The Changing Substance of European Law

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Intrinsic relation between form and substance in law and between the institutional law of the EU and its substantive goals – idea and criteria for a 'substantive core' to the legal order – the internal market as early EU law's substantive core – the EU's changing policy substance and the subsequent 'de-coring' of the legal order – the consequences of de-coring and its impact on EU law's relevance and legitimacy – early attempts to reconcile EU law with the changing substance of EU policy.

Introduction: the un-settling of European law and its causes

European law is by now an established legal order. Law has been historically central to European integration and a key driver of its politics. To what extent, though, does this centrality and stabilising role of EU law still hold today? The erosion of the rule of law in several EU states strikes at the core of the legal order, namely its values, enforced via a cooperative relationship between national and European Courts. EU political leaders seem to increasingly turn to resources as their main tool to achieve political change (as evidenced via the landmark Next Generation EU programme).[1] For others, the problem is not too little law in the EU but too much – while integration through law portrays law as a facilitator of integration, several leading accounts have begun to argue that EU law

[1]'Editorial Comments: A Jurisprudence of Distribution for the EU', 59 *Common Market Law Review* (2022) p. 957.

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'over-constitutionalises' EU policy-making, reducing democratic agency.[2] EU law – just as it matures – is also undergoing a period of 'un-settling', where its boundaries are increasingly contested.

What explains this un-settling? One way to explore the contestation of EU law is through the nexus between law and politics. Many accounts have therefore used the labels of 'judicial politics' or even 'judicial activism' to analyse the relationship between Courts and political institutions.[3] The over-constitutionalisation literature also follows this path, seeking to better understand the political dynamics unleashed by Court rulings.[4] Others have used the rise of populism or euro-scepticism to understand how domestic political conflicts can spill over into the European arena.[5] Often this literature carries strong normative or ideological baggage, with academics laying the blame for political rupture at the door of the Court of Justice (or 'arrogant' national Courts).[6]

What this explanation misses out, however, is a key ingredient in the EU's design. As long discussed by its founding theorists, the EU is not just a legal but also a functional project.[7] While some saw European integration as a goal in itself, for others, European integration has always been a vehicle to achieve important functional goals. As Weiler once put it, law has been both 'object' and 'agent' of integration, i.e. the legal order is both the goal of the integration project and a vehicle to achieve other objectives.[8] The other nexus, therefore, of crucial importance in understanding legal integration is not between law and politics, but between law and *policy*.

[2]D. Grimm, *The Constitution of European Democracy* (Oxford University Press 2017); F.W. Scharpf, 'De-constitutionalisation and Majority Rule: A Democratic Vision for Europe', 23 *European Law Journal* (2017) p. 315.

[3]D. Chalmers and M. Chaves, 'The Reference Points of EU Judicial Politics', 19 *Journal of European Public Policy* (2012) p. 25; M. Dawson et al., *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013).

[4]D. Martinsen, *An Ever More Powerful Court: The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015); C. Moser and B. Rittberger, 'The CJEU and EU de-Constitutionalization: Unpacking Judicial Responses', 20 *International Journal of Constitutional Law* (2022) p. 1038.

[5]P. Castillo-Ortiz, 'Constitutionalism and the Radical Rights: The Case of the Spanish Party Vox', 4 *International Journal of Constitutional Law* (2022) p. 733; C. de Vries, *Euroscepticism and the Future of European Integration* (Oxford University Press 2018).

[6]*See* e.g. G. Davies, 'Activism Relocated. The Self-restraint of the European Court of Justice in its National Context', 19 *Journal of European Public Policy* (2012) p. 76.

[7]G. de Burca, 'Rethinking Law in Neofunctionalist Theory', 12 *Journal of European Public Policy* (2005) p. 310.

[8]R. Dehousse and J.H.H. Weiler, 'The Legal Dimension', in W. Wallace (ed.), *The Dynamics of European Integration* (Labyrinth 1990) at p. 242.

The central argument of this article is that a fruitful way of understanding EU law's present predicament is not to see contestation as solely the result of shifts in national and EU politics, but rather as a result of shifts in substantive policy. If the EU legal order was built not just to achieve integration *per se* but to deliver a core set of functional goals anchored in the single market, what happens when the goals of the order change and diversify? Under these circumstances, a legal order built and modelled to achieve the goals of period A might seem increasingly challenged, or even dysfunctional, in period B. This article will thus be devoted to unpacking the changing substance of EU law, arguing that the law-policy nexus (and inter-relation between EU law's substantive and institutional elements) deserves more scholarly attention.

The argument will proceed in three steps. First, the article sets out the theoretical grounding for the argument, namely that there is an organic link between 'form' and 'substance' in law. In the EU context, this means that key features of EU law also reflect the policy context in which key early cases were decided. As the original 'substantive core' of the EU was the internal market and its freedoms, this had an indelible effect on the *form* and structuring principles of EU law. The EU legal order we know today was formed not just through high political conflict (as discussed by 'integration through law') but through *the legal implications of policy choices*.

Second, the article will explore EU law's changing substance. If the internal market was the 'core' of the EU in integration's founding period, to what extent is this true of the 2020s, or even the post-Maastricht period of integration? As the section will argue, while the internal market remains a crucial area of EU law, it increasingly sits alongside other key policy fields that are inscribed in the European Treaties. These provide a new policy context for legal developments, fuelling the development both of scholarship and case law. By developing a typology to identify the 'policy core' of the EU (rather than its constitutional or normative core as discussed in other literature),[9] this section seeks to evidence that the EU increasingly functions as a multi-purpose organisation, with its legal order in turn 'de-cored' from its market origins. The purpose of the section is therefore to demonstrate the changing substance of EU law, drawing on the example of Economic and Monetary Union (EMU). While EMU does not constitute a new substantive core for EU law, its influence on the legal order serves to illustrate the substantive fracturing of EU law across increasingly varied policy fields.

Finally, the article will discuss the legal implications of the EU's substantive 'de-coring'. Many of the controversies and deficiencies EU law presently faces can

[9] *See* e.g. J. Bast and A. von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's New Constitutionalism', *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2024-06*.

be understood in terms of an increasing gap between the goals its legal order was built to fulfil, and the goals EU law must deliver today. While EU law therefore is trying to 'catch-up' with changing policy needs, it struggles to do so, producing scholarly and practical dissatisfaction, as manifested in key policy fields.[10] The changing substance of EU law is insufficiently reflected in its 'form', adding to EU law's contestation. As the article will conclude, the EU's de-coring may have both positive and negative implications: both highlighting deficiencies in the legal order and providing a new catalyst for its development.

Form and substance in European law

Legal theorists have long been interested in the relationship between the form of the law (i.e. the way law is written and the institutions responsible for interpreting it) and the law's substance (i.e. the goals forwarded through rules).[11] Much of this interest concerns the impact of form on substance – for example, whether the form of rules leaves the legal system open to pursuing different substantive goals or rather biases the goals that *can* be pursued through law.[12] EU law carries its own version of this debate, namely the dispute over whether the Treaties carry implicit biases between market and non-market objectives (which limits the ability to pursue the latter).[13]

Of equal importance, however, is the impact *of substance on form*. The types of goals pursued through rules, and the substantive conflicts that take place within legal institutions, also inevitably shape the form of rules, and the principles of the legal order. The principles of interpretation and judicial organisation we see developing in social security courts will differ from those in criminal courts. Similarly, the organising principles of an international tribunal dedicated to resolving trade disputes are likely to look quite different to those of a human rights tribunal. The substance of the law is likely to have a decisive impact on law's form, i.e. how the legal order's central principles look, and the institutions needed to deliver them.

What produces this 'organic link' between form and substance? The first element concerns legal interpretation. While courts vary in their interpretive

[10]*See* e.g. on climate, L. Fischer, 'Challenges for the EU Climate Regime', 21 *German Law Journal* (2020) p. 5.

[11]For an historical summary, *see* D. Dyzenhaus, 'Process and Substance as Aspects of the Public Law Form', 74 *The Cambridge Law Journal* (2015) p. 284.

[12]For example the idea that individuals are rational/autonomous persons, able to enter into contracts freely, obscures material inequalities: *see* D. Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* (1975) p. 1685.

[13]*See* e.g. S. Garben, 'The Constitutional (Im)balance between "the Market" and "the Social" in the European Union', 13 *EuConst* (2017) p. 23.

tools, it is common for courts to read rules according to their underlying goals, understood either narrowly (i.e. the objectives of legislation) or systemically (i.e. what goals underpin the legal order as a whole). This first impact of substance on form is well known to EU law in terms of the Court's teleological approach.[14]

A second element concerns litigants. To return to an example above, a human rights court and a trade arbitration tribunal are likely to have very different litigants, raising different arguments and requiring a different balancing of interests. The substantive content of the law shapes both who *can* access legal institutions and who is *likely to do so*, influencing how actors in the legal system see their roles.

A final link between substance and form concerns what might loosely be called the context of a legal dispute. Questions are not answered by an apex court if they do not need to be answered to resolve the dispute at hand (a notion equally embedded in EU law's general refusal to answer hypothetical questions).[15] The substantive content of the law therefore frames the questions courts are asked (reflected, in the EU case, by the questions brought by national courts to the European Court of Justice).

EU law reflects this broader impact of substance on form. In simple terms, there is an equally organic link between what EU lawyers commonly term the institutional and substantive dimensions of EU law. In terms of interpretation, EU law's most important source, the Treaties, are not a blank procedural set of documents, but contain a particular set of substantive goals, designed to be carried out both by the Court and the EU's political institutions. In terms of litigants, these Treaties have been developed and interpreted through the case law of the European Court of Justice, in which the primary litigants are parties (either private or public) who raise cases because their goals align with the substantive goals of the Treaties. In terms of context, the substance of the Treaties – in particular the goals of the common market – thus provided the surrounding context in which questions on the 'foundations' of EU law were asked and answered.

This link between the goals of EU law and EU law's form is most obvious in one of EU law's founding judgments, *Costa* v *ENEL*.[16] The judgment has often been discussed in terms of its contribution to ensuring EU law's effectiveness (by limiting the ability of states to cherry-pick EU obligations). Of equal importance, however, is the reasoning used to justify what is now the principle of primacy:

[14]On this approach and its limits, *see* G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012) p. 49-50.

[15]ECJ 16 December 1981, Case C-244/80, *Pasquale Foglia* v *Mariella Novello (No 2)*, ECLI:EU:C:1981:302.

[16]ECJ 15 July 1964, Case C-6/64, *Flaminio Costa* v *ENEL*, ECLI:EU:C:1964:66.

> The integration into the laws of each member state of provisions which derive from the community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.

The justification for primacy is linked closely to the goals of the early Community, namely the establishment of a customs Union and the elimination of discriminatory barriers to trade. Threats to EU law's uniformity and consistent application would be particularly problematic in a community whose precise goal is the establishment of common rules and conditions for cross-border commerce. This key principle of the legal order is not only therefore justified in terms of the need for an effective legal order but in terms of the effectiveness of *this particular legal order* with this particular set of objectives attached to it.

The organic connection between the internal market and the building blocks of EU law is no surprise. Many (if certainly not all) of the key cases of what we would now call the 'institutional law' of the EU were internal market cases, in which the substantive dispute the Court had to resolve concerned market barriers of various kinds. If, therefore, structural principles and rules – like direct effect,[17] standing rules[18] or fundamental rights standards[19] – were needed to resolve these cases, they were developed with the arguments and facts raised by the parties to those cases as a surrounding context. The institutional rules of the EU thus 'make sense' and carry a sustainable logic when viewed through the prism of this policy goal.

Two concrete and well-known examples might suffice to evidence this link. The first is the *Plaumann* ruling.[20] As is well known, *Plaumann* constituted the Court's first attempt to concretise the standing of non-privileged applicants under what is now Article 263 TFEU. A case involving the agricultural sector, it was

[17] *See* e.g. ECJ 21 June 1974, Case C-2/74, *Jean Reyners* v *Belgium*, ECLI:EU:C:1974:68 (on direct effect in the context of freedom of establishment); ECJ 4 December 1974, Case C-41/74, *Van Duyn* v *Home Office*, ECLI:EU:C:1974:133 (on free movement of workers) and ECJ 5 April 1979, Case C-148/78, *Pubblico Ministero* v *Ratti*, ECLI:EU:C:1979:110 (on labelling in goods).

[18] *See* the discussion on *Plaumann infra*.

[19] *See* e.g. ECJ 12 November 1969, Case 29/69, *Stauder*, ECLI:EU:C:1969:57 (which concerned butter subsidies; the other famous early judgment in this field, *Internationale Handelsgesselschaft*, concerned the common agricultural policy).

[20] ECJ 15 July 1963, Case 25-62, *Plaumann & Co.* v *Commission of the European Economic Community*, ECLI:EU:C:1963:17.

brought by a clementine importer seeking to challenge German customs duties. The Court's interpretation of the 'direct and individual concern' test restricted standing to individuals affected by an EU legal act 'by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'. This test has, of course, been criticised from its inception as being overly restrictive and has been (partly) relaxed by Treaty amendment.[21]

It also, however, carries a logic that fits the early goals of the Union. While the common market included general legislative acts, it frequently involved the direct regulation of market actors (such as those benefiting from funding in the coal or agricultural sectors or those in breach of state aid and competition rules). The single market concerned the 'micro-economy', where the principle legal relation was between an administrative actor (the Commission or national officials) and a limited group of private individuals/companies.[22]

In this context, standing rules based on 'direct and individual concern' carried two distinct logics that directly related to the litigants active in the early Community. One concerns the number of actors who could access the Court. As a result of *Plaumann* – a key explanation for its durability – the Court has remained in a 'goldilocks zone' of having neither too many nor too few direct applicants. The number of legal claims was significantly reduced by the formula but crucially it was not reduced to zero. The second, and related, logic concerns the purpose of judicial review. By ensuring that those who slipped through the judicial net were, by definition, doing so out of their 'direct' individual economic interest (and not, for example, as a vehicle to achieve other political goals) direct actions could fulfil their intended purpose, namely to act as a check on executive discretion, without acting as a surrogate for political activity. Although, therefore, the justification for early standing rules is not explicitly anchored in the single market, there seems a close fit between their design and its goals.

A further example of relevance concerns not the jurisprudence of the Court but the forms of early EU law. The main types of EU law we know today were established in the Treaty of Rome, namely Regulations, Directives and Decisions. Regulations were designed to be acts of general application, applicable to all member states. While directives were defined by the Treaty as binding 'on the Member State to which they are addressed' and only 'as to the result to be achieved', Directives have broadly been directed at all member states. At the same

[21] *See* R. Caranta, 'Knock, and it Shall be Opened unto You: Standing for Non-privileged Applicants after *Montessori*', 58 *Common Market Law Review* (2021) p. 163.

[22] On the distinction between the macro and mico-economic Constitution of the EU, *see* K. Tuori and K. Tuori, 'Two Layers of the European Economic Constitution', in K. Tuori and K. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge University Press 2014) p. 13.

time, the European Court of Justice's establishment of doctrines such as vertical direct effect, the duty of consistent interpretation and state liability, all limited the discretion of member states to depart significantly from a Directive's initial text.[23]

These forms of law – and the doctrines through which the Court shaped them – are of crucial importance for the single market. The main advantage of such a market is its ability to facilitate trade through common market conditions and the elimination of discriminatory barriers. The main 'risk' is free-riding, i.e. that Member States will seek access for their citizens and firms to foreign markets while erecting barriers based on national preferences at home.[24] In this context, there is a strong legal rationale for ensuring that – once EU law is agreed upon – it is applicable in a uniform manner. It also makes sense to expand the opportunities for individuals to legally challenge states who fail to implement EU law fully. Failing to provide such opportunities would hamper legal certainty by sowing doubt on whether EU law could be relied upon (a particular disadvantage for market actors seeking to plan investments or trade).

What, however, if the 'advantages' an EU policy seeks to reap, and the 'risks' it has to avoid, change? As will be later explored, in policy areas where EU law is unlikely to succeed in eliminating strong structural divergences between member states, such as fiscal policy where member states face quite different challenges and sources of financial risk, there might be stronger reasons to differentiate EU law, to tolerate stronger divergences on how EU law is domestically implemented or to focus less on 'clear and certain' rules than broad quantitative benchmarks. The form of EU law therefore matched the substance and goals of the early integration project, in a manner that may or may not be appropriate today.

To be clear, there is no perfect fit between all of the principles of EU law and the common market. The original Rome Treaty pursued a number of non-market goals and these goals have expanded in scope as the EU has developed, impacting EU law. If, however, the single market was the central policy – the substantive 'core' – of the early European Community, its path dependencies have left an indelible impact on the form of EU law today. While this section explored only a few examples of EU law's original building blocks, other examples not explored (for example the prioritisation of material over non-material harm in developing states and later EU non-contractual liability,[25] or the strong embedding of

[23]As discussed at length by Morten Rasmussen, the Court's approach to the direct effect of Directives took place against the background of the poor national implementation of harmonisation directives in the early 1970s. *See* M. Rasmussen, 'How to Enforce European Law? A New History of the Battle over the Direct Effect of Directives, 1958–1987', 23 *European Law Journal* (2017) p. 290.

[24]M.P. Maduro, 'Reforming the Market or the State? Article 30 and the European Constitution: Economic Freedom and Political Rights', 3 *European Law Journal* (1997) p. 55 at p. 67-70.

[25]In the case of EU non-contractual liability, for example, some early requirements laid down by the Court were that there was not a potentially large number of potential claimants, and that damage

citizenship as a legal concept in the four freedoms[26]) also suggest an organic link between EU law's core organising principles, and its original goals.

This leaves open the question of the nature of the EU's substantive priorities today. If there is a strong link between substance and form, a change in substance would have significant implications for how EU is and should be organised. A more dramatic change – a move of the Union away from having a substantive 'core' at all – would likely have even greater implications. It is to this topic, i.e. how to identify EU law's evolving 'substantive core', that we now turn.

What is the 'substantive core' of EU law?

What is the 'core' of the EU and how can we understand it?

While economic and single market goals were at the centre of the European Community, the EU has always been a multi-purpose organisation.[27] Its priorities have shifted significantly in the last six decades, with the goals pursued via the Treaties also expanding. This does not mean *per se*, however, that the common or now single market has lost its place as the substantive core of the Union.

Answering the question of whether the single market remains EU law's core requires some analytical framework for how to define the 'substantive core' of EU law in the first place. A useful starting point is the use of the core-periphery distinction in political science.[28] Examining primarily territorial cleavages, Lippset and Rokkan have developed an advanced typology designed to understand state formation in Europe in terms of the dynamics between the *territorial* centre of European polities and their peripheries. Varieties of this core/periphery distinction have already been used to analyse the EU and EU law. An example is the study of enlargement. The EU law debate over the *Laval* and *Viking* judgments was therefore re-evaluated by scholars from central and eastern European states, who argued that the casting of the judgments as a victory of 'economic' over 'social' rights was based itself on a core-periphery dynamic, i.e. a definition of 'social rights' based on Western economic ordering, which

was quantifiable. Such requirements are of course easier to fulfil for market actors (for example a firm negatively affected by a state aid decision) than non-market actors (for example an environmental group). On these early requirements, *see* K.A. Havu, 'Damages Liability for Nonmaterial Harm in EU Case Law', 44 *European Law Review* (2019) p. 492 at p. 563.

[26]N. Nic Shuibhne, 'The Resilience of EU Market Citizenship', 47 *Common Market Law Review* (2010) p. 1597.

[27]On the distinction between single and multi-purpose international organisations, *see* G. Hooghe et al., *A Theory of International Organization* (Oxford University Press 2019) p. 44-59.

[28]S.M. Lipset and S. Rokkan (eds.), *Party Systems and Voter Alignments: Cross-National Perspectives* (Free Press 1967).

discounted the concerns of the Union's Eastern 'periphery'.[29] There is already, therefore, an established spatial use of the core-periphery distinction in EU law. As with Lippset and Rokkan, this literature attempts to explain polity development by demonstrating how territorial cleavages structure the political space.

The distinction can also, however, be used substantively. Many sociological theories (such as those of Parsons, Bourdieu and Luhmann) discard territorial cleavages in favour of understanding differentiation in modern societies functionally or horizontally. For such theorists, the key element in structuring social and political order are the distinctions between fields or systems,[30] of which individuals and institutions are part. For Luhmann in particular, a functionally differentiated society would remove any substantive core-periphery dynamic in that it would suggest a society made-up of autopoietic social systems, each responding to their own logic, rather than any central system.[31]

A core-periphery understanding, however, would imply something quite different, i.e. a structuring of institutions in which certain fields predominate and are able to impose their logic on others. The core-periphery distinction in its *functional* understanding would therefore imply understanding legal and political systems as structured via a relationship between a *substantive* core and a substantive periphery. Polity development in this sense is influenced by substantive dynamics in which one field, even if it relies on the 'periphery' in various ways, plays a central structuring role (along three distinct pathways, as will be elaborated on below). Following from the last section, this would therefore imply analysing whether the EU's internal market – as the Union's initial guiding project – played such a role in the EU's development, marginalising other fields in the process.

This implies three elements, each of them mapping onto Lippset and Rokkan's spatial understanding of core-periphery dynamics. The first elements concerns *power and influence*. We might think of the core as a place of domination (and the periphery as a place that is influenced by the core, without being able to reciprocally influence to the same degree). In its spatial usage, therefore, Rokkan depicted the periphery as having 'little control over its fate' (a sense of political alienation that finds contemporary resonance in mobilisation against 'metropolitan elites').[32] In our substantive understanding, this would imply that a particular 'field' has increased power in a given institution and able to either structure or impose externalities on other fields.

[29]D. Kukovec, 'Law and the Periphery', 21 *European Law Journal* (2015) p. 406; C. Kaupa, *The Pluralist Character of the European Economic Constitution* (Hart Publishing 2016).

[30]This terminology distinguishes Bourdieu from systems theorists such as Luhmann and Parsons.

[31]N. Luhmann, *Social Systems* (Stanford University Press 1995).

[32]P. Flora et al. (eds.), *State Formation, Nation-building and Mass Politics in Europe: The Theory of Stein Rokkan* (Oxford University Press 1999) at p. 113.

While this is of course subject to scholarly disagreement, numerous strands of EU legal scholarship advance this proposition in the internal market case. Internal market lawyers have pointed to the broad boundaries of Article 114 TFEU, leading the internal market to act as a central legal basis for a broad range of EU initiatives.[33] As a result, legislation in 'non-market' areas – ranging from environmental protection to artificial intelligence – often carries the imprint of its original market legal basis. This power imbalance may also influence the way in which the European Court of Justice adjudicates conflicts between objectives. To use the ubiquitous example of posted workers, a central debate has been the attempt to reconcile market freedoms and social rights, with reference to the proportionality principle. Whereas this principle would normally suggest the need for public policies to be scrutinised in light of rights, the European Court of Justice has often taken the opposite approach (with social rights having to show how their effects on market freedoms are proportionate, not the other way around).[34] These legal critiques point to this first power dimension, i.e. the question of whether the Treaty establishes an implicit hierarchy between the internal market and other goals.

A second crucial aspect of the core-periphery distinction concerns *innovation*. We might think of 'the core' as a place of dynamism and growth, which drives economic, social and political change. For Lippset and Rokkan, therefore, the 'core' was also a place of economic change, which relegated the periphery to copying or 'reproducing' its outputs. In our substantive understanding, the relevant question, therefore, is whether a particular field is more dynamic than others and more likely to produce ideas, goods, and innovations (that are then replicated elsewhere).

As already discussed, key doctrinal innovations in EU law have not only flowed from judgments concerning the internal market but have often been justified in terms of their contribution to its goals. This innovative force of the internal market has applied well beyond jurisprudence, extending to the very form of EU law. Mutual recognition and the use of minimum harmonisation in directives were initially developed to better deliver internal market goals but in recent decades have spread well beyond the internal market into new policy fields (such as the Area of Freedom, Security and Justice).[35] Mutual recognition has also spearheaded discursive innovations such as the conceptualisation by the European

[33] *See* for a recent example, the draft AI Regulation, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206, visited 4 September 2024.

[34] *See* e.g. A. Hinarejos, '*Laval* and *Viking*: The Right to Collective Action versus EU Fundamental Freedoms', 8 *Human Rights Law Review* (2008) p. 714; C. Barnard, 'Social Dumping or Dumping Socialism?', 67 *The Cambridge Law Journal* (2008) p. 262.

[35] M. Schwarz, 'Let's Talk about Trust, Baby! Theorizing Trust and Mutual Recognition in the EU's Area of Freedom, Security and Justice', 24 *European Law Journal* (2018) p. 124.

Court of Justice of the EU legal order as an area informed by mutual trust (a concept of increasing relevance in defining the EU's relations with other international frameworks).[36] This point replicates many of the arguments raised above – by providing a policy context for EU law, the internal market has also been the birthplace of innovations in EU law.

Linked to this, the final element of the core-periphery distinction concerns *discourse*. Spatially, another aspect of the core's power was the ability of urban capitals to define a sense of the nation (and the subsequent development of counter-narratives, often based on a sense of exclusion and/or regional identity). Substantively, we might think of an organisation's 'core' as a place where over-arching narratives about the polity as a whole are constructed, again excluding or re-forging the narratives of the periphery. This would imply that a particular field is able to define what a given institution is 'for', to the exclusion of competing discourses.

The internal market of the EU might also, therefore, be seen as the substantive core of the EU because it was able to project a particular idea of what the EU was 'for'. In the beginnings of integration, this was encapsulated in the Schuman declaration, which explicitly tied broader goals such as post-war reconciliation with commodity and trade inter-dependence.[37] In later decades, the ability of the internal market to set the Union's narrative can be seen in its lasting impact on newer ideas that link EU law to polity development, such as EU citizenship. As extensively commented by others, the degree to which EU citizens can exercise citizenship rights in other states depends heavily on their degree of economic and social integration.[38] This has often been crystallised into a more pointed critique – that EU citizenship remains a 'market citizenship'. The internal market has in this sense carried a strong imprint on the notion of what it means to be European (becoming a battleground for defining concepts, such as EU citizenship, of broader constitutional relevance).

Perhaps the simplest combination of these three strands comes in legal education itself. When referring to the 'substantive law of the EU', EU lawyers are commonly referring to the internal market, with the four freedoms and competition law being the main substantive fields of EU law studied as part of a mandatory EU law curriculum.[39] This choice, of course, relegates other

[36] *See* e.g. ECJ 18 December 2014, *Opinion 2/13 (ECHR Accession)*, ECLI:EU:C:2014:2454, at para. 168.

[37] *See* https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en, visited 4 September 2024.

[38] Nic Shuibhne, *supra* n. 26; F. de Witte, 'The Judicial Politics of Solidarity', in M. Dawson et al. (eds.), *Revisiting Judicial Politics in the European Union* (Edward Elgar 2023).

[39] *See* e.g. C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2019).

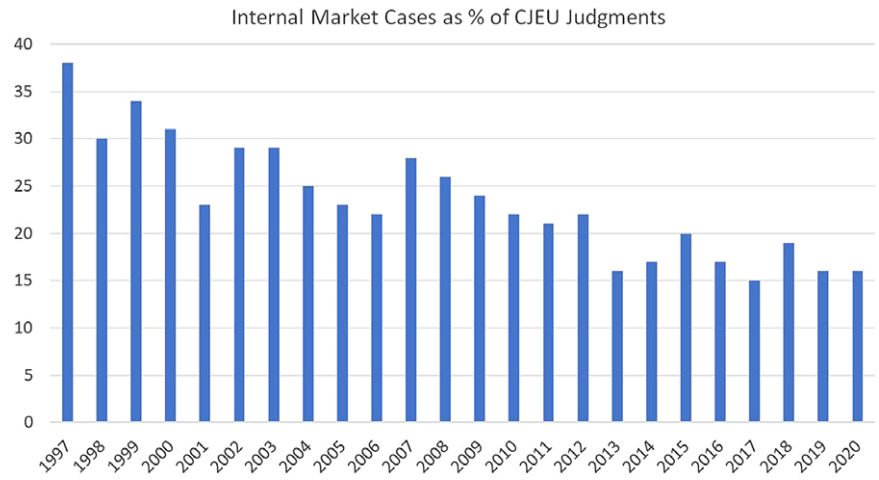

Figure 1. Internal market cases as a percentage of all completed European Court of Justice judgments[40]

substantive fields of EU law to the periphery, to be studied in electives (if at all). This sends a strong pedagogic message – first, one must learn the institutions and constitutional law of the Union, then one must learn the substance, i.e. the internal market. 'The rest' follows from these other two building blocks. While, therefore, the EU has always been a complex organisation, there are good reasons to think of its internal market goals as being at the centre of Europe's nascent legal order.

Has the EU been 'de-cored'?

Does the EU still carry a substantive core today, and if so, is it the same core? The first step in addressing this question is to assess the contemporary importance of the internal market, both in terms of its structuring role (and consequent impact upon the legal order) and its relation *vis-à-vis* 'the periphery'.

One starting point is to examine the changing relationship between the internal market and other fields of EU law quantitatively, i.e. in terms of the volume of cases that concern the internal market versus other substantive fields of EU law. This is represented in Figure 1.

While the internal market remains a significant driver of case law, the share of the European Court of Justice's workload that concerns internal market matters

[40]Source: Curia database, judicial statistics of the ECJ. Included fields: approximation of laws, customs Union, free movement of goods, free movement of persons, free movement of capital, freedom to provide services and freedom of establishment.

has roughly halved from the first year the Court started publishing judicial statistics (1997) – when 38% of cases concerned the internal market – to a settled pattern of between 15 and 18% of cases in the last eight years. Other work empirically examining specific elements of the internal market prior to 1997, such as cases on free movement of goods, also observes an ongoing decline in litigation on goods from a peak in the mid-1980s to today.[41]

These indicators must, of course, be qualified. While they indicate general trends, one way of interpreting them is that – precisely because the internal market is a relatively established field – there is less need for litigation to interpret its norms. As Jan Zglinski has pointed out, declining levels of litigation may also be linked to the increasing legislative harmonisation of internal market measures.[42] Such quantitative studies in this sense only tell us so much about the structuring role of the internal market in EU and national law more broadly (even if, already of some importance, they indicate that the single market is less likely to provide the context and litigants in which EU law is developed).

There are also, however, more qualitative reasons to consider whether – even if the internal market remains crucial – it increasingly sits alongside other fields of EU policy that are equally central to driving integration. One could use several examples in this regard. Digital governance and environmental policy have been increasingly central EU policy fields in the last decade. The example we will focus on, however, is EMU: an area of policy of increasing prominence in tackling recent crises of the EU, from Covid-19 to the rule of law. As a preliminary note, the point of the analysis below is *not* to test whether EMU has 'replaced' the internal market as the core of the EU. Instead, the section below is designed to assess whether EMU could increasingly be seen as *part* of the EU's substantive core (alongside the internal market, and potentially other fields as well). For this purpose, the article will define EMU broadly, including both monetary Union and the wider economic governance of the EU in which non-Euro members also participate, including for example new EU fiscal instruments such as the Next Generation EU Programme. To make this argument, it is useful to return to the three building blocks of the core-periphery distinction.

The first of these building blocks is power. As noted above, part of the single market's power was its ability to structure EU law and to extend its own logic to other fields. There is no evidence of significant change in this regard – the examples given above of the extensive use of Article 114 TFEU and the use of the proportionality principle in cases invoking fundamental rights and freedoms still broadly hold true today. There is evidence, however, of a similar dynamic at play

[41]J. Zglinski, 'The End of Negative Market Integration: 60 Years of Free Movement of Goods Litigation in the EU (1961–2020)', 31 *Journal of European Public Policy* (2024) p. 633 at p. 639.
[42]Ibid., p. 647-649.

in EMU, i.e. its ability to encroach upon and structure other fields of policy (and influence EU law in the process).

The first element of this concerns EMU's spill-over effects. From its very establishment, EMU has carried unclear substantive limits. By definition, an effective EU fiscal policy must carry broad boundaries – both negative macro-economic 'imbalances' and positive levers for economic recovery can be found as much in health or transport policy as in taxation and fiscal rules.[43] This has justified the coordination of a wide range of policies,[44] first through general employment and economic policy guidelines in the 90s and 2000s and later under the umbrella of the European Semester. A resulting critique emerging from this spill-over has been that policy fields that are largely national competences (such as social policy) must increasingly be justified under the logic of supra-national *economic* coordination.[45]

The recent Next Generation EU Programme furthers EMU's effects on other policy fields. While legally justified as an economic Covid-related measure, the Programme's investments are tied to two broader policy goals (digital transformation and the green transition). The national spending priorities proposed by governments even under these headings are extremely diverse (with many carrying only a tangential link to financial recovery post-Covid).[46] Next Generation EU adds, in addition, much clearer carrots and sticks to the EU's pre-Covid fiscal coordination processes, namely the possibility of restricting access to grants where national plans divert too egregiously from EU goals. In simple terms, therefore, the EU's fiscal policy instruments both increasingly reach across different areas of national and EU policy and carry increasingly strong compliance incentives.

The second element of EMU's influence concerns not its reach into other policy fields but the opposite, i.e. that other policy fields *require the institutions and authority of EMU to resolve problems that cannot be resolved within that field itself*. Two examples might demonstrate this dynamic. The first is the rule of law. As has been extensively discussed, the European Court of Justice has significantly

[43]*See* e.g. the broad definition found in Art. 2 of Regulation 116/2011 on the prevention and correction of macro-economic imbalances.

[44]On this, *see* M. Markakis, *Accountability in the Economic and Monetary Union: Foundations, Policy, and Governance* (Oxford University Press 2020) p. 66-104.

[45]M. Dawson, 'New Governance and the Displacement of Social Europe: The Case of the European Semester', 14 *EuConst* (2018) p. 191.

[46]German Federal Constitutional Court (BVerfG), Act Ratifying the EU Own Resources Decision – Next Generation EU, Judgment of 6 December 2022, 2 BvR 547/21, 2 BvR 798/21 at para. 82.

strengthened the legal tools available to ensure judicial independence.[47] These rulings have not, however, prevented a continued process of rule of law erosion. From the beginning of the crisis, EMU has provided an important further set of tools – EMU rules have been activated, for example, to protect the independence of the Hungarian Central Bank as an actor within the European System of Central Banks.[48] The EU's conditionality regulation, however, is the most explicit example of using economic policy, and the mechanisms of EU funding, to promote policy change. In the past year, the disbursement of EU funding to both the Polish and Hungarian governments has thus been suspended because of failure to meet Commission 'milestones' regarding judicial independence.[49]

A second example is the green transition.[50] A major element concerns finance. The balance sheets of governments and central banks alike are replete with assets which carry a major impact on the ability of the EU to meet its climate targets. A key element in the EU achieving a successful climate transition is therefore the ability of the European Central Bank to support green financing, either through prioritising green investments itself or providing a framework for national actors and other EU institutions to do so.[51] What brings both examples together is EMU's increasing 'centrality' in EU governance. The institutions of EMU not only influence other policy goals but are increasingly required *to achieve other goals* (that might, in a previous era, have been seen as de-coupled from this policy field).

The examples above speak to the second element of the core-periphery framework as well, namely that a field is a site of innovation. While the EU has always relied on finance as a means of achieving policy change (see, for example,

[47] *See* e.g. ECJ 27 February 2018, Case C-64/16, *Associacao Sindical dos Juizes Portuegeses* v *Tribunal de Contas*, ECLI:EU:C:2018:117; ECJ 11 July 2019, Case C-619/18, *Commission* v *Poland*, ECLI:EU:C:2019:531; ECJ 15 July 2021, Case C-791/19 *Commission* v *Poland*, ECLI:EU:C:2021:596.

[48] *See* Commission Press Release, https://ec.europa.eu/commission/presscorner/detail/lv/MEMO_12_165, visited 4 September 2024.

[49] *See* (on Hungary) https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5623; (on Poland) https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3375, both visited 4 September 2024.

[50] On the governance structure of this transition, including its financing aspects, *see* E. Chiti, 'Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process', 59 *Common Market Law Review* (2022) p. 19.

[51] C. Zilioli and M. Ioannides, 'Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies', 59 *Common Market Law Review* (2022) p. 363; S. Dietz, 'Green Monetary Policy Between Market Neutrality and Market Efficiency', 59 *Common Market Law Review* (2022) p. 395.

the historic use of cohesion and agricultural funding), financial conditionality is an increasingly central cornerstone of EU governance.[52] Next Generation EU presents a new frontier in the use of finance to achieve goals that rules-based integration alone could not achieve, in that it grounds financial conditionality in explicitly EU debt instruments (rather than member state contributions). EMU might also, however, be a driver of innovation in other ways. Above, we discussed the litigants and context of the law. The single market influenced EU law partly because it was the vehicle through which jurisprudence reached the Court. By contrast, EMU has not seen high levels of judicialisation.

We have nonetheless seen key cases of broader constitutional significance in this field. It is notable that principles are being developed in the field of EMU that are of more relevance *outside* EMU itself. Let us mention three brief examples. The first are cases concerning the delineation of competences. It could, of course, be considered coincidental that an *ultra vires* finding by the German Constitutional Court emerged in the context of European Central Bank litigation. At the same time, the European Central Bank and EMU pose particular dilemmas associated with the EU's system of conferral that made the *PSPP* judgment a 'most likely case' for such a clash. One of the unique features of the Bank's legal position in the Treaties is the self-defined nature of its mandate.[53] As held by the Court in *Gauweiler*, while the European Central Bank must restrict its activities to monetary policy, 'within that framework, it is for the [European System of Central Banks], pursuant to Article 127(2) TFEU, to define and implement that policy'.[54] The existence of an institution with strong powers to define what constitutes necessary measures to conduct monetary policy – combined with the highly blurred boundaries between monetary and fiscal policy – thus made a clash with national institutions over conferral likely. While the German Constitutional Court's *PSPP* judgment may seem the zenith of an ongoing conflict between the European Court of Justice and national courts, other areas of EMU, such as the Bank's pandemic emergency purchase programme and the Next Generation EU Programme have also produced *ultra vires* challenges.[55] Given EMU's effects on a host of policy areas closely connected to national sovereignty, it has been an important testing ground regarding the Union's vertical division of powers.

[52]A. Baraggia and M. Bonelli, 'Linking Money to Values: the New Rule of Law Conditionality Regulation and its Constitutional Challenges', 23 *German Law Journal* (2022) p. 131.

[53]J. Mendes, 'Constitutive Powers of Executive Bodies: A Functional Analysis of the Single Resolution Board', 84 *Modern Law Review* (2021) p. 1330.

[54]ECJ 16 June 2015, Case C-62/14, *Peter Gauweiler & Others* v *Deutscher Bundestag*, ECLI:EU:C:2015:400, at para. 37.

[55]*See* BVerfG Own Resources Decision, *supra* n. 46; https://afdbundestag.de/boehringer-afd-fraktion-hat-organklage-gegen-das-ezb-anleihekaufprogramm-pepp-eingereicht/, visited 4 September 2024.

A second set of examples concerns cases in EMU where new interpretations of EU law were developed that are of importance to other policy fields. A major set of recent cases of the Court have concerned rule of law backsliding. A central provision has been Article 19(1) TEU and the Court's argument that this article imposes on national governments an obligation to ensure judicial independence as a necessary element of effective judicial protection. This argument was, however, developed not in the rule of law field but in *Portugese Judges,* a case concerning the adjustment of judicial salaries (introduced as a result of Portugal's entry into a European Stability Mechanism programme).[56] A further example is the Court's ruling on the EU's conditionality regulation: a measure designed to ensure sound financial management but with the rule of law as a guiding political object.[57] When this was challenged before the Court, the European Court of Justice ruled that the measure carried a correct legal basis and was consistent with other Treaty rules such as Article 7. A significant element of the judgment was, however, the anchoring of the Regulation's legality in its use for giving practical effect to the principle of solidarity.[58] While solidarity is, of course, not a new principle in EU law, the Court's use of solidarity to understand the EU budget and the balance of competences is both novel and of relevance outside of the immediate EMU context (as will be further elaborated below).[59] In this sense, while neither of these cases seem crucial for the development of EMU *per se*, they illustrate the use of EMU as a space in which innovations in the interpretation of EU law increasingly occur.

A final set of EMU cases of relevance to its dynamic character concern institutional balance. To return to the conditionality regulation, its adoption was mired in significant controversy as a result of European Council conclusions seen by some EU lawyers as an attempt to modify the content of a legislative act *ex post*.[60] While Next Generation EU has not yet been the subject of EU level litigation, some EU lawyers have also questioned whether its adoption threatens institutional balance (as a result of the choice not to adopt the programme through simply enlarging the EU budget, a decision on which the Parliament

[56]Case C-64/16, *Portugese Judges*, *supra* n. 47.

[57]ECJ 2 December 2021, Joined Cases C-156/21 and C-157/21, *Hungary and Poland* v *Parliament and Council*, ECLI:EU:C:2021:974.

[58]Ibid., at para. 129.

[59]On the use of solidarity in the judgment, *see* V. Borger, 'The ECJ Approves the Conditionality Mechanism to Protect the Union Budget: *Hungary and Poland* v. *Parliament and Council*', 59 *Common Market Law Review* (2022) p. 1771 at p. 1783.

[60]A. Alemanno and M. Chamon, 'To Save the Rule of Law You Must Apparently Break It', *Verfassungsblog*, 11 December 2020, https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/, visited 4 September 2024.

would have significantly greater powers).[61] A final example is *Chrysostomides,* where the Court determined that the Eurogroup was merely an informal institution and therefore not one which could itself establish acts liable to produce legal effects.[62] While one can, of course, have different view-points on the merits of these cases, they illustrate that EMU increasingly represents a testing ground for disputes regarding the *horizontal* balance of power too. Part of this relates to factors already discussed – as a field with wide boundaries and high political salience, the 'stakes' of EMU decisions are sufficiently high as to produce inevitable competition between institutions over 'who decides what'.[63] Cumulatively, these cases therefore speak to EMU as an area of particular significance in developing the EU legal order.

The final element of the core-periphery framework concerns discourse. In the internal market example, the connection of citizenship to the internal market speaks to the ability of the latter to influence new ways of seeing the EU as a political project. 'Citizenship' implies significant mutual obligations, moving the Union into an area closely associated with the sovereignty of its member states. EMU's development, however, even more radically questions what is means to participate in European integration. Crucially, EMU has from its inception invoked strong questions of sharing and re-distribution. Even the initial establishment of a common currency area was conceptualised by the Treaties as making national fiscal decisions an area of 'common concern', given that (as the Euro crisis aptly demonstrated) fiscal decisions in one state can easily spill over to others, limiting their budgetary autonomy.[64] For this reason, in cases such as *Pringle* and *Gauweiler*, the Court of Justice insisted that financial assistance measures, to be compliant with Article 125 TFEU, must be based on conditionality and the budgetary responsibility of each state.[65] Here, we see a strong notion of equality of member states, understood as their sovereignty to make independent financial decisions.[66] This notion of national budgetary

[61]P. Leino Sandberg, 'Next Generation EU: A Constitutional Change without Constitutional Change', *Re-Connect Blog*, 13 January 2021, https://reconnect-europe.eu/blog/new-generation-eu-a-constitutional-change-without-constitutional-change/, visited 4 September 2024.

[62]ECJ 16 December 2020, Case C-597/18 P, *Council* v *K. Chrysostomides & Co. and Others*, ECLI:EU:C:2020:1028.

[63]M. Dawson and A. Maricut-Akbik, 'Accountability in the EU's Para-regulatory State', 17 *Regulation & Governance* (2023) p. 142.

[64]Art. 121(1) TFEU.

[65]ECJ 27 November 2012, Case C-370/12, *Thomas Pringle and Others* v *Government of Ireland*, ECLI:EU:C:2012:756 at paras. 137-141; Case C-62/14, *Gauweiler*, *supra* n. 54, at para. 100.

[66]A. Bobić, '(Re)turning to Solidarity in EU Economic Governance: A Normative Proposal', in A. Farahat et al. (eds.), *Contesting Austerity: A Socio-Legal Inquiry Into Resistance to Austerity* (Hart Publishing 2021).

sovereignty has also been of crucial importance to some national Courts, particularly the German Constitutional Court.[67]

Since the Covid crisis, EMU has seen subtle changes in this narrative. The Next Generation EU programme heightens the inter-dependency of EMU member states still further, allowing for the first time both common debt instruments and the explicit re-distribution of resources towards member states most in financial need.[68] This re-distribution is based on governments pursuing explicit EU-level policy priorities. It is difficult, therefore, to conceptualise the Next Generation EU Programme as an instrument based on national budgetary autonomy and sovereignty alone: rather, the EU member states are agreeing to treat a certain pool of resources as 'common resources' and (unlike with the regular EU budget) accept the joint risks associated with basing these resources on debt.[69] Even the German government, including before its Constitutional Court, has defended the Programme as a solidarity-based instrument.[70]

It is perhaps then of little surprise that 'solidarity' is also increasingly resuscitated as a concept in the European Court of Justice's case law, used in cases ranging from rule of law to energy.[71] As noted in a recent editorial, it is also a concept increasingly anchored in EU legislative initiatives from the distribution of asylum-seekers to climate adaptation policies.[72] Solidarity is a contested concept but one which invokes a quite different conception of the European project – one rooted not only in the sovereign equality of states but in their inter-dependence and their resulting need to shoulder risks collectively.[73] In this sense, the development of EMU has shifted the narrative surrounding distribution and the sharing of benefits and burdens from an implicit to an explicit discourse, that

[67]BVerfG Own Resources Decision, *supra* n. 46, paras. 118-146.

[68]B. de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift', 58 *Common Market Law Review* (2021) p. 635.

[69]On the Next Generation EU Programme's re-distributive aspects, *see* M.A. Panascì, 'Unravelling Next Generation EU as a Transformative Moment: from Market Integration to Redistribution', 61 *Common Market Law Review* (2024) p. 13.

[70]*See* A. Becker, 'Germany as the European Union's Status Quo Power? Continuity and Change in the Shadow of the Covid-19 Pandemic', 30 *Journal of European Public Policy* (2022) p. 1473 at p. 1481.

[71]Editorial Comments, *supra* n. 1.

[72]Ibid., p. 958-959.

[73]*See* e.g. A. Sangiovanni, 'Solidarity in the European Union', 33 *Oxford Journal of Legal Studies* (2013) p. 20-29. On the ECJ's case law, *see* D. Schiek, 'Solidarity in the Case Law of the European Court of Justice: Opportunities Missed?', in H. Krunke et al. (eds.), *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press 2020),

increasingly reaches across different areas of EU policy, questioning what it means to be a citizen and member state of the Union.[74]

Before concluding this section, it is necessary to make one remark. The claims above are not designed to suggest that EMU has displaced the internal market as the 'core' of the European Union. The internal market remains a decisive element of EU law and one that is closely bound up with EMU itself. At the same time, the development of EMU has coincided with the development of other crucial fields of EU policy, such as climate and environmental policy, digital governance and a host of other areas. To take the environmental example, one could surely demonstrate its importance along the three categories of the core-periphery distinction too, i.e. the power, innovation and discourse-altering aspects of this policy field.

The intention instead was to demonstrate, by using the EMU example, that the EU is increasingly 'de-cored'. If it was once feasible to argue that the EU carried an internal market which decisively shaped the EU in a categorically different way than other fields, this claim seems less and less defendable today. Today's EU has multiple 'cores' – it has retained a powerful internal market but also diversified its policy priorities, establishing new challenges of managing trade-offs and inter-dependencies between them (as the rise of EMU and its influence on EU law demonstrates). The question then becomes – if the EU has been 'de-cored', what are the consequences of EU law's changing substance for the wider EU legal order? This will be the focus of the remaining sections.

The legal implications of a 'de-cored' EU

It may be useful to distinguish between three different general impacts of de-coring. The first set of implications concerns the legitimacy and authority of EU law, i.e. how a de-cored EU legal order defends and legitimates itself, particularly in relation to its political and legal interlocutors (such as national courts and legislatures). The second set of implications concerns the reach and effectiveness of the legal order, i.e. to what extent EU law remains 'relevant' under conditions of de-coring and how it acts to secure its own centrality in the EU's wider political system. Finally, a third set of implications concerns the concrete rules of EU law themselves, i.e. how particular doctrines of EU law are affected (or potentially even made redundant) by de-coring. As we will see, there is a close relation between all three sets of concerns. As the final section below will argue, there are existing attempts by the legal order to address each in turn – EU law is capable of

[74]On implicit and explicit discourse surrounding solidarity in EU law, *see* F. de Witte, 'Transnational Solidarity and the Mediation of Conflicts of Justice in Europe', 18 *European Law Journal* (2012) p. 694.

evolving but carries a 'functional hangover' from its market origins, problematising its ability to do so.

De-coring EU law's legitimacy: from hierarchy to 'balancing'

The first implication of the diversification of the EU's objectives concerns its impact on EU law's authority and legitimacy. Single purpose organisations carry a clear substantive hierarchy. Their mission is to achieve the core goal and therefore to orient their institutional framework – and hence also their legal framework – around it. In EU studies, this understanding of legitimacy has commonly been understood under the rubric of 'output' legitimacy, which suggests that there is a relatively clear shared understanding among members of an organisation as to the benchmark for desirable output.[75] This does not mean, of course, that single purpose organisations do not have to consider the impacts of their activities on 'other' policy goals. It means, however, that other policy goals are treated as exceptions to the rule that require justification and whose negative impacts on the 'core mission' must be minimised.

In the EU case, the classical manifestation of this structure is how the European Court of Justice has treated national restrictions in the context of the free movement of goods. National measures which restrict trade or make it less attractive may be justified as 'mandatory requirements' but only where Member States can demonstrate the proportionality of these measures and that they do not constitute arbitrary discrimination. This allows proportionality reasoning to follow a relatively predictable rule-exception logic. A whole range of measures necessary for public policy reasons may be upheld under EU law but only where they demonstrate their suitability and where they limit trade to the most limited extent necessary.

In a multi-purpose organisation, 'output' legitimacy is much harder to achieve for the simple reason that the more goals an organisation must fulfil, the more likely it is that these goals will conflict or affect each other. Achieving a high-level of environmental protection may require aiming at a lower-level of intra-community trade (for example, requiring consumers to 'buy local'); protecting digital rights may require unconventional forms of competition enforcement; forging a stable currency Union may require limiting or increasing social spending, and so on. What's more, members of the organisation are likely to disagree on the relative importance of the priorities the organisation pursues and how best to manage the resulting trade-offs.

[75]F. Scharpf, 'Legitimacy in the Multilevel European Polity', 1 *European Political Science Review* (2009) p. 173.

This problem of defining legitimate 'output' and managing the resulting conflicts inevitably spills over into the legal order. In a de-cored organisation, one can no longer follow the simple logic of 'rule-exception'. The job of a Court in such an organisation is no longer to 'minimise' the impact of the exception on the rule (it is impossible in fact to say which policy is the 'exception' to the other). Rather it is to balance several competing goals, none of which has a clear priority. Additionally, it may require a Court to *choose* or prioritise certain goals over others, bringing Courts into contested terrain (and potentially justifying greater deference to political institutions).

The Court of Justice increasingly finds itself having to conduct exactly this type of balancing.[76] When having to decide, for example, how to balance internal market measures with fundamental rights;[77] how to balance one fundamental right against another;[78] or how to adjudicate the boundaries between different legal acts,[79] the European Court of Justice must weigh and demarcate goals of equal constitutional value. How it does so is likely to be contested by other legal and political actors. The same challenge applies to political actors. For the EU legislature, how, for example, can the EU build a 'green new deal' without endangering single market objectives, and what should it do if achieving the former requires limiting the latter? And in the case of Commission officials, what should EU policy-makers do if their attempts to buttress EU industrial policy in the name of greater 'strategic autonomy' conflicts with their commitment to free trade and WTO rules?[80] The 'de-coring' of the EU thus poses a significant legitimacy challenge – it deprives EU law of a clear hierarchy of goals within which it can justify and structure its law and policy-making.

It is little surprise, therefore, that many of the examples of strong contestation of EU law emerging from national Courts in recent years concern precisely how the European Court of Justice balances interests and even competing Treaty goals. In a prolonged back and forth in *Taricco*, the Italian Constitutional Court and lower courts, for example, repeatedly questioned the balance struck under EU law

[76]On earlier ideas of balancing in EU adjudication, *see* J. Bengoetxea, 'Principles in the European Constitutionalising Process', 12 *King's Law Journal* (2001) p. 100.

[77]*See* e.g. ECJ 23 March 2021, Case C-28/20, *Airhelp Ltd* v *Scandinavian Airlines System*, ECLI:EU:C:2021:226; ECJ 30 April 2020, Case C-5/19, *Ø vergas Mrezhi AD and Balgarska gazova asotsiatsia* v *KEVR*, ECLI:EU:C:2020:343.

[78]*See* e.g. ECJ 29 January 2008, Case C-275/06, *Productores de Música de España (Promusicae)* v *Telefónica de España SAU*, ECLI:EU:C:2008:54; ECJ 16 December 2008, Case C-73/07, *Tietosuojavaltuutettu* v *Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECLI:EU:C:2008:727.

[79]*See* e.g. ECJ 21 December 2021, Case C-124/20, *Bank Melli Iran* v *Telekom Deutschland GmbH*, ECLI:EU:C:2021:1035.

[80]On this potential conflict, *see* G. Kübek and I. Mancini, 'EU Trade Policy between Constitutional Openness and Strategic Autonomy', 19 *EuConst* (2023) p. 518.

between the financial interests of the Union on the one hand and the principles of legal certainty and non-retroactivity on the other (prompting the European Court of Justice in its second ruling to emphasise the principle of legality as part of the constitutional traditions common to the member states).[81] In *PSPP*, the conflict over balancing was yet more dramatic, with the German Constitutional Court arguing that both the European Court of Justice and European Central Bank had failed to adequately weigh the impact of the Bank's monetary policy competences on national fiscal autonomy and on those most affected by 'unconventional' measures (such as savers).[82] The eventual *ultra vires* finding hinged on the German Constitutional Court's belief that – by excluding any kind of *sensu stricto* balancing between these two sets of interests – the European Court of Justice's approach to proportionality and the delineation of competences was simply 'incomprehensible'.[83]

Aside from the question of the merits of these judgments, they suggest something important about national contestation of EU law (and hence the authority of EU law more widely). Even if national legal and political systems do not contest the underlying goals of EU law, they may contest the way different objectives served by EU law are weighed and prioritised (often by analogising the way the European Court of Justice balances interests to the way this is conducted at the national level). The blurred boundaries between the expanded goals a 'de-cored' EU must deliver and key national policy prerogatives make this type of contestation more likely (a factor particularly at play in *PSPP*).[84] De-coring thus significantly complicates the way in which EU law can project its legitimacy, eroding the demarcating lines between national and European institutions.

De-coring EU law as a system: from enforcement to structuring

A second implication of de-coring concerns not the legitimacy but the reach and relevance of EU law, i.e. the question of whether and how the EU's legal system remains 'central' in a de-cored European Union. As already discussed, the centrality of EU law to the construction of the single market relates closely to some specific features of this policy field. While EU single market rules are addressed to member states, the private actors which benefit from the application

[81]*See* ECJ 8 September 2015, Case C-105/14, *Ivo Taricco and Others*, ECLI:EU:C:2015:555; ECJ 5 December 2017, Case C-42/17, *M.A.S.*, *M.B.*, ECLI:EU:C:2017:936.

[82]BVerfG, Judgment of 5 May 2020, 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15.

[83]Ibid., at para. 116.

[84]On this element of the *PSPP* saga, *see* M. Dawson and A. Bobic, 'Quantitative Easing at the Court of Justice – Doing Whatever it Takes to Save the Euro: *Weiss and Others*', 56 *Common Market Law Review* (2019) p. 1005 at p. 1017-1019.

of these rules have a strong incentive to enforce them through litigation. EU law therefore links three different levels of governance: directly affected individuals; national governments; and the supra-national level. Some 'new' areas of EU policy are analogous. In the area of digital governance, for example, once again EU regulation seeks to modify the behaviour of market actors with legal institutions important in ensuring that both member states and 'big-tech' follow EU rules. In these examples, EU law (and the EU Courts) therefore plays a direct role in ensuring that substantive rules of EU law are followed.

Other new areas of EU policy are quite different in nature. To take the example of climate policy, while companies are important actors, much EU climate regulation involves a bi-lateral relationship between the EU and its member states, with the EU pushing member states into developing policy frameworks to cut emissions, including through financial support to manage the climate transition.[85] In EMU, this bilateralism is even clearer. EU fiscal policy is largely about regulating how *member states* allocate spending, ensuring that fiscal risks for the EU as a whole are minimised.[86] Frameworks like the European Semester are therefore largely bilateral frameworks, with the Commission and member states the predominant actors.

This carries two important legal implications. The first is the by-passing of the individual. While a key story of EU law's development has been the use of private parties to protect the legal order, the individual (while massively affected by decisions in areas like climate and EMU) is far more marginalised. As a result, while both EMU and environmental policy have plenty of 'legal acts', they have seen limited levels of litigation, with large numbers of cases confined to areas like banking supervision, where private actors are directly regulated.[87]

The second is a shift in law's regulatory role. In a legal order with a single market core, much of law's role concerned directly enforcing obligations (often through litigation based on Treaty provisions with direct effect). In areas like EMU and the environment, the Treaties create few directly effective provisions, entrusting the EU institutions with the responsibility of establishing policies based on broad principles (such as, in the EMU case, stable prices or the prudent use of natural resources). Law therefore seems to *structure* rather than directly 'enforce' policy-making. In a de-cored Union, EU law therefore lacks two of the

[85]*See* e.g. the national action plans demanded under Art. 3 of Regulation 2018/1999/EU on the Governance of the Energy Union and Climate Action.

[86]On the 'missing individual' in EMU, *see* A. Bobić, *The Individual in the Economic and Monetary Union: A Study of Legal Accountability* (Cambridge University Press 2024).

[87]EMU therefore provided 12 out of the Court of Justice's 838 cases in 2021 (for environmental policy, there were 23 cases). *See* the ECJ's Annual Report on Judicial Activity, at https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-07/qd-ap-22-001-en-n.pdf, visited 4 September 2024.

mechanisms by which it gained 'centrality' in the EU's wider political system – its connection to the individual and the ability of the Treaties themselves to directly regulate the Union's central policy objectives.

This shift is reflected in changes in the form of EU law. In the 1990s and 2000s, soft law for example was mostly associated with EU action in fields where the EU carried limited competences.[88] In the last two decades, however, soft law has taken on increasing prominence in fields where the Union also has strong powers to legislate. In environmental policy, the complexity of environmental decisions and the need to integrate rapidly changing information has led to an increasing tendency to supplement environmental legislation with guidance documents and communications.[89] These may be non-binding but nonetheless of crucial importance in determining how regulators actually carry out environmental policy. Similarly in EMU, while legislation establishes the overall framework of fiscal policy coordination, many consequential decisions (for example country-specific recommendations or Commission Assessments of recovery plans in the context of the Next Generation EU Programme) carry a soft law form.

In both cases, the boundaries between policy-making and legal decisions are blurred – for example, determining whether a state has an excessive deficit depends on a complex balancing of risks that are difficult to specify in a clear rule *ex ante*. The dynamism and complexity of new policy fields has thus challenged (and even marginalised) the EU's historic reliance on static 'hard' legislation.

The shift of the Union from rule-making to spending as a vehicle to advance the EU's goals is likely to further this trend of using law not to enforce decisions already made but rather structure future decision-making. The Next Generation EU Programme, for example, is founded in a series of EU legislative acts. Decisions on national plans are also adopted by Council decision, as are decisions to activate forms of 'policy conditionality', such as the decision of the Council to suspend €6.3 billion of EU budgetary payments to Hungary in December 2022.[90] 'Hard law' under the Recovery and Resilience Facility, however, contains relatively loose substantive prescriptions, rather establishing a soft law process

[88]As put in the 2001 Commission White Paper on Governance, the OMC 'should not be used when legislative action under the Community method is possible': 'European Governance: A White Paper', COM (2001) 428 at p. 21. On early experimentalist approaches to the development of soft law, *see* C.F. Sabel and J. Zeitlin, 'Learning from Difference: the New Architecture of Experimentalist Governance in the EU', 14 *European Law Journal* (2008) p. 271.

[89]M. Eliantonio, 'Soft Law in Environmental Matters and the Role of the European Courts: Too Much or Too Little of it?', 37 *Yearbook of European Law* (2018) p. 496.

[90]*See* ~https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/#:~:text=According%20to%20the%20Conditionality%20Regulation,or%20beneficiaries%20of%20the%20funds, visited 4 September 2024.

through which decisions over the disbursement of spending can be negotiated between member states and the Commission over time.

Member states thus carry broad discretion to draw up national recovery national plans, provided that they are consistent with minimum levels of investment in the main priority areas of climate transition and digitalisation.[91] In terms of the Commission's discretion, their assessment of these plans is linked largely to substantive criteria to be elaborated through soft law, such as the European Semester, the Council's recommendations on the economic policy of the euro area and national energy and climate plans.[92] In simple terms, where there is hard law, it largely establishes a process of policy coordination within which the most important decisions (on funding priorities and disbursement) are made. Law structures decision-making, but rarely substantively determines policy (in a manner that, for example, a European Court of Justice decision determining the eligibility of non-nationals for a form of benefit in a free movement case frequently might). The de-coring of the EU does not render EU law redundant but may significantly alter its reach.

De-coring EU law doctrines – fostering legal change

A final set of impacts of the substantive de-coring of the EU concern concrete impacts on particular doctrines and principles in EU law. Principles of key relevance in an EU with an internal market core may be increasingly challenged in a de-cored Union. It may be useful here to return to some of the examples already used in sections above. For example, above we discussed how standing rules and the early goals of the Community inter-related, by for example producing a 'goldilocks zone' of of litigants, while avoiding frivolous legal claims. When applied to new policy fields, we can be relatively certain that EU law has left the goldilocks zone. As frequently discussed by others, EMU and environmental policy are both fields where the number of individuals affected by decisions is likely to be large in nature, depriving any one of the capacity to demonstrate that they are 'individually affected'.[93] It is noticeable, therefore, that while national Courts have seen extensive litigation by individuals or non-governemental organisations challenging the failure of national institutions to meet global climate obligations, similar litigation at the EU level has failed because of a lack of legal standing.[94]

[91]Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, Art. 17(4).

[92]Ibid., Art. 18(3).

[93]*See* e.g. F. Bignami, *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) p. 531-576.

[94]ECJ 25 March 2021, Case C-565/19 P, *Carvalho and Others* v *Parliament and Council of the European Union*, ECLI:EU:C:2021:252.

While, of course, this does not remove the possibility for litigation to reach the European Court of Justice through national courts, this is inhibited by numerous factors, such as the diverse standing rules of national courts and their varied willingness to engage the Court of Justice on matters of domestic political sensitivity. Questions, therefore, of high constitutional significance, such as the legality of the Next Generation EU Programme, or how the EU's climate act affects the mandate of the European Central Bank, may never reach the European Court of Justice, not because of a lack of concerned litigants but rather due to the path dependencies of standing rules established with a quite different set of EU goals in mind.

A second set of examples concerns mechanisms for the implementation of EU law. EU law has always attempted to balance between the need for enforcement of law on the one hand and allowing autonomy for national legal orders to remedy breaches on the other. In the case of infringement actions, this balance is represented in their 'dialogic' nature.[95] This balance is, of course, based on certain assumptions, namely that many failures to give effect to or implement EU law reflect not bad faith but rather an inability on the part of national institutions to either understand what EU law requires or carry the necessary capacities to implement EU law faithfully. In many classical areas of market integration – from food safety to product regulation – the sheer complexity of EU rule-making makes this type of non-compliance commonplace.

De-coring, however, suggests a shift of the Union into different areas of policy. To use examples like asylum, environmental and economic policy, the EU is regulating areas with significant distributive stakes and with high levels of political salience. This produces a greater likelihood of *intentional* non-compliance, i.e. a refusal to implement EU obligations not because they are misunderstood but because a domestic actor sees unduly high political costs in compliance. Many recent flashpoints between the EU and member states fall into this category – from the failure of three member states to participate in the EU's refugee re-settlement programme[96] to Poland's unwillingness to stop deforestation.[97] This also, of course, concerns conflicts over the rule of law itself, where so-called 'constitutional reform' has been a key political goal of the Hungarian and Polish governments in spite of its corrosive effects on the EU's legal order.

The difficulty in these examples is that 'dialogue' is unlikely to be effective. As mechanisms like the rule of law dialogue have demonstrated, negotiation and

[95] *See* ECJ 31 January 1984, Case C-74/82, *Commission* v *Ireland*, ECLI:EU:C:1984:34.

[96] ECJ 2 April 2020, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission* v *Poland*, ECLI:EU:C:2020:257.

[97] ECJ 17 April 2018, Case C-441/17, *Commission* v *Poland (Białowieża Forest)*, ECLI:EU:C:2018:255.

awareness raising is likely to do little to persuade governments to change policies that are central to their political identities.[98] Even the increasing use of innovative sanctioning measures such as interim relief[99] and heightened penalty payments[100] may be of limited effectiveness in that governments may treat such measures as 'costs' that pale in significance to the political costs of abandoning policies closely connected to their electoral programmes.[101] This – as the last section will explore – is not to say that EU law is unable to meet this challenge, but rather that the de-coring of the EU (by shifting rule-making into increasingly sensitive fields) demands significant change in the EU's approach to implementation. In terms of central doctrines and mechanisms of EU law, the EU's increasing functional diversity has blunted the usefulness of its existing tools.

Conclusion – catching up with de-coring?

The above sections present a potentially disconcerting picture. The de-coring of the EU has not only altered the EU's political trajectory but also unsettled the EU legal order, even rendering it less central and relevant to the project of integration.

From another perspective, however, the EU legal order has been remarkably adept at responding to processes of political change. This adaptability of the legal order can also be observed with reference to the implications of de-coring discussed above. To take them in turn, the multiplication of the EU's objectives may present the EU institutions with difficulties in balancing potentially irreconcilable values and interests. This does not mean, however, that the European Court of Justice cannot develop tools to deliver defendable forms of balancing. One approach, for example, is that the need to balance provides a stronger justification for anchoring legal decisions in the legitimacy provided by

[98]S. Priebus, 'The Commission's Approach to Rule of Law Backsliding: Managing Instead of Enforcing Democratic Values?', 60 *Journal of Common Market Studies* (2022) p. 1684.

[99]*See* Press Release 122/17, 'Poland must immediately cease its active forest management operations in the Białowieża Forest, except in exceptional cases where they are strictly necessary to ensure public safety', available athttps://curia.europa.eu/jcms/upload/docs/application/pdf/2017-11/cp170122en.pdf, visited 4 September 2024.

[100]*See* Press Release 192/21, 'As it has not suspended the application of the provisions of national legislation relating, in particular, to the areas of jurisdiction of the Disciplinary Chamber of the Supreme Court, Poland is ordered to pay the European Commission a daily penalty payment in an amount of €1,000,000', available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-10/cp210192en.pdf, visited 4 September 2024.

[101]*See*, for example, questions over whether the ECJ's order to cease logging in the Białowieża Forest was complied with. *See* 'Poland to resume some logging in ancient Bialowieza forest', *Reuters*, 9 March 2021, available at https://www.reuters.com/article/us-poland-eu-bialowieza-idUSKBN2B11WS/, visited 4 September 2024.

expressly political institutions. This would suggest, where possible, using EU legislation to inform how the Treaties and accompanying general principles are interpreted.[102]

Another approach is to turn not to legislation but to the EU's foundational values when conducting balancing, i.e. choosing, where possible, the interpretation of EU law that is most consistent with fundamental rights or other values contained in Article 2 TEU.[103] Perhaps substantive 'de-coring' precisely could pave the way for normative 'coring', i.e. an EU legal order that uses normative principles to structure its legal order in novel ways. What brings both of these avenues together is a reimagining of what is 'fundamental' in EU law and the initial hierarchy of substantive values that the internal market established. De-coring may therefore prompt new hierarchies in EU law, either in terms of institutions (e.g. giving more priority to the legislative branch) or of values (e.g. providing the Charter with greater prominence in EU law's interpretation).

Similarly, EU law may adapt to ensure its reach and effectiveness. If, for example, de-coring renders soft law an increasing part of the EU's legal acts, EU law can develop tools to tackle this. The European Court of Justice has generally refused invitations by its Advocates General to alter its general approach to the justiciability of soft law measures.[104] At the same time, it has shown an increasing willingness to draw within the ambit of judicial review a wide range of instruments, even allowing the preliminary reference procedure to be engaged for the purposes of ruling on the interpretation and validity of a non-binding instrument.[105]

The same ability to adapt applies to specific doctrines in EU law. The Court has been frequently asked to adapt its standing rules, particularly as a result of the Aarhus Convention.[106] It is within the Court's power to alter these rules – an effort which could be aided by organisational change (for example an expansion of the Court's members or altering the role of the General Court in preliminary rulings). Finally, the development of new remedies in relation to interim relief,

[102]M. van den Brink, 'Justice, Legitimacy and the Authority of Legislation within the European Union', 82 *Modern Law Review* (2019) p. 293.

[103]*See* e.g. the idea of rights as the core of the EU discussed in A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', 37 *Common Market Law Review* (2000) p. 1307; L. Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press 2023).

[104]*See* e.g. the Opinion of AG Bobek delivered on 12 December 2017 in Case C-16/16, *Belgium* v *European Commission*, ECLI:EU:C:2017:959.

[105]ECJ 15 July 2021, Case C-911/19, *Fédération bancaire française (FBF)* v *Autorité de contrôle prudentiel et de résolution (ACPR)*, ECLI:EU:C:2021:599.

[106]On this issue, *see* A. Danthinne et al., 'Justifying a Presumed Standing for Environmental NGOs: A Legal Assessment of Article 9(3) of the Aarhus Convention', 31 *Review of European, Comparative & International Environmental Law* (2022) p. 411.

and the increasing willingness to hear infringement actions which concern systemic deficiencies,[107] illustrate the ability of the EU legal order to recognise that its approach to EU law's enforcement must change. These developments suggest that the organic link between the substance and the form of EU law is not just a 'challenge' to the legal order but is already driving legal reform in the EU. De-coring in this sense is a way not just of understanding the EU's challenges but also its evolution.

EU law's changing substance thus suggests a different way of approaching the question of how EU law and the EU legal order ought to be reformed. This article began with the initial diagnosis of 'integration through law'. For that school of thinking, EU law was formed through a legal order that responded to political conflict (and stagnation). This way of thinking also influences the question of how scholarship sees the EU legal order today. It suggests, for example, that one of the primary dilemmas of EU law is its proper relationship to politics: a relationship that might be threatened either by an 'activist' Court or by the undermining of judicial independence by political institutions.

As this article has attempted to demonstrate, however, EU law was also formed through policy. The 'success' of the legal order was anchored not just in its ability to break through political conflict but its adeptness at delivering and facilitating the policy goals that underpin the Treaty. If this is so, the success and stability of the present EU legal order similarly rests not just on its relation to EU politics but on the suitability of EU law to support the diverse goals the EU of the mid-21st century must achieve. The changing substance of EU law thus deserves greater attention not only to understand the challenges EU law faces but to build its future legitimacy and resilience.

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[107]P. Pohjankoski, 'Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines, and Set-off', 58 *Common Market Law Review* (2021) p. 1341.