


## The European Union in multi-crisis: towards differentiated legal integration?

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**Abstract:** The aim of this article is to present a general forecast of the development of processes of legal integration in the European Union in the coming years. The European Union is in ‘multi-crisis’, which may force the member states to adopt an organizational development scenario based on differentiation. The selectivity of this differentiation is understood both in terms of the heterogeneity of integration in some areas and the reduction in the number of states fully participating in integration. An analysis of the current trends and solutions proposed and taken by EU decision-makers shows that the EU legal system is not subject to federalization, but in fact the tendency to deepen integration does not conflict with intergovernmentalism. The multiplicity of problems resulting from the multi-crisis will most likely require the deepening of the current differentiation mechanisms and the emergence of new ones.

## 1. Introduction

The specificity of its current condition allows to apply to the European Union the concept of ‘multi-crisis’<sup>1</sup>. Currently, this phenomenon consists of

<sup>1</sup> A category widely used in 2000s not only in social sciences. Cf.: Jatin Nathwani, Niels Lind, Ortwin Renn, Hans Joachim Schnellhuber, “Balancing Health, Economy and Climate Risk in a Multi-Crisis,” *Energies* 14, no. 4067 (2021): 1–13; Prasetyono Hendriarto,

as many as ten individual crises. They are related to the following events: (a) health and social impacts of the Covid-19 pandemic; (b) the economic impact of the Covid-19 pandemic; (c) the withdrawal of the United Kingdom; (d) the quality of leadership at the level of the EU institutions and at national levels; (e) the increased role of national identities; (f) compliance with the rule of law by the member states; (g) intensified immigration processes from outside the EU; (h) lack of basic agreement on the EU's development vision; (i) north-south and west-east economic diversification; (j) deepening of the hierarchy between the member states.

The aim of this article is to present a general forecast of the development of integration processes in the European Union in the coming years in terms of its legal system, resulting from the current trends. At the beginning, the Author's concept of systemic principles relevant to EU law will be discussed, then – the theoretical views related to the differentiation of integration in the legal sphere will be elaborated, and finally – the legal and political tendencies currently occurring in EU practice will be assessed. The main idea of the article is that the multi-crisis will force the member states of the Union, as key players in an intergovernmental construction, to adopt an organizational development scenario based on differentiation. The selectivity of this differentiation is understood both in terms of object (heterogeneity of integration in individual areas) and subject (reduction in the number of states fully participating in integration processes)<sup>2</sup>.

## 2. EU legal system in the Lisbon perspective

The systemic principles of EU law created by the Treaty of Lisbon in no way constituted a new quality in comparison with the previous situation. Rather, they expressed the continuation of the legal tradition rooted in the original versions of basic treaties and the established jurisprudence of

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“Understanding of the Role of Digitalization to Business Model and Innovation: Economics and Business Review Studies,” *Linguistics and Culture Review* 5, no. S1 (2021): 160–173.

<sup>2</sup> Some updated views present in Author's earlier works are recalled and marked in respective fragments of the article.

the Court of Justice<sup>3</sup>. In Author's own view there are seven primary principles of EU law<sup>4</sup>.

The first principle is the homogeneity of values of the legal system of the Union and those of the member states. The axiology of the EU does not differ from its state counterparts, emphasizing the fundamental role of states in this organization. This is accomplished by upholding the principle of direct and indirect democratic representation in the EU decision-making process. The indirect representation, resulting from the accountability of EU intergovernmental institutions to national parliaments, is still more important than the direct representation in the European Parliament. The second principle is defined by the equality of member states and respect for the functions of the state, with particular emphasis on its responsibility for the security of citizens. The 'typical' principles of subsidiarity and proportionality are maintained, while the principle of conferral is strengthened – compared to pre-2009 period – by the explicit presumption of state competence. The implementation of each of the indicated principles is beneficial to the sovereignty of the state, as it guarantees not only legal autonomy, but above all, exercises the constant states' supervision over the Union's activity. The third principle relates to the division of competences between the Union and the state. However, it resembles to a small extent similar distinctions made in the constitutions of federal states, being rather an expression of the application of the concept based on the balance of profits and losses, typical for international agreements<sup>5</sup>. The group of exclusive EU competences is limited to five areas, and the competences of the Union in the area particularly essential for the sovereignty of the state, that is the common foreign and security policy, are strictly limited. The fourth principle is the lack of treaty provisions introducing the principle of the absolute primacy of EU law. The supremacy is largely the result of application of interpretative standards specific to the EU judicial system, which should

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<sup>3</sup> Cf. Jan Barcz, *Od lizbońskiej do polizbońskiej Unii Europejskiej. Główne kierunki reformy ustrojowej procesu integracji europejskiej* (Warszawa: Wolters Kluwer, 2020), 102–199.

<sup>4</sup> Piotr Tosiek, "Prawne gwarancje pozycji państwa członkowskiego w systemie decyzyjnym Unii Europejskiej," in *Unia Europejska po Traktacie z Lizbony. Pierwsze doświadczenia i nowe wyzwania*, ed. Piotr Tosiek (Lublin: Wydawnictwo UMCS, 2011), 27–51.

<sup>5</sup> Donald J. Puchala, "Institutionalism, Intergovernmentalism, and European Integration: a Review Article," *Journal of Common Market Studies* 37, no. 2 (1999): 319.

be assessed as a positive event for maintenance of a strong position of member states. The fifth principle is the recognition of the leading role of states in decision-making procedures relevant to the existence of the Union and the relationship between the Union and the state. Treaty changes can only be made with the consent of all states, and in each case not only the governments but also national parliaments play a fundamental role. Also, the accession of new states requires the conclusion of an interstate agreement ratified by all members and acceding states. Sovereignty is also strongly emphasized in the withdrawal procedure and the procedure for suspending of the member state in certain rights (Art. 7 TEU). The sixth principle relates to the construction of the Union as a non-state entity. The institutional system is not based here on the separation of powers, but on the principle of interinstitutional balance. It results from a compromise between intergovernmental and supranational approaches, where intergovernmental elements prevail in the most important spheres. The seventh principle is the central position of the state in the procedures of creating secondary law. The decision-making mechanisms continue to be based on a relative balance between the European Parliament and the Council, with a qualified majority requirement in the latter. In respect of the procedures for drafting delegated and implementing acts, the supervision of the member states is also present. The procedures in the area of common foreign and security policy are separated from other ones: they consist of the general principle of unanimity of states and exclusion of the supranational bodies. Also, the extension of the Union's competences based on the rules set out in Art. 352 TFEU requires the unanimity of states.

The seven principles in the Lisbon version define the essence of EU law perceived as a system. The most important task of this law is to create a structure focused on the resolution of inter-state legal conflicts<sup>6</sup>. In view of Christian Joerges, EU law is defined as the specific 'conflicts law' with no imperative to create a uniform legal regime. This approach takes into account the current contestation of the type of political system generated by the integration process, which is somewhat similar to the national undermining of the principles of the proper political order. National

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<sup>6</sup> Cf. Piotr Tosiek, *Member State in the Decision-Making System of the European Union. The Example of Poland* (Lublin: Wydawnictwo UMCS, 2018), 93–104.

constitutional law in a democratic system, however, offers a structure that channels political contestation, and the law of the integration does not refer to this type of legitimization<sup>7</sup>.

The same scholar emphasizes that potential legal conflicts occurring at the EU level are complicated in a way that makes them impossible to resolve in a centralist and hierarchical manner. The law that acts here as an intermediary between the various levels of competence, without creating a federal system. The task of this law is also the organization of relations between public institutions and private structures. Therefore, it must be a 'conflicts law' oriented not only on strictly legal solutions, but also on certain forms outside the treaty system<sup>8</sup>.

There are five consequences of seeing EU law in this way<sup>9</sup>. First, the 'conflicts law' should be indirectly based on democratic rules. Under the influence of globalization and Europeanization, societies experience an increasing tear between the goals of actors making political decisions and the expectations of the addressees of these decisions. Secondly, the 'conflicts law' should be supranational in nature and therefore must be characterized by a justification for the existence of supranational jurisdiction. Due to increasing interdependence, the member states and the European Union are unable to guarantee the legitimacy of their policies separately. EU law should eliminate negative externalities, that is, compensate for the shortcomings of national democracies and derive its own legitimization potential therefrom. Third, the 'conflicts law' should be based on a certain degree of convergence of national legal systems. An important feature of EU law is the 'supranational recognition' consisting of non-discrimination and the requirement to justify actions imposed on national

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<sup>7</sup> Christian Joerges, *Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form* (Vienna: Institute for Advanced Studies, 2010), 6; Idem, "The Lisbon Judgement, Germany's Sozialstaat, the ECJ's Labour-Law Jurisprudence, and the Reconceptualisation of European Law as a New Type of Conflicts Law," *ZERP-Diskussionspapier*, no. 1 (2010): 28–32; Michelle Everson and Christian Joerges, "Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism," *European Law Journal* 18, no. 5 (2012): 644–645.

<sup>8</sup> Christian Joerges, "Integration durch Entrechtlichung. Ein Zwischenruf," *ZERP-Diskussionspapier*, no. 1 (2007): 14.

<sup>9</sup> Christian Joerges, *Unity*, 21–25.

legal systems with the principle of proportionality. Fourth, the ‘conflicts law’ should be internally differentiated. The vertical, horizontal and diagonal collisions can be distinguished and, thus, an integral infrastructure of ‘conflicts law’ is being created, which is not limited to resolving individual conflicts in specific situations, but is oriented towards finding general solutions to universal problems. Fifth, the concept of ‘conflicts law’ is based on the premise that diversity and conflict are permanent features of European integration. The integration process must therefore be supervised by law, but the law cannot determine the directions of the progress of integration. It is the member states cooperating in a variety of intergovernmental modes that are responsible for EU development.

### 3. EU legal system in the perspective of differentiated integration

There are many views on differentiated integration in both political and legal science<sup>10</sup>, but the approach most coherent with the Lisbon EU legal construction and the ‘conflicts law’ concept seems to be offered by intergovernmentalists<sup>11</sup> gathered around Frank Schimmelfennig<sup>12</sup>. That author finds at the starting point that integration is uniform when the EU rules are applied equally in all member states, and it is differentiated when the legal boundaries of EU law do not comply with the boundaries of EU membership. The differentiation thus results from intergovernmental negotiations on EU primary and secondary law and is based on the fact that member states may refuse to participate in integrated policies, accept individual rules or be excluded from participation in the integration system. If governments have consistent goals, are interdependent, and able to help each other achieve

<sup>10</sup> Cf.: Menelaos Markakis, “Differentiated Integration and Disintegration in the EU: Brexit, the Eurozone Crisis, and Other Troubles,” *Journal of International Economic Law*, no. 23 (2020): 489–493; Tomasz Kubin, “Enhanced Cooperation, EMU Reforms and Their Implications for Differentiation of the European Union,” *Baltic Journal of European Studies* 7, no. 2 (2017): 86–92; Jan Barcz, “Flexible Integration as a Target System of Governance for the European Union,” *Yearbook of Polish European Studies* 18 (2015): 72–77.

<sup>11</sup> Christian Joerges’ ideas do not belong to the intergovernmental trend. This article proposes, however, a combination of his concept with intergovernmentalism.

<sup>12</sup> Cf. Piotr Tosiek, “Integracja zróżnicowana jako cecha systemowa Unii Europejskiej. Perspektywa liberalno-międzyrządowa,” in *Europa wielu prędkości. Problemy. Wyzwania. Konsekwencje*, eds. Marek Golińczak and Robert Klementowski (Wrocław-Warszawa: Wydawnictwo IPN, 2021), 53–68.

their goals, then negotiations are likely to lead to the uniform integration. Conversely, if governments have incompatible goals or are not interdependent in achieving them, or lack the ability to cooperate effectively, integration is unlikely to be unitary in nature<sup>13</sup>.

Christian Jensen and Jonathan Slapin distinguish two basic differentiation options that may be applied in the current legal status of the European Union<sup>14</sup>. They are: (a) deepening of integration beyond the official structure of the EU; (b) deepening of integration within the official structure of the EU. In the latter case, there are two options. The first of them is defined, *inter alia*, in Art. 114 (4) TFEU as the possibility of maintaining national provisions at the time of introducing the provisions of EU law on the approximation of laws in the field of the functioning of the internal market. This allows a single state to avoid introducing regulations that have already been passed at the EU level and – although it is difficult – may induce other states not to adopt regulations that are known not to be implemented. The second option is defined in Art. 20 TEU (and clarified in Art. 329 TFEU) as the possibility of establishing enhanced cooperation on the basis of the Council decision taken at the proposal of the Commission with the consent of the European Parliament. Mention should also be made of more detailed treaty provisions allowing the establishment of regional associations of the Benelux states (Article 350 TFEU) or the participation of only certain states in cooperation in the field of research and technological development (Article 184 TFEU)<sup>15</sup>.

The group of scientists<sup>16</sup> notes that the diversity of integration may result not only from treaty provisions, but also from secondary law. Legal

<sup>13</sup> Frank Schimmelfennig, “The Choice for Differentiated Europe: an Intergovernmentalist Theoretical Framework,” *Comparative European Politics* 17, no. 2 (2019): 177–179.

<sup>14</sup> Christian B. Jensen and Jonathan B. Slapin, “Institutional Hokey-Pokey: the Politics of Multispeed Integration in the European Union,” *Journal of European Public Policy* 19, no. 6 (2012): 783–792.

<sup>15</sup> Ibidem. Cf. the still up-to-date list of actual areas of enhanced cooperation: Tomasz Kubin, “A ‘Last Resort’ or a ‘Bypass’? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union,” *Yearbook of Polish European Studies* 20 (2017): 43.

<sup>16</sup> Thomas Duttler, Katharina Holzinger, Thomas Malang, Thomas Schäubli, Frank Schimmelfennig, and Thomas Winzen, “Opting out from the European Union Legislation: the Differentiation of Secondary Law,” *Journal of European Public Policy* 24, no. 3 (2017): 407.

acts may release individual states from certain obligations or introduce special rules, thus creating an unequal level of integration beyond primary law. There is also a specific complementarity in terms of accessibility and relevance between the differentiation at the level of primary and secondary law. In terms of accessibility, it was the secondary law that was initially a tool for differentiating member states, and it was only in the period preceding the 2004 enlargement that this task was taken over by primary law. In terms of relevance, a constant feature of the Union is the rule that some issues are regulated at the level of the treaty while others remain the subject of secondary law. Disputes in highly politicized areas (such as the integration of core state powers) are usually resolved through treaty-based differentiation, while heterogeneity in low-severity cases is subject to differentiation at the level of secondary law<sup>17</sup>.

According to Schimmelfennig and his colleagues, the differentiation can be treated as a vertical or horizontal phenomenon. Vertical differentiation means that specific policy areas have been integrated at different speeds, resulting in different levels of centralization at different times. The horizontal variation relates to the territory and means that many integrated policies do not apply in some member states (internal horizontal variation), although some non-EU actors do participate in them (external horizontal variation)<sup>18</sup>. In another article a similar group of scientists<sup>19</sup> also proposed a classification of the effects of differentiation based on its persistence and subjective scope. These researchers noted that diversification is a routine phenomenon with the accession of new member states: governments and interest groups in the old states then fear that their position in terms of competition, migration and reallocation of funds will be weakened, and the new states associate their concerns with pressures related to market integration and the cost of adopting Union legislation. The transitional periods and derogations agreed in the accession treaties and the early post-accession legislation make it easier for both old and new member

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<sup>17</sup> Ibidem.

<sup>18</sup> Frank Schimmelfennig, Dirk Leuffen, and Berthold Rittberger, *The European Union as a System of Differentiated Integration: Interdependence, Politicization and Differentiation* (Vienna: Institute for Advanced Studies, 2014), 6.

<sup>19</sup> Duttelle et al., "Opting Out," 408.



states to adapt to the new conditions. It is therefore the so-called instrumental differentiation. The situation is completely different when – unrelated to enlargements – more competences are transferred from the state to the EU level and supranational institutions. The diversified approach then allows less integration-friendly members to protect themselves from strong internal opposition and to remain at their preferred level of integration, refraining from vetoing the more ambitious majority projects. The said authors refer to this as the constitutional differentiation.

According to Schimmelfennig, constitutional differentiation is – as opposed to the instrumental one – less frequent, but more permanent. It is conditioned by concerns in some areas of state's key powers like monetary policy, internal policy, or defence and foreign policy. The constitutional differentiation takes into account the heterogeneity of states and societies, as well as their commitment to the protection of sovereignty, while not blocking the possibility of integration for other member states. Importantly, constitutional differentiation creates permanent institutional boundaries between the core, the semi-peripheral and the peripheral member states<sup>20</sup>.

It is worth noting – so the leader of the group of researchers – that the two main integration projects after the completion of the internal market, namely the monetary integration and the integration in the field of justice and home affairs, turned out to be the constitutional differentiation. Successive enlargements and the crisis of the eurozone even strengthened the institutional divisions among the member states in these two areas, although at the same time third states were selectively integrated with the internal market (within the European Economic Area) and with specific EU policies (within the Schengen area)<sup>21</sup>. However, the differentiation solutions are based on the 'multi-speed' principle, creating only temporary differences in the integration. The core of the EU, which has always been pro-integrationist in nature, is of great importance here, offering the initially excluded member states the opportunity to join within a reasonable

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<sup>20</sup> Frank Schimmelfennig, *Differentiation and Self-Determination in European Integration* (Barcelona and Leuven: Centre on Constitutional Change and Centre for Global Governance Studies, 2017), 14.

<sup>21</sup> Frank Schimmelfennig and Thomas Winzen, "Grand Theories, Differentiated Integration," *Journal of European Public Policy* 26, no. 8 (2019): 1175.

timeframe. Non-participants have the attribute of being peripheral usually of their own choice<sup>22</sup>.

The legal differentiation should be treated as a ‘relatively’ permanent phenomenon, but not as a ‘necessarily’ permanent one. Katharina Holzinger and Frank Schimmelfennig believe that there are strong incentives to include closer cooperation in the legal and institutional framework of the EU. The structure of the Union is characterized by a high level of legitimacy, and the pursuit of legal uniformity leads to a relatively quick inclusion of subsequent member states in cooperation in all possible fields. At the same time, the prevailing ideology in domestic politics at the moment may have a negative impact on the logic of cooperation. The ‘non-political’ costs resulting from the reputation and ideological influence can also play an important role here. For other systemic and ideological reasons, states that do not participate in closer cooperation may actively participate in the creation of standards applicable within this cooperation, the participation of Denmark and the United Kingdom in cooperation in the former third pillar of the Union serving as examples<sup>23</sup>.

According to Schimmelfennig, however, the diversification of integration is not always an appropriate strategy to deal with serious crises in the EU. Radical proposals to solve the eurozone crisis, consisting of a clear distinction between northern and southern states, have not been implemented due to the interdependence of these groups of states. The proposal to solve the immigration crisis, based on the diversification of asylum policy, was *de facto* accepted, but has led to a significant overburden of some states in this regard. Also, the dispute over the rule of law has not yet been resolved through differentiation, since liberal democracy is a fundamental value of the Union, and the independence of the judiciary is essential for the functioning of the EU legal system and the internal market. Undoubtedly, then, differentiation works when it is connected with acceleration of

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<sup>22</sup> Frank Schimmelfennig, “Is Differentiation the Future of European Integration?,” in *Perspectives on the Future of the EU*, eds. Björn Fägersten and Göran von Sydow (Stockholm: Swedish Institute for European Policy Studies, 2019), 102–103.

<sup>23</sup> Katharina Holzinger and Frank Schimmelfennig, “Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data,” *Journal of European Public Policy* 19, no. 2 (2012): 301–302.

new rules, but it is not a good solution when member states cannot cope with the implementation of the rules already integrated<sup>24</sup>.

#### 4. EU multi-crisis as the engine of differentiated integration

The European Union is often called a ‘crisis-resistant’ entity<sup>25</sup>. However, many previous crises led to systemic reforms, which should be true also for the multi-crisis situation today. Politically at the moment, such a reform is unlikely to rely on treaty changes, while it is easier to adopt minor legal changes to the practice of Union’s operation<sup>26</sup>. It is worth focusing on the latest trends in EU activity in order to refer to the two scenarios most often debated in public. The first is the federalization scenario, which ultimately means that all member states will transfer more powers to the EU level, and the second is the aforementioned differentiation scenario<sup>27</sup>.

The analysis of today’s EU policy shows a different likelihood of each of these scenarios materializing. An expression of the federalization is to be the shape of the mechanism known under the market name of *Next Generation EU*<sup>28</sup>, called sometimes the ‘Hamiltonian moment’ of European integration<sup>29</sup>. Its essence is to increase the Union’s own resources by EUR 750 billion based on the activity of EU institutions in the loan market

<sup>24</sup> Frank Schimmelfennig, “Is Differentiation,” 119.

<sup>25</sup> Agnieszka K. Cianciara, “Does Differentiation Lead to Disintegration? Insights from Theories of European Integration and Comparative Regionalism,” *Yearbook of Polish European Studies* 18 (2015): 45.

<sup>26</sup> Cf. David Sassoli, Antonio Costa, and Ursula von der Leyen, *Joint Declaration on the Conference on the Future of Europe*, Brussels, 10 March, 2021.

<sup>27</sup> Those processes can be treated both as opposite or complementary phenomena. Cf. Tomasz Grzegorz Grosse, “Can ‘Differentiated Integration’ Lead to a Federation in Europe?,” *Yearbook of Polish European Studies* 18 (2015): 31–32.

<sup>28</sup> Cf.: Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, O.J.E.U. L 424, 15 December, 2020, 1–10; Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, O.J.E.U. L 433, 22 December, 2020, 23–27; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, O.J.E.U. L 57, 18 February, 2021, 17–75.

<sup>29</sup> Caroline de la Porte and Mads Dagnis Jensen, “The Next Generation EU: An Analysis of the Dimensions of Conflict Behind the Deal,” *Social Policy & Administration* 55, no. 2 (2021): 399.

with the projected debt repayment in 2058. It should be noted, however, that the nature of new funds is not of new quality: their management is essentially intergovernmental, which contradicts the assumption of federalization. First, the consent of the member states to create new financial instruments did not constitute a transfer of new competences to the Union level as it was purely quantitative: it simply concerned an increase in the Union's own resources. Second, the new mechanisms do not rely on the full communitarization of the new debt, since an individual state only responds to the ceiling in which it participated in the fund. Also, the possibility to demand repayment of the debt of other states is temporary and limited to 0.6% of the GNI of the state executing the request. Third, national plans presented by member states are initially assessed by the European Commission, but finally adopted by the Council as an implementing decision (Art. 291 TFEU). Moreover, based on Art. 293 (1) TFEU, it must be assumed that the Council is able to amend the Commission proposal if it acts unanimously. Fourth, the implementation phase (granting specific loans) and its monitoring is the responsibility of the Commission, but this is scrutinized through a comitology procedure, allowing the implementing powers to be transferred to the Council<sup>30</sup>. The adoption of delegated acts by the Commission is also governed by Art. 291 TFEU, allowing the supervision by the Council. Fifth, the European Parliament, which does not even have the power to be informed about the details of how the money is spent, does not play any role in allocating concrete funds to states.

The second manifestation of federalization is to be the emergence of the principle of budgetary conditionality<sup>31</sup>, challenged before the Court of Justice of the European Union by Hungary and Poland. It introduces the possibility of temporarily limiting the transfer of funds from the EU budget to a state that violates the rule of law. It should be noted, however, first, that the cases proving a violation are vague and the conditions for

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<sup>30</sup> Cf. the 'examination procedure' in: Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, O.J.E.U. L 55, 28 February, 2011, 13–18.

<sup>31</sup> Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, O.J.E.U. L 433, 22 December, 2020, 1–10.

adopting measures against states are difficult to meet. Second, the procedure is intergovernmental in nature: the dialogue with the state is conducted by the Commission (under the rules similar to Art. 258 TFEU), but final decisions are taken by a qualified majority in the Council (pursuant to Art. 291 TFEU). Moreover, the Council may, also by a qualified majority, amend the Commission proposal to impose penalty measures on the state. Third, it is apparent from the recitals to the regulation that, in exceptional cases, a state against which sanctions are to be applied may request that the matter be referred to the European Council for a political decision, which slows down the procedure. Fourth, also against the federalization concept, the role of the European Parliament is limited to some information and reporting obligations of the Commission.

The very practice of the functioning of the Commission under the leadership of Ursula von der Leyen does not indicate the feasibility of the federal scenario, either. Contrary to the tendencies apparently occurring in previous terms, including the Jean-Claude Juncker period in particular, the Commission tends to be openly expectant today, first demanding a response to emerging challenges from the member states. It seems, however, that when disregarding the PR activities, the constant feature of the EU executive institution for many years has been the sole presenting of conceptual documents, and not carrying out real political activities disagreed by the states. This was clearly visible in 2020: the real work on the recovery fund began only after the common Franco-German proposal had been presented.

An event that also contradicts the federal scenario is the practice used, in particular, in the first months of the Covid-19 pandemic. The lack of Union's competences in the field of health policy resulted in immediate re-nationalization of combating the disease, as well as the actual temporary liquidation of the functioning of the Schengen area. The then Commission's activity resulted in a relatively quick reaction and a decision to jointly purchase vaccines, but also this solution was taken according to intergovernmental rules.

It is therefore difficult to conclude that the European Union is moving towards a federation. On the contrary, the intergovernmentalism is still very strong and the Lisbon rules are prolonged. This process, however, is not related to the spill back of integration, but rather to decisions about its deepening made by states rather than supranational institutions. This

phenomenon has been widely described and explained by the representatives of the so-called new intergovernmentalism<sup>32</sup>. All of the above-mentioned multi-crisis elements clearly indicate not only the possibility, but also the necessity of the implementation of the differentiated integration scenario. The main reason for this is the large number of member states with different interests: Brexit has become a symbolic symptom of the EU's inconsistency. The growing role of national identities, non-compliance with the rule of law, inability to solve the problem of immigration, the lack of basic agreement on the future EU vision, as well as economic diversification between member states related to the functioning of the eurozone, are other indicators of possible differentiation.

The probability of the differentiation scenario depends on the strength of the preferences of the member states<sup>33</sup>. In legal terms, in the case of blocking of the differentiation tendencies with the use of mechanisms resulting from the current legal EU status, there is a high probability of deeper integration outside the EU legal system. Examples from the past are the creation and long-term operation of the Schengen area, the beginnings of monetary integration or – in more recent times – the Fiscal Compact. The already existing (Art. 7 TEU) and the newly introduced (extended approvals of national recovery plans or the budgetary conditionality) mechanisms may also contribute to the differentiation of powers and responsibilities of individual states. An extreme solution may be the adoption by some member states only of the treaty establishing the 'new Union'. This will result in *de jure* exclusion of some member states from the new organization, with the marginalization of today's Union and its legal system.

## 5. Conclusions

At least since 2008, the European Union has been in a deepening crisis, which after several years in terms of the subject matter covers so many areas

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<sup>32</sup> Christopher J. Bickerton, Dermot Hodson, and Uwe Puetter, "The New Intergovernmentalism: European Integration in the Post-Maastricht Era," *Journal of Common Market Studies* 53, no. 4 (2015): 703–722.

<sup>33</sup> Cf.: Andrew Moravcsik, "Preferences, Power and Institutions in 21<sup>st</sup>-Century Europe," *Journal of Common Market Studies* 56, no. 7 (2018): 1650–1654; William Phelan, "European Legal Integration: Towards a More Liberal Intergovernmentalist Approach," *Journal of Common Market Studies* 56, no. 7 (2018): 1562–1577.

that it can be called a ‘multi-crisis’. The still binding principles of the EU legal system resulting from the Treaty of Lisbon indicate the fundamental role of the member states, instead of supranational institutions, both in shaping of the content of EU law and the decision-making procedures. EU law is therefore, in essence, a ‘conflicts law’ aimed at solving dilemmas arising from the structure and functioning of a *sui generis* system.

One of the most widely debated theoretical problems are the concepts of differentiated integration. They relate not only to the political, but also – and perhaps above all – to the legal dimension of integration. An analysis of the current trends and solutions proposed and taken by EU decision-makers shows that the EU legal system is not subject to federalization, but in fact the tendency to deepen integration does not conflict with intergovernmentalism. The multiplicity of problems resulting from the multi-crisis will most likely require the deepening of the current differentiation mechanisms and the emergence of the new ones. However, they will not fundamentally change the intergovernmental nature of the Union, constituting rather a practical response to the needs existing at the moment. At the end of this process, it may be necessary to abolish the European Union in its present scope, which undoubtedly poses a challenge to the political and legal systems of the member states.

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