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## THE EU'S REACTION TO THE RUSSIAN INVASION OF UKRAINE: LEGAL CHALLENGES AND THE ROLE OF THE EUROPEAN PARLIAMENT\*\*

**Abstract [It]:** Questo saggio analizza il ruolo del Parlamento europeo nel corso della risposta dell'Unione europea all'invasione russa dell'Ucraina, la cui immediata conseguenza è stata l'adozione di sanzioni verso la Russia e un'ampia assistenza militare verso l'Ucraina mai era stata sperimentata in precedenza. Considerando nella Politica estera e di sicurezza comune l'incidenza del metodo intergovernativo, questo saggio mira a evidenziare il ruolo del Parlamento europeo: da un iniziale e fermo supporto verso le misure restrittive più dure nei confronti della Russia, il Parlamento ha iniziato a invocare una risposta maggiormente "sovranazionale". Infatti, in numerose risoluzioni adottate a partire dal marzo 2022, il Parlamento ha evidenziato la necessità di impegnare nuove e maggiori risorse finanziarie in ragione dell'escalation militare. Ciò ha portato, nel 2024 all'adozione dell'Ukraine Facility, che ha garantito 50 miliardi di euro all'Ucraina e un incremento delle risorse proprie dell'Unione. Tale strumento si pone in linea di continuità con la "metodologia" sperimentata con il Dispositivo per la ripresa e la resilienza, nonché si innesta e promuove un nuovo allargamento dell'Unione fondato strettamente su interessi di natura geopolitica.

**Abstract [En]:** The purpose of this essay is to examine the role of the European Parliament in shaping the European Union's response to the Russian invasion of Ukraine. Never has the EU faced such a military escalation and crisis at its borders, with consequences that have been the disbursement of significant financial resources. Considering that the Common Foreign and Security Policy (CFSP) falls in the domain of the EU's intergovernmental institutions, this essay aims to provide a comprehensive account of the European Parliament's role. From its initial support for the strongest restrictive measures, the European Parliament has advocated for a more supranational response to the military crisis. By analysing the tools at its disposal within the CFSP framework, the European Parliament has mobilised new financial resources to address the ongoing Russian invasion of Ukraine. Notably, in 2024 the Ukraine Facility was adopted building on the methodological continuity established by the Recovery and Resilience Facility. This initiative has led to €50 billion in loans and grants in support of Ukraine. The Facility has not only led to a new increase in the EU's own resources but has also triggered a new enlargement process with clear geopolitical objectives.

**Parole chiave:** Parlamento europeo, Unione europea, Russia, Ucraina, Politica estera e di sicurezza comune.

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**Keywords:** European Parliament, European Union, Russia, Ukraine, Common Foreign and Security Policy.

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## 1. Introduction

This paper discusses the role of the European Parliament (EP) in the EU's reaction to the Russian invasion of Ukraine. At the beginning of the war, in February 2022, the EU mainly adopted financial sanctions and provided humanitarian aids and weapons to Ukraine. The EU action took place under the Common Foreign and Security Policy (CFSP), formally excluding the (EP) and the Commission from the decision-making process.

Never before in the history of European integration has the EU faced a similar military crisis at its borders,<sup>1</sup> one which has led not only to the disbursement of large quantity of money already allocated for preserving peace and military assistance but has also forced the EU to retrieve new resources on the financial markets. The support for Ukraine via the EU budget led to the adoption of a specific Facility for Ukraine in late February 2024, consisting of €50 billion for the country and required the participation of the Parliament, according to articles 212 and 322(1) of the Treaty on the Functioning of the European Union (TFEU). Overall, from 2023 onwards, the Parliament was more involved in the medium-to-long term of the EU's strategy for Ukraine. The different instruments adopted in relation to the war indicate the extent of the EP's involvement in the EU's response. Analysing these measures allows for an assessment of the democratic nature of the EU's reaction to the war in Ukraine. The EP's involvement has grown after the immediateness of the crisis drove the initial response. It has been aimed at isolating and shocking the Russian economy and fostering the resistance of the Armed Forces of Ukraine.

The essay proceeds as follows. First, it analyses the CFSP by highlighting the role of intergovernmental institutions and the exceptional context of Russia's invasion of Ukraine (par. 2). The EU was called to answer, and shortly after, exceptional restrictive measures within the CFSP were adopted. Nevertheless, the effects of such an answer were not as far-reaching as expected because Russia did not cease its military intervention in Ukraine (par. 3). At this stage, the EP promoted a full supranational response to Russian

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<sup>1</sup> The Russian invasion is not even comparable with the dissolution of Yugoslavia, which was the implosion of a federal system kept united by Josip Tito and by its successors during the 1980's, when tensions among different groups emerged and led to the extinction of the Federation. In the present case, the deliberate invasion by a nuclear power of a sovereign country poses a different and major threat to the security of the borders as well as for the desire of Ukraine to become part of the European Union.

aggression, including adopting several resolutions to avoid sectorial interests and provide Ukraine with further financial support (par. 4). The EP also changed some rules governing the CFSP to make it less intergovernmental and more supranational, which allowed for the development of broader and more far-reaching aid to Ukraine and the adoption of the Ukraine Facility in 2024 (par. 5). Lastly, the conclusion (par. 6) considers the evolution of the reaction in light of similarities between other instruments adopted by the EU more recently (i.e. the Recovery and Resilience Facility) and the conditionality mechanisms for protecting the rule of law. The conclusion also acknowledges that the Ukraine Facility has triggered a new wave of enlargement and a new (exceptional) “expansion” of the financial capacity of the EU<sup>2</sup>.

## 2. The European Common Foreign and Security Policy, the Russian invasion of Ukraine and the restrictive measures

As the CFSP falls into the domain of intergovernmental institutions (see below), its treaties do not guarantee a margin of legal manoeuvre to other institutions, meaning the EU cannot adopt regulations and directives<sup>3</sup>. Therefore, the CFSP is «a distinct subsystem of law on the outer-most sphere of European supranationalism» where the key role is played by the Council, which is “shielded” from parliamentary involvement<sup>4</sup>. The oversight function of the representative assemblies is tricky, especially in foreign affairs<sup>5</sup>. In national constitutions, this task falls under the *domaine réservé* of the executive power, and the EU is not an exception in the CFSP<sup>6</sup>. Despite that, *ex post* or *ex ante* parliamentary scrutiny of external action remains a key feature from a constitutional law standpoint<sup>7</sup>. The case of the EP is slightly different when compared with national representative assemblies<sup>8</sup>. The treaties grant the EP only scrutiny powers, which are limited to the

<sup>2</sup> See F. FABBRINI, *EU Fiscal Capacity: Legal Integration After Covid-19 and the War in Ukraine*, Oxford, Oxford University Press, 2022.

<sup>3</sup> C. ECKES, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford, Oxford University Press, 2009, 121-124; L. LONARDO, *EU Common Foreign and Security Policy After Lisbon*, Cham, Springer, 2023, 60.

<sup>4</sup> J. WOUTERS, et al., *The Law of EU External Relations Cases, Materials, and Commentary on the EU as an International Legal Actor*, Oxford, Oxford University Press, 2021, 178; G. BUTLER, *Constitutional Law of the EU's Common Foreign and Security Policy Competence and Institutions in External Relations*, Oxford, Hart, 2019, 1, 39 ff.

<sup>5</sup> The complexity of the subject matter is laid down by the presence of art. 216(1) TFEU in matter of international agreements between the EU and third countries and international organisations. To this regard, it has been argued to distinguish between competences part of the Union's external action (among others the common foreign, security and defence policies) and competences which involve “external aspects” of other Union's policies. This view is grounded also on Art. 3(1) TFEU where, among the exclusive competences of the EU, enlists one external policy – the common commercial policy – and others with may have external features. See M. CREMONA, *EU External Competence – Rational for Exclusivity*, in S. GARBEN - I. GOVAERE (eds.), *The Division of Competences between the EU and the Member States*, London, Hart, 2017, 136.

<sup>6</sup> See C. MOSER, *Accountability in EU Security and Defence: The Law and Practice of Peacebuilding*, Oxford, Oxford University Press, 2020, 133, 135.

<sup>7</sup> For a comparative overview see E. GRIGLIO, *Parliamentary Oversight of the Executives. Tools and Procedures in Europe*, Oxford, Hart, 2020, 154 ff.

<sup>8</sup> In a comparative perspective there are no standard way in which state parliaments are engaged in EU security affairs. Among different national legal frameworks it is possible to distinguish four categories: the first includes those

consultation by the High Representative of the Union for Foreign Affairs and Security Policy, who must ensure that EP views are properly considered. This normative framework has made the EP an “informed spectator”, given the fact that in the realm of the CFSP, the normative action is precluded<sup>9</sup>. Hence, the designated procedure – the involvement or non-involvement of the EP – makes the difference in categorising the legislative act. Therefore, under the CFSP umbrella, only European decisions are enacted, with the result that accountability is first channeled through the HR.

It has been stressed that the quality and quantity of information received by the EP are insufficient to enable proper scrutiny, which undermines the role of democratic representation<sup>10</sup>. Notably, the Court of Justice of the European Union (CJEU) has stressed the relevance of such an information duty toward the EP according to art. 218(10) TFEU because it expresses the democratic principle<sup>11</sup>. More specifically, according to the reasoning of the Court, the purpose of informing the EP is not to enable its participation in the negotiation and conclusion of agreements concerning the CFSP. Indeed, it aims to check the appropriate legal basis for measures adopted and to exercise its own powers with full knowledge of the EU’s external action as a whole<sup>12</sup>.

From a mere normative standpoint, the specificity of the CFSP is already laid down by art. 2(4) TFEU and art. 40 Treaty of the European Union (TEU), but above all in art. 24(1) TEU, where special rules and procedures are established. Within the domain of the CFSP, the main role is exercised by the two intergovernmental institutions: the European Council and the Council. The former identifies the strategic interests and objectives of the Union by unanimous vote and defines general guidelines (Decisions) for the CFSP (art.

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countries (Finland, Luxembourg, Sweden) whose parliaments must authorize their executive powers to take a Council decision in favour of launching an EU civilian or military mission; the second envisages Member States (Austria, Ireland, the Netherlands, Italy, Cyprus, Estonia, Germany, Spain) in which the legislative power must authorize the government to deploy troops; in the third are included countries whose national parliaments have a consultative or debating role (Belgium, France, Poland, Portugal); lastly, the fourth encompasses Member States where the parliamentary scrutiny is excluded (Bulgaria, Greece, Romania). See C. MOSER, *Accountability in EU Security and Defence*, cit., 139-140.

<sup>9</sup> P. EECKHOUT, *The EU’s Common Foreign and Security Policy After Lisbon: From Pillar Talk to Constitutionalism*, in A. BIONDI - P. EECKHOUT - S. RIPLEY (eds.), *EU Law After Lisbon*, Oxford, Oxford University Press, 2012, 279-84. Besides that, it has been stressed that to grasp the EP role in foreign policy an overall assessment is needed which entails the EU’s external action as a whole: it means to take into account areas in which the EP is a co-legislator that are connected to external action, or where it is not impossible to consider the external dimension of internal policies. See on this point M. GOINARD, *The Growing Role of the European Parliament as an EU Foreign Policy Actor*, in M. WESTLAKE (ed.), *The European Union’s New Foreign Policy*, Cham, Palgrave Macmillan, 2020, 108-109.

<sup>10</sup> C. MOSER, *Accountability in EU Security and Defence*, cit., 152.

<sup>11</sup> According to Article 218(10) «the European Parliament shall be immediately and fully informed at all stages of the procedure».

<sup>12</sup> Case C-263/ 14 European Parliament v Council [2015] EU:C:2015:729. The case was about the negotiation and conclusions of international agreements and treaties. Specifically on this topic see for example A. DASHWOOD, *EU Acts and Member State Acts in the Negotiation, Conclusion and Implementation of International Agreements*, in M. CREMONA - C. KILPATRICK (eds.), *EU Legal Acts – Challenges and Transformations*, Oxford, Oxford University Press, 2018, 189-250. For the purpose of this paper the analysis of the jurisprudence of the Court of Justice in CFSP and CSDP will not be considered. See for a comprehensive account C. NOVI, *Corte di giustizia e competenze esterne dell’Unione europea*, Bari, Cacucci, 2023; M. CREMONA - A. THIES, *The European Court of Justice and External Relations Law. Constitutional Challenges*, London, Hart, 2016. See also S. POLI, *The right to effective judicial protection with respect to acts imposing restrictive measures and its transformative force for the Common Foreign and Security Policy*, in *Common Market Law Review*, Vol. 59, Issue 4, 2022, 1045-1080.

22(1) and art. 26(1) TEU); the latter, instead, acts as the main rule-making body, whilst the EP retains only the right to be informed and may address questions or make recommendation to the Council or the HR (art. 36(2) TEU)<sup>13</sup>. Hence, it shall be emphasised that the Decisions under the CFSP are not legislative acts (art. 31(1) TEU) and are adopted by the European Council and the Council by unanimity. In derogation to the general rule, the Council decides with Qualified Majority Vote (QMV) in case of Decisions defining a Union action or position and for implementing and amending Decisions previously enacted as well as for the appointment of the Special Representative (art. 31(1) TEU). The second derogatory provision fits this chapter, since sanctions are generally adopted in order to strengthen previous Decisions. This means that once “basic sanctions” have been set, more Decisions may be adopted on such a legal basis by the recourse to Qualified Majority Vote (QMV)<sup>14</sup>. Besides Decisions under Title V of the TEU, there is an additional legal basis for adopting sanctions, which is art. 215 (TFEU). This disposition works in pair with arts. 29 and 31(1, 2) TEU, and it is “a legal basis within the TFEU” which, as of today, has been used for sanctions. Thus, it shall be borne in mind that the sanctions are regulated by a «combination of legal instruments based on a legal basis from each Treaty, which puts the powerful legal instrument of a directly applicable TFEU regulation at the service of CFSP objectives»<sup>15</sup>. To sum up, firstly a Decision is adopted by the European Council and/or the Council by unanimity and by QMV under the TEU; and, secondly, a Regulation which implements the previous Decisions by the Council follows, based on art. 215 TFEU<sup>16</sup>.

Therefore, restrictive measures/sanctions<sup>17</sup> represent a specific example within the CFSP where intergovernmental institutions – and the Member States – have a major grip over the law-making under the TFEU. In *Rosneft*, the CJEU assessed that art. 215 TFEU may be considered a “bridge” between the two Treaties, which allows for the adoption of restrictive (and detailed) measures in a technical field such as the economy and financial

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<sup>13</sup> «The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy». In addition, it is worth mentioning the European External Action Service (EEAS), an autonomous body tasked to assist the HR, as well as to remember the limitations over the acts that may be adopted and the limited jurisdiction of the Court of Justice. See M. CREMONA, *The position of CFSP/CSDP in the EU's constitutional architecture*, in S. BLOCKMANS - P. KOUTRAKOS (eds.), *Research Handbook on the EU's Common Foreign and Security Policy*, Cheltenham, Edward Elgar, 2018, 7 ss.; C. HILLION, *A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy*, in M. CREMONA - A. THIES (eds.), *The European Court of Justice and External Relations Law*, cit., 47 ss.

<sup>14</sup> L. LONARDO, *EU Common Foreign and Security Policy After Lisbon*, cit., 58-66.

<sup>15</sup> C. ECKES, *The law and practice of EU sanctions*, in S. BLOCKMANS - P. KOUTRAKOS (eds.), *Research Handbook on the EU's Common Foreign and Security Policy*, cit., 207.

<sup>16</sup> Thus, the CFSP Decision is a prerequisite for the validity of a regulation. See L. LONARDO, *EU Common Foreign and Security Policy After Lisbon*, cit., 75, 85.

<sup>17</sup> Restrictive measures are distinguished in measures of general application in order to limit economic, financial, or other relations with third states and measures which target specific persons or groups/non-state entities. See P. MAHNIČ - A. DE ELERA, *Differentiated Integration in EU Foreign, Security, and Defence Policy*, in D. FROMAGE (ed.), *Redefining EU Membership: Differentiation In and Outside the European Union*, Oxford, Oxford University Press, 2024, 67-69.

markets<sup>18</sup>. The Court argued that «sanctions are the exception, where the Court interprets Treaty provisions in a way that allows a CFSP decision [...] to give determinative guidance for the content of TFEU measures»<sup>19</sup>.

Therefore, a CFSP decision is necessary to adopt measures under art. 215 TFEU, and the two acts operate autonomously<sup>20</sup>. It has been the case of the large and unprecedented array of restrictive measures (sanctions) adopted from 2022 onwards against Russia and the two separatist republics of Donetsk and Luhansk, which were based on the legal platform offered by the 2014/2015 Decisions (*infra*). It was due to the fact that at the beginning of the invasion, the EU's reaction has been twofold: a smooth and steady assistance (military and humanitarian) to Ukraine as well as the adoption of several sanctions against both Russia and many individuals connected to the Russian establishment and elite<sup>21</sup>. The EU, for the first time, quickly adopted and implemented a broad set of sanctions, from ban on investment, trade, export of goods and technologies and financial assistance, to individual restrictive measures against personalities of the Russian establishment.

The sanctions became even broader and more tailored in order to weaken the most relevant sector of Russian economy and defence industry<sup>22</sup>.

### 3. Russian invasion and EU's reaction: sanctions and humanitarian aid, quickly!

The restrictive measures adopted in February 2022 were based on three batches of sanctions in force against Russia since 2014. The first batch was against legal persons linked to the violation of the territorial integrity of Ukraine. Their targets were those supporting Russia in the annexation of Crimea, as well as those actively involved in the war in Donbass, such as the emerging leaders of the Donetsk and Luhansk People's Republics<sup>23</sup>. The second was related to the annexation of Crimea, which led to the almost

<sup>18</sup> Case C-72/15, *Rosneft* [2017] ECLI:EU:C:2017:236. In this landmark judgement the CJEU was asked to assess whether the Council by exercising its CFSP powers encroached the TFEU as well as the qualification or not of the CFSP Decision as legislative act. Overall, the Judgement clarified the power of the Court over the acts under the CFSP. See P.V. ELSUWEGE, *Securing a Coherent System of Judicial Protection in Relation to Restrictive Measures: Rosneft*, in G. BUTLER - R.A. WESSEL (eds.), *EU External Relations Law*, Oxford, Hart, 2022, 881-889.

<sup>19</sup> C. ECKES, *EU Powers Under External Pressure: How the EU's External Actions Alter its Internal Structures*, Oxford, Oxford University Press, 2019, 138-139.

<sup>20</sup> P. MAHNIČ - A. DE ELERA, *Differentiated Integration*, cit., 68.

<sup>21</sup> L. LONARDO, *Weapons, humanitarian assistance, sanctions: a legal analysis of the EU's immediate response to the Russian invasion of Ukraine of 2022*, in *European Law Review*, n. 3, 2022, 410-423.

<sup>22</sup> C. CHALLET, *A Revolution within the EU's Common Foreign and Security Policy: EU Sanctions Adopted in Reaction to Russia's Aggression*, *EuLawLive-Weekend Edition*, N° 92, 2022.

<sup>23</sup> Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Implementing Decision 2014/238/CFSP of 28 April 2014 implementing Decision 2014/145/CFSP; Council Decision 2014/455/CFSP of 11 July 2014 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine; Council Implementing Regulation (EU) No 753/2014 of 11 July 2014 implementing Regulation (EU) No 269/2014.

total ban of trade and investment on the peninsula, as well as the prohibition of financial assistance, insurance, and reinsurance related to goods originating in Crimea or Sevastopol<sup>24</sup>. Finally, the third aimed at punishing people and entities connected to the destabilisation of Ukraine<sup>25</sup>. Despite initial success, the measures adopted in 2014 failed to re-establish Ukraine's territorial integrity and avoid the military escalation in February 2022<sup>26</sup>. Furthermore, the economic sanctions were limited even if, at that time, the sovereignty of Ukraine had already been violated<sup>27</sup>.

Therefore, the Decisions adopted were “ready” to be implemented and broadened since the recognition of the two separatist republics by the Russian Federation<sup>28</sup>. Decisions and Regulations adopted on 21 February 2022 either amended or implemented previous Decisions of the Council and contained targeted and comprehensive sanctions<sup>29</sup>. The measures adopted in 2022, far from those of 2014, have been pursuing more decisively the weakening of the Russian economic and financial system to stop the invasion and, afterwards, the sustainability of the war<sup>30</sup>.

At the time of writing – December 2024 – fourteen batches of measures are in force against Russia (the last being Council Regulation (EU) 2024/1745) and specific personalities and proxies in the two separatist republics<sup>31</sup>. In the first seven days after the Russian invasion, four heavy packages of sanctions were adopted. Among them was enacted, for the first time, the ban on broadcasting operations of Russian-linked telecommunications channels, whose legality, according to EU law, was later confirmed by the Grand Chamber of the General Court in *RT France v. Council*<sup>32</sup>.

<sup>24</sup> Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol; Council Regulation (EU) No 692/2014 of 23 June 2014 concerning restrictions on the import into the Union of goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.

<sup>25</sup> Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine; Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

<sup>26</sup> E.H. CHRISTIE, *The Design and Impact of Western Economic Sanctions against Russia*, in *The RUSI Journal*, Vol. 161, Issue 3, 2016, 52–64.

<sup>27</sup> G. BOSSE, *The EU's Response to the Russian Invasion of Ukraine: Invoking Norms and Values in Times of Fundamental Rupture*, in *Journal of Common Market Studies*, Vol. 62, Issue 5, 2024, 1226, 1229-1231.

<sup>28</sup> C. CHALLET, *A Revolution within the EU's Common Foreign and Security Policy*, cit., 4.

<sup>29</sup> M. KATHARINA - C. GRAZIANI, *The transformation and design of EU restrictive measures against Russia*, in *Journal of European Integration*, Vol. 45, Issue 3, 2023, 284.

<sup>30</sup> It shall be acknowledged that being the sanctions the most intense and tougher ever adopted, many scholars have investigated the impact of such measures over fundamental rights protection – specifically grounded on Art. 47 of the Charter of Fundamental Rights (CFR) – as well as the proportionality especially related to third countries and economic operators. See A. HOFER, *The EU's 'Massive and Targeted' Sanctions in Response to Russian Aggression, a Contradiction in Terms*, in *Cambridge Yearbook of European Legal Studies*, Vol. 25, 2023, 19-39; L. LONARDO, *Challenging EU Sanctions against Russia: The Role of the Court, Judicial Protection, and Common Foreign and Security Policy*, in *Cambridge Yearbook of European Legal Studies*, Vol. 25, 2023, 40–63.

<sup>31</sup> C. ARCHICK, *Russia's War Against Ukraine: European Union Responses and UE-EU Relations*, Congressional Research Service, updated November 1, 2024; S. FELLA, *The EU response to the Russian invasion of Ukraine*, House of Commons Library, 22 March 2022.

<sup>32</sup> Case T-125/22, *RT France v Council of the European Union*, Judgment of the General Court (Grand Chamber) of 27 July 2022, ECLI:EU:T:2022:483. For a comment see: S. POLI, *Prime riflessioni sulla sentenza del Tribunale “RT France” sulle misure restrittive contro le attività di disinformazione russe*, in *I Post di AISDUE*, IV (2022), n. 8, 5 settembre 2022, 111-129; A. MAFFEO, *La sottile linea di confine tra libertà di informazione e propaganda di guerra: il caso RT France*, in R. MASTROIANNI - F. FERRARO (eds.), *Libertà di informazione e diritto dell'Unione Europea. Le nuove sfide a tutela*

Especially at the beginning, the European Commission strengthened *de facto* its political role despite the prevalence of intergovernmental institutions. The Commission prepared the five packages of restrictive measures, which were put on the table of the Council and quickly adopted because the Member States supported them. At that time, the aim was to speed up the adoption and implementation process as well as avoid leaks; consequently, the packages did not pass through the Working Party of Foreign Relations Counsellors (Relex)<sup>33</sup>, but were discussed exclusively within the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER II)<sup>34</sup>. Nevertheless, this stage did not last long. From the sixth package onwards, an increasing disagreement among Member States has been witnessed, including many derogations, such as the exemption of Hungary over the importation of crude oil from Russia<sup>35</sup>.

The EU's reaction was not limited to the enactment of restrictive measures but included military and humanitarian aid to Ukraine<sup>36</sup>. Regarding the former, the legal basis is art. 41(2) TEU, which, contrary to CFSP measures within the EU budget, requires the unanimity of the Council because the Member States fund the expenditures. This tool was already set up via the European Peace Facility (EPF)<sup>37</sup>, an off-budget instrument financed outside the Multiannual Financial Framework (MFF) for providing military assistance<sup>38</sup>. Under the EPF, operations may be funded with defence implications as well as assistance for third states, and, for the first time, it has included the possibility of delivering weapons and military vehicles<sup>39</sup>. Therefore, under the EPF, the EU adopted the Council Decisions (CFSP) 2022/338 and (CFSP) 2022/339. The EU provided military equipment to Ukraine to strengthen the capabilities and resilience of its armed forces with lethal and non-lethal force (e.g. first aid kits and fuel)<sup>40</sup>. Through these Decisions, the EU pursued the

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*della democrazia e del pluralismo*, Napoli, Editoriale Scientifica, 2022, 195-216; V. SZÉP - R. WESSEL, *Balancing restrictive measures and media freedom: RT France v. Council*, in *Common Market Law Review*, Vol. 60, Issue 5, 2023, 1384-1396.

<sup>33</sup> See the RELEX group meetings of March and April 2022 [here](#).

<sup>34</sup> The usual procedure envisages the initiative or proposal of one or more Member States or the High Representative, while the Commission plays the supporting role in the drafting. Afterwards the decisions are prepared in the Political and Security Committee, the working party of the Council, the RELEX and the COREPER II. Cfr. F. ERLBACHER, *Article 215 TFEU*, in M. KELLERBAUER - M. KLAMERT - J. TOMKIN (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, New York, Oxford, 2019, 1634. In the adoption of the first batch of measures the Commission took the lead, also in light of the need to reach a fast and firm response to the Russian invasion. K.B. OLSEN, *The Sanctioning of Warfare: Early lessons from the EU's geoeconomic response to Russia's invasion of Ukraine*, Danish Institute for International Studies, DIIS Research Report, 2022, 31-35.

<sup>35</sup> C. HAKANSSON, *The Ukraine war and the emergence of the European commission as a geopolitical actor*, in *Journal of European Integration*, Vol. 46, Issue 1, 2024, 32-35; G. Bosse, *The EU's Response to the Russian Invasion of Ukraine*, cit., 1232-1235.

<sup>36</sup> See C. ARCHICK, *Russia's War Against Ukraine*, cit.

<sup>37</sup> Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528. The objective of the EPF was to enact a tool more oriented to support militarily third states and it has replaced other instruments the African Peace Support Facility and the Athena mechanism. See F. SANTOPINTO, *EU military assistance under the new European Peace Facility*, Konrad Adenauer Stiftung, 2021.

<sup>38</sup> S. RUTIGLIANO, *Accountability for the Misuse of Provided Weapons in the Framework of the New European Peace Facility*, in *European Foreign Affairs Review*, Vol. 27, Issue 3, 2022, 401-416.

<sup>39</sup> P. MAHNIĆ - A. DE ELERA, *Differentiated Integration*, 63-64.

<sup>40</sup> See M.E. BARTOLONI, *First-Ever EU Funding of Lethal Weapons: "Another Taboo Has (Lanfully) Fallen"*, in *European Papers*, Vol. 7, No 1, 2022, 379-383.



objectives set by art. 21 TEU, especially the maintenance of peace and the strengthening of international security in accordance with humanitarian and human rights law<sup>41</sup>.

The above measures are managed by intergovernmental institutions and, as such, the role of democratic representative institutions falls short. Both sanctions and the Decision adopted under the EPF are implemented and funded by the Member States, whereas the EU has acted as a common coordinating forum and framework within which the national governments have reached a common understanding on how to react to Russia's invasion of Ukraine<sup>42</sup>. The EP has excluded adopting the above-mentioned decisions because they fall under the umbrella of art. 24 TEU, derogating the general disposition contained in art. 14 TEU that assigns legislative and budgetary functions to the EP and the Council. Therefore, the EP tried to influence the CFSP decisions regarding the support of Ukraine through resolutions, with their symbolic nature as impulse givers<sup>43</sup>. Since then, the EP has acquired a growing role since the Commission started to propose legislative acts involving a large quantity of funds for Ukraine<sup>44</sup>.

#### 4. The rising role of the European Parliament and its limits

The EP may informally influence the CFSP decision-making process, given the full discretionary power of the Council<sup>45</sup>. It may intervene, without any binding power, only to address questions and recommendations to the Council or the High Representative, without being consulted over individual measures<sup>46</sup>. Thus, the EP is fully involved only when new acts supporting Ukraine envisage a new allotment of money. This was not the case with the restrictive measures and lethal and non-lethal aid under the EPF because the financial burden lies with the Member States.

Therefore, the tools at the EP's disposal for influencing intergovernmental institutions shall be considered. First, there are the resolutions and the committees that deeply scrutinize CFSP Decisions. It must also be considered whether the interparliamentary cooperation and the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union (COSAC) had a hand in promoting the EP's more active role in the CFSP. Each of these tools will be addressed in turn.

<sup>41</sup> S. RUTIGLIANO, *Accountability for the Misuse*, 412; A. Hofer, *The EU and Its Member States at War in Ukraine? Collective Self-defence, Neutrality and Party Status in the Russo-Ukraine War*, in *European Papers*, Vol. 8, Issue 3, 2023, 1701-1703.

<sup>42</sup> L. LONARDO, *Weapons, humanitarian assistance, sanctions: a legal analysis of the EU's immediate response to the Russian invasion of Ukraine of 2022*, in *European Law Review*, Vol. 47, Issue 3, 2022, 421-422.

<sup>43</sup> F. ERLBACHER, *Article 215 TFEU*, cit., 1634.

<sup>44</sup> C. MOSER, *The impact of the war in Ukraine on the EU's Common Security and Defence Policy*, in S. KADELBACH - R. HOFMANN (eds.), *The Common Security and Defence Policy of the EU. Perspectives from Member States*, Baden Baden, Nomos, 2024, 47-49.

<sup>45</sup> F. GOINARD, *The Growing Role of the European Parliament*, 107-124.

<sup>46</sup> R. SCHÜTZE, *Parliamentary Democracy and International Treaties*, in *Global Policy*, Vol. 8, Issue 6, 2017, 7-13; L. Lonardo, *EU Common Foreign and Security Policy After Lisbon*, cit., 92.

The EP's recommendations aimed at influencing the decision-making behind the sanctions and making them more transparent in the representative institution par excellence. Overall, the EP employed its scrutiny, agenda-setting, and budgetary powers to mobilise and scrutinise EU support for Ukraine. The EP pushed in this direction by adopting more than 30 resolutions, as well as through question time to the High Commissioner and the Commissioner for the defence industry<sup>47</sup>.

On the one hand, the EP sponsored a firm and unambiguous answer to the invasion of Ukraine and, on the other hand, highlighted the risks surrounding the EU response based only on the intergovernmental fora. The EP advocated a more formal role in managing the EU–Ukraine dossier.

For example, Parliament Resolution of 1 March 2022 enlisted all the issues at stake and warned against the “sectoral or national interests” of the Member States. In the same document, the EP paved the way for a long-term strategy in support of Ukraine by clearly committing to use any EU budget instruments available, as well as calling on the Member States to prepare a multi-billion-euro assistance and recovery plan for the country<sup>48</sup>. More significant has been the resolution adopted in June 2022, which was also tabled under a different disposition of the EP Rules of Procedure<sup>49</sup>. In this recommendation, the EP firmly stressed its unique oversight function over the executive at the Union level and the relevance of the coordination with national parliaments. Moreover, by recalling its role in representing EU citizens, the EP recommended extending the QMV in certain areas of foreign policy, such as adopting EU personal sanctions regimes, including foreign policy in the Council. The EP firmly expressed its willingness to be involved in scrutinising the European Peace Facility and aimed for a comprehensive budgetary function in foreign security and defence policy, especially for decisions based on art. 42(2), art. 45 and art. 46 TEU<sup>50</sup>.

In subsequent resolutions, besides questioning the effectiveness and the implementation of EU sanctions against the Russian Federation<sup>51</sup>, the EP stressed that «the democratic transformation and the rule of law have a central role in the EU accession process, in line with the new methodology»<sup>52</sup>. It considered enlarging a strategic,

<sup>47</sup> European Parliamentary Research Service, *Examples of Parliament's impact: 2019 to 2024. Illustrating the powers of the European Parliament*, Brussels, 2024, p. 19. For the EP resolutions see [here](#).

<sup>48</sup> European Parliament, *European Parliament resolution of 1 March 2022 on the Russian aggression against Ukraine* (2022/2564(RSP)) (P9\_TA(2022)0052), para 18, 27, 34, 35.

<sup>49</sup> All the previous resolutions over Ukraine, according to rule 132 of the Rule of Procedure, followed the statements of the Commission, the Council and European Council. That of 8 June 2022 was, instead, based on Rule 118, which regulates the role of the EP in making recommendations on Union's external policies.

<sup>50</sup> European Parliament, *European Parliament recommendation of 8 June 2022 to the Council and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the EU's Foreign, Security and Defence Policy after the Russian war of aggression against Ukraine* (2022/2039(INI)), P9\_TA(2022)0235.

<sup>51</sup> European Parliament, *European Parliament resolution of 9 November 2023 on the effectiveness of the EU sanctions on Russia* (2023/2905(RSP)) P9\_TA(2023)0397. Later see European Parliament resolution of 29 February 2024 on the need for unwavering EU support for Ukraine, after two years of Russia's war of aggression against Ukraine (2024/2526(RSP)) P9\_TA(2024)0119.

<sup>52</sup> European Parliament, *European Parliament recommendation of 23 November 2022 to the Council, the Commission and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy concerning the new EU strategy for enlargement* (2022/2064(INI)), P9\_TA(2022)0406, (ak).

future-oriented geopolitical investment within the EU and candidate countries. In this task, the EP highlighted its role as a “pure” democratic institution and a reliable partner for future newcomers. It implies a major role of budgetary instruments linked to the EU rule of law. To this end, the EP advocated its competence in evaluating the use of all pre-accession funds through progress benchmarks «rewarding reforms and sanctioning regression or a persistent lack of progress»<sup>53</sup>.

It also means systematically using the Rule of Law Report<sup>54</sup> and the EU Justice Scoreboard<sup>55</sup> for the candidates’ countries to foster the «democratic and socio-economic transformation in candidate countries»<sup>56</sup>. To this point, one may argue that the EP took the stance as a pure constitutional standpoint, implicitly recalling the “transformative constitutionalism” through the dissemination and influence of the EU values<sup>57</sup>. This declaration may be considered an attempt to fix the homogeneity of the normative criteria within and outside the EU in a clearer manner compared with the past. At the time of the 2004 and 2007 enlargements, the inclusion of Eastern European countries was also guided by geopolitical reasons, even though serious concerns were expressed over the commitment of the newcomers to the rule of law and the Copenhagen criteria<sup>58</sup>.

Overall, it is noteworthy that the EP firmly showed its willingness to acquire a more formal role in the CFSP and, conversely, tried to tackle the dominant intergovernmentalism in the CFSP/CSDP. This emerged from the amendments proposed to the EU Treaties, where the EP advocated the QMV for decisions on sanctions, interim steps in the enlargement process and other foreign policy decisions. Moreover, the EP asked to become a co-legislator in the CSDP, the procurement and development of armaments, which shall be financed through a dedicated budget<sup>59</sup>.

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<sup>53</sup> *Ibid.* The reference is the policy coordination built after the pandemic. See. C. FASONE - N. LUPO, *Learning from the euro crisis: A new method of government for the European Union's economic policy coordination after the pandemic*, in *International Journal of Constitutional Law*, early view, 1-24.

<sup>54</sup> See Y.M. CITINO, *The Prospective Impact of the Rule of Law Reports: A Tool to Be Fine-Tuned*, in C. FASONE - A. DIRRI - Y. GUERRA, (eds.), *EU Rule of Law Procedures at the Test Bench. Palgrave Studies in European Union Politics*, Cham, Palgrave Macmillan, 2024, 173-185.

<sup>55</sup> Y GUERRA, *Measuring Justice? The EU Justice Scoreboard in the Light of the Performance-Based Approach*, in C. FASONE - A. DIRRI - Y. GUERRA, (eds.), *EU Rule of Law Procedures at the Test Bench*, cit., 157-171.

<sup>56</sup> *Ibid.*

<sup>57</sup> This wording was introduced and then developed by comparative law scholars related to Global South constitutionalism but later discussed in the Global North. See K.E. KLARE, *Legal Culture and Transformative Constitutionalism*, in *South African Journal on Human Rights*, Vol. 14, No. 1, 1998, 146–188. M. HAILBRONNER, *Transformative Constitutionalism: Not Only in the Global South*, in *American Journal of Comparative Law*, Volume 65, Issue 3, 2017, 527-565.

<sup>58</sup> Similar consideration may be found in a subsequent communication of the Commission: COM(2024)146 final, “Communication on pre-enlargement reforms and policy reviews”, pp. 1-4. This path has been criticized since the enlargement as a geo-strategic investment might be a serious threat if badly and hurriedly prepared. *Editorial comments: Another “Big Bang” enlargement? Three candid suggestions to start preparing*, in *Common Market Law Review*, Vol. 61, Issue 4, 2024, 899-912.

<sup>59</sup> *Proposals of the European Parliament for the amendment of the Treaties European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties* (2022/2051(INL)), P9\_TA(2023)0427.

Besides the adoption of resolutions, the role of the Committee on Foreign Affairs (AFET) shall be mentioned<sup>60</sup>. The AFET's activity is mainly incisive over the CSDP, the accession processes<sup>61</sup>, the assistance programmes and agreements, and the promotion of democracy in third countries. In addition, with the Lisbon Treaty, the AFET became the link between the EP and the High Representative and assumed the role of coordinator of inter-parliamentary delegations<sup>62</sup>. Since the entry into force of the Lisbon Treaty, the AFET made clear its willingness to ensure the EP's oversight over the CFSP and CSDP, especially in the CFSP spending and in the CSDP missions<sup>63</sup>.

Regarding the restrictive measures enacted by the Council, the AFET is working informally in strict compliance with the Commission over the issue of the sanction's implementation and circumvention. To this end, the AFET has enhanced the mandate of the pre-existing Working Group on Eastern Partnership, which has focused more deeply on sanctions, by acting as the AFET Working Group on Sanctions until the end of the IX legislature in 2024. It has also been suggested that coordination between the AFET and other committees and subcommittees be strengthened to enhance the expertise in sanctions matters and to make the EP scrutiny more effective<sup>64</sup>.

In these ways, the AFET has been considered crucial for the EP. Given the technicalities of sanctions and the difficulties surrounding their enforcement, it has been suggested that the AFET Working Group be formalised and a Subcommittee on sanctions be established. The AFET should become the body of the EP, which should receive detailed reports and briefings from the Council in case of the adoption of or amendments to sanctions. Hence, the EP should be aware of the implications of sanctions through the AFET, which «tend to centre on the request to impose, tighten and occasionally lift sanctions». In addition, the EP should establish an independent monitoring repository and foster technical expertise among the EP advisors because the EU sanctions are implemented at the Member State level<sup>65</sup>.

Overall, the AFET has impacted resolution drafting and highly sensitive and technical issues such as sanctions, especially for their geopolitical consequences in accession

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<sup>60</sup> F. LONGO - C. FASONE - S. DELPUTTE, *The Diplomatic Role of the European Parliament's Standing Committees, Delegations and Assemblies: Insights from ACP–EU Inter-Parliamentary Cooperation*, in *The Hague Journal of Diplomacy*, Vol. 11, Issue 2-3, 2016, 161-181.

<sup>61</sup> T. WINZEN, *Technical or Political? An Exploration of the Work of Officials in the Committees of the European Parliament*, in *The Journal of Legislative Studies*, Vol. 17, Issue 1, 2011, 29.

<sup>62</sup> F. LONGO - C. FASONE - S. DELPUTTE, *The Diplomatic Role*, cit., 166.

<sup>63</sup> A. HERRANZ-SURRALLÉS, *The Contested "Parliamentarisation" of EU Foreign and Security Policy. The role of the European Parliament following the introduction of the Treaty of Lisbon*, Peace Research Institute Frankfurt (PRIF) Report No. 104, Frankfurt, 2011, 13-14. Thus, the AFET may enter in conflict with the budgetary committee (BUDG) given the funds allocated to the CFSP.

<sup>64</sup> C. PORTELA - K.B. OLSEN, *Implementation and monitoring of the EU sanctions' regimes, including recommendations to reinforce the EU's capacities to implement and monitor sanctions*, Study Requested by the AFET committee - Directorate-General for External Policies, Brussels, 2023, 38-39.

<sup>65</sup> *Ibid.*, 53-54. In addition, a leaked report has revealed that the EP is examining the possibility to reform its internal structure to foster its capacity to scrutiny and to shape EU legislation, also in security and defence matters, which could lead to an *ad hoc* committee. See C. MOSER, *The impact of the war in Ukraine*, cit., 49.

processes, enlargement and the rule of law<sup>66</sup>. More recently, the AFET has made the emergency of this context clear by calling on the Member States to redefine the CFSP into a fully-fledged EU policy and to strengthen the democratic legitimacy of the CFSP. To this end, the AFET advocated a stronger institutionalised parliamentary oversight and underlined the EP budgetary function over CFSP/CSDP, whose expenditures should be charged to the EU budget<sup>67</sup>.

The third aspect examined is the interparliamentary cooperation in the CFSP/CSDP between the EP and national parliaments, which are collectively called upon to contribute to the good functioning of the Union, according to art. 12 TEU<sup>68</sup>. The COSAC, whose legal basis are art. 9 and art. 10 of Protocol No 1 TFEU, has empowered the EP and the national parliaments to organise conferences “to debate matters of common foreign and security policy”. Even though the experience of the interparliamentary cooperation in matters of the CFSP/CSDP has not been significant<sup>69</sup>, the Russian invasion of Ukraine represents a test for understanding how the parliaments of the Member States have responded to this crisis.

Some interesting data may be drawn from the 40th bi-annual report, where a single chapter is devoted to the Parliamentary scrutiny related to Russia’s invasion of Ukraine. For example, whereas most of the representative assemblies scrutinised the Council’s conclusions related to Ukraine, only a minority pursued debate in the EP, while the majority chose the Committee level. The most interesting part is that all assemblies adopted resolutions/motions or generally debated the Council’s conclusions, and only the EP examined a specific legislative proposal, which was the adoption of the Ukraine Facility (*infra*). Regarding Ukraine’s accession to the EU, most of the assemblies again adopted a resolution, while only three declared the scrutiny of legislative proposals (the Romanian *Senat*, the Hungarian *Országgyűlés* and the EP)<sup>70</sup>. The prominent role of the EP in opposing intergovernmental, as well as the prevalence of the executive powers over representative institutions across the EU, is evident from the COSAC meeting in March 2024. Among the outcomes, the COSAC called on the Council to ensure access to

<sup>66</sup> See for example: Committee on Foreign Affairs, *Report on a European Parliament recommendation to the Council and the Vice-President of the Commission / High Representative of the Union for Foreign Affairs and Security Policy on the EU’s Foreign, Security and Defence Policy after the Russian invasion of Ukraine*, 25.5.2022 - (2022/2039(INI)). It shall be acknowledged also the consequences of sanctions over third parties and generally economic operators.

<sup>67</sup> In addition, the AFET remembered the “specific relationship” between the Vice-President and the High Representative and the EP, where the former should support the latter. Regarding the Commission, the AFET asked for a timelier presentation of the MFJ proposals to allow for sufficient time to negotiations. To sum up, it is interestingly that the AFET wishes “an appropriate response by the executive”, expects a “more systematic exchanges prior to the adoption of mandates and CFSP strategies” and, especially, the incorporation of the EP throughout EU external policies and action as an integral player of “Team Europe”. See Committee on Foreign Affairs, *Draft Report on the implementation of the common foreign and security policy – 2024 annual report* (2024/0000(INI)), 15.10.2024.

<sup>68</sup> This framework represents a one of the features of the euro-national parliamentary system. See N. LUPO - A. MANZELLA, *Il Parlamento europeo*, Roma, Luiss University Press, 2024.

<sup>69</sup> On the shortcomings and deficiencies of the AFET see J. WOUTERS - K. RAUBE, *The Interparliamentary Conference on Common Foreign and Security Policy: A Quest for Democratic Accountability in EU Security Governance*, in N. LUPO - C. FASONE (eds.), *Interparliamentary Cooperation in the Composite European Constitution*, Oxford, Hart, 2016, 227-245.

<sup>70</sup> COSAC, 40th Bi-annual Report Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny, Brussels, 2023, 23 ff.

information for national parliaments throughout the legislative process and emphasized the importance of articles 4 and 12 TEU as well as Protocol No 1 TFEU. Moreover, it highlighted the EP resolution of 17 January 2024<sup>71</sup>, which strongly invited the active involvement of national parliaments in EU affairs. Similarly, it called for an effective scrutiny of national governments “to ensure the democratic accountability and legitimacy of the institutional system of the EU”<sup>72</sup>.

Two considerations may be drawn from the documents of the COSAC related to foreign affairs. First, the role of the interparliamentary cooperation made clear that the EP was the sole representative assembly that scrutinised legislative acts and engaged the executive power of the EU. Second, the EP called on national parliaments to have more significant involvement in scrutinising the executive powers. Therefore, one may argue that during Russia’s invasion of Ukraine, the EP has taken the lead in defending the role of representative institutions and promoting a parliamentarisation of the CFSP.

Besides scrutiny and non-substantive powers in the CFSP and sanctions, the EP promoted the growing financial support to Ukraine, highlighting the limits of intergovernmentalism in such critical issues. Therefore, given the need for broader financial support for Ukraine, the EP took the opportunity to intervene as a legislator and to link budgetary instruments, the enlargement process, and the protection of the rule of law. In substantive terms, the EP found a way to encroach on the CFSP area, where the Council is the leading decision-maker and where the role of supranational institutions is relatively weak on paper<sup>73</sup>.

Overall, the EP, in several non-legislative acts, has advocated for proper funding and timely delivery of goods and lethal weapons to Ukraine<sup>74</sup>. This advocacy led quickly to the approval, based on art. 212 TFEU, of the Decision (EU) 2022/1201 (macro-financial assistance, for 2022)<sup>75</sup> and Regulation (EU) 2022/2463 (macro-financial assistance +, for 2023)<sup>76</sup> through the ordinary legislative procedure, the prelude of the broader “plan” for Ukraine.

## 5. The Ukraine Facility: rule of law, conditionality and enlargement

The involvement of the Parliament in the reaction to the Russian invasion is directly connected to the enlargement of the EU budget. In this regard, in one of the resolutions

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<sup>71</sup> European Parliament, *Report on the implementation of the Treaty provisions on national parliaments*, (2023/2084(INI)), 11.12.2023

<sup>72</sup> COSAC – LXXI, Brussels, 24-26 March 2024, recital 76.

<sup>73</sup> See R. SCHÜTZE, *European Union Law – 3rd*, Oxford, Oxford University Press, 2021, 289 ff.

<sup>74</sup> European Parliamentary Research Service, *Examples of Parliament’s impact: 2019 to 2024*, 20.

<sup>75</sup> Decision (EU) 2022/1201 of the European Parliament and of the Council of 12 July 2022 providing exceptional macro-financial assistance to Ukraine.

<sup>76</sup> Regulation (EU) 2022/2463 of the European Parliament and of the Council of 14 December 2022 establishing an instrument for providing support to Ukraine for 2023 (macro-financial assistance +).

referred to above, the Parliament already aimed for a more comprehensive budgetary functioning of the CSFP, according to arts. 14(1), 16(1) and 41 TEU<sup>77</sup>.

The available tools within the CFSP excluded a prominent role of the Parliament, which from time to time asked for more procedures of scrutiny over the restrictive measures adopted.

The Parliament opened the way, along with the Commission, to a broad and overarching assistance to Ukraine which had already applied for European membership on 28 February 2022<sup>78</sup>.

This was coupled with the EU adoption of financial measures to face the COVID-19 pandemic. The macro-financial assistance + (MFA+), for example, was aimed at expanding the fiscal capacity of the EU through common borrowing and spending, but it was blocked in December 2022 by Hungary which did not consent to the amendment of the Multiannual Financial Framework (MFF) which requires unanimity according to article 312 TFEU and, consequently, it was necessary to resort to Member States' financial guarantees (Council Position (EU) No 4/2022, 2022/C 476/03)<sup>79</sup>. In addition, the macro-financial assistance resorted to the design of the Recovery and Resilience Facility (RRF) (Regulation (EU) 2021/241)<sup>80</sup>, establishing conditions such as the compliance with democracy and the rule of law to receive the payments.

The MFA+ was established in light of the limited resources available under the EPF, which required the adoption of new regulations based on art. 212 TFEU. The MFA+ stands in discontinuity if compared to the EPF<sup>81</sup> because its governance shows more supranational features, especially considering the role of the Commission, which was tasked to support and oversee Ukraine in upholding and respecting the rule of law and complying with the *ex-ante* conditionality. Given the impossibility of amending the MFF, the Member States also represented the debt guarantees.

Nevertheless, the MFA+ is worth mentioning since it has been an additional instrument based on common debt similar to SURE and NGEU<sup>82</sup>. Even though the MFA+ was designed only for 2023, from a financing viewpoint, it issued a new common EU debt in loans, far different from the EPF. Thus, the Commission raised €18 billion

<sup>77</sup> European Parliament, *European Parliament recommendation of 8 June 2022*, recital.

<sup>78</sup> A.F. TATHAM, "Knock, and the Door Shall Be Opened to You": *The Challenges of an Expedited EU Accession Procedure for Ukraine*, in *EuLawLive-Weekend Edition*, N° 92, March 5, 2022, 24-28.

<sup>79</sup> Position (EU) No 4/2022 of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing an instrument for providing support to Ukraine for 2023 (macro-financial assistance +) Adopted by the Council on 10 December 2022 2022/C 476/03.

<sup>80</sup> Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>81</sup> It shall also be noted that the EPF financial ceiling was increased by €5 billion by establishing a specific military support to Ukraine, the Ukraine Assistance Fund (UAF) within the EPE with the Council Decision (CFSP) 2024/890 of 18 March 2024 amending Decision (CFSP) 2021/509 establishing a European Peace Facility. Actually, the EPF ceiling is beyond €17 billion, including €11.647 billion for Ukraine. See B. BILQUIN, European Parliamentary Research Service, *Ukraine, the European Peace Facility and additional financing*, PE 762.381 – September 2024.

<sup>82</sup> F. FABBRINI, *Funding the War in Ukraine: The European Peace Facility, the Macro - Financial Assistance Instrument, and the Slow Rise of an EU Fiscal Capacity*, in *Politics and Governance*, Vol. 11, Issue 4, 2023, 54–55.

through the financial markets on behalf of the EU under the “policy and template and legal technique” offered by SURE and NGEU<sup>83</sup>.

Therefore, the time was thus ripe for a broader and more far-reaching instrument which would enable the EU to borrow a large quantity of money to support Ukraine, as well as give substance to the accession path of the country to European Union.

The Ukraine Facility<sup>84</sup> was adopted in February 2024 and replaced the previous regulations of the macro-assistance to Ukraine. In total, it amounts to €50 billion, composed of €17 billion in grants guaranteed by a new tool, the Ukraine Reserve, within the MFF, and €33 billion in loans by the EU budget “headroom”. This financial support will be retroactively available since 1 January 2024 and will last until 2027.

It is noteworthy that the Parliament willingness was, since the beginning, to assure democratic control over the expenditure of the Facility, through enhanced control of both the Parliament and the Verkhovna Rada (the Ukrainian Parliament)<sup>85</sup>. The Parliament promoted the creation of a far-reaching tool for supporting Ukraine in a medium-to-long-term range, which would have been connected directly to the MFF. This has meant the revision of the MFF (Regulation (EU, Euratom) 2020/2093)<sup>86</sup>, in order to finance Ukraine and expand the financial capacity of the EU.

The Facility shows similarities with the RRF: Ukraine must submit a plan to the Commission (art. 16), which will be assessed by implementing a Decision by the Council<sup>87</sup>.

What matters here are the achievements of the Parliament in the legislative process, among which a stronger transparency, information flow, democratic scrutiny, and audit and investigation rights of the European Court of Auditors and of the Ukrainian bodies. The Commission must assure the democratic scrutiny, according to art. 4(6) of the Regulation, “in the form of consultation by the Ukrainian government of the Verkhovna Rada in accordance with the constitutional order of Ukraine”<sup>88</sup>. This is a very questionable provision because it requires that the Commission should ensure that the Ukrainian Parliament and society are duly consulted in the drafting of the Plan, but this can be hardly achieved by the Commission. This is linked to the precondition for support under the Facility (art. 5), which encapsulates most of the EU values set by art. 2 TEU such as the respect of democratic mechanisms, party pluralism, the rule of law and human

<sup>83</sup> F. FABBRINI, *From the Pandemic to the War: The EU Fiscal Response to Russia's Aggression of Ukraine, the Legacy of NGEU, and the Challenge to 'Promote the General Welfare'*, in *American Journal of International Law Unbound*, Vol 118, 2024, 179–180.

<sup>84</sup> Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility. The Regulation is based on articles 212 and 322(1) TFEU; the latter was also the legal basis for the adoption of the Regulation (Eu, Euratom) 2020/2092 Of the European Parliament and Of The Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, the “conditionality regulation”

<sup>85</sup> T. PETERS, European Parliamentary Research Service, Briefing, *EU Legislation in Progress, Establishing the Ukraine Facility*, 2024, PE 759.582.

<sup>86</sup> Council Regulation (EU, Euratom) 2024/765 of 29 February 2024 amending Regulation (EU, Euratom) 2020/2093 laying down the multiannual financial framework for the years 2021 to 2027.

<sup>87</sup> Whose features are enlisted in art. 17 of the Regulation.

<sup>88</sup> T. PETERS - S. CHAHRI, *European Parliamentary Research Service, Briefing, EU Legislation in Progress, Establishing the Ukraine Facility Financing Ukraine's recovery and its path to EU accession*, 2024, PE 753.954



rights, though in a war context<sup>89</sup>. The Plan, therefore, must cope with “high level” protection of financial interests of the Union: while art. 9 of the Ukraine Facility Regulation enlists the benchmark which must be respected, it shall be noted that the wording “high level” remains vague and flexible to interpretation<sup>90</sup>.

Regarding this, the Court of Auditors (ECA) raised criticisms assessing the proposal, that the Commission did not prepare an impact assessment due to the “urgent nature of the proposal”<sup>91</sup>. In addition, the ECA highlighted the vagueness of the preconditions as well as the possibility envisaged by art. 13(1) to allow for exceptional financing in “duly justified exceptional circumstances” through a Council implementation decision after a proposal by the Commission. The ECA again noted the slight control over this exceptional measure and called for a limitation of the validity of the Council implementing Decisions for a fixed period, to assess the factual background which would back the exceptional financing<sup>92</sup>. During the legislative drafting, in the first reading, the Parliament proposed relevant amendments to art. 5 in line with the ECA recommendations, with the objective to make more precise the preconditions to be fulfilled by Ukraine<sup>93</sup>. But despite this, the final version of the disposition does not show such precise conditions, probably because it would have been difficult to fairly assess them, representing a burden for both Ukraine and the Commission given the short time in which the payments had to be disbursed. More detailed prescriptions are entailed in art. 35, which relates to the EU financial interests, whose protection shall be assured by the Commission and Ukraine. It implies that the latter is committed on the one hand to respect preconditions and on the other hand, to protect the financial interests of the EU, without having the administrative and legal machinery for this purpose and in a very short period of time. The Commission, instead, is obliged to report annually about the progress under this Regulation, as well as quarterly about the state of play of the implementation of the Facility.

The investment flow has been the subject matter of a joint declaration of the Parliament and the Council in late February 2024<sup>94</sup>, where the Commission was invited to create different budget lines for the three Pillars in which the €50 billion for Ukraine is divided under the Facility, where grants and loans are directed to reconstruct, modernize

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<sup>89</sup> Art. 5, par. 1: «A precondition for the support to Ukraine under the Facility shall be that Ukraine continues to uphold and respect effective democratic mechanisms, including a multi-party parliamentary system and the rule of law, and to guarantee respect for human rights, including the rights of persons belonging to minorities». Consequently, the Commission assumed the key institution in monitoring the compliance with the precondition set by the Regulation itself.

<sup>90</sup> Art. 9, par 4: «The Framework Agreement shall ensure the commitment of Ukraine to achieve a high level of protection of the financial interests of the Union and shall lay down detailed provisions concerning [...]». How Ukraine shall ensure this task is laid down in the same article (lett. a-j).

<sup>91</sup> European Court of Auditors - Opinion 03/2023, concerning the proposal for a Regulation of the European Parliament and of the Council on establishing the Ukraine Facility, Luxembourg, 26 September 2023, p. 9.

<sup>92</sup> *Ibid.*, 11, 14.

<sup>93</sup> European Parliament, Establishing the Ukraine Facility, Amendments adopted by the European Parliament on 17 October 2023 on the proposal for a regulation of the European Parliament and of the Council on establishing the Ukraine Facility (COM(2023)0338 – C9-0210/2023 – 2023/0200(COD), P9\_TA (2023)0363.

<sup>94</sup> Joint declaration by the European Parliament and the Council on the appropriate budgetary nomenclature for the Ukraine Facility, (C/2024/1968), 29.2.2024.

and support reforms for accession (Pillar I – €38.27 billion in grants and loans); to attract public and private investments (Pillar II – €6.97 billion in grants); and to assist capacity building programmes for implementing the EU *acquis* standards (Pillar III – €4.42 billion in grants)<sup>95</sup>. Furthermore, shortly after the adoption of the Facility, several questions were raised by the EU Institutions, especially those especially related to the exceptionalism of the tool. This is the content of a common declaration of the Parliament the Council and the Commission, on 29 February, where on the one hand were highlighted the exceptional circumstances which Ukraine is passing through and, on the other, the support of the Plan in rushing (or facilitating) the accession path to membership<sup>96</sup>. The solution found for Ukraine, the statement says, shall not be considered as a precedent for future economic assistance and it echoed an additional resolution of the Parliament of the same day, which called the Commission and the Council “to set out a clear pathway for the accession negotiations” and to an accession process based on merit, by focusing on the respect for the rule of law, fundamental values, human rights, democracy and the fight against the corruption. Lastly, the Parliament, shortly after the adoption of the Ukraine Facility, wanted to express its concerns about the process of disbursement of funds as well as regarding its oversight role<sup>97</sup>. From the Resolution, it is palpable that the Parliament is aware of the risk of this kind of accession, as much as the EU and individual Member States about the capability of Ukraine in the fulfillment of the preconditions set by the facility, that is a prerequisite for the accession.

## 6. Conclusions

The Russian invasion of Ukraine has provided the EU with an additional opportunity (or burden?) to rethink its value-oriented decision-making in policy areas, such as CFSP, which fall within the domain of intergovernmental institutions, i.e. the Member States.

Therefore, questioning the reaction to the war in Ukraine in relation to the role of the EP is likely to be even a harder task for two main reasons: first, legally speaking, the Treaties do not confer any binding power in the CFSP upon the Parliament, which here has been considered the compass according to which it is possible evaluate how much the representatives of the European citizens have been involved in a crucial “reaction” to the Russian invasion of Ukraine; second, the involvement of the Parliament in this field may be measured only when budgetary functions are at stake.

Before considering the latter argument, one must remember that the most unitary voice towards a stronger and far-reaching reaction to Russia’s invasion of Ukraine came

<sup>95</sup> €0.34 billion are allocated for technical and administrative assistance according to article 6(5) of the Regulation.

<sup>96</sup> Joint declaration of the European Parliament, the Council and the Commission relating to the exceptional nature of the Ukraine Facility, (C/2024/1969), 29.2.2024.

<sup>97</sup> European Parliament, European Parliament resolution of 29 February 2024 on the need for unwavering EU support for Ukraine, after two years of Russia’s war of aggression against Ukraine, (2024/2526(RSP)) P9\_TA (2024)0119.

from the EP, which used all its soft power tools at its disposal. This event gave the EP the opportunity to reconsider and improve its role. For example, beyond the hypothesis of changing the internal EP structure, it has been recommended to intensify the EP scrutiny of the HR and increase the use of parliamentary questions and interparliamentary cooperation to provide better democratic control in the emerging multi-layered European Defence Union and the CFSP<sup>98</sup>. In light of the changing geopolitical context, the EU normative framework has been shaken, and it has revealed, once again, the weaknesses of a pure intergovernmental approach. In this regard, a more unitary and far-reaching normative response is being requested to cope with the multifaced implications of the CFSP. Thus, it has been rightly called for a Europeanisation of the CFSP/CSDF, where the EP must play a significant role<sup>99</sup>.

This argument brings us to the second feature: the budgetary functions of the EP and the need to keep momentum in the issuance of common EU debt despite the several constitutional constraints embodied in the EU Treaties<sup>100</sup>. Russia's invasion of Ukraine and the subsequent call to resource mobilisation over the member states and then through the Ukraine Facility cannot be said to have promoted a further federalisation of the EU simply because the «supranational capacity building remained secondary»<sup>101</sup>. This state of play endured at least until early 2024, when the Ukraine Facility was adopted, a new debt was issued, and a new enlargement wave has formally taken its way to pursue one of the several constitutional objectives of the EU enshrined in art. 21 TEU<sup>102</sup>.

The Ukraine Facility lies in continuity with other legal instruments adopted by the EU (the RRF and the Conditionality Regulation) and as a novelty for what concerns the application of secondary EU law to this exceptional tool provided for the Ukraine's accession to the EU. The adoption of the Ukraine Facility means, in terms of decision-making, the involvement of the Parliament in the enlargement process or, better to say, an overarching operationalisation of the rule of law principles to Ukraine for protecting the financial interests of the Union<sup>103</sup>. It has implied more Parliament scrutiny over the Commission which is tasked to monitor the Ukraine Plan. Hence, for geopolitical reasons,

<sup>98</sup> C. MOSER - S. BLOCKMANS, *The extent of the European Parliament's competence in Common Security and Defence Policy*, European Parliament - In-depth analysis requested by the SEDE sub-committee, Brussels, 2022, 42-43. A European Defence Union is slightly emerging as it has argued by Fabbrini in examining the Act on supporting ammunition production (ASAP). This Regulation was adopted to boost the production and procurement of weapons with the aim to support Ukraine. Nevertheless, if compared with the United States, the ceiling amounted in only €500 million bi-annual budget. See F. FABBRINI, *European Defence Union ASAP: The Act in Support of Ammunition Production and the development of EU defence capabilities in response to the war in Ukraine*, in *European Foreign Affairs Review*, Vol. 29, No. 1, 2024, 67-84.

<sup>99</sup> See C. MOSER, *The impact of the war in Ukraine*, cit., 51-52.

<sup>100</sup> This issue has recently been at the epicentre of discussion in both EU institutions and academic scholarship. The budgetary constraints are notably the art. 41(2) TEU and artt. 310(1), 311, and art 312 TFEU. F. FABBRINI, *From the Pandemic to the War*, cit., 181. See F. FABBRINI, *Funding the War in Ukraine: The European Peace Facility*, cit., 56-69; S. GRUND - A. STEINBACH, *Debt-Financing the EU*, in *Common Market Law Review*, Vol. 61, 1004 ff.

<sup>101</sup> See P. GENSCHEL - L. LEEK - J. WEYNS, *War and integration. The Russian attack on Ukraine and the institutional development of the EU*, in *Journal of European Integration*, Vol. 45, Issue 3, 2023, 343-360.

<sup>102</sup> F. HOFFMEISTER, *Strategic Autonomy in the European Union's External Relations Law*, in *Common Market Law Review*, Vol. 60, 2023, 697-698.

<sup>103</sup> M. RABINOVYCH, *EU Enlargement Policy Goes East: Historical and Comparative Takes on the EU's Rule of Law Conditionality vis-à-vis Ukraine*, in *Hague Journal on the Rule of Law*, Vol. 16, 2024, 715-737.

the EU used its legislative scaffolding to apply the rule of law conditionality to Ukraine, which has also implied an additional - and exceptional - increase of EU fiscal capacity<sup>104</sup>.

A more overarching argument may be advanced in addition to considerations related to the enlargement process<sup>105</sup> triggered by the Russian invasion of Ukraine, the measures adopted for the Western Balkans<sup>106</sup>, and the reform of the EU system of own resources<sup>107</sup>. One may argue that the main trajectory of European integration is no longer represented by the single market that has been rightly called the EU policy “core”<sup>108</sup>. Instead, the most relevant challenge is the effectiveness of other EU policies or areas where the Union has developed its normative intervention and pursued its constitutional values and objectives. The way to pursue the goal set by art. 21 TEU may be considered an additional field where EU law is called to intervene and which is not primarily related to the expansion or the enforcement of the single market. That is to say that the Ukraine Facility, which has meant a rising role for the EP in supporting Ukraine, may be seen as an additional attempt to broaden the reach of the EU rule of law, according to art. 2 TEU and art. 21(1) TEU, through the protection of financial interests strictly connected to the enlargement process which has renovated the geopolitical function of the rule of law as a constitutional EU value<sup>109</sup>. Despite that, given the constitutional constraints of the treaties, the broadening of the EU fiscal integration and capacity remains full of challenges, and its available tools are far from promoting the “general welfare”<sup>110</sup>.

<sup>104</sup> F. FABBRINI, *Funding the War in Ukraine: The European Peace Facility*, cit., 52.

<sup>105</sup> The Commission recently has strongly advocated the firm commitment of candidate’s countries to promote EU values and that the «alignment with the EU’s common foreign and security policy is a more significant signal than ever of shared values and strategic orientation in the new geopolitical context». European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2024. Communication on EU enlargement policy*, COM(2024) 690 final, Brussels, 30.10.2024, 19.

<sup>106</sup> See to this regard the Regulation (Eu) 2024/1449 of the European Parliament and of the Council of 14 May 2024 on establishing the Reform and Growth Facility for the Western Balkans.

<sup>107</sup> Which is currently underway. See A. DOBREVA, *Reform of the EU system of own resources: State of play*, European Parliamentary Research Service, June 2023.

<sup>108</sup> This terminology has been borrowed by the insightful essay of M. DAWSON, *The Changing Substance of the European Law*, in *European Constitutional Law Review*, Vol. 20, 2024, 459.

<sup>109</sup> It would mean «balancing, i.e. choosing, where possible, the interpretation of EU law that is most consistent with fundamental rights or other values contained in article 2 TEU. Perhaps substantive ‘de-coring’ precisely could pave the way for normative ‘coring’, i.e. an EU legal order that uses normative principles to structure its legal order in novel ways. “De-coring” may reveal new hierarchies in EU law, either in terms of institutions» (and that is the case of the legislative branch) or of values (the relevance of the Charter in EU law’s interpretation). Therefore, this changing substance and its effectiveness has become crucial for the future legitimacy of the EU normative framework. M. DAWSON, *The Changing Substance of the European Law*, cit., 479-481.

<sup>110</sup> F. FABBRINI, *From the Pandemic to the War*, cit., 178.