at ([http://hub.coe.int/en/web/coe-portal/press/newsroom?p\\_p\\_id=newsroom&\\_newsroom\\_articleId=1329709&\\_newsroom\\_groupId=10226&\\_newsroom\\_tabs=newsroom-topnews&\\_pager.offset=0](http://hub.coe.int/en/web/coe-portal/press/newsroom?p_p_id=newsroom&_newsroom_articleId=1329709&_newsroom_groupId=10226&_newsroom_tabs=newsroom-topnews&_pager.offset=0)), accessed 4.3.2013. Some even understood the Council of Europe’s Secretary General to have stated, on 29.1.2013, that “all the work assigned has been completed” (Agence Europe 30.1.2013).

<sup>85</sup> Profil 16.7.2012.

<sup>86</sup> FT 4.3.2013 and 5.3.2013.

<sup>87</sup> E.g. with regard to buying property (Die Presse, 5.9.2012).

<sup>88</sup> ORF, Ö1 Morgenjournal 7.3. 2013.

<sup>89</sup> Agence Europe 9.3.2012 and 12.3.2012.

<sup>90</sup> Agence Europe 4.7.2013.

<sup>91</sup> A related conflict involves criticism against Bulgaria and its oligarchic tendencies and, again, social democrats and Christian conservatives find themselves in opposing camps (Agence Europe 4, 6 and 9 July 2013).

the EU to the Soviet Union and Hungary's Parliament declared "we had enough of dictates during the 40 years we spent behind the Iron Curtain" (quoted from FT 11 July 2013).

To conclude, the Commission has so far not chosen the Article 7 procedures. It rather used 'normal' infringement proceedings via the ECJ, pressure via the Council of Europe and the IMF<sup>92</sup>, and finally pressure via the excessive deficit procedure, as a means to exert influence on Hungary's government. However, this is increasingly getting controversial. Most recently, Commission President Barroso in his 2013 "State of the Union address" (speech/13/684, 11.9.2013) considered that "(e)xperience has confirmed the usefulness of the Commission role as an independent and objective referee. We should consolidate this experience through a more general framework ... activated only in situations where there is a serious, systemic risk to the rule of law, and triggered by pre-defined benchmarks. The Commission will come forward with a communication on this."

### Case 2: Romania

Political instability in Romania is *inter alia*<sup>93</sup> connected to the economic and financial crisis. The country went through "a 20 billion Euro bailout from the International Monetary Fund and the European Union in 2009 ... pushed through some of Europe's toughest austerity measures and endured one of the continent's longest recessions" (FT 6.2.2012). Poverty and alleged cronyism led to street turmoil until the liberal democrat Prime Minister Emil Boc resigned in early 2012 (*ibid.*). Commentators consider that this surprising move only months before election time "should be seen ... as a sign of desperation, given the strong pressure on the government to cede to protests over the last few weeks, versus the stark position of the EU-IMF on issues such as public sector wages and pensions"<sup>94</sup>. Successor Mihai-Razvan Ungureanu tried in vain to uphold the coalition government since, in the light of forthcoming elections, ever fewer members wanted to be connected to the austerity measures. After his resignation in April 2012, President Traian Basescu, himself member of the centre-right, could not avoid appointing a social democrat.<sup>95</sup> Subsequently, a power struggle erupted between the new Prime Minister Victor Ponta of the centre-left governing coalition, a controversial young politician,<sup>96</sup> and President Traian Basescu.

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<sup>92</sup> Where Hungary had submitted a request for fresh financial support, FT 24.1.2012.

<sup>93</sup> For an in-depth analysis, see e.g. Phinnemore and Papadimitriou, forthcoming and Gallagher, 2008.

<sup>94</sup> FT 6.2.2012 citing a strategist at ING.

<sup>95</sup> Der Standard 26.4.2013.

<sup>96</sup> Victor Ponta also has a less than clean personal record: The University of Bucarest conceded that his dissertation was massive plagiarism, see e.g. German weekly « Die Zeit » (<http://www.zeit.de/politik/ausland/2012-07/rumaenien-ponta-plagiatsvorwurf-universitaet>) accessed 7.3.2012. Ponta was, hardly surprisingly, cleared by a government ethics board (<http://www.nature.com/news/conflicting-verdicts-on-romanian-prime-minister-s-plagiarism-1.11047>), accessed 7.3.2012. His own statement is more than

It may have fuelled the conflict that Ponta's interim government had little time to convince voters before the elections in late 2012 (which they won with nearly 58,6% of the votes<sup>97</sup>), that Ponta's own mentor and former prime minister Adrian Nastase<sup>98</sup> was sentenced to two years in jail on corruption charges,<sup>99</sup> and that the pre-membership adaptation to EU standards regarding law and justice were at best superficial (Gugiu, 2012).

The power struggle involved various issues closely related to democratic principles, e.g.<sup>100</sup>

- a procedure to suspend the president, alleged to have overstepped his powers,<sup>101</sup> voted on in the Romanian parliament on 6 July and triggering a referendum on impeaching the head of state (who was finally reinstated in August 2012<sup>102</sup>);
- emergency decrees, e.g. to remove the constitutional court's powers to review parliamentary decisions and to change the referendum rules, requiring only a simple majority of those voting to remove the president instead of 50 per cent of registered voters;
- replacement of high-level office holders such as the ombudsman, who can challenge institutions' actions in the constitutional court, and the speakers of both chambers of parliament.
- a clash over who should represent Romania at the EU summits as well as over the constitutional court's authority: defying a constitutional court ruling upholding Mr. Basescu's claim that this was the president's job, Ponta travelled to Brussels in June 2012.

Thanks to EU intervention (and due to a less than 50% turnout in the referendum), the President stayed in power. The Commission's pressure on Romania also led to the revocation of two controversial decrees (on powers of the constitutional court and on

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telling, however: When he was at university nine years ago, quotation marks for direct citations were not yet standard (<http://www.zeit.de/politik/ausland/2012-07/rumaenien-ponta-plagiatsvorwurf-universitaet>; accessed 8.3.2013). However, the university states that he knew the rules since he applied them in other parts of the PhD thesis (<http://www.spiegel.de/unispiegel/studium/plagiatsaffaere-in-rumaenien-uni-will-ponta-dokortitel-entzogen-sehen-a-855435.html>, accessed 8.3.2013). An additional shadow on his CV is that he listed a Master studies program that he has, according to the Italian university, never attended; Austrian public news station ORF (<http://news.orf.at/stories/2129688/2129574/>).

<sup>97</sup> FT 10.12.2012.

<sup>98</sup> Already during his term of office, less than full respect of democratic values seems to have prevailed, which, however, did not yet raise major objections on the EU level (e.g. Austrian weekly politics journal Profil, 16.7.2012).

<sup>99</sup> See e.g. Der Standard 9.7.2012 citing a Romanian ex-Minister of Justice who holds that Ponta's goal was stopping the ongoing corruption processes; see also Der Standard 14.2.2012, FT 12.8.2012.

<sup>100</sup> Compilation from various sources, e.g. FAZ 6.7.2012, Der Standard 5.7.2012, Agence Europe e.g. 18.7.2012, European Voice e.g. 19.7.2012.

<sup>101</sup> The constitution provides that the president of Romania should be neutral, FT 8.7.2012.

<sup>102</sup> E.g. Agence Europe 29.8.2012, FT 21.8.2012.

referendum rules). However, the conflict is only under truce,<sup>103</sup> and, more importantly, this struggle casts serious doubt on “the solidity of Romania’s democracy and respect for the rule of law in the country.”<sup>104</sup> The deeper roots of this “anti-graft battle is striking at the nexus between politics and money that has characterised post-communist life, particularly in the Balkans.”<sup>105</sup> From the outset, building market democracy had been intertwined with control over the former state property “through often skewed privatisations, and for lucrative government contracts and EU money. The old nomenklatura, or communist and security elite, were among the biggest winners; they had contacts and funds. Political parties and media often became tools of these wealthy vested interests.”<sup>106</sup> In Romania, former second-grade communists are said to have quickly come “to power under president Ion Iliescu, who ruled until 1996, while pursuing only limited reforms” – and in fact both Basescu and Nastase, the founder of the present prime minister’s party, were among that group.<sup>107</sup> Commentators see former PM Nastase’s sentencing as a “watershed” that made the elites nervous they could possibly no longer control the judiciary.<sup>108</sup>

The EU frequently hinted that fundamental principles are at stake: Commission President Barroso, for example, “expressed his serious concerns about recent political events in Romania in relation to the rule of law, the independence of the judiciary and the role of the Constitutional Court.”<sup>109</sup> Nonetheless, Article 7 proceedings were not started.<sup>110</sup>

Just like in the Hungarian case, alternative means were chosen to increase pressure on Romania. In this case, the country’s wish to join the border-free Schengen zone provides some leverage. Various EU-level politicians and governments have hinted that failure to respect democratic norms limits Romania’s chances of joining. Originally, both Romania and Bulgaria were expected to enter in spring 2011, but this Schengen enlargement was repeatedly blocked by France, the Netherlands, Finland, Germany, and most recently, also Austria.<sup>111</sup> They worry that problems such as organized crime and corruption might jeopardize safety in the Schengen Area<sup>112</sup> and link the decision to the so-called Cooperation and Verification Mechanism reports. The latter were agreed upon during the membership

<sup>103</sup> The two opposing leaders signed an agreement to that effect (e.g. FT 26.11.2012, Newsletter Robert Schuman 8 January 2013).

<sup>104</sup> FT 26.11.2012.

<sup>105</sup> FT 12.8.2012, referring to analysts’ opinions.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Meeting between European Commission President, José Manuel Barroso, and Romanian Prime Minister, Victor Ponta, European Commission, Memo/12/558, 12. July 2012, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/558>.

<sup>110</sup> They were however debated and called for, e.g. by various conservative MEPs (Der Standard 5.7.2012).

<sup>111</sup> See e.g. Agence Europe 4.3.2013, 8.3.2013.

<sup>112</sup> Sofia News Agency Novinite.com, 24. 7. 2012 ([http://www.novinite.com/view\\_news.php?id=141607](http://www.novinite.com/view_news.php?id=141607)), accessed 7.3.2013.

negotiations and have evaluated Romania as well as Bulgaria since 2007. The Act of Accession of Bulgaria and Romania to the EU provides for safeguard clauses and taking of “appropriate measures”<sup>113</sup> if there are shortcomings in the implementation of the *acquis*. The report adopted by the Commission on 18 July 2012 turned out to be highly critical. It raised “great concern” and “serious doubt as to the commitment of Romania to respecting the rule of law and to conforming to fundamental principles like the independence of the judiciary.”<sup>114</sup> It stated that “the Commission today more than ever doubts the “sustainable and irreversible” nature of the efforts made since 2007 and will obviously pursue for some times to come its monitoring of Romania.”<sup>115</sup> The latest report was published in late January 2013, stressing that the situation is “of concern” - and although respect for the constitution and for decisions of the constitutional court was seen to have been restored, “the lack of respect for the independence of the judiciary and the instability faced by judicial institutions remain a source of concern”.<sup>116</sup> Intimidation of lawyers and judges including threats of death are just some of the problems being hinted at. There is also a critical debate about members of government and top executives reportedly not stepping down after serious corruption and fraud charges or even convictions.<sup>117</sup>

The situation is undisputedly serious. However, this further example of an indirect fight for improving democratic standards in a Member State by the EU is quite controversial and bears a certain risk of antagonizing EU Member States. In principle, Romania fulfils the criteria for Schengen, as stressed repeatedly by Commission President Barroso.<sup>118</sup> In the EP, the Social Democrats, for example, support accession and criticise the German position as less than responsible and “populist”.<sup>119</sup> At the same time, the Netherlands want to see two consecutive positive reports on both EU newcomers before lifting their veto.<sup>120</sup> Various actors, including Commission Vice President Viviane Reding, argue that the Schengen area “is not just about technical border control, as evaluated by the Commission, but also about proper functioning of the justice system and the guarantees it provides.”<sup>121</sup> It comes as no surprise that some Romanian politicians react harshly, e.g. the foreign minister who is reported to have said he was surprised at these comments, and that “linking of the question of joining Schengen and the justice situation in Romania lays the foundations for discriminatory treatment against a Member State that has met all its obligations under EU

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<sup>113</sup> See Article 38 (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:157:0203:0220:EN:PDF>).

<sup>114</sup> Quoted in Agence Europe 19.7.2012.

<sup>115</sup> Ibid.

<sup>116</sup> Quotes as reported in Agence Europe 31.1.2013.

<sup>117</sup> Ibid. According to „Der Standard“, six parliamentarians continue in office after corruption convictions, cumulatively worth 17 years of jail (14.2.2012).

<sup>118</sup> Agence Europe 31.1.2013 and 5.2.2013.

<sup>119</sup> S&D group chairman Hannes Swoboda, cited in Agence Europe 5.3.2013.

<sup>120</sup> FT 8.2.2012.

<sup>121</sup> Quoted in Agence Europe 4.9.2012.

law.”<sup>122</sup> In the most recent, relevant meeting the decision was postponed until the end of 2013. This was seen as “a bitter blow to Bulgaria and Romania” who have argued that they spent a lot of money on speedily making their borders secure and that, “with the crisis, all this money could have been spent differently.”<sup>123</sup>

In the aftermath of the latest critical Commission report, Prime Minister Victor Ponta went to Brussels and voiced that Romania would “implement all the recommendations made by the Commission” (as he did in July 2012;<sup>124</sup> fellow government members denied that only days afterwards<sup>125</sup>). Reportedly, he “even thanked the president of the Commission and the president of the European Parliament ... for their help in improving his country.”<sup>126</sup> This may be seen as a victory for the EU Commission -- but it needs mentioning that the dire financial situation of the country gave crucial backing to the political pressures since the uncertain and controversial political situation “sent the leu to an all-time low against the euro and raised concerns about Bucharest’s 5 billion euro credit line with the IMF.”<sup>127</sup>

### Lessons from the 2012 problem cases

All in all, what can we learn from the 2012 struggles and how can foundational principles of the EU (liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law) be efficiently protected?

The good news is that with the EU, there are nowadays at least some checks and balances outside individual countries. This adds some leverage to those forces fighting against a weakening of important fundamental principles.

The bad news is that the EU Treaties do not (yet) offer an effective framework to fight dangers to democratic principles in the Member States. Article 7 TEU is less than easily applied since determining a breach needs unanimity minus the government concerned in the European Council, plus the consent of the EP and hence a two-thirds majority of MEPs. This seems to be the main explanation why it has not yet been used. Nonetheless, the case of Hungary highlights that continued non-usage could turn into a very obvious sign of weakness on the part of the EU, and that pressurizing by other means may not have the desired effects.

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<sup>122</sup> Quoted in Agence Europe 4.9.2012.

<sup>123</sup> Agence Europe 8.3.2013.

<sup>124</sup> FT 11.7.2012: „Romania’s PM vows to respect rule of law ... ready to correct any democratic failings detected by EU executive.“ Similar: FAZ 12.7.2012.

<sup>125</sup> FAZ 15.7.2012.

<sup>126</sup> Agence Europe 5.2.2013.

<sup>127</sup> FT 17.7.2012.

What is more, to continue with mainly “indirect” means in the fight against non-compliance with the EU’s basic principles could in the long run invite criticism that the EU acts in a less than transparent and rule-based manner.<sup>128</sup> Potential ad hoc strategies could be seen at odds with the fiduciary principle’s stress on long-term reliability of governmental action (“Vertrauensgrundsatz”). What is more: Would indirect means work in many cases? It seems that relevant media attention can hardly be multiplied. Finally, a lot of the seeming success of indirect means has, in fact, depended on external levers, but after the end of the financial crisis, pressure via IMF, for example, could lose importance.

Additionally, as long as no formal proceedings under Article 7 TEU are executed, voting rights in the Council cannot be withdrawn. All leaders of EU states, regardless of their credentials, will continue to participate in the central decisions. Indeed, this is a painful issue: who qualifies in a more than formal sense to be a member of the team in the EU’s major decision-making body? Should it be open even for personalities tampering with crucial issues of democracy and human rights? Or need the EU – if an important case comes up – ponder the withdrawal of membership rights not only for reasons of procedure, but also for the very sake of protecting itself from the effects this may have on the output and the impression the EU sends to the world and its citizens?<sup>129</sup>

It is understandable, however, that the Union does indeed act with extreme caution. In addition to the great sensitivity of the matter, it is also obvious that in recent times, there are more than one or two top-level politicians whose democratic credentials have been questioned in one or another dimension, or have even been tried in court proceedings. Among them are former Italian PM Silvio Berlusconi<sup>130</sup> (his country’s slow moving court

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<sup>128</sup> It may even expose the EU “to charges of hypocrisy and a lack of transparency” Dawson and Muir, 2012, 473.

<sup>129</sup> It seems that in at least one EU summit, a politician not even entrusted with the task by the national constitution took part, which was reportedly only detected by a Romanian journalist (Profil 16.7.2012). The case of Ponta brings to mind an argument used in the Austrian pre-accession debates: Some held that the surge of the right-wing populist FPÖ made EU-membership all the more important. Others countered, however, that the worst of all worlds was one with Jörg Haider as a member of the EU’s Council and therefore even much more influential than he could be only on the national level (it needs mentioning that, back then, the EU had no procedures at all to counter anti-democratic developments in Member States). Some will remember that the only “sanctions” ever taken against a government was against the Austrian centre-right coalition government established in 2000. At that time, any Article 7 proceedings would still have needed unanimous approval. Proceedings were not even started but they would have been debatable because apart from forming a coalition government including a right-wing populist, no acts against democratic principles occurred. See e.g. Falkner, 2001. The EU governments acted outside the Treaty framework and very ad hoc, which de-legitimised the use of sanctions and possibly still today explains some of the reluctance to use Article 7 TEU: “The isolation policy ... failed miserably, as the EU was later forced to drop the sanctions, while Mr. Haider remained in power” (FT 15.7.2012). For Austria, the outcome of the ÖVP/FPÖ era was a series of corruption processes but no sweeping anti-democratic legal reforms such as those now being discussed with Hungary and Romania at hand. For an in-depth legal analysis, see Schorkopf, 2002.

<sup>130</sup> To date, the Italian government is in a fragile truce since the party of Silvio Berlusconi threatens to pull out of the coalition government if the former Prime Minister, recently convicted of tax fraud, is removed from the Senate as a consequence of this verdict (e.g. FT 11. and 4.9.2013). Already before that, Berlusconi had been condemned to four years of jail for tax fraud as well as one year for publishing materials stolen from the federal prosecutors’ office to harm his opponents, and several further proceedings are ongoing, e.g. for purchase of votes and political bribery (e.g., Der Standard 8.3.2013). It needs mentioning that the EU did not act when Berlusconi had several

system and tough immigration policies have by the way raised “serious concerns” at the Council of Europe<sup>131</sup>), former Czech president Vaclav Klaus,<sup>132</sup> and even former French President Nicolas Sarkozy. The latter was responsible for controversial, large-scale Roma deportations in 2010,<sup>133</sup> raising great concerns with the EU Commission regarding human rights and the EU’S freedom of movement. In Greece, to briefly mention a different field of neglect for basic EU values, politicians of all kinds have regularly accepted that the situation of one million migrants is so dire that the Council of Europe recently needed to call out loud for solidarity and “humane housing.”<sup>134</sup>

Further countries have been profoundly de-stabilized after electoral outcomes that do not promise smooth government formation and long term stability (e.g. Italy, Greece etc.), or have seen public upheavals following the economic crisis. The European Trade Union Confederation (ETUC) has even launched a major petition to EU leaders and as of March 2013, over 500 experts have already signed this manifesto urging the EU to respect and promote fundamental social rights in respect of all crisis-related measures.<sup>135</sup> Bulgaria has, to a particular extent, made headlines recently since “tens of thousands of Bulgarians took to the streets in a round 10 cities to demonstrate against corruption and poverty, calling for the political elite to be replaced ... ultra-nationalist groups condemning ‘colonisation’ by Brussels.”<sup>136</sup> Bulgaria has indeed been dubbed the first example of a country that is fiscally stabilized but socio-politically de-stabilized.<sup>137</sup> In any case, Italy in 2013 is another example of a country close to political instability. Enough voters were so unsatisfied with recent

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laws, including electoral laws (e.g. Der Standard 23.2.2013), changed to his own benefit (including in court proceedings). In what is reportedly the most dangerous case in court against him thus far, a Senator recently confessed to have accepted three million euro from Berlusconi in order to bring down the Prodi government in 2006. Allegedly, several of those who withdrew their support for the Prodi government back then had actually been bribed. Berlusconi, in turn, spoke of an attempted coup d’etat by the courts in order to harm him (Der Standard 4.3.2013, translation from German citation by GF). In February 2013, Berlusconi reproached Italian judges as « worse than the Mafia » (translation GF, Der Standard, 25.2.2013).

<sup>131</sup> Whose Commissioner for Human Rights urged Italy to rethink legislation not in line with European standards, and ordered the country to pay some 40m Euro for violations between 2007 and 2012 (FT 18.9.2012). It should be mentioned that there seem to be “almost 9m criminal and civil cases pending at all levels of jurisdiction, and an average length of more than eight years for criminal trials” (ibid.).

<sup>132</sup> He allegedly used a new year’s amnesty to end corruption proceedings and is now being sued for high treason by the Czech Senate (e.g., der Standard 8.3.2013). He was also considered an anti-European and at his departure, MEP Jo Leinen (S&D, Germany) described Klaus’ refusal to sign the Lisbon Treaty as “a ridiculous theatre” (Agence Europe 8.3.2013).

<sup>133</sup> For example, see Time Magazine online (<http://www.time.com/time/world/article/0,8599,2015389,00.html>) accessed 23.3.2013 and Parker, 2012

<sup>134</sup> FAZ 24.1.2013. Greece alone, however, is not to blame: The EU is liable for making its external borders secure and keeps asking its members to make ever larger investments along these lines, but there is little attention for the human tragedies of those who have crossed them. Responsibility for them has been shifted, as a part of the EU’s justice and home affairs policy, to the external borders. The latter moved ever further away from the prosperous core EU Member States – an intended effect of the enlargement of membership and neighbourhood policy – and the formerly complaining Member States showed no interest in sharing the burden after they were no longer really affected Trauner, 2011.

<sup>135</sup> See (<http://www.etui.org/Networks/The-Transnational-Trade-Union-Rights-Experts-Network-TTUR>) accessed 24.3.2013.

<sup>136</sup> Agence Europe 5.3.2013.

<sup>137</sup> Der Standard, 21.2.2013, quoting Bulgarian expert Ivan Krastev.

governments that they voted for the “five star party” of a comedian, Peppe Grillo, who does not want to govern at all.<sup>138</sup>

All the above is a warning that the EU needs to be very careful in order to prevent a meltdown of democratic systems in Europe,<sup>139</sup> particularly at times of profound economic crisis. While it cannot accept that national politicians endanger common democratic principles without reacting, the EU needs to carefully ponder its leverage. In that light, the Article 7 proceedings may indeed appear as a potentially “nuclear option”:

‘A political union also means that we must strengthen the foundations on which our Union is built: the respect for our fundamental values, for the rule of law and democracy... We need a better developed set of instruments – not just the alternative between the “soft power” of political persuasion and the “nuclear option” of article 7 of the Treaty.’ (Barroso, Speech/12/596, 10)

#### **4. Non-compliance with EU law in the Member States and enforcement shortcomings**

This section covers what is mostly discussed under the heading of non-compliance with EU law. In terms of the ongoing crisis, all of the phenomena highlighted above may seem even more important but, in any case, an in-depth analysis of the EU’s non-compliance problem cannot spare these issues. In a nutshell, significant improvements seem to have happened lately due to increased attention and investment by the EU Commission. However, they are mainly concerned with the timely transposition of EU Directives in the Member States. The ensuing implementation on the ground and the enforcement by the national governments, in turn, are still found wanting, including for structural reasons. Overall, there is no reason as of yet to believe that EU laws are actually obeyed in a regular manner, and there is much reason to fear that compliance is quite uneven across the Member States. This section will briefly summarize what the main problems are, both for compliance as such and for academic research on this multi-dimensional problem.

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<sup>138</sup> E.g. FT 27.2.2013, 28.2.2013.

<sup>139</sup> Could the EU witness some of its members becoming “failed states”? Although there is no general consensus on the definition, those EU Member States that seem in danger of declining governability are clearly not fulfilling some of the basic responsibilities of a sovereign government. In any case, austerity has recently become a point of contention and could, in the medium run, get EU-level party politics significantly more attention and possibly even make the next EP election somewhat more than “second-order national elections” (Marsh and Mikhaylov, 2010, abstract). Social democrats increasingly warn of the “risk of the crisis leading to a rejection of Europe” because citizens in difficulty see Europe more as “something that aggravates” their situation (French Economy Minister Pierre Moscovici, cited in Agence Europe 8.3.2013) and it seems that they will make that a core issue in the 2014 EP elections.

By the end of 2011, the EU's "acquis communautaire" consisted of 8862 regulations and 1885 directives in addition to the primary law enshrined in the Treaties.<sup>140</sup> For cases of non-compliance with EU law in the Member States, it is important to keep in mind that we have no such figures easily at hand.<sup>141</sup> The reason is that the phenomenon is highly complex. Both EU-level actors and national actors come into play, and at the lower level, it is the Member States and the citizens and firms. Even discarding the behaviour of individuals "on the ground," compliance still covers a whole range of aspects. For a Member State, complying with an EU-related rule will typically include duties during various phases of the implementation process: law-making to adopt new rules or adapt old ones; control of these laws as to their application in practice; and finally, asserting the rules where they are not adequately respected. In a wider sense, "enforcement" denominates both of the latter stages, monitoring and enforcement.

It is a typical feature of the EU's multi-level polity that implementation and enforcement of its policies takes place predominantly at the lower levels<sup>142</sup> – at least outside the field of competition law, where the Commission has a wide range of enforcement powers.<sup>143</sup> For reasons of fighting anti-competitive developments like cartel formation, the Commission may indeed investigate businesses, block mergers, stop state aid, etc. It cannot, however, take similar measures when it suspects that the EU's social or environmental standards are imperfectly respected. The Commission can certainly monitor if Member States notify timely and correct transposition of Directives into national law and, if not, it can initiate infringement proceedings (it should be stressed that the Commission has actually significantly improved its procedures in recent years<sup>144</sup>). However, this is only indirect action since the real actors are the Member States, and all rests on the expectation that due compliance is assured there. In actual fact, however, there are multiple prerequisites, many of which are not unproblematic. We will come back to this below.

So what information do we have regarding the success of implementation? First, it needs mentioning that most of the relevant academic literature falls prey to a fundamental shortcoming, studying only the transposition of EU Directives whilst arguing that the results speak about "implementation" (i.e. the overall process) or "compliance" (the conforming

<sup>140</sup> 29th Annual Report on Monitoring the Application of EU Law, published by the Commission on 30 November 2011, page 3. Data for 2010: approx. 8400 regulations and approx. 2000 Directives. ([http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/annual\\_report\\_29/sg\\_annual\\_report\\_monitoring\\_eu\\_law\\_12\\_1130.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_29/sg_annual_report_monitoring_eu_law_12_1130.pdf)).

<sup>141</sup> This section summarizes arguments developed in Falkner, Hartlapp and Treib, 2007. Please consider that article for a full list of references including also positive exceptions to the practices criticized. More recently, see als Treib, 2008 and the discussions by Toshkov, 2010 and Toshkov, Knoll and Wewerka, 2010.

<sup>142</sup> See also Cremona, 2012, Grohs, 2012

<sup>143</sup> See e.g. ([http://ec.europa.eu/competition/consumers/institutions\\_en.html](http://ec.europa.eu/competition/consumers/institutions_en.html)), accessed 14.3.2013.

<sup>144</sup> For the early efforts and the Commission's non-compliance with its own relevant internal procedures still in the years post-2000, see Hartlapp, 2005, Falkner, Treib, Hartlapp and Leiber, 2005

outcome). Therefore, “transposition” studies look at only the “tip of the iceberg” of non-compliance. For practical reasons, this is often the only feasible strategy when researchers opt for an economic research design. A second reason why the compliance literature is rarely telling of the phenomenon at stake is that all too often, easily accessible data is used. However, the statistics published by the EU Commission on transposition notifications and on infringement proceedings cannot be expected to simply mirror transposition outcomes, even less so “non-compliance” overall. One of the few qualitative projects with empirical data for a significant number of cases (90 cases resulting from six social policy directives) can indicate the problems involved: infringement procedures were only initiated in 60% of the cases found to be in breach of the studied directives (Falkner, Treib, Hartlapp, and Leiber, 2005). The Commission data on infringements not only underestimated the level of domestic non-compliance, the latter was also distorted between countries, between Directives, and between forms and stages of the implementation process (Hartlapp and Falkner, 2009).

Notwithstanding such shortcomings of the EU statistics, the most recent data of relevance shall be mentioned here to give an idea of the official numbers. It should be highlighted that this is the place where the paper's most important good news is coming. It seems that the Commission's increased efforts<sup>145</sup> reap results since both the number of formal infringement proceedings launched<sup>146</sup> and the seizures of the ECJ have recently been decreasing. The number of open infringement cases even fell from 2900 in the year 2009 to 1775 by the end of 2011.<sup>147</sup> With regard to the EU standards relevant for Internal Market, the Commission actually applauds that compared “to November 2007, the number of open infringement proceedings is down by 38%”.<sup>148</sup> In other words, the part of non-compliance that is discovered and followed-up by the European Commission is tackled more efficiently, both by itself and by the Member States. This is “partly due to the increased use of problem solving mechanisms”<sup>149</sup> under the “Europe of Results” program of 2007<sup>150</sup> which allowed matters to be resolved without formal legal proceedings (see below section III.1.).<sup>151</sup>

<sup>145</sup> 29th Annual Report on Monitoring the Application of EU Law, published by the Commission on 30 November 2011, pt. 2.2, ([http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/annual\\_report\\_29/sg\\_annual\\_report\\_monitoring\\_eu\\_law\\_12\\_1130.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/annual_report_29/sg_annual_report_monitoring_eu_law_12_1130.pdf)), accessed 3.3.2013.

<sup>146</sup> The Commission reports that in 2011, from an overall number of three thousand complaints received overall and initially assessed, it opened bilateral discussions with Member States in 619 cases. By the end of 2011, 1775 infringement cases were open. Italy is the « leader » with a total of 39, Latvia is best with 23 « only » (ibid., 2.2).

<sup>147</sup> Ibid. Annual Report, pt. 2.2.

<sup>148</sup> 15th scoreboard on the internal market presentation, summarized in Agence Europe 20.2.2013. See also (IP/13/127 Event Date: 19/02/2013, [http://europa.eu/rapid/press-release\\_IP-13-127\\_en.htm](http://europa.eu/rapid/press-release_IP-13-127_en.htm)), accessed 3.3.2013.

<sup>149</sup> Quote from the press release summarizing the Annual Report ([http://europa.eu/rapid/press-release\\_IP-12-1280\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1280_en.htm)), accessed 15.3.2013.

<sup>150</sup> See European Commission Communication ([http://ec.europa.eu/eu\\_law/eulaw/pdf/com\\_2007\\_502\\_en.pdf](http://ec.europa.eu/eu_law/eulaw/pdf/com_2007_502_en.pdf)), accessed 22.3.2013.

<sup>151</sup> For an overview or recent measures see ([http://ec.europa.eu/eu\\_law/infringements/application\\_monitoring\\_en.htm](http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm)), accessed 16.3.2013.

However, the Commission's reports are not unequivocally positive: "The correct application of EU law continues to present challenges for the Member States... with late transposition becoming increasingly problematic."<sup>152</sup> The Commission is thus in agreement with the almost indisputable voice of researchers stating that further improvements are needed as "the scale of the compliance gap appears worrying" (Toshkov, Knoll, and Wewerka, 2010). A review of the explanations of compliance offered in numerous qualitative studies revealed that factors related to administrative capacity and co-ordination seem to have the greatest explanatory leverage (ibid.).<sup>153</sup>

It is true that non-compliance issues "below" the level of transposition into national law only occasionally attract attention – but if they do so, the harm for the EU's reputation in the eyes of the citizens is enormous. A case in point is the 2013 "horse meat scandal" where a variety of national and EU laws have evidently been disrespected and adequate checks were lacking, so that actors from all sides are asking for more controls at this moment (e.g., Agence Europe 26.2.2013). However, the large-scale fraud involving horse meat – with at times dangerous drug contamination – sold as beef in ready-made meals reveals one essential weakness of the EU's approach: an ever larger market makes efficient control more difficult as well as more expensive. For insiders<sup>154</sup> of the food industry, lacking controls are the issue rather than lacking laws, and checks should be EU-wide. Against this background, it comes as no surprise that increased controls ensuing the horse meat scandal also revealed other food law infringements, e.g. 57 tons of lamb meat from Britain, which, according to French veterinary inspectors "was processed using a method made illegal because of the risk of spreading mad cow disease" (Agence Europe 19.3.2013).

However, various arguments make good rule compliance less probable in a wider market, in the absence of specific measures. Regulation is, at least partly, on a higher level and therefore further from the people on the ground; control of the application of these rules is also more complex and, in the case of the EU, divided between levels. Lower-level authorities are mainly in charge, but they may have less of an interest in tight controls if "exports" are concerned, as opposed to local consumption; human psychology has less hurdles to cheat when the victim is anonymous and far away<sup>155</sup> since people are arguably complying with rules – at least, inter alia – for reasons of fear,<sup>156</sup> pride,<sup>157</sup> as well as

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<sup>152</sup> Annual report, pt. 4 conclusions.

<sup>153</sup> We need "a stronger focus on an effective sanctioning mechanism," another one of the most recent studies on compliance with Directives concludes (König and Mäder, 2013, abstract).

<sup>154</sup> See e.g. the chairman of REWE international in an interview about the horse meat scandal (Der Standard 15.3.2013).

<sup>155</sup> I am indebted to Jean Leca for pointing out these arguments and this literature to me.

<sup>156</sup> Lange, 2002, p. 197.

<sup>157</sup> Elster, 1999, p. 145

anticipated shame<sup>158</sup>. In all that, of course, the chances of cheating being discovered and sanctioned matter a lot<sup>159</sup> – but this is less realistic in a larger and diverse union. In short, the current scandal can be read as one of many indications that the EU has not yet sufficiently made it an issue that the wider and unified market may ask for wider and unified controls and rule enforcement as well. To set that up, however, a significant proportion of the economies of scale resulting from the enlarged market would possibly need to be spent on upholding quality of the products circulating and levels of consumer protection – which brings up difficult and highly political questions, e.g. potential needs for redistributing profits made to carry some of the costs for securing the quality of the consumables marketed.

Overall, our knowledge is still very scarce when the application and enforcement of EU law (not only the first step of transposition of Directives) is concerned.<sup>160</sup> There are, at least in several Member States, structural weaknesses that make the expectation of swift application seem an illusion.<sup>161</sup> Effective law enforcement needs a number of basic pillars to work effectively: public administrations, labour inspectorates, court systems, media, and civil society institutions that could be a whistleblower and intermediate potential problems. In several new Member States, but also realistically in at least some of the older ones,<sup>162</sup> these essential infrastructures have been found wanting. In other words, they did not work with a high enough degree of effectiveness as to deserve trust in their capacity to indeed secure that EU rules be applied. And if there is reason to doubt if all structures are indeed in place to make EU law living rights instead of dead letters in the existing Member States, then this seems all the more questionable in the case of some possible future Member States. Considering that enlargement negotiations are highly sensible and multifaceted, with compliance issues playing but one of many roles, it seems therefore doubtful that the EU should indeed discard the means to discipline noncompliant new members after accession,<sup>163</sup> the Cooperation and Verification Mechanism now applied to Romania and Bulgaria.

## **5. Non-compliance with ECJ judgments and even penalization proceedings**

During the pre-1992 era, even non-compliance with verdicts of the EU's court soared: Every year about four so-called "second judgments" were handed down because a Member

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<sup>158</sup> Gagné, 2007, p. 445

<sup>159</sup> For rational choice explanations of humans complying see, e.g., May, 2004 and Posner, 2007

<sup>160</sup> For the findings and pitfalls of EU compliance studies, see the state-of-the-art papers on the quantitative and qualitative literature by Dimiter Toshkov : Toshkov, 2010, Toshkov, Knoll and Wewerka, 2010 and his databases published at the EIF website (<http://eif.univie.ac.at/datenbanken.php>).

<sup>161</sup> Toshkov, 2007, Falkner and Treib, 2008, *ibid.* Falkner, 2010b, Falkner, Treib and Holzleithner, 2008, Toshkov, 2007, Falkner, 2010a, Zubek and Goetz, 2010a, Zubek and Goetz, 2010b. Hartlapp 2013 (Hartlapp, 2013) studies the cooperation of labour inspectorates and administrations in the enforcement of EU labour law in-depth, hinting at both positive and negative developments in recent times.

<sup>162</sup> In one typology, the « World of Dead Letters » includes also Ireland and Italy (Falkner and Treib, 2008).

<sup>163</sup> As stated by EU Commissioner for enlargement Stefan Füle, Agence Europe 10.10.2012.

State had not complied with earlier European Court of Justice (ECJ) judgments on the same case. No effective EU weapon against such forms of Member State non-compliance existed. The last resort of the European Commission as the watchdog over the application of EU rules was to initiate a “second judgment” following up on a “first judgment” that EU law had been infringed. By the early 1990s, the Commission claimed that shaming Member States into compliance was too weak a means of governance. Ole Due, then president of the ECJ, seems to have been the first to suggest that the Court should be allowed to impose penalties (Kilbey, 2010, p. 371). The Maastricht Treaty indeed set up procedures to penalize disobedient Member States which are now contained in Article 260 of the Treaty on the Functioning of the EU, adopted in December 2007 in Lisbon, “If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.”

Did this change the EU's state-of-law performance? Little is known about the use and effect of these proceedings. Pathbreaking legal work by Ian Kilbey<sup>164</sup> is now followed up by an in-depth political science project still under way.<sup>165</sup> It is safe to say that the Commission's use of these powers is extremely cautious. Between November 1993 and early 1997, no decision regarding a 2<sup>nd</sup> referral was taken, so it took 7 years to see the first 2<sup>nd</sup> judgment under the post-Maastricht rules handed down. And during the 17 years after the Maastricht Treaty (November 1993 – end 2010) no more than 12 second judgments were given. This is the same as the sum of only the three years preceding the Maastricht Intergovernmental Conference (Kilbey, 2010, p. 371): with further references). Both 2011 and 2012 saw two penalization judgments. In total, there were only 16 such ECJ rulings through the end of 2012.<sup>166</sup>

From the cases before mid-2011, we have full information and the data presented in the following only covers them. Greece is by far the country with the most cases of fines imposed with a total of five. Overall, the fines against Greek non-compliance with EU law amount to 34 500 000 Euro. France follows with three penalization cases, but due to the enormous sum of 78 000 000 Euro paid for its failures to protect fish stock, that country is the leader of the fined non-compliance list in terms of money. In overall terms, looking at the countries that received 2nd judgments reveals that the 2005 finding of different ‘worlds of

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<sup>164</sup> See e.g. Kilbey, 2010 with further references.

<sup>165</sup> The project is ongoing at the Institute for European Integration Research at the University of Vienna under the directorship of the present author. The data reported here cover all second proceedings that have entered the ECJ's registry before the end of 2009 and all judgments given until the end of 2010. Funding by the Jubilee Fund of the Austrian National Bank is gratefully acknowledged. Junior colleagues participating in this project were Nikolas Rajkovich (9/2010 to 1/2012 with interim periods of leave) and Florian Steininger (mid-2009 until mid-2010) and I would like to acknowledge their cooperation in the findings reported here.

<sup>166</sup> According to the Curia database, checked on 15.3.2013.

compliance' (Falkner, Treib, Hartlapp and Leiber 2005) still has some appeal; from the 'world of law observance' (Denmark, Sweden, Finland), no single member is among the list of culprits, and no member is even on the list of countries with cases that entered the ECJ registry a 2nd time but were withdrawn before judgment. By contrast, there are once again multiple signs of disregard towards obligations arising from EU-law in Greece, France, and Portugal – all part of the 'world of neglect'.

Between 2006 and 2010, an average of 108 cases of Member State non-compliance were being condemned each year in 1st judgment, compared to less than one 2nd judgment annually. This seems to suggest that the Commission regards 2<sup>nd</sup> judgments and penalization as an exceptional means to demonstrate power in selected cases, not as the standard means to be applied whenever Member States do not comply with ECJ judgments. The Commission is indeed quite successful in Court when it actually chooses to use this instrument. Studying the cases in detail reveals that the ECJ has essentially followed the Commission's views, and that the Commission hardly ever really lost a case at 2<sup>nd</sup> judgment.<sup>167</sup> Does this make the Commission truly successful and the penalization proceedings a powerful weapon? The author rather doubts this since there are manifold signs that one cannot always consider the problem indeed solved, at least in a profound sense, when the Commission treats a 2<sup>nd</sup> judgment to be finally implemented correctly.<sup>168</sup> Among the cases outlined, it seems that seven out of thirteen have some, at least related, problems persisting.

Another argument to that effect is that the fines seem quite sincere only at first sight. Looking at the relevant frame of comparison, the national budgets, makes the amounts seem small indeed. Consider even the case of Greece where the amount of fines paid (34 500 000 Euro) approximates 0,54% of the annual social expenses of the Greek state.<sup>169</sup> This suggests that even a less wealthy state can in fact afford to keep paying the EU's fines. Maybe this is what makes the Commission so very prudent in its use of the seemingly most powerful weapon; since no direct intervention in domestic affairs is possible for the EU, penalization could easily boil down to a 'paper tiger' with quite narrow limits.

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<sup>167</sup> Only two of the 13 cases covered in this section: when Portugal (case 2007/457) did not fully respect free movement of goods via mutual recognition, the ECJ in the end dismissed the Commission's second referral. Italy (case 2004/119) with its discrimination of foreign language teachers ultimately passed without penalization but with a statement of unduly late compliance. In both instances the Court seemed rather placid compared to similar cases.

<sup>168</sup> See also Kilbey, 2010.

<sup>169</sup> Reportedly at 6 400 000 000 Euro, Austrian daily Die Presse, 3 August 2011 (<http://diepresse.com/home/wirtschaft/international/683097>), accessed 12 August 2011.

To conclude: Research on the penalization proceedings is scarce<sup>170</sup> but has hinted that the new instrument is a useful means to pressurize, while falling short of truly bringing Member States in line with EU law – concerning both some of the cases judged a second time and the wider phenomenon of non-compliance.

## **6. Abusive use of EU funds and fight against fraud**

Specialists in the EP from the anti-corruption and organized crime committee (CRIM) have recently been “ringing the alarm bells at the abusive use of European funds and the corruption that is lined to them,” being “very sceptical about the progress made” by the Commission and the Council (Agence Europe 18.1.2013). French EPP MEP Véronique Matthieu reproached that legal proceedings for corruption of European funds by national authorities are rare (ibid.). Data collected from the Member States by OLAF indicate that more than 13.600 cases involved the fraudulent use of EU funds in 2010, their estimated cost reaching 2 billion euro (Agence Europe 5.12.2012). Structural and CAP funds seem to be most affected, conclude two MEPS from the EP’s special anti-corruption and organised crime committee (ibid.).

A recent major case concerning Poland indicates the sizeable character of the problem, particularly – but not only – in the southern and new Member States. In early 2013, the Commission froze approximately 5 billion euro overall in the hitherto biggest scandal, affecting the largest recipient of structural fund means (FT 30.1.2013). The involved road building agency accounts for about 90 % of EU-funded road investments in Poland (ibid.). It should play into the country’s favour that it was the Polish government that alerted the Commission to the alleged cartel scandal (Agence Europe 2.2.2013). The size of the case is outstanding, but about 200 cases of suspension overall have reportedly already been handled by the Commission over the last two years (ibid., citing Commissioner Johannes Hahn).

The EU’s agricultural policy, CAP, regularly needs the so-called “clearance of accounts procedure.” For example, the Commission in 2013 called on 22 Member States to return irregular expenditure of 414 million euro overall, as these funds did “not comply with EU rules or due to inadequacy of control procedures on agricultural expenditure” (Agence Europe 27.2.2013). Evidently, the problems discussed in this section relate to the issue of enforcement gaps as discussed above (section II.4.). Another example from the CAP is that

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<sup>170</sup> See mainly Kilbey 2010. Further research is needed and forthcoming.

in 2008, Bulgaria saw 500 million euro stopped and 200 withdrawn based on corruption charges.<sup>171</sup>

It goes without saying that wherever there is social life, there is some amount of cheating. That is nothing special to the EU – as long as it is not systematic features that favour fraud. The large sums involved in the CAP might be a case in point. The MEPs involved in the EP's CRIM committee also hint that the multi-level character of the system may at times be detrimental. Reportedly, there is "statistically less fraud when European funds are directly allocated by the Commission to regions or certain sectors."<sup>172</sup> In any case, they are less than contented with the degree of priority given to fighting the problems overall, and with control and enforcement (e.g. Agence Europe 18.1.2013, 5.12.2012).

Since the euro is without any doubt of special importance to the EU, the Libor/Euribor/Tibor scandal also needs mentioning here. It seems that crucial benchmarks were manipulated to bring traders extra profits: reference values used to set the rates for currencies and co-determining the value of hundreds of billions of euro in credits, securities, etc. (e.g., Agence Europe 23.2.2013, FT 21.2.2013, Der Standard 23.2.2013). It came as a shock to many that the making of such crucial benchmarks was not a matter of greater prudence and control, including on the part of the EU. Together with the problems around the EU's statistical data used to prepare and conduct EMU (see above II.1.), it seems that there is indeed room for improvement in the protection of even the very basic indicators used in political and economic life. It seems a very promising advance that the EU Commission recently suggested to establish a European prosecutor to fight fraud in all member states in similar manner, provide for truly dissuasive sanctions and accelerate control procedures (AE 30.7.2013).

## **7. Unravelling historical compromises that built the very basis of major EU projects**

Ever since its origins in the mid-1950s, the core element of regional integration in the "European Economic Community"<sup>173</sup> (EEC) was the "common market". However, from the outset, the EU found a compromise solution between liberalization and re-regulation in fields such as competition policy and social policy. Both had their own chapters in the EEC-Treaty. The competition rules even came first among all policies specified, and they were quite specific about preventing distortions of competition and dominant positions via joint legislation (Art. 85 - 90). The social policy chapter (see Art. 118-124), by contrast, remained rather vague and without specific regulatory tasks enumerated, but in the long run, the

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<sup>171</sup> Reportedly, the then new Member State was given three months' time to hand back the money (Der Standard 31.7.2009).

<sup>172</sup> French MEP Jean-Jacob Bicep from the Greens/EFA Group cited in Agence Europe 18.1.2013.

<sup>173</sup> Only much later, the primarily economic character was somewhat softened and the name changed to "European Union" under the 1992 Maastricht Treaty.

compromise formulae still formed the basis for the development of quite a substantial EU policy with regard to equality between the sexes, and – ensuing Treaty reforms after the mid-1990s – also minimum standardization of labour law. In short, the deal among EU Member States had been liberalization going hand-in-hand with some degree of harmonization. This model can be dubbed “market-plus”, and it has been extended in various EU treaty reforms to cover further fields such as, importantly, environmental policy (since the Single European Act 1986).<sup>174</sup>

Most recently, however, one EU Member State government wants to undo this initial bargain and its follow-up compromises, in order get a new deal of market-making without significant re-regulation, hence a “market-only” model. Along with pressures to undo the original EU deal comes the UK’s threat to otherwise exit the Union, as mentioned in Prime Minister Cameron’s much delayed speech in January 2013<sup>175</sup> as his unwanted scenario but still a possible one due to the announced referendum. Cameron’s argument is, in brief, that the EU set out with the purpose to “secure peace ... But today the main, overriding purpose ... is different ... to secure prosperity”. For the UK, the EU “is a means to an end ... not an end in itself” and he, Cameron, wants “a better deal for Britain”, “a new settlement ... It will be a relationship with the Single Market at its heart” (text of speech as published in the FT, 23.1.2013).

That the UK wants to continue profiting from the internal market without simultaneously continuing with the previously agreed re-regulatory policies, begs discussion as a novel type of non-compliance problem in the wider sense. Even potential non-compliance in the narrow sense: the UK is withdrawing from an existing *acquis* and threatening to no longer apply parts of it. While Cameron stresses that continued “access to the Single Market is vital for British businesses and British jobs” (*ibid.*), he wants to get rid of existing policies surrounding the market-making policy. On “Cameron’s possible shopping list” are social and employment Directives, environmental policy, and regional and fishing policies (FT 23.1.2013). Already in October 2012, British Foreign Secretary William Hague announced what the FT called a “mammoth audit by Whitehall of Britain’s relations with

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<sup>174</sup> It makes no difference here that the UK was never enthusiastic about reforming the EU and was actually outvoted in the decisions to summon the pre-SEA and pre-Maastricht Intergovernmental Conferences (see : Schwimmer, 2004) (thanks to Christian Lesquesne for this hint). The UK signed up to the initial deal when it joined the EU by 1973 and it explicitly agreed to all further Treaty reforms, as well.

<sup>175</sup> The speech had been announced for months in 2012 and then formally delayed twice in 2013 after the German Chancellor Merkel asked Cameron not to hold it in Berlin in parallel to celebrations for the 50th anniversary of the *German-French friendship treaty* ; then, the scheduled date for Amsterdam was cancelled after an effort to free hostages in Algeria ended with deaths, including British ones (e.g. Der Standard 20.1.2013, 10). Even Cameron himself joked that the event was becoming “tantric” (FT 18 January 2013), and commentators have held that “the postponement signals ongoing disagreements within Downing Street about what he should say” (FT 17 December 2012). Cameron has been said to be “a prisoner of his party’s anti-Europeans” (FT 18.10.2012) and under pressure by the UK Independence Party which threatens to conquer 51 seats of the Conservatives in the next election (FT 6.1.2013).

Brussels" (FT 22.10.2012) with 32 reports on different aspects of Britain's EU membership before the next election expected in 2015. In any case, the UK is said to want to scrap the EU's Working Time Directive and to restrict the ability of EU migrants to claim welfare (FT 6.1.2013).<sup>176</sup> From the viewpoint of EU partners, this would "unstitch the social fabric of the EU" (FT 6.2.2013 referring to France's President Francois Hollande).

In the field of justice and home affairs, the UK could even perfectly legally exit the *acquis communautaire* since it secured a one-off opportunity to withdraw when the Member States lose their veto powers in 2014 under the rules agreed upon in the Lisbon Treaty (Protocol No 36 on transitional provisions, Art. 10 para. 4). Cameron announced that the UK will exercise this block opt-out (FT 28.9.2012) for nearly all 130 crime and policing rules, including the European arrest warrant, but then wants to opt back into a select number it considers desirable (FT 30.9.2012). Again, the issue of cherry-picking is on the agenda. EU home affairs commissioner Cecilia Malmström warned that the UK might be forced to rejoin some parts of the overall package it disagreed with in order to retain the rules it likes (FT 9.12.2012).

Clearly, Prime Minister Cameron's EU departure threat is not without critics even in the UK: Former PM Tony Blair warns that it "is massively in Britain's interest not to play short-term politics with this issue" (FT 29 October 2012). Ed Milliband, Labour leader, said that Cameron's strategy was "incredibly dangerous" and created a danger of him "sleepwalking" Britain towards an EU exit (FT 13 January 2013). A former UK business secretary and EU trade commissioner, Peter Mandelson, warned that if Cameron were to seek exemption from employment and social regulation while keeping the trade and investment privileges of the single market, "others would say: Sorry, with rights come obligations – the EU is not a cafeteria service in which you arrive with your own tray and leave with what you want" (FT 23 January 2013). The British Prime Minister himself stresses he wants the UK to stay EU member, albeit on new terms, but he is in a difficult strategic environment with a strong Eurosceptic wing in his party.

Be that as it may, accepting vote-seeking strategies as a legitimate excuse to withdraw from European commitments seems a dangerous strategy from the EU's viewpoint: As populist appeals<sup>177</sup> are gaining ground in many places these days, the EU's achievements might quickly be unravelled and the Union dissolved. It is therefore crucial how the EU partners react to such a request of any leader. In the case at hand, some clear words were

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<sup>176</sup> EU social affairs commissioner László Andor rebuked this by announcing that the Commission plans to take legal action against the UK since „Britain is the only member state to require EU citizens, who legally reside and pay taxes in the country, to pass a test to qualify for basic benefits such as child care ad state pension“ (FT 10 October 2012).

<sup>177</sup> Since all politicians to some extent employ populist strategies, I agree with Tim Haughton that it is indeed better not to use the term "populist", see Deegan-Krause and Haughton, 2009.

actually voiced but also signs given that there might be room for compromise. German Chancellor Angela Merkel said that she is prepared to talk intensively about British wishes, although her government's Foreign Minister Guido Westerwelle held that cherry picking was not an option (FT 23.1.2013). French President Francois Hollande made clear that he wants the British to stay in<sup>178</sup> but not at any price (FT 27.1.2013).<sup>179</sup> This seems to imply that some price could be paid and, most importantly, negotiations started. A more decided (but still not entirely unequivocal) stance has been taken by the French Foreign Minister Laurent Fabius who warned that if "you give in to the demands of the British Conservatives, the ball of wool will unravel, Europe will fray" (FT 27.1.2013).

From the perspective of credible commitments, in any case, the firmest rejection of any insinuation to re-open done deals seems in place. Regardless of any specific outcome of such bargaining processes in the British case, it seems a foregone conclusion that, if such negotiations were started, leaders of other states could not resist pressures to undo compromises they or any powerful lobby in their country might at any point consider less than advantageous.<sup>180</sup> Playing with the "strength of weakness" (Grande, 1996, Kohler-Koch, 1995) to put pressure on one's EU partners by hinting at referenda at home would become a wide-spread strategy due to the well-known mechanics of party politics. In other words, to give in to Cameron's wish to cherry-pick and un-twist the EU's existing policies could be like opening Pandora's box.

### **III. Recent action fighting non-compliance: promises and dangers**

#### **1. Secondary law**

The Commission has made important progress in following up on deficient Member State behaviour when transposing Directives. In recent years, it has streamlined both its relevant internal proceedings and its follow-up of these targets (Chiti, 2012). The Commission has actually put in place three major initiatives (Scoreboard, EU Pilot, SOLVIT) that, although falling short of solving the compliance problems overall, have helped in specific cases.

Since 1997, the European Commission and the EFTA Surveillance Authority have issued the Internal Market Scoreboard to monitor how well the EU States and the EEA EFTA

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<sup>178</sup> It is worth mentioning that in some polls, French citizens voice a majority supporting "Brexit", that is an exit of the British (FT 27.1.2013).

<sup>179</sup> To the EP, Hollande said at least (without mentioning Cameron's name) that the EU should not be content to be "a sum of nations where each looks for what is good for itself and only itself" (FT 5.2. 2013).

<sup>180</sup> Already, there are signs of how such a pick-and-choose strategy might spread. For example, the leader of the conservative party in the German state of Bavaria, where elections will take place in autumn 2013, voiced support for Cameron hinting at his own hesitance against European policies in the past (Die Presse 28.1.2013).

States comply with their obligations to ensure timely transposition of Internal Market directives.<sup>181</sup> Covered are legal acts “considered to have an impact on the functioning of the Internal Market as defined in Articles 26 and 114(1) of the Treaty on the Functioning of the European Union. This includes the four freedoms and the supporting policies with a direct impact on the functioning of the Internal Market (such as: taxation, employment and social policy, education and culture, public health and consumer protection, energy, transport and the environment except nature protection, information society and media).”<sup>182</sup>

Clearly, such monitoring activities are of great importance. However, they need to be paired with control capacities over both the accuracy of the transposition data reported to Brussels and the actual enforcement and final application of the written standards on the ground. If this is lacking, increased pressures on notifying transposition may as well present an invitation to simply improve on “window dressing”. Unfortunately, large-scale studies on the application of EU law in practice are not available (see already above section II.4). The few existing, comprehensive studies tend to be eclectic but, in any case, they rather hint at major problems with both implementation itself and with enforcement structures (Toshkov, Knoll *et al.*, 2010). One in-depth study from the mid-2000s covered six EU social policy directives in all of the then 15 Member States (Falkner, Treib, Hartlapp and Leiber, 2005). Although the findings are now somewhat out of date, they clearly came as a sign of warning back then, *inter alia* to the Commission, as they revealed that only 11% of 90 cases studied saw both timely and correct transposition. In implementation overall, many further problems came to the fore (see already above section II.4.).

To help improve the situation, the EU Commission has meanwhile set up “important fire-alarm oversight mechanisms by means of transgovernmental networks” (Martinsen and Hobolth, forthcoming, 1). Since April 2008, the “EU Pilot” is used before the first step of an infringement procedure under Article 258 TFEU is taken by the Commission. It aims to improve communication and problem-solving between the Commission and national authorities at an early stage where the application of EU law or the conformity with EU law is at stake. Complaints under this project are examined by the responsible service in the Commission and forwarded to the national authority. The Commission informs the complainant of its evaluation after 20 weeks at the latest.<sup>183</sup> By 2011,<sup>184</sup> all Member States but Luxembourg and Malta participated in this communication tool. A database manages complaints from citizens, businesses, MEPs, etc. as well as own-initiative cases. According

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<sup>181</sup> (<http://www.eftasurv.int/press--publications/scoreboards/internal-market-scoreboards/nr/127>), accessed 13.3.2013.

<sup>182</sup> See ([http://ec.europa.eu/internal\\_market/score/docs/score25\\_en.pdf](http://ec.europa.eu/internal_market/score/docs/score25_en.pdf)), FN 1 on page 5, accessed 13.3.2013.

<sup>183</sup> For details, see ([http://ec.europa.eu/eu\\_law/infringements/application\\_monitoring\\_en.htm](http://ec.europa.eu/eu_law/infringements/application_monitoring_en.htm)), accessed 13.3.2013.

<sup>184</sup> ([http://ec.europa.eu/eu\\_law/docs/docs\\_infringements/eu\\_pilot\\_en.pdf](http://ec.europa.eu/eu_law/docs/docs_infringements/eu_pilot_en.pdf)), FN 4, page 2, accessed 13.3.2013.

to the second evaluation report, 2121 files were submitted to EU Pilot between April 2008 and September 2011.<sup>185</sup> Nearly 80% of the responses provided by the Member States enabled the file to be closed without the need to launch an infringement procedure and, therefore, the EU pilot is said to have possibly helped lower the number of infringement proceedings in recent years.<sup>186</sup>

One step further towards actually improving (and not only clarifying) things is SOLVIT, an on-line problem solving network (Martinsen and Hobolth, forthcoming). EU Member States cooperate to solve problems caused by the misapplication of Internal Market law by public authorities without legal proceedings. In every EU Member State (as well as in Norway, Iceland, and Liechtenstein), there is a SOLVIT centre as part of the national administration to handle complaints submitted by citizens, businesses, or intermediaries acting on their behalf. Since July 2002, the European Commission has been coordinating this network in order to speed up the resolution of problems. The essential tool is a database of complaint cases connecting the national centres so that information is shared efficiently and best practice can spread. This is an alternative dispute resolution mechanism free of charge and quicker than making a formal complaint. However, if a change in laws is needed instead of only having them applied more thoroughly or if a problem goes unresolved, formal action or even legal proceedings will still be needed.<sup>187</sup>

In fact, the most relevant empirical study is rather confirmative with regard to SOLVIT: “The important role of the Commission substantiates the multilevel character of the emerging EU executive. It is neither intergovernmental in a classic sense, nor strictly supranational. Instead of the Commission enforcing EU law from the distances of Brussels, it monitors the right application of EU law through national authorities, which are financed and located in the Member States but assigned with the responsibility to oversee that EU rights and obligations are correctly applied by its domestic counterparts. The EU executive is embedded within the national public administration and vice versa” (Martinsen and Hobolth, forthcoming). Further insights are that effectiveness varies between Member States “with a significant link between case load and effectiveness” (ibid.). The complaints (i.e. the SOLVIT cases) seem to function as input for network interaction, upon which knowledge of EU law and problem-solving capacities expand. Learning dynamics, however, are thought to interact with other factors such as staffing levels and the wider bureaucratic capacity (ibid.).

All in all, it seems that the Commission’s recent improvements, though very useful, fall short of convincingly fighting the major problems of non-compliance with EU law in the

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<sup>185</sup> Ibid., 5.

<sup>186</sup> Ibid., 6.

<sup>187</sup> See ([http://ec.europa.eu/solvit/site/index\\_en.htm](http://ec.europa.eu/solvit/site/index_en.htm)), accessed 13.3.2013.

Member States: insufficient enforcement capacities and structures with overly scarce resources, both on the national and EU level, and less than dutiful “compliance cultures” in most countries. The Commission has recognised this state of affairs and in its 2012 Communication on “Better governance of the Single Market,”<sup>188</sup> it announced that it “will use its enforcement powers more vigorously” and it requested the cooperation of the Member States to ensure that breaches of EU law are swiftly brought to an end.<sup>189</sup>

## 2. Austerity under pre-designed duress

Various forms of (partly even “automatic”) brakes to excessive spending have been used in recent times. In Europe, the Maastricht Treaty, the Stability and Growth Pact, the Fiscal Pact, the Six-Pack, and the Two-Pack legislative measures<sup>190</sup> all aim in one way or another to bind the politicians’ hands, extending across the levels of government. As outlined above in section II.2., the initial procedures (convergence criteria, excessive deficit procedure) set up with the 1992 Maastricht Treaty did not, by any means, live up to their own goals. Recent times have seen a steady growth of self-binding documents and agreements of various kinds, most of them covered by the so-called “Stability and Growth Pact” that has actually existed in multiple guises since 1997 as a kind of top-level soft law. In the words of the Commission, non-compliance with either the preventive or corrective mechanisms of that Pact can now “lead to the imposition of sanctions for euro area countries. In the case of the corrective arm, this can involve annual fines for euro area Member States and, for all countries, possible suspension of Cohesion Fund financing until the excessive deficit is corrected.”<sup>191</sup>

The 2012 fiscal pact, signed by 25 Member States, more specifically provides for an automatic correction mechanism which the Member States need to set up, working in case of non-respect for the balanced budget rule. The failure to implement such a correction mechanism may be enforced via the ECJ.<sup>192</sup>

<sup>188</sup> COM(2012) 259 final, quoted from the Internal Market Scorebord evaluation report ([http://ec.europa.eu/internal\\_market/score/docs/score25\\_en.pdf](http://ec.europa.eu/internal_market/score/docs/score25_en.pdf)), accessed 13.3.2013. From the perspective of compliance, this sounds like good news. However, some may wonder if this means that the Commission will focus its activities on those areas most relevant for the market (as the title of the Communication indicates; mentioned are: Services including retail and wholesale trade, business services, construction, and financial intermediation services; transport, digital economy and energy), as opposed to spreading its resources equally across all areas of EU regulation, including, for example, social and environmental issues.

<sup>189</sup> Ibid., 7.

<sup>190</sup> For a brief summary, see e.g. FT 18.2.2013.

<sup>191</sup> ([http://ec.europa.eu/economy\\_finance/economic\\_governance/sgp/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/sgp/index_en.htm)), accessed 16.3.2013.

<sup>192</sup> If the European Commission concludes that a contracting party has failed to comply, “the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties” (Article 8). Also, any contracting party considering independently that another contracting party has failed to comply may also bring the matter to the Court of Justice; and, in “both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice” (ibid.). If a contracting party considers that another one has not taken the necessary measures to comply with the judgment, it may seize the ECJ again “and request the imposition of

The core of the agreement is that contractors “subject to an excessive deficit procedure ... shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law” and implementation will be monitored by the EU institutions (Article 5).

Experts suggest that much of the fiscal pact could have possibly been enacted legally in the same way under the EU’s Treaties, but that if “the precepts contained ... are taken seriously it will lead to increased EU oversight over domestic economic affairs and to inter-state legal actions” (Craig, 2012, p. 248). It remains to be seen how that will function in actual practice and if the EU will continue its piecemeal increase of self-binding in the future, possibly at some point coming close to the transatlantic example.

In the United States of America, the White House and the Congress adopted the so-called “sequester” in summer 2011 in order to force themselves to find a compromise in the fight against budgetary deficits; failure to produce a certain deficit reduction would trigger across-the-board caps to mandatory and discretionary spending. By 1 March 2013, cuts amounting to 85 billion US Dollars are impending. Under this automatism, cutting will not be tailor-made; thus heavy impacts on public infrastructures and employees as well as on spending for schools, the military, and social support will now come as a shock to many. President Barrack Obama argues that this is a “make or break moment for the middle classes and those trying to reach it.”<sup>193</sup>

All in all, the dynamics of party competition seem to incline politicians towards excessive spending of public means in order to gain votes. Establishing “automatisms” may seem an attractive way to fight this. However, at least three dangers are looming:

- The mechanisms need to be very well-designed in order to have the intended effect. Note that when referring to the sequester US President Obama stated that “the whole design of these arbitrary cuts was to make them so ... unappealing that Democrats and Republicans would actually get together and find a good compromise.”<sup>194</sup> Nonetheless, both major US parties reportedly did not work seriously towards

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financial sanctions” (ibid.). The Court may impose a lump sum or a penalty payment up to 0,1 % of the state’s gross domestic product. Note that these procedures concern failure to implement the correction mechanism, but not failure to balance the budget). The amounts imposed on a contracting party whose currency is the euro are payable to the European Stability Mechanism, other payments shall be made to the general budget of the European Union. Evidently, there is still leeway for non-application of the enforcement provisions (e.g. the Commission cannot seize the Court, at least one state is needed, oversight by the national courts was eliminated during draft revisions) and for ample disagreement on details during the execution.

<sup>193</sup> (<http://www.nzz.ch/aktuell/international/der-sequester-wirft-lange-schatten-voraus-1.18029317> (accessed 1 March 2013), <http://www.whitehouse.gov/omb/budget>, accessed 1 March 2013).

<sup>194</sup> <http://www.whitehouse.gov/blog/2013/02/22/what-sequester> (accessed 1 March 2013).

preventing the 2013 crisis but rather seem to be playing a “blame game.”<sup>195</sup> In an article entitled „Congress forgets its safe word” the Economist has meanwhile suggested that instead of the socially dangerous budgetary break mechanism, a different stick should be used to make the US politicians stand up to their job and find compromise solutions; for instance, a “federal election fund, kicking in if Congress hadn't approved a budget by a certain date, that would dole out large matching grants to all challengers in every congressional district in the country. Maybe that would be a prospect that would strike fear into the hearts of representatives and party organisations. In any case, what we need are political disincentives that punish politicians for failing to govern, not budget disincentives that punish the country for having a dysfunctional government.”<sup>196</sup>

- Times, economic conditions, and even mainstream economic policy doctrines are changing and hence self-binding ties should not only be reserved for very special issues but should also remain reasonably flexible. Since important schools refer to the “paradox of thrift” (if the domestic private and external sectors are retrenching, the public sector cannot reasonably do so at the same time without major negative consequences on the economic output), austerity on public spending needs, in the view of some commentators and scholars, to be made explicitly contingent on “the economy: more when the economy grows faster and less when the economy grows more slowly.”<sup>197</sup> It seems crucial that self-binding should only apply to policies that are undisputed across the board of varying doctrines. Fixing the ways of only one of several philosophies, possibly even on a constitutional level (as, one can argue, happened in the case of Maastricht and EMU, (Scharpf, 2012) see also (Scharpf, 2011)) is not only inappropriate in terms of political legitimacy but also ineffective. As the case of the EMU suggests, later generations of politicians will find a way to work around such a “trap” if the targets are no longer considered appropriate. If that is not possible, the results may be considered highly illegitimate and may bear high costs for the affected societies (see the current US case).
- Precautions are needed so the effect of such an automatism is acceptable in terms of distributional outcomes. Considering the current economic trend towards ever higher inequality of incomes, such automatisms could, in the worst case, endanger social cohesion in that they offer an excuse for cuts that would otherwise have been socially unacceptable and politically unviable for any major party. Without relevant

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<sup>195</sup> <http://www.nzz.ch/aktuell/international/der-sequester-wirft-lange-schatten-voraus-1.18029317> (accessed 1 March 2013).

<sup>196</sup> <http://www.economist.com/blogs/democracyinamerica/2013/02/sequester> (accessed 1 March 2013).

<sup>197</sup> Martin Wolf, FT 26.2.2013, with further references.

precautions, “sequesters” could become mechanisms (in new clothing) to prevent tax increases for the “haves” and to impoverish the “have nots,” i.e. those who would have needed social assistance when the self-binding bites.

In short, it seems that tying the hands of governments bears some promise in the light of the EU’s compliance problematique. However, the devil is in the details, so that this is by no means a simple way out of the danger zone.

#### **IV. Where to go? Towards «compliance for credibility»**

We cannot belong to the same Union and behave as if we don't.  
(Barroso, Speech/12/596: 2)

Each of the sections above has hinted at potential or already real compliance problems, at least in a wider sense. My conclusion is that, as unfortunate as any single non-compliance aspect may be (or not), it is the overall impression of the EU as a credible and authoritative body that matters most. Under the condition that any of the non-compliance phenomena discussed appears as a singular weakness, no fundamental danger will result. In a state of rather ‘generalized non-compliance,’<sup>198</sup> by contrast, the EU would no longer be perceived as a trustworthy actor either by its people or by the outside world. And once the EU is indeed seen as a “non-compliance community”, decay seems a foregone conclusion: why should anyone take it seriously?

In that light, policy recommendations and the renewed promotion of good ideas already voiced by various EU actors seem an urgent matter. Humans including politicians follow both the ‘logic of appropriateness’ and the ‘logic of consequentiality’ for different reasons and at different times,<sup>199</sup> and democratic governance involves balancing between diverse motivations and modes of actions. Hence, both rule-oriented prescriptions based on sanctions and value-oriented measures connected to relevant beliefs can be usefully employed by the EU when striving for improvements to the status quo. One should start with promoting the basic, fundamental values involved and improving the provision of related data and comparative statistics:

- The rule-of-law can, unfortunately, not be taken as a “given”, even in today’s Europe. Therefore, a relevant campaign should be put in place throughout the EU. People can be convinced, but much more effort is needed to make them aware that law abidance is of crucial value in stable democracies and hence worth fighting for (see also

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<sup>198</sup> Thanks to Christopher Bickerton for suggesting the expression.

<sup>199</sup> See the work by March and Olsen, e.g. (2009).

Dawson and Muir, 2012, 476). Good compliance examples should be spread in TV spots and newspapers. For example, politicians from Nordic countries (whose culture of law abidance is comparatively advanced<sup>200</sup>) could publicly explain that they dutifully implement even Directives with costly effects for their country because they trust that, in turn, the EU partners will do the same with Directives they may find difficult. Business people should argue that they depend on a level playing field in the EU's internal market, not only in the books, but in practice. Campaigning for the rule-of-law could even have an additional, indirect benefit as well: the EU would, in the longer run, be less associated with infringements and fraud of agricultural subsidies and more with its role as a watchdog for democracy and basic rights throughout the EU – a role it has started to play during recent years.

- Additional (and finally appropriate) resources for the Commission are indispensable with regard to improved EU-level control of the application of EU law. If not the daily process of application, at least the framework conditions for its functioning need to be controlled much more tightly from the EU level. The open method of coordination (OMC)<sup>201</sup> could be used with regard to court systems, labour inspectorates and administrative capacity. With regular reporting duties resulting in relevant cross-country datasets that can be used for naming and shaming as well as harvesting examples of good practice, all national infrastructures should be supported that are needed to uphold the practice of the rule-of-law. Spreading best practice models could help activists among the citizens and the media throughout the EU promote democracy since, typically, even the leading countries can improve on some specific facets.
- Similarly, an “OMC democracy” could be set up overlooking all basic building blocks that are indispensable for a properly working democracy, such as political parties (adequate and transparent funding, intra-party democracy procedures, etc), civil society organisations (working conditions, transparency of funding etc.), and freedom of the media, etc. The OMC (see above) goes beyond data comparison, which is however in itself a task to be specified.
- These OMCs should be supported by bodies or units with the task to develop useful indicators and collect, compare, and publicize relevant data. This could mean strengthening the human rights agency and/or establishing observatories (in the

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<sup>200</sup> See, for example, Falkner, Treib, Hartlapp, and Leiber 2005, p. 317ff; Sverdrup 2004.

<sup>201</sup> The Open Method of Coordination is a multiform process of reporting, benchmarking, establishing best practice etc. It involves a communicative process amongst a large variety of national and supranational actors (Kröger, 2009 and Hartlapp, 2012).

Commission or in academia<sup>202</sup> or scoreboard task forces within the Commission. At least for the judicial systems, the case of Hungary has triggered relevant developments: EU Commissioner for Justice Viviane Reding announced a procedure to assess its members' democratic standards and a 'scoreboard on judicial systems'<sup>203</sup>.

- Great care is needed to respect best practice during the process of law-making, too. It is not viable to set standards that are simply unrealistic targets for some of the Member States (or to fail to exempt new Member States); at times, more differentiation may be needed – as demanded by Vivien Schmidt in her 2009 article in the *JCMS Annual Review* (Schmidt, 2009; see also Piris, 2012). For example, it seems with the benefit of hindsight quite evident that some of the EU environmental policy directives contained unfeasible goals considering the state of affairs in states such as Greece.<sup>204</sup> If such circumstances continue to be neglected, non-compliance may develop into a “weapon of the weak” for those who are outvoted in the Council but incapable of complying even if they wanted to.<sup>205</sup> Admittedly, striking a balance between the ambition and the feasibility of targets will surely not be an easy task, and the same is true when considering if a government's commitment can actually be trusted to be real if it does not protest against a particularly demanding new regulatory joint standard.
- Law-making at the higher level, and implementation at the lower one, seems a plausible distribution of labour, in principle. However, that cannot function properly if the indispensable equipment for effective enforcement is missing on the lower level. Recent problems discussed in this paper indicate a danger that EU law might be degrading towards a “dead letter” in some places for structural reasons. Even if the problems of having EU law applied, particularly in the new Member States, is now said to ‘toughen the pre-membership process,’ and even if the EU strives in the future only to let in ‘those which are fully prepared to assume their responsibility join the

<sup>202</sup> See the European Observatory on Counterfeiting and Piracy ([http://ec.europa.eu/internal\\_market/iprenforcement/observatory/index\\_en.htm](http://ec.europa.eu/internal_market/iprenforcement/observatory/index_en.htm)) set up in the Commission. At the European University Institute in Florence, the European Union Democracy Observatory (EUDO) has four Observatories responsible for data gathering, reporting and fostering dialogue; in the fields of citizenship, public opinion and the media, political parties and representation, and institutions. So far, its “Observatory on Institutional Change and Reforms” is devoted to the analysis of institutional reforms of the EU, not in the Member States, but this could possibly be further developed given the necessary means.

<sup>203</sup> *Agence Europe*, 14 September 2012

<sup>204</sup> Since the 1970s, Member States need to ensure that waste is disposed of without harm to health or the environment. Notwithstanding relevant ECJ judgments against Greece, including with penalization, ‘some 78 illegal landfills continue to operate in violation of EU waste legislation and 318 are still in the process of being rehabilitated’ by March 2013 ([http://europa.eu/rapid/press-release\\_IP-13-143\\_en.htm](http://europa.eu/rapid/press-release_IP-13-143_en.htm), accessed 23.3.2013). The Commission has therefore taken Greece to the Court again.

<sup>205</sup> Thanks to Renaud Dehousse for this argument.

EU,<sup>206</sup> it seems that an important instrument may be given up if new Member States (such as Croatia by mid-2013) would, in the future, not have to undergo a process like the Cooperation and Verification Mechanism applied to Bulgaria and Romania. Giving up these monitoring systems seems unduly optimistic with regard to new member states' reform and compliance capacities. Indeed, already the first months of Croatian EU-membership have brought a dispute involving non-compliance with the EU's arrest warrant in politically sensitive cases. Commissioner Reding recently announced that action under a relevant clause – however comparatively weak – in the accession Treaty was possible.<sup>207</sup>

If the first group of measures above did not even demand any significant legal reforms, a second group would go much further and establish either new rules or even innovative institutions at the European level. This may seem outrageous in the light of the longstanding ideas of democracy being located first and foremost in “sovereign nation states”. However, that may no longer be sufficient. Democracy is under pressure when national politics are ever more prone to instability<sup>208</sup>, parliamentary majorities are ruthlessly exploited for anti-democratic means, populism abounds, the media no longer perform their classic control function and the economy is in trouble. In such circumstances, it seems not only prudent but sensible to contemplate additional and innovative checks and balances in order to make sure that the basic democratic pillars are fully supported. This task should involve representatives from all levels of EU governance – local, national, European – and from multiple segments of society. Crucially, it could combine actors with different, reinforcing kinds of legitimacy (politics, academics, civil society, legal and technical experts). The EU's great potential for collaboration and discourse could hence be turned into a resource, as a means of both enabling and restraining national politicians. The idea is not to supersede national systems but rather to use European means to stabilize and, where appropriate, improve democracy in the Member States. With major challenges ahead, a two-level system of checks and balances seems indispensable.

Promising possibilities are, for example:

- Provision of expert advice and discourse when it comes to the basic architecture of democracy. Constitutional reforms and changes concerning pillars of democratic life such as electoral and media laws should, before being voted on at the relevant national level, be checked (possibly at a later point even approved) at the EU level.

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<sup>206</sup> EU Commissioner for enlargement Stefan Füle, cited in Agence Europe 10 October 2012.

<sup>207</sup> See Agence Europe 6.9.2013.

<sup>208</sup> Consider that about half of the EU's national governments already fell pre-maturely due to the financial and ensuing economic crisis and that the latter decisively shapes elections nowadays in about any member state.

For example, an “EU Council for democracy and rule-of-law”<sup>209</sup> could vet all major reform projects according to basic common principles. Its composition needs in-depth consideration but representatives from the EU institutions come to mind, as well as representatives of the national constitutional courts and the ECJ<sup>210</sup>, and independent experts such as political scientists and lawyers from an academic background. Possibly, this institution could become an independent agency (the dynamics of party-politics need to be kept at bay) at the EP since the latter is directly legitimized by the EU’s citizens.<sup>211</sup>

This raises the question of who is best suited to perform highly sensible functions in terms of safeguarding basic democratic principles.<sup>212</sup> As far as the collection of data is concerned, the legitimacy of well-trained personnel in expert institutions such as the EU Commission, the Council of Europe<sup>213</sup>, the EU’s Human Rights Agency, etc. may be appropriate. When it comes to making judgments and innovative proposals, a board of truly independent wise (wo)men – possibly political scientists and constitutional lawyers – might be better placed. When decisions concerning the withholding of funds or even suspending voting rights come into play, the highest level of political legitimacy is clearly indispensable. For good reasons, the Treaty provides for the determination of a serious and persistent breach by a Member State of values mentioned in Article 2 TEU to be agreed in the Council (in such cases, composed of the Heads of State or Government) upon assent by the EP. At times, the courts might also be appropriate umpires, including the ECJ and the national (constitutional) courts. In any case, the EU needs a forum bringing together various stakeholders and experts to promote much needed discourse on democracy and rule-of-law. On that basis, effective protection mechanisms could be developed and implemented.

- With regard to Article 7 TEU, the excessively high quota - all governments minus one, and EP assent - for determining the breach of basic EU values could be replaced by, for example, simple majorities in both the Council and the EP in cases where an

<sup>209</sup> Or “EU Constitutional Council”, or “Joint Council for fundamental EU values” or “EU Council for democratic principles and fundamental values”.

<sup>210</sup> There is an interesting debate amongst specialised lawyers to possibly have fundamental rights checked by national and EU-level courts under a “reversed solange” doctrine (for the details see von Bogdandy, Kottmann *et al.*, 2012).

<sup>211</sup> The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress.

<sup>212</sup> This raises complex issues of legitimacy as well as politicization (De Wilde and Zürn, 2012) that cannot be discussed in-depth here. See e.g. the JCMS 50th anniversary special issue on the evolution of the EU’s polity (Mattli and Stone Sweet, 2012).

<sup>213</sup> The EU’s potentials for cooperation with the Council of Europe would warrant in-depth consideration that is, however, beyond this article’s scope.

advisory opinion of the ECJ (and potentially, of the new EU Council for democracy and rule-of-law mentioned above) supports the motion.

- Commission Vice-President Viviane Reding proposed that the talks about establishing a 'European minister of finance' should be complemented by an "EU Minister of Justice endowed with enforcing the rule-of-law in the EU."<sup>214</sup> Although possibly perceived by some countries as overly interventionist, this could certainly be an effective pathway to make EU standards that are still dead letters into living rights.
- Establishing EU-wide rules for independent supervisory agencies in the Member States is also a relevant idea. With regard to the freedom of press relevant proposals have been made by a high-level working group set up by EU Commission Vice-President Neelie Kroes. They refer to the harmonization of media laws across the EU and regulation of the media by independent agencies based on EU-wide principles with powers to investigate complaints and impose fines and orders.<sup>215</sup> Similarly, the EP's Civil Liberties Committee recently recommended that the European Commission and the European Fundamental Rights Agency carry out an annual audit of media laws, monitoring, for example, the concentration in the media industry and the extent to which the new laws allow governments to interfere with the media across the EU. The Committee recommended non-legislative action as well as expanding the audio-visual services directive to ensure full application of the European Charter of Fundamental Rights, particularly full independence and adequate resources for national media watchdogs.<sup>216</sup>

The above suggestions are bold. However, decisive action is needed so the EU will continue to be perceived as a trustworthy actor by the outside world and its citizens, not a "non-compliance community." This is a major goal to be achieved without delay. What indeed matters are credible commitments. If non-compliance spreads – and a tipping-point even in terms of basic legitimacy of the political system might be close – any policies formally adopted by the EU will not find the trust of economic operators, global partners, or the European people themselves. But trust is crucial. Even (or maybe particularly) markets judge credibility, not de facto compliance. If the essential, high level of trust in the EU's overall ability to deliver and meet its goals can be restored, there will be little cause to worry about minor problems of continuing slack in policy implementation.

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<sup>214</sup> Interview with *Frankfurter Allgemeine Zeitung*, 18 July 2012 (translated by the author).

<sup>215</sup> *Financial Times*, 21 January 2013. See also the sub-section on Hungary's non-compliance with EU law above.

<sup>216</sup> *Agence Europe*, 23 February 2013.

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