Sovereignty and Legitimacy: Contrasting Claims of EU Institutions with Member State Perspectives and Strategies

Vertical and Horizontal Dynamics of Integration Through Law at the Member State Level

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Abstract

The EU's integration through law depends on member states' administrations implementing EU policies and complying with EU law. For their electorates, it is thereby hardly transparent which are EU requirements and which domestic policy decisions. The paper is interested in the dynamics, when integration through law is contentious and politicised. Why do member-state administrations follow EU rules against political domestic opposition, risking their political support for the sake of integration through law? There are vertical dynamics between the Commission, the European Court of Justice and Member States, as the former oversee implementation. But there are also horizontal dynamics as Member States are mutually dependent on their implementation of European legal requirements. Integration through law confronts member-state administrations with constraints and requirements partly challenging their legitimacy.

1. Introduction: Vertical and Horizontal Dynamics and Integration Processes

European integration relies on integration through law. Law that is set at the European level requires implementation in the Member States; it is via law that integration proceeds, also because the European level does neither have a large budget nor significant administrative capacity. But when implementing integration through law, Member States use their political le-

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gitimacy, we learn from *Scharpf*, towards the ends of European integration.[1] The EU depends for the implementation of EU policies on Member States.

But what happens, if this is contentious and politicised? Why do member-state administrations follow EU rules against domestic political opposition, risking their political support for the sake of integration through law? And given their dependence on compliance of the Member States, in how far do EU actors respond? Moreover, all Member States as member of the EU face interdependencies. They also have stakes in whether their fellow members comply with EU law or ignore integration through law, as integration deepens mutual interdependence and non-compliance imposes costs on others – as is the case if Member States exploit integration for beggar-thy-neighbour policies. In this paper, I am interested in the dynamics following from the dependence of integration through law on Member States' implementation of EU policies. These dynamics are first of all in the vertical relation between EU actors and the Member States. But there is also a horizontal dimension among Member States, where non-compliance imposes costs on others or where some may use the positive and negative externalities evolving from the common economic and political space to their own fortune.

In the following, I start by discussing the concept of integration through law, to then turn to the challenges Member States are being confronted with, when putting it to work. I differentiate between the dynamics in the vertical dimension between Member States and European actors, the Commission and the European Court of Justice, and the horizontal dimension, of Member States among themselves. Just as the Commission can initiate infringement procedures, so can Member States, but they rarely do, although they bear costs and benefits of their respective (non-)compliance. The Commission and the European Court of Justice, for their part, are ultimately dependent on Member States, and have no means to force them into action. We are thus faced with interesting endogenous tensions in the multi-level system.

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

2. Integrating Through Law

Integration through law is an influential concept in European integration studies, and one having several different dimensions.[2] The EU is lacking a strong central government, and therefore it relies on law as its major governance mechanism. This law needs to be subsequently implemented by Member States for this integration to materialise – when replacing national policies with policies that were agreed at the EU-level, Member States work towards European integration. But integration through law has yet another dimension. It also points at the importance of dynamic case law development of the European Court of Justice for integration. Because EU law was constitutionalised with the rulings declaring direct effect and supremacy in 1963/64, the development of EU law does not rely only on political processes.[3] The European Court of Justice can replace political decisions with its case law development, spelling out those requirements the Member States have to adhere to, without relying on previous political decisions.

These different dimensions of integration through law capture most aspects of European integration research. The lack of core-state powers with the need to largely govern through rules[4], the reach of dynamic case law development,[5] and the question of implementation.[6] But the dominance of integration through law is also an important backdrop to the politicisation

2 R. B. Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18 *German Law Journal*, 6; M. Cappelletti, M. Seccombe, and J. H. H. Weiler, *Integration Through Law. Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions* (De Gruyter, 1986).

3 J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal*, 8.

4 P. Genschel and M. Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press, 2014).

5 D.S. Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015); S. K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018).

6 T. A. Börzel, *Why Compliance. The Politics of Law in the European Union* (Cornell University Press, 2021); R. D. Kelemen and T. Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75 *World Politics*, 4.

of the integration process.[7] For a long time, integration through law kept the politicisation of integration low.

My focus in this paper is on the member-state level. The EU is a "government of governments".[8] The EU not only borrows Member States' administrations for the implementation of EU policies, it also borrows their legitimacy, *Scharpf* holds.[9] But why do member-state governments use their legitimacy to implement EU law, where it does not further their interests? Which are the dynamics when bringing integration through law to work at the member-state level? And how does the EU-level respond, given that it utterly depends on Member States' cooperation?

We can think of several aspects when analysing how Member States put to work integration through law. Whenever EU law results from the legislative process, and governments have agreed to it, we should assume their willingness to also implement EU rules. However, there are some caveats. When the underlying policy problem resembles a prisoner's dilemma in its problem structure, also those Member States that agree with the thrust of the policy have the incentive to defect. They are better off, if all the others implement, say, environmental measures, but they themselves free-ride. The risk of non-compliance is even larger with those Member States not having agreed to the EU legislation, or those having had a change in government in between.

It is thus not trivial that integration through law actually works. An additional aspect needs mentioning. EU laws, once agreed, are relatively difficult to change. EU policies have a significant status-quo-bias, so that costs arise from having policies that are difficult to be reformed. The saga of the working-time directive is a telling example.[10] But also the reform of the social-security coordination has not been possible since 2016.[11] Conflict rules on the responsible national system of social security were first enacted

7 L. Hooghe and G. Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 *British Journal of Political Science*, 1.

8 F. W. Scharpf, see n. 1.

9 F. W. Scharpf, see n. 1, 181.

10 T. Nowak, 'The Working Time Directive and the European Court of Justice' (2008) 15 *Maastricht Journal of European and Comparative Law,* 447.

11 C. Grabbe, 'Free Movement and Access to Social Security in the EU: The Challenge of Exporting Unemployment Benefits' (2023) 25 *European Journal of Social Security,* 20.

in regulations No. 3 and 4 in 1958, and have been periodically reformed.[12] Regulations 883/2004 and 987/2009 contain the current rules.

On the one hand, the EU's legislative process is demanding, as it needs a proposal by the European Commission and subsequent majorities in the Council and the European Parliament (EP). On the other hand, many EU policies create path-dependencies, as actors adapt and institutions are established in line with these policies. Because rules often have distributive effects, some actors will resist reform. If laws are clearly in need for reform, it becomes even more difficult to expect that Member States comply with them.

Successful implementation at the member-state level can therefore rely on the European Commission pursuing non-compliance with infringement procedures, or on litigants that address the courts and push for their rights under EU law, with member-state courts addressing the European Court of Justice potentially with preliminary reference procedures. Next to the vertical pressure on Member States from the Commission and/or the European Court of Justice, there could also be horizontal pressure from Member States towards other Member States, which mutually rely on their implementation for integration through law to succeed.

Putting integration through law to work successfully can be expected to be even more problematic, when this law roots in case law development rather than in political decisions. *Scharpf's* distinction between negative and positive integration is relevant here.[13] Where positive integration refers to common policies overcoming differences among Member States, negative integration creates markets via the lifting of national regulatory restrictions. However, negative integration via case law may be particularly demanding on national political legitimacy when being implemented. In this case, authorities have to refrain from using domestically available policy options, though these could realise domestic political preferences.

To sum up: Integration through law captures that law is the primary instrument for the European Union to pursue its integration efforts. Dynamic case law development of the European Court of Justice has supported integration through law throughout the EU's history. However, the EU relies on Member States' administrations for integration through law to

12 P. Pierson and S. Leibfried, 'Multitiered Institutions and the Making of Social Policy' in S. Leibfried and P. Pierson (eds), *European Social Policy Between Fragmentation and Integration* (The Brookings Institution, 1995).

13 F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

work – and it not only borrows administrative capacity but also the greater political legitimacy of member-state governments. It is therefore not trivial for integration through law to work. We now turn to analysing the vertical and horizontal dynamics resulting from this dependence.

3. *The Implementation Dimension – Bringing Integration Through Law to Work in the Member States*

Being dependent on national administrations to implement its policies, the EU borrows member-state governments legitimacy towards their electorates. This introduces tensions. Drawing on the distinction between positive and negative integration, we can analytically differentiate dynamics that result for Member States in the vertical and horizontal dimensions.

Table 1: Vertical and horizontal dynamics among Member States (MS)

	Positive integration	Negative integration
Vertical dimension	Where MS were outvoted, they nevertheless have to comply with EU law. There are partly incentives to free-ride in implementation. Reform problems imply the need to implement outdated policies.	EU law constrains governments' policy options, e.g. free movement rules or non-discrimination on the basis of nationality
Horizontal dimension	Implementation can imply uneven costs among MS; also, free-riding imposes costs on others.	Regulatory competition results between MS as they lose the means to close their markets

Altogether, the table makes plausible that one should not necessarily expect integration through law to work smoothly at the member-state level. Why would Member States implement EU law that does not bring benefits or even impose costs? The European Commission, of course, has the means to bring pressure via infringement procedures to push Member States into compliance. However, the Commission can only risk a certain amount of conflict with the Member States – and as *Kelemen and Pavone* argue, it is increasingly abstaining from using this legal instrument, as it rather wants

to push its policy agenda and wants to refrain from alienating Member States.[14]

In the following, I give examples for the four cells of the above table. This is not systematic evidence in any way. Integration through law can only function, if Member States are willing to implement EU law, but they need to do this at the expense of their own political legitimacy. Consequently, one needs to look for cases which are politically contentious, to see how actors cope in these instances.[15] The main thrust is to explore the dynamics integration through law faces at the level of the Member States.

3.1 The Vertical Dimension

In the vertical relationship between the EU and Member States, the implementation of jointly decided EU policies is particularly demanding, whenever Member State governments have not agreed to EU policies under qualified-majority rule.[16] Why should they use their legitimacy to enforce these rules against potential opposition in their country? But non-implementation need not be directly linked to opposition to the EU-policy's goals, it may also be due to the height of implementation costs. Thus, Germany still has not implemented the EU working-time directive (2003/88/EU) in many parts of the public sector.[17] Member States may see formerly agreed rules in need of reform and be therefore unwilling to implement them.

In addition to implementing positive integration, Member States have to abide by the constraints of negative integration. Next to realising the single market via the four freedoms and competition law, Member States may not discriminate based on nationality. This imposes particular challenges on democratically elected Member State governments. They were elected to realise certain policy goals, but these may no longer be legally feasible as a member of the EU. Though they are not part of the constituency, EU citizens may not be discriminated against – and this may even result in a reverse discrimination of nationals, whenever governments continue

14 R. D. Kelemen and T. Pavone, see n.6.

15 D. Beach and R. Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan Press, 2013).

16 Strategic objections in the interest of blame avoidance are the exception.

17 D. Creutzberg, 'Stechuhr für alle? Nicht für Richter' *Frankfurter Allgemeine Zeitung* (Frankfurt 1 April 2023) <https://zeitung.faz.net/faz/wirtschaft/2023-04-01/aeb92371379d70f798079d02d70819ae/?GEPC=s5> accessed 17 January 2025.

to enforce regulation domestically, while actors from other Member States benefit from their more favourable home rules.[18] *Scharpf* mentioned the case of German medical students in Austria; a saga that took long to resolve as the smaller Austria initially could not restrict the access of Germans to its universities.[19] Given increased inner-EU migration following rounds of Eastern accession, the general constraints governments face when aiming to restrict welfare benefits for EU citizens have been figuring high in attention. This is also because Brexit was so closely connected to this question.[20] I will first discuss the vertical relationship when it comes to implementing contentious EU law, and then turn to the compliance with case law constraints.

3.1.1 Implementing Agreed Secondary Law

In the literature on Member States' compliance with EU law are different positions in the literature – some regard the Commission as turning a blind eye to non-implementation, and others regard the small number of infringement cases as a sign of compliance.[21] In the following, I start with the example of the services directive (2006/123), which was an unusual contentious piece of legislation.[22] It demonstrates how the EU pressure on national legitimacy is being mediated – this is done giving actors time to adapt, as implementation partly takes very long. This allows integration through law to work, even if its demands are contentious.

Take the granting of Italian beach concessions. They have been under pressure for long to be awarded under transparent procedures for a limited period, as demanded by the services directive and the freedom to provide

18 E. Ambrosini, 'Reverse Discrimination in EU Law: An Internal Market Perspective' in L. S. Rossi and F. Casolari (eds), *The Principle of Equality in EU Law* (Springer International Publishing, 2017); M. van den Brink, 'A Typology of Reverse Discrimination in EU Citizenship Law' (2023) 2 *European Law Open*, 57.

19 F. W. Scharpf, see n. 1.

20 S. K. Schmidt, 'No Match Made in Heaven: Parliamentary Sovereignty, EU Over-constitutionalization and Brexit' (2020) 27 *Journal of European Public Policy*, 779.

21 T. A. Börzel, see n. 6; R. D. Kelemen and T. Pavone, see n. 6.

22 A. Crespy and K. Gajewska, 'New Parliament, New Cleavages after the Eastern Enlargement? The Conflict over the Services Directive as an Opposition between the Liberals and the Regulators' (2010) 48 *Journal of Common Market Studies*, 5; M. D. Jensen and P. Nedergaaed, 'From "Frankenstein" to "Toothless Vampire"? Explaining the Watering Down of the Services Directive' (2012) 19 *Journal of European Public Policy*, 6; K. Nicolaïdis and S. K. Schmidt, 'Mutual Recognition "on Trial": the Long Road to Services Liberalization' (2007) 14 *Journal of European Public Policy*, 5.

services. However, typically, this is a family business where concessions are passed on from one generation to the next. Several Court rulings have dealt with the question, such as infringement procedures initiated by the Commission C-458/14 and C-67/15 as well as the recent preliminary ruling C-348/22. The European Parliament commissioned a study in 2017 as to the unresolved issue.[23] Finally, in 2024 it appeared that the granting of concessions would be restructured as of 2025, also under the pressure of an Italian association Mare Libero, domestically organising protests against the privatisation of Italian beaches through these concessions.[24]

Another example comes from Germany and concerns the prohibition of third-party ownership for law firms. Again, this is an issue for the freedom to provide services and the services directive, but also the freedom of establishment and free movement of capital. A preliminary reference decided in late 2024 (C-295/23) was the result of a 'constructed' case, where an Austrian investor bought a German law firm, both parties being personal friends, with the intention to start litigation aiming to abolish the German prohibition.[25] The Federal Ministry of Justice under a liberal Minister, *Marco Buschmann*, certainly promised favourable scope conditions. But the Federal Bar Association was strictly opposed to the move, arguing that the prohibition of third-party-investors protects the professional spirit of lawyers, and that the proportionality test allows for such restrictions; it is used to assess the reach of the fundamental freedoms and also relevant under the services directive.[26] While the Advocate General in his opinion clearly argued for a violation of EU law, the Grand Chamber let the restrictions pass under the general interest exception of the fundamental freedom.

23 Policy Department C Citizens' Rights and Constitutional Affairs, 'Italian state beach concessions and Directive 2006/123/EC, in the European context. Study for the PETI Committee' (PE 596 809, European Parliament 2017) <www.europarl.europa.eu/RegData/etudes/STUD/2017/596809/IPOLSTU(2017)596809_EN.pdf> accessed 17 January 2025.

24 AP, 'Beach Wars: Are EU and Italy close to resolving beach concession feud?' (*euronews* 23 August 2024) <www.euronews.com/business/2024/08/23/beach-wars-are-eu-and-italy-close-to-resolving-beach-concession-feud> accessed 17 January 2025.

25 M. Kudermann, 'Die Finanzialisierung der Anwälte' (*Jacobin* 26 August 2024) <https://jacobin.de/artikel/fremdbesitzverbot-marco-buschmann-eugh> accessed 17 January 2025.

26 Bundesrechtsanwaltskammer, 'Stellungnahme gegenüber dem BMJ zum EuGH-Vorlageverfahren AGH München, Beschluss vom 20. April 2023 – BayAGH III – 4 – 2021' (Stellungnahme Nr. 41 July 2023) <www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2023/stellungnahme-der-brak-2023-41.pdf> accessed 17 January 2025.

Different to the case of the Italian beaches it appears that notable domestic support for this liberalisation has not built up sufficiently, though legal tech companies and insurers would very much welcome a liberalisation of the legal professional code in Germany. For the time being, therefore, the German law profession can continue with its traditional restrictions- with likely repercussions on other German professions.[27]

We now turn to an example of compliance difficulties, where Member States violate existing secondary law that they feel is no longer adequate.

The indexation of child benefits has become a politically salient issue with much more significant intra-EU mobility after Eastern enlargement – and the greater differences in cost-of-living among Member States. Social security systems remain national and are not harmonised. Coordination rules determine whether the country of work or of habitual residence is responsible for social security. According to Article 67 of regulation 883/2004, the country of work is responsible for the benefits also of family member living in other Member States.

Motivated by the concessions the European Commission had granted the United Kingdom prior to the Brexit vote, Austria introduced the indexation of child benefits in 2019. The United Kingdom had gotten the right to indexation under its renegotiation terms. Austria wanted to cut back on subsidies from social benefits for migrants from Eastern Europe, though indexation meant that child benefits for children living for instance in Scandinavia would need to be higher.

Blauberger et al. criticise the indexation policy, given its high administrative costs, as showing that even the free movement of labour is no longer taken for granted in the EU, because governments bow to pressure of politicisation from right-wing populists.[28] In fact, the actual costs of exporting child benefit are only high in small countries such as Luxembourg. In Germany, merely 1% of all benefits goes to children living abroad.[29] The Commission initiated an infringement procedure against Austria. The

27 'Luxemburg verwehrt Investoren den Zugang zu Anwaltskanzleien' *Frankfurter Allgemeine Zeitung* (Frankfurt 20 December 2024) 23.

28 M. Blauberger, A. Heindlmaier and C. Kobler, 'Free Movement of Workers under Challenge: The Indexation of Family Benefits' (2020) 18 *Comparative European Politics*, 925.

29 'Arbeitsagentur überweist rund halbe Milliarde Euro an Kindergeld ins Ausland' *WELT* (Berlin 27 December 2024) <www.welt.de/politik/deutschland/article254977550/Kindergeld-Rund-500-Millionen-Euro-fliessen-ins-Ausland.html> accessed 17 January 2025.

European Court of Justice ruled in June 2022 (C-328/20) the indexation to violate the social security coordination as well as the prohibition to discriminate according to nationality, bringing the end to Austrian indexation. The case shows how the EU is divided by the issue – the Commission was supported by Czech, Croatian, Polish, Slovenian, Slovak governments, and the EFTA surveillance authority, while Austria was supported by Denmark and Norway.

Different to *Blauberger et al.*, *Ruhs* and *Palme* argue against the exportability of child benefits, supporting a change from linking the benefit to the employment status to shifting it to habitual residence. They see a strong normative claim that states offer the same benefits to all children residing in their country, and explain the politicisation of the export of child benefits with the unfairness of the EU's approach.[30]

Despite the ruling of the European Court of Justice, indexation is still a relevant issue, showing that integration through law reaches limits here. Bavaria offers social benefits for families with children, which are lowered if children live in a Member State with lower cost-of-living expenses. The Commission has threatened to initiate an infringement procedure during 2024. Italy also introduced benefits for families with children, but eligibility depends on a two-year residence in Italy, where children also have to live.[31]

Germany had also responded to poverty migration in 2019 by restricting access to child benefits in the first three months of residence for EU citizens with no employment. But the European Court of Justice ruled in 2022 (C-411/20) that this is not possible under EU law, also because returning Germans are not banned from benefits.[32] Child benefits can support exploitative relations, as they are the only benefit, economically inactive EU

30 M. Ruhs and J. Palme, 'Free Movement and European Welfare States: Why Child Benefits for EU Workers Should Not Be Exportable' in N. N. Shuibhne (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press, 2023).

31 M. Wolf, 'Familiengeld in Bayern ungerecht? EU-Kommission droht mit Klage' *BR24* (Munich 25 July 2024) <www.br.de/nachrichten/deutschland-welt/familiengeld-in-bayern-ungerecht-eu-kommission-droht-mit-klage,UJYwjXa> accessed 17 January 2025.

32 K. Gelinsky, 'Kindergeldsperre für Ausländer ist EU-rechtswidrig' *Frankfurter Allgemeine Zeitung* (Frankfurt 1 August 2022) <www.faz.net/aktuell/wirtschaft/kindergeld-sperre-fuer-auslaender-ist-eu-rechtswidrig-18214351.html?GEPC=s5> accessed 17 January 2025; N. Bugaj-Wolfram, 'EuGH: Kindergeldsperre für erwerbslose EU-Bürger*innen in den ersten drei Monaten ist rechtswidrig' (*Der Paritätische Gesamtverband*, 8 August 2022) <www.der-paritaetische.de/alle-meldungen/eugh-ki

citizens can have immediate access to, once taking habitual residence in Germany. After the accession of Bulgaria and Romania had broadened the socio-economic divide in the EU substantially, some German municipalities faced the problem of poverty migration.[33]

In these examples, vertical pressure relates to existing secondary law. We proceed to discussing pressure arising from case law constraints.

3.1.2 Complying with Case Law Constraints

Already the implementation of the services directive shows that EU liberalisation does not come with a bang but as a slow process. In it, typically, groups of domestic actors form and start supporting the change. Whether obligations are mediated via secondary law (like with the services directive), or directly stem from the Treaty (to which we now turn), protracted implementation may allow for incremental adaptations that are more easily legitimated. Seikel already showed with view to the different impact of the infamous Laval ruling in Sweden and Denmark, how in Sweden construction business went for confrontation with the unions, while in Denmark the consensus between employers and unions could be stabilised.[34]

But when rulings imply higher costs, it remains difficult to follow the demands of integration through law. Similar to the case of German medical students in Austria, the European Court of Justice opened the non-means tested and generous Danish study grants to some EU students in 2013 (C-46/12) – if they qualify, for instance, via an EU worker status, thereby falling under the prohibition to discriminate along national lines.[35] The free movement of workers applies under a low threshold. In *Genc* (C-14/09), the European Court of Justice even argued that working five hours per week suffices. Denmark requires working 10–12 hours weekly. Thanks to a highly digitised administration, study grants are given and withdrawn according

ndergeldsperre-fuer-erwerbslose-eu-buergerinnen-in-den-ersten-drei-monaten-ist-rechtswidrig/> accessed 17 January 2025.

33 S. K. Schmidt, 'Ein Kampf der Staatsgewalten? Die schwierige soziale Absicherung des europäischen Freizügigkeitsregimes' (2019) 65 *Zeitschrift für Sozialreform*, 29.

34 D. Seikel, 'Class Struggle in the Shadow of Luxembourg. The Domestic Impact of the European Court of Justice's Case Law on the Regulation of Working Conditions' (2015) 22 *Journal of European Public Policy*, 1166.

35 D. Kramer, J.S. Thierry and F. van Hooren, 'Responding to Free Movement: Quarantining Mobile Union Citizens in European Welfare States' (2018) 25 *Journal of European Public Policy*, 1501.

to sufficient employment. Nevertheless, Denmark in 2021 decided to cut down on its degree programmes in English language, as the expenses for international students surpassed the threshold set in a political agreement in response to the European Court of Justice ruling.[36] English language degree-courses were only in the national interest if foreign students are likely to stay and work in Denmark.[37] While the extensive non-discrimination jurisprudence of the European Court of Justice aims to overcome borders, this initial Danish reaction – enabled by the non-widely spoken national language – actually enforced these borders.

Scharpf argued that by opening up benefit schemes based on non-discrimination, the European Court of Justice may undermine the financing of support: "By replacing the reciprocal link between entitlements and contributions with the assertion of unilateral individual rights, the Court may seem generous. But its generosity ignores the club-good character of most of the benefits and services provided by the solidaristic nation state".[38]

For Member States, it has been particularly contentious to give economically inactive EU citizens access to non-contributory social benefits in the 2010s.[39] Legally, the extent of rights was unclear – and we are dealing here with a mixture of Treaty interpretation and secondary law. The citizenship directive of 2004, agreed on at the eve of Eastern enlargement, in fact had granted this right only after five years of legal residence with own financial means and a health insurance. But the coordination regulation for social security (883/2004) that was reformed at the exact time, implied that the

36 Ministry of Higher Education and Science Denmark, 'A new political agreement limits SU spending on foreign students from the EU' (*ufm.dk*, 5 July 2021) <https://ufm.dk/en/newsroom/press-releases/2021/a-new-political-agreement-limits-su-spending-on-foreign-students-from-the-eu> accessed 17 January 2025.

37 J. P. Myklebust, 'New reforms include bid to attract international students' (*University World News*, 11 March 2023) <www.universityworldnews.com/post.php?story=20230310131701751> accessed 17 January 2025; The Local, "Crazy": Opposition parties hit out at Danish limits on international students' (*The Local DK*, 2 August 2023) <www.thelocal.dk/20230802/crazy-opposition-parties-hit-out-at-danish-limits-on-international-students> accessed 17 January 2025; ICEF monitor, 'Lessons from Denmark: The downside of limiting international student flows' (20 March 2024) <https://monitor.icef.com/2024/03/lessons-from-denmark-the-downside-of-limiting-international-student-flows/> accessed 17 January 2025.

38 F. W. Scharpf, see n. 1, 195.

39 M. Blauberger and S. K. Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 *Research and Politics*, 1.

country of habitual residence was responsible.[40] It took the European Court of Justice a decade to follow the citizenship directive and restrict the access to social benefits for economically inactive EU citizens. For quite some time, the EU citizenship and non-discrimination rules of the Treaty helped the Court to construct rights to equal treatment also for the economically inactive, thereby sidestepping the directive.[41] The citizenship jurisprudence of the European Court of Justice is a very telling example of the way integration through law works – with the Court extending the rights beyond the political consensus.[42] But in 2014, in view of the political contestation, the European Court of Justice stopped its hitherto line of ever expanding the non-discrimination of economically inactive EU citizens with the case of *Dano* (C-333/13).

The underlying problem is as complex as the rules. With many Member States not offering their citizens the security of basic social benefits, the immediate opening is linked to fears of substantial poverty migration. It may be good to remember that also in federal states, the poor of one state often cannot count on immediate access to benefits outside of their normal place of residence.[43] Two issues are particularly relevant – poverty migration with its burden on public finances, public services and housing[44], and the subsidisation of low paid jobs, often inviting exploitation of the migrating working poor.

3.1.3 Coping with Vertical Dynamics

What kind of dynamics do we see, when it is politically contentious to put implementation through law to work at the member-state level, threatening

40 S. K. Schmidt, 'The Limits of Judicialising Transnational Welfare: Progression and Retrogression of the ECJ Case Law on Access to Social Benefits' in D. Kostakopoulou and D. Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar, 2022).

41 M. van den Brink, *Legislative Authority and Interpretation: Political Judgment in European Union Law* (Oxford University Press, 2024).

42 M. Wind, 'Post-national Citizenship in Europe: the EU as a "Welfare Rights Generator"?' (2009) 15 *Columbia Journal of European Law*, 2.

43 W. Maas, 'Boundaries of Political Community in Europe, the US, and Canada' (2017) 39 *Journal of European Integration*, 575.

44 HAMBURG Journal, 'Obdachlose in Hamburg: Lage laut Straßenmagazin teils "dramatisch"' *Norddeutscher Rundfunk* (Hamburg 4 November 2024) <www.ndr.de/nachrichten/hamburg/Obdachlose-in-Hamburg-Lage-laut-Strassenmagazin-teils-dramatisch,obdachlose578.html> accessed 17 January 2025.

the legitimacy of national political actors? When regulatory change like liberalisation is the issue, a drawn-out implementation process mediates the pressure and facilitates integration through law.

When integration through law imposes costs, granting more time is no solution. There is significant national politicisation of the opening of social systems in response to larger intra-EU mobility. Underlying it is that courts grant rights to free movement and non-discrimination, although social-security systems are the result of political processes. The lack of political decision-making behind non-discrimination decisions makes them particularly vulnerable to politicisation and populism. This also explains the will of open non-compliance, which we saw with child benefit indexation. In Germany, the right-wing populist Alternative für Deutschland (AfD) thrives on parliamentary questions regarding the costs resulting from refugees or EU citizens requiring social benefits.[45] Given general EU support, the relevance of the problems is difficult to assess.

There are also instances of politicisation from other Member States, for example the Netherlands. There was a conflict particularly about Polish workers, using the portability of unemployment payments to live for some time in their home country, to come back to the Netherlands afterwards to take up new employment. Dutch unemployed, in contrast, are immediately activated in view of a good labour market.[46] The problem here is that unemployment insurance consists, on the one hand, of payments that are portable; but on the other hand, activation of the unemployed is just as much part of the unemployment insurance. This activation is much higher in the Netherlands, as Polish authorities have less of an incentive with benefits being paid from another country. The lower price level in Poland, at the same time, implies less de facto pressure to take up work again. The example of the opening of Danish study grants to EU students was already mentioned above.[47]

The extent of politicising vertical constraints of EU law appears dependent on the extent to which the respective government is willing to garner or prevent politicisation of the relationship. The examples of Denmark and the Netherlands show that it is hardly possible to assess the costs and benefits of unemployed EU citizens or opening students grants. Denmark checked to which extent graduates of international programmes worked in

45 See: BT Drs 19/754; BT Drs 19/9817; BT Drs 19/2473.
46 C. Grabbe, see n. 11.
47 D. Kramer, J.S. Thierry and F. van Hooren, see n. 35.

the country after graduation. Regarding unemployment insurance, this is more difficult to do, as one would have to consider that in cases of longer crises migrant workers are more likely to move on than are members of the native population.[48]

Altogether, there are not many options open to governments, given vertical constraints of EU law. Open non-compliance as with the indexation of child benefits is unlikely to be successful, but rather fosters EU-scepticism. EU-friendly governments are likely to cover-up the cost, while EU sceptical governments will be prone to blow-up and exaggerate the constraints – and this implies that the way vertical constraints are being perceived is very volatile, depending on politicisation.

But we also see reactions at the EU-level, at the European Commission and also at the European Court of Justice. The pressure stemming from the EU is not invariant. After all, the EU's legitimacy suffers as well, should member-state governments come too much under pressure. Thus, the EU actors European Commission and European Court of Justice do not operate in a vacuum, they are dependent on the cooperation of actors from the Member States. As *Blauberger et al.* argued with view to the European Court of Justice and its about-turn in the question of the access of non-economically active EU citizens to social benefits, "judges read their morning papers"; in view of high politicisation, they slow down developing case law.[49] We saw this above with the cases of Italian beaches and the German restrictions on law firms. Similarly, the Commission may be more cautious regarding the constraints of EU law on Member States.[50] A further example may be its position towards the Danish ghetto policy. In order to reverse the development of segregated living quarters, Denmark enacted quite a radical housing policy in 2018, targeting residential areas with dominant non-Western tenants. In reaction to the displacement of particularly

48 Thus, in calculations as to the benefits of migration from Bulgaria and Romania the expectation that many will leave Germany after retirement is taken in as an advantage for the social-security systems. See: Carsten Wolf, 'Erfolgsgeschichte statt "Armutszuwanderung"' (*Mediendienst Integration*, 29 December 2021) <https://mediendienst-integration.de/artikel/erfolgsgeschichte-statt-armutszuwanderung.html> accessed 30 January 2025.

49 M. Blauberger, A. Heindlmaier, D. Kramer, D. Sindbjerg Martinsen, J. Sampson Theirry, A. Schenk, B. Werner, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 *Journal of European Public Policy,* 1422.

50 R. D. Kelemen and T. Pavone, see n. 6.

Muslim families from their neighbourhoods, a preliminary reference was handed to the European Court of Justice, with the hearing in autumn of 2024 (C-417/23). Residents of Mjølnerparken in Copenhagen had brought the legal action against their eviction from housing, arguing that it was racially discriminatory.[51] Interestingly, the Commission's legal service argued the policy to be only indirectly (and not directly) discriminatory, thereby leaving scope for justifying such a policy out of general interest considerations in a proportionality assessment.[52] It remains to be seen how the Court will judge this policy. The Advocate General, for her part, argued that the policy was directly discriminatory, implying that Denmark could not use this policy option.[53]

We can take from this discussion that the pressure *Scharpf* analysed from the tension between EU opening via non-discrimination and free movement, and Member States financing via national solidaristic systems has become less apparent in open financial constraints, but more in the domestic politicisation of migrants' access to the welfare state. How Member States react to vertical constraints as part of the multi-level system is volatile; EU-friendly governments are likely to downplay constraints, while more integration-sceptical actors may blow them up.

3.2 The Horizontal Dimension

Integration through law not only establishes obligations of Member States towards the EU-level, it also establishes them towards each other. The single market as well as other EU policies such as the Euro regime or home affairs deeply interconnect member states. Cooperation benefits and the

51 Open Society Justice Initiative, 'EU Top Court to Review Denmark's "Racially Discriminatory" "Ghetto Package"' (*Open Society Foundations*, 17 June 2024) <www.justiceinitiative.org/newsroom/eu-top-court-to-review-denmark-s-racially-discriminatory-ghetto-package> accessed 17 January 2025.

52 Europäischer Gerichtshof, 'Rechtssache C-417/23 Zusammenfassung des Vorabentscheidungsverfahrens gemäß Art. 98 Abs. 1 der Verfahrensordnung des Gerichtshofs' (6 July 2023) <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=276705&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=2890091> accessed 17 January 2025.

53 Court of Justice of the European Union, 'AG Ćapeta: The Danish legislation on public housing in transformation areas constitutes direct discrimination based on an ethnic criterion. Advocate General's Opinion in Case C-417/23. PRESS RELEASE No 18/25' (13 February 2025) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2025-02/cp250018en.pdf> accessed 4 March 2025.

avoidance of negative externalities require that Member States comply with their prior legislative commitments. However, if they had different policy preferences to begin with, why should they? Moreover, if the underlying problem structure resembles a prisoners' dilemma, non-implementation allows having the cake and eating it. Member States then free ride on the implementation efforts of others.

When harmonised regulations are agreed with positive integration, this can achieve positive externalities and avoid negative externalities. In fact, the same is true for negative integration. The broad interpretation of the fundamental freedoms as prohibition of restrictions avoids that Member States enact new trade barriers via regulation. Member States are forced to take into account repercussions on other Member States.[54] Similarly, the prohibition to discriminate on the basis of nationality assures equal treatment throughout the EU, while constraining Member States' policies – as the example of German medical students in Austria already showed. At the same time, harmonised common policies or the lifting of restrictions leads to spill-over in other policy fields. One example are open borders that facilitate trade but put pressure to enact a common asylum policy.

In the following, I focus first on Member States' mutual compliance with secondary law and then on problems driven by the integrated economic and political space, that invites regulatory competition and, possibly, beggar-thy-neighbour policies.

3.2.1 Member States' Reactions to Non-Compliance

Just as the Commission can push for compliance with the initiation of infringement procedures, Member States can initiate these against each other at the European Court of Justice. After all, they incur costs if other Member States defect and opt towards free-riding with implementation deficits. However, Member States hardly ever make use of their possibility to start infringement procedures against each other. Only six cases are known.[55] Although non-compliance directly concerns them, Member States rely on the Commission and the vertical relationship to enforce EU law.

54 C. Joerges, 'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making' (2006) 44 *Journal of Common Market Studies*, 779.

55 Case C-141/78 *France v. UK* [1997] CJEU; Case C-388/95 *Belgium v. Spain* [2000] CJEU; Case C-145/04 *Spain v. UK* [2006] CJEU; Case C-364/10 *Hungary v. Slovakia*

This relaxes the horizontal dynamics of interference between Member States.

Interestingly, in Justice and Home Affairs, we are confronted with horizontal dynamics that we do not see in other areas of insufficient compliance with EU law. There are many decisions of domestic courts objecting to the national administration following EU rules, thereby preventing that integration through law works. With regards to asylum, national courts take it upon themselves to control whether human rights standards are sufficiently honoured in other Member States, for instance concerning accommodation in refugee camps. Similar questions rise with the European Arrest Warrant regarding judicial procedures and prisons. Thus, despite the common policies of the Dublin accord, German courts have prohibited renditions to Greece and Bulgaria, given the dire conditions of accommodation there. The European Court of Justice allows this as a sign of systemic deficiency, lifting the duty to cooperate in mutual trust following from Article 2 TEU.[56] Insufficient compliance with EU law, leading to domestic court cases when individual rights are concerned, constitutes and strengthens mutual interest in previously purely domestic affairs. In the course of these growing horizontal externalities among Member States, the EU has strengthened its vertical grip on Member States. Just as happened in the Euro crisis regarding

[2012] CJEU; Case C-591/17 *Austria v. Germany* [2019] CJEU; Case C-457/18 *Slovenia v. Croatia* [2020] CJEU.

56 In German called „systemischer Mangel". Fundamental is C-411/10 N.S. regarding the transfer of refugees to Greece, in the suite of which MS ended the rendition to Greece on the basis of the Dublin regulations (see Recommendation of the Commission 2016/1117). See also C-163/17 regarding the transfer to Italy. Mutual trust is foregone if Article 4 of the Charter of Fundamental Rights regarding inhuman or degrading treatment is not safeguarded. Thus, the administrative court in Freiburg (04.02.2016, A 6 K 1356/14) refused sending back a refugee to Bulgaria; as did the administrative court of Oldenburg (01.07.2014, 12 B 1387/14). The administrative court in Munich did the same regarding sending back a refugee to Croatia (22.02.2024, M 10 K 23.50597) as well as to Cypris (15.12.2022, M 3 S 22.50694). The upper administrative court of North Rhine-Westphalia addressed a preliminary reference to the European Court of Justice regarding the announcement of the Italian administration in December 2022 to no longer accept renditions because of systemic deficiencies (14.02.2024, 11 A 1255/22.A). See: Legal Tribune Online, 'Keine Abschiebungen nach Griechenland' (24 November 2022) <www.lto.de/recht/nachrichten/n/ovg-saarland-2-a-81-22-abschiebungsverbot-griechenland-systemische-maengel/> accessed 17 January 2025. Regarding Hungary, there are contradictory assessments, which are summarised in Administrative court Würzburg 23.02.2017, where the court affirmed the rendition of a pregnant refugee. See: VG Würzburg, 'Beschluss vom 23.02.2017 – W 2 S 16.50198', <https://openjur.de/u/2282247.html> accessed 17 January 2025.

Member States' spending regimes, national institutions related to the rule of law are increasingly subject to streamlining, implying a centralisation tendency.[57]

Different to Justice and Home Affairs raising questions of human rights, we do not see domestic courts act with view to other examples of non-compliance. This difference also exists with view to the attention of external border. While problems resulting from insufficient controls of external borders are widely discussed regarding asylum, there was surprisingly little attention when it became known that Bulgaria had failed for years to control agricultural goods entering from Turkey sufficiently with view to pesticides.[58]

Regarding Member States mutual interests in each others' implementation, it is also interesting to note that implementation demands may affect member-state administrations in an asymmetric way. Sometimes, national administrations enforce rules predominantly to the benefit of other Member States. Controlling borders are a case in point, but it may also be that exports in an area are more important than domestic consumption. In this case, it is not so much that their own population benefits from high standards of product safety, although they face the expenses for administrative controls. In such situations, either the costs of compliance or of non-compliance are being externalised. Other countries may benefit from these administrative controls or they pay for insufficiently controlled rules and companies.

That the enforcement of rules in one Member State is predominantly to the benefit of others, is, for instance, the case in transborder-services provision such as posting. Here, administrations enforce the preconditions of secondment, such as the remuneration of workers according to conditions in the host country to the benefit of these host countries. Thereby, they constrain competitive pressures, while foregoing their own competitive benefits.[59]

57 M. M. Manriquez and T. Pavone, 'Follow the Leader: the European Commission, the European Court of Justice, and the EU's Rule of Law Revolution' (2024) 32 *Journal of European Public Policy*, 444.

58 S. Nowotny, 'Pestizide: Warum die bulgarischen Grenzkontrollen fragwürdig sind' *Schweizer Radio und Fernsehen* (Zurich 1 June 2023) <www.srf.ch/news/international/fruechte-fuer-europa-pestizide-warum-die-bulgarischen-grenzkontrollen-fragwuerdig-sind> accessed 17 January 2025.

59 M. Blauberger and S. K. Schmidt, 'Negative Integration Is What States Make of It? Tackling Labour Exploitation in the German Meat Sector' (2023) 61 *Journal of Com-*

3.2.2 Regulatory Competition in the Single Market

Regulatory competition as a result of the single market is probably the most widely discussed horizontal implication for Member States.[60] Wherever economic pre-conditions are not harmonised, like qualifications, energy costs, social security contributions, taxes (etc.), companies or individuals have incentives to settle in cheaper Member States. For instance, higher inheritance or wealth taxes may be very desirable for Member States but impossible to enact under conditions of open borders. In early 2023 Norway – a member of the European Economic Area – made headlines due to the high numbers of rich Norwegians settling in Switzerland after the government raised the wealth tax.[61] An extreme example of regulatory competition are corporate taxes in Ireland. In this context, Apple was ruled to being liable to pay €13 billion in taxes to the Irish government[62] – an extent of repayment, actually imposing problems to the Irish budget. That many examples for regulatory competition concern taxes points to an interesting aspect of regulatory competition – causes of asymmetry. In tax competition, this concerns the differences between small and large countries. Small Member States are particularly prone to benefit from tax competition, as the losses of lower taxation in the comparatively small tax base are much less relevant than the significant increases, if companies choose the country for their establishment.[63]

Not all asymmetries are as insurmountable as country size. Institutional and socio-economic differences as well as cultural preferences also cause asymmetric conditions. Thus, *Zöllmer* and *Grethe* analyse the difficulty pressure groups faced in Germany lobbying for higher standards on hus-

mon Market Studies, 917; N. Rennuy, 'Posting of Workers: Enforcement, Compliance, and Reform' (2020) 22 *European Journal of Social Security*, 212.

60 J-M. Sun and J. Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies*, 67.

61 D. Vonplon, '«Dass so viele Kunden aus einem Land in die Schweiz umziehen wollen, habe ich noch nie erlebt»' *Neue Züricher Zeitung* (Zurich 27 January 2023) <www.nzz.ch/schweiz/dass-so-viele-in-schweiz-umziehen-wollen-habe-ich-noch-nie-erlebt-ld.1721229> accessed 17 January 2025.

62 T. Hartmann, 'Top EU court orders Apple to pay €13 billion tax bill' *Euractiv* (Brussels 10 September 2024) <www.euractiv.com/section/competition/news/top-eu-court-orders-apple-to-pay-e13-billion-tax-bill/> accessed 17 January 2025.

63 V. H. Dehejia and P. Genschel, 'Tax Competition in the European Union' (1999) 27 *Politics and Society*, 403.

bandry.[64] Though public opinion had favoured the introduction of stricter standards than the existing EU minimum harmonisation for years, the fear of seeing the national production of piglets decline due to the cost of better caring for sows, prevented action. Altogether, instances of regulatory competition set incentives for harmonisation in those Member States that are harmed by it – but others enjoying competitive advantages are unlikely to agree.

Because of the asymmetries among the Member States, some may also be lured into openly exploiting the interdependencies among each other. This is akin to the problem of tax competition. Such is the case with investment citizenship programmes, which some Member States have installed particularly in the course of the Euro crisis. Notably Malta, Cyprus and Bulgaria have to be mentioned here; in fact, most Member States offer at least residence by investment schemes. But notably Malta 'sells' its citizenship to rich Russians or other citizens of states with passports offering less privileges, demanding investment but hardly any residence in the country as a precondition.[65] Malta's citizenship, of course, would be of little worth, were it not for the EU citizenship being tied to it, with the freedom to move in all of the EU. Several law firms are active in this business, which extends also to countries such as the Caribbean islands that benefit from privileged access to Schengen visas. Law firms not only help their clients acquiring the passports, but also assist the states in 'vetting' the candidates, making for an attractive service business. The European Parliament first critically debated these practices as free-riding in 2014, calling repeatedly upon the Commission for action.[66] The Commission became active a few years later,

64 J. Zöllmer and H. Grethe, 'Enabling Free Movement but Restricting Domestic Policy Space? The Price of Mutual Recognition' (2024) 10 *European Policy Analysis*, 380.

65 Think Tank European Parliament, 'Aspects of golden passport and visa schemes in the EU. Briefing' (11 September 2024) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762395> accessed 4 March 2025.

66 Legislative Train Schedule European Parliament, 'Citizenship and residence by investment schemes. In "A New Push for European Democracy"' (*European Parliament*, 23 June 2022) <www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-citizenship-and-residence-by-investment-schemes?sid=6001> accessed 17 January 2025; Think Tank European Parliament, 'Avenues for EU action on citizenship and residence by investment schemes – European Added Value Assessment' (*European Parliament*, 21 October 2021) <www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)694217> accessed 17 January 2025.

resulting in some reports.[67] The Russian war against Ukraine then not only halted the possibilities for Russians acquiring EU citizenship but also led the Commission to put in a higher gear and refer an infringement procedure against Malta to the European Court of Justice (C-181/23). Cyprus and Bulgaria had ended their practices under Commission pressure before.

The case is interesting not only because of the Commission attempting to end the outgrowth of the strengthening of individual liberal rights, it has done itself so much to foster. Alongside the European Parliament, it aims to morally refer to solidarity as the essence of EU citizenship that may not be up for sale. But it finds few legal backings in the Treaty for its argument, pointing mainly to EU citizenship of Article 20 TFEU and to the principle of sincere cooperation of Article 4.3 TFEU. Interestingly, Advocate General *Collins* in his opinion of August 2024 backed Malta.[68] The Commission, it seems, cannot get rid of the spirits it called.[69]

In selling their citizenship or residence, Malta or other countries clearly rely on exploiting the common European space, created through law. But there are also examples of very indirect externalities on neighbours stemming from seemingly purely domestic policy choices. Thus, a Czech minister complained about German social transfers like the high child benefits. Already German wages imposed high competitive pressure on his country, aiming to retain workers, added social benefits actually made it impossible to compete.[70] And recently, the Hungarian decision on facilitating visas for

67 European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Investor Citzenship and Residence Schemes in the European Union COM(2019)12 final' (*EUR-Lex*, 23 January 2019) <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=COM:2019:0012:FIN> accessed 17 January 2025.

68 S. Coutts, 'On mutual recognition and the possibilities of a "Single European Polity": The opinion of AG Collins in Case C- 181/23 Commission v Malta' (2024) 9 *European Papers*, 818; E. Fripp, 'Maltese "golden passports": Advocate General rejects European Commission claim of "genuine link" requirement for naturalisation' (*EJIL:Talk!*, 8 November 2024) <www.ejiltalk.org/maltese-golden-passports-advocate-general-rejects-european-commission-claim-of-genuine-link-requirement-for-naturalisation/#:~:text=On%2021%20March%202023%2C%20the,EU%2C%20could%20be%20created%20by> accessed 17 January 2025.

69 M. Höpner, 'Darf Malta seine Unionsbürgerschaft verhökern?' (2025) *Merkur*.

70 A. Zachová, 'Deutsche Sozialleistungen locken tschechische Arbeiter' *Euractiv* (Brussels 14 May 2018) <www.euractiv.de/section/soziales-europa/news/deutsche-sozialleistungen-locken-tschechische-arbeiter/> accessed 17 January 2025.

Russia and Belarus led to criticism, as these persons can then go on to be posted, for instance, to other Member States.[71]

In addition, we can note here the recent complaints particularly from Sweden and Norway about ultra-high electricity prices in the EU, caused by Germany having to import record amounts of electricity in the winter of 2024, as a side-effect of its exit from nuclear power despite the Ukrainian war.[72] The decision about nuclear power had, however, been taken as a purely domestic one.

In sum, integration through law and the common economic and political space implies that regulatory decisions of Member States have repercussions on other Member States. These may be targeting the potential of regulatory competition and exploitation, or take external repercussions merely as an unintended consequence.

3.3 Perpetual Dynamics?

As we saw, vertical constraints on Member States can be mediated, so that the pressure on Member States legitimacy is less apparent than *Scharpf* expected in 2009. Since then, horizontal interdependencies have become rather important. Constraints appear to play out with the movement of persons than for other economic factors. The politicisation and rise of right-wing populism is one consequence. Member States increasingly rely on each other, and thereby have legitimate interest in domestic policy decisions, though it would hardly appear legitimate were they to intervene on decisions such as the end of nuclear power or the height of social transfers. Yet, in the conflict about 'Golden Passports', there is an interesting void as to the reactions of other Member States – though this is a case of open free-riding, the discussion among the other Member States is notably absent. It is not politicised by or in other Member States that citizenship for sale implicitly relies on the membership of their countries in the EU citizenship space.

71 A. Brzozowski, 'Ungarn bleibt stur: Einreiseerleichterungen für Russen und Belarussen' *Euractiv* (Brussels 20 August 2024) <www.euractiv.de/section/eu-aussenpolitik/news/ungarn-bleibt-stur-einreiseerleichterungen-fuer-russen-und-belarussen/> accessed 17 January 2025.

72 M. S. Wolf, 'Deutsche Energiepolitik in der Kritik: Schweden und Norwegen beklagen hohe Strompreise' *Merkur* (Stuttgart 15 December 2024), <www.merkur.de/wirtschaft/deutsche-energiepolitik-in-der-kritik-schweden-und-norwegen-beklagen-hohe-strompreise-zr-93466919.html> accessed 17 January 2025.

This differs in the case of asylum, as it did in the case of the Euro crisis. In the latter, setting-up strict conditionality rules strengthened the vertical grip on Member States.[73] Regarding asylum, we saw that declined human-rights standards lead domestic courts to stop renditions. Rule of law deficits, particularly in Hungary, moreover, raise concern that the different redistributive funds of the EU serve to stabilise authoritarian leaders.[74] While negative externalities of authoritarian changes in Member States are most apparent in questions of Justice and Home Affairs, declining rule of law standards also matter in general, by undermining mutual trust in law abidance. As a consequence, particularly rulings of the European Court of Justice, often triggered by preliminary references, have tightened the vertical grip on rule-of-law questions, leading to a judicially grounded definition of polity requirements.[75] Needless to say, such a revolution from above raises important issues of legitimacy as there is no 'standard' way of the separation of powers and the institutionalisation of judicial independence.[76]

4. Conclusion

Integration through law can only be successful in the EU, if Member States implement policies and comply. Several dynamics result from this need. In the vertical dimension, the EU imposes constraints that can be costly for the legitimacy of Member States governments as political options are taken away. Governments can cover-up and downplay these constraints, or blow them up and exaggerate. This implies that the support for the EU risks being subject to significant volatilities. While support may appear secured, also due to the pro-EU bias of governments compared to their electorate[77], EU sceptical parties may suddenly succeed with their exaggeration of constraints.

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73 F. W. Scharpf, 'Forced Structural Convergence in the Eurozone' in A. Hassel and B. Palier (eds), *Growth and Welfare in Advanced Capitalist Economies How Have Growth Regimes Evolved?* (Oxford University Press, 2021).

74 R. D. Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27 *Journal of European Public Policy*, 481.

75 M. M. Manriquez and T. Pavone, see n. 57.

76 M. Nettesheim, 'Europäische Werte und mitgliedsstaatliche Verfassungsautonomie – über einen Machtkampf in der EU' in F. Michl and T. P. Holterhus (eds), *Die schwache Gewalt? Zur Behauptung judikativer Autorität* (Mohr Siebeck, 2022).

77 H. Döring and P. Manow, 'Electoral and Mechanical Causes for Divided Government in the European Union' (2008) 41 *Comparative Political Studies*, 1349.

But Member States depend also on each other's implementation, when agreeing on common policies. Partly, this interdependence is asymmetric – Member States incur implementation costs less for their own, but more to the benefit of other Member States. In addition, with integration progressing partly purely domestic policy decisions have externalities on other Member States. And, moreover, Member States may actively exploit asymmetries, such as with investment citizenship programs.

Member States have been surprisingly lenient with each other when it comes to not honouring promises and commitments stemming from EU law. They rely on the Commission. However, when it comes to EU laws concerning human rights, it is national courts that have stepped in, hindering national administrations in the rendition of refugees, for instance. In single market issues, despite problems, Member States hardly litigate each other, preferring diplomatic principles. Domestic courts, neither, bar products from another Member State because of, say, problems in the control of the implementation of product safety laws.

We therefore come full circle, as the exploitation of interdependencies of individual Member States via beggar-thy-neighbour policies strengthens the mandate of the supranational level to intervene. After it has been well-established in the case of single-market policies, also rule-of-law questions are increasingly judicialised to support supranational intervention, often with measures of conditionality involving EU funds.[78] With integration through law becoming important for the rule of law, Member States' institutional and political heterogeneity is under pressure. The dynamics in this polity dimension stemming from the implementation of EU policies thereby underline the difficulty of the EU to allow for legitimate diversity.[79]

78 A. Hoxhaj, 'The CJEU Validates In C-156/21 and C-157/21 The Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5 *Nordic Journal of European Law*, 131.

79 F. W. Scharpf, 'Legitimate Diversity: the New Challenge of European Integration' (2003) 1 *Zeitschrift für Staats- und Europawissenschaften*, 32.