



The Conference on the Future of Europe

The future of Legal Europe – will we trust in it?

Peter-Christian Müller-Graff¹



Accepted: 23 July 2021 / Published online: 11 August 2021
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Abstract

The agenda of the Conference on the Future of Europe contains the potential for numerous legislative recommendations. This raises the question of the future resilience of Union law. The article, which is based on the author’s introductory speech of ERA’s webinar on the Conference, assesses the challenges and chances of the Union’s capacity to engage in proper rule-making, to experience compliant rule-implementation and to benefit from a judiciary which reliably settles disputes. It concludes that as long as the demanding requirements of an enlightened legal civilisation are fulfilled there is no reason not to trust in Legal Europe’s future.

Keywords Legislative impetus of the Conference on the Future of Europe · Rule-making capacity of the EU · Rule-implementing capacity of the EU · Judicial dispute-settlement capacity of the EU

1 Introduction

The Conference on the Future of Europe in combination with the sub-question “The Future of Legal Europe – Will We Trust in it?” is the topic of this contribution.¹ Obviously the Conference which has just opened is *different* from the Constitutional

¹This contribution is the text of the introductory speech by the author to the webinar “*The Conference on the Future of Europe – The Future of Legal Europe – Will We Trust in it?*” held at the Academy of European Law, Trier, 11 May 2021.

✉ P.-C. Müller-Graff
p.mueller-graff@igw.uni-heidelberg.de

¹ Universität Heidelberg, Heidelberg, Germany

Convention² both in its composition and in its objective. The new Conference is an experiment in two ways. It involves not only representatives of European and national public institutions, but also citizens.³ Its objective of formulating *recommendations* is somewhat unclear, but open to any kind of proposal and offers a *chance* to obtain strategic inspiration and concrete proposals for the Union's future.

The Conference gives us – as lawyers of all professional disciplines – a fresh impetus to think about the future of Legal Europe. Why? Because the proposed topics lean towards a norm-oriented outcome. This leads directly to a follow-up-question to the Academy of European Law's 25th anniversary Congress topic "The Authority of EU Law – Do we Still Believe in it?" in 2017. Four years ago, the conclusions were largely affirmative.⁴ At that time, the deviations from the rule of law in Poland were not yet persistent,⁵ the British rejection of supranational law not yet finalised,⁶ the German Federal Constitutional Court's PStP decision not yet handed down⁷ and a pandemic stress-test of the Union's legal order had not yet been experienced.⁸ Enough reasons thus exist for turning the present focus to the future of "Legal Europe" – understood (in a certain allusion to Montesquieu's tripartite division of powers) in its rule-making, its rule-implementing and its judicial dispute-settlement capacity – with the threefold question: will we trust in the future of the Union's capacity to engage in proper rule-making (2.); to experience compliant rule-implementation (3.); and to benefit from a judiciary which reliably settles disputes (4.)? In other words, how much can we burden the community of law with new political matters without weakening its reliability and integrative power?

2 European rule-making

First, European rule-making is very much inherent in the thematic agenda of the Conference as published on the digital platform. Its potential *legislative* implications are easily visible in the abstractly mentioned ten topics (2.1) and point to a variety of rule-making challenges (2.2).

²Peter-Christian Müller-Graff, *Der Europäische Verfassungskonvent*, (Österreichische Verlagsgesellschaft, Wien, 2004); Klemens H. Fischer, *Der Europäische Verfassungsvertrag*, (Nomos, Baden-Baden, 2005).

³Nicolai von Ondarza/Minna Ålander, *Die Konferenz zur Zukunft Europas*, SWP-Aktuell 2021/A 20, 2021.

⁴Wolfgang Heusel/Jean-Philippe Ragueade (eds.), *The Authority of EU Law. Do We Still Believe in It?*, (Springer, Cham, Switzerland, 2019).

⁵See CJEU, Judgment of 24.6.2019, Case C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531 para.124; CJEU, Order of 8.4.2020, *Commission v. Poland*, C-791/19 R, ECLI:EU:C:2020:277.

⁶OJ 2019 C 384I/1.

⁷Bundesverfassungsgericht, BVerfGE 154,17-152, ECLI:DE:BVerfG:20200505.2bvr085915.

⁸Peter-Christian Müller-Graff, in: Peter Hilpold/Andreas Raffener/Walter Steinmair (eds.), *Rechtsstaatlichkeit, Grundrechte und Solidarität in Österreich und Europa* (facultas, Wien, 2021), S. 765ff.

2.1 Topics

What are the topics? Not the five scenarios of Jean-Claude Juncker in 2017,⁹ but rather, thematic headwords. Most of them fit neatly into Ursula von der Leyen's six-pillar agenda of 2019¹⁰ as pursued by the Commission and supplemented by the experience of the pandemic. To give a short overview:

2.1.1 Climate change and the environment

The first-named topic "*climate change and the environment*" parallels the Commission's "European Green Deal". Understood as a concept of industrial transformation, the latter comprises legislative projects such as the proposed "European climate law", the extension of the "emissions trading system", the introduction of a "carbon border tax", the fostering of a "circular economy" and "clean technologies", and the pursuit of a "biodiversity strategy".

2.1.2 Health

The pandemic-elevated second subject "*health*" may turn out to be a *legislative* grabbox with demands for stronger Union competences. But how is the Union's operative management capacity in this area?

2.1.3 A stronger economy, social justice and jobs

The third topic: "a stronger economy, social justice and jobs" resembles the Commission's agenda "an economy that works for people". The latter addresses the legal unfolding of the primary law concept of a "social market economy" (Article 3 para. 2 TEU) by supporting "small and medium-sized enterprises", by deepening the Economic and Monetary Union (including the "Banking Union" with a "European Deposit Insurance System"), by implementing the "Social Pillar" (including a "fair minimum wage", an "Unemployment Benefit Reinsurance Scheme" and a "European Child Guarantee"), by promoting "equality" (in the sense of new anti-discrimination legislation) and by striving for fair taxation (including the reform of the international corporate tax systems with a "common consolidated corporate tax base" and introducing a digital tax).

2.1.4 The EU in the world

The fourth theme, the "EU in the world" corresponds to the Commission's "a stronger Europe in the world". The latter aims – in its legal dimension – at updating "the rules-based global order" and should lead to the conclusion of "comprehensive trade agreements" that "include highest standards of climate, environmental and labour

⁹European Commission, *White Paper on the Future of Europe, Reflections and Scenarios for the EU27 by 2025*, 2017.

¹⁰Ursula von der Leyen, *A Union that strives for more. My agenda for Europe* (Amt für Veröffentlichungen der Europäischen Union, Luxemburg, 2019).

protection” and can strengthen the global “Brussels effect” (a term coined by Anu Bradford¹¹).

2.1.5 Values and rights, rule of law, security

The fifth issue “values and rights, rule of law, security” echoes parts of the Commission’s point “protecting our European way of life” – an objective which includes such legally relevant subjects as “upholding the rule of law” (including the insertion of this aim in the Multiannual Financial Framework) and the improvement of cross-border cooperation in “internal security”.

2.1.6 Digital transformation

The sixth topic “digital transformation” parallels the Commission’s item “a Europe fit for the digital age” comprising legislative action such as the proposed “Digital Services Act”, a “new competition tool” and a “coordinated ... approach on the human and ethical implications of Artificial Intelligence”.

2.1.7 European democracy

The seventh heading, “European democracy”, comprises the Commission’s quest for “a new push for European democracy” – an institutional power relation issue – which involves potentially legal questions such as “a right of initiative for the European Parliament”, the improvement of the “lead candidate system” and the issue of “transnational lists”.

2.1.8 Migration

The eighth issue “migration” accentuates parts of the Commission’s chapter “protecting our European way of life”, including the modernisation of the “Common European Asylum System” with a new pact-based approach to burden-sharing and the reinforcement of the “European Border and Coast Guard Agency”.

2.1.9 Education, culture, youth and sport and “other ideas”

The topics “education, culture, youth and sport” and, in particular, “other ideas” may possibly turn out as surprise bags for recommendations such as, *e.g.*, amending the Charter of Fundamental Rights, creating self-sufficiency instruments for essential commodities (such as pharmaceuticals or semiconductors), strengthening the decision-making rules on external action and common defence, establishing new own resources (including Union taxes), creating new cohesion instruments, electing the

¹¹ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP, Oxford, 2020); see also Peter-Christian Müller-Graff, *Unionsrechtliche Europäisierung außerhalb der Europäischen Union*, in: Wolfram Hitz/Antje Nötzold (eds.), *Die Zukunft Europas in einer Welt im Umbruch* (Springer VS, Wiesbaden, 2018), p. 185ff.

President of the Commission by direct universal suffrage, transforming the Union into a “true” federation.

All told, it is safe to predict for the future of Legal Europe that we can trust in the existence of manifold ambitions for legislative productivity. But can we also trust in their feasibility?

2.2 Challenges for European rule-making

Here, the general challenges to adopting convincing rules at the right time come to mind – outside crisis-driven situations (with results such as the European Stability Mechanism, the Fiscal Compact and the Recovery Fund¹²). Specific difficulties exist for European rule-making: in decision-making, in implementing a coherent approach, in formulating concise rules, in exercising self-restraint, in approaching Treaty amendments.

Because decision-making for primary law amendments requires unanimity plus ratification (or approval or non-opposition) by all Member States¹³ (e.g., for new competences or for changing decision rules for tax legislation,¹⁴ for measures in the Common Foreign and Security Policy (CFSP)¹⁵ or for determining the existence of an Article 7 para. 2 TEU situation¹⁶), the courage to take such decisions has decreased and the taboo-driven risks of petrification increase, if the search for “sleeping beauties”¹⁷ in existing primary law (in the sense of not yet discovered or awakened legislative powers) is unsuccessful. Adopting secondary law runs the risk of hybrid standards which, however, can reflect the virtue of combining and reconciling a variety of different perspectives from all corners of Europe in the form of compromises. This is due to the decision-making rules and the required majorities (or unanimity) in the Union institutions involved, thereby, if the course of legislation is successful, producing complex rules (e.g., in consumer and data protection) and *linguistically* diplomatic ambiguities and abstract wording, which leaves – perhaps wisely – conflict resolutions to the judiciary. Implementing a *coherent* approach (e.g., in health law or tax law) can, in addition, meet different *scopes* and *categories* of *competences*, the availability or non-availability of different *legal instruments* or the choice between them, thereby increasing rule-complexity (e.g., in migration law). At the same time – paradoxically – the exercise of self-restraint in European rule-making is sometimes threatened by the temptation of rule-shapers to devote themselves to needless details or educational ambitions (see e.g., the Unfair Commercial Practices Directive¹⁸),

¹²Council Regulation (EU) 2020/2094, OJ 2020 L1 433/23.

¹³For the different revision procedures, see Article 48 TEU.

¹⁴Currently Articles 113 and 115 TFEU.

¹⁵Currently Article 31 para. 1 TEU.

¹⁶Currently Article 7 para. 2 TEU.

¹⁷A word coined by Jean-Claude Juncker in a tweet of 11 December 2017, 12:04.

¹⁸OJ 2005 L149/22.

regulatory paternalism (perhaps seen partially in consumer protection ¹⁹) or hardly realisable provisions (perhaps seen in procedural asylum law).

As a whole, rule-making for and in the Union has proven to be structurally more complex and time-consuming and – all in all – a more demanding endeavour than rule-setting in most nation states. Hence it is almost a miracle that it succeeds – again and again – to a very respectable extent and degree. This experience can bolster our trust in the future of the rule-making capacity of Legal Europe at least insofar as concerns secondary law. But can we also trust in the future of rule implementation and compliance?

3 European rule-implementation and compliance

Rule-implementation and compliance with rules is the second aspect. The split between rule-making and rule-implementation is not a European speciality. However, in comparison to a state, two additional challenges come into play: the level split between supranational rule-making and national rule-enforcement authorities (3.1) and latent differences between Member States in the perception of law in social, economic and political life (3.2).

3.1 The level split between supranational rule-making and rule-enforcement authorities

First: in contrast to a nation state, the Union's legal order is characterised by the separation of the level of the single holder of the power of supranational legislation and that of the 27 national holders of power of enforcement. As a result, the Commission as the monitor of the EU's legal order has complained that the Member States' compliance with EU law "is not yet good enough".²⁰ According to its 2019 report, the Commission launched 797 infringement cases in that year. The highest number concerned environment and internal market issues but failures in implementing migration and asylum law were also picked up.²¹ However, failures in the application of small-scale secondary law may be classified as a common occurrence in any legal system and hence, as long as they remain scattered islands of national disobedience in a sea of loyal compliance, should not shatter our trust in the future of Legal Europe.

However, the disrespect of primary law obligations by certain Member States is alarming: *e.g.*, the EU law commitment to the Geneva Convention on Refugees (see Article 77 TFEU), the avoidance of excessive government deficits (see Article 126 TFEU – *scil.*: in times not affected by the pandemic) or the respect for the independence of courts and judges as part of the rule of law (Article 2 TEU). Here, our trust

¹⁹Very critical *e.g.*, Michael Martinek, *Das Prinzip der Selbstverantwortung im Vertrags- und Verbraucherrecht*, in: Karl Riesenhuber (ed.), *Das Prinzip der Selbstverantwortung* (Mohr Siebeck, Tübingen, 2011), 247ff.

²⁰European Commission, Press Release, 6 July 2017: *Member States compliance with EU law: not yet good enough*.

²¹European Commission, *2019 Commission report and factsheets on monitoring the application of EU law*, 31 July 2020; European Commission, *Monitoring the Application of European Union Law – 2019 Annual Report*.

requires the utmost *attention* as well as decisive *action* to avoid damaging developments. The “rule of law conditionality” for access to EU funds²² and the establishment of an annual reporting system on the state of the “rule of law”²³ are steps in the right direction.

It is worth remembering that the proper implementation of rules is also an important responsibility of the national judiciary. In this regard, the national reports of this year’s upcoming FIDE Congress on “National Courts and the Enforcement of EU Law”²⁴ seem to paint a rather comforting picture of increased efforts on the part of courts to engage in consistent interpretation of national law with Union law, to apply the principles of direct effect and supremacy of EU law, to realise the principles of equivalence and effectiveness (including compensation in damages) and the use of the system of preliminary references to the European Court of Justice (CJEU). The clear violation of procedural obligations (Article 267 para. 3 TFEU) by the German Federal Constitutional Court’s PSPP judgement²⁵ should remain a singular incident. Nevertheless, an infringement procedure, as carried out in a case of non-reference by the French Conseil d’État,²⁶ could bolster trust in the firmness of Union law.

3.2 Latent differences between Member States in the perception of law in social, economic and political life

Besides this level split of sovereign rights a second, but more diffuse challenge to compliance is of a mixed historically-shaped social, cultural, and political nature. The perception of the role of law as such in social life does not seem to be identical in all Member States. *E.g.*, the writer Hans Magnus Enzensberger’s impressions of different European countries (in his book “Ach Europa”²⁷) senses a different human attitude to the importance of legal rules in Sweden and Italy. It may also be different as between Hungary and Denmark, Poland and the Netherlands and encumber the readiness for mutual recognition.²⁸ However, insofar Union law offers a permanent chance for the gradual alignment of perceptions of law and courts – in particular if the Union’s legal order as a whole is perceived as a being framed by a trustworthy dispute settling judiciary.

²²Regulation (EU, Euratom) 2020/2092 of the European Parliament and the Council, OJ 2020 L 433/1.

²³European Commission, *2020 Rule of Law Report*, 30 September 2020.

²⁴Marleen Botman/Jurian Langer (eds.), *National Courts and the Enforcement of EU Law*, (Eleven International Publishing, The Hague, 2020).

²⁵*Supra*.

²⁶CJEU, Judgment of 4 October 2018, Case C-416/17, *Commission v. France*, ECLI:EU:C:2018:811 para. 114.

²⁷Hans Magnus Enzensberger, *Ach Europa! Wahrnehmungen aus sieben Ländern* (Suhrkamp, Frankfurt am Main, 1987).

²⁸A principle given expression in judicial cooperation in civil matters (Article 81 TFEU) and criminal matters (Article 82 TFEU).

4 Dispute settling judicial capacity in Union law

The third and last aspect of our question regarding the future of Legal Europe's future consists of the dispute settling judicial capacity in Union law.

In this respect challenges pertain to the readiness of all branches of national sovereignty and all bodies of the Union to recognise the last word of the CJEU in settling disputes on the interpretation of Union law in accordance with its basic mission – laid down in Article 19 TEU – of ensuring that the law is observed. In this regard, the main burden rests with the CJEU. Against the background of nearly 70 years' experience it is surely no exaggeration to assess the CJEU's work as constituting a gigantic admirable achievement in shaping a European community of law. Its gradually-acquired highly respected role also gradually entails increased expectations for the future. Three of them concern sensibility, justification and legal doctrine.

4.1 Sensibility in the interpretation of Union law

First: sensibility in the interpretation of Union law – equally authentic in 24 languages (the political question has been raised: why is English still an authentic legal language?) – is a matter of course for gaining persuasiveness in 27 Member States. The more words in codifications, the more demanding the CJEU's task. The open ear for interpretations of referring national courts helps, but often the teleological method must have decisive weight. When it comes to constitutional concerns of national courts in regard to the interpretation of Union law, sensibility for the “*granum salis*” can lead the CJEU to the transformative internalisation of national constitutional criteria into genuine Union law criteria (as practiced in the second *Taricco* decision²⁹). In extraordinary cases a conflict might be avoided by a wise understanding of “fundamental structures, political and constitutional” which amount to the “national identity” of a Member State which must be respected by the Union in accordance with Article 4 para. 2 TEU. But this cannot lead to the recognition of a national definition of the values that are common to the Member States (Article 2 TEU) which is inferior to their core content to be defined by Union law such as, *e.g.*, the independence of judges as a core element of the rule of law.³⁰

4.2 Comprehensible reasoning in the judgments of the CJEU

Second: the lack of a comprehensible justification of the CJEU's affirmation of the ECB's competence to adopt the PSPP was one of the core issues in the German Federal Constitutional Court's PSPP-decision. Karlsruhe missed such a comprehensible reasoning in the PSPP-judgement of the CJEU.³¹ Undoubtedly, the Federal Constitutional Court's judgment infringed Union law by not referring this Article 19 TEU question to Luxembourg.³² But this incident signals that regarding sensitive issues, the needs for deepened reasoning increase.

²⁹CJEU, Judgment of 5 December 2017, C-42/17, *M.A.S., M.B.*, ECLI:EU:C:2017:936 para. 51.

³⁰See, *e.g.*, ECJ, Case C-619/18, *Commission v. Poland*, *supra* (note 5), para. 42-59.

³¹Bundesverfassungsgericht, *supra* (note 7) para.155 *et seq.*

³²*E.g.*, Winfried Tilmann IWRZ 2020, 166; Peter-Christian Müller-Graff, GPR 2020, 167 and EuZ 2020, 154, 155; Ingolf Pernice, EuZW 2020, 511, 518; Peter Meier-Beck, EuZW 2020, 522.

4.3 Incorporation of academic legal doctrine

Last but not least, there is the role of legal doctrine. Contrary to frequent assertions that the ECJ pursues a case-law approach, I see the CJEU as having been for long on the course of developing its own legal doctrine (*e.g.*, in the area of internal market freedoms and competition law). This deserves full support. Justice and legal certainty require that the same issues be decided upon the same way and that different issues be decided upon differently – according to a clear system of criteria, rules and principles. The incorporation of academic legal doctrine in the judgments of the CJEU can serve this objective and additionally strengthen the trust in the good future of the Union's judicial dispute settlement capacity.

5 Conclusion

Will we trust in the future of Legal Europe? Why shouldn't we? As long as a sufficient number of Union citizens are convinced of the benefits of Union law for the wellbeing of the peoples of the Union and as long as legislators remain prudent, the addressees – essentially – compliant, the counsels knowledgeable and creative, the judges independent, well trained and wise and the scholars vigilant – hence, as long as these demanding requirements of an enlightened civilisation are fulfilled – we as lawyers of all professional branches and the Academy of European Law have no fundamental reason not to trust in Legal Europe's future.

Funding Note Open Access funding enabled and organized by Projekt DEAL.

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