

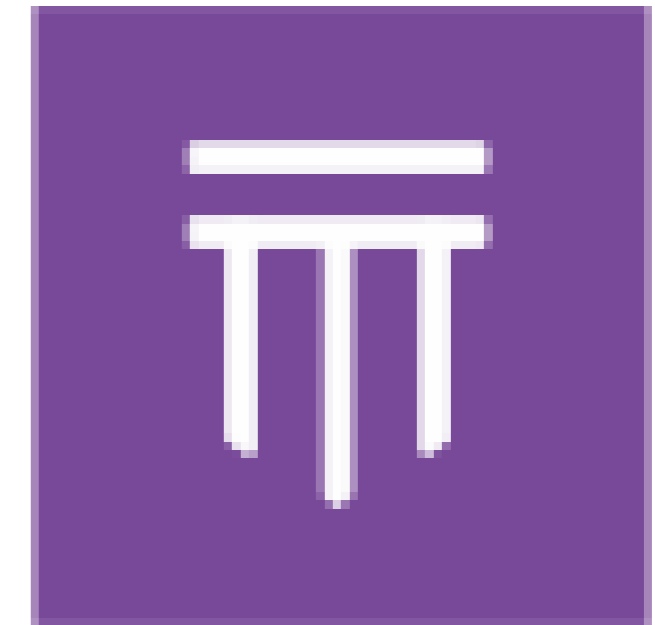
Brno, 3 November 2021

Accession to ECHR

A Deeper Look into Dissonance

National Identity

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JUSTIN
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Article 6
(ex Article 6 TEU)

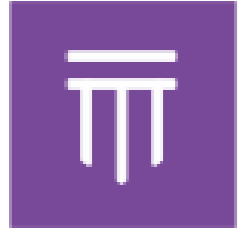
1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

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.

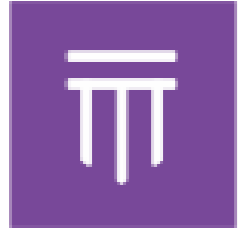
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

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.**



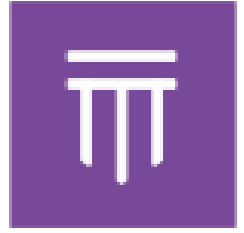
Accession to ECHR – Opinion 2/13

- EU is not a state
 - Only states are member parties of the Convention (ECHR). The accession agreement (AA) treats the EU as a state, which is not adequate. **EU is a new legal order**
 - under international law, the EU is precluded by its very nature from being considered a State
- Autonomy of EU law



Accession to ECHR – Opinion 2/13

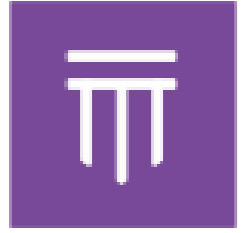
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Accession to ECHR – Opinion 2/13

1. Autonomy of EU law

- Needs to be protected
- Strasbourg interpretation of ECHR would bind the EU, but ECtHR cannot review interpretations and scope of EU law
 - A53 ECHR allows MS to lay down higher standards of HR protection than ECHR. But A53 Charter (Melloni): MS cannot have higher standards than EU Charter in fully harmonised area.
 - Principle of mutual trust would be compromised
 - Protocol 16 is a threat to autonomy of EU law (PR to Strasbourg instead of Luxembourg)



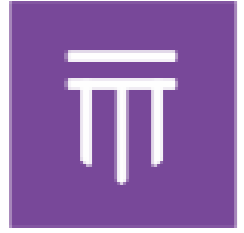
Accession to ECHR – Opinion 2/13

2. Treaty interpretation/application: CJEU.

- but, AA does not exclude the possibility of the ECtHR to settle such disputes

3. Co-respondent mechanism

- EU law implemented by MS – hence applicant will mostly go against the state. But MS have little discretion over EU actions.
- How to split responsibility between MS and EU?
 - C-R on request of the ECtHR or the contracting party
 - But, ECtHR would need to assess the rules of EU law governing the division of powers between EU and MS.



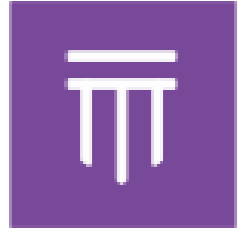
Accession to ECHR – Opinion 2/13

4. Prior involvement of the CJEU

- CJEU must have a chance to interpret and rule on the issue of EU law before it reaches the ECtHR.
- But national courts sometimes might not refer PR to CJEU.
 - Costa and Skouris: joint communication that part of AA would be an internal procedure for indirect actions (allowing CJEU to make a ruling).
 - CJEU did not find the procedure sufficient:
 - CJEU has not reserved right to rule whether it already dealt with an issue (it allowed to do so for ECtHR)
 - Did not permit the CJEU to rule on the interpretation (only validity of EU law)

5. Specific characteristics of EU law as regards review in CFSP matters

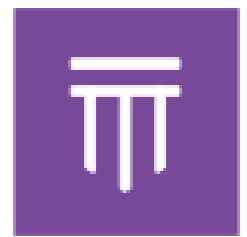
- Limited powers of CJEU in CFSP => no interpretation of EU law prior to ECtHR ruling.
- E.g. HR violation due to EU military action -> exclusive JR for ECtHR



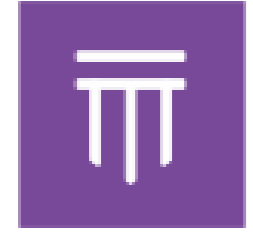
Accession to ECHR – Opinion 2/13

Repercussions:

- Commission can initiate infringement if the EU does not accede to ECHR
- Amendment of the Treaties: explicitly asking the EU to proceed notwithstanding A 6.2 TEU, Protocol 8 and Opinion 2/13?
- Courts try to engage more in a dialogue
- More considerations to application of some doctrines (mutual trust)
- Core issue: for EU, FR still only instrumental to achieving other policy goals
- Sn: how to solve the increasing caseload?

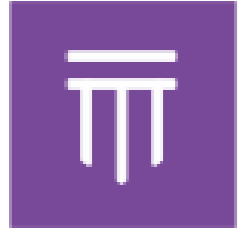


Dissonance



Solangene repercussions

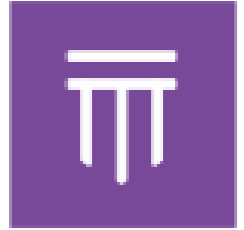
- Can domestic courts challenge ECJ? On what grounds?



Solange repercussions

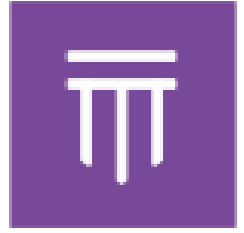
- Can domestic courts challenge ECJ? On what grounds?
 - (constitutional) human rights
 - National identity

- What is national identity?



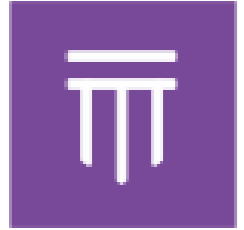
Slovak Pensions case

- Introductory thoughts:
- Principle of non-discrimination in EU law
 - Driving force of both single market and FR
 - ECJ generally reluctant to make compromises
 - But! Exceptions: *Josemans case*
 - Prohibition of non-Dutch nationals from having access to Dutch coffee shops
 - ECJ: the sale of soft drugs does not fall within the scope of Treaty regulation of services, but, coffee shops also sale other products covered by the Treaty
 - Restricting measures have to be justified on grounds of public order
 - Discriminatory, but justifiable
- Test Achats case (different insurance rates on the grounds of sex)
 - ECJ requires same insurance rates for car insurance or life insurance
 - Women live longer....
 - Different rate of accidents



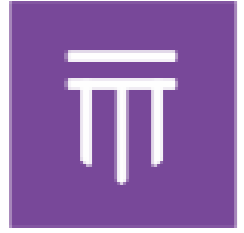
Slovak Pensions case

- Introductory thoughts:
- Mangold (discrimination on the ground of age is a general principle of EU law)
- Coleman (discrimination by association)
- Commission v Hungary (retirement of Hungarian judges and prosecutors)
- Commission v Poland (no sitting judge can be removed on the grounds of age)



Slovak Pensions case

- Constitutional complaint of a Czech claimant (previously working for CS train rails 1969-1993 in Slovakia).
- 1992 Both countries had to establish which state would be responsible for paying the pensions for former CS citizens -> Agreement: the authority with competence to grant pension will be determined by the State of residence of employer
- Core issue: **Slovak pensions in 1990s are significantly lower**
 - ! What about people who lived in the Czech part but their employer resided in the Slovak part? -> they receive Slovak (lower) pensions while living in CR
 - CCC: this violates the right to adequate material security in old age, the Czech authorities have to pay a **special increment** to Czech citizens to compensate their lower pensions from Slovakia



Slovak Pensions case

- SAC never accepted the CCC reasoning -> Judicial war
- The decision after Landtova is the 17th in line!
- SAC: Such special increment is incompatible with EU law – preliminary question leading to C-399/09 Landtová
 - Is it a discrimination case? The CCC's findings should apply to any EU citizen retiring in CR after its accession to EU, working in CSR before the dissolution

EU Law, FR, and dissolution of the Federation

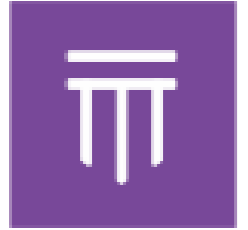
- CJEU: the CCC's case law is in violation of discrimination on the grounds of nationality, but could be accepted if the same increment would be paid also to other than Czech citizens (within the EU)
- CJEU found “no evidence justifying such discrimination”
- The Czech reaction:
 - Czech legislator amends the law 155/1995 on retirement pensions, prohibiting ANY special increment 😊
 - CCC argues (Holubec case) that it is the domestic constitutional court who is the sovereign authority in protection of constitution, even against the excesses of EU institutions.
 - The coordination of retirement pensions within the EU is a very different question than the one between CR and SR –post federal settlement. There is not cross-border movement or element. The CJEU acted ultra vires (also refused to hear out the CCC)

EU Law, FR, and dissolution of the Federation

- The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal relationships arising from the free movement of persons in the European Communities, or the European Union, for social security systems of the Member States, is a failure to respect European history; it is comparing matters that are not comparable. For this reason it is not possible to apply European law, ie. the regulation, to the Czech citizens' claims stemming from social security. Following the principle explicitly stated in its judgment [Lisbon Treaty], it is not possible to do otherwise than to find in relation to the consequences of the [Court of Justice's judgment in Landtová] for similar cases that in its [the Court of Justice's] case the situation where an act of an institution of the EU exceeded the competences transferred to the EU by virtue of Article 10a of the Czech Constitution occurred, that an act ultra vires has occurred.

EU Law, FR, and dissolution of the Federation

- Behind the scenes
 - The CCC refused to ask another preliminary question, instead, it attempted to **invent** its own way of talking to the CJEU – send in amicus curiae
 - The Registry refused the letter and sent it back to the CCC: *The members of CJEU do not exchange correspondence with third parties*
 - This angers and insults the CCC
 - CCC also argues that it ***should enjoy a fair trial***



EU Law, FR, and dissolution of the Federation

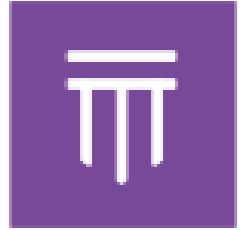
Komarek: The case is the reflection of continuing undermining of the authority of highest national judicial bodies by incorporating lower levels into the system of EU courts and giving these lower courts a **European mandate**

European mandate = lower courts can choose who their superior is
Instrumental use -> to circumvent the limitations of their own judicial system

In 2012, the Czech case seen as an isolated accident, not a calculated strategy of CCC

Still, a culture of disobedience

Chalmers: *dialogue with constitutional courts is much vaunted in the literature about it, ... in the last two years its central interventions have been to refuse to take submissions from one country's constitutional court and to deny the French Constitutional Council its traditional role of assessing whether French laws violate the French Constitution, if such an assessment in any way touches upon EU law*



EU Law, FR, and dissolution of the Federation

Skouris:

In this case the Supreme Administrative Court received an answer [from the ECJ] and followed it in its own decision. The Constitutional Court reviewed the case and decided differently. So it is primarily a problem on the level of Czech courts. The ECJ did what it was supposed to and answered the questions submitted. If there are some problems in the Czech Republic, it is not our task to solve them. And I would not like to comment on them further. The responsibility for the final decision in the case always rests solely with the national court

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 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.

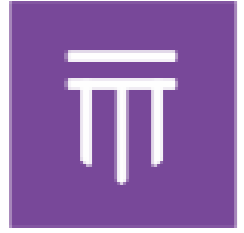
2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after 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.

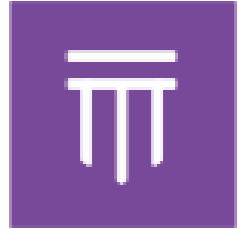
4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

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.



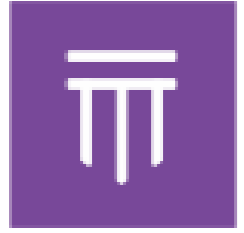
PolExit?

- 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
- Targets mostly compatibility of A19.1 and 19.2 TEU with the Constitution (remedies sufficient to effective legal protection in fields covered by EU law)
- Activist decision (review beyond the scope of the PM application)
- Tribunal interprets the EU law – exclusive competence of the CJEU



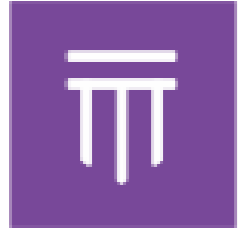
PolExit?

- Argues that questioning of EU institutions of the breach of Polish statutes goes beyond competences conferred to EU (organisation of the judiciary)
 - BUT: the scope of competences transferred to EU includes the obligation of MS to establish remedies sufficient to ensure effective legal protection of the EU law application (a.19.1)
 - Also, everyone, whose RandF guaranteed by EU law are violated has the right to effective remedy before a tribunal (meaning domestic one, not CJEU)
- Independence of judges is prerequisite of this



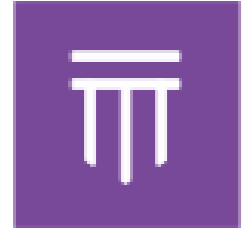
The Polish case

- The supremacy of Polish Constitution was already established (K 18/04, K 32/09, SK 45/09)
 - two autonomous legal orders exist side by side, they interact and potential conflict is not excluded
 - In case of a collision, authorities should respect the autonomy of both legal orders, but they CANNOT recognize the supremacy of EU norm over the Polish constitutional norm
 - Nor can they replace the constitutional norm with a Union norm
 - Friendly interpretation of EU law cannot go contrary to express wording of constitutional norms
- This all does NOT mean that Poland cannot function in EU as a sovereign and democratic state, or the Constitution ceased to be the supreme law of Poland (as argued in K 3/21)

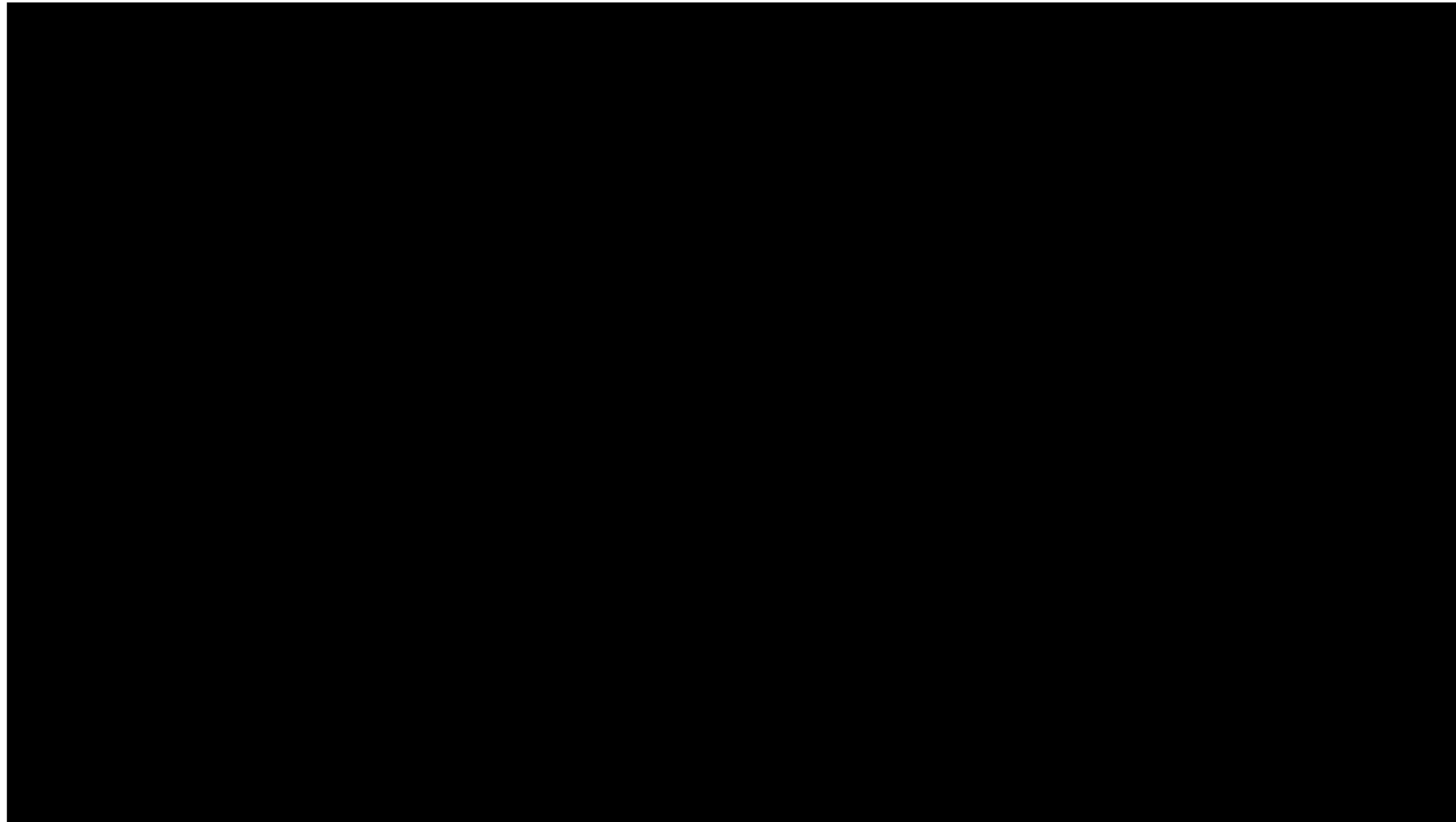


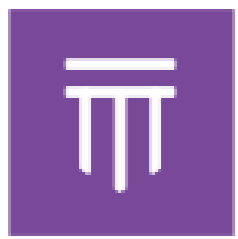
The Polish case

- 2015 PiS wins the election
- Constitutional Tribunal crises
 - Preemptive selection of 2 constitutional justices by Tusk
 - New government thwarts the whole process and reelects all 5 justices
 - Benching and golden parachutes
- Reform of the Judicial Council
- Reform of the Supreme Court
 - New disciplinary chamber
 - Disciplinary sanctions for dishonorable behavior of judges (camping, constitution T-shirt)
 - Disciplinary sanctions against judges who ask the CJEU whether their colleagues are independent (muzzle law)
- The Caste TV series
(https://www.youtube.com/watch?v=5uPAeBCAbIc&ab_channel=TVPIInfo)



The smell of democracy



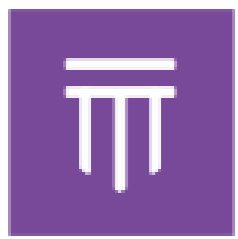


The Polish case

- Cases

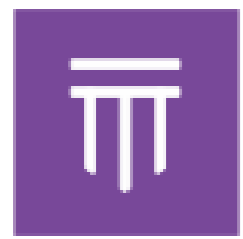
- C-192/18 Independence of Ordinary courts (retirement age rules incompatible with EU law and principles of JI and irremovability)
- C-619/18 Independence of the Supreme Court (retirement age of SC judges)
- Independence of the Disciplinary chamber of the SC: C-585/18, C-624/18 and C-625/18: EU law precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is neither independent nor an impartial tribunal.
- Muzzle law
- C-791/19 Disciplinary chamber: injunction to immediately suspend the Chamber
- Polish SC (December 2019 and January 2020): The NCJ cannot be considered an independent tribunal
- 14 February 2020: Amendment of the Law on the organisation of ordinary courts, Supreme Court and other laws

- Commission brought another action for failure to fulfil obligations (1. April 2021) C-204/21 Independence of the Disciplinary chamber (amending law prohibits national courts from reviewing compliance with EU law requirements relating to an independent and impartial tribunal)



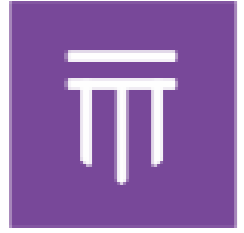
The Polish case

- Poland disregards the temporary injunction over illegal clearing work in Bialowieza nature reserve
 - 500.000 EUR a day fine
- Refuses injunctions in infringement on the NJC
- Commission asks the Court to order Poland to adopt series of interim measures - > order issued on 14. July 2021, pending the delivery of final judgment in C-204/21
- Poland has not complied -> 7 September 2021, Commission lodged an application requesting that Poland will pay a daily penalty payment in an amount that would encourage the MS to give effect to these interim measures
 - Poland asks for cancellation of the order: dismissed



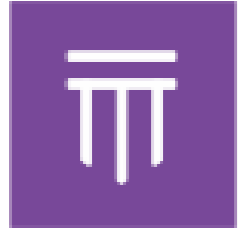
The Polish case

- Other EU institutions keep arguing on the admissibility of financial sanctions to safeguard the RoL
- EC is withholding 36 billion EUR Covid recovery fund
- EP also asked the Commission to activate a conditionality mechanism and freeze EU funds: The Commission missed the deadline to trigger the new mechanism. If it did trigger it, European Council would have month to vote on the proposal (QMV)
- Commission: this can only be a final resort
- EP not convinced, considers infringement against the Commission for non-activity

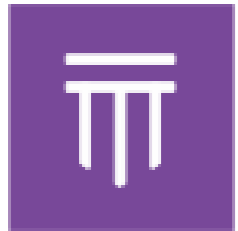


The Polish case

- 27 October 2021 ECJ (decision of its Vice President Lars Bay Larsen) imposes a fine of 1 mil EUR per day on Poland, for **consistent refusal to comply with interim measures in most recent infringement proceedings**
- The punitive measures will be in place until Warsaw agrees to comply with an ECJ ruling issued back in July that ordered the immediate suspension of the disciplinary chamber of judges of the Supreme Court
- Controversies: single order of the Vice-President, it is the Vice-president who reviews how the interim measures have been implemented
- 2 November 2021: Norwegian court suggests that surrenders according to EAW to Poland may be suspended due to **significant greater danger and probability** of HR violations

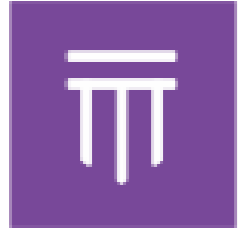


What does Bogdandy et al. propose?



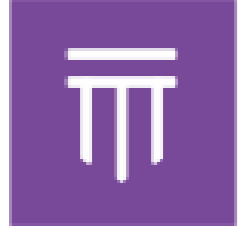
Reversed Solange

- 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



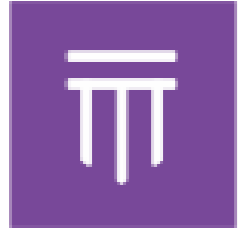
What does Bogdandy et al. propose?

- **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**

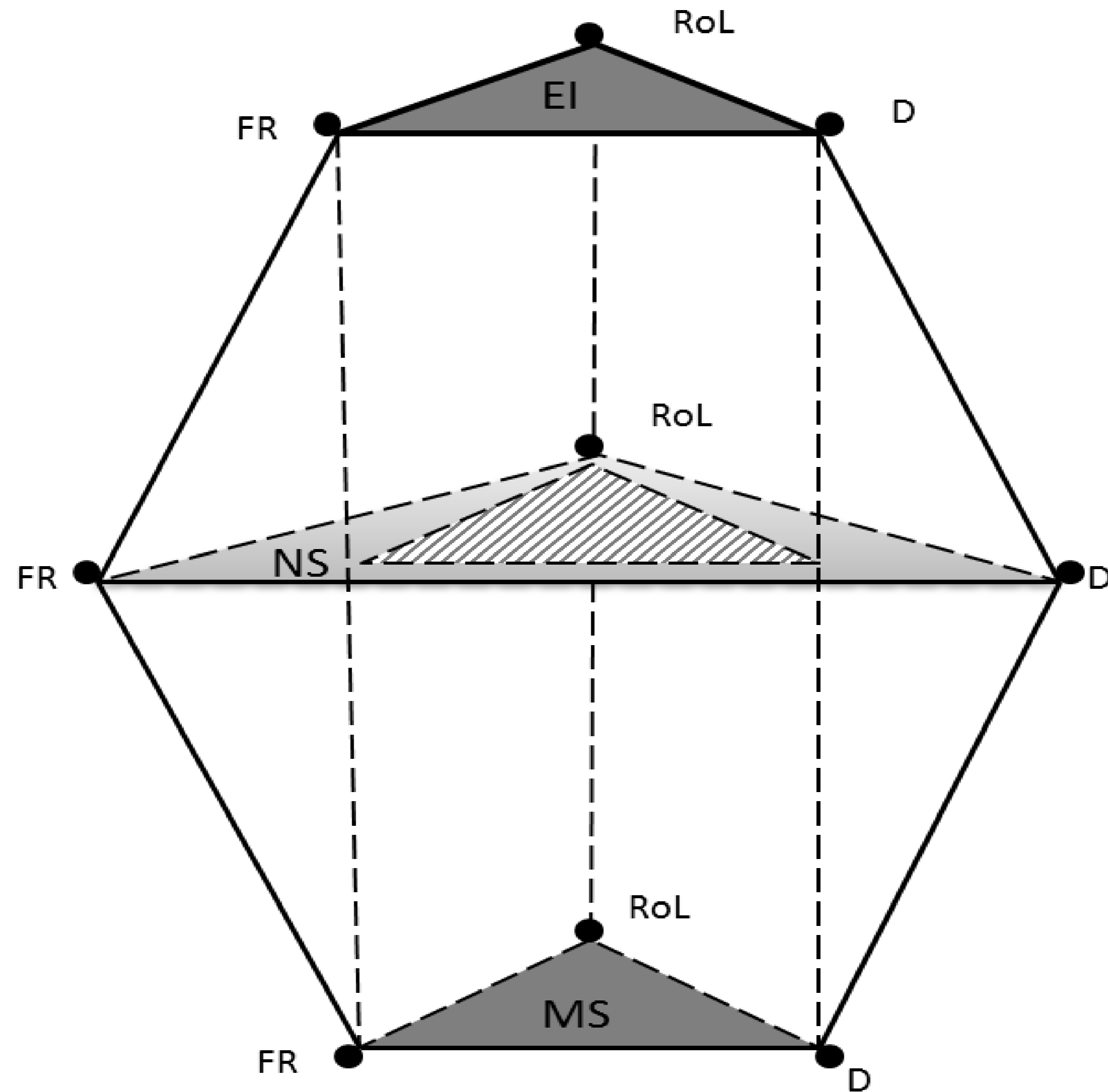


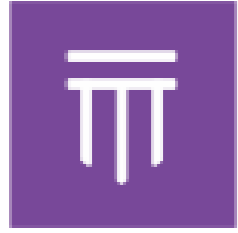
What does Bogdandy et al. propose?

- **RoL Mechanism?**



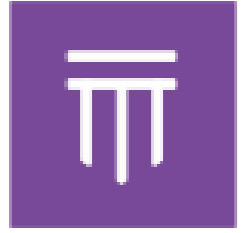
A2 triangular protection



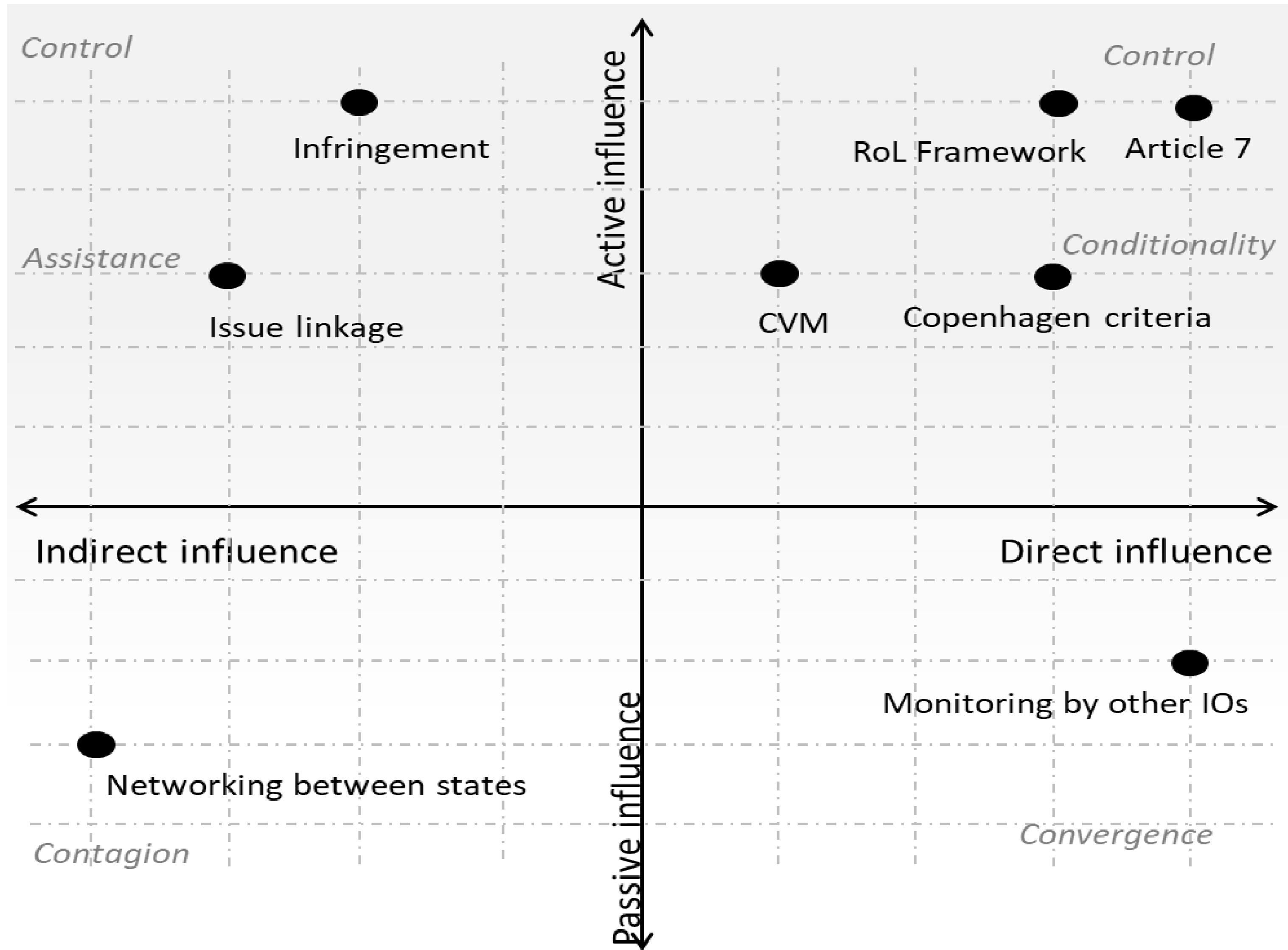


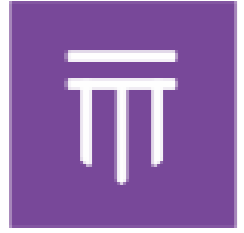
A2 Control

Policy instruments	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
Legal instruments	Infringement	Control (indirect influence)
	Preliminary ruling procedure	Control



A2 Control





Scheppele: Systemic Infringement Actions

- [Scheppele 2013](#)
- Extension of A7 mechanism
 - Ecom may signal **systemic complaints against a MS by bundling a group of individual infringements under the banner of A2**
 - The whole is more than the sum of parts -> systemic breach of basic values



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