




NEW UNIVERSITY, FACULTY OF GOVERNMENT AND EUROPEAN STUDIES

ARRS RESEARCH PROJECT *Integral Theory of Future of the European Union*

The Conference on the Future of Europe – a View from Slovenia

WORKING PAPER

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INTRODUCTION

Matej Avbelj, Polona Batagelj

On May 9 the Conference on the Future of Europe was launched in Strasbourg. The political expectations with regard to the Conference have been extremely high. It has been envisaged that the Conference would last for two years, taking the form of a comprehensive bottom up democratic exercise among EU citizens and their national and supranational institutions, which would eventually mark or at least lead to a turning point in the functioning of the European Union. To facilitate this EU wide democratic consultation process, a Multilingual Digital Platform was launched on 19 April 2021,¹ which enables the citizens to share their ideas and engage with the ideas of others. This debate is then fed into the work of European citizens' panels² and eventually to the Conference plenary, an inclusive and balanced assembly of the representatives of national and supranational institutions, EU citizens and interest groups.³

According to the official interim reports, most recent was published in November 2021, since April 2021 29,012 contributions were recorded on the platform, including 9,337 ideas, 16,017 comments and 3,658 events.⁴ They were structured around the following 10 topics: Climate change and the environment; Health; A stronger economy, social justice and jobs; EU in the world; Values and rights, rule of law, security; Digital transformation; European Democracy;

¹ Kantar Public, Third interim report, November 2021, p. 4

² There have been created 4 Panels of 200 European citizens each chosen through random selection, from the 27 Member States. The panels have focused on 4 issues: Stronger economy, social justice, jobs, education, culture, sport, digital transformation; EU democracy, values, rights, rule of law, security; Climate change, environment, health; EU in the world, migration.

³ Conference Plenary - Conference on the Future of Europe (europa.eu): "The Conference Plenary is composed of 108 representatives from the European Parliament, 54 from the Council (two per Member State) and 3 from the European Commission, as well as 108 representatives from all national Parliaments on an equal footing, and citizens. 108 citizens will participate to discuss citizens' ideas stemming from the Citizens' Panels and the Multilingual Digital Platform: 80 representatives from the European Citizens' Panels, of which at least one-third will be younger than 25, and 27 from national Citizens' Panels or Conference events (one per Member State), as well as the President of the European Youth Forum. 18 representatives from the Committee of the Regions and 18 from the Economic and Social Committee, 6 elected representatives from regional authorities and 6 elected representatives from local authorities, 12 representatives from the social partners, and 8 from civil society also participate. The High Representative of the Union for Foreign Affairs and Security Policy shall be invited when the international role of the EU is discussed. Representatives of key stakeholders may also be invited."

⁴ Third interim report, November 2021, p. 4.

Migration and Education, Culture, Youth and Sport as well as other ideas.⁵ The highest number of contributions have been dedicated to European democracy, climate change and other ideas.⁶

The final outcome of the Conference shall be presented in a report to the Joint Presidency of the Conference, composed of the heads of European Parliament, the Council and the European Commission. They are expected to process it in accordance with the Treaties and their respective competences contained therein. While the mandate of the Conference is thus clearly very weak, its concrete legal and political impact will depend on the political will of the Member States. Taking into account the political schisms in the European Union, on the axes running from the North to the South and from the West to the East, it is question-begging to what an extent the Conference will really live up to its initial high expectations, rather than just causing another crisis as a result of unfulfilled expectations. Nevertheless, there are certain political signals that the Conference will achieve more than being just about the EU-wide formal democratic consultation process. The new German government, in particular, judging by its coalition agreement, could provide a strong political boost even toward a new EU constitution-making process, with a constitutional convention, leading up to the creation of a European Federal State.

Time and, admittedly, political fortunes will tell which direction the EU will move to in the near future and what, if any, the legacy of the Conference on the Future of Europe will be. Irrespectively of that, the research team of the New University, working on the research project dedicated to the Integral theory of the future of the European Union, decided to join the debate and provide its policy input. What follows is thus a working paper, initiated as a response to the Conference on the Future of Europe and Slovenia's presidency to the Council of the European Union, consisting of four papers. The working paper contains some important proposals for the further development of the European Union within four areas: Human Rights Protection, Economic Power, Soft Law, and Common Security and Defence Policy.

The first paper by Letnar Čerňič⁷ and Cigoj⁸ focuses on the future of human rights protection. Based on several recent analytical studies, the authors argue that the impact of EU law in terms of human rights protection has been limited and that discrepancies between objectives and practice have remained. The EU institutional and normative framework has often been inferior to the Council of Europe's ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms) and domestic constitutional human rights protections. Thus, the authors suggest that the EU (and its member states) should strengthen its human rights protection system. They propose reforms at three

⁵ Ibid., 6.

⁶ Ibid.

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⁸ Assistant of European law at the New University European Faculty of Law.

different levels - institutional, normative, and practical. To protect the rights and freedoms of individuals and groups fully, the EU should: establish a new Fundamental Rights Agency; create the right to an individual application to the CJEU in the case of human rights violations by national authorities; implement the economic and social rights to exploit the full potential of the Charter; establish a more precise determination of the relationship between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).

The paper by Justinek⁹ then focuses on the economic power of the EU and argues that many changes will need to be implemented if European economies want to stay on pace with the most propulsive global economies. The EU will have to focus on sustainability, and above all, digitalization. The whole business environment thus needs to become more attractive and friendly. This can be done through European countries, where academia and universities can also make a significant contribution by introducing a new perception of entrepreneurial thinking at all levels and spheres. Europe must speed up its reform processes and implement promising strategies, including ensuring an actual EU single market if the European flagship companies wish to compete globally.

The third paper by Rošic Feguš¹⁰ aims to answer the question if, how, and under what prerequisites can the EU soft law contribute to the rule of law in the EU. Considering that soft law can solve many complex issues when hard law is not capable to do so. The author suggests that the proposed changes (the adoption of minimal procedural requirements when adopting the EU soft law; the capability to block and annul acts opposing to the sovereign nature of EU Member States) would cause the EU's soft law to move closer to the rule of law requirements. It thus strengthens its importance and satisfaction at the EU level. That is even more important because of the growing role of soft law. Meaning, that issues of granting appropriate democratic levers when EU soft law is concerned should therefore constitute an essential part of the debate on the future of Europe.

The purpose of the last paper by Brožič¹¹ is to verify whether the goals set out in the 18-month Programme of the Council (1 July 2020 - 31 December 2021), regarding the EU's Common Security and Defence Policy (CSDP), can be achieved or strengthened, and in what time frame. The paper analyses various contributions and publications to identify the development trends so far and what they should become in the future, considering that in 2020 EU's CSDP marked the 20 Anniversary of its existence. The author has thus selected six important topics from the strategic program and determined the extent to which they can be realized and how Slovenia could contribute to their realization during its Presidency of the Council of the European Union.

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¹⁰ Assistant Professor of European law at the New University, European Faculty of Law.

¹¹ Associate Professor of Security Studies at the New University, Faculty of Government and European Studies.

FUTURE OF HUMAN RIGHTS PROTECTION IN THE EUROPEAN UNION

Jernej Letnar Čerňič, Maja Cigoj

1. Enhancing Human Rights Protection in the EU: Main values and objectives

Any system, either domestic, regional, or international, of human rights protection is based on fundamental values, which provide ethical foundations for principles, rights, and freedom. The Treaty of the European Union notes in Article 2 that »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.«¹² It adds that its aim is »/.../ to promote peace, its values and the well-being of its peoples.«¹³ Human dignity is a constituting value of the human rights protection system of the European Union (hereinafter: EU) upon which all human rights and fundamental freedoms are based. It is of individual and collective legal nature. It belongs not only to each individual, but also to societies and communities as a whole. Collective nature of human dignity is reflected in the customs, culture, and traditions of European societies. The value of human dignity has been accordingly recognized in the case law of the European Court of Justice (hereinafter: CJEU).¹⁴ The CJEU observed in that »Human dignity, as a fundamental expression of an element of mankind founded simply on humanity, forms the underlying basis and starting point for all human rights distinguishable from it; at the same time, it is the point of convergence of individual human rights in the light of which they are to be understood and interpreted.«¹⁵ It added that »human dignity has its roots deep in the origins of a conception of mankind in European culture that regards man as an entity capable of spontaneity and self-determination.«¹⁶ Values such as human dignity, freedom, equality, solidarity and pluralism illustrate that states have negative and positive obligations to respect, protect and exercise the human rights and fundamental freedoms of individuals and groups. They must refrain from any interference with human rights and fundamental freedoms, as well as take active measures to protect human rights in private relations. All in all, values establish the minimum common

¹² Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Article 2.

¹³ Ibid, Article 3, Para.1.

¹⁴ Heselhaus, 2019, pp. 943–96.

¹⁵ CJEU Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, C-36/02, 14. 10. 2004, para. 76.

¹⁶ Ibid, para. 78. CJEU Haqbin, C-233/18, 12. 11. 2019; CJEU M.A.S. and M.B., C-42/17, 5. 12. 2017; CJEU Maio Marques da Rosa, C-306/16, 9. 11. 2017; CJEU PPU – C.K. and Others, C-578/16, 16. 2. 2017; CJEU Aranyosi and Caldaru, C-404/15 and C-659/15, 5. 4. 2016; CJEU Lambauer v Council, C-52/15 P, 3. 9. 2015; CJEU Stefano Melloni v Ministerio Fiscal, C-399/11, 26. 2. 2013.

denominators of human protection across different cultures, traditions, customs of societies of the EU Member States.

2. Assessment of the Current Framework for Human Rights Protection in the EU

The foundation of the EU as is stated in Article 2 of the Treaty on EU (hereinafter: the TEU) rests on common values, *inter alia* the respect for human rights, the pre-existing principles that form a part of the European heritage.¹⁷ The catalogue of substantive human rights in the legal order of the EU is established in the EU Charter of Fundamental Right (hereinafter: the Charter) that became legally binding on 1 December 2009. Article 6 of the TEU in a combination with Article 51 of the Charter provide legal basis for the institutions of the EU and Member States to employ EU human rights and simultaneously with due regard for the principle of subsidiarity restrict the obligation to apply the provisions of the Charter by Member States only when they are implementing the EU law.¹⁸ Additionally, The TEU emphasises the importance of fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) along with the constitutional traditions common to Member States that constitute general principles of the EU law.¹⁹ In this respect the system of judicial human rights protection in the EU may be regarded as a multi-layered construction of shared competences, distributed among the CJEU, the European Court of Human Rights (hereinafter: ECtHR) and national (constitutional) courts of all 27 Member States of the EU.

From the perspective of an individual, accordingly, human rights enshrined in the Charter may be invoked in national court proceedings in front of national (constitutional) courts in the fields covered by EU law as well as in front of the CJEU respectively.²⁰ In its jurisprudence, the CJEU has consistently held that the protection of human rights in the EU is an autonomous system and, therefore, the mechanisms of human rights protection in a framework of EU legal order must be used in accordance with the primacy, unity and effectiveness of EU law.²¹ Having said that, as opposed to the human rights protection under the ECHR in front of the ECtHR, the lack of active standing of an individual to address the breaches of human rights caused by national authorities directly to the CJEU can be detected; namely, the participation of an individual in the proceedings in front of the CJEU is not properly defined in EU Treaties. In contrast, the TFEU grants individuals access to the CJEU in the cases of alleged violations of fundamental rights caused by the EU institutions.²²

¹⁷ Geiger, Khan, Kotzur (eds.), 2015, p. 15.

¹⁸ Peers (ed.), 2014, p. 1561.

¹⁹ Ibid, p. 1559.

²⁰ Ibid, p. 1413.

²¹ Avbelj, 2018, p. 13.

²² However, the *locus standi* of individuals to address breaches of the Charter caused by EU institutions appears to be properly defined in the TFEU, namely, individuals (non-privileged applicants) are entitled to bring actions for annulment of EU

Since the protection of human rights in the EU legal order arises mainly through the preliminary reference procedure in which the right and the duty to submit a reference have been vested in the national courts, the role of an individual remains merely indirect and reduced to an object rather than a party in a given proceedings in front of the CJEU.²³ Nonetheless, the lack of the right to individual application before the CJEU remains one of the greatest shortcomings of human rights protection in the EU.

Unsurprisingly, as data show, the awareness of the Charter in civil society of the EU remains very low with just over four in ten citizens aware of the existence of the Charter. There has been a slight improvement in awareness of the Charter in recent years and citizens show eagerness to gain more information about the content, application, and historical and political context of the Charter.²⁴ Yet, there is still a lot of work to be done in the future to unlock the Charter's full potential.

2.1 The Role of the Charter of Fundamental Rights of the EU

Following the development of EU market integration and fast-growing competences of the EU institutions, the regulation of lively economic processes that occur within the EU legal framework raised conflict of authoritative action of EU institutions and national institutions when implementing EU law with fundamental rights of individuals inscribed in the national constitutions of Member States of the EU. It was the incentive of national constitutional courts that encouraged the CJEU to embrace the importance of human rights protection in an otherwise economically focused Union.²⁵ As a consequence, the CJEU, in a close cooperation with national constitutional courts, has decided to promote common standards of human rights protection of the EU and, eventually, in a constant upgrading it widened the scope as well as the substance of human rights to the point where it became obvious that a non-codified judge-made human rights order was insufficient due to the lack of transparency and consistency.²⁶ Until the Charter entered into force the evolution of the protection of human rights in the EU has thus been captured in a form of coincidental opportunities for implementing human rights in the EU legal framework as general principles of EU law through the jurisprudence of the CJEU. Being incorporated into the constitutional foundations of the value based legal order of the EU, human rights have served the CJEU as a tool for filling normative gaps in the EU legislation and a guidance for the interpretation of the EU law on one hand and have been relied upon as grounds for judicial review when either EU legislation or national law implementing EU law contravene fundamental rights on the other hand.²⁷

Institution's acts or failures to address acts to individuals under the conditions laid down in Articles 263–265 of the TFEU (See in detail: Geiger, Khan, Kotzur (eds.), 2015).

²³ Daminova, 2017, p. 140.

²⁴ Special Eurobarometer 487b Report. Awareness of the Charter of Fundamental Rights of the European Union, 2019.

²⁵ Geiger, Khan, Kotzur (eds.), 2015, p. 1064.

²⁶ Ibid, p. 1065.

²⁷ Peers et al. (eds.), 2014, p. 1559.

Today, the Charter can be seen as a crucial component of the EU constitutional configuration that, together with the TEU and TFEU, forms foundational treaties of the EU and shares the same legal value as the Treaties.²⁸ The binding nature of the provisions of the Charter creates formal legal grounds for human rights protection in the EU legal order. In the hierarchical clustering of EU legal norms, the provisions of the Charter enjoy equal status as the provisions of both EU Treaties and are subject to the principles of conferral, primacy and direct effect. Under the direct effect principle, the provisions of the Charter may be applied by the national courts and other governmental bodies as long as those provisions are unconditional and sufficiently précised.²⁹ Compliant with the principle of primacy of EU legal norms, the CJEU has established primacy of fundamental rights defined in the Charter over constitutional rights defined in national Constitutions when the subject matter in question has been harmonized by an act of the EU,³⁰ which brings us to the next point – the scope of the application of the Charter. Since the Charter itself unambiguously defines that the provisions shall not extend in any way the competences of the EU as stated in the Treaties, the limited scope of the application of the Charter is the cornerstone which underpins the principle of conferral that preserves constitutional jurisdiction over matters where EU law imposes no obligation on the Member States and the Charter does not apply.³¹

In situations where Member States fulfill their obligations under the Treaties as well as under secondary EU law, the Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States to guarantee compliance with constitutional human rights. In this context, the interpretation of fundamental rights enshrined in the Charter shall reflect the substance of constitutional rights in accordance with common constitutional traditions in a way that offers the highest level of protection. Hence, the CJEU takes into consideration common constitutional traditions when determining the content, limitations and scope of fundamental rights of the EU.³²

With respect to the common constitutional space, it should be pointed out also the relationship of the Charter and the ECHR that is of great importance to the construction of human rights protection of the EU. In so far as the EU, following the Opinion 2/13 of the Court,³³ has not acceded to the ECHR, the provisions thereof may not be regarded as EU law but rather as a source of an inspiration for the discovery of the meaning of general principles of EU law.³⁴ It is worth noting in this connection that, as an autonomous legal system separated from its national counterparts and from international legal order, the EU legal order possesses its own constitutional framework based on founding principles that constitute a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation. At the heart of that legal structure lies the Charter that is a binding

²⁸ Rossi, 2017, p. 795.

²⁹ Ibid, p. 791.

³⁰ Ibid, p. 785.

³¹ Peers et al. (eds.), 2014, p. 1561.

³² Ibid, p. 1586.

³³ Opinion 2/13 of the Court, 2014.

³⁴ Peers et al. (eds.), 2014, p. 1580.

source of human rights protection not only for EU institutions, but also for Member States when they are implementing EU law.³⁵ Notwithstanding, the human rights protection under the Charter cannot be understood as a substitute either for constitutional human rights protection at the national level or human rights guaranteed under the ECHR in a common constitutional space, but rather as a complementary mechanism for protecting human rights that emerged from complex relationships in the contemporary EU.

2.2. The Institutional Framework of the Human Rights Protection in the EU

All institutions, bodies, agencies of the European Union are obliged to respect, protect, and fulfil human rights and fundamental freedoms. More specifically, the main actors such as European Commission, Parliament, European Council, Council of the European Union, and Court of Justice of the European Union are tasked with promoting and protecting human rights and fundamental freedoms of all their activities and operations. Particularly, the Court of Justice of the European Union has justifiably been since decades lauded as championing fundamental rights.³⁶ Nonetheless, several specific bodies have been created to act in the field of human rights protections. The Fundamental Rights Agency (FRA) is the main specialized EU agency for protection of human rights and fundamental freedoms. It was created in 2007 »to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.«³⁷ The primary competences of FRA are therefore to collect data, prepare reports and analysis to inform the EU institutional actors and members about fundamental rights challenges. The FRA lacks any binding competences to deliver decisions in the case of human rights abuses. Nor is it now allowed to produce annual reports about the state of the art of human rights protections in the EU. It can conduct fact-finding missions in the Member States, however it is obliged to maintain an objective and independent position and not to interfere with the sovereignty of the member states. As a result, FRA has been since its establishment suffering from a systematically weak position in the institutional framework of the EU. It has been very much dependent on the instructions of the EU Commission, whose representatives sit on its Management Board. Its added value therefore lies particularly in the area of production of reports and analysis, whereas its added value on the ground has been limited.³⁸ Nonetheless, the dilemma about FRA's competences remains: should not its competences be extended into the more binding competences investigating fundamental rights protection in the EU institutional framework and its member states?

³⁵ Opinion 2/13 of the Court, 2014, p. 32.

³⁶ Morano-Foadi, 2015.

³⁷ Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights. See for example, Letnar Čeranič, 2015, pp. 79–108; Letnar Čeranič, 2011, pp. 272–276.

³⁸ De Schutter, 2020, online source.

Several other agencies of the EU also work in the wider area of human rights such as for example the European Agency for Safety and Health at Work, European Centre for the Development of Vocational Training, European Foundation for the Improvement of Living and Working Conditions and European Environment Agency, European Asylum Support Office, European Border and Coast Guard Agency.³⁹ Additionally, there are some other bodies such as the European Institute for Gender Equality and the Advisory Committee on Equal Opportunities for Men and Women that complement the EU human rights protection system. As far as good governance goes, the Treaty on the Functioning of the EU has also established the Office of the European Ombudsman, which can handle complaints against EU public administration.⁴⁰ However, it cannot examine on merits complaints the national authorities of the Member States. All in all, EU institutions, agencies, bodies and offices work to ensure promotion and protection of human rights and fundamental freedoms across the Union. However, the institutional framework of EU human rights protection remains scattered across different levels of the EU public administration. As a result, it does not provide an efficient approach to human rights protection.

2.3 The Relationship of the EU with the European Court of Human Rights

As it is well known, the human rights protection at the supranational level in the EU is divided between two courts, the CJEU with broad jurisdiction to decide all sorts of cases involving EU law that became an official supranational human rights adjudicator in a recent past and, as a human rights protector much more experienced ECtHR that has been a freestanding international human rights court from the very beginning of its existence.⁴¹ In order to preserve the common heritage of European peoples, the two courts are both searching for common norms of European human rights law and in doing so they cooperate very closely, they observe each other's jurisprudence and, where appropriate, they transmit the interpretation of substantive human rights into their own context.⁴² Nonetheless, the ECtHR has so far kept a pivotal role in human rights protection on the European continent.

The most challenging issue that the CJEU and the ECtHR must confront when they assess human rights cases that derive from substantively the same features of both supranational legal regimes is the existence of an overlap of jurisdiction between the two courts. In the light of the autonomy and exclusive authority to rule on matters of EU law, the reluctance of the CJEU to draw on

³⁹ Institutions and bodies, 2021, online source.

⁴⁰ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Its Article 228, Para. 1, provides that »1. A European Ombudsman, elected by the European Parliament, shall be empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role /.../.«

⁴¹ Sionaidh, 2006, p. 629.

⁴² Ibid, p. 653.

the jurisprudence of the ECtHR should be pointed out insofar as the distance from settled common norms may increase in the jurisprudence of the CJEU in favour of the autonomous interpretation of the Charter which may result to the detriment of the human rights protection.⁴³ Another significant matter that is of a major concern is the competence of the ECtHR to consider cases that bring the compatibility of EU measures with the ECHR into question taking into account the possible clash of two authorities that are supposed to be natural allies in defending human rights in common supranational space.⁴⁴

However, this kind of outcome is highly unlikely as both courts stand to risk too much; whether to be completely marginalized or their decisions overturned by the other court.⁴⁵ Instead, the CJEU and the ECtHR have rather engaged in judicial dialogue and, in developing a common legal language, they have acknowledged the authority of one another. As result, they have been developing a partnership that is based on mutual respect and cooperation between them with the CJEU seeking an alignment of its interpretation of human rights with the jurisprudence of the ECtHR and,⁴⁶ on the other hand, a self-restraint approach towards the judicial review of EU acts or to the adjudication of the conduct of EU Member States implementing EU law by the ECtHR.⁴⁷

2.4 Human Rights obligations of state and non-state actors

The EU Human Rights Framework provides beyond the primary treaties and the EU Charter on Fundamental Rights individuals with the rights against state and private abuses. Member States are primary duty-holders of human rights obligations in the EU human rights protections system. Nonetheless, corporations also carry some human rights obligations that are scattered across different areas of law. Human rights therefore apply in the EU human rights protection system not only vertically between an individual and state or EU institutional actors, but also horizontally among private actors.⁴⁸ The EU law provides some promising instances of binding law in the business and human rights field, which could be developed and strengthened further in the novel legislative proposals on the due diligence requirements for larger corporations. For instance, the EU Non-Financial Reporting Directive obliges larger corporations to report on non-financial indicators.⁴⁹ The EU Regulation on the conflict

⁴³ De Búrca, 2013, p. 5.

⁴⁴ Sionaidh, 2006, p. 630.

⁴⁵ Ibid, p. 664.

⁴⁶ Cherubini, 2015, p. 1377.

⁴⁷ Ibid, p. 1379.

⁴⁸ See in detail: Letnar Čerňič, 2019, pp. 77–88; Frantziou, 2019, 306–323.

⁴⁹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance.

minerals and metals provides in Article 3 on »Compliance of Union importers with supply chain due diligence obligations« that »1. Union importers of minerals or metals shall comply with the supply chain due diligence obligations /.../, including the results of the independent third-party audits.«⁵⁰ Article 5 of the same Regulation on Risk management obligations establishes that »1. Union importers of minerals shall: (a) identify and assess the risks of adverse impacts in their mineral supply chain on the basis of the information provided pursuant to Article 4 against the standards of their supply chain policy, (b) implement a strategy to respond to the identified risks designed so as to prevent or mitigate adverse impacts.«⁵¹ Wording of Articles 3 and 5 of the Regulation indirectly suggests that the EU importers of minerals and metals have an obligation to monitor their supply chains and that failure of such obligations would establish their vicarious liability for the actions and omissions of subsidiaries, suppliers and business partners. If corporations do not meet such duty of care, their conduct would constitute an act or omission failing to comply with the obligation to conduct due diligence in their supply chains, amounting to liability of an EU importer corporations. As a result, the EU Institutions have been at the moment considering proposals for the EU directive corporate due diligence and corporate accountability.⁵² The accountability and obligations of corporations in the field of business and human rights have been therefore clearly on the agenda of different EU stakeholders. To be sure, the EU system of human rights protection already nowadays recognizes both states and non-state actors as duty-holders of human rights obligations.

3. Proposal on how to reform human rights protection in the EU

The impact of the EU human rights protection on the ground in the domestic systems of Member States has been piecemeal. The EU institutional and normative framework has been often inferior to that of the Council of Europe's ECHR and domestic constitutional human rights protections.⁵³ Its normative and practical impact has been so far under-researched in comparison with, for instance, the impact of the Council of Europe and United Nations human rights bodies.⁵⁴ Several recent analytical studies have confirmed that the impact of the EU law in terms of human rights protections has been limited and

⁵⁰ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

⁵¹ Ibid.

⁵² European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

⁵³ Avbelj, Letnar Čerňič, 2020; Bobek (ed.), 2015.

⁵⁴ Gómez Isa, F., et al., 2016, p. 155: they argue that: »There is a need for more systematic impact evaluation and more scholarly work on it, preferably in collaboration with local researchers and institutions.«; See also Kämmerer, Kotzur, Ziller (eds.), 2019, pp. 87–106; O'Gorman, 2011, pp. 1833–1861.

that discrepancies between objectives and practice have remained.⁵⁵ How should the EU and Member States strengthen its system of human rights protection in order not to turn a blind eye to the suffering of individuals and groups on their territory?

It is clear that the EU has to proceed with the reform at the institutional, normative and practical levels. First, the institutional level suffers as it stands from lack of clarity of competences and their division among different institutions and bodies in the European public administration. As a result, the EU and its Member States should establish a new Institution or reform for instance the Fundamental Rights Agency along National Human Rights Institutions, which could take over all or at least some of the competences of the existing bodies in the wider field of the EU public administration⁵⁶ In order to be efficient and successful the newly formed or reformed Fundamental Rights Agency would have been granted with wide competence to supervise the situation of human rights and fundamental freedoms not in individual Member States but across EU public administration.

Second, if the EU system of human rights protections wishes to increase legitimacy and credibility, it is indispensable that it creates the right to individual application in the case of human rights violations by national authorities. The limited scope of the EU Charter of Fundamental Rights and the Court of Justice of the European limits the reach of the EU's system of human rights protection. To be clear, its future rests on creation of direct access to the EU's judicial institutions in the case of human rights violations by national authorities. The EU system of human rights protection should be brought closer to individuals and groups. The EU Charter of Fundamental Rights should be brought from the ivory towers of the European institutions, agencies, bodies and offices to the daily lives of ordinary persons. The EU institutions and its Member States should pay more attention to the educational and promotion activities about the EU system of human rights protection.

Third, in the light of the above, the EU institutions shall continue to develop the autonomous system of human rights protection in the field of its competences as determined in the Treaties. Especially, it is important to emphasize the second generation of EU fundamental rights that supply the CJEU with legal grounds for developing a proper implementation of economic and social rights enshrined in the Charter. The implementation of economic and social rights with the aim of exploiting the full potential of the Charter would offer to an individual a comprehensive protection in vertical as well as in horizontal relationships that emerge within the EU legal framework.

Finally, since the final outcome of the negotiations on the accession of the EU to the ECHR is still uncertain, a more precise determination of the relationship between CJEU and ECtHR would be desirable due to the ambiguous division of competences between them. For the benefit of rights-holders, the EU institutions shall bear in mind the shortcomings of the autonomous system of human

⁵⁵ Avbelj, Letnar Čeranič, 2020; Bobek, 2015; Bobek, Jeremias (eds.), 2020; Rauegger, Wallerman, 2019.

⁵⁶ Principles relating to the Status of National Institutions (The Paris Principles), United Nations General Assembly resolution 48/134, 20 December 1993, Section 1. Nonetheless, the new or reformed institution should follow Section 1 of the Principles on »Composition and guarantees of independence and pluralism« that states that »The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights.« See De Beco, Murray, 2015.

rights protection. All in all, the EU as a whole shall strive to surpass differences with the system of human rights protection under the ECHR and should provide a complementary level of human rights protection in order to best protect rights and freedoms of individuals and groups.

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THE ECONOMIC POWER OF EUROPEAN UNION

Gorazd Justinek

1. Introduction

A country is as powerful as its economy. This is an old notion, which often proves to be very right. There are several »strengths« of a country, usually defined as hard or soft power. While hard power comes from the military or economic power of the state, soft power comes primarily from individuals and civil society, occurs in discrete, subtle forms, and is essential for the in-depth influence of the state in the international community¹.

However, in our paper we will focus on economic strength of a country or in our case, economic strength of an integration, which is even a bit more difficult to define. The aim of this paper is therefore to analyse, weather the European Union (EU) is on the right path to stay a global (economic) power in the future decades to come.

In order to do so we first must define, how will we measure economic power of a country or in the case of EU – an integration and of course we must define what makes some countries more powerful than others?

This is one of the most important questions for the study and practice of international relations.² We need a sound way to measure power, because the balance of power is the motor of world politics, playing a role as central as the role of energy in physics and money in economics, and serving as a key variable in seminal theories of war and peace, alliance politics, international cooperation, state building, trade, nuclear proliferation, and democratization. Policymakers, too, need an accurate way to gauge the power of nations, because vital decisions regarding grand strategy, alliance commitments, economic policy, military procurement, and the use of force hinge on estimates of relative power.³

Power, however, is like love; it is »easier to experience than to define or measure.«⁴ For scholars it is hard to calculate the balance of power precisely, because power is largely unobservable and context dependent. Power is typically defined as the ability of a country to shape world politics in line with its interests⁵, but measuring this ability systematically is impossible, because doing so would require parsing each country's interests in, and influence over, a potentially infinite number of

¹ Nye, 2021, pp. 196–208.

² Baldwin, 2016, p. 1

³ Beckley, 2018, pp. 7–44.

⁴ Nye, 1990, p. 177

⁵ Sevin, 2021, pp.19–32.

international events.⁶ Moreover, measuring power by evaluating outcomes is not very useful for policymaking, because analysts have to wait for an event (e.g., a war, diplomatic summit, or trade dispute) to occur before they can assess the balance of power—and even then, they will only know the distribution of power regarding that particular event.⁷

Therefore, most scholars usually measure power in terms of resources, specifically wealth⁸ through GDP. The logic behind is quite simple and sound: the countries with more wealth tend to get their way more often than the countries with less wealth. There have been many scholars also arguing these approach⁹ and international organisations like the OECD have introduced more »soft« measures like the OECD Better Life Index.¹⁰

Nevertheless, for the purpose of these paper, we will use the GDP measure, PPP measure and the economic growth measure, since we are currently witnessing the changing of the economic guard, with emerging-market economies, particularly in Asia, making huge development strides. The COVID 19 crisis has seemingly accelerated this change, since China was one of the few major economies to record growth in the year 2020 for instance, while the USA and Europe were mired in deep recessions.¹¹

Additionally, the COVID 19 pandemic has redefined some of the long-lasting notions. The pandemic was and still is of course at first a health/medical problem and as we speak, we are struggling with the economic impact of it. It will have serious consequences also in the field of sociology and psychology. It will seriously reshape the technological field and likewise also the sustainability future developments. As the Microsoft CEO, Mr. Nadela said¹², we witnessed two years of digitalisation in two months' time in the spring of 2020.

Thus, in the years to come we will encounter emphasis around the pillars of digitalisation and sustainability, which will define the future development of leading global economies. Therefore, special focus in this paper will be devoted to these two topics, where we will try to present how the EU is doing and if it really does play a global leading role on these two fields today and if the right policies are set in the EU to be a global leader also in the decades to come?

2. State of global play

If we first look at the GDP data, then we can notice that for the third year in a row, China was the world's largest economy (2019). It contributed USD 22,5 trillion, or 17,3%, of the world's USD 130

⁶ Nye, 2021, p. 3.

⁷ Wohlforth, 1993, p. 4.

⁸ Mearsheimer, 2014, p. 12.

⁹ Beckley, 2011, pp. 58–59; or Knorr, 1956, p. 231.

¹⁰ OECD Better Life Index, online source.

¹¹ Reynolds, 2021, online source.

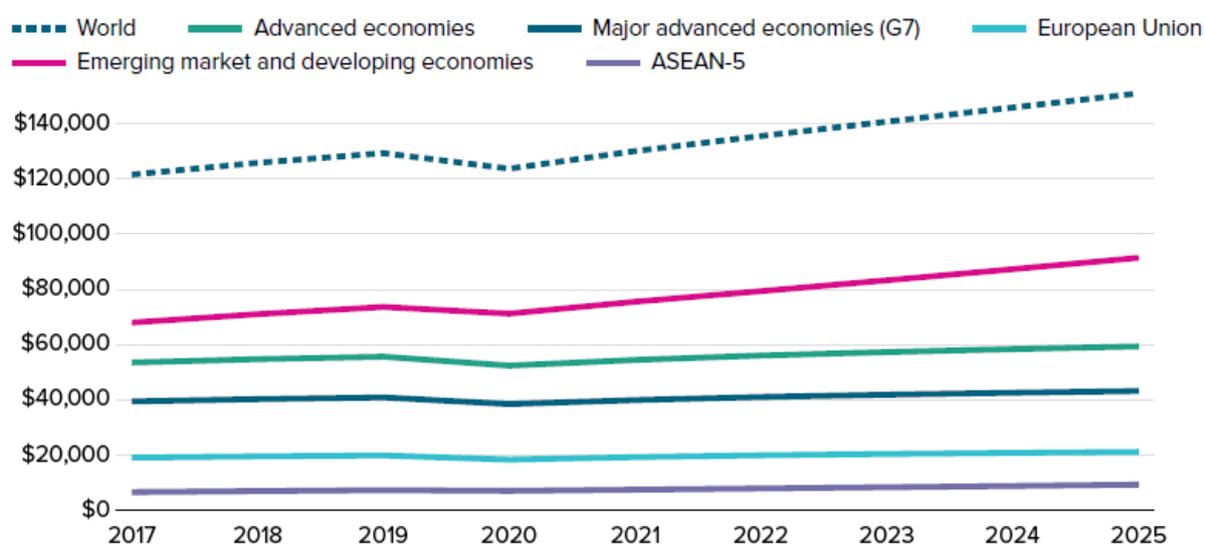
¹² Spataro, 2020, online source.

trillion in GDP, according to estimates by the World Bank¹³. The USA was second, with USD 20,5 trillion, or a 15,8% share. The EU was in third place, contributing USD 19,9 trillion, or 15,3%, of world GDP. The three combined represented 48% of the world economy.¹⁴

Of course, the GDP measure does not tell the whole story and here we must keep in mind also the size of population, living costs etc. Some authors go even further and state that standard gross indicators, like GDP are not good enough; they are logically unsound and empirically unreliable, severely mischaracterizing the balance of power in numerous cases, including in some of the most consequential geopolitical events in modern history¹⁵.

In this regard it is worth mentioning the International Comparison Program (ICP), which is a global initiative to collect comparative price and expenditure data in participating economies and to subsequently produce purchasing power parities (PPPs) and price level indexes (PLIs) for each economy, under the auspices of the World Bank¹⁶. In this regard the PPP based GDP projections for the coming years show stagnation for the EU economy, while on the other hand a significant rise for the emerging and developing economies from the year 2020 onwards. These are also the countries, which will the most significantly add to the global rise of the whole world.

Figure 1: PPP-based GDP projections, by country group 2017 PPPUSD \$ (billions)



Source: World Bank staff calculations based on IMF World Economic Outlook data

In sum, we can conclude that most forecasts from different international think tanks and institutions are devoting a lot of attention to emerging markets and especially Asian economies, foremostly China. On the other hand, European economies, according to this analysis, are going to stagnate in the years to come.

¹³ The World Bank uses so-called international dollars to make better comparisons among countries.

¹⁴ GDP, PPP (constant 2019 international \$), 2021, online source.

¹⁵ Beckley, 2018, p. 9.

¹⁶ World Bank, 2021.

3. Sustainable

We have also mentioned sustainability as one of the key future orientations already in the introduction to this paper. This is nothing new, since already the United Nations Millennium Declaration, signed in September 2000, committed world leaders to combat poverty, hunger, disease, illiteracy, environmental degradation, and discrimination against women. The Millennium development goals (MDGs) are derived from this Declaration. Each MDG has targets set for 2015 and indicators to monitor progress from 1990 levels. Several of these relate directly to health¹⁷.

Sadly, we all must agree that the MDGs were not accomplished in the way or in the amount which would satisfy the international community. Therefore, a new initiative was launched by the UNO and a new set of goals was set internationally. The Sustainable Development Goals (SDGs)¹⁸ are a call for action by all countries – poor, rich and middle-income – to promote prosperity while protecting the planet. They recognize that ending poverty must go hand-in-hand with strategies that build economic growth and address a range of social needs including education, health, social protection, and job opportunities, while tackling climate change and environmental protection. More important than ever, the goals also provide a critical framework for the COVID 19 recovery.

Again, we all can agree that building future strategies on policies related to circular economy and sustainable development have been the buzz words in the last decades. Yet, we all can also agree that some steps in this regard have been done, however much more also should be done. Especially more should be done in the EU economies, where the sustainable policy has been one of the priorities of the European Commissions for the past two decades.

Therefore, the new European Commission presented, at the beginning of its mandate in 2019, a new European Green Deal programme¹⁹, since climate change and environmental degradation are an existential threat to Europe and the world. To overcome these challenges and to be in accordance with the SDGs, Europe launched a new growth strategy that will transform the Union into a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases by 2050 and economic growth is decoupled from resource use. The European Green Deal is also in line with the COVID 19 pandemic recovery plan. One third of the 1,8 trillion euro²⁰ investments from the NextGenerationEU Recovery Plan, and the EU's seven-year budget will finance the European Green Deal.

This is of course a very ambitious plan, meaning that Europe will be a global leader in the field of sustainability. Yet the Economist,²¹ the weekly London based magazine, points out that the deal itself is a set of agreed objectives. Achieving them will require sweeping new rules. The most important of these is a European climate law which enshrines the 2050 net-zero emissions goal, the details of

¹⁷ Taking Stock of the Global Partnership for Development, MDG Gap Task Force Report 2015, 2015, online source.

¹⁸ 17 Goals to Transform Our World; The Sustainable Development Goals, online source.

¹⁹ A European Green Deal, online source.

²⁰ Ibid.

²¹ The Economist explains: What is the European Green Deal?, 2021, online source.

which were agreed by European politicians in April 2021, including an interim requirement for member states to cut their emissions by »at least« 55% from 1990 levels by 2030. It is part of a wave of green regulation working its way through Brussels' bureaucracy. The European Green Deal also demands financial support. Within the budget, much of the promised funding seems to have been conjured up by relabelling money that would have been spent anyway, for example on infrastructure and agriculture. The rest relies on mobilising unprecedented amounts of private investment.

We will also see how the COVID 19 crisis will affect this transformation, yet the concept could also go hand in hand with the recovery and the Deal itself. However, Graham Weale, professor of sustainable economics warns in the Financial Times²² about seriousness in hitting its target of reducing greenhouse gas emissions by 2030. In the first phase of Europe's seminal climate plan, the goal was to reduce emissions 20% by 2020 from 1990 levels, and this has been comfortably achieved. Since 2005, renewable power has been the main workhorse accounting for over 60% of emissions reduction, and will remain as such, coming to play a vital role in clean electrification. However, renewable power is struggling to grow at anything like the rate required to make the EU's ambitious targets a reality. Calculations from the Centre for Environmental Management Energy and Resources at the Ruhr University Bochum, show that even in an optimistic scenario, 65% of the incremental renewable power available will be required to replace nuclear and coal plants earmarked for closure. That means no additional power, just substitution. The next 25% will be required for heat pumps, leaving only enough power left over for only two-thirds of the electric cars expected to be on Europe's roads by 2030.

In this manner it is worth looking also at the business side, namely European companies, if they are indeed front liners in regard of sustainable products and circular economy?

According to Corporate Knights²³, a think tank from Canada, which also produces rankings and financial product ratings based on corporate sustainability performance. Their annual ranking is based on an assessment of 8.080 companies that report more than USD 1 billion in revenues. In the 2021 list, 46 of the most sustainable corporations are based in Europe; 33 in North America; 18 are in Asia; two are in South America; and one is in Africa.

In accordance with the presented data, we can conclude that Europe is leading the global sustainable path, however it is still a very ambitious scenario and very much dependant also on the COVID 19 recovery policies.

4. Digital

Digitalisation is an enormous opportunity and challenge for the current generation. It is revolutionising the world of work, business structures and value chains as well as innovation and market structures. The recent COVID 19 pandemic is a sombre reminder of the relevance and necessity of digital technology for a variety of businesses and sectors: from health to retail, from manufacturing to education.

²² Weale, 2021, online source.

²³ 2021 Global 100, 2021, online source.

The EU is devoting a lot of resources towards a successful digital transformation. In March 2021, the European Commission²⁴ presented a vision, targets and avenues for a successful digital transformation of Europe by 2030. This is also critical to achieve the transition towards a climate neutral, circular and resilient economy, which is in line with the before mentioned European Green Deal. The EU's ambition is to be digitally sovereign in an open and interconnected world, and to pursue digital policies that empower people and businesses to seize a human centred, sustainable and more prosperous digital future. This includes addressing vulnerabilities and dependencies as well as accelerating investment.

Yet a recent report by the European Investment Bank (EIB) Investment Survey²⁵ shows that EU firms lag in adopting digital technologies, particularly in the construction sector and the »Internet of Things« (IoT). It also highlights the importance of adopting digital technologies as they can lead to large boosts in productivity and disproportionate dividends in terms of competitiveness for early adopters. A vast number of leading digital technology companies today are based in the USA. The EU, it seems, has fallen behind in the digital services transformation race but it might be able to take up leading positions in new races. This will depend on Europe's ability to seize the opportunities arising from automation, artificial intelligence and other emerging digital technologies.

In a Manifesto by the European Digital SME²⁶ Alliance it is stated that Europe has been the birthplace of world-changing revolutions, such as the first industrialisation, and it has been a centre of innovation for centuries to follow. While Europe is still at the forefront of innovation and inventions, many European digital players seem to have difficulties scaling up to the same extent as their foreign competitors. The most valuable global companies of today are digital – and are born either in the USA or China. Yet, the USA and China follow very different economic and social models. While the USA focuses on the freedom of the individual and the market, China combines state control with capitalism. In competition with those two models, Europe finds itself »in between«. This applies not only to global politics, but also to European policies related to the competitiveness of the European digital economy. Growing a strong and independent digital industry is thus fundamental to ensuring Europe's economic prosperity in the future. Even more, digital autonomy and sovereignty are key elements to maintain and protect our free and democratic societies.²⁷

In addition, according to the Forbes magazine, among the top 10 world's most valuable brands, there are six from the tech sector (Apple, Google, MS, Amazon, FB, Samsung) and none of them is from Europe. Out of 10 most valuable brands, eight of them are coming from the USA, one from South Korea (Samsung) and the only »European representative« is at 9th place, representing the branch of luxury – Louis Vuitton.²⁸

Digitalisation and technology development are thus shaping and probably will also shape the global business environment in the future. Hopefully, the EU's ambitious digitalisation programme will

²⁴ Europe's Digital Decade: Commission sets the course towards a digitally empowered Europe by 2030, 2021, online source.

²⁵ EIB Investment Survey (EIBIS), online source.

²⁶ Small and medium sized enterprises (SMEs).

²⁷ 10 key priorities for Europe's Digital Future, online source.

²⁸ The World's most valuable brands, online resource.

be implemented by 2030, with more success than some other strategies in the previous decades (Lisbon agenda, Barcelona process etc.).

5. The case of Slovenia

What about Slovenia? In a recent analysis by Justinek²⁹, the author points out that Slovenia's economy has evolved differently during the past. It has experienced different ups and downs. With the independence of Slovenia in 1991, the whole of economic and monetary system experienced a shock since it had to change from centrally planned economy towards market and competitiveness-oriented economy. Yet, fortunately Slovenia was at the beginning of 1990's compared to other transitional economies (Slovakia, Czech Republic, Baltic states) much more developed and economically advanced.

In this regard Slovenia reached all important economic and diplomatic goals in the next fifteen years. It became a full EU member in 2004, as the first of the former Yugoslav republics. In the year 2007 it fulfilled the Maastricht criteria as the first »new« EU member state and joined the Eurozone. In the year 2008 Slovenia took over the Presidency of the EU Council again as the first »new« member state and at that time already peaked 80% of the average development of the EU member states, measured in GDP per capita³⁰. However, with the end of the year 2008 all the dreams of the best »student«, as Slovenia was often referred to, collapsed. Slovenia's economy was completely unprepared for the financial and economic crisis that embraced European economies and, in this sense, recorded one of the largest falls of economic growth among the EU member states in 2009, namely a fall of 7,8%.

Nevertheless, since its independence Slovenia's economy was comparatively speaking losing against other transitional economies, or to say it clear; other economies were catching up much faster. Having in mind all these and looking at the data for the years 2017 and 2018, we can notice, that some other transitional economies that were in the year 1991 lagging far behind Slovenia's development, came very close or have already overtaken it.

If it has been often argued that Slovenia was unprepared for the 2008 financial and economic crisis, then for sure no one was really prepared for the 2020 pandemic crisis.

After the financial and economic crisis, Slovenia returned to the path of convergence with more developed Member States. In the period of economic upturn (2014–2019), Slovenia gradually narrowed its gap in economic development with the EU average and employment reached record highs.³¹ The crisis caused by the COVID 19 epidemic interrupted several years of economic growth and favourable labour market developments. Its impact on the economy and the population was markedly mitigated by government measures. They prevented a decline in household disposable income and alleviated cost pressures in companies, thus helping to preserve economic potential. However, owing to a sharp contraction of economic activity and the government financing of measures to mitigate the consequences of the epidemic, the public finance situation deteriorated notably.

²⁹ Justinek, 2020, pp. 55–74.

³⁰ Justinek, 2017, pp. 119–130.

³¹ Development report 2021, 2021.

In this sense, the National recovery and Resilience Plan, which was endorsed by the Commission in the beginning of July 2021, will be of utmost importance, since it will allow Slovenia to draw EUR 1,8 billion in grants and EUR 705 million in loans under the Recovery and Resilience Facility, pending confirmation by member states. Slovenia will use the funds, equivalent to 5,4% of the country's GDP, to support 33 reforms and 50 investments. The plan earmarks 42,4% for green transition goals and 2,4% for digital goals, with 30% set aside for the promotion of smart and inclusive growth, 15% for health, and 13% for digital transformation. The main investment areas include energy efficiency and seismic renovation of buildings (EUR 230 million), investments in railway infrastructure (EUR 292 million), and EUR 305 million to support private investments and reforms to improve the business environment. In the digital segment, EUR 114 million has been set aside for digital literacy and lifelong learning, EUR 83 million for digitalisation of healthcare, and EUR 44 million for the digital transition of business. Some EUR 79 million in spending is planned to set up a long-term care system, EUR 110 million for increasing the resilience of the health system, EUR 60 million for affordable housing, and EUR 28 million for a faster entry of the young into the labour market³².

When speaking about recovery after the pandemic, we must point out the new (July 2021) economic growth forecast from the European Commission for Slovenia, which was revised from the spring forecast (4,9%) to 5,7%. This is the 4th highest growth among the Eurozone countries, proving that Slovenia is obviously implementing the right economic measures and policies in regard of recovery.³³

6. Conclusion

As we presented in the paper there are many economic forecasts and analysis among scholars, think tanks, even international institutions that highlight the rise of emerging economies in the last decade, while for the years to come, the European economies will be rather stagnating. If European economies want to stay in pace with the most propulsive global economies, many changes will need to be implemented. This puts additional momentum on the policymakers in the EU since their focus was and, in many ways, still is on sustainability and digitalisation.

We agree, that digital and sustainable will probably be the next two focus pillars for the most influential global economies in the decades to come. The EU has launched new strategies tackling both two topics some time back and has implemented new revised strategies in this regard just recently with the new Commission taking the office in Brussels. The strategies are ambitious and supported with concrete resources, also financial, which is often very important.

Yet, if in the field of sustainability (policy and business sector), we could agree that Europe is doing well, for the part of digitalisation, as we have seen, Europe is for the time being, lagging far behind.

Well, how to make a move forward in this field?

We believe that primary the whole business environment (tax, incentives, labour market etc.) needs to be more attractive and user friendly throughout European countries. All this of course cannot be done in the mandate of one Commission and will take more time to implement.

³² Maček, 2021, online source.

³³ Evropska komisija: Rast slovenskega BDP-ja bo letos 5,7-odstotna, 2021, online source.

Maybe the whole perception of entrepreneurial thinking on all levels and in all spheres needs to be reinterpreted in Europe. Entrepreneurial thinking needs to become the basis of syllabus not only at business faculties, but rather already in primary schools and especially at universities from the field of natural sciences.

Thus, more needs to be done also in the field of academia and Universities, since many hi-tech companies are closely cooperating with top Universities, which again are predominantly USA based³⁴. It is in this regard worthwhile to notice that some of Chinese Universities are persistently becoming higher ranked (e.g., Tsinghua University is already listed at rank 29 globally, while five additional Chinese Universities are already ranked among top 100 Universities in the world³⁵).

And of course, last but not least, the market of the USA in fact does work as a single market with a population of around 330 million, while on the other side of the Atlantic, the EU still does not operate as a true single market, with the population of 450 million. Having this in mind, we must not forget that China on the other side of the Pacific, operates as one (centrally governed) market with 1,4 billion population.

In an editorial by Justinek³⁶ in the International Journal of Diplomacy and Economy the author pointed out a huge shift which we have seen in the last years. And not only in the field of economic diplomacy, but rather on the whole global sphere. The COVID 19 pandemic has reshaped the world economy and boosted some of the processes which would have otherwise taken years to implement, like digitalisation, and on the other side stopped some of the processes, probably forever (like classical door to door selling).

Additionally, we have witnessed the return of Keynesianism practically everywhere around the world, even in countries where liberal economic concepts have been in place for decades. What kind of consequences will that have for public policies and public finances in the future, we shall see in the years to come?

Yet, in the years 2020 and 2021, there was a new type of »cold« war going on – for medical equipment and lately for vaccines. The countries that will have their population vaccinated faster, the sooner they will be able to return to normal, even though the normal is what actually brought us here in the first place. On the other hand, a country might be more successful in their vaccination process, yet if the neighbouring countries – or your largest trading partners will not be so successful, that still will not do much good for international business and economic recovery.

A huge shift in this regard has happened in the last two decades and Europe must speed up its reform processes, since we do not want European flagship companies to become only observers at the global level. We have witnessed what happened with the Finish Nokia and Sweden's Ericsson in the past and at present we are witnessing something similar also in the automotive industry, where the USA based Tesla Motors is taking the lead, way ahead of the European (German) traditional industrial sector.

Hopefully in the year 2030, we will not look back and say, that Europe had good strategies, but were implemented only partially or poorly. Europe needs to implement the strategies, which are well

³⁴ The World's Top 100 Universities, 2021, online source.

³⁵ 2020 Academic Ranking of World Universities, 2020, online source.

³⁶ Justinek, 2021, pp. 1–3.

prepared and address the right questions and maybe the time of recovery after the COVID 19 crisis is the right time to do this homework.

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SOCIAL DIMENSION

Verena Rošic Feguš

Each EU Member State, Union institution, body or agency is bound by »the rules of the EU game« established by the Treaties, general principles of EU law and the Charter of Fundamental Rights of the EU.¹ As one of the founding values of the EU and as a reflection of common identity and common constitutional traditions EU relies upon the rule of law (Article 2 TEU). As the European Commission illustratively put it in the Communication »Further strengthening the Rule of Law within the Union«², the rule of law is the basis of the democratic system of all Member States, necessary to ensure the protection of fundamental rights and it is »/.../ central to making the EU work well as an area of freedom, security and justice and an internal market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules.«³ Although the responsibility for the respect of rule of law primary lies within the Member States, EU institutions, bodies and agencies are equally bound by this fundamental principle. Consequently, the requirement relates *inter alia* to the adoption of EU legal acts of all kind, including EU soft law and new decentralised forms of governance, the trend of which does not seem to decrease. Arising from prerequisites of complex nature of EU, need for rapid and interative regulatory interventions, various level of decision-making, objective to fully satisfy the requirements of legality of EU actions and increased importance of EU soft law this paper aims to answer the question if, how and under what prerequisites can EU soft law contribute to the rule of law in the EU.

1. The absence of rule of law requirements by adoption of EU soft law

The EU soft law started its path towards EU governance three decades ago. Despite efforts of legal academia to understand its normativity and functions, different issues considering legal effects, »bindingness«, admissibility of judicial review, competence for its adoption and compliance of EU soft law with general principles of EU law, uncertainties (partly) remain.⁴ Legal academics mostly agree that

¹ Lenaerts, 2019, p. 71.

² Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps.

³ Lenaerts, 2019, Introduction.

⁴ See for example SoLaR Network (European Network on Soft Law Research).

EU soft law creates not only practical but also significant legal effects, thus having normative nature⁵ recognised also by the CJEU. Although much praised in legal theory to be effective and capable of regulating when hard law is not capable to do so,⁶ soft law is not without flaws, one of them relating to the circumstances of its adoption.

Namely, contrary to its normativity and increasing acknowledgement of importance in the EU legal system, how these acts are adopted excludes all appropriate democratic mechanisms capable of preventing potentially arbitrary measures of (usually) the European Commission. Generally, these rules are adopted on the initiative of the European Commission when and to the extent the European Commission considers appropriate. A duty or requirement to include representatives of the people, to engage in public discussion or to adopt measures transparently are not provided, causing these acts to be contrary to the demands of the representative democracy.⁷ Additionally, although soft law is creating undeniable legal effects, an action for annulment of these acts is limited to situations when soft law is found to create binding legal effects or intended to create binding legal effects.⁸ Such situation opens a window to the dilemma of appropriate respect of the principle of effective protection of rights as a component part of the rule of law.⁹

When one looks at the rules relating to the adoption of EU soft law, one quickly determines that primary and/or secondary EU law do not prescribe a formalised procedure for the adoption of acts of this kind. As the competence of the European Commission and the Council for the adoption of soft acts is practically unlimited,¹⁰ their adoption is possible without obligatory consultation or participation of other EU institutions, due to which the actor of the proposed acts (as mentioned, this will usually be the European Commission) avoids also long-lasting negotiations necessary for the achievement of adequate consent needed for the adoption of a legal act (usually majority). The practice of adoption of various soft law acts shows that the European Commission and the Council adopt recommendations, action programmes, declarations, guidelines, resolutions, codes of conduct/practice and explanatory communications and notices without the involvement of other EU institutions. The European Commission as the major initiator of soft law acts generally does not follow any special procedure when adopting recommendations and opinions, although these two types of EU soft law are expressly mentioned in Article 288 TFEU. The only case where the European Commission is bound to act in accordance with procedure determined in advance is when primary or secondary EU

⁵ Normative nature of soft law varies from minimal (when EU soft law is applied by the CJEU as source of confirmation of interpretation already given on the basis of hard law) to maximal (when binding legal effects of soft law are determined). See Rošic Feguš, 2016.

⁶ Soft legalisation shall enable Member States to adapt legal rules and their implementation to different national circumstances (flexibility), lead to more transparency, diversity and effectiveness of the EU legal system, all enabling better governance instead of government. Abbott, Snidal, 2000, p. 445.

⁷ In it legal rules are legitimate if they show that they were adopted by the majority of representatives of the people in the representative body and in the legislative procedure. Sabel, Zeitlin, 2008, p. 276.

⁸ So called ERTA test. See in more details: Korkea-aho, 2018, 470–495; Eliantonio, Stefan, 2018, str. 457–469.

⁹ Tridimas, 2006, p. 4.

¹⁰ Legal academics agree that the competence for the adoption of EU soft law is very broad. General legal basis for adoption of EU soft acts of all kind by the European Commission is given in Article 17, paragraph 1 of TEU, special legal basis is not required. Only if a specific legal basis is indeed given, the general competence of the European Commission (due to principle of legal protection, institutional balance and democracy) is derogated; the EU soft law should be then adopted on specific legal basis. See Smit, Herzog, 2002, p. 634; Von der Groeben et al., 1991, p. 274; Senden, 2004, p. 199–201. The same holds true for the Council – general legal basis for adoption of EU soft law is provided in Article 16 TEU. Krausser, 1991, p. 88.

law determine the procedure that must be followed by the European Commission (delegation).¹¹ Although this is not directly or indirectly provided in binding legislation, the European Commission is more consistent by adoption of communications and notices including rules of conduct adopted due to evolution in legislation, case law or changes in politics. As a rule of its own choice, the European Commission in this case firstly publishes the draft, invites stakeholders to give contributions and then publishes the latter in the form of communications, although these contributions are later not necessarily taken into regard.¹²

When recommendations are concerned, the Council – contrary to the European Commission – is more consistent: as it derives from the preambles of recommendations, the Council often acts on the basis of a draft or proposal of the European Commission,¹³ the opinion usually being given by the European Parliament and/or the European Economic and Social Committee, in some cases also the Committee of the Regions, all opinions then being followed by the consultation procedure.¹⁴ In certain cases, although not consistently, also other stakeholders are consulted.¹⁵

Thus, with an exception of the situations described above, the practice of EU institutions confirms the initial argument that EU institutions adopt soft law when and to the extent they find appropriate without any prescribed procedure. Consultation, public discussion and voting on the substance of these rules are excluded. Except when a procedure is explicitly prescribed by binding EU law, the EU institution is not bound to always follow any procedure: the decision to follow a certain procedure is a decision of own initiative of the EU institution. There are no sanctions, negative consequences nor guarantee that the procedure will always be considered. Additionally, there is also no duty to take contributions or stakeholders observations into regard. All of the above consequently causes the lack

¹¹ As this is the case for instance in the Article 117 TFEU.

¹² See for example Commission Notice on the non-imposition or reduction of fines in cartel cases; or Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Text with EEA relevance).

¹³ See for example Council Recommendation of 10 July 2021 on the National Reform Programme 2012 of Austria and delivering a Council opinion on the Stability Programme of Austria, 2011–2016, 2012/C 219/01, pp. 1–4.

¹⁴ It derives from the Council Recommendation on the economic policy of the euro area 2020, the Council has adopted the following procedure: it has taken into regard the recommendation of the European Commission, conclusions of the European Council and performed a consultation procedure with Economic and Financial Committee and Economic Policy Committee. This derives from the beginning of the Recommendation stating:

»The Council of the European Union,

having regard to the Treaty on the Functioning of the European Union, and in particular Article 136 in conjunction with Article 121(2) thereof,

having regard to Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, and in particular Article 5(2) thereof,

having regard to Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, and in particular Article 6(1) thereof, having regard to the recommendation of the European Commission,

having regard to the conclusions of the European Council,

having regard to the opinion of the Economic and Financial Committee,

having regard to the opinion of the Economic Policy Committee...«

¹⁵ As it derives for example from the Council Recommendation 87/371/EEC of 25 June 1987 on the coordinated introduction of public pan-European cellular digital land-based mobile communications in the Community, the Council has taken into regard a favourable opinion of the SOG-T (Senior Official Group on Telecommunications) and favourable opinions of the telecommunications administrations, by the European Conference of Postal and Telecommunications Administrations (CEPT) and by telecommunications equipment manufacturers in the Member States.

of guarantees provided by democratic mechanisms and is contrary to the principle of legality as another component part of rule of law.¹⁶

2. How to harmonise EU soft law and the rule of law? Propositions for procedural improvements

Such state of affairs does not however entail that EU soft law is »bad« or that its adoption and application should be suspended. As the flaws or irregularities of EU soft law with the principle of rule of law refer to the procedural requirements,¹⁷ these could be eliminated with the introduction of appropriate adoption procedure of EU soft law of all kind. Such procedural rules should be appropriately determined in primary EU law (TFEU), the procedure being – with respect of flexibility and ratio of soft law – much shorter and less formalised as ordinary legislative procedure. As the European Parliament represents EU citizens and their interests and because its influence or participation regarding the scope and form of legal acts is correlated with the level of democratic legitimacy, this institution shall be included as an equal partner (is participation either in a consultation procedure or as co-decision making).¹⁸

Determination of an obligatory standard procedure is needed when EU soft law determines new rules of conduct at the EU level, rules of conduct supplementing abstract legal provisions and determination of the way in which the European Commission will exercise its discretion. As these acts establish rules of conducts, in certain circumstances creating legal effects practically equal to legal effects of binding legislation, the absence of participation or cooperation of the European Parliament endangers democratic legitimacy and acceptability of EU conducts by EU citizens. When soft law »merely« repeats rules embodied in hard EU law, the threat to democratic legitimacy or rule of law is not given. As a result, in these situations above mentioned steps of participation – although still welcomed – are not strictly necessary.

Besides the participation of the European Parliament other requirements of the procedure increasing transparency and legitimacy of EU soft law could be: 1) the duty of the widest possible

¹⁶ European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law adopted by the Venice Commission at its 86th plenary session, p. 10.

¹⁷ Rose, R., Page, E.C. (2001), p. 21.

¹⁸ That the European parliament is not included when adoption of soft law is concerned, in a sense that there is no consultation or that his objections or amendments are not considered enough, derives from various critics of the European Parliament, one of them being the European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)).

consultation with all stakeholders;¹⁹ 2) the duty to explain why certain proposed amendments given by certain EU institution were not taken into account and 3) mandatory publication of all documents adopted in the procedure, namely the draft/proposal, document containing results of the consultation and document explaining chosen regulatory options, the latter two in a form of a green book, notice or communication. In the light of transparency, it should be worth considering also an obligatory publication of adopted EU soft law in the Official Journal of the EU (C series).²⁰ As a result, judicial review of the CJEU would be guaranteed (action due to infringement of an essential procedural requirement, Article 263 TFEU) enabling effective protection of rights and respect of institutional balance eliminating the criticism of the European parliament that soft law *»all too often constitutes an ambiguous and ineffective instrument, which is liable to have a detrimental effect on [EU] legislation and institutional balance.«*²¹

At the same time, because EU soft law especially in fields of exclusive competence of the EU and wide discretion of the European Commission (such as field of state aid), creates significant legal effects (individual binding decisions of the European Commission are grounded in EU soft law, thus in practice creating same effects as binding legislation), Member States should also be able to prevent the adoption of completely authoritative and *»totalitarian«* measures of the European Commission. The blockage (refusal of certain soft law by for example by qualified majority or consent of the European Parliament and the Council), taking into regard the nature and flexibility of EU soft law, should be limited to situations where the European Commission aims to adopt measures contrary to the interests of the independent and sovereign Member States. As a result, the introduction of minimal procedural requirements and their respect being granted by the intervention of the CJEU would lead to the increased transparency of these rules and minimisation of the lack of its democratic legitimacy. Standard adoption procedure would also guarantee procedural legitimacy of EU soft law. Namely, in the legitimacy of governance and exercise of authority at the EU level, procedural legitimacy has a special important role, reinforcing and improving all other types of legitimacy. A thoughtfully structured rulemaking process will clarify underlying issues, bring facts to bear, promote careful analysis of policy options and engage interested parties in political dialogue.²² In other words, a well-considered adoption procedure forces the adopting institution to justify its regulatory framework and its political choices, leading to rational and legal decisions subject to review and improved legitimacy

¹⁹ Although the European Commission has stressed on several occasions that its aim is the widest possible consultation with all interested parties (see for example Communication from the Commission, *»Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission«*), the duty to actually perform such consultation does not exist.

²⁰ Which is contrary to the current standing point of the CJEU. See case CJEU *Polska Telefonia Cyfrowa*, C-410/09, 12. 5. 2011.

²¹ European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of 'soft law' instruments (2007/2028(INI)), point 1.A.A.

²² *Etsy*, 2006, p. 1520.

of politics. A transparent decision making that provides opportunities for debate and political dialogue, with the participation of a broad range of stakeholders, is also a key to deliberative legitimacy, substitution for the missing democratic legitimacy and accountability that elections provide.²³ Additionally, as *Habermas* illustratively observed, a robust political dialogue that engages multiple perspectives on the issues at hand creates a sense of ownership of the result, whereas structured dialogue, involving competing claims that are thoughtfully debated, tends to lead to more carefully constructed outcomes based on the authority of logic and reason.²⁴ Mandatory consultation would hence move the deliberative legitimacy from »incidental« (when the European Commission decides for consultation and takes contributions into account) to regular (existing by all acts of this kind). Institutionalization of cross-checks on the exercise of authority and judicial review would cause these acts to satisfy also the criteria of systemic legitimacy, where a system as a whole produces pragmatic governance that advances accountability, draws in expertise, equitably distributes the benefits of collective action and systematically catches errors or anomalies in policymaking.²⁵ This view is especially important also due to the fact, that although legal academia and practice mostly agree that the generation of soft law measures today is reaching levels that were previously unthinkable,²⁶ the action for annulment when EU soft law is at stake, is practically excluded. Namely, following the existent case law of the CJEU an action of annulment is admissible only when soft law's binding effects are concerned,²⁷ thus excluding the possibility of an independent action when these acts are creating significant legal effects, that are not binding. Although General Advocate *Bobek* in this regard already argued that the test for admissibility of action (so-called ERTA test) should be, following the original case law in which it was established, broadened to enable challenge of all measures capable of producing legal effects (post-ERTA case law narrowed the test to binding legal effects), this approach removing also the uncertainty regarding the requirement of an act being »intended to produce legal effect« as the controversial requirement of ERTA doctrine,²⁸ the CJEU has not (yet) warmed to this

²³ Ibid.

²⁴ Habermas, 1981, p. 287.

²⁵ See Eskridge, Ferejohn, 1992, pp. 523–564.

²⁶ Korkea-aho, 2018, p. 451.

²⁷ About the inadmissibility of action for annulment see for example CJEU *Kingdom of the Netherlands v Commission of the European Communities*, C-147/96, 22. 6. 2000, Para. 27; CJEU *Kingdom of Spain v Commission of the European Communities*, C-443/97, 6. 4. 2000, Para. 34 or CJEU *International Business Machines Corporation v Commission of the European Communities*, C-60/81, 11. 11. 1981, Para. 19.

²⁸ In accordance with case law, in order to determine whether an act is capable of having legal effects and, therefore, whether an action for annulment under Article 263 TFEU can be brought against it, it is necessary to examine its wording and context, its substance and the intention of its author (whether author had the intent the act to create legal effects). CJEU *Commission of the European Communities v Council of the European Communities*, C-22/70, 31. 3. 1971, Para. 40.

idea, causing the judicial review of the EU soft law to be insufficient and hence contrary to the effective protection of right and the rule of law.

3. From another point of view: reconsideration of concept of legality

In the light of flexibility, growing awareness that the EU regulatory framework today is drastically different than ever before and knowing that the closest integration between the Member States is possible only if hard and soft law stand and work together (the existence of so-called hybrid legal fields), it might be also worth to revise the understanding of the rule of law. Strict understanding of legality, where legality is understood as law constructing the system of legal rules, their changes being possible only through the formalised procedure, might be incompatible with today's complex nature of the EU. Namely, new modes of governance in the EU have challenged the role of law in the integration process, whereas the need for fast and adequate regulative changes of legal rules demand the development of a new concept of legality and consequently the widest possible understanding of the rule of law.²⁹ In this regard the existence and functioning of the EU soft law may do not lead to the de-integration, but to the reconsideration and consequently strengthening of the rule of law at the EU level.

4. Concluding remarks

Despite increasing role and recognition of importance of EU soft law, the questions related to the uncertainties of EU soft law and its (non)compliance with the requirement of rule of law and/or democratic legitimacy, have not been included in the debate on strengthening the rule of law in the EU. Unfortunately, at the moment of preparation of this paper, such activities are not even planned.

The adoption of minimal procedural requirements when adoption of EU soft law is concerned – especially the demand for consultation of stakeholders, participation of the representatives of EU citizens (the European Parliament) and mandatory publication of all documents in the decision-making process – and the capability to block and annul acts opposing to the sovereign nature of EU Member States (admissibility of action for annulment of EU soft law), all increasing transparency and legitimacy of EU actions in this regard, would cause EU soft law to move closer to the requirements of the rule of law as a fundamental pillar of the EU. Consequently – considering the initial question of this paper – the answer to the question if and when EU soft law could contribute to the rule of law at the EU level, would be positive. With proposed changes vast amount of EU acts existing in different policy fields capable of resolving complex issues when hard law is not capable to do so, would be granted adequate legal and legitimate status, strengthening the importance and satisfaction of the rule of law at the EU level. The issues of granting appropriate democratic levers when EU soft law is concerned should therefore constitute an important part of the debate on the future of Europe to enable the EU work as the Union of democracy, freedom, security and justice.

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²⁹ Dawson, 2009, p. 2, 14; and Dawson, 2009, p. 4.

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THE FUTURE OF THE COMMON SECURITY AND DEFENCE POLICY – A VIEW FROM SLOVENIA

Liliana Brožič

In the second half of 2021, the Republic of Slovenia will take over the Presidency of the Council of the European Union. Together with Portugal and Germany, it has prepared the Strategic Agenda on the work program of the EU Council, which will be implemented in the period from 1 July 2020 to 31 December 2021.¹ The content that interests us the most during the Slovenian Presidency of the Council of the EU is the EU's Common Security and Defense Policy. The strategic program includes some ambitions of the Republic of Slovenia and, of course, the European Union in this field, which both will strive to achieve or, as more precisely written in this chapter, strengthen.

The purpose of this paper is to explore and verify whether the goals set out in this strategic program can be achieved or strengthened and in what time frame. To this end, we analyze some of the contributions and publications of various experts in the field of the EU's common security and defense policy in order to identify what the development trends have been so far and what they should be in the future. It is crucial to determine the extent to which the Republic of Slovenia can contribute to the realization of common goals during its presidency.

In order to achieve the set goal, we selected some of the most important topics from the strategic program² (8086/20, 5 June 2020) and determined the extent to which they can be realized.

- The **first one** is *»Strong commitment to enhance all aspects of the CSDP with the overall goal of making the EU a responsible, capable and reliable actor and global partner for peace and security«³.*

In 2020 EU Common Security and Defence policy marked 20 Anniversary of its existence. Debates and publications were dedicated to this important milestone. There are quite a few ideas on the future of the EU, but in the field of CSDP one prevails. The security environment dictates that there should be more »Union« in the CSDP. As Fiott states it is not only that Union is facing by security challenges near its borders, »but structural-geopolitical-shifts are forcing the Union to question and reassess long-standing partnerships«.⁴

The Russian annexation of Crimea in 2014, the European migrant crisis in 2015, the Great Britain referendum on leaving the EU in 2016 and the Covid 19 pandemic changed the security environment of EU tremendously.

¹ 18-month Programme of the Council (1 July 2020 – 31 December 2021), 8086/20, 5. 6. 2021.

² Ibid.

³ Ibid, p. 29.

⁴ Fiott, 2020, p. 3.

Russia's annexation of Crimea was an updated form of hybrid warfare⁵ that cost Ukraine territories, and there are other examples of hybrid warfare in the eastern EU countries.

The European migrant crisis has surprised the EU in several ways and caused many dilemmas. Ceccorulli and Lucarelli demanded an answer to the dilemma of whether the EU wants to secure its borders or to protect the migrants, a question which had already been highlighted in 2015 by its political leaders with a request for more cooperation between the EU members (2018). This dilemma has shaken some of the foundations of the EU's values, such as the freedom of movement and human rights with which it has identified and developed since its beginnings and have been the building blocks of its functioning and integration between Member States.

Braxit means for Fiott »that one half of the duo that signed the St Malo Declaration in 1998 is leaving the Union behind - and taking its capabilities with it«⁶ what makes EU weaker.

The covid 19 pandemic has reopened the EU's eternal dilemma of what connects and divides. At the declarative level, when we are all doing well, we are very connected and united, and in times of hardship and scarcity, we rush to take care of ourselves first.

Given the security threats to which the EU is exposed, and to some the whole world, there is no dilemma as to whether the EU should be more integrated and effective in the field of CSDP. This is the only future. Many authors emphasize that the lines between internal and external security are increasingly blurred.⁷ What does this blurred line between internal and external security actually mean for the organization and functioning of the EU? The EU is organized in all areas to operate at two levels, with everything takes place at national level and is coordinated and agreed at EU level. In doing so, a bottom-up and top-down approach is logically used. So far, the mode of operation in the field of security and defense has been stated. By changing or erasing the borders between internal and external security, a problem arises in the basic organization of the operation of the Member States and the EU as a whole. Thus, the logical conclusion to be drawn from this finding is that the Member States, their national security systems and the EU should be more interconnected in structural, organizational and political terms in order to be more effective.

If we may have been able, at least in theoretical terms, to answer the key question of blurring the line between external and internal security and what this means for the EU in organizational terms, it remains what is crucial, and that is how to ensure security and defense from a practical point of view or to be more precisely, how to find the resources, capabilities and mechanisms that will make Member States and the EU so resilient that it can withstand future security and other threats.

1. What Slovenia can do?

Avbelj⁸ proposes more constitutionalism in this context. In fact, he advocates the revitalization of EU constitutionalism. He argues that economic, humanitarian and security crises are once again calling for

⁵ Štrucl, 2021, p. 71.

⁶ Fiott, 2020, p. 11.

⁷ Lutterbeck, 2006, p. 70; Parkes, 2020, p. 102; Resteigne, Manigart, 2019, p. 19; Serano, 2020, p. 27; Zandee, 2020, p. 51.

⁸ Avbelj is a Slovenian researcher from New University, Ljubljana.

more transnational solidarity. »Genuinely common, indeed single, asylum policy presupposes an overreaching transnational support for it. The same is true for building the EU's own security and military forces and a meaningful long-term response to the most recent public health crisis«. ⁹ Further insists that all crises require solutions and political response. An adequate solution to the crisis of EU integration assumes the existence of the EU as a political union. »/.../ It can only be brought about qualitative leap of political legitimation from the exclusively national constitutional democratic environment into a supranational democratic political process. If the problems are common, they also ought to be approach as such, holistically, comprehensively, through a common search for a common good«. ¹⁰

Slovenia in time of its presidency to the Council of EU should promote more constitutionalism of the EU in these regard and to find new ways, forms and organizational approaches that will be universally accepted, acceptable to all members, and that will make the EU more efficient and thus strengthened.

- The **second one** is »*Strengthening the EU's ability to act in order to be able to respond adequately and decisively to crises that directly affect our interests and security – where possible with our partners and where necessary independently*«. ¹¹.

After a long period of general progress in all areas of society, most Eastern European countries have successfully integrated into the EU and NATO, which has also provided them with greater collective security. There was almost no perception of threat, so countries at the national level no longer developed and invested in their own national security as they once did. The EU did not develop the field of security and defense until 1999, when after war in Croatia and Bosnia and Herzegovina, Milosevic's rule in Serbia and its territorial and political appetites in Kosovo, proved to be completely powerless in the event of the need for rapid civilian and military intervention.

As an insider Serrano recognises two main development stages »the birth and initial steps of CSDP, as it was called prior to the Lisbon Treaty from 1999 to 2003; and its adolescence and adulthood, as CSDP from 2016 to date«. ¹². Global strategy in 2016 sought to address the new strategic environment and it led to review EU structures and helped to rethink the operational dimensions of crises management. ¹³

»New initiatives that were born out of a Global strategy, such as PESCO, CARD and the MPCC, were not only about defence but also (if not mainly) about the overall political cohesion of the Union« wrote Major and Mölling. ¹⁴ They doubt that these initiatives »will radically alter member states'

⁹ Avbelj, 2021, p. 14.

¹⁰ Ibid.

¹¹ 18-month Programme of the Council (1 July 2020 – 31 December 2021), 8086/20, 5. 6. 2021, p. 29.

¹² Serano, 2020, p. 169.

¹³ Ibid, p. 27.

¹⁴ Major, Mölling, 2020, p. 44.

reluctance to pool sovereignty in the area of defence«¹⁵. In accordance to their question if the EU has met the stated military level of ambition it set back in 1999, they have found out that the reality is 30 – 80% of reduction of relevant capabilities lost since the inception of the CSDP policy.¹⁶ After the Brexit, EU possesses only 30% of capabilities required to fulfil its level of ambition.¹⁷

Major and Mölling claim that the SCDP was created to »act autonomously in military crisis management«¹⁸ where autonomously was understood as »in terms of independence from the United States, in order to ensure that it is faces with the military threat the European could act even if the US chose not to become engaged«¹⁹ but in 2020 the EU's military legacy is over-institutionalized, under-equipped and strategically divided.²⁰

»As European governments only have a single set of forces, and these forces are dedicated to the EU, NATO, UN and the coalitions of the willing, there is perhaps a need to rethink the Headline Goals that have been inherited«²¹. After all it is not all about the mass of people for the EU forces or is it? The number 60.000 from 1999 demands military personnel, capabilities and technology. »Continental security in Europe has always required military mass, increasingly, crisis management operations do too«²².

So how to strengthen the EU's ability to act? The obvious answer is with strengthening the armed forces with personnel, capabilities and new technologies but also with the more personnel in civilian and defence structures. For civilian missions one of the key problems within the CSDP relates to recruitment and deployment of qualified personnel from member states. According to Juncos competences of civilian personnel, such as judges, police, prosecutors, can be spread across many ministries of the Member States, civilian personnel are not constantly ready for deployment as military counterparts, which poses additional obstacles.²³ The Member States ought to do more on their national level with the emphasis on modernisation of recruitment, training, equipment and institutional coordination. But for the future is essential if Member States will »make ready the forces and capabilities needed to fulfil the gap between rhetoric and reality?«²⁴

2. What Slovenia can do?

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Douglas Barrie and Major and Mölling, 2020, p. 44.

¹⁸ Major, Mölling, 2020, p. 38.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Fiott, 2020, p. 122.

²² Ibid.

²³ Ibid, p. 83.

²⁴ Ibid, 2020, p. 123.

With the European migrant crisis in 2015, by dealing with illegal migration until today, and with the Covid 19 pandemic, Slovenia gained a lot of new experience in ensuring its security and defense. It was a bitter realization that in times of crisis, regardless of involvement in various international organizations and mechanisms, you are first and foremost dependent on yourself and your abilities. Most of the ministries, various institutions, all with an emphasis on mutual cooperation and, of course, crisis organization and response, were put to the test. The key findings are most related to the realization that we are not self-sufficient. Solidarity in the European spirit can only be developed in the EU and when there is enough capacity to share. Without these, solidarity is not possible. If we want to strengthen the EU so that it can act independently and in the interest and for the good of all, then every member of it, that is, every Member State, must be strengthened, and more. Each Member State must have capacities that it can develop and share for and with others. The experience from Covid 19 is that there are also situations where all EU citizens need the same thing that no one even has for themselves. Slovenia should promote the importance of ensuring greater national security of its own, emphasizing the importance of each link in the chain of ensuring common EU security.

- The **third one** is »EU ability to act depends on a clear and common understanding of what we want to be able to do as Europeans in the area of Security and Defence as laid out in the EU Global Strategy. A political strategic guidance is necessary if EU wants to live up to the expectations of the Strategic Agenda 2019–2024«²⁵.

In the past 20 years the member states have politically agreed to deploy a CSDP mission or operation but this fact was not always supported with credible pool of experts of force package. European governments have collectively invested in no-EU frameworks such as NATO or more bilateral and mini-lateral endeavours.²⁶ As Zandee mentioned that »the defence bureaucracies did not follow up on what their political masters had decided in the past«²⁷.

In 2016 the EU Global Strategy and the Council Conclusions on security and defence only reaffirmed the EU commitment from the 1999. They had decided to strengthening the EU capacity to respond to external conflicts and crises, build partners capabilities, protect the EU and its citizens.²⁸

Economides claims that EU wish to redefine itself as an autonomous and strategic actor in the international system.²⁹ The main reason for this is a long term posture that EU reacted to changes and in present wants to shape the events. But as Economides says the EU security agenda could be characterised as the formulation of strategy as response, reinforcing the view of the EU as a reactive power without a clear or consistent strategic purpose. Deciding whether to launch CSDP mission was the result of disharmony between member states interests, dissonance in the transatlantic alliance, the inability always to put normative objectives into practise, the lack of will and capability to be a

²⁵ 18-month Programme of the Council (1 July 2020 – 31 December 2021), 8086/20, 5. 6. 2021, p. 29.

²⁶ Fiott, 2020, p. 4

²⁷ Zandee, 2020, p. 57.

²⁸ Parkes, 2020, p. 118.

²⁹ Economides, 2018, p. 222.

global actor in security terms.³⁰ EU in the future needs a strategy as a choice and not a strategy as a response.

Serrano says that there are still differences among EU member states as regards the level of ambition for common defence policy, so at present the reflection is being lunched within the Council to gain a better understanding of defence needs at the EU level under the title »Strategic Compass«. It will also cover national defence needs and other defence efforts such as NATO.³¹

3. What Slovenia can do?

Avbelj quotes Habermas saying »/.../ Democratic political authority in EU derives from the national and supranational source, which both find their origin in the individuals acting simultaneously into two different democratic capacities. First as citizens of their respective Member states and second as citizens of EU«³².

Slovenia should place greater emphasis on research in the field of security, defense and the military. It should modernize the national security system with an emphasis on providing a sufficient number of professional staff to cope with modern security threats. The state should systematically promote the importance of active citizenship, security and defense of the homeland and the EU.

At EU level, it should strive for more cooperation, for better relations between countries and for greater connectivity of defense and military structures and equipment. The Slovenian defense industry should receive more support from the state to achieve greater activity in the European market. The impression is that we like to feel and consider ourselves Europeans when we benefit from it, but when some effort needs to be put into common commitments, we are more in favor of national identity. This is why raising awareness and identifying about being European is all the more important.

- The **fourth one** is »More goal oriented defence capability-planning and development«³³.

According to Zandee what EU did not realized in the past 20 years, are military capabilities, and that's what it is, that the EU defence needs first to conduct military operation autonomous across the whole spectrum of the use of force. After the annexation of Crimea by Russia and increasing instability in the Middle East and Africa, the EU needs additional capability requirements. On the list of capabilities, the prominence is dedicated to heavy weaponry, firepower and armoured vehicles. Territorial defence is back on agenda for many countries.³⁴ As Fiott writes that the political level of ambition through Global Strategy and the Implementation plan on Security and Defence focused on strengthening 1. the EU capacity to respond on external conflicts and crisis, 2. build partners capacities and 3. protect the EU and its citizens.³⁵ The EU military planners have flexibly used existing policy tools to identify the current

³⁰ Ibid, p. 221.

³¹ Serano, 2020, p. 36.

³² Avbelj, 2021, p. 17.

³³ 18-month Programme of the Council (1 July 2020 – 31 December 2021), 8086/20, 5. 6. 2021, p. 29.

³⁴ Zandee, 2020, p. 51.

³⁵ Fiott, 2020, p. 118.

challenges of military engagement and permissibility and call for the prioritization of capabilities needed for the next 12 years. Through PESCO the participating states need to make available formations that are strategically deployable and interoperable to meet the EU's military ambitions. Besides the protecting EU and its citizens, the CSDP and EU might do some other tasks like protecting networks and critical infrastructure, ensuring border security, countering hybrid threats, preventing and countering terrorism, etc., was agreed by the Council of EU. The potential expansion of the CSDP's work on continental security can only exist as a theory, as the EU is failing to meet its crisis management objectives and its military capabilities have been declining for years.³⁶

Joint EU-NATO declaration in July 2016 pledged the two organizations to work together to develop coherent, complementary and interoperable defence capabilities in the future. In this regard the Capability development plan is also being undertaken in closer cooperation with NATO officials and NATO defence planning process. EU military staff does not believe that EU capabilities currently meet the level of ambition, so capability shortfalls remain major concern.³⁷

Defense planning in NATO is based on long-standing theories and, above all, experience. Networking and closer cooperation between NATO and the EU is certainly welcome and desirable, especially at this stage of the CSDP development, when the purpose of establishing these capabilities is really clearly articulated and sufficient mechanisms seem to be in place to achieve it. In this process at EU level, it would make sense to take into account the findings of experts who claim that NATO's defense planning process has shortcomings. Young writes that elements of the NATO defence planning process method are well suited to provide objective data and support of senior leadership's decision making; alone it is insufficient to drive planning which is inherently a political process.³⁸ As Young has been pointing out for some time in his articles, in defense planning, in addition to strategy (read policy) and methodology, money is a very important factor, which he explains in detail in the chapter Show me the money.³⁹ Without proper political decisions, including the allocation of more resources or, more precisely, money for defense and security matters, even a good strategy, programs, directives and ideas in the field of CSDP cannot guarantee what the EU representatives agreed back in 1999.

4. What Slovenia can do?

Slovenia can contribute its knowledge and many years of experience in this field. During its presidency, however, it can pay close attention to this goal on all occasions. Defense planning is a demanding process in all Member States, but when it comes to a transnational entity such as the EU, this is a particular challenge. Unifying so many different countries with diverse capabilities is almost mission impossible, especially in the case of joint defense planning. This is certainly an area where the latest methodologies, projects, research and programming need to be given the opportunity to help achieve such a demanding goal.

³⁶ Ibid, pp. 119–121.

³⁷ CSDP defence capability development, In-depth analysis requested by the sub-committee on security and defence, 2020.

³⁸ Young, 2021, p. 95.

³⁹ Ibid, 2021, pp. 104–106.

- The **fifth one** »The implementation of the ground-breaking steps of the last two years in all key areas (PESCO, CARD, and the European Defence Fund). This should include a stronger, inclusive and sustainable European Defence Technological and Industrial Base«⁴⁰.

As we can read in In-depth analysis of defence capabilities development from January 2020, the EU Global Strategy in 2016 noted the need for synchronisation and mutual adaptation of national defence planning cycles and capability development practices. It has also called for synchronisation for what paved the ways that has become Coordinated annual review on defence (CARD). EU Commission announced its proposals for European defence fund with the aim of supporting the EU defence industrial base via funding for research and technologies and joint development and capabilities worth up to EUR 5.5 billion per The most significant event in 2016 was the re-emergence of PESCO »as an inclusive and modular approach, based on future performance benchmarking rather than a narrow set of strict criteria for entry«⁴¹.

Culleto and Himelrajh⁴² highlight some key commitments that can make a significant contribution to strengthening Europe's defense capabilities and are directly linked to PESCO:

»Funds; members are to regularly increase defence budgets in real terms, raise investment expenditure to 20 percent, increase number of strategic projects and link them to EDF funding, increase research and development expenditure to 2 percent, and establish regular review of commitments.

Improve national defence apparatus; implement and completely support the CARD, close identified capability gaps, increase involvement of EDF in multinational procurement, agree on requirements for all capabilities, jointly use existing capabilities, and increase efforts in the area on cyber defence.

Enhance availability, interoperability and flexibility of member states' forces; make available strategically deployable formations in addition to EUBG, create a common database with records of available and rapidly deployable capabilities, review national decision-making processes and shorten them, fully support

CSDP operations, substantially contribute to EUBG, simplify and standardise cross-border military movement, optimise the existing multinational structures (EUROCORPS, EUROMARFOR, etc.), and increase funding of CSDP operations and missions.

Work within NATO to overcome shortfalls perceived in the framework of the Capability Development Mechanism; close capability gaps identified in CDM and CARD to increase EU's strategic autonomy and strengthen the European Defence Technological and Industrial Base, use a collaborative approach to close national capability gaps, and take part in at least one strategically relevant PESCO project.

⁴⁰ 18-month Programme of the Council (1 July 2020 – 31 December 2021), 8086/20, 5. 6. 2021, p. 29.

⁴¹ CSDP defence capability development, In-depth analysis requested by the sub-committee on security and defence, 2020, p. 9.

⁴² Culleto, Himelrajh, 2018.

Develop joint or European equipment programmes in the framework of the EDA; use EDA as the European forum for joint capability development, consider organisation for Joint Armament Cooperation to manage projects, avoid overlap and make European defence industry more competitive, and make sure acquisition strategies have a positive impact on the EU's defence and technological and industrial base.⁴³

5. What Slovenia can do?

As Culleto and Himelrajh already mentioned in 2018 about PESCO and Slovenia, »the Government needs to stay committed to the decision and the realisation of the projects which, if rightly promoted, could benefit the Slovenian economy«⁴⁴. They have emphasised the importance of awareness that »when it comes to security and defence matters, the Slovenian public is more inclined to support activities within the EU framework rather than NATO. The Slovenian Presidency of the EU in the second half of 2021 will be a great opportunity to advance PESCO. PESCO is what the Maastricht criteria are to the euro: a sui generis institution of European law because, as the name suggests, it is intended to organise (structure) something that already exists (cooperation) on the basis of enduring principles (permanently). The purpose of the process is to go beyond mere »cooperation« and achieve »integration«.⁴⁵

- *The **sixth one** Remain fully committed to the transatlantic security partnership by ensuring complete complementarity of all CSDP related initiatives to NATO will include military mobility, cyber security and defence, development of capabilities, hybrid threats, capacity building, comprises military assistance to civilian authorities and measures to enhance resilience/civil preparedness« (8086/20, 5 June 2020, p 29).*

As we can read in In-depth analysis by CSDP defence capability development, the NATO alliance shapes the approach of EU member states to their capabilities. »When they feel comfortable relying on the United States for their defence, they are more likely to conceive of military capabilities as primary »contributory« and may perhaps be tempted to »free ride« on United States military power«⁴⁶.

Since World War II, European countries have relied heavily on an alliance with the United States, with an emphasis on political and military alliance and, of course, NATO.

Slovenia must show by example and prove that it thinks seriously when it comes to strengthening the security and defense attitude first at home. In recent years, however, the United States has encouraged Europe to finally get back on its feet and start securing its proportionate share of security and defense burdens. The rhetoric of former President Trump was quite clear on this, and it is evident that »Washington wants EU member states to contribute more on their own defence, but

⁴³ Culleto, Himelrajh, 2018, p. 19.

⁴⁴ Ibid, p. 28.

⁴⁵ European Parliament, 2017, p. 9; Culleto Himelrajh, 2018, p. 28.

⁴⁶ CSDP defence capability development, In-depth analysis requested by the sub-committee on security and defence, 2020, p. 5.

greater autonomy may also mean EU action with less United States influence⁴⁷. It is evident that the EU is aware that, despite many policies, years and efforts over the last twenty years, it has failed to develop the CSDP area to the point where it can at least achieve its own goals and agreements, let alone be able to do more than that. The logical consequence of this awareness is still a close connection with the United States, and especially on their defense and, above all, military capabilities. A key question for the future of the EU is whether the organization of the Member States, with a focus on security and defense, its organization, and together with NATO, really provides adequate deterrence, security and defense for all involved in the face of modern security threats. In a situation where several different modern threats (demonstrations, terrorism, mass illegal migration, pandemics, cyber threats, or even wars) would occur simultaneously or sequentially across EU Member States and the United States, the biggest problem would arise with priorities. In such a case, we should look for answers to questions such as the situation in each country, what are the priorities for providing assistance and to whom, where to get this assistance and how to provide it. Each Member State will take care of itself first or not. However, the one who does not take care of itself will depend on the alms of others. Given the current capacity of the Member States in the field of defense, we can conclude that in many cases there will be no charity.

6. What Slovenia can do?

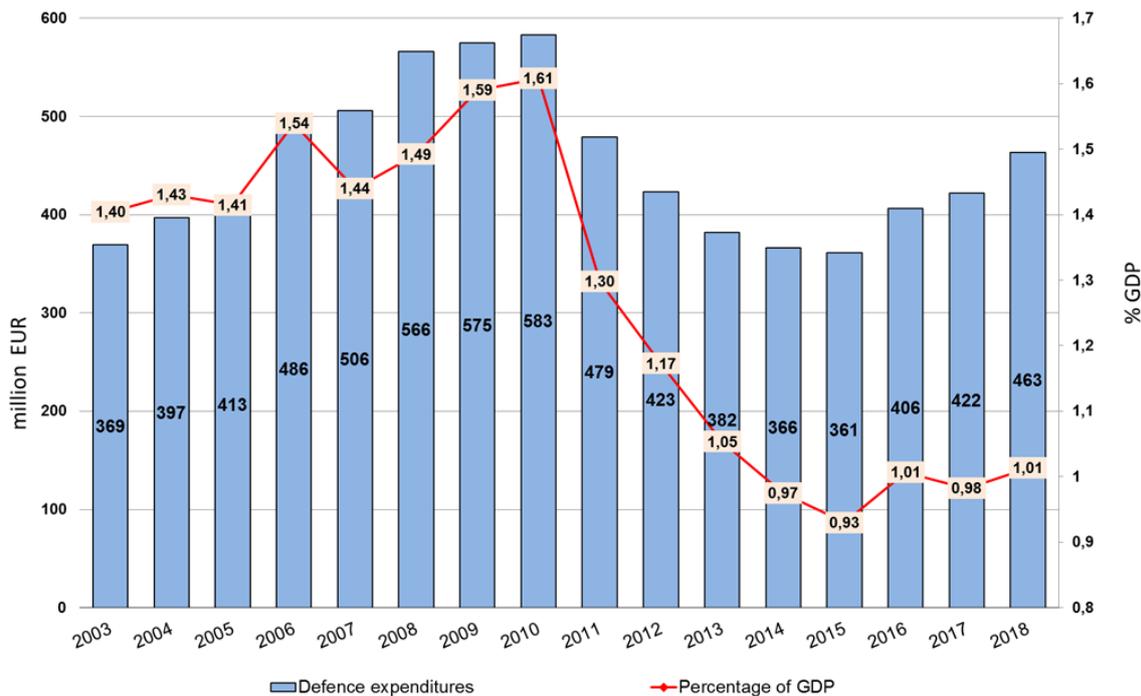
»At the NATO Summit in Wales in 2014, heads of states and governments – including Slovenia – agreed to reverse the trend of declining defence budgets. They agreed the members would, within a decade (i.e., up to 2024), a) halt any decline, b) increase defence budgets with the aim of moving towards the 2% of GDP guideline, and c) structurally adapt defence budgets to spend 20% or more on major new equipment⁴⁸. Ever since 2010, when the global financial crisis really started to show its teeth, Slovenia has failed to deliver on what it promised in Wales. Moreover, since then, defense spending has fallen steadily, the number of military personnel has fallen, investment in development has stopped and political support for the provision of funds for defense purposes in the country has fallen dramatically.

As Furlan shows in figure there has been some progress made since 2016 in this regard but in accordance to previous years the defence budget is still in decline.⁴⁹

⁴⁷ Ibid.

⁴⁸ Wales Summit Declaration, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Wales, 5. 9. 2014; Čehovin, 2019, p. 7.

⁴⁹ Furlan, 2019, p. 101.



In 2020, the Government of the Republic of Slovenia adopted a law on investments in the Slovenian Armed Forces with the aim of stopping its declining trend. It is about 680 million euros, which it wants to provide for additional equipment of the Slovenian Armed Forces. The leader of one of the opposition parties organized a collection of signatures to organize a referendum on this particular law. The National Assembly rejected it, so it submitted an initiative to the Constitutional Court to review the constitutionality of this law, suspended the implementation of the law and began a constitutional review. With the Decision of the Constitutional Court no. U-I-483/20 of 1 April 2021,⁵⁰ it was ruled that the exclusion of the referendum is not unconstitutional, which means that we can expect progress in the field of security and defense in the near future. However, this is not a miraculous solution to all the challenges of the future. The national security system of the Republic of Slovenia needs to be evaluated on the basis of the experience gained from the last few years and updated. These experiences need to be shared with other EU Member States, NATO and others, and even better possible solutions need to be found. The exchanged acquired experiences and ideas can significantly contribute to greater resilience of Slovenian and European society. As stated above, the EU CSDP can only be strengthened by strengthening each of its constituent elements, ie each Member State. Further strengthening at EU level can happen in line with Avblelj's proposals, of course, only with appropriate political decisions and their implementation. The EU's CSDP proposals have been relatively good for several years now, as we have already noted, and the biggest problem is implementation.

During its presidency, Slovenia can and must draw attention to all the above and look for the best solutions together with others. It is very difficult to estimate how long the EU and the CSDP will be strengthened, but it will certainly not be soon.

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⁵⁰ USRS Decision U-I-483/20, 1. 4. 2021.

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