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Abstract

This paper develops a theoretical framework for the study of "pressure" in EU constitutional legal scholarship. Pressure is understood as a promise of consequences unless certain requirements are complied with. This encompasses both conditionality mechanisms and long-standing EU constitutional mechanics relying on a diversity of legal provisions, including for motions of censure, for veto powers, for sanctions, or for the discontinuation of financial assistance. While pressure is not law per se, it can be an object of law, and often appears as the product of careful EU constitutional design by the Masters of the Treaties. However, requirements backed by pressure have a different structure than requirements backed by EU legal obligations, which comes with important implications concerning the adequacy of the constitutional safeguards provided for by EU law to constrain its uses, notably by EU institutions on Member States.

Keywords: pressure, EU constitutional law, accountability, independence, conditionality, threats, offers, rule of law, Recovery and Resilience Facility, euro crisis, legal engineering, legal methods

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Towards a theoretical framework for studying "pressure" in the EU constitutional order

Robin Gadbled*

Introduction

"Blackmail", "leverage", "coercion", "pressure" – terms such as these have been gaining recognition in the public debate around European Union (EU) integration. In recent times, they have featured most visibly in the context of often overlapping discussions concerning the protection of the rule of law and the uses made of funds to pursue EU objectives, notably through "conditionality"[1] instruments. For instance, Hungary and Poland have denounced both the adoption of the so-called Conditionality Regulation[2] and the withholding of pandemic Recovery funds[3] as attempts to "blackmail"[4] them into compliance with EU-imposed rule of law and other standards. In return, similar accusations[5] have been levelled at Hungary and Poland in the Winter of 2020 for threatening to veto[6] the adoption of the EU Multi-annual

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[1] See in particular Baraggia and Bonelli, "Linking money to values: the new Rule of Law Conditionality Regulation and its constitutional challenges", 23 *German Law Journal* (2022), pp. 131–156. See also *e.g.* Lindseth and Fasone, "Rule-of-Law conditionality and resource mobilization – the foundations of a genuinely 'constitutional' EU?", *Verfassungsblog* (11 December 2020), https://verfassungsblog.de/rule-of-law-conditionality-and-resource-mobilization-the-foundations-of-a-genuinely-constitutional-eu/ (last visited 07 April 2022); Goldner Lang, "The rule of law, the force of law and the power of money in the EU", 16 *Croatian Yearbook of European Law and Policy* (2020), pp. 1–26.

[2] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, O.J. 2020, L 433 I/1.

[3] Eszter Zalan, "Rule-of-law issues still hold up Hungary-Poland recovery plans", euobserver, 03 Sept 2021, https://euobserver.com/rule-of-law/152803 (last visited 07 April 2022).

[4] Piotr Skolimowski and Zoltan Simon, "Poland, Hungary Accuse EU of ‚Blackmail' Over Pandemic Aid Delay", Bloomberg, 02 Sept 2021, https://www.bloomberg.com/news/articles/2021-09-02/poland-accuses-eu-of-blackmail-as-recovery-fund-access-delayed (last visited 07 April 2022); Euronews, "Morawiecki and Orbán step up attacks on EU over rule of law debate on eve of summit", 19 Nov 2020, https://www.euronews.com/my-europe/2020/11/18/morawiecki-and-orban-step-up-attacks-on-eu-over-rule-of-law-debate-on-eve-of-summit (last visited 07 April 2022).

[5] Judy Dempsey, "Germany Needs to End Hungary and Poland's Blackmail", Carnegie Europe, 17 Nov 2020, https://carnegieeurope.eu/strategiceurope/83245 (last visited 07 April 2022).

[6] Hans von der Burchard, "Hungary and Poland escalate budget fight over rule of law", Politico, 26 Nov 2020, https://www.politico.eu/article/poland-hungary-budget-democracy-rule-law-orban-morawiecki-merkel/ (last visited 07 April 2022).

Financial Framework Regulation (MFF Regulation) unless changes were made to the draft Conditionality Regulation, then being negotiated. In parallel, the "coercive"[7] power of infringement actions followed by fines under article 260(2) TFEU and budgetary set-offs based on article 317 TFEU[8] have been assessed in EU legal academic discourse in light of the added "leverage"[9] they bring to the EU rule of law protection toolkit. Such terms have also been employed in other contexts of relevance to EU legal scholarship. During the euro-crisis, it was argued for example that the European Central Bank (ECB) had imposed "pressure"[10] on certain Member States, warning them that financial assistance would be discontinued unless they would adopt fiscal consolidation and economic reforms at national level, and formulating such requirements via informal means such as Press Releases[11] or "secret letters"[12] to governments.

All these terms have in common that they refer to promises of consequences – suspension or recovery of EU funding, discontinuation of financial assistance, veto on a piece of EU legislation, fines – unless certain requirements are complied with. Thus, there is a specific structure to the claim to compliance of these requirements. Their addressees ought to comply because consequences may be imposed – not necessarily because the requirement itself is legally binding. For sure, requirements backed by promises of consequences may otherwise also have legally binding quality[13], thus adding an overlapping second claim to compliance to the first. Yet, it is noteworthy that requirements backed by promises of consequences do not have to be law. Importantly, they can be the object or product of (EU) law – and a crucial component of the EU constitutional order, as will be argued throughout our discussion. As such, the EU legal and institutional rules that enable or constrain them deserve to be analysed from an EU constitutional perspective.

This paper sets out to develop a theoretical framework allowing for a detailed constitutional legal discussion of requirements backed by promises of consequences in the European Union, including but not limited to conditionality instruments. For that purpose, the paper proposes a definition of "pressure mechanisms" as constituted by three components: the formulation of a *requirement* (a), the (non-) compliance with which is *linked* (b) to a *decision on consequences* (c). The proposed concept is therefore more specific than everyday expressions such as "peer pressure" or "popular pressure", which can remain vague regarding the body or authority issuing requirements, or regarding the establishment of an observable link between

[7] Pohjankoski, "Rule of law with leverage: policing structural obligations in EU law with the infringement procedure, fines, and set-off", 58 Common Market Law Review (2021), pp. 1341–1364, at p. 1354.
[8] *Ibid.* p. 1358.
[9] *Ibid*. pp. 1341–1364.
[10] See in particular Beukers, "The new ECB and its relationship with the eurozone Member States: between central bank independence and central bank intervention", 50 CML Rev. (2013), pp. 1579–1620, at p. 1598; Kilpatrick, "On the rule of law and economic emergency: the degradation of basic legal values in Europe's bailouts", 35 *Oxford Journal of Legal studies* (2015), pp. 325–354; Kilpatrick, "Abnormal sources and institutional actions in the EU sovereign debt crisis - ECB crisis management and the sovereign debt loans", in Cremona and Kilpatrick (eds), *EU legal acts : challenges and transformations*, Collected courses of the Academy of European Law (Oxford University Press 2018), p. 101.
[11] Kilpatrick, "Abnormal sources and institutional actions in the EU sovereign debt crisis", *op.cit.* p. 90.
[12] *Idem*.
[13] As is for instance the case with the requirement to comply with Court judgements.

requirements and promised decisions on consequences. Moreover, the proposed concept should be considered as neutral in value-normative terms in the context of our discussion. For instance, the argument that the Recovery and Resilience Facility Regulation[14] (RRF Regulation) creates pressure mechanisms contains no judgement of value. Instead, the term is meant to refers to the three-pronged structure which can be observed where the Regulation establishes[15] (link) that access of a Member State to Recovery Funds may be denied (consequences) unless that Member State commits to adopting national measures "effectively addressing all or a significant subset of challenges identified in the relevant country-specific recommendations" formulated in the context of the European Semester (requirement).

The concept of "conditionality" is already available in EU law[16] and legal scholarship[17] to describe and analyse some of the examples given above. To be sure, all "conditionality mechanisms"[18] are pressure mechanisms for the purposes of the present paper. However, the paper understands conditionality as a special type of pressure mechanisms, whereby *formal* documents set out (link) both the conditions (requirements) and the measures to be adopted in cases of non-compliance (consequences) – as is the case with the example given above concerning the RRF Regulation. Conditionality mechanisms are formalised, whereas pressure mechanisms may include informal components. For instance, the *informal* threat made by Hungary (link) to veto the adoption of the MFF Regulation (consequences) unless changes are made to another legislative draft (requirement) would probably not qualify as "conditionality" in the relevant literature. In the same way, it is not evident that the concept of conditionality should apply to the declaration made during the euro-crisis by the Governing Council of the European Central Bank, in a Press Release[19] (link), that Cyprus's banks would be denied continued financial assistance (consequences) unless the Cypriot authorities agreed on a programme with the "EU/IMF" by a certain date (requirement). Nor would any of these examples fit squarely under the umbrella of "sanctions"[20], such as those provided for under

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[14] See Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, article 19(3), O.J. 2021, L 57/17.
[15] Regulation 2021/241, article 19(3).
[16] See Regulation 2020/2092; Case C-156/21, *Hungary v European Parliament and Council of the European Union*, EU:C:2022:97, *e.g.* para 139; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2022:98, *e.g.* para. 157.
[17] See in particular Cremona, "EU Enlargement: Solidarity and Conditionality", 30 European Law Review (2005), pp. 3–22; Viţă, "Revisiting the dominant discourse on conditionality in the EU: the case of EU spending conditionality", 19 Cambridge Yearbook of European Legal Studies (2017), pp. 116–143; Viță, "The rise of spending conditionality in the EU: what can EU learn from the U.S. conditional spending doctrine and policies?" (European University Institute, Department of Law, Working Paper No. 16, 2017); Viţă, "Conditionalities in cohesion policy : research for REGI Committee" (European Parliament, Policy Department for Structural and Cohesion Policies, 2018); Baraggia and Bonelli, *op.cit. supra* n.1.
[18] Case C-156/21, Hungary v European Parliament and Council, para 129; Case C-157/21, *Republic of Poland v European Parliament and Council*, para 140.
[19] European Central Bank, Governing Council decision on Emergency Liquidity Assistance requested by the Central Bank of Cyprus, 21 March 2021, available at https://www.ecb.europa.eu/press/pr/date/2013/html/pr130321.en.html (last visited 07 April 2022).
[20] See in particular Prete, "Infringement procedures and sanctions under Article 260 TFEU: evolution, limits and future prospects", in Montaldo, Costamagna and Miglio (eds), *EU law enforcement: the evolution of sanctioning powers* (Routledge 2021), pp. 71–92.

article 260(2) TFEU. Yet, such examples can be characterised as "pressure mechanisms" within the theoretical framework proposed in this paper.

As will be argued, the relevance of pressure to (EU) constitutional law can be deduced both from the existence of EU legal rules explicitly aiming at containing or preventing the imposition of pressure on certain bodies, and from the purposiveness with which pressure has been made part of the constitutional design of the European Union, both horizontally between EU institutions and vertically vis-à-vis Member States (Section 1). Yet, an analysis of its three-pronged structure shows why pressure may in certain cases escape the constitutional safeguards built around it, and which challenges EU law faces if it is to constrain in particular the power of EU institutions to impose pressure on Member States (Section 2).

1. The relevance of pressure to (EU) constitutional law

Pressure mechanisms may not be law, but they may be the object of law, and in this way, become relevant for lawyers – the protection of holders of independent offices under EU law is illustrative of this point (Section 1.1.). Beyond that, pressure mechanisms are also a product of constitutional design, contributing to the very definition of the horizontal (Section 1.2.) and vertical (Section 1.3) relationships which shape the repartition of powers in the Union.

1.1 "Without fear or favour": pressure on holders of independent offices

The Court of Justice of the European Union (ECJ, the Court) explicitly acknowledges the imposition of "pressure" as an activity of relevance to the assessment of breaches to the principle of judicial independence in EU law. As stated in the Grand Chamber *ASJP (Portuguese Judges)* case[21] and repeated in later judgements,[22] "the concept of independence presupposes" that a judicial body "exercises its functions wholly autonomously", being "protected against external interventions or *pressure* liable to impair the independent judgment of its members and to influence their decisions"[23]. The Court specifies that a "hierarchical constraint" or a relationship of "subordinat[ion] to any other body"[24] are conducive to situations in which the decisions of judicial bodies can be subjected to undue influence. In addition, judicial bodies shall be barred from "taking orders or instructions from any source whatsoever"[25], implying that external interventions or pressure can come from bodies or even persons which do not entertain formal hierarchical relationships, or formal relationships of subordination, with the judicial bodies.

This case-law does not simply serve as a confirmation that the word "pressure" is in use in the case-law of the Court. More substantially, it indicates that a concern of the Court with regards

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

[22] See Case C-216/18 PPU, *Minister for Justice and Equality (Deficiencies in the legal system) ('LM')*, EU:C:2018:586, para 63.

[23] Case C-64/16, *ASJP*, para 44 (emphasis added).

[24] *Idem*.

[25] *Idem.*

to judicial independence has to do with the specific structure of pressure mechanisms. As was pointed out in the introduction, the claim to compliance of requirements backed by promises of consequences does not have to derive from the legally binding quality of the requirement. It exists because a link has been created with consequences in case of non-compliance. In this regard, "orders or instructions" (requirement) seeking to influence judicial decisions gain normative weight notably when they are formulated by bodies with the power to impose consequences on judges not complying with them. The case-law makes clear that such consequences may vary in nature and include the removal of judges from office,[26] the refusal to extend the period of judicial activity beyond normal retirement age where such an extension may otherwise be authorised;[27] disciplinary action for decisions adopted by a judicial body within its judicial capacity;[28] or the conduct of investigations – without sufficient guarantees – to determine the personal liability of members of a judicial body.[29] The wider case law of the Court shows that the same reasoning can be applied to the issue of the independence of the European Central Bank, national central banks participating in the European System of Central Banks, and the members of their decision-making bodies.[30]

An examination of this case-law allows one to understand how pressure mechanisms can be relevant in EU legal terms, but only to a limited extent. It confirms that pressure is an activity of concern with regards to the guarantee under EU law of the independence of specific bodies: judges from national courts acting in their capacity as EU courts; central bankers acting as members of the European System of Central Banks. Similar concerns[31] regarding pressure apply to the independence of the members of the European Commission,[32] the CJEU[33] and other bodies whose independence is provided for under EU law.[34] The case-law also makes clear that the word 'pressure' can be given a specific legal meaning compatible with the definition proposed in the present paper: that of requirements backed by the promise of

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[26] Case C-216/18 PPU, *LM*, para 64.

[27] Case C-619/18, *European Commission v Republic of Poland*, EU:C:2019:531, paras 110 and 112; C-192/18, *Commission v Poland*, EU:C:2019:924, paras 116–124.

[28] See Case C-216/18 PPU, *LM*, para 67; Case C-8/19 PPU, *RH*, EU:C:2019:110, para 47; joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others*, EU:C:2020:234, paras 58–59.

[29] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, paras 235–236.

[30] See in particular case C-11/00 *Commission v European Central Bank*, EU:C:2003:395, esp. paras 130–134: "Article 108 EC [(now article 130 TFEU)] seeks, in essence, to shield the ECB from all political *pressure* in order to enable it effectively to pursue the objectives attributed to its tasks" (para 134, emphasis added) ; joined Cases C-202/18 and C-238/18, *Ilmārs Rimšēvičs and European Central Bank v Republic of Latvia*, EU:C:2019:139, paras 43–55: "a temporary prohibition on a governor of a national central bank performing his or her duties is likely to constitute a form of *pressure* on that person" (para 52, emphasis added).

[31] See case C-11/00, *Commission v European Central Bank*, para. 133.

[32] Article 17(3) TEU : '[...] The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose *independence* is beyond doubt.

In carrying out its responsibilities, the Commission shall be *completely independent*. Without prejudice to Article 18(2), the members of the Commission *shall neither seek nor take instructions from any Government or other institution, body, office or entity*.' (emphasis added).

[33] Article 19(2) TEU; Articles 253–254 TFEU; Article 3 of the Protocol (n°3) on the Statute of the Court of Justice of the European Union, annexed to the Treaties.

[34] See in particular Protocol (n°7) on the privileges and immunities of the European Union, annexed to the Treaties.

consequences. In fact, the very empowerment of certain bodies to adopt decisions having certain consequences on holders of independent offices can be held as a breach of EU law, if not accompanied with sufficient safeguards.[35]

However, this case-law does not teach us what to make of pressure mechanisms in the absence of an applicable EU legal principle of independence. Moreover, and relatedly, this case-law only considers forms of pressure which are illegal – precisely because they interfere with a principle of independence protected under EU law. It is not concerned with pressure mechanisms which are accepted in and even created by EU law. Finally, the case-law on judges and central bankers is essentially concerned with consequences affecting the holders of offices, as persons whose interests may be impacted by coercive or corruptive action. It does not tell us how institutions or even Member States could be said to be, as such, subjected to pressure.

1.2 Inter- and intra-institutional pressure mechanisms

Yet, a strong argument can be made that certain pressure mechanisms are not only acceptable, but even central to the functioning of (the EU) constitutional system(s), aside from the protection of independent bodies; and that such pressure mechanisms may apply to institutions or States, without there being a need to identify the persons holding public office whose private interests would be affected by a decision on consequences.

In constitutional theory, Riccardo Guastini identifies two distinct categories[36] of legal norms organising the separation of powers in a constitutional system: norms pertaining to the repartition of the functions of the State, and norms pertaining to the means of action available to State organs on one another. Norms from this second category are of such importance in constitutional legal thought that a major typology used in the field of Comparative Constitutional Law distinguishes between constitutional systems by focussing primarily on the means of action available to parliaments on governments, making the latter accountable – or not – to the former.[37] Constitutional rules on accountability provide means of action to certain bodies to enable them to promise consequences to other bodies unless certain requirements are met – for instance, parliaments to governments in parliamentary systems.

This category of constitutional norms can easily be translated to the EU legal context and accommodates rules pertaining to the adoption of a motion of censure,[38] to the approval of

[35] Case C-216/18 PPU, LM, para 67.

[36] Guastini, *Leçons de théorie constitutionnelle*, (transl. Champeil-Desplats, Dalloz 2010) p. 148.

[37] According to the general typology and in a nutshell, in "parliamentary" systems the executive is accountable to parliament; in "presidential" systems the executive has its own mandate and remains largely independent from parliament; in "semi-presidential systems" the head of state has an own mandate while the government is accountable to parliament. See *e.g.* Duhamel and Tusseau, *Droit constitutionnel et institutions politiques*, 4th ed. (Éditions du Seuil, 2016), p. 486 ; Grimm, "Types of constitutions", in Rosenfeld and Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, (OUP 2012), pp. 115–129 ; Elgie, "Semi-presidentialism : an increasingly common constitutional choice", in Elgie, Moestrup and Wu (eds.), *Semi-presidentialism and democracy*, (Palgrave Macmillan, 2011) ; Duverger (ed.), *Les régimes semi-présidentiels*, (Presses Universitaires de France, 1986).

[38] Article 17(8) TFEU.

another institution’s budget[39] or, as seen previously, rules guaranteeing the independence of an institution vis-à-vis other institutions or other external influences. Legal norms pertaining to the establishment of relationships of accountability or responsibility appear as the counterpart of legal principles of independence, in that they are already presupposing the imposition of pressure as an activity to be constrained by law – with the difference that the law of accountability serves to structure pressure mechanisms rather than to prevent them.

1.2.1 Interinstitutional relationships of accountability or responsibility

One obvious example of a relationship of accountability or responsibility in EU constitutional law can be found under article 17(8) TEU, establishing the “responsib[ility]” of the European Commission, “as a body, [...] to the European Parliament”. The following sentence of the same paragraph provides the European Parliament with the power to “vote on a motion of censure of the Commission”, in accordance with article 234 TFEU, making clear that the responsibility of the Commission to the European Parliament is organised around the power of the latter to oblige the former to “resign as a body”. What is being set in place, by design, under article 17(8) TEU and 234 TFEU fits with our definition of a pressure mechanism, whereby a power is given to the European Parliament to impose consequences to the Commission unless it pays attention to its requirements.

The question arises to know to which extent such a power is also constrained by law. On the one hand, nothing in article 17(8) TEU or 234 TFEU limits the freedom of the European Parliament to decide to vote on a motion of censure, besides the procedural requirements attached to the vote itself.[40] On the other hand, the Treaties grant to the Commission a specific set of powers and prerogatives, in particular legislative initiative.[41] Would certain uses of pressure by the European Parliament amount to a capture of the Commission’s prerogatives, and would that constitute a violation of the institutional balance provided for in the Treaties?[42] Koen Lenaerts remarks in his early scholarship that the Parliament “could sanction through the motion of censure [...] a possible *abuse* of [the Commission’s] prerogative [of legislative initiative]”, provided for under now article 17(2) TEU, “in extreme cases”, including the “neglec[t]” by the Commission “to deal with a policy concern altogether” despite “repeated admonitions of the Parliament”.[43] However, the author immediately notes that

> “the Parliament’s power to vote a motion of censure against the Commission cannot be seen as *a regular means of pressure to be resorted to as a matter of course* each time the Commission refuses to take a

[39] Sánchez-Barrueco, “At the crossroads of a frozen conflict: political oversight of the Council’s administrative budget by the European Parliament”, 58 *CML Rev.* (2021), pp. 333–360.
[40] See article 234 TFEU.
[41] Article 17(2) TEU.
[42] Article 13(2) TEU.
[43] Leanerts, ‘Some reflections on the separation of powers in the European Community, 28 *CML Rev.* (1991), pp. 11–35, at p. 23.

> legislative initiative called for by the Parliament or refuses to alter its initial proposal to include in it the policy views of the Parliament”.[44]

The author identifies pressure both as a means made available to the European Parliament by the Treaties and one which must at the same time be limited by them, confining the acceptable use of motions of censure to “extreme cases”.[45] An absence of constitutional limits set on the imposition of pressure through threats of censure would arguably “distort the legislative process as provided for in the Treaties”.[46]

Our aim in the present paper is not to come to a definitive conclusion as to whether the apparent freedom given to the European Parliament to vote a motion of censure under the Treaties would be constrained in certain cases by the safeguard of the Commission’s legally protected prerogatives. Instead, three aspects of the discussion are worth underlining for our purposes.

Firstly, it is apparent that the granting to an institution of a power to adopt decisions imposing consequences on another raises questions of constitutional importance, pertaining to the extent of control and discretion the latter keeps over the powers conferred on it by the Treaties.

Secondly, the example makes clear that the key element in a legal system which makes pressure mechanisms available is where legal provisions exist for the adoption of decisions on consequences (the vote of a motion of censure). This leaves the possibility open for the remaining two components of pressure (requirement and link) to be spelt out informally. As shall be seen in the second section of the present paper, this observation has important implications.

Thirdly, and relatedly, while it is possible that the Court of Justice might be presented with a case allowing it to clarify to what extent EU law restricts the freedom granted to the European Parliament to censure the Commission, it remains remarkable how unconstrained that freedom appears in the Treaties. As will be seen below, other inter- and intra-institutional pressure mechanisms made available by EU law share this feature of leaving great discretion as to which requirements can be linked to promises of consequences on another institution.

1.2.2 Veto threats

While the adoption of motions of censure – and concrete threats thereof – may be considered as a rather exceptional event, there are more habitual forms of interinstitutional pressure mechanisms. Chief amongst them, veto powers in law-making procedures may be used to create pressure mechanisms. For instance, article 218(6) TFEU gives to the European Parliament a right to consent to – or veto – the conclusion of certain international agreements

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[44] *Idem.* (Emphasis added).
[45] *Idem.*
[46] *Idem.* Constitutional limits of this nature may arguably be found in Treaty provisions relating to the powers of the Commission – such as its right of legislative initiative under article 17(2) TEU. The principles of institutional balance and sincere cooperation (13(2) TEU) are other possible candidates.

by the EU.[47] Writing in 1990, Roland Bieber has pointed out how a power of veto allows the European Parliament to assume "influence over the substance of the treaty negotiations", even where its power would "formally" consist only in accepting or rejecting the outcome of the negotiations.[48] What is more, Bieber noted how "the power attached to [the European Parliament's] right of assent can also be used to impose conditions only indirectly relating to the treaty itself".[49] The author observed that "[s]uch package deals may appear unusual but are not in breach of the treaty".[50] In much the same way more than three decades later, no evident legal recourse appeared available – nor was one pursued – to challenge Poland and Hungary's threat to continuously veto the adoption of the seven-year EU Budget, unless concessions were made on another legislative front. The two Member States were able to create a pressure mechanism bearing on their counterparts on the basis of the requirement of unanimity voting in the Council for the adoption of the MFF Regulation under article 312(2) TFEU.

A likely justification for this lack of legal constraints may be that such procedures allow for pressure to be imposed as a normal tool of negotiation between political actors, for them to be able to voice different interests and be forced to find compromises. Otherwise, veto – and less dramatically, voting – powers would be deprived of much of their purpose. A similar rationale can be developed to justify the relative freedom with which the European Parliament may threaten the Commission with a motion of censure. In such a perspective, the lack of clear legal limits as to the use of pressure could be considered as a feature of the EU institutional design for negotiations within or between political institutions.

1.3 Pressure applied by EU institutions on Member states

By contrast – and noticeably – strong institutional and legal safeguards tend to be built into legal provisions enabling pressure mechanisms when they are meant to be imposed on Member States by EU institutions, whether these mechanisms rely on threats of sanctions or on conditioned offers.

1.3.1 Threats of sanctions

Legal provisions for sanctions do not all aim at deterring conducts or inducing a specific behaviour through the threat of their application; they may serve other objectives, such as compensation or retribution.[51] However, wherever a link is established between sanctions and the obligation to comply with certain requirements to avoid them, legal provisions for sanctions fit into pressure mechanisms as understood in this paper. In such cases, sanctions

[47] I am grateful to Andrea Ott for suggesting I look in this direction. See also Andrea Ott, 'The European Parliament's Role in EU Treaty-Making', 23 *Maastricht Journal of European and Comparative Law* 6 (2016), pp. 1009–1039.

[48] Roland Bieber, "Democratic control of European foreign policy", 1 *European Journal of International Law* (1990), pp. 148–173, at p. 161.

[49] *Idem*.

[50] *Idem.*

[51] Lamond "The coerciveness of law", 20 *Oxf. J. Leg. Stud.* (2000) pp. 39–62, at p. 59; Hughes, "Law and coercion", 8 *Philosophy compass* (2013), pp. 231–240, at p. 232.

constitute the "consequences" prong of pressure, made available in EU law for the purpose of inducing compliance with EU requirements. Where EU law provides for sanctions against Member States,[52] it can be argued that the pressure mechanisms they enable become part of the design of the "vertical" constitutional relationship established between the EU and its Member States.

Contrary to pressure mechanisms based on veto powers in EU law-making, one finds obvious legal and institutional constraints on the application of pressure mechanisms on Member States through the threat of formal sanctions. For instance, article 260(1) TFEU lays down a legally binding obligation according to which Member State whose "fail[ure] to fulfil an obligation under the Treaties" has been established by the Court of Justice "shall be required to take the necessary measures to comply with the judgment of the Court". This requirement is linked to a procedure to impose sanctions under article 260(2) TFEU, potentially resulting in the imposition of a lump sum or penalty payment obligation on the Member State. Thus, the requirement to comply with Court judgements has two distinct claims for compliance: the first, that Court judgements are legally binding under EU law; the second, that failure to comply with them may lead to sanctions. In so far as the second claim is concerned, the requirement to comply with Court judgements fits into a pressure mechanism made available by article 260 TFEU.

It is worth underlining the extent to which the whole pressure mechanism is formalised and specified. What the requirement is about is set out in advance (to comply with Court judgements); the consequences in case of non-compliance are outlined in advance (the imposition of a lump sum or penalty payment), even though amounts may vary depending on explicit criteria;[53] and the link between the requirement and the consequences is established by primary law (article 260(1) and (2) TFEU). The distribution of institutional roles in the process is also detailed: the Commission may bring a case before the Court should it consider that a Member State has failed to comply with a judgment; it shall specify the amount to be paid; the Court is competent to find whether the failure to comply has taken place and to impose the lump sum or penalty payment.[54]

With their own specificities, other sanctions mechanisms under the Treaties share similar traits of cautious formalisation and encasement in predefined procedures. Article 126 TFEU forms the basis[55] of a complex and gradual system of monitoring and sanctions aiming at inducing compliance with the requirement set out in its first paragraph that "Member States shall avoid excessive government deficits". That requirement can be specified in "recommendations" addressed to a Member State by the Council, itself acting on a recommendation by the Commission, "with a view to bringing [the situation of excessive deficits] to an end within a given period".[56] After this stage and on a recommendation from

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[52] Montaldo, Costamagna and Miglio (eds), *op.cit. supra* n.20.
[53] Prete, *op.cit. supra*. n.20, at 75.
[54] Article 260(2) TFEU.
[55] Secondary law complements this article on the issue of sanctions. See in particular Council Regulation No 1177/2011 of 8 November 2011 amending Regulation No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.
[56] Article 126(7) TFEU.

the Commission[57], the Council may decide to "make its recommendation public"[58] – itself an imposition of consequences linked to the requirement, as publicization may harm *i.a*. the creditworthiness of the targeted Member State on financial markets. In case of a persistent and duly noticed failure to comply,[59] the Council may trigger a variety of other possible sanctions – always on a recommendation from the Commission[60] –, including an invitation made to the European Investment Bank to "revisit its lending policy towards the Member State concerned", requiring a non-interest-bearing deposit until correction of the deficit has been acknowledged by the Council, or the imposition of a fine.[61] Thus, rather than one, the sanctions procedure under article 126 TFEU provides for several successive pressure mechanisms, linking a variety of cumulative possible consequences to non-compliance with the requirement to avoid excessive government deficits.

A third example of the same pattern of formalisation of pressure mechanisms in procedures for sanctions can be found in article 7 TEU. The requirement is set out in advance: for Member States to abstain from committing a "serious and persistent breach [...] of the values referred to in Article 2" TEU.[62] That requirement is linked in article 7 TEU to a decision imposing as a consequence, in case of non-compliance, the "suspen[sion of] certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council"[63]. Ultimate consequences under article 7 TEU can only be imposed after demanding procedural hurdles are overcome, involving in particular a three-fifth majority in the Council,[64] consents of the European Parliament,[65] and a unanimity vote in the European Council.[66]

Like the inter- and intra-institutional pressure mechanisms seen before, sanctions procedures enable pressure to be imposed as a normal feature of the functioning of the EU. They do not need to be targeted at private individuals or interfere with a guaranteed principle of independence to become relevant. The care and caution given to the design of legal and institutional safeguards around the imposition of sanctions on Member States show how seriously the masters of the Treaties take pressure mechanisms made available to EU

[57] Article 126(13) TFEU.
[58] Article 126(8) TFEU.
[59] Article 126(9) TFEU.
[60] Article 126(13) TFEU.
[61] Article 126(11) TFEU. Note that a specific and stricter regime of sanctions also developed on the basis of article 136 TFEU for euro-area Member States.
[62] Article 7(2) TEU.
[63] Article 7(3) TEU.
[64] Article 7(1), to "determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2", following a "reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission".
[65] Article 7(1).
[66] Article 7(2), "on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament", to "determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations". After this stage, article 7(3) requires a qualified majority in the Council for voting rights of the representative of the targeted Member State in the Council to be suspended.

institutions against them. This is not only true of mechanisms based on sanctions, but also of certain aspects of pressure mechanisms based on conditioned offers.

1.3.2 Conditioned offers

Valid arguments can be made to stress the difference between the threat of sanctions and the conditioned offer of benefits. The legal and moral philosophy of coercion devoted considerable attention to the difference between threats and offers.[67] Whereas threats may constrain the freedom of their addressees and possibly affect their being fully or solely responsible for actions performed under coercion, offers might appear to stand outside of the realm of coercion, leaving the option that they and attached conditions be either accepted or rejected by choice – unless one accepts that certain types of offers may be coercive.[68] Yet, threats of sanctions and conditioned offers would not be discussed together and distinguished at such pains without an initial risk of confusion, based on similar features. In fact, both share the same three-pronged structure: requirements linked to promises of consequences in cases of (non-) compliance.

Because of this shared structure, for the purposes of the present paper, both threats and conditioned offers are understood as fitting into the category of pressure mechanisms. This is not to dispute the importance of ascertaining the differences between the two in certain contexts: for instance, to assess whether a decision by a Member State to comply with a requirement set by an EU institution was effectively adopted by choice (or out of national discretion), and whether responsibility for that decision should be displaced[69] – also depending on whether and how applicable law recognises coercion as a ground to displace responsibility.[70] However, effective choices and displacements of responsibility are not the only issues of interest in the discussion of conditioned offers in the EU. To understand how they function, one must first ascertain how the benefits on offer (access to EU funding, continued financial assistance) are made available to Member States by EU law; which legal bases enable both the offers being made and the conditions attached to them; and which

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[67] See in particular Nozick, "Coercion", in Morgenbesser, Suppes, and White (eds), *Philosophy, science, and method: essays in honor of Ernest Nagel* (St. Martin's Press, 1969), pp. 440–474; Zimmerman, "Coercive wage offers", 10 Philosophy and Public Affairs (1981), pp. 121–145; Feinberg *The moral limits of the criminal law: volume 3: harm to self* (Oxford University Press, 1986); Wertheimer, *Coercion*, (Princeton University Press, 1987); Lamond, *op.cit. supra*. n.51; Anderson, "The enforcement approach to coercion", 5 *Journal of Ethics and Social Philosophy* (2010), pp. 1–31; Kiener, "Coercion", *Routledge Encyclopedia of Philosophy*, (Taylor and Francis, 2020).

[68] See in particular Zimmerman, *op.cit.*, and Feinberg, *op.cit.*, *supra* n.67.

[69] See for instance how the General Court's considers in the *Chrysostomides* case the extent of discretion retained by Cyprus in the adoption of measures while under "economic and financial pressure", and how this issue is linked (notably by the claimants) to the question of whether responsibility for the adoption of these measures should be displaced to EU institutions in light of the requirements they addressed to Cyprus to adopt similar measures. See case T-680/13, *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others*, EU:T:2018:486, para 103.

[70] Compare with Venetia Argyropoulou's attempt to read ECB action during the Cyriot banking crisis through the lens of the international law on economic coercion. One may question whether this legal framework was applicable in this context, also given the state-centric nature of relevant concepts (such as 'counter-measures'), not readily applicable to relationships between a State and a specific EU institution. Argyropoulou, "Acts of financial distress in the EU: is the EU to blame?", 27 *Washington International Law Journal* (2018), pp. 485–522.

other legal norms constrain the imposition of these conditions.[71] As will be seen in Section 2, acknowledging the three-pronged structure of pressure is key to appropriately answering such questions.

One recent example of conditioned offers creating pressure mechanisms can be found in the EU Recovery and Resilience Facility (RRF) Regulation.[72] This instrument provides for 360 billion euros in loans and 312,5 billion euros in grants (in 2018 value)[73] to be allocated to Member States. It was advertised as a means to "repair the economic and social damage brought about by the coronavirus pandemic".[74] A number of objectives[75] and conditions[76] are attached to this offer made to Member States, who shall respect them to access their whole shares[77] of the funds. In this regard, both objectives and conditions constitute "requirements" addressed to Member States in their access to or use of funds. Consequences linked to non-compliance with these requirements include delays in accessing the funds,[78] suspension of payments,[79] decommitment of financial contribution and recovery of funds paid.[80]

Of note for our purposes is that the Regulation formalises to a large extent the pressure mechanism at play. The numerous objectives and conditions listed for the benefit of the funds have been inserted in the Regulation by the EU legislator, which also carefully designs the institutional framework for the governance of the funds. In order to benefit from RRF funds, Member states submit National Recovery & Resilience Plans[81] explaining to the Commission, for assessment, how the funds will be used, and which reforms adopted.[82] If its assessment of the plans is positive, the Commission proposes to the Council that it adopts them via an implementing decision.[83] The granting of implementing powers to the Council in budgetary matters – normally reserved to the Commission in cooperation with the Member States under

[71] See the discussion by the Court of how the principles legal certainty, proportionality and equality of Member States constrain the application of the Conditionality Regulation: C-156/21, *Hungary v European Parliament and Council of the European Union*; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*.
[72] Regulation 2021/241 (RRF), cited *supra.* n.14.
[73] Article 6(1) RRF.
[74] See European Commission, "Recovery plan for Europe", https://ec.europa.eu/info/strategy/recovery-plan-europe_en (last visited 17 January 2023).
[75] See Article 3(1) RRF on its "general objective" being the promotion of "the Union's economic, social and territorial cohesion", which is then translated in a number of listed objectives including *i.a.* mitigating the social and economic impact of the crisis, "especially on women"; "supporting the green transition" (see also article 18(4)(e)); the "digital transition" (see also article 18(4)(f)); or high-quality employment creation.
[76] Conditions on National Recovery Plans include respect for the principle "do no significant harm" to the environment (article 5(2) RRF) and consistency with European Semester Recommendations (article 17(3) RRF).
[77] See Annex IV to the RRF Regulation, including a table specifying maximum amounts of grants and loans per Member State.
[78] Payments may not be made to a Member State if the Commission is unable to give a positive assessment of the National Recovery Plans submitted to explain how the Member State will use the funds (articles 14 and 19 RRF), or if the Council does not adopt the plans via an implementing regulation (article 20 RRF).
[79] Articles 10 & 24 RRF.
[80] Article 24(9) RRF.
[81] Article 17 RRF Regulation.
[82] Art. 19 and 14 RRF.
[83] Art. 20 RRF.

article 317 TFEU – is justified by recital 29 of the Regulation.[84] The Council's role is particularly notable in its ability to reject (with a qualified majority) a proposal of the Commission to suspend payments in case a Member State would breach EU rules on "sound economic governance".[85] While the Commission retains important powers under the Regulation,[86] the involvement of the Council in the governance of the RRF enables it to exercise partial control over the pressure mechanism it creates vis-à-vis Member States.

Other provisions contribute to assorting the mechanism with legal constraints, such as article 10(4) of the Regulation, which states that "the scope and level of the suspensions of commitments or payment" (consequences) linked to a breach of EU rules on sound economic governance (requirement) "shall be proportionate[87], respect the equality of treatment between Member States and take into account the economic and social circumstances of the Member State concerned". A similar involvement of the Council[88] and pointed references to respect for the principle of proportionality can also be found in the Conditionality Regulation, as well as in the Common Provisions Regulation governing most funds falling under the EU Budget.[89]

2. EU constitutional safeguards around pressure – and their limits

The analysis presented so far has shown to what extent pressure mechanisms can be seen not only as an object of EU law – as is the case with the protection of holders of independent office from indue influence –, but also as a defining feature of EU constitutional and legislative designs. Pressure is both enabled and constrained by EU law. Variations in the nature and extent of safeguards made available under EU law against pressure appear to often result from choices by the Masters of the Treaties (Section 2.1). However, the robustness of legal and institutional constraints on pressure mechanisms must also be assessed with due regard to their three-pronged structure. That structure is what makes it possible for EU institutions in certain cases to impose pressure on Member States in the absence of prior constitutional

[84] Recital 29: "In order to ensure uniform implementation and in view of the importance of the financial effects of the measures imposed, implementing powers should be conferred on the Council which should act on the basis of a Commission proposal". The same formulation is used at recital 20 of the Budget Conditionality Regulation.

[85] Article 10 RFF.

[86] See especially article 24 RRF on "Rules on payments, suspension and termination of agreements regarding financial contributions and loans", which leaves the Commission in charge of assessing whether milestones and targets committed to by Member States have been achieved (point 3) and empowers it to suspend (point 6), reduce in proportion (point 8) or ultimately decommit the amounts of financial contribution promised and recover amounts paid in case of sustained lack of compliance (point 9).

[87] See also the application of the principle of proportionality to measures taken by the Commission under article 22 RRF for the protection of the financial interests of the Union, i.a. in cases of fraud (art.22(5)); as well as the requirement of proportionality in the Commission's reductions of amounts under article 24 (art. 24(8)).

[88] Budget Conditionality Regulation Article 6(9–11) (with qualified majority rather than reverse-qualified majority); Common Provisions Regulation Article 19(6-13) (as regards suspensions of payments for breaches of rules on sound economic governance).

[89] See in particular Articles 5(3) and 6(8) of the Conditionality Regulation; Article 19(11) of the Common Provisions Regulation, also including "respect [for] the equality of treatment between Member States and [...] account [being taken of] the economic and social circumstances of the Member State concerned".

design, through the "reengineering" of EU legal bases (Section 2.2.) and through the creation of "hidden" or "interstitial" pressure mechanisms (Section 2.3). Such phenomena raise questions concerning the adequacy of the safeguards available to limit the uses of pressure in the EU constitutional order.

2.1 Judicial and institutional safeguards

A rationale appears to emerge from our study so far. According to this rationale, pressure mechanisms pertaining to the vertical relationship between EU institutions and Member States, relying on threats of sanctions as well as conditioned offers, tend to be formalised to a large extent in all their components. By contrast, interinstitutional relationships of political accountability (e.g. between the European Commission and the European Parliament), as well as inter- and intra-institutional relationships applying to the negotiation of (political) decisions, notably under the shadow of veto threats, seem to be structured around partially informal pressure mechanisms. In such cases, the informality concerns two of the components of pressure – requirement and link. The third component – a decision on consequences (e.g. the vote of a motion of censure; the imposition of a veto or negative vote) – remains formalised, supposing both the existence of a legal provision allowing for its adoption and the satisfaction of procedural rules under EU law.

Differences in the formalisation of pressure mechanisms may very well reflect constitutional choices. On the one hand, formalising pressure may allow for or a greater role for courts in the review of each of the components of pressure mechanisms, which fits with the traditional notion that the vertical relationship between the EU and its Member States must be clearly defined in law.[90] On the other hand, more informal pressure mechanisms leave EU political actors with the flexibility they need to use pressure as part of normal political negotiations and decision-making. It allows political institutions, member states and other actors to defend different views and interests and reach compromises, and the intervention of courts may not be welcome in the process.

Three observations should be made on the above. First, let it be underlined that it suffices *a minima*, for the purposes of creating a pressure mechanism, that EU law provides for the adoption of a decision on consequences, as long as it is possible for both requirement and link to be spelt out informally. The European Parliament's ability to create pressure mechanisms relies on its right to adopt motions of censure, or its right to veto certain international agreements – that is to say, thanks to EU legal provisions allowing for the imposition of "consequences" on the Commission and/or the Council. The Parliament may create pressure mechanisms mainly because it has a legal power to impose consequences; links between consequences and requirements may follow without a need for legal formalisation.

Second, it can be assumed that the less procedural and substantive rules apply to any component of pressure – and the more they are informal – the less it will be easy for EU courts

[90] See notion of conferral, Articles 4(1) and 5 TEU; Article 1 and Part 1 Title 1 TFEU.

to have a role in exerting judicial control over the mechanism[91], beyond assessing whether all substantive and procedural rules have been respected for the ultimate adoption of a decision on consequences.

Third, and relatedly, constitutional safeguards erected around pressure mechanisms often do not appear to rely on courts as much as on careful institutional design. Thus, participation and voting rights under EU law in the definition of requirements, links and/or decisions on consequences seem to have been built into the system by the Masters of the Treaties for the protection of Member States' rights and interests, in several instances where they might be the targets of pressure imposed at EU level.

As will be seen, however, the first of these three observations – that a power under EU law to adopt a decision on consequences may be sufficient for a pressure mechanism to be created – destabilises our rationale of carefully weighted constitutional safeguards built around well-designed pressure mechanisms, notably with regards to the vertical relationship between the EU and its Member States.

2.2 Reengineering of legal bases

A number of EU legal provisions could be used as the basis for decisions imposing consequences on Member States. The possibility exists – and has already been used – for some of these legal bases to be repurposed or "[re]engineered"[92] to allow for additional requirements to be linked to decisions on consequences, thus creating new pressure mechanisms where no prior constitutional design provided for them. This expansion of the reach of EU-imposed pressure on Member States may result from the reinterpretation of legal bases in primary law via legislation (Section 2.2.1), as well as from creative applications of existing powers by EU institutions (Section 2.2.2).

2.2.1 Reengineering Treaty bases via legislation

A brief account was given in this paper of the structure of formalised sanctions and conditionality mechanisms bearing on Member States, whereby all components of pressure appeared to be laid down and regulated in law to a greater extent than in the case of pressure imposed between actors involved in political negotiations. Where the pressure mechanism is formalised, EU law defines what the requirements can be about as well as what consequences can be attached to (non-)compliance with them. Crucially, this is made possible where the *links* establishing the relationship between requirements and consequences take the form of legally binding provisions of primary or secondary law.

Treaty legal bases may explicitly provide for consequences to be attached to (non-)compliance with certain requirements. To an extent, this is the case with the sanctions

[91] On how the informal quality of acts of the EU may constitute a challenge for judicial review, see Molinari, "The EU and its perilous journey through the migration crisis: informalisation of the EU Return Policy and rule of law concerns", 44 *European Law Review* (2019), pp. 824–840.
[92] See the use of the expression "legal engineering" in de Witte, "The European Union's COVID-19 Recovery Plan: the legal engineering of an economic policy shift", 58 *CML Rev.* (2021), pp. 635–682.

procedures outlined earlier, founded on articles 260 TFEU, 126 TFEU and 7 TEU. Other legal bases may formally allow for conditionality mechanisms to be created, as is the case with articles 136(3) TFEU[93] or 122(2) TFEU,[94] although provisions as to the nature and specific content of requirements are largely left to other instruments, some of which can be legislative.[95]

However, certain formalised pressure mechanisms may be established by legislation and yet rely on Treaty legal bases which at first sight do not explicitly provide for them. For instance, the RRF Regulation is based on article 175(3) TFEU, which only foresees the adoption of necessary action "outside the Funds" in line with the objectives set out in article 174 TFEU on strengthening the EU's economic, social and territorial cohesion. In this regard too, the choice of this legal basis as part of the legal architecture of the recovery plan was a "case of creative legal engineering"[96] to respond to the challenges raised by the COVID-19 pandemic. In a similar way, the Conditionality Regulation is based on article 322(1)(a) TFEU, which enables the adoption of "financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts" – not evidently a legal basis for a conditionality mechanism.[97]

Strong legal arguments exist to defend the soundness of these choices of legal bases. Legislation on funds aiming at strengthening cohesion may include conditions and objectives as to how cohesion is to be promoted, and such conditions and objectives may apply through mainstreaming clauses in EU primary law,[98] may be required in EU primary law,[99] or may otherwise have become the object of EU legal commitments.[100] Importantly, one should also

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[93] "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict *conditionality*."

[94] "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, *under certain conditions*, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."

[95] Concerning article 136(3) TFEU, see *e.g.* Regulation No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability (O.J. 2013, L 140/1), which makes the junction between the conditionality requirements made by the ESM/EFSF for financial assistance, and Council decisions addressed to the Member States concerned (recital 18; article 7(12)). For legislation based on article 122(2), see Council Regulation 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis (O.J. 2020, L 433I/23), which outlines the objectives of the fund it makes available, the conditions for the benefit of which are spelt out in greater retail in the Recovery and Resilience Facility Regulation (itself based on article 175(3) TFEU).

[96] Bruno de Witte, *op. cit. supra* n. 90 at p. 638. See also de Gregorio Merino, "The Recovery Plan: solidarity and the living constitution", 50 *EU Law Live Weekend Edition* (2021), pp. 2–12.

[97] Although the Court confirmed it could be one in cases C-156/21*, Hungary v European Parliament and Council of the European Union*, and C-157/21, *Republic of Poland v European Parliament and Council of the European Union*.

[98] See Title II TFEU on provisions having general application, including gender equality or environmental protection requirements.

[99] See *e.g.* article 126 TFEU laying down the obligation on Member States to avoid excessive government deficits.

[100] See for instance the Paris Agreement or the Governance of the Energy Union and Climate Action as established by Regulation (EU) 2018/1999, cited in the RRF Regulation.

note the existing links between, on the one hand, the Recovery and Resilience Facility and, on the other hand, the Recovery and Resilience Instrument (EURI),[101] itself founded on article 122 TFEU – a legal basis for conditions to be attached to assistance. In the same way, respect for the rule of law in Member States has been recognised by the Court as a "precondition"[102] without which EU funds injected in these Member States may be jeopardised, justifying that the Conditionality Regulation may be founded on a legal basis on the implementation of the Budget.

Nevertheless, more delicate is the issue of aligning such legislative reengineering with the pre-existing conceptual framework applying to the vertical power relationships between the EU and its Member States. This framework has developed notably around the understanding that this relationship concerns the extent and limits of EU competences, primarily understood a power to impose legal obligations on Member States – a power constrained notably by the principle of conferral.[103] The Treaties even suggest that the implementation of the EU Budget – which for our purposes is an important vessel for the formulation of conditioned offers as pressure mechanisms – obeys the logic of conferral.[104] In light of our discussion of pressure, two caveats must be attached to this conceptual framework.

Firstly, impositions of pressure are not the same as impositions of legal obligations under EU law[105], whereas conferral has arguably developed to constrain mainly the latter. Because pressure has a three-pronged structure, a legal basis for the adoption of decisions on consequences may suffice for the creation of a pressure mechanism, leaving the option open

[101] Council Regulation 2020/2094, cited *supra* n.93. The Recovery and Resilience Instrument has been described as "the container instrument in which the total sum of EUR 750 billion is embedded and assigned to various spending programmes", the "biggest chunk of which" is to be spent through the RRF. See Bruno de Witte, *op.cit. supra.* n.90, at p. 636.

[102] Case C-156/21, *Hungary v European Parliament and Council of the European Union*, para 116; case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, para 130.

[103] See in particular articles 4(1) and 5 TEU. Article 5(2) TEU does state that "[u]nder the principle of conferral, the Union shall *act* only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein" (emphasis added) which might include acts of pressure. However, the preceding paragraph refers to the principle of conferral in relation to "the limits of Union *competences*" (emphasis added), whereas article 2 TFEU under Title I on the categories and areas of Union competence could be read as considering primarily as "competence" the ability to "legislate and adopt legally binding acts". However, it is true that one can propose another reading of the notion of competence including all forms of EU activities mentioned under article 2 TFEU, such as coordinating (point 3), taking action (point 5) and making policy (point 4). Such a wider reading of the notion of competences may cover the formulation by EU institutions of requirements backed by the promise of consequences to Member States.

[104] See article 310(3) TFEU: "The implementation of expenditure shown in the budget *shall require the prior adoption of a legally binding Union act providing a legal basis for its action* and for the implementation of the corresponding expenditure in accordance with the regulation referred to in Article 322, except in cases for which that law provides" (emphasis added).

[105] See for instance Baraggia and Bonelli, *op.cit supra.* n.1, at p. 143: "Conditionality is thus a *tool for the exercise of public power via other means than the traditional enactment of legal rules* or the exercise of pure coercion, and where obedience is achieved thanks to the '*power of the purse*.' Just like other regulatory devices that have emerged in the last decades, such as nudging or soft law, conditionality departs from the classical 'command and control' paradigm" (emphasis added). However, the authors do not develop on how exactly conditionality differs from and relates to "the enactment of legal rules", nor on how the claims to compliance of requirements backed by the "power of the purse" are structured. The present paper contributes to this discussion by developing a definition of pressure mechanisms and situating conditionality as a subtype of such mechanisms.

to have requirements be linked to them in creative – and unforeseen – ways. Moreover, such requirements may be linked to them informally, making it harder for courts to control them.[106] Therefore, the risk exists that the power to create pressure mechanisms escapes the limits set by the legal basis of decisions on consequences – that is to say, that pressure may go beyond the powers initially conferred on the EU by that legal basis.

Secondly, the conferral to the EU of the power to impose legal obligations on Member States in any field is conceived as a matter for primary law.[107] Unanimity and ratification rules on Treaty amendments or expansions of EU competences[108] are meant to guarantee that each Member State will be able to accept or reject any such expansions of conferred powers. However, this conception appears to sit uneasily with the creation through legislative engineering of pressure mechanisms leading to the imposition of requirements backed by pressure in fields where such requirements were initially inexistant, if the legislation at issue can be passed in the Council with the assent of only a qualified majority of Member States representatives[109].

These caveats do not necessarily doom pressure to be considered an illegitimate means of expanding EU powers on Member States. As long as pressure is exerted on matters in which the EU also has competence to impose legal obligations, the issue appears less acute. Moreover, one may take the view that imposing new requirements backed by pressure should be considered to be of a different nature, and less sensitive, than the expansion of EU competences to impose legal obligations,[110] justifying different voting thresholds – for instance, where pressure relies on conditioned offers rather than threats of sanctions. Additionally, well-chosen criteria constraining the creation of pressure mechanisms,[111] in all three of their components, may go a long way in answering these concerns.

2.2.2 (Re)interpretation of existing powers of EU institutions

The reengineering of legal bases leading to the creation of pressure mechanisms on Member States may also be performed through the reinterpretation of existing powers under EU law, without taking the legislative route.

Consider for instance the contentious[112] Press Release issued by the European Central Bank on 21 March 2013, during the euro-crisis. The Press Release states that the financial assistance (Emergency Liquidity Assistance) on which major Cypriot banks relied for survival would only

[106] Note how Baraggia and Bonelli stress on the importance of developing precise criteria and a doctrine of judicial control over the extent to which conditions may be attached to spending in the EU. Baraggia and Bonelli, *op.cit. supra.* n.1, at p. 144.

[107] Article 5(2) TEU.

[108] See Article 48 TEU; see also the “flexibility” clause under Article 352 TFEU.

[109] This was the case with both the RRF Regulation and the Conditionality Regulation.

[110] *Contra.*, see the arguments put forward by Hungary and Poland against the Conditionality Regulation, concerning a breach of the principle of conferral: Case C-156/21, *Hungary v European Parliament and Council of the European Union*, para 90; Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*, paras 253–258.

[111] See Baraggia and Bonelli, *op.cit. supra.* n.1, at p. 144.

[112] See Case T-680/13, *Chrysostomides*, para 147; Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Chrysostomides*, para 158.

be maintained until 25 March 2013, while continuation of Emergency Liquidity Assistance "thereafter [...] could only be considered if an EU/IMF programme [was] in place that would ensure the solvency of the concerned banks". All three components of a pressure mechanism are present: the Press Release establishes a link between a requirement (to come to an agreement by 26 March with the EU/IMF on a programme ensuring the solvency of the banks) and consequences in case of non- compliance with the requirement (discontinuation of financial assistance).

The EU legal provision which enables the European Central Bank to adopt a decision on consequences in this context is Article 14(4) of Protocol n°4 on the Statute of the European System of Central Banks and of the European Central Bank. This provision grants to the Governing Council of the ECB the power to terminate Emergency Liquidity Assistance – provided for by a national central bank – insofar as it "interfere[s] with the objectives and tasks of the European System of Central Banks".

There is little doubt that EU law allowed the Governing Council of the ECB to terminate financial assistance[113]. It also makes legal sense that that Governing Council would indicate to Cyprus under which conditions maintaining assistance would or would not be interfering with "the objectives and tasks of the ESCB", and which steps Cyprus should take to prevent such interference. In this case, absence of interference would be established by agreeing with the "EU/IMF" on a programme involving national reforms susceptible to ensure the solvency of the banks. At the same time, article 14(4) of Protocol n°4 does not explicitly endow the Governing Council of the European Central Bank with the power to formulate requirements on Member States backed by the promise of its application in case of non-compliance. The legal basis for the pressure mechanism is present, but it has become one through an act of (re)interpretation of existing EU powers.

Coming to an agreement with the "EU/IMF" is a national competence; the ECB could normally not have imposed on Cyprus an obligation under EU law[114] to conclude one. The claim to compliance of the requirement imposed by the ECB on Cyprus stems more obviously from the ECB's ability to adopt a decision on consequences affecting the Member State – that is to say, from pressure. To what extent does EU law constrain the ability of the Governing Council of the ECB to formulate requirements such as the one at hand, bearing on issues of national competence for a Member State, yet formulated in light of a general notion of "the objectives and tasks of the ESBC" – and explicitly linked to the promise of consequences in case of non-compliance, imposed via the formal adoption of an EU decision?

While space would not allow to explore the issue in sufficient detail in the present paper, one crucial aspect of this question has to do with the extent to which "links" and "requirements" prong of pressure are made explicit, or publicized. This is the constitutional problem of both "hidden" and "interstitial" pressure mechanisms.

[113] See Case T-680/13, *Chrysostomides*, *esp.* para 384.

[114] This being said, the General Court appears to suggest that this could have been the case, with the caveat that the Press Release of 21 March 2013 would only have imposed "an obligation of result" on Cyprus (see Case T-680/13, *Chrysostomides*, paras. 147–148). On this issue, see Section 2.3.2. of the present paper.

2.3 Hidden and interstitial pressure mechanisms

The reengineering of legal bases and interpretive creativity in linking new requirements to the exercise of existing EU competences are not the only options made more easily accessible to EU institutions by the structure of pressure. The specific features of pressure's claims to compliance allow for pressure mechanisms to be hidden from view (Section 2.3.1), or to be complemented by "interstitial" pressure mechanisms (Section 2.3.2.), greatly complicating attempts at imposing judicial review on acts of pressure.

2.3.1 Hidden pressure mechanisms

Pressure mechanisms may be hidden. This is another implication of the observation that only the third prong of pressure, on adopting a decision on consequences, has to be formalised[115]. Where the other two – requirements and link – are formulated informally, the option becomes available to formulate them away from public view. Moreover, should pressure work and the Member State comply with requirements, there may be no need to adopt a formal decision on consequences – leaving the whole process confidential.

A famous example of (initially) hidden pressure is that of the so-called "secret letters"[116] sent by the European Central Bank to crisis-hit Member States during the euro-crisis. The letter sent on 19 November 2010 by the President of the ECB to the Irish Minister of Finance of the time rings familiar, in that it points to the power of the Board of Governors of the ECB to suspend the provision of vital Emergency Liquidity Assistance granted by national central banks (decision on consequences) in case they "may interfere with the objectives and tasks of the Eurosystem" and "may contravene the prohibition of monetary financing"[117] imposed by article 123(1) TFEU. As was the case with the Press Release to Cyprus in 2013, the letter itself makes clear the link between consequences and requirements:

> "it is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish Government vis-à-vis the Eurosystem on the four following points that we can authorise further provision of ELA to Irish financial institutions"

The "following points" mentioned in the letter formulate requirements going beyond EU competences to impose legal obligations on Ireland – as was the case with the precisely worded requirements for fiscal consolidation and economic reforms laid out in similar[118]

[115] The present paper leaves aside situations in which pressure may arise out of "bluff" concerning decisions on consequences for which no legal basis would exist. It is assumed that in most cases, the legal services of Member States would normally be able to signal whether such decisions could effectively be adopted.

[116] See e.g. Eugénia C. Heldt & Tony Mueller (2020): "The (self-)empowerment of the European Central Bank during the sovereign debt crisis", *Journal of European Integration*, p. 2.

[117] Jean-Claude Trichet, "Letter to the Irish Finance Minister – 19 November 2010", European Central Bank, http://bit.ly/2HbY6ae (last visited on 07 April 2022).

[118] The Italian and Spanish letters do not spell out as explicitly and with as much precision by themselves which consequences would flow from non-compliance with the requirements. The existence of "interstitial" pressure mechanisms is however likely in those cases (see next sub-section).

letters to Italy[119] and Spain[120]. Space precludes to contribute here to the broader debate which arose in the following years regarding the management and governance of the euro-crisis, and the role of the ECB within it.[121] For our purposes, it will be enough to point to the fact that the structure of pressure mechanisms is what allows pressure to remain hidden, and yet contribute the constitutional process of defining the extent of the powers EU institutions are able to exercise on Member States.

2.3.2 "Interstitial" pressure mechanisms

A related feature of pressure, also resulting from the possible informality of two of its components, is that it can be imposed in layers. One relatively loose requirement linked to a promise of consequence – the "primary" pressure mechanism – can be further specified through additional requirements, which themselves can be linked to another or to the same promise of consequences – this is what we call "interstitial" pressure mechanisms. This feature of pressure is key to understanding some of the challenges posed to its being kept in check through judicial review.

Let us consider again the ECB Press Release of 21 March 2013, mentioned earlier, on financial assistance to Cyprus. The requirement it bears is formulated in fairly general terms: Cyprus was to come to an agreement by 26 March 2013 on "an EU/IMF programme" ensuring the solvency of two banks, or it would lose access to financial assistance. Cyprus did come to an agreement with the Member States whose currency is the euro during a Eurogroup meeting[122] and adopted national measures[123] in line with expectations, causing financial harm to clients of the banks concerned in the process. Some of the clients sought judicial remedy and argued before the General Court that the European Central Bank – alongside other EU institutions and the Eurogroup[124] – should be held responsible for the harm they suffered following the

[119] Jean-Claude Trichet and Mario Draghi, "Letter to the Italian Prime Minister – 5 August 2011" Voltaire Network, http://bit.ly/2BZrXnh (last visited on 07 April 2022).
[120] Jean-Claude Trichet and Miguel Fernández Ordóñez, "Letter to the Spanish Prime Minister – 5 August, 2011." European Central Bank, http://bit.ly/2F1NMkH (last visited on 07 April 2022).
[121] See in particular Beukers, *op.cit. supra.*, n.10; Torres "The EMU's Legitimacy and the ECB as a Strategic Political Player in the Crisis Context", 35 *Journal of European Integration* (2013), pp. 287–300; Tuori and Tuori, *The Eurozone crisis : a constitutional analysis*, (Cambridge University Press, 2014); Joerges and Glinski (eds), *The European Crisis and the Transformation of Transnational Governance: Authoritarian Managerialism versus Democratic Governance*, (Hart Publishing, 2014); Somek, "Delegation and Authority: Authoritarian Liberalism Today", 21 *European Law Journal* (2014), pp. 340–360; Kilpatrick, *op.cit. supra*, n.10; Fabbrini, Ballin and Somsen, *What Form of Government for the European Union and the Eurozone?*, (Hart Publishing, 2015); Curtin "'Accountable Independence' of the European Central Bank: Seeing the Logics of Transparency" 23 *European Law Journal* (2017), pp. 28–44; Verdun "Political leadership of the European Central Bank", 39 *Journal of European Integration* (2017), pp. 207–221; Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance*, (OUP 2020); Dermine, *The new economic governance of the Eurozone: A rule of law analysis*, PhD thesis (KU Leuven/Maastricht University, 2020).
[122] See Case T-680/13, *Chrysostomides*, paras 122–132.
[123] In particular, four decrees adopted on the basis of a Law adopted by the Republic of Cyprus on 22 March 2013. See Case T-680/13, *Chrysostomides*, paras 30–36.
[124] Contrary to the General Court, the Court of Justice did not recognise in appeal the Eurogroup as "an EU entity established by the Treaties". See Joined Cases C-597/18 P, C-598/18 P, C-603/18 P and C-604/18 P, *Chrysostomides*, para 212.

implementation of the national measures. They notably claimed that the European Central Bank required Cyprus to adopt the measures through its Press Release.[125]

The way the General Court analysed this claim is revealing for our purposes. It applied an analytical framework meant for the review of legally binding requirements to a requirement backed by pressure, concluding that the requirement "merely expresses an obligation of results" concerning "the conclusion of an EU/IMF programme ensuring the solvency of the banks concerned"[126] – it did not require the *specific* measures adopted by Cyprus. However, as was argued throughout the present paper, the claim to compliance of pressure does not have the same structure as the claim to compliance of binding legal obligations. Thus, a careful judicial review of the wording[127] of a requirement backed by pressure is not necessarily enough to assess the extent of the obligation imposed – and freedom left – to its addressee. Especially where requirements and links are established informally, what matters is that the decision-maker able to impose consequences is satisfied with the way the requirements have been interpreted and applied – that is, if the decision on consequences can be adopted with "a wide margin of discretion", as was true *in casu.*[128] Indeed, where no or little formal constraints surround the formulation of the requirement nor link, additional specifications can be added when it is felt that the initial requirement risks being misunderstood, or not observed to satisfaction. Such additional specifications are what is meant by the expression "interstitial pressure mechanisms".

Importantly, the claimants in the *Chrysostomides* case did argue that the Press Release of 21 March 2013 should be read in light of additional specifications, in the form of "opinions expressed by a member of the ECB Executive Board during the Euro Group meetings of 15 and 16 March 2013".[129] Importantly as well, the General Court paid consideration to the argument – noting however that the opinions expressed, "assuming them to be proved", "related to the introduction" of other measures than the specific measures which had been harmful to the claimants.[130] This indicates that fact – and "proo[f]" – finding would indeed be necessary conditions to establish the existence of both pressure and interstitial pressure mechanisms where informality would leave them hidden. Exactly to what extent EU law and procedures before the CJEU enable claimants to follow such a path is a question which would require a dedicated discussion.

Interstitial pressure mechanisms play a role in different contexts, not limited to the euro-crisis.[131] For instance, the RRF Regulation provides for a number of objectives and conditions

[125] Case T-680/13, Chrysostomides, para 147.
[126] *Ibid.* para. 148.
[127] *Ibid.* para 147.
[128] *Ibid.* paras 291 and 379.
[129] *Ibid.* para 150.
[130] *Idem.*
[131] They also played a role at different stages of the management of the euro-crisis. Note for instance how 'technical assistance' provided notably by the so-called "Troïka" (composed of the European Commission, European Central Bank, and International Monetary Fund, joined later by the European Stability Mechanism) to Member States subject to a macroeconomic adjustment programme could function as one forum for the (informal) creation of such interstitial pressure mechanisms. See in particular Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary

to be observed in National Recovery Plans submitted to the Commission by Member States wishing to benefit from Recovery funds. These objectives and conditions constitute the “requirement” prong of a “primary” pressure mechanism, linked by the RRF to a “consequences” prong consisting in a negative assessment of the Commission, or a decision to suspend, decommit or recover payments.[132] In addition, interstitial pressure mechanisms may be created during the interactions between the Commission and each Member State in the stages *leading up to* the submission of their plans. Indeed, during such interactions, the Commission may – and does[133] – make observations or recommendations to the Member States as regards their Plans, which suggest whether a positive assessment could be granted once the Plans are submitted. In this context, depending on the substance of the informal exchanges held between Commission and Member States, the recommendations of the Commission should be considered as “requirements” linked to the adoption of a decision on “consequences” (a positive assessment on the Plans), constituting “interstitial” pressure mechanisms existing alongside the primary pressure mechanism. In this case too, it is a factual question whether such informal exchanges between the Commission and the Member States led to the creation of interstitial pressure mechanisms.

Conclusion

This paper has proposed a theoretical framework for the study of “pressure” as an object of relevance for EU constitutional lawyers. Pressure mechanisms have been defined based on their three-pronged structure, whereby a requirement is linked to the possible adoption of a decision imposing consequences in cases of (non-) compliance. The claim to compliance of pressure is conceived as distinct from – although sometimes overlapping with – impositions of legal obligations under EU law. Pressure is not law, but it may be both an object and a product of law.

Thus, imposing pressure may be explicitly illegal under EU law (in particular where principles of independence provide so). It may also be an accepted and normal feature of the EU constitutional order, contributing to the definition of inter- and intra-institutional relationships at EU level, as well as to the definition of the relationship between EU institutions and Member States. Legal provisions enabling pressure mechanisms are numerous and include provisions for conditionality mechanisms, for sanctions, for motions of censures, for veto, or for the discontinuation of financial assistance.

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surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, article 7(8): “[t]echnical assistance may include the establishment of a resident representative and supporting staff to *advise authorities* on the implementation of the programme” (emphasis added). On the role of the “Toïka” in Cyprus, see Kruse, “Cyprus: The Troika’s new approach to resolving a financial crisis in a Eurozone member state”, in Magone, Laffan and Schweiger (eds), *Core-periphery Relations in the European Union: power and conflict in a dualist political economy* (Routledge, 2016), pp. 190–204.

[132] See *supra.* Section 1.3.2.

[133] See the statement given by the European Commission at a Hearing on 25 October 2021 before the European Parliament’s Committee on Budgetary Control: https://multimedia.europarl.europa.eu/en/webstreaming/committee-on-budgetary-control_20211025-1400-COMMITTEE-CONT (as from 16h14’30’’, last visited 07 April 2022).

However, its very three-pronged structure also means that pressure may be imposed where constitutional design had not foreseen it. Pressure may partly escape the judicial and institutional safeguards built around it in other contexts. Especially where it is possible for two of its components – requirement and link – to be created informally, unforeseen, hidden and "interstitial" pressure mechanisms may be produced, challenging pre-existing frameworks of analysis concerning the constraints made available by the EU legal order to limit EU power over Member States. While EU law does provide means to constrain pressure, the paper suggests that such means are bound to remain incomplete where pressure is not understood in its own terms.

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