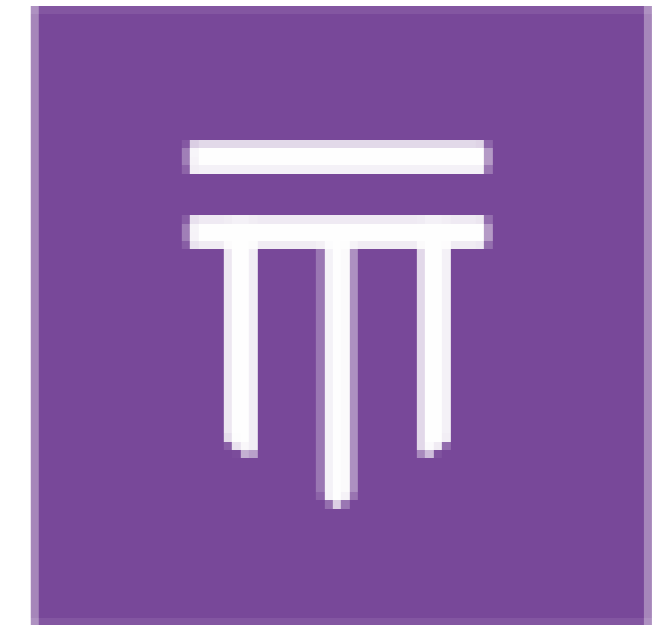


Brno, 13 October 2021

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# ECJ and Human Rights



JUSTIN  
Judicial Studies Institute  
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Katarína Šipulová

### *Article 2*

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

### *Article 3*

(ex Article 2 TEU)

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.

*Article 4*

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

*Article 6*  
**(ex Article 6 TEU)**

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

**The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.**

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

**2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.** Such accession shall not affect the Union's competences as defined in the Treaties.

**3. Fundamental rights**, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, **shall constitute general principles of the Union's law.**

*Article 7*

*(ex Article 7 TEU)*

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may 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.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend 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. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under the Treaties shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

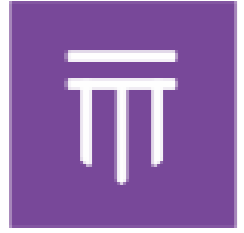
5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

# EU Charter of FR

## *Article 51*

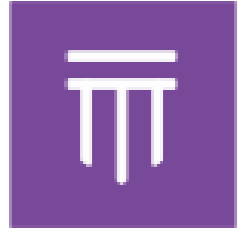
### **Field of application**

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.



# What do we know about the EU law?

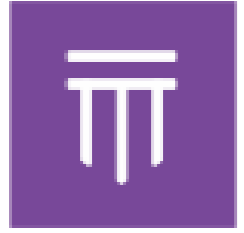
- Composition
- Principles



# What do we know about the EU law?

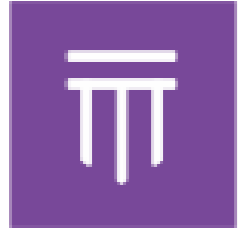
- Composition
- Principles
  - Supremacy over what?
  - Domestic courts?





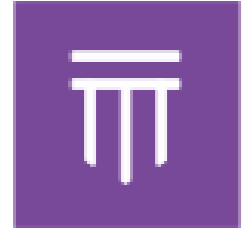
# How does the ECJ react

- Commission: What are the implications of the doctrine of supremacy?
- Clash of courts: Solangene & ECJ's compromise



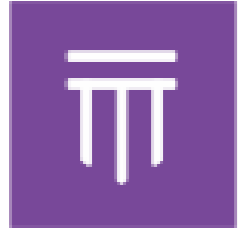
# How does the ECJ react

- ECJ starts incorporating FR into its case law (general principles of Community/EU law)
- Examples?



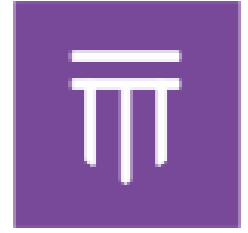
# Where do EU fundamental rights constrain the states?

- Common market:
  - principle of non-discrimination
  - Equal pay for men and women
- General principles
- Migration & Asylum Law
- Justice
  - Criminal law
- Foreign policy



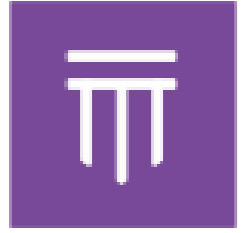
# Maastricht Pillars

- II. And III. Pillar
  - II. Pillar: principle of nondiscrimination
    - **Tanja Kreil**
    - **Alexander Dory**
  - III. Pillar
    - **Maria Pupino**
    - Accused of a crime (mistreating children). Prosecutor asked for evidence of children. Should the national law be interpreted in light of a Council's Framework Decision, or does the duty of harmonious interpretation relate only to the first pillar?
    - ECJ: the interpretative duty applies to pillar 3 decisions too.



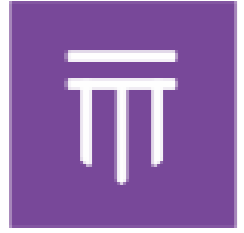
# EU Charter of Fundamental Rights

- What changes did the Charter bring?



# EU Charter of Fundamental Rights

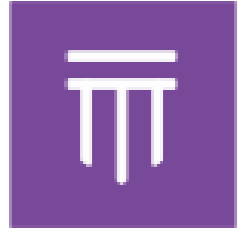
- What changes did the Charter bring?
  - No generations of rights
  - Innovative rights
  - Some rights missing
- Codification of existing case-law: the problem of authority?
- Rights v principles
- What is the added value of the Charter?



# EU law and Fundamental rights

1. Infringement of FR by EU Institutions
  - Stauder v Ulm
  - Volker and Schecke
  
2. Actions of MS leading to infringement of FR
  - I. Implementation of EU law
  - II. Deviation from the free movement rules
  - III. Invocations of FR as a justification of the restriction on free movement
  
3. Autonomous application of EU fundamental rights

**Is there a self-standing obligation under EU law, to respect fundamental rights?**



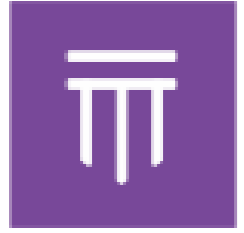
# What does Charter do with this scope?

- Article 51: implementation of EU law
  1. MS as agents implementing and applying EU measures
  2. MS derogating from EU rules
  3. MS actions within the scope of EU law

## What is outside the scope?

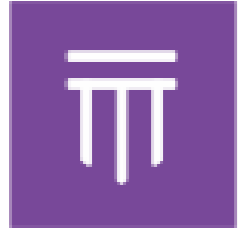
- **Craig-De Burca:** Treaties do not provide any general power to enact rules on human rights (apart from anti-discrimination)
- Exclusive national competences and legislation
- A 4 TEU
- Residence permits e.g.





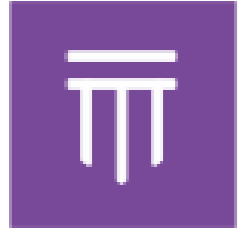
# Balancing

- ECtHR: Is political measure a legitimate & proportional restriction of the human right?
- CJEU: is FR a legitimate & proportional restriction of the fundamental freedom?

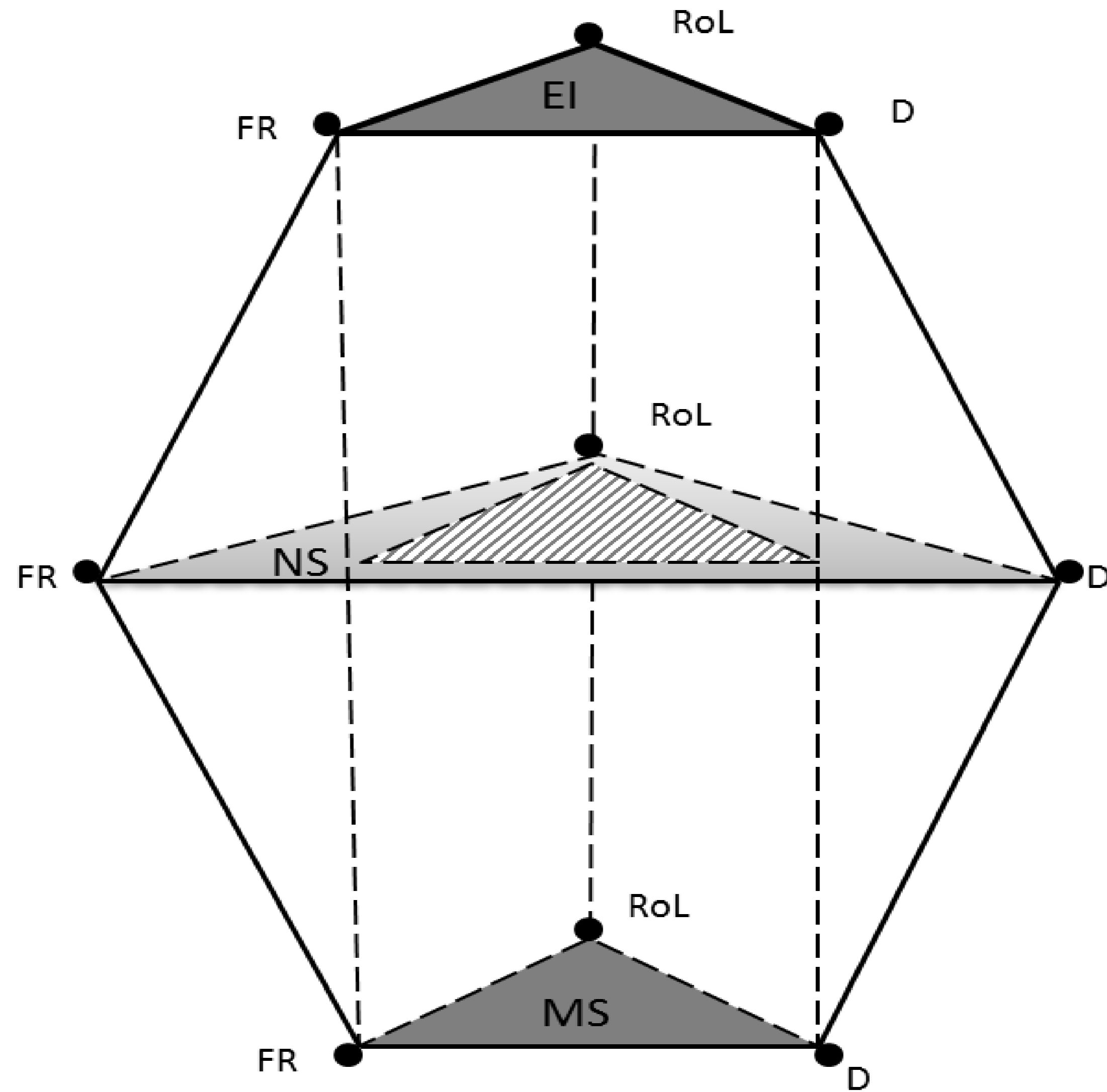


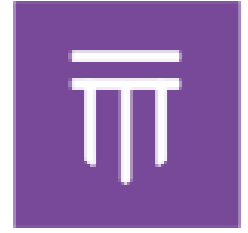
# Balancing

- In case of a conflict, general principles of law have precedence over specific Community / EU law measures
- Proportionality test
  - Legitimate aim
    - Regulation of the market (and causal connection btw national measure and the aim)
  - Necessary measure
    - Is there any other equal measure?
  - Proportional burden
- ECtHR Proportionality test:
  - (scope and interference)
  - Legality
  - Legitimate aim
  - Necessity in a democratic society (proportionality test)



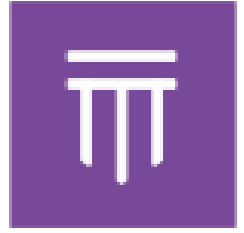
# A2 triangular protection





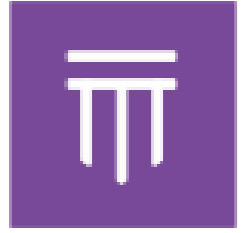
# Solange repercussions

- Can domestic courts challenge ECJ? On what grounds?



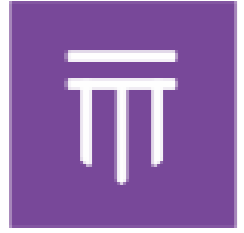
# Solange repercussions

- Can domestic courts challenge ECJ? On what grounds?
  - (constitutional) human rights
  - National identity
- What is national identity?



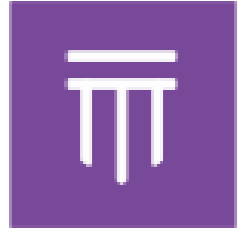
# Democratic Backsliding

- Poland, Hungary, Romania – which rights are at stake?



# Democratic Backsliding

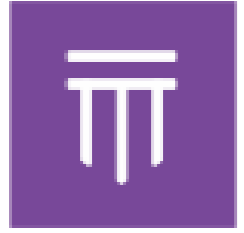
- **Media freedoms**
  - **Minority rights**
  - **Judicial independence**
- 
- EU law and institutional structure of the state
  - Romania: CVM mechanism



# National Challenges II: Competences

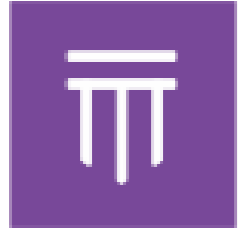
- ECJ Press release
- 1 In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty.
- 2 Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect.
- 3 That is the only way of ensuring the equality of Member States in the Union they created



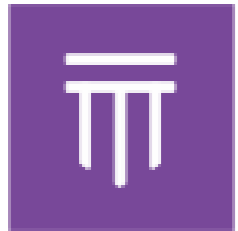


# National Challenges II: Competences

- Poland: Constitutional Tribunal decision of 7 October 2021
- Unlike the German ruling, it calls into question the cornerstone of European integration
  - Sweeping rejection of the primacy of European law
  - Establishes the unconstitutionality of central primary law norms: A1 and 19 TEU
  - Poor reasoning, does not address harmonization or reconciliation of EU law and national constitution
  - **Blanket primacy of Polish constitution**
  - Effectively denies any competence of the EU
  - Denies national judges power to review the conformity

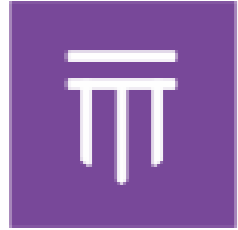


What does Bogdandy et al. propose?



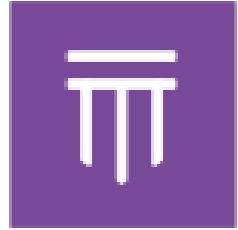
# Reversed Solange

- beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU
- The scope:
  - 1. MS executing obligations from EU law
  - 2. MS implementing EU law (directives)
  - 3. The scope of EU law: national limitations of a right granted by EU law (market freedoms) trigger the application of EU fundamental rights
    - Not applicable to non-economic activities and purely internal situations



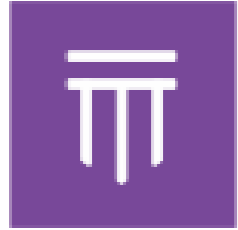
# What does Bogdandy et al. propose?

- **Systemic violations of the essence of fundamental rights (A2 TEU) by any public authority in the European legal space amount to infringements of Article 20 TFEU which can be considered by national courts in cooperation with the Court of Justice**

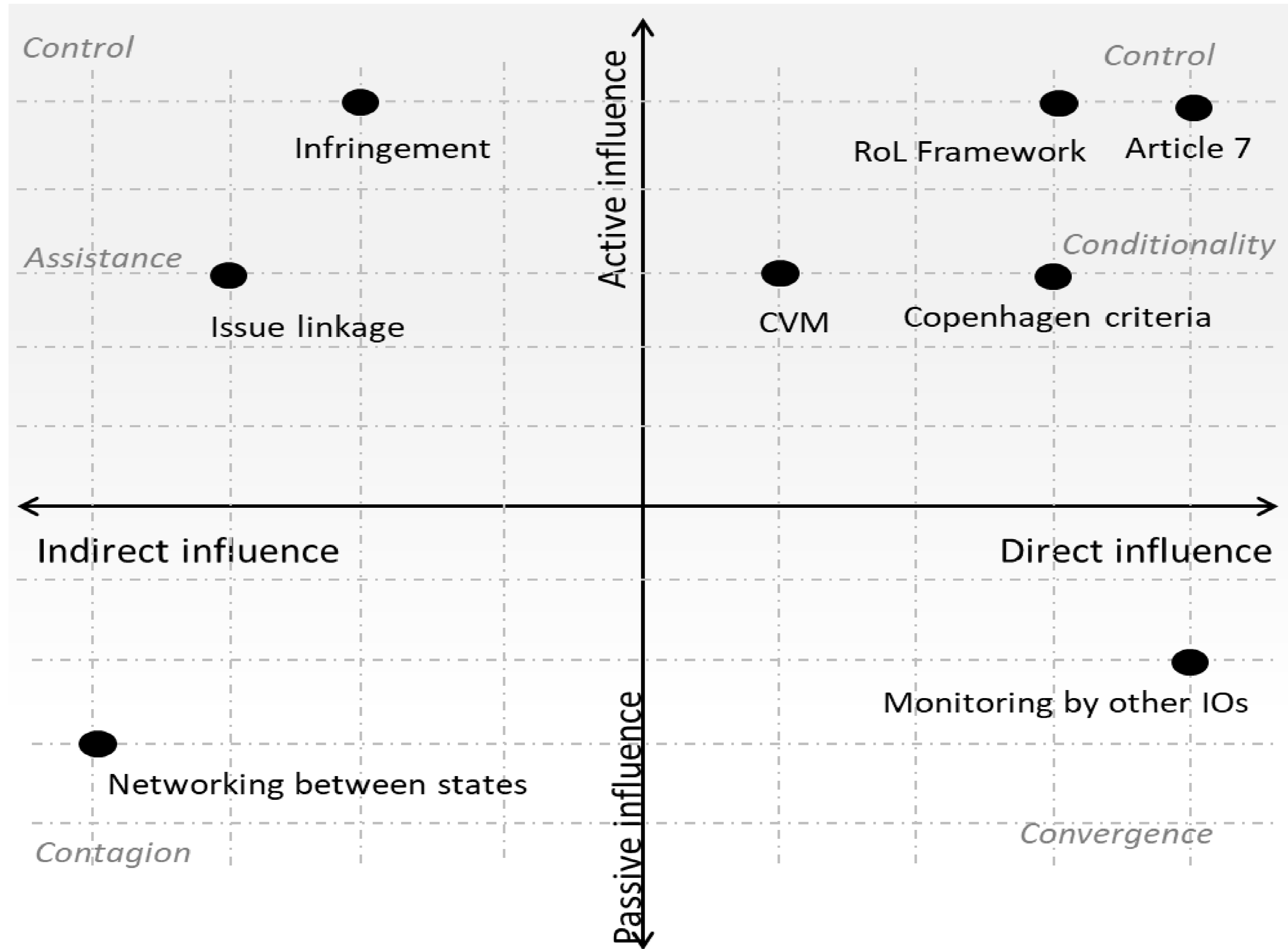


# A2 Control

<b>Policy instruments</b>	Sanction mechanism, Article 7 TEU	Control
	International peer pressure	Convergence
	Evaluation reports of the accession process/CVM	Conditionality
	Issue linkage (loans, package negotiations)	Control (indirect influence)
	Pre-accession influence + networking (social learning)	Contagion
<b>Legal instruments</b>	Infringement	Control (indirect influence)
	Preliminary ruling procedure	Control



# A2 Control





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