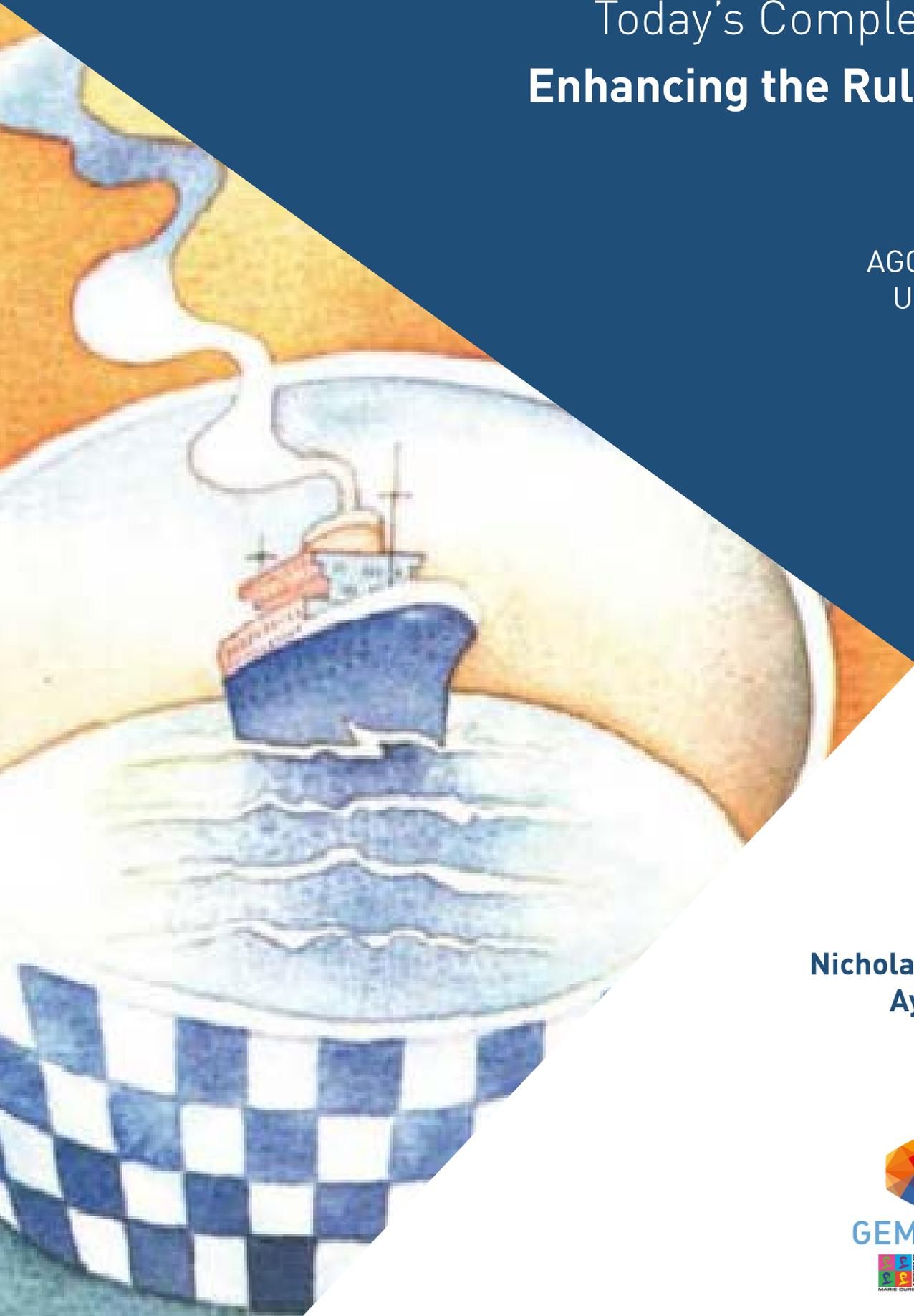


# Policy Perspectives on the EU in Today's Complex World: **Enhancing the Rule of Law**

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**GEM STONES**



European Joint Doctorate on  
Globalisation, Europe & Multilateralism -  
Sophistication of the Transnational Order,  
Networks, and European Strategies

## «Steady as She Goes? The European Union Navigating Today's Complex World»

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**Rooted in original scientific research, AGORA© Fora endeavour to improve policy making by fostering suggestions based on academic research and effective dialogue among a limited number of participants hailing from the research, policy making and civil society communities.**

The rationale behind the GEM-STONES AGORA© Fora is to foster two-way interactions between the GEM-STONES' academic research and policy-making in the fields broached by the GEM-STONES' research agenda. This enables the GEM-STONES PhD Fellows to jointly reflect on their research in an inter-sectoral environment as they will be confronted by representatives from both the academic and non-academic sectors.

Roundtable 5 of the 2018 AGORA© Forum on «The EU in Today's Complex World: Enhancing the Rule of Law» discussed the EU's ability to safeguard the Rule of Law - be it domestically or internationally. It explored to what extent institutional / legal provisions within the EU have allowed for a "conscious effort [by the EU institutions] to address and improve [both] institutional interactions" as well as guarantees safeguarding fundamental rights, due process and the separation of powers.

The following briefs, prepared by three MSCA-funded GEM-STONES Early Stage Researchers served as reference documents for discussions on the specific role of European and national judiciaries in setting the limits and contours of its crisis-driven policy-making efforts with regards to European:

- Cooperation in criminal matters to combat terrorism (ESR-1 Céline Cocq)
- Macro-economic governance (ESR-7 Nicholas Haagenen)
- Migratory governance (ESR-13 Aysel Küçüksü)

Cover image:  
Jean-Michel Folon - Croisière dans la tasse

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## ROUND TABLE 5 – Enhancing the Rule of Law

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ESR 1: The Institutions of the European Area of Freedom, Security and Justice (AFSJ) and the Global Fight Against Terrorism



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### BACKGROUND OF THE STUDIED POLICY FIELD

EU counterterrorism law follows the evolution of criminal trends. The Islamist terrorism has ruthlessly impacted Europe since the Madrid attack in 2004. The EU required Member States to criminalise terrorist offences and further develop cooperation mechanisms. Since most of these attacks have extraterritorial EU elements, the EU has adopted strategies, developed tools and established bodies in order to promote externally its own human rights and security standards. The EU may be an important hotbed of foreign terrorist fighters, but the Association of South East Asian Nations (ASEAN) follows. Although the level of regional integration differs, the two regions have developed their regional legal framework criminalising terrorist offences and aiming to facilitate intra-regional cooperation. Using a normative approach, it will expose the current state of the law as adopted and implemented in both regions. This PhD will provide a comparative regional analysis between the EU and ASEAN and an interregional analysis focusing on counterterrorism. It will especially examine the EU' strategy in promoting its standards in ASEAN. This study adopts a criminal law approach, but constitutional, administrative, immigration and military laws are also involved.

Cooperation in criminal matters within the EU has been the object of numerous publications (Anne WEYEMBERGH and Gilles DE KERCHOVE (eds.), *Vers un espace judiciaire pénal européen* (Brussels: Ed. de l'Université de Bruxelles, 2000); Gert VERMEULEN, Wendy DE BONDT and Charlotte RYCKMAN (eds.), *Rethinking international cooperation in criminal matters in the EU* (Antwerpen: Maklu, 2012)). However, certain aspects remain unexplored or are so quickly evolving that it requires constant analysis and update, even within this region. This is the case of information and intelligence sharing (Franziska BOEHM, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice. Towards Harmonised Data Protection Principles for Information Exchange at EU-level* (Heidelberg: Springer, 2012)). The analysis of the EU's external dimension remains scarce (Cremona and al, *The external dimension of the AFSJ*, 2011; Van Vooren and Wessel, *EU external relations law*, 2014) and few publications have addressed its external dimension in counterterrorism (O'Neill, *The evolving EU counter-terrorism legal framework*, 2012). Numerous publications focusing on security matters in ASEAN are the result of political science studies. Legal literature has been very limited, notably regarding ASEAN's counterterrorism efforts. Similarly, comparative regionalism has grown exponentially. Some political science publications compared the EU and ASEAN regionalisms (Novotny and Portela, *EU-ASEAN Relations in the 21st Century*, 2012; Telo et al, *Interregionalism and the EU*, 2015), but legal comparisons are almost non-existent.

In this context, this study aims at filling in a gap both regarding the regional legal analysis and the EU-ASEAN relations. The final outcome of this PhD research might be either the creation of a grid of analysis for further regional and/or interregional legal studies in criminal matters or the demonstration of very specific regional systems developing with their own set of particularities that limit their interregional collaboration when combating terrorism.

### BACKGROUND OF EU ACTIONS IN THE STUDIED POLICY FIELD

The EU has gone through a tremendous institutional evolution, including in the field of police cooperation in criminal matters, which has deeply impacted its counterterrorism policy. The Lisbon Treaty has indeed largely communitarised this field. In terms of normative developments, a fundamental evolution is to be noticed as well. The EU has adopted norms to facilitate cooperation based on common standards and mutual trust. It adopted two consecutive framework decisions on terrorism in 2002 (Council Framework Decision 2002/475/JHA) and 2008 (Council Framework Decision 2008/919/JHA). The latter amended the former by adding public provocation, recruitment and training for terrorism. After the adoption of the Lisbon Treaty and the attacks in Paris, the European Commission adopted a new Directive to integrate provisions criminalising travelling abroad for terrorist purposes and ensuring the protection of the rights of victims of terrorism (Directive (EU) 2017/541). In parallel, the EU develops mechanisms of cooperation including information and intelligence sharing (Council Framework Decision 2006/960/JHA; Council Decision 2008/615/JHA; Regulation (EU) 2016/794). Adopting norms and means to counter terrorism, the EU always aims to reach a coherent balance between security and human rights. For instance, using information and intelligence sharing as means of cooperation, the EU adopted a two-fold objective, namely facilitating the cross-border flow of information while preserving the right to privacy, including the right to the protection of personal data (Directive 95/46/EC; Council Framework Decision 2008/977/JHA; Directive 2016/680; Regulation (EU) 2016/679).

The EU has been working with its Member States to harmonise the national legislations and developing cooperation mechanisms in order to ensure the best response regional against terrorism. Despite having control at its external borders, the EU is conscious that this does not stop the external threat. Terrorism cannot be dealt with within the sole European region. ASEAN is also particularly concerned by the terrorist threat that affects the region. But, although ASEAN could claim to be one of the most successful experiments in regional cooperation in the developing world, it remains a traditional intergovernmental organisation without independent regional representativeness. Today, the ASEAN legal architecture is mainly governed by non-binding regional instruments and by regional instruments transposing the international norms with limited changes and adaptations. Interactions with this region may therefore be a challenge. For this reason, the EU must not think its relations with ASEAN as regional organisation to regional organisation. In fact, the EU and ASEAN attempted a “group-to-group dialogue” through regular senior officials and ministerial meetings. The two organisations emphasised the importance of the shared values and common interests that bind them in a long-standing and unique relationship as “partners in integration” (Nuremberg Declaration (2007); Council of the EU, Press statement of the ASEAN-EU commemorative summit (2017)). Since 2008, the EU is in fact the only partner of ASEAN with regard to regional integration. The EU has supported different missions towards a more connected and integrated ASEAN. For instance, the EU supports missions of development and assistance in the region, mainly via the DG for International Cooperation and Development.

## SWOT ANALYSIS OF EU ACTIONS IN THE STUDIED POLICY FIELD

As the most integrated regional organisation, and not a State, the EU can certainly play a significant role in Southeast Asia to support ASEAN regional integration in security matters.

In particular in the field of this PhD research, the EU has been effective in harmonising its Member States’ criminal laws and in developing cooperation mechanisms, with regional agencies coordinating competent national authorities’ action(s). Due to its experience, the EU has a card to play in the region. Making each country knows each other - their policy, their legislation, their actions and objectives - is a necessary step towards a common regional action against terrorism (exchange of best practices and information, mutual learning).

In terms of norms diffusion, the EU has been worldwide known for promoting human rights standards and having an effective control mechanism. However, these norms can be in conflict with other norms or values that exists in other countries. This aspect often forgotten is essential to the effective implementation of common standards (mutual understanding)

Moreover, with regard to regional cooperation, the EU has developed an institutionalised approach that may not correspond to the ASEAN approach at the moment. But the links that Europol and Aseanapol are starting to develop are worth been further enhanced and a demonstration of the added value of such coordinated approach may be a future step. As elaborated in this PhD research, trust between relevant national authorities and then, potentially, between institutions may be necessary to develop and enhance cooperation.

EU's missions are difficult to implement in ASEAN as it is confronted to multiple interlocutors, namely the ASEAN Secretariat and ASEAN Member States.

At first, the EU has adopted a regionally centred approach supporting the ASEAN Secretariat to be a driving force for promoting dialogue, moderation and cooperation for peace, security, stability and prosperity in the region. For instance, the EU has particularly supported the ASEAN Common Visa. The EU's objective is to develop a more legalistic architecture in the region. These relations, including those related to criminal matters are rather strategic for now. For instance, Europol and Aseanapol have recently started to talk to each other but no operational agreement exists between the European agency and the Southeast Asian forum of discussion.

But more effective at this stage of ASEAN integration, the EU has resigned to conclude bilateral agreements with every ASEAN Member States to develop operational relations, including in criminal matters. In fact, operational communication is more significant between the Member States of each region.

Therefore, interregional relations are hardly happening between the two regional organisations as such but rather between the EU and ASEAN Member States or between the Member States of each regional grouping.

## RECOMMENDATIONS

The EU is a significant normative power and a force of norms diffusion. However, although it should not lower down its standards, it needs to adapt its actions to the local circumstances.

Developing of a policy and legal analysis to understand better the state of the art of the fight terrorism in each country would improve knowledge and ensure that all the measures proposed to the countries can actually be implemented with a long-term perspective.

Also, if the EU wishes to have, one day, a single interlocutor, it needs to work with ASEAN Member States on the points mentioned in the previous box. Working on this aspect of harmonisation and regional institutionalisation could be a long run project but which could be worth it for ASEAN and the EU and for the interregional relations.

A better knowledge of each other and finding common legal standards and procedures shall facilitate cooperation between regions and even enable the EU and ASEAN countries to evolve from diplomatic and -potentially- strategic relations towards more operational types of cooperation.

## ROUND TABLE 5 - Enhancing the Rule of Law

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### BACKGROUND OF THE STUDIED POLICY FIELD

The policy field under study is the macro-economic constitution of the Europe Union, the Economic and Monetary Union (EMU). The EMU – established by the Maastricht Treaty in 1992 – was designed to deliver economic growth and price stability. These two policy targets would be achieved with an asymmetrical institutional structure whereby monetary policy moved to the supranational level and was centralized at the European Central Bank, and fiscal and economic policy stayed at the national level, albeit with the Member States coordinating their economic policies in a decentralized system of governance. This asymmetry meant fiscal integration would be substituted by financial integration (Rey 2013), but also meant having the tension of fiscal constraints coming from the supranational level together with democratic sovereignty at the national level. With the introduction of the Stability and Growth Pact (SGP) in 1997 into the EMU, clear excessive deficit procedures were laid out. However, these turned out to be unenforceable, especially in terms of the relaxed attitude of Member States towards their excessive deficits and the Pact in the 2000s.

In 2010, the sovereign debt crisis erupted in the European Union (EU) and continues to raise critical questions about the macro-economic governance structure of the EU. The Eurozone crisis impacted not only financial stability, but also confidence in the EU system. Reform of the Economic and Monetary Union (EMU) institutional structure as well as member states fiscal positions have been contentious issues. The crisis in the area of economic and financial governance revealed a more fundamental problem: the sustainability in the long-term of the Euro and the EMU broadly speaking.

### BACKGROUND OF EU ACTIONS IN THE STUDIED POLICY FIELD

To contain the crisis, the Member States and the EU institutions initiated massive transformation of the EMU. Firstly, a number of mechanisms were created to aid Member States who had serious fiscal issues. The European Financial Stability Mechanism (EFSM) was initiated in May 2010 via Council Regulation 407/2010, with legal basis in Article 122(2) TFEU which provides for "granting Union financial assistance to a Member State in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control". Immediately following this, the European Financial Stability Facility (EFSF) was established under private law as limited liability company in Luxembourg. Initially, these mechanisms were not intended to be used but rather to calm market pressures, however, they were soon activated and a permanent solution was proposed, the European Stability Mechanism (ESM), which entailed a treaty outside the Union, based on international public law, as well as an amendment to Article 136 TFEU by adding a 3rd paragraph clarifying the legality of euro area member states establishing such a mechanism. A second international treaty was signed, the Treaty on Stability, Coordination and Governance (TSCG), which aimed to create stronger budgetary discipline, notably with the signatories (member states) implementing a balanced budget amendment in the national constitutions (or the like) giving the CJEU the competence to review national budgets. Secondly, the European Central Bank initiated bond-buying programmes, among them the controversial Outright Monetary Transactions (OMT) which was never activated, as well as the Public Sector Purchase Programme (PSPP). Generally, the consensus is that the sovereign debt crisis, and market sentiment, only really changed after the ECB announced the OMT (and 'whatever it takes'), as it suggested an ex ante unlimited firing power on the part of the ECB to deal with the Eurozone crisis. Finally, the surveillance and monitoring of member states' economic policies were reinforced with the "Six Pack" and the "Two Pack".

All of the above mentioned initiatives (except for Six Pack and Two Pack) have been the focus of a series of constitutional court cases before both national constitutional courts and the Court of Justice of the European Union (CJEU). The constitutional complaints concerned questions of violating either EU treaty law or national constitutional law. In the cases before the CJEU, the crisis mechanisms were found not to violate EU treaty law.

## SWOT ANALYSIS OF EU ACTIONS IN THE STUDIED POLICY FIELD

### Strengths:

- the EU actions were taken swiftly for the sake of political expediency
- many measures had to be done outside the Treaties indicating flexibility of EU institutions
- the range of measures demonstrate EU's commitment to finding a solution (albeit temporary)
- all the measures have been constitutionally validated, even by the German Constitutional Court, suggesting general agreement amongst European courts.
- many EU initiatives to stabilize the EMU architecture, including European Semester, banking union, capital market union, etc., European Systemic Risk Board, Single Resolution Mechanisms, Single Supervisory Mechanism
- following the Eurozone crisis, the Commission has established DG FISMA (focused on banking and finance with harmonising objective) to monitor financial stability of Eurozone area, and SRSS (Structural Reform Support Service) to assist member states with structural reforms, plus Commission's EU budget proposal (specifically the EMU section) all signal a strong desire for the institutional structure of EMU to absorb the Eurozone crisis initiatives and mechanisms (this of course will not be without controversy, but still signals a commitment to assist Member States).

### Weaknesses:

- the political expediency and flexibility mentioned above in Strengths arguably came at the cost of rule-of-law requisites of clarity and predictability (Kilpatrick 2015)
- asymmetry in filed constitutional complaints at national level suggests effective judicial protection and judicial remedies are not uniform across Europe.
- measures made outside the Union but with Union institutions' participation create levels of complexity and ambiguity that could undermine the legitimacy of EU; e.g. case of Ledra (C-8/15 P to C-10/15) before CJEU, in which the European Commission had to recognize its obligations in terms of the Charter of Fundamental Rights of the European Union when engaging in a Memorandum of Understanding as part of the Troika, even though the Commission was functioning outside the Union's legal framework.
- despite above-mentioned overall agreement between European Courts about the constitutional validity of the legal measures taken (EFSF, ESM, TSCG, OMT), the overall process was haphazard and contentious (e.g. preliminary ruling from FCC to CJEU).

### Opportunities:

- room for much more judicial dialogue on the law of the EMU in terms of the Euro area crisis
- judicial dialogue could be instigated to discuss the Commission's EU budget (MFF 2021-2027) proposal because it looks toward bringing Eurozone crisis legal measures within the Union's EMU legal structure, e.g. investment stabilization function, possible European Monetary Fund, etc. (see Cohesion & Values part of EU budget proposal).
- now that the severity of the crisis has mostly subsided there is time to explore many possibilities in strengthening EMU's legal structure so that it respects both rule-of-law requirements (e.g. predictability and clarity) as well as being more connected to positive social outcomes.

### Threats:

- Will giving the CJEU jurisdiction to review national budgets (as per TSCG by way of Art. 273 TFEU) and the possibility of a fine (Art. 260) actually ensure budget discipline, when market discipline, which is more severe in its repercussions (regardless of their irrational character), never worked?
- A number of court cases before the General Court (Bourdouvali, Mallis & Malli, Chrysostomides) have dealt with the question of non-contractual liability related to the decisions of the Eurogroup, or in other words, asking whether the Eurogroup can be held accountable. This issue raises some crucial questions about where political responsibility can be placed regarding the conditionality requirements put on the member states receiving financial aid. The biggest threat I believe would be related to a huge loss of legitimacy for the European Union if it tried to avoid placing responsibility and accountability.
- Commission's proposal of EUR 30 billion for stabilization function is too low.

## RECOMMENDATIONS

Given that the Commission's proposal in the EU budget for EMU entails the possibility of absorbing the Eurozone crisis mechanisms, it seems prudent to initiate judicial dialogue on these subjects to get a conversation started between judges across the EU on possible issues to ensure the efficiency of the preliminary reference mechanism (Art. 267) when judicial questions arise later on regarding the constitutionality in terms of national constitutions of forthcoming legislative proposals.

The Eurogroup should now be seen as a formal body of EU law. Especially now that the EMF proposal has been shelved, and given that the Eurogroup has had so much power in deciding on the conditionality for member states, it only seems legitimate to make it a formal body; otherwise the EU legal framework will be seen to lack coherence and thereby legitimacy.

(Perhaps this is already the case). When the Commission makes legislative proposals on EMU, perhaps having experts on Member States' constitutional law would help to clarify limits and possibilities, especially given that when negotiating with the Member States themselves in legislative phases, it will always be ambiguous whether the Member States will use their constitutions as bargaining strategies (i.e. being disingenuous about constitutional limits and constraints).

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## ROUND TABLE 5 – Enhancing the Rule of Law

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### BACKGROUND OF THE STUDIED POLICY FIELD

The studied policy field is migration (which includes asylum). Today, the UNHCR records over 65 million people who are forcibly displaced (22.5 million of which would qualify as refugees) for reasons ranging from conflict, violence, and poverty, to climate change. At the global level, the unanimously adopted 2016 New York Declaration for Refugees and Migrants has been a milestone in the path towards recognition of the problem by the international community and has seen a revived commitment by Member States to create and improve mechanisms for protecting people who are displaced. The New York Declaration established the central aspects of a Comprehensive Refugee Response Framework to support the communities hosting refugees and enabled the adoption of both the Global Compact on Refugees and the Global Compact for Safe, Orderly, and Regular Migration in 2018.

At the EU level, the phenomenon of migration has also attracted significant attention. From its very inception, the EU has always been committed to furthering all of the principles espoused by the UN Charter and has written them into its primary law (see Article 3(5) TEU). Those include, but are not limited to the eradication of poverty and the protection of human rights. The EU has backed its commitment through becoming the global leader in providing development assistance and through working towards tackling the root causes of forced displacement and migration through creating a sophisticated net of legal policies and financial instruments, aimed at allocating funds towards projects that pursue those objectives.

### BACKGROUND OF EU ACTIONS IN THE STUDIED POLICY FIELD

The European Union as an institution has a shared competence with its Member States in developing a common immigration policy. That is to mean that whilst the EU develops a common immigration policy, the EU Member States are not deprived of their own competences in the field as long as any action they undertake complies with the objectives pursued by the Union, which can be derived from both primary and secondary EU law. The most recent EU actions in migration have been deeply marked by the so-termed migration 'crisis' which started in 2015. It brought about a number of changes to existing EU actions and had very significant budgetary (and democratic) consequences. The Union's focus shifted from providing protection to decreasing irregular migration through fortifying its borders, outsourcing their location, and donating money in the hopes of solving the root causes of what by then was seen as the 'problem' of migration. Finding resources in times of emergency proved to be very difficult, however, due to the Union's sophisticated budget which is prepared years in advance through the Multiannual Financial Framework (MFF). Therefore, the Union created different EU Trust Funds (funding instruments) and the Facility for Refugees in Turkey (a coordination mechanism), which existed outside the MFF and the EU Parliament's budgetary control. The European Commission has now proposed the Multiannual Financial Framework (MFF) for the period of 2021-2027, the highlight of which is the Neighbourhood, Development and International Cooperation Instrument, which will be more coordinated, but have a rapid-response mechanism to allow quicker allocation of money in times of crisis, but also possibly avoid democratic scrutiny and accountability.

## SWOT ANALYSIS OF EU ACTIONS IN THE STUDIED POLICY FIELD

**Strengths:** the strengths of pooling resources for addressing the 'crisis' of migration outside the EU budget is that it allows flexibility and rapid response in times of crisis.

**Weaknesses:** unfortunately, the extra-budgetary approach to funding 'migration-reducing' actions has many pitfalls. Firstly, it creates a very complex web of instruments that is really hard to understand, follow, or monitor. Secondly, it escaped democratic scrutiny which would have been available through the European Parliament or judicial challenges incited either by institutions or by affected individuals in the European Court of Justice. In that sense, such actions negatively affect the rule of law.

**Opportunities:** the newly proposed Multiannual Financial Framework for 2021-2027 offers opportunities in addressing the shortcomings of the current approach to financing the tackling of migration. Combining funds to avoid previous confusions (as was the case with Turkey, whose donors included eighteen different EU entities following the EU-Turkey deal in 2016) would enable a better tracing of the money, but would also lead to the inevitable clash of the varying objectives pursued by the different funds.

**Threats:** a big threat facing the funds allocated to tackling migration through the MFF is that they might continue to escape democratic scrutiny as a result of how complicated they are. Additionally, there is the risk that Member States' leaders might take things into their own hands and still take extra-Union action in working towards minimising irregular migration in order to avoid liability and accountability before the European Court of Justice. An additional threat is posed by the securitisation of the rhetoric surrounding migration which might weaken human rights protection for vulnerable individuals.

## RECOMMENDATIONS

Accompanying the newly proposed MFF, there should be a legal instrument ensuring that Member States would be barred from taking unilateral action that could avoid democratic scrutiny and thereby harm the fundamental principle of the Rule of Law.

The European Parliament should be given a prominent role in future funding actions through being granted a right of consent or a right of scrutiny when it comes to binding agreements with a financial aspect.

The nexus between development and migration needs to be clarified as migration is clearly linked to development, but previous actions and current plans to use development resources in order to heed migration send unclear signals to the recipients of the aid and to the international community.

All European Union institutions need to be reminded that they are bound by the principles enshrined in the EU Charter of Fundamental Rights in their actions whether through trainings or other means that ensure the effective protection of people affected by EU policies.

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