



# How does the EU seek to encourage change in national justice systems? A framework of coordinative and coercive Europeanization at work

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## Abstract

A decade of crises has changed the EU's modes of governance and power relations between institutions. By the same token, the rule of law crisis has reshaped the ways the Union 'hits home', or in other words, the ways it Europeanizes its Member States. This article looks at how the EU's responses to this ongoing crisis has led to the institutionalization of new modes of Europeanization. How does the EU seek to shape the national justice systems of its Member States? This article proposes a framework that conceptualizes two modes of top-down Europeanization: *coordinative* and *coercive*. Drawing on the analysis of policy tools established in response to the rule of law crisis, it shows how *coordinative Europeanization* strengthens the ability of the Commission to shape national agendas (*power to*) and how *coercive Europeanization* empowers the EU to take binding decisions that impact Member States (*power over*). *Coercive* and *coordinative* Europeanization complement each other and are supported by specific mechanisms such as dialogue, persuasion and negotiation between the Commission and Member States.

**Keywords** Coordinative Europeanization · Coercive Europeanization · Justice systems · Negotiation · Persuasion · Dialogue · Mechanisms

## Introduction

Over the past decade, both European integration and Europeanization have been in flux. The 2008 Great Recession, the 2010 Eurozone crisis and the 2020 Covid-19 pandemic, among other endogenous and exogenous crises, have fed one another (Caporaso 2018), revealing not only the fragilities of the political and economic foundations of the Union but also the strong economic, political and territorial

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disparities between Member States and the limitations of Europeanization (Featherstone and Papadimitriou 2008). In this context, European integration has advanced at a more accelerated pace (Christiansen 2020; Schmidt 2020a, 2020b), in ‘fast-forward’ (Ladi and Graziano 2014) or ‘failing forward’ (Jones et al. 2015). In the 2010s, EU institutions doused the Eurozone crisis flames by tightening the rules of economic governance and putting in place a conditionality culture, which has been generalised to other policy areas including cohesion policy (Coman 2018), with major consequences for both politics and policies at the national level (Schmidt 2020b). In contrast, EU institutions were divided over what to do, when and how when the Hungarian FIDESZ government began its comprehensive process of de-Europeanization in the first half of 2010 and when existing EU enforcement mechanisms for compliance with values showed their limitations (Kelemen 2020; Coman 2022). Following the establishment of a series of soft tools, it was only in 2020 that a conditionality regime was put in place to protect the financial interests of the EU by sanctioning rule of law breaches in EU Member States. The macroeconomic conditionality for the Eurozone crisis and the rule of law conditionality have developed in parallel to address different crises. They have been intertwined by the Recovery and Resilience Facility (RRF), which is the EU’s response to the Covid-19 pandemic, together giving rise to a comprehensive conditionality regime that brings all the conditionalities together. A vast body of research has convincingly showed that something has changed over the course of the last decade of crises, and not just in the ways the EU governs and makes decisions (Schmidt 2020a, b; Fabbrini 2022; Lupo 2022). Something has also changed in the ways the Union ‘hits home’ (Börzel and Risse 2000), or to put it another way, in the ways it Europeanizes its Member States. Successive crises have not only reshaped but also diversified the EU’s modes of Europeanization (Wolff and Ladi 2020; Ladi and Wolff 2021). The aim of this article is to contribute to this debate by showing how the EU’s response to the rule of law crisis has institutionalized new modes of Europeanization, focusing on a specific case: the national justice systems. Beyond de-Europeanization in Poland and autocratization Hungary (Müller and Gazsi 2023), the question is: How does the EU seek to ensure the quality, effectiveness and independence of Member State justice systems? As Jaremba and Mayoral (2019) have argued, little is known about the mechanisms of Europeanization of the national judiciaries, except for a series of studies conducted in the context of the Eastern enlargement, with a focus on conditionality.

In a polity like the EU, which has been shaped by law, national justice systems have not remained unaffected by European integration. This process has been rather gradual and latent, intensifying from the 1990s onwards when the independence of the judiciary and respect for the rule of law became clear conditions for enlargement towards Central and Eastern Europe (Dallara 2014), as well as an important pillar in the establishment of the Area of Freedom, Security and Justice (Trauner and Ripoll-Servent 2015). The first half of the 2010s marked a critical juncture, following measures adopted by the Hungarian FIDESZ and Law and Justice (PiS) Polish governments that drastically limited the independence of the judiciary and gave rise to important debates about how to strengthen the power of the EU and its capacity to act when the functioning of justice systems in Member States is at stake. In



response, EU institutions established tools for *coordinative Europeanization* in the first half of 2010, and *coercive Europeanization* in the second half of 2010. The preference for coordinative or coercive tools is largely explained by the politics of the rule of law crisis, which have been discussed by various scholars (Closa 2019; Coman 2022; Kelemen 2024; Bohle et al. 2023). A flourishing body of research has underlined the proactive—albeit initially divided—role of the Parliament, the silence of the Member States in the Council and the lack of political will to act, as well as the hesitation of the Commission in searching for support from the Member States to create policy instruments to douse the flames of the rule of law crisis.

This article proposes a general framework to study the Europeanization of the national justice systems as a top-down process, looking at the nature of the European incentives for domestic change. Tracing the policy instruments established over the last 14 years to ensure the independence and effectiveness of the justice systems, the article conceptualizes two alternative yet complementary modes of top-down Europeanization of national justice systems: coordinative and coercive. Europeanization is defined here as a process through which EU institutions seek to achieve an outcome in Member States. The article shows that *coordinative Europeanization* strengthens the ability of the Commission to shape national agendas (*power to*), while *coercive Europeanization* is about the ability to take binding decisions with an impact on the Member States (*power over*). While *coercive Europeanization* corresponds to the fulfilment of strict conditions and the adoption of possible sanctions and *coordinative Europeanization* refers to recommendations, the article shows that they both rely on specific mechanisms that link the source of change to the outcome. These mechanisms are dialogue, persuasion and negotiation between the Commission and the Member States.

To conceptualize these two modes of Europeanization, the article examines the establishment of policy tools designed at the EU level, such as the European Semester; the Rule of Law Framework and the Rule of Law Annual Report; Regulation 2020/2092, which establishes a general regime of conditionality for the protection of the EU budget; and the RRF Regulation and the Common Provision Regulation (Regulation EU no. 1303/2013; Regulation EU no. 2021/1060). It draws on document analysis as well as on a series of interviews conducted (in 2016) with EU officials involved in the establishment of the European Semester and (in 2020) with regard the adoption of Regulation 2020/2092, as well as with diplomats from EU Member States regarding the ongoing Article 7 TEU procedure. The interviews were conducted to understand the motivations of actors for the design of such tools, as well as the use of dialogue, persuasion and negotiation in the relationships with the Member States.

The article is organized as follows: "[Conceptualizing coordinative and coercive Europeanization in core state powers](#)" section conceptualizes *coordinative* and *coercive* Europeanization. "[The commission's ability to shape the agenda: instruments and mechanisms of coordinative Europeanization of the national justice systems](#)" section focuses on the mechanism and policy tools for coordinative Europeanization of the national justice systems, including the European Semester, the Rule of Law Framework and the Rule of Law Annual Report. "[The EU's power to take binding decisions: instruments and mechanisms of coercive Europeanization of the national](#)



[justice systems](#)" section examines policy instruments of coercive Europeanization, namely Article 7 TEU and Regulation 2020/2092, and the place that the rule of law occupies in the RRF and Cohesion Policy. The article shows that *coordinative* and *coercive* Europeanization are two sides of a complementary process through which change is expected, not only in response to strict conditions and recommendations but also facilitated through mechanisms such as dialogue, persuasion and even negotiation. The article establishes a framework of top-down Europeanization that can be used for further empirical analysis.

## Conceptualizing coordinative and coercive Europeanization in core state powers

Traditionally, the EU has used a wide range of policy instruments to encourage domestic change in its Member States and beyond, either through ‘hard law’ or ‘soft law’ (Saurugger and Terpan 2012/2013). Depending on the issues at stake, Member States have adapted to Europe either through policy coordination (mainly since the 1990s and the diffusion of the open method of coordination) or coercion (through conditionality introduced in Cohesion Policy and the EMU in the late 1980s). These processes have shaped the transformation of Member States in many ways (Ladrech 2010; Graziano and Vink 2008). Yet, recent crises have revealed not only the limits of EU influence but also a crisis of compliance (Closa 2019) and a growing degree of *misfit* (Börzel and Risse 2000) between the EU’s aims and domestic situations in Member States.

Although Europeanization does not mean convergence or harmonization (Radaelli 2000), the state of the Union in the midst of crises has given rise to important questions about its power and ability to attain its aims as enshrined in the treaties and in terms of social, economic and territorial cohesion, as well as about Member State compliance with EU norms and values. To save the Euro, in early 2010 new rules were adopted to strengthen the coordination of macroeconomic policies through immediate action and coercion. These changed Eurozone governance and Member State policies (Fabbrini 2015; Schmidt 2020a, b) and impacted other EU policies such as Cohesion Policy and EU funds (Coman 2018). The European Commission played a central role in the establishment of a new conditionality culture and forms of coercive Europeanization, with the support of the Member States in the Council and an active role of the European Council (Schmidt 2020a, b). The rules of the Stability and Growth Pact were revised and the Macroeconomic Imbalance Procedure was introduced to avoid excessive deficits (macroeconomic conditionality). Additionally, new provisions in the Cohesion Policy were adopted, allowing the Commission to propose to the Council that all or a portion of the commitments or payments for one or more programmes be suspended in cases where the Council determines that a Member State has not taken effective action to reduce its excessive deficits (Regulation (EU) no. 1303/2013; Regulation (EU) no. 2021/1060).

In contrast, when in the first half of 2010 the Hungarian FIDESZ government initiated a comprehensive process of de-Europeanization, undermining the values and principles of liberal democracy and curtailing the independence of the judiciary,



the Commission took a cautious approach. The infringements that the Commission brought before the Court of Justice had limited impact (Pech and Scheppele 2017; Closa 2019; Kelemen 2020). Furthermore, it took nearly 8 years to secure a majority in the European Parliament and trigger Article 7 TEU against Hungary. In 2018, after the Polish PiS government followed the same path and 2 years of dialogue between the Commission and the Polish government failed to find common ground, the Commission triggered Article 7 TEU against Poland. Beyond the specific cases of Poland and Hungary, which have attracted considerable political and academic attention, the question is more general and concerns all 27 Member States: How does the EU seek to encourage change in national justice systems?

Over the past 14 years, EU institutional actors have gradually established a rule of law policy. This has been done gradually by taking small steps, with each policy instrument being the result of many institutional battles (Coman 2022). Kelemen (2020), Closa (2019) as well as Bohle et al (2023), have explained the cautious approach of the Commission, the silence of the Ministers in the Council and the role of the European Parliament (EP). The lack of support for the Commission within the Council in the first half of the 2010s explains why the former favoured soft policy instruments, which preserve its engagement with Member States, given the EU's reliance on the national authorities for compliance, implementation, and effectiveness (Closa 2019). Only in the second half of the 2010s, and especially with the declared support of France and Germany, were more coercive tools introduced to ensure respect for the rule of law.

I argue that through the institutionalization of the successive policy instruments discussed in this article, the EU has designed both coordinative and coercive modes of Europeanization of the national justice systems. Through *coercive Europeanization*, the EU establishes its *power to* shape national agendas, while through *coercive Europeanization* is strengthens its *power over*. Europeanization is understood here as a process that is not only in search of an outcome but also encapsulates a power relation. As Dahl (1957) put it, 'A has power over B when A can get B to do something that B would not otherwise do'. Power is not only a relational concept; it has also many faces (Lukes, quoted by Heywood and Chin 2023: 73) as it implies power as a capacity (*power to*) and power as control (*power over*). Yet, this is a one-dimensional view of power, which when applied to the EU does not take into account the power of actor B over actor A, where B represents the Member States and A is the EU institutions. If coercive and coordinative Europeanization strengthen the EU's *power to* and *power over*, they also institutionalize mechanisms through which Member States and the Commission engage in a process of dialogue, persuasion and negotiation.

*Coercion* is traditionally associated with the power to enforce the law or the state's power to punish lawbreakers. Hobbes and Locke saw coercion as being essential to the justification and the functions of the State, while Kant underlined the importance of coercion for guaranteeing the rights of citizens (Anderson 2006). Coercion is defined here as the practice of persuading someone to do something using strict conditions (conditionality) and/or sanctions. In the EU, conditionality sets the aims to be reached and the sanctions for failing to do so (Featherstone and Papadimitriou 2008: 25; Vita 2017). The power of coercion



depends on the determinacy of conditions, the credibility of threats/sanctions or the size of adoption costs (Schimmelfennig and Sedelmeier 2020: 815). It is a rules-based concept, referring to a set of conditions coupled with sanctions. In other words, *coercive Europeanization* is about the ability to take binding decisions with an impact on Member States and enforcement (*power over*).

*Coordinative Europeanization* encapsulates Foucault's conception of power, which is less a confrontation and more an exercise of 'guiding the possibility of conduct and putting in order the possible outcome' (Heywood and Chin 2023: 81). It is a process-based concept that refers to interactions (formal or informal) between the Member States and the Commission (supranational coordinative Europeanization), between member states in the Council (intergovernmental coordinative Europeanization) or between national parliaments and the EP (parliamentary coordinative Europeanization). Through coordinative Europeanization, the Commission determines with the Member States (in bilateral relations) their degree of fit/misfit and the nature of the reforms to be implemented. It is used as a mechanism of prevention or adaptation by anticipation. Put differently, *coordinative Europeanization* is about the ability to shape national agendas (*power to*).

Both *coercive* and *coordinative* Europeanization encapsulate a top-down process of interactions between the Commission and the Member States that occur through specific mechanisms (see Table 1). A mechanism is a concept that encapsulates how one factor produces an effect on another (Gerring 2010).

**Dialogue**, as mechanism, is used to deepen understanding. It is a practice used to share experience or information without necessarily seeking a specific outcome or agreement.

**Persuasion** involves influencing others' beliefs, attitudes or behaviour (Coman 2018). It is used to convince other actors to adopt a particular position using arguments.

**Negotiation** is a form of dialogue focused on reaching an agreement; it implies finding a solution and is more goal-oriented and strategic. The scope of the negotiation can be the content or the timetable of the reforms to be undertaken in exchange for funding.

"The Commission's ability to shape the agenda: instruments and mechanisms of coordinative Europeanization of the national justice systems" section shows how the Commission steers a process of *coordinative Europeanization*, understood as *power to* shape national agendas for the justice systems. "The EU's power to take binding decisions: instruments and mechanisms of coercive Europeanization of the national justice systems" section shows how the Commission and the Council steer a process of *coercive Europeanization*, understood as *power over*, or the ability to make binding decisions.



**Table 1** Coordinative and coercive top-down Europeanization

	Coercive Europeanization (power over)	Coordinative Europeanization (power to)
Definition (what)	A rules-based concept referring to a set of conditions coupled with sanctions	A process-based concept referring to interactions (formal or informal) between the Member States and the Commission (supranational coordinative Europeanization), between Member States in the Council (intergovernmental coordinative Europeanization) or between national parliaments and the EP (parliamentary coordinative Europeanization)
Functions (why)	Enforcement	Prevention (or adaptation by anticipation)
Mechanisms	Dialogue (bilateral) Persuasion Negotiation	
EU's rule of law policy instruments for coercive and coordinative Europeanization	Article 7 TEU Regulation on a general regime of conditionality for the protection of the EU budget Common Provisions Regulation for EU funds Recovery and Resilience Facility as main tool for implementing Next Generation EU	European Semester (including CSR for the national justice systems) Rule of Law Framework Annual Rule of Law Report



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## The Commission's ability to shape the agenda: instruments and mechanisms of coordinative Europeanization of the national justice systems

The functioning of national justice systems is pivotal in the EU. The independence of the judiciary emerged as a *sine qua non* condition in the context of the Eastern enlargement, guided by the Commission. Since 2010, the Commission has developed policy instruments that place the justice systems of all EU Member States at the centre. Through the European Semester, the Commission puts the independence, efficiency and quality of the justice system on the agenda of all EU Member States. The Rule of Law Framework, established in 2014, is an example of the use of prevention through dialogue and persuasion when systemic threats to the rule of law are observed, as a preliminary step before triggering Article 7 TEU. Through the Annual Rule of Law Report (2020), which emulates the European Semester but focuses exclusively on rule of law concerns, the Commission shapes national agendas by issuing recommendations to encourage the Member States to implement structural reforms.

### The European semester

In 2010, to avoid macroeconomic imbalances, EU institutions established the European Semester as an annual cycle of coordination of the economic, social and budgetary policies of Member States. The strict macroeconomic conditionality of the Stability and Growth Pact, connected to the Cohesion Funds through Regulation 1303/2013 (allowing for the suspension of funds when excessive deficits are observed), are the foundations of the Economic governance born out of the Eurozone crisis. The Commission plays a central role as it examines the situation in the Euro area and in the EU and proposes country-specific recommendations (CSRs) to stimulate structural domestic reforms. These CSRs are adopted by the Council and endorsed by the European Council. Member State representatives criticised the first iterations of the Semester because of the subordination of all policies to economic ends and the intrusive nature of the CSRs. The philosophy of the Semester changed over time, however, allowing for more flexibility in the use of conditionality. 'A more collaborative process' has now been put in place (Zeitlin and Vanhercke 2018: 32), based on bilateral relations with the Member States in defining the nature and the scope of structural reforms.

The Semester has been expanded to additional policy areas, including the national justice systems. Because the Semester was created for macroeconomic coordination, only components of the judicial reforms aiding economic growth were taken into consideration. Thus, since 2010 the Semester has devoted particular attention to the efficiency, quality and (to a lesser extent) the independence of national justice systems. The Semester is hypothetically a driver of change through which the Commission proposes CSRs. Since 2012, 14 Member States have received at least one CSR pertaining to their justice system, including countries in Central, Eastern and





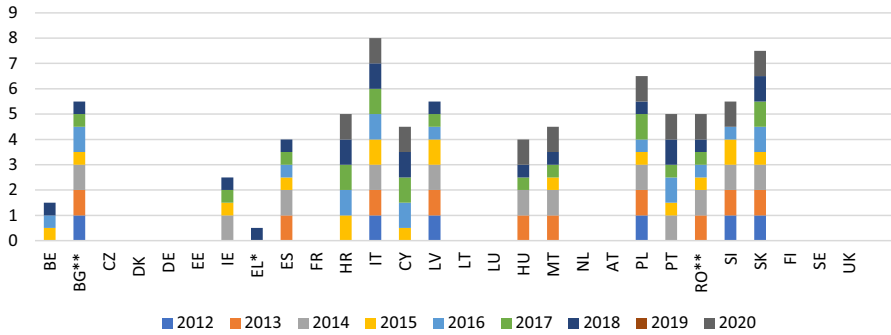


Fig. 1 EU Member States that have received CSRs related to the functioning of their justice system as part of the European Semester 2012–2020

Southern Europe, as well as Ireland on occasion. Another 14 countries (mostly former EU members, including Estonia, Lithuania and Czechia) have not received any recommendations. Italy has received the most recommendations, followed by Hungary, Malta, Spain, Romania, Croatia, Poland, Bulgaria, Cyprus, Latvia, Portugal, Slovenia and Ireland (see Fig. 1).

Although the Commission frequently emphasizes the importance of the justice system for the proper functioning of the economy, the CSRs for the justice systems have not occupied a central role in the Semester, in particular after the Juncker Commission decided to reduce the number of recommendations per Member State in order to streamline the process. As a result, although some Member States did not receive a recommendation concerning their justice systems, a need for improvement was nevertheless emphasized by the Commission. This was the case for Belgium, Ireland, Spain, Cyprus, Latvia, Hungary, Malta, Poland, Portugal, Romania, Slovakia and Slovenia.

The Semester has informally institutionalized the bilateral dialogue between the Commission and the Member States that is at the core of coordinative Europeanization. What is coordinated through dialogue is the domestic situation, that is, the degree of fit/misfit and the measures to be implemented. It appears that national governments wish to have a say in how the Commission portrays their domestic situations in the Country Reports and in the drafting of the CSRs. They are mindful of how prescriptive CSRs are, while also attempting to avoid a negative Country Report if it will affect local politics and reputational consequences (Interview 1; Interview 2). The timing of the reforms and the outcomes are also discussed in these bilateral dialogues between the Commission and the Member States. As a result, the language used in the Country Reports or in the CSRs themselves can change. For instance, the Commission uses a variety of verbs (such as ‘improve’, ‘enhance’, ‘increase’, ‘adopt’, ‘implement’, ‘identify’, ‘take measures’, ‘reduce’, ‘address’ and ‘ensure’) and phrases (such as ‘further enhance’) to denote progress or a lack thereof. These words of positive or negative assessment are frequently the subject of negotiations between the Member States and the Commission. Informally, through bilateral relationships, governments have attempted to



incorporate the domestic perspective into the Commission's appraisal. Words are not simply words: they also reflect the power dynamics and interactions between the Commission and the Member States, as well as an effort to balance national concerns with EU requirements.

Since 2012, the Semester has included 45 recommendations formulated by the Commission regarding the functioning of the national justice systems. Their formulation shows that while the aims to be reached are similar, the modalities in terms of implementation can vary. In most cases, the Commission has focused its CSRs on the quality of justice systems, and most recommendations target the efficiency of the justice systems. Because the recommendations of the Commission for the justice systems tend to be very general, they have rarely been contested by the Member States. Only in 2017, when the Commission linked the recommendations to Poland to the rule of law, did the government contest this decision, arguing that the Semester does not cover rule of law issues.

After more than 10 years, the Semester has become routine. However, the level of implementation of recommendations has remained extremely low, not only in the area of justice but also more generally, as the Court of Auditors has pointed out on several occasions (Special Report 16/2020). As discussed in "[The EU's power to take binding decisions: instruments and mechanisms of coercive Europeanization of the national justice systems](#)" section, in order to remedy this lack of implementation, the European Semester has been articulated with tools of coercive Europeanization since the adoption of the RRF.

## The rule of law framework

In 2014, the Commission established the Rule of Law Framework (RLF) to prevent 'systemic threats to the rule of law' (COM(2014) 158 final) and avoid having to trigger Article 7 TEU. The RLF formalizes this dialogue between the Commission and the Member State concerned. The Framework, which is a process of coordination, is organised in three stages: assessment, recommendation and follow-up to the recommendation. When in 2015 the Polish Law and Justice government initiated a rapid process of transformation of the Polish justice system, the Commission launched the RLF. It lasted 2 years, from 2015 to 2017. During this time, several meetings were organized between the European Commission and members of the Polish PiS Government and more than 25 letters were exchanged, without result. While the Commission emphasized the need to restore the independence of the judiciary, Polish authorities asserted that this was a matter of national sovereignty. Coordinative Europeanization did not work. The recommendations of the Commission related to the independence of the judiciary, broadly speaking (COM(2017)835 final), were seen as 'too political' (Coman 2022). Following 2 years of negotiations, in December 2017 the Commission ended the matter by triggering Article 7 TEU (Closa 2019, 707), after concluding that the thirteen laws the Polish government had passed since 2015 posed a clear threat to judicial independence and exposed a serious violation of the rule of law.



## The annual rule of law report

In 2020, 10 years after the creation of the European Semester, the Commission established a ‘comprehensive mechanism’ (the Annual Rule of Law Report) that emulates the process and methodology of the European Semester but focuses specifically on the rule of law, and more specifically four main pillars: the justice system, the anti-corruption framework, media pluralism and other institutional checks and balances. Like the Semester, this new instrument is intended to encourage Member States to carry out structural changes. The Commission publishes an Annual Rule of Law Report and 27 Country Reports. Here, the process of coordinative Europeanization is broader and extends beyond bilateral relations with the Member States. Like the Semester, the process starts in September when the Commission adopts the Annual Rule of Law Report.

The Annual Rule of Law Report is the result of various rounds of dialogue that take place at the political level in the Council and through bilateral political and technical meetings between the Commission and Member States (*supranational coordinative Europeanization*), as well as with national parliaments and the EP (as a form of *parliamentary coordinative Europeanization*) and between the Member States in the Council (*intergovernmental coordinative Europeanization*). For example, for the 2021 Annual Report the Commission organized over 400 meetings across all EU Member States and Member States provided input (Com2020, 580final: 5). The report also took into account contributions received from over 200 expert actors and civil society organisations. The entire process was conceived ‘to stimulate a constructive debate on consolidating the rule of law and encourage all Member States to examine how challenges can be addressed, learn from each other’s experiences and show how the rule of law can be further strengthened in full respect for national traditions and national specificities’ (Com2020, 580final: 7). Based on successive dialogues, the Commission drafts Country Reports in the April–June period every year. For the 2022 edition, Member States received specific recommendations. The emulation of the European Semester is therefore complete. Through this process, all Member States are encouraged to consider European standards regarding judicial independence.

The dialogue between the governments of Member States and the Commission concerns the nature of the reforms, their pace and their progress. A total of 15 Member States reported an institutional focus on the independence of the judiciary. The Commission either recommended that the members of the Judicial Council be subject to sufficient guarantees of independence (Slovakia) or that reforms regarding the powers of the future Council for the Judiciary be continued (Luxembourg). Some of the reforms concerned the independence of judges and prosecutors (Slovenia), others the establishment of an independent Prosecutor Office (Austria). Administrative reforms are being conducted in Finland and Malta, and access-to-justice reforms are being undertaken in Lithuania, Ireland and Czechia. Personnel are at the core of justice system reforms in Lithuania, Croatia, Greece and Ireland. The Commission made recommendations for reforms related to human resources in the justice systems of Portugal, France, Germany and Denmark, while digitalisation of the justice system is to be improved in the Netherlands, Italy, France and Belgium. In steering



this process of change, the language of the Commission matters and depicts a diversity of situations or the degree of fit or misfit of the Member States. ‘Concerns’ have been mentioned in relation to a limited number of Member States: 6 in 2020 (Poland, Hungary, Romania, Bulgaria, Croatia and Slovakia), 8 in 2021 (the six previously mentioned, joined by Spain and Lithuania) and 9 in 2022 (including also Ireland and Greece). Domestic progress is expressed by the Commission through its choice of verbs.

## **The EU’s power to take binding decisions: instruments and mechanisms of coercive Europeanization of the national justice systems**

Article 7 TEU, which the Commission triggered against Poland in 2017 and the EP against Hungary in 2018, is the coercive procedure *par excellence* as it can lead to the suspension of Council voting rights for the country concerned. Because both Article 7 TEU and coordinative Europeanization tools failed in preventing de-Europeanization (Müller and Gazsi 2023) and autocratization, more coercive instruments have been put in place. This includes Regulation 2020/2092 (passed in December 2020), regarding a general regime of conditionality for the protection of the EU budget, which permits the suspension of EU funds where Member State breaches of the principles of the rule of law have an impact on the Union’s budget. In addition, the disbursement of Cohesion Funds (Regulation 2021/1060) is conditioned on the respect of a set of enabling conditions, among which is the respect of the rights within the Charter of Fundamental Rights. Amidst the Covid-19 pandemic, the Recovery and Resilience Facility (RRF) brought all conditions together. The conditionality put in place for the governance of the eurozone by the Cohesion Policy (Regulation EU No 2021/1060), the rule of law (Regulation EU No 2020/2092) and the Resilience and Recovery Facility (Regulation EU No 2021/241) have together given rise to a comprehensive regime through which domestic change is expected to occur. This new conditionality regime strengthens the complementarity between coordinative and coercive Europeanization.

### **Article 7 TEU**

Since the activation of Article 7 TEU, the Council has organized several hearings with Poland and Hungary. The hearings with Poland have focused on the measures adopted by the PiS government concerning the independence of the justice system, the organisation of the courts, and the National Judicial Council, among other issues, all discussed by the Commission and Polish authorities as part of the RLF discussed in the previous section. The hearings with Hungary cover a wider range of subjects because the reasoned proposal of the EP extends beyond the rule of law and judicial functioning to other principles that have been put under strain. Each hearing begins with a presentation of the issues of concern and recent developments by the Commission, for Poland, or the Council presidency, for Hungary. The Member State in



question then shares its perspective, followed by an opportunity for questions from other Member State representatives. Each hearing lasts roughly two hours and thirty minutes. Hearings are not ‘comfortable’ situations, neither for diplomats nor for ministers. Some Member States (mainly the EU15 or the ‘Rule of law friends’) take an active role, asking questions to the governments concerned. Other representatives ‘just sit there not doing much’ because they do not want to ‘antagonise’ Poland and Hungary (Interview 4). A few countries have wished to remain ‘neutral’ in order to ‘calm things down’ (Interview 5), including Austria, Bulgaria and Romania (Interview 3). Others used to support Poland and Hungary, such as Slovakia or Czechia. After 5 years of intergovernmental coordination as part of Article 7 TEU or the Rule of Law Dialogue in the Council, the concerns about the independence of the judiciary have remained. Over time, the hearings have transformed into ‘long monologues’ (Interview 6). Paradoxically, the so-called nuclear option has transformed into a ‘talking shop’. The ongoing Article 7 TEU proceedings and the Council hearings amply demonstrate the limitations of intergovernmentalism and the weak power of persuasion of the Council. Diplomats argue that solely holding intergovernmental talks appears to be inadequate and that additional instruments of coordinative and coercive Europeanization involving the Commission are required to advance in this process. A Council majority of fourth fifths is needed to state that there is ‘a clear risk of a serious breach’ of the values enshrined in Article 2 TEU, and unanimity in the European Council is required to determine the ‘existence of a serious and persistent breach’. If this consensus is achieved, the Council, acting by a qualified majority, may then decide to suspend the voting rights of the country concerned. While the new Polish government led by the Civic Platform (PO) is determined to take the necessary steps to exit the Article 7 TEU procedure during the Belgian Presidency of the Council (before July 2024), the question remains open as to the future of this procedure in the case of Hungary.

## **Regulation 2020/2092**

In the face of the rapid deterioration of the independence of the judiciary in Poland and Hungary, in 2018 more actors began to advocate for new coercive instruments, not just in the EP but also within the Commission, among member states and elsewhere, including the potential suspension of EU funds to prevent the erosion of the rule of law (Blauberger and van Hüllen 2021; Hillion 2021; Łacny 2021). In May 2018, the Commission issued a proposal for a *Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law* (COM(2018)324 final), which was received ‘cautiously’ by Member States (Interview 7). Some representatives requested a legal opinion from the Council Legal Service (Baraggia and Bonelli 2021). The Legal Service questioned the validity of the Regulation. Spending conditionality was, in the opinion of the Legal Service, ‘a well-established practise in the context of the EU Funds’ (Council Legal Service, 13593/18, p. 4). Linking the EU budget to respect for the rule of law was ‘too sensitive’ and ‘too political’ (Interview 8). While the EP swiftly adopted the Commission’s proposal as part of the ordinary



legislative procedure, the Council was divided and awaited guidance from the European Council. From May 2018 until the European Council in July 2020, the proposal for a regulation remained in the Council. It was only at the July 2020 European Council meeting, which addressed the EU's response to the challenges of the global health crisis, the Multiannual Financial Framework and new resources to increase the Union's budget, that some Member States conditioned the increase of the EU's resources on the existence of strict rules, including respect for the rule of law. In July 2020, not only did the European Council agree on an ambitious Next Generation EU programme, but it also emphasized that 'the Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU', highlighting 'the importance of the respect for the rule of law' (European Council, Conclusions, July 2020). The adoption of Next Generation EU played a key role in accelerating the process of adoption of Regulation 2020/2092. The July 2020 European Council gave an impetus to the German rotating presidency to come to an agreement in the Council regarding the Commission's proposal and to start negotiations with the EP. In October 2020, a compromise was reached in the Council. The Council's compromise weakened the Commission's proposal and limited its scope, as a concession to Poland and Hungary, but not only to them. The Regulation does not deal with breaches of the rule of law in general, but rather, with breaches that affect the Union's budget and can lead to the suspension of EU funds. Poland and Hungary blocked the process until the very end. On the 10th and 11th of December 2020, the European Council adopted an interpretative declaration that allowed the governments of Poland and Hungary to finally lift their veto on the Multiannual Financial Framework (MFF) and the EU Recovery plan. Despite various concessions, Poland and Hungary voted against Regulation 2020/2092 and contested its legality in the Court of Justice.

After a tumultuous legislative process, on the basis of this Regulation, the Commission sent a notification to the Fidesz government in April 2022, presenting several issues concerning systemic irregularities, deficiencies and weaknesses in public procurement procedures (Council, 12551/22), among other concerns. The Hungarian government responded, but the Commission felt that the first reply did not contain adequate remedial measures. A second letter was sent in July 2022, to which the Hungarian government responded and submitted remedial measures, while contesting the 'veracity and the reliability of the methodology' (Council, 12,551/22: 4). Although the remedial measures were adopted, the Council stated that they were affected by significant weaknesses (Council of the EU, 12 December 2022). On the 18th of September 2022, the Commission adopted a proposal on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary. After 3 months, in December 2022, the Council decided to suspend €6.3 billion of EU Cohesion policy funds (55% of allocated funds, instead of the 65% proposed by the Commission). Since then, the Commission has stated that the issues identified and communicated to the Hungarian government persist.



## Cohesion policy and the RRF

The amount of grants (€312.5 billion) and loans (€360 billion) that make up Next Generation EU is unprecedented and represents, if not a ‘Hamiltonian Momentum’, at least an instance of financial European solidarity (Fabbrini 2022; Lupo 2022). The RRF is a tool designed to promote the Union’s economic, social and territorial cohesion by mitigating the social and economic impact of the Covid-19 pandemic (Regulation 2021/241). To this end, Member States prepare National Recovery and Resilience Plans (NRRPs) that set out the national reform agenda, while seeking to achieve recovery in six areas ranging from the green transition and digital transformation to social and territorial cohesion. Although national plans must take into account political priorities established at the EU level, they must also be developed in response to national problems. The National Plans ‘are not a statement of intent’ but ‘a commitment to deliver’ (Bokhorst and Corti 2023). Concretely, access to funding is based on compliance with various conditions (Fasone and Simocini 2023: 66). To begin with, an NRRP must be consistent with the challenges and priorities identified as part of the European Semester (Bekker 2021; Dermine 2024), as a tool of coordinative Europeanization. In other words, the RRF grants are conditioned on the implementation of the CSRs issued in the Semester. The RRF is also linked to the need for sound economic governance. This is also articulated in Regulation 2020/2092, establishing a general regime of conditionality for the protection of the EU budget. Hence, all the conditionality dots are connected, including those established to douse the flames of the Eurozone (macroeconomic conditionality) and rule of law crises (rule of law conditionality). In addition to the RRF, the rule of law remains central in the Common Provisions Regulation for EU funds, which put together a series of enabling conditions, horizontal and thematic, among which is the effective application and implementation of the Charter of Fundamental Rights (Fiscaro 2022). The non-respect of these conditions can also lead to the suspension of EU funds.

The National Plans are adopted by the Council through proposal by the Commission (Fabbrini 2022). The Commission plays a central political and technical role in this process, through bilateral dialogue and negotiations with each Member State. Payments are conditional on a positive assessment by the Commission regarding the relevance, effectiveness, efficiency and coherence of the plans. Funds are also contingent of the fulfilment of milestones and targets.

Despite the fact that the functioning of the justice systems has continued to be a cause of concern, the Commission has authorized the Hungarian and Polish NRRPs. However, the NRRP leading to the disbursement of €25.3 billion in grants and €34.5 billion in loans to Poland had been kept on hold for almost 1 year (Fabbrini 2022:57). Approved by the Commission, it was endorsed by the Council with demands for reforms related to the independence of the judiciary and discussed as part of the Article 7 TEU procedure. Regarding Hungary, to release the first tranche of the RRF, the government must first complete several reforms and measures, including those outlined in the CSRs for 2019–2022, the European Semester and Article 7 TEU. As stated by the Commission, Hungary has committed to 27 ‘super milestones’ to ensure the protection of the Union’s financial interests and



to strengthen judicial independence. They include 4 ‘super milestones’ for judicial independence, which correspond to the measures requested of Hungary by the Commission under the horizontal enabling conditions of the EU Charter of Fundamental Rights, and 21 ‘super milestones’ corresponding to the remedial measures under the budget conditionality mechanism. This is a precondition for the pay-out of the €5.8 billion in grants and €9.6 billion in loans from the RRF. Given that the super milestones have not been fully complied with, no payment request has been fulfilled. Yet, in December 2023 the Commission considered that Hungary had fulfilled the horizontal enabling conditions of the EU Charter of Fundamental Rights in what concerns judicial independence; based on this decision, the Hungarian government may start the payment of €10.2 billion.<sup>1</sup> The decision of the Commission has been strongly criticised, as various civil society organizations have provided critical evaluations of the situation in Hungary that stand in stark contrast to the positive assessment of the Commission (Hungarian Helsinki Committee 2024).

## Conclusions

By addressing the question ‘How does the EU seek to shape national justice systems in the Member States?’, this article has proposed a framework that conceptualizes two modes of Europeanization: *coordinative* and *coercive*. Analysing the policy tools institutionalized in response to the rule of law crisis, the article shows that the former strengthens the ability of the Commission to shape national agendas (*power to*), while *coercive Europeanization* is about the ability to take binding decisions with an impact on Member States (*power over*). These two modes of Europeanization complement each other. They are vehicles through which domestic change is meant to occur, either through binding conditions or non-binding recommendations. These policy tools also institutionalize mechanisms that bring together the Commission and the Member States, seeking to accommodate their preferences through dialogue, persuasion or even negotiation. By including the national justice systems in the European Semester, the Commission sought to infuse in its relationship with the Member States not only more dialogue and cooperation but also more legitimacy and learning. By putting forward policy instruments such as the European Semester, the Rule of Law Framework and the Annual Rule of Law Report, the Commission sought to determine *with* the Member States (not *against* them) the degree of fit/misfit in the functioning of their justice systems, in an interactive process/co-construction meant to strengthen both legitimacy and governmental acceptability. As far as coercive Europeanization is concerned, the article shows not only the complexity of the conditionality regime put in place but also the underlying mechanisms such as dialogue, persuasion and negotiation between the Commission and the Member State concerned. *De jure*, the power and the ability of the EU in general, and the Commission in particular, to strengthen the independence, effectiveness and quality of national justice systems is consolidated. *De facto*, both *coordinative* and *coercive*

<sup>1</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_6465](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6465).





Europeanization raise questions about the limited outcomes on the ground, which need to be examined in further research, including questions about who has power over whom.

## List of interviews

- Interview 1, civil servant, European Commission, DG EMPL, 26 February 2016.
- Interview 2, diplomat, PermRep Portugal, 30 August 2017.
- Interview 3, expert, PerRep Austria, 3 October 2022.
- Interview 4, diplomat, PermRep Luxembourg, 24 November 2022.
- Interview 5, two diplomats, PermRep Bulgaria, 13 October 2022.
- Interview 6, two legal experts, PermRep Germany, 10 November 2022.
- Interview 7, diplomat, PermRep Romania, 25 February 2021.
- Interview 8, diplomat, PermRep Belgium, 23 July 2021.

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