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## Editorial comments: A Jurisprudence of distribution for the EU

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## EDITORIAL COMMENTS

### *A jurisprudence of distribution for the EU*

#### *Interregnum and distribution*

Every lawyer in Europe may legitimately wonder what EU law will look like in the years to come. The Union seems to live in a sort of *interregnum*: the old forms of European integration are dying, and new forms are still to be born.<sup>1</sup> War, external threats, Europe's dependence on external resources and infrastructures, the rule of law crisis, the ecological catastrophe, the polarization of European societies and the ensuing contestation of the Union and its law are not just ordeals to which the Union is forced to adapt. They render the law of the Union inherently unstable, requiring something new: the elaboration of a broader and more refined legal framework.

Is the Union able and equipped to engage in this task? Its reaction has hitherto been twofold. On the one hand, the Union has relied on its capacity to develop new instruments and legal concepts best suited to these challenges. Recent practice is not short of evidence of creative constructions: be it the case law of the Court of Justice to protect judicial independence in the context of the rule of law crisis, the Next Generation EU programme in response to the pandemic episode, or the policy instruments developed by the Commission to cope with Europe's "strategic autonomy" challenge. On the other hand, and in the opposite sense, it seems that the Union is taking refuge in its fundamental values and resorting to long-standing principles enshrined in EU law. Two of these principles have recently re-emerged in the case law of the ECJ, yet endowed with a new function. One is the principle of equality between Member States, considered as a new basis for the primacy of EU law, beyond the instrumental notion of effectiveness. Recognized by the Court of Justice in the 1970s, but then hardly relied on, introduced by the Lisbon Treaty in Article 4(2) TEU,<sup>2</sup> it has been recently resurrected in a context where the

1. The reference is to Antonio Gramsci's classic passage: "The crisis consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear." (*Prison Notebooks* Vol. II, Notebook 3, 1930).

2. See Case 39/72, *Commission v. Italy*, EU:C:1973:13; Case 128/78, *Commission v. UK*, EU:C:1979:32; Case 231/78, *Commission v. UK*, EU:C:1979:101.

authority of EU law is ever more questioned.<sup>3</sup> The other is solidarity between Member States. First mentioned in 1969 as the basis of Community membership, infrequently used since then,<sup>4</sup> solidarity has only recently been recognized as “one of the fundamental principles of EU law”, in a case concerning energy supply in a context of external dependence,<sup>5</sup> then reasserted in relation to the use of the Union budget to impose sanctions on violations of the rule of law.<sup>6</sup> Classic principles of EU law are used to provide a normative justification for new constructions. Legally, the interregnum assumes a special shape: old forms are embedded in new ones.

The insistence on equality and solidarity relates to worrying questions of compliance with EU law; it also signals a growing concern about distribution and fairness in the Union. As interdependencies between Member States continue to increase, while vulnerabilities of European societies are exposed more than ever before, the case for a rise in power of the EU strengthens. It seems that the EU is to become a new entity engaged in restructuring, enabling the transition to more resilient European infrastructures and societies. This raises issues of distribution and redistribution, of how to ensure that the benefits and burdens associated with this transition are allocated efficiently and fairly among Member States and social groups within European societies. The transition involves structural policy reforms, high-level financial investments and innovative coordination mechanisms and, with respect to each of these, a recurrent concern is fairness, i.e. the correction of inequalities that might arise as a result of the interdependencies created by the process of European integration itself. Recent examples include the agreement on a Social Climate Fund to support the climate transition package,<sup>7</sup> the proposal to set up a joint purchase of gas mechanism to end dependence on Russian

3. See the Court of Justice Press Release No. 58/20, following the *PSPP* judgment of the German Constitutional Court, 8 May 2020; Lenaerts, “L'égalité des États membres devant les traités: la dimension transnationale de la primauté”, 4 RDUE (2020), 7–10; Dubout (Ed.), *L'égalité des États membres de l'Union européenne* (Larcier, forthcoming 2022).

4. Joined Cases 6 & 11/69, *Commission v. France*, EU:C:1969:68. See generally Schiek, “Solidarity in the case law of the European Court of Justice: Opportunities missed?” in Petersen et al. (Eds.), *Transnational Solidarity: Concept, Challenges and Opportunities* (Cambridge University Press, 2020), pp. 252–300.

5. Case C-848/19 P, *Germany v. Poland*, EU:C:2021:598, para 38. See generally Lenaerts and Adam, “La solidarité, valeur commune aux États membres et principe fédératif de l'Union européenne”, (2021) CDE, 307–417.

6. Case C-156/21, *Hungary v. Parliament and Council*, EU:C:2022:97, para 129.

7. Council Press Release of 29 June 2022: <[www.consilium.europa.eu/en/press/press-releases/2022/06/29/fit-for-55-council-reaches-general-approaches-relating-to-emissions-reductions-and-removals-and-their-social-impacts/](http://www.consilium.europa.eu/en/press/press-releases/2022/06/29/fit-for-55-council-reaches-general-approaches-relating-to-emissions-reductions-and-removals-and-their-social-impacts/)>. The agreement amends the Commission's proposal for a regulation establishing a Social Climate Fund, COM(2021)568 final of 17 July 2021.

supplies and relax the excessive pressure on gas dependent States,<sup>8</sup> or else the setting up of a temporary solidarity mechanism for the allocation of asylum applications between some Member States.<sup>9</sup>

Significantly, EU law documents are filled with what are commonly referred to as “distribution keys”, i.e. methods and criteria governing the sharing of benefits or burdens between Member States. Such keys are to be found in relation to the Common Agricultural Policy, cohesion policy, environmental policy, health policy, migration policies, or financial instruments. The sharing arrangements concern items such as financial resources, crop productions, fishing opportunities, migrants’ applications, polluting emissions, or vaccines. They are about benefits (financial resources, vaccines), as well as burdens (reception of asylum seekers, polluting emissions, or milk production restrictions).<sup>10</sup> They take many different forms: quotas, financial contributions, opportunities, loans, etc. They are based on varying criteria: the population of each Member State, the GDP per capita, the average unemployment rate, or the past number of asylum seekers and resettled refugees in the country concerned. A complete analysis has yet to be carried out to make a complete list of the various “sharing formulas” enshrined in EU law.<sup>11</sup>

8. European Commission, *REPowerEU Plan*, COM(2022)230 final of 18 May 2022.

9. “First step in the gradual implementation of the European Pact on Migration and Asylum: modus operandi of a voluntary solidarity mechanism”, of 22 June 2022, concluded by the Ministers in charge of migration matters of Belgium, Bulgaria, Cyprus, the Czech Republic, Germany, Greece, Spain, Finland, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Norway, Switzerland, Liechtenstein, in the presence of the European Commission: [presidence-francaise.consilium.europa.eu/en/news/first-step-in-the-gradual-implementation-of-the-european-pact-on-migration-and-asylum-modus-operandi-of-a-voluntary-solidarity-mechanism-1/](https://presidence-francaise.consilium.europa.eu/en/news/first-step-in-the-gradual-implementation-of-the-european-pact-on-migration-and-asylum-modus-operandi-of-a-voluntary-solidarity-mechanism-1/).

10. Note that there might be some discomfort with the use of the notion of “burden” as applied to the reception of asylum seekers. This reflects the way the EU approached the issue. See, however, for the specific ethical issues raised, Gibney, “Refugees and justice between States”, 14 *European Journal of Political Theory* (2015), 448–463.

11. See, for example, the allocation keys provided in Annexes II and III of Regulation 2021/241 of 12 Feb. 2021 establishing the Recovery and Resilience Facility, O.J. 2021, L 57/17–75, which are in the form of a mathematical formula. See also the more readable initial proposal of the Commission for a relocation of asylum seekers from Italy, Greece and Hungary to other Member States, which is as follows: “The proposed distribution key should be based on (a) the size of the population (40% weighting), (b) the total of the GDP (40% weighting), (c) the average number of asylum applications per one million inhabitants over the period 2010–2014 (10% weighting, with a 30% cap of the population and GDP effect on the key, to avoid disproportionate effects of that criterion on the overall distribution) and (d) the unemployment rate (10% weighting, with a 30% cap of the population and GDP effect on the key, to avoid disproportionate effects of that criterion on the overall distribution)”, COM(2015)451 final of 9 Sept. 2015, Recital 25. In relation to cohesion policy, the allocation method for the structural funds builds on the so-called “Berlin formula”, adopted by the European Council in 1999 (European Council Presidency, Berlin, 24 and 25 March 1999).

Economists and political scientists are well aware of the significant implications of these technical tools, and analytically equipped to deal with them.<sup>12</sup> It is of utmost importance that lawyers are too. For the question of Europe's justice is partly played out in the implementation and contestation of these mechanisms. Distribution mechanisms among Member States are often a proxy for addressing the issue of social justice *within* Member States; it is a way of allocating resources or charges among social groups and individuals. The analysis of these mechanisms requires us to go beyond the traditional institutional analysis in terms of the allocation of competences, powers, and responsibilities. EU lawyers should be ready to develop distributional analyses, exploring the impact of EU law on the distribution of available resources among the persons subject to EU law.<sup>13</sup> The issue here is not to identify the winners and losers of European integration, thus fuelling the creeping phenomenon of polarization that affects the discourse on Europe and is now reaching the field of European studies. The issue is to unravel the underlying conceptions that govern the processes of redistribution within the Union. These conceptions are not fully transparent and they seem to vary randomly from one sector to another. What we need is a robust jurisprudence of distribution in the EU.<sup>14</sup>

### *Distributive conflicts avoidance*

Distributive issues are not new in the EU. However, they have long been considered as pertaining to the realm of high politics, subject to intergovernmental negotiations. The history of the (in)famous “UK rebate,” renewed every year since the Council Decision of 7 May 1985 on own resources, bears witness to this. This correction was unanimously considered to be politically unavoidable, legally problematic, and substantively unfair. The recent EU-UK fishing deal, in the context of Brexit, seems a reiteration of the same problematic pattern.<sup>15</sup>

12. See e.g. in relation to migration issues, Altemeyer-Bartscher et al., “On the distribution of refugees in the EU”, 51 *intereconomics* (2016), 220–228; Grech, “Undesired properties of the European Commission’s refugee distribution key”, 18 *European Union Politics* (2016), 212–238. See e.g., in relation to cohesion policy, Solís-Baltodano et al., “Distributing the European structural and investment funds from a conflicting claims approach”, 42 *Review of Regional Research* (2022), 23–47.

13. See already Nicola, “La doctrine and the missing distributive analysis”, *Verfassungblog* (2 Sept. 2020).

14. See Barrozo, “Critical legal thought: The case for a jurisprudence of distribution”, 92 *University of Colorado Law Review* (2021), 1043–1057.

15. Stewart et al., “The Brexit deal and UK fisheries – has reality matched the rhetoric?”, 21 *Maritime Studies* (2022), 1–17.

There is yet another reason for the inattention of EU lawyers to these issues. Distributive conflicts have been classically subsumed under institutional issues.<sup>16</sup> This has been clear ever since *Commission v. Italy*, of 7 February 1973.<sup>17</sup> Italy complained that the Council measures to restrict milk production were not adapted to the particular needs of the Italian economy and population; the Italian Parliament decided not to implement them. The ECJ considered that “in permitting Member States to profit from the benefits of the Community, the Treaty imposes on them also the obligation to respect its rules”. Since Italy had unilaterally broken, “according to its own conception of its national interest, the equilibrium between advantages and obligations flowing from its adherence to the Community”, it had in fact breached “the equality of Member States before Community law”. Membership of the Community entails compliance with a “measure decided upon in common” within the Council. It was open to the Italian Government to act and to assert its difficulties within “the Community institutional system.” By freeing itself from this system, Italy sought to take an “undue advantage to the detriment of its partners in view of the free circulation of goods.”

The distributional work must be done by the “framework of the mechanics of collective discussion set up with a view to the implementation of the common agricultural policy.”<sup>18</sup> The EU institutional framework allows the Member States to “emphasize their interests, while it falls to the Commission to arbitrate between possible conflicts from the point of view of the general interest.”<sup>19</sup> However, when put under pressure, the Court often relies on an additional technique: the recourse to general principles of EU law (mainly: non-discrimination, legitimate expectations, proportionality). In cases involving distributive conflicts, the operation of these principles acts as a shield against arguments based on particular situations or special circumstances. Thus, for instance, the Court accepted that the advantages and disadvantages of the Common Agricultural Policy should be “distributed proportionately among those concerned, without any distinction being made between the territories of the Member States.” However, it made clear that particular situations or special circumstances should yield to the “concerted effort by all the Community producers” and the overall balance commonly achieved in the EU provisions.<sup>20</sup>

16. See, for an extensive analysis of these conflicts under EU law, Díez Sánchez, *Integration through law and its Discontents: Unveiling the distributive impact of judge-made law in the EU* (PhD thesis, EUI, 2021).

17. Case 39/72, *Commission v. Italy*, especially paras. 20–24, cited in the next sentences.

18. Case 57/72, *Westzucker v. Einfuhr- und Vorratsstelle für Zucker*, EU:C:1973:30, para 17.

19. *Ibid.*

20. Case 203/86, *Spain v. Council*, EU:C:1988:420. para 25.

This reasoning has also been applied to environmental policy. This area is the site of a multitude of burden-sharing conflicts between Member States. One example is the fight against air pollution. Under the Directive on the reduction of national emissions of certain atmospheric pollutants, a concerted effort is imposed on the Member States.<sup>21</sup> This effort is distributed according to the “reduction potential” of each State, taking into account its GDP and the historical level of emissions. It is being challenged by Poland, arguing that the cost of implementing the Directive is disproportionately higher in Poland than in other Member States.<sup>22</sup> The Court reasoned in the way it had developed in the field of agriculture. The procedure for adopting this measure was fine: all relevant data were taken into account, and the Member States were regularly informed and consulted during the decision-making process. Moreover, “the EU legislature is not obliged to take into consideration the particular situation of a Member State if the EU measure concerned has an impact in all Member States.” What matters is that a balance is struck “taking into account not the particular situation of a single Member State, but that of all EU Member States.” The fact that certain socio-economic sectors and areas in Poland will be particularly affected by the implementation of this Directive yields to the overall socio-economic and ecological benefits that it brings. Thus, it is apparent that substantive distributive concerns are addressed through institutional and procedural considerations. The ECJ relies on the formal equal position of States within the Union’s institutional framework and on the value of common achievements. This may be at the expense of discrete local injustices.

### *Distributive issues in a crisis context*

Such a legal analysis is sustainable as long as the main players of European integration agree on the terms of integration, and are convinced that integration is globally and mutually beneficial for all of them. It is this assumption that the crises of the last decade have significantly eroded. As a result of crises, inequalities in socio-economic conditions have clearly emerged, and a disproportionate burden has been placed on some Member

21. Directive 2016/2284 of the European Parliament and of the Council of 14 Dec. 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, O.J. 2016, L 344/1–31.

22. Case C-128/17, *Poland v. Parliament and Council*, EU:C:2019:194.

States.<sup>23</sup> This became clear in relation to the migration crisis as well as in the case of the European debt crisis. The EU has responded to these by new “solidarity” mechanisms, where transfers (of migrants and money) go hand-in-hand with “responsibilities”: the beneficiaries must deserve them by strictly complying with common rules (obligations to control migrants and public finances). These regimes have been contested on distributive grounds.

The two decisions on relocation adopted in September 2015 had as their aim a response to an emergency situation and the insurmountable difficulties that Greece and Italy were experiencing in managing the arrival of third-country nationals at Europe’s external borders.<sup>24</sup> The decisions clearly departed from the Dublin system, which is based on the notion that the country responsible for examining an asylum application is, by default, the country where the asylum seeker first entered the territory of the Union.<sup>25</sup> The ECJ saw in these decisions the expression of the “principle of solidarity and fair sharing of responsibilities between Member States” which, in accordance with Article 80 TFEU, “governs EU asylum policy.”<sup>26</sup> The mechanism was contested by Poland, Hungary, Slovakia and the Czech Republic. Those countries considered that a disproportionate burden was placed on them. In particular, Hungary argued that it was itself subject to “particularly strong migratory pressure.” This is granted: as a matter of fact, the Commission had initially proposed to add Hungary to the number of Member States in distress, eligible for the support mechanism through relocation. However, as Hungary had refused to be included among the beneficiaries of relocation, the ECJ felt comfortable enough to reiterate its mantra: the task of the EU legislature is to seek to strike a “balance between the different interests involved, “taking into account not the particular situation of a single Member State, but that of all of Member States.” Moreover, the Court considers that “the proportionate nature of the relocation mechanism provided for in the contested decision is also

23. See Palier et al., “European disunion? Social and economic divergence in Europe and their political consequences” in Manow et al. (Eds.), *Welfare Democracies and Party Politics: Explaining Electoral Dynamics in Times of Changing Welfare Capitalism* (OUP, 2018), pp. 277–296.

24. Council Decision 2015/1523 of 14 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece O.J. 2015, L 239/146–156, and Council Decision 2015/1601 of 22 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, O.J. 2015, L 248/80–94.

25. Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (“Dublin III”), O.J. 2013, L 180/31–59.

26. Joined Cases C-643 & 647/15, *Slovak Republic and Hungary v. Council*, EU:C:2017:631, para 291; Joined Cases C-715, 718 & 719/17, *Commission v. Poland, Hungary and Czech Republic*, EU:C:2020:257, para 80.

shown by the distribution key, on the basis of which the allocations were set.”<sup>27</sup> It may be necessary to take into account exceptional situations, such as those facing Austria and Sweden. However, they are to be addressed through the procedures and adjustment mechanisms specifically provided for in the relocation decisions.<sup>28</sup> It is *within* the institutional system that Member States should have their voice heard. This relates to the fact that Court is willing to accept deviations from the Dublin system only as long as the relocation mechanism contributes to the protection of the EU migration “ecosystem” as a whole.

The EU mechanisms on financial assistance certainly differ in many ways from the relocation mechanism: they concern financial resources, not people; the sharing of benefits, not burdens. Yet, like the relocation mechanism, they are designed as corrective measures: they aim to absorb the cyclical and highly asymmetric shocks that the euro area experienced as a result of the economic and financial crisis. Just as the relocation mechanism was a response to the migratory externalities generated by the functioning of the Schengen and Dublin systems, the financial assistance mechanisms provide a response to the negative externalities resulting from the creation of the euro and the European system of central banks.

These mechanisms have also been contested. Before the ECJ, the conflicts have taken the form of jurisdictional disputes. Behind the specific issues on the division of competences between the Union and its Member States lurks, however, a broader concern over the nature and scope of the financial transfers. In Germany, it was feared that the Union would become a “transfer Union,” forcing the most fiscally virtuous States to transfer resources to States unable to use them responsibly. This fear is present in the background of the ECJ’s judgment in *Pringle*.<sup>29</sup> The whole point of the judgment was to demonstrate that the European Stability Mechanism should not be seen as a transfer mechanism in favour of certain Member States. It is to be conceived as an instrument “indispensable for safeguarding the financial stability of the euro area as a whole and of its Member States.” The consolidation of States in financial trouble conditions the stability of the euro system. This justified making assistance conditional on compliance with “strict conditionality”, respect for budgetary discipline rules. This is not protecting particular situations as such; rather, it is protecting particular situations that condition the maintenance of a system that has positive effects for the whole euro area.

Although it concerns a different mechanism, falling within the scope of monetary policy and not economic policy, *Gauweiler* follows the same basic

27. Joined Cases C-643/15 & C-647/15, *Slovak Republic and Hungary*, paras. 290 and 299.

28. *Ibid.*, paras. 295–298.

29. Case C-370/12, *Pringle*, EU:C:2012:756.

line.<sup>30</sup> One of the issues was whether the European Central Bank's programme of purchases of sovereign bonds, the so-called OMT programme, was "selective," i.e. whether it had the effect of unduly benefiting some Member States while placing a disproportionate burden on others. To this the Court replied that, admittedly, the purpose of the programme "is intended to rectify the disruption to the monetary policy transmission mechanism caused by the specific situation of government bonds issued by certain Member States." However, it does not selectively favour the situation of these Member States. This is because these situations are only taken care of to the extent that they are part of an overall system; this programme is warranted as long as it is intended "to guard against the risk of a break-up of the euro area."<sup>31</sup> According to the Court, the fact that the purchase of government bonds is conditional upon full compliance with structural adjustment programmes in the Member States concerned is confirmation of this.

The Court endorses mechanisms that are intended to correct inequalities arising from the normal functioning of the regulatory systems established by the Union itself in a context of crisis. This does not mean that it has been able to develop a proper distributional framework of analysis. Perhaps as a result of the nature of the legal challenge before it, framed in terms of competence, its perspective is based on institutional considerations and systemic concerns about the sustainability of the EU legal ecosystems.<sup>32</sup>

### *Distributional analysis and structural dependence*

A shift in analysis may be discerned in the recent *OPAL pipeline* case.<sup>33</sup> The EU energy system is based on the liberalization and regulation of the internal market for gas and electricity. This means, among other things, open and non-discriminatory access to energy networks. However, Article 36 of the Internal gas market Directive provides for an exemption regime for the benefit of "major new gas infrastructures," in order to facilitate the realization of new infrastructure investments and improve security of gas supply in the Union.<sup>34</sup>

30. Case C-62/14, *Gauweiler e.a.*, EU:C:2015:400.

31. *Ibid.*, paras. 55 and 72.

32. See, on the notion of a systemic narrative developed by the Court, Nic Shuibhne, "The 'Territory of the Union' in EU citizenship law: Charting a route from parallel to integrated narratives", 38 *YEL* (2019), 267–319.

33. Case T-883/16, *Poland v. Commission*, EU:T:2019:567; Case C-848/19 P, *Germany v. Poland*.

34. Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, O.J. 2009, L 211/94–136.

In 2016, the Commission approved a decision of the German regulator exempting, subject to conditions, part of the OPAL pipeline used by the Gazprom group to transport gas from Russian gas fields from the rules on access by competitors. This decision was strongly criticized by several Baltic, Eastern and Central European States. It was challenged by Poland, considering that the reduction in gas transports through Poland as a consequence of this decision posed a risk of “serious and irreparable harm” for Polish energy security.<sup>35</sup>

Poland relied on Article 194(1)(b) TFEU providing that “the Union policy shall aim, in a spirit of solidarity between Member States, to ensure the security of energy supply in the Union.” It interpreted this provision as meaning that the Union is committed to “ensure energy security in the European Union as a whole and in all its Member States individually.”<sup>36</sup> The General Court agreed; as did the Court of Justice, ruling on an appeal initiated by Germany. The Commission could not content itself with a balancing of interests carried out in an “overall” manner, as it usually did, following the analysis developed by the Court when confronted to distributive conflicts.<sup>37</sup> It should have considered whether its decision “could affect the energy interests of Member States liable to be affected.”<sup>38</sup> The two Union Courts concluded that the principle of energy solidarity was infringed. Thus, the Commission is not only bound by an obligation to ensure energy security for the Union as a whole; it is bound to take into account the specific interests of the Member States. In practice, this means that the Union’s institutions as well as the Member States are obliged to internalize the negative distributive consequences that their decisions in this field may produce for the other stakeholders in the Union. It does not result in ruling out negative consequences as such, but this means being concerned with the protection of the energy capacities and infrastructures of individual Member States.

This is a shift. How should one account for this? It may be related to the specifics of the case. But there may be more: a change in framing. The Commission processed this case as a classic internal market case. It argued that the decision duly considered the negative externalities of the German exemption, and was adopted in the interest of the Union as a whole. The Court considered otherwise. The whole issue is seen as a security issue involving critical resources and infrastructures, on which Europeans find themselves in a situation of dependence on external actors. Such a situation brings to light

35. See, for an analysis, Boute, “The principle of solidarity and the geopolitics of energy: *Poland v. Commission (OPAL pipeline)*”, 57 CML Rev. (2020), 889–914.

36. Case T-883/16, *Poland v. Commission*, para 52.

37. Case C-849/19 P, *Germany v. Poland*, para 84.

38. *Ibid.*, para 87.

inequalities and asymmetries between Member States on the infrastructural level. Infrastructures are essential for the maintenance of vital societal functions, the disruption of which would have a significant impact in a Member State.<sup>39</sup> The characteristic of infrastructures is that they are not commutable. They can be interconnected, they must be constantly adapted and improved, but they cannot be distributed. This in turn justifies a substantive distributional analysis.

The question is whether the new instruments developed by the EU to respond to the pandemic crisis, the ecological crisis, or external threats, which are presented as instruments aimed at strengthening the resilience of critical assets in European societies, may cause a similar shift in legal analysis. Next Generation EU presents itself as a plan with a twofold objective: it is aimed, on the one hand, to meet the “immediate financing needs” of the Member States to avoid a re-emergence of the crisis;<sup>40</sup> and, on the other hand, to respond to the “actual needs of Member States” to undertake structural reforms and make their society more resilient in terms of green transition, digital transformation or “health, economic, social and institutional resilience.”<sup>41</sup> Is it financial assistance or is it restructuring? It is both. The lax conditionality regime as well as the allocation key applied to the resources from the recovery plan reflect this ambivalence.<sup>42</sup>

If the Union is to reinvent itself as a restructuring entity, if it decides to assume responsibility for the essential infrastructures of European societies, then questions relating to inequalities, burden-sharing, and distribution will become ever more acute and problematic. This should not mask fundamental issues.<sup>43</sup> But we, European lawyers, will have to address such questions. This

39. See, on the definition of “critical infrastructure”, Art. 2 of Council Directive 2008/114 of 8 Dec. 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, O.J. 2008, L 345/75–82. See also the recent Council Press Release of 28 June 2022, “EU resilience: Council presidency and European Parliament reach political agreement to strengthen the resilience of critical entities”.

40. Art. 1 of Council Regulation 2020/2094 of 14 Dec. 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J. 2020, L 433I/ 23–27.

41. Art. 3 of Regulation 2021/241 establishing the Recovery and Resilience Facility, cited *supra* note 11.

42. See, on the allocation key, Annex II of Regulation 2021/241, *ibid*.

43. There is indeed a risk that redistribution in a context of adversity and structural dependence obscures the Member States’ responsibility with regard to Union’s foundational values, and in particular respect for the rule of law. This risk exists in relation to the recent Commission proposal to endorse Poland’s recovery and resilience plan (COM(2022)268 final of 1 June 2022). The decision refers to the need to fulfil “milestones” linked to the protection of the financial interests of the Union (namely, the independence and impartiality of national courts and judges) before payment. However, these milestones seem to be formulated in a way that departs from the stricter obligations arising from the ECJ’s case law.

means unearthing the distributive struggles that are concealed in the ordinary political or legal debates and engaging with the political economy background of the EU rules and technical tools.<sup>44</sup> It also means developing substantive legal concepts of equality and solidarity that recognize the need for both collective endeavours and non-reciprocal efforts to address particular situations of unfairness.

44. See already Díez Sánchez, *op. cit. supra* note 16.