

The Eurosceptic Challenge

National Implementation and Interpretation of EU Law

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National Resistance Against EU Law and Governance: Degrees and Manifestations

CLARA RAUCHEGGER* AND ANNA WALLERMAN

I. INTRODUCTION

‘THE IDEA OF Europe is in peril. From all sides there are criticisms, insults and desertions from the cause.’ These are the words used in a recent manifesto that was signed by 30 intellectuals from 21 countries and published by several newspapers.¹ The signatories warned against the consequences of populism, nationalism and Euroscepticism and they claimed that the current challenge to liberal democracy and its values was greater than any since the 1930s.

The overall aim of this book was to determine to what extent Eurosceptic attitudes have translated (or may translate) into actual legislative, administrative and judicial practices that challenge European Union (EU) law and governance in the Member States. Our wish was to divert attention from claims and pledges made by politicians to their specific consequences (or lack thereof) at the national level.

This chapter strives to bring together the main findings of the preceding 11 chapters in a coherent framework and to confront these findings with the academic literature on Euroscepticism and compliance. We do not attempt a conceptual definition of Euroscepticism. Instead, we present a spectrum of national resistance to the authority of EU law and governance that ranges from the drastic rejection of EU membership and disrespect of the EU’s most

* Clara Rauchegger’s work was supported by the Austrian Science Fund (FWF) [project J 4104-G16].

¹ ‘Fight for Europe – or the Wreckers will Destroy It’ (25 January 2019) *The Guardian*, available at www.theguardian.com/commentisfree/2019/jan/25/fight-europe-wreckers-patriots-nationalist.

fundamental values to unintentional practical obstacles that hinder the full effectiveness of EU law in the Member States. Some of the challenges discussed in this overview can be seen as expressions of Euroscepticism, but not all of them. The terms ‘Euroreluctance’ or ‘Euroignorance’ might more adequately capture some of these challenges.

The remainder of the chapter is divided into four sections. Section II discusses previous scholarship on the understanding, definition and classification of Euroscepticism, and relates it to the challenges discussed in this volume. Section III places these challenges on a spectrum from challenges brought on by hard-line, ideological Euroscepticism, to those that have their roots in more specific objections to the forms of European integration and finally to such challenges that are the effect of practical difficulties rather than political preferences. Section IV then turns the attention to remedies and in particular to the role of courts in countering manifestations of Euroscepticism. Lastly, section V offers some concluding remarks.

II. CLASSIFYING EUROSCEPTICISM

Although Euroscepticism has received considerable attention in the political science literature for the past two decades, no clear and common definition has emerged.² The dominant literature provides a number of dichotomies. In one of the most influential conceptualisations, Szczerbiak and Taggart distinguish between hard and soft Euroscepticism, where hard Euroscepticism signifies rejection of the European integration project as such, whereas soft Euroscepticism denotes a more qualified critique of EU policies.³ Other commentators distinguish between diffuse and specific criticism of Europeanisation, where the former rejects the integration ideal, whereas the latter rejects the EU as the current embodiment of said ideal (without necessarily rejecting the ideal).⁴ Yet others differentiate between political and instrumental Euroscepticism, with the former being of a more principled kind, whereas the latter is determined

²CE de Vries and EE Edwards, ‘Taking Europe to its Extremes: Extremist Parties and Public Euroscepticism’ (2009) 15 *Party Politics* 5; P Kaniok, ‘Eurosceptics – Enemies or a Necessary Part of European Integration?’ (2012) 12 *Romanian Journal of Political Science* 29; B Leruth, N Startin and S Usherwood, ‘Defining Euroscepticism: From a Broad Concept to a Field of Study’ in B Leruth, N Startin, S Usherwood (eds), *The Routledge Handbook of Euroscepticism* (Abingdon, Routledge, 2017).

³eg A Szczerbiak and P Taggart (eds), *Opposing Europe? The Comparative Party Politics of Euroscepticism, Volume 1: Case Studies and Country Surveys* (Oxford, Oxford University Press, 2008); A Szczerbiak and P Taggart (eds), *Opposing Europe? The Comparative Party Politics of Euroscepticism, Volume 2: Comparative and Theoretical Perspectives* (Oxford, Oxford University Press, 2008).

⁴P Kopecký and C Mudde, ‘The Two Sides of Euroscepticism: Party Positions on European Integration in East Central Europe’ (2002) 3 *European Union Politics* 297.

by whether oneself or one's own country is thought to gain from European co-operation.⁵

In legal scholarship, the term has been subject to less discussion, and consequently is even more indistinct. Euroscepticism is typically used as a broad term referring to all objections towards the EU (or European co-operation in general), its policies or its functioning.⁶ Interestingly, however, a recent editorial in the *Common Market Law Review* took a literal perspective on the notion of *scepticism*, removing the most hard-line opposition from the concept altogether and differentiating between Euroscepticism on the one hand and outright hostility towards the EU on the other.⁷

The UK's decision to withdraw from the EU seems an obvious example of Euroscepticism and it could be classified as hard, diffuse and political Euroscepticism. The contributions to this volume, however, illustrate national policies and actions vis-à-vis EU law and governance that do not fit neatly with the dichotomies set out above. Most of these national policies and actions do not entail opposition to one's Member State remaining in the EU and could therefore be classified as soft Euroscepticism. However, this classification is unhelpful as it ignores the various facets of the challenges to EU law and governance set out in the different chapters and the significant differences between them. For this reason, we find that these challenges are better understood as positions on a continuum.⁸ The benefit of this image, in contrast to dichotomies, is that it not only allows for clear-cut cases, but also for middle positions. Notably, it is suitable to distinguish different degrees and manifestations of Euroscepticism.

The spectrum of national measures that we propose in the following section is more than a subdivision of soft Euroscepticism. It includes all kinds of national resistances against the EU, not only those that can be termed Eurosceptic. In particular, the spectrum encompasses failures by the Member States to respect and implement EU law. Lack of compliance with EU law can be as dangerous to the authority of EU law in the Member States as outright Eurosceptic attitudes. However, it is not necessarily an expression of Euroscepticism, as some of the contributions to this volume clearly demonstrate. Sometimes, national resistance to the full effectiveness of EU law is not even intentional on the part of the

⁵ M Lubbers and P Scheepers, 'Political versus Instrumental Euro-Scepticism: Mapping Scepticism in European Countries and Regions' (2005) 6 *European Union Politics* 223.

⁶ See, eg, S Garben, 'Sky-High Controversy and High-Flying Claims? The Sturgeon Case Law in Light of Judicial Activism, Euroscepticism And Eurolegalism' (2013) 50 *Common Market Law Review* 15; S Douglas-Scott, 'Fundamental Rights, Not Euroscepticism: Why the UK Should Embrace the EU Charter of Fundamental Rights' in L Hodson, E Wicks and K Ziegler (eds), *The UK and European Human Rights: A Strained Relationship* (Oxford, Hart Publishing, 2015).

⁷ 'Editorial Comments' (2019) 56 *Common Market Law Review* 2.

⁸ Similarly see de Vries and Edwards, 'Taking Europe To Its Extremes' (2009) 11; L Hooghe and G Marks, 'Sources of Euroscepticism' (2007) 42 *Acta Politica* 119; A Krouwel and Y Kutiyski, 'Soft Sceptics and Hard Rejectionists: Identifying Two Types of Eurosceptic Voters' in B Leruth, N Startin, S Usherwood (eds), *The Routledge Handbook of Euroscepticism* (Abingdon, Routledge, 2017) 190.

relevant national actor. Combing Eurosceptic resistances and other resistances to the EU in one scale allows us to reflect on the correlations between attitudes and actions at the national level.

Besides, the term Euroscepticism has strong negative connotations that should not be applied to any criticism of the EU or its developments.⁹ Criticism is clearly legitimate in a democratic community based on the rule of law, as the EU strives to be. For instance, labelling Italian criticism of the asylum regime established by the Dublin III Regulation as solely Eurosceptic is hardly conducive to the improvement of either political debate or academic understanding, if the rationale of such criticism is mainly to foster a discussion on the distribution of responsibilities between the Member States.

Among the resistances against EU law and governance that are identified in the contributions to this volume, we can distinguish between, on the one hand, lawful resistances that stay within the limits provided by EU law and, on the other hand, unlawful resistances that undermine European integration by disregarding EU rules.¹⁰ Fundamentally, this difference is illustrated by the difference between Brexit and the illiberal developments in Poland and Hungary. Brexit represents the ultimate rejection of European integration through withdrawal, but it is undertaken in accordance with Article 50 of the Treaty on European Union (TEU) and thus qualifies as a lawful challenge. On the contrary, the systemic rule of law backsliding in Poland and Hungary violates the EU's fundamental values that are enshrined in Article 2 TEU. Likewise, the Luxembourgish legislation examined by Warin in her chapter, as well as the Hungarian economic policy measures analysed by Papp and Varju, constitute unlawful resistances as they infringe EU free movement law. In contrast, the reintroduction of border controls in the wake of the migration crisis that Thalmann describes in his chapter is arguably lawful, relying on exceptions inbuilt in the Schengen regime.

III. SPECTRUM OF RESISTANCES AGAINST EU LAW AND GOVERNANCE

A. Fundamental Challenges to Core Values, Policies and Law of the EU

We have seen that Brexit is an example of hard Euroscepticism in the sense of an opposition to one's Member State remaining in the EU. However, there are various forms of national resistance against European integration that do not correspond to a wish to leave the EU. The combined effect of these challenges might be more dangerous for the EU than the UK's withdrawal as it undermines EU law and policy from within.

⁹ Kaniok, 'Eurosceptics' (2012) 35.

¹⁰ Similarly see MR Madsen, P Cebulak and M Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts' (2018) 14 *International Journal of Law in Context* 197.

One such fundamental challenge for the EU is the rise of populist radical right-wing parties and their combined influence on established EU policies. These parties are not necessarily opposed to EU membership, but they are EU-hostile in the sense that they tend to call for the dismantling of EU policies rather than for policy extension. A second fundamental challenge consists in illiberal developments in some Member States, in particular Hungary and Poland. Rather than expressing an intention to leave the EU, governments and legislators in Poland and Hungary disregard the EU's core values and undermine the authority of EU law in their Member State by blatantly disregarding EU law that diverges from their perceived national interests.

Regarding the first challenge, the rise of populist radical right parties, Falkner and Plattner show in their chapter that these parties do not oppose any shift of competences to the EU level in principle. Where it might benefit their own Member State, they even demand enhanced co-operation within the EU's legal framework. Overall, Falkner and Plattner find significant incoherence in these parties' policy preferences. Their findings suggest that it is rather unlikely that populist radical right parties will join forces to reform the EU with a common goal in mind. The main danger seems to be that these parties will undermine EU policy making by opposing further integration in specific sectors. This opposition can have a significant impact on EU law and governance as the traditional pro-EU centre-right and centre-left parties continue to lose votes and seats, both at the national level and in the European Parliament.

The second challenge is twofold. First, systemic disrespect of the rule of law in Poland and Hungary threatens some of the values on which the EU is founded.¹¹ The European Commission has reacted to the rule of law backsliding in Poland by triggering an Article 7(1) TEU procedure against this Member State.¹² The European Parliament has done so in respect of Hungary.¹³ It remains to be seen whether these attempts to safeguard the rule of law in Poland and Hungary will be successful.¹⁴ The second problematic aspect of the illiberal developments in Poland and Hungary is that disrespect for the rule of law seems to coincide with

¹¹ For an explanation on how rule of law backsliding tends to happen and an assessment of the mechanisms the EU could rely on to address this problem see, eg, L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3. See also C Closa and D Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in W Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford, Hart Publishing, 2016).

¹² European Commission, 'Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law' (2017) COM/2017/0835 final.

¹³ European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018) 2017/2131(INL).

¹⁴ Halmai argues that the traditional mechanisms that are aimed at safeguarding the rule of law in Member States are incapable of enforcing compliance and that there is a need for conditionality measures, such as cutting funds for Member States that fail to comply, see G Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2018) *Hague Journal on the Rule of Law* 1.

non-compliance with EU law, at least to a certain extent. Two contributions to this volume suggest that blatant, public disregard of EU law is a corollary of the illiberal turn in Poland and Hungary. This aspect of the rule of law crisis has so far received less attention in the academic literature.

Tacik's chapter indicates that the Polish Government challenges the authority of EU law by refusing to comply with EU secondary law where it goes against (what the government considers to be) national interests. According to Tacik, the Białowieża forest case is more than an example of a standard failure to fulfil the obligations that arise from EU law. He suggests that the Polish Government not only failed to comply with EU secondary law on environmental protection by undertaking logging activities in the protected forest, but also engaged in a disinformation campaign on its logging activities and their legal assessment, and deliberately undermined the authority of the Court of Justice of the EU (CJEU). In the author's view, the Polish Government disrupted any rational communication with the EU institutions by advancing arguments that were manifestly inconsistent and unreasonable. Moreover, members of the Polish Government openly contested and ridiculed the authority of the CJEU, in particular by questioning the scientific evidence on which the CJEU based its assessment. Most importantly, the Polish authorities deliberately ignored the CJEU's order to stop logging except in cases of threat to public security. This was an unprecedented case of open and daring disregard of an interim measure of the CJEU.

Similarly, Papp and Varju's chapter details how Hungary, following the installation of the Orbán government in 2010, took a decidedly patriotic turn in its economic policy. They suggest that the Hungarian economic policy, which has frequently been struck down as incompatible with EU free movement law, is in fact a manifestation of 'deep-rooted ideological divisions'¹⁵ between EU core values and Hungarian patriotism. In their view, the Hungarian Government not only challenges the EU's core democratic values, but also the market liberalism on which the EU's internal market is founded. It is hard to imagine a more thorough rejection of the Union's *raison d'être*.

Most of the anti-EU policy preferences examined by Falkner and Plattner and the disregard for EU law identified by Tacik, Papp and Varju are expressions of instrumental Euroscepticism.¹⁶ Many populist radical right parties are in favour of European integration where it may be of benefit to those who they consider as their own people. For example, Falkner and Plattner note that even the radically patriotic Hungarian far-right party Jobbik calls for an extension of the protection of minorities by the EU, albeit only in order to benefit its own ethnos. Similarly, the Polish KNP, a radically Eurosceptic Polish party, favours extending the free travel of people in the Schengen area as this extension

¹⁵ Section IX, ch 10, this volume.

¹⁶ On instrumental Euroscepticism, see Lubbers and Scheepers, 'Political versus Instrumental Euro-Scepticism' (2005).

would be likely to benefit Polish citizens. If populist radical right parties support EU membership, they appear to do so based on “instrumental Euroscepticism”, that is a hope or belief that membership is overall beneficial from a state-centric point of view. Conversely, populist far right parties tend to oppose EU policies that are seen as disadvantaging their own people. The two populist radical right parties that govern Hungary and Poland, Fidesz and PiS, seem to be amongst those that take such an instrumental approach. They support continued EU membership, but they fail to comply with EU environmental law or free movement law where it goes against their own interests.

Although the failures to comply with EU law described in the Polish and Hungarian case studies can be interpreted as instrumental Euroscepticism, it would be wrong to assume that Euroscepticism or Eurofriendliness explains compliance with EU law or lack thereof. Toshkov’s contribution to this volume indicates that the overall degree of compliance with EU law in a Member State is largely unconnected to the Eurosceptic tendencies of its government or population. Likewise, Guastafarro and Gianniti indicate in their chapter that, while Italy traditionally had a Eurofriendly government and population, this has ‘not necessarily turn[ed] into a speedy and correct implementation of EU law’ in this Member State.¹⁷ Conversely, the new Italian Government, which is composed of two Eurosceptic parties, has not (yet) engaged in any major reforms that question the authority of EU law in the national legal order. Thus, judging by these contributions, Euroscepticism does not appear to be the main cause for lack of compliance with EU law.

Compliance scholars have identified several different factors that influence compliance rates.¹⁸ According to constructivism, one theoretical approach to understanding compliance with EU law, the normative cost of non-compliance must be high enough to encourage compliance. In Member States that are traditionally committed to the rule of law, blatantly disregarding EU law is unthinkable.¹⁹ For this reason, loud and ardent political criticism of the EU does not necessarily lead to non-compliance in these Member States because their government ultimately concludes that it cannot clearly and publicly violate EU rules.²⁰ The difference between Eurosceptic rhetoric and actual policies in Italy could thus be explained from a constructivist perspective. While blatant non-compliance would be inappropriate, compliance can be incomplete insofar as the practical implementation and application of EU law is concerned – this seems

¹⁷ Section I, ch 3, this volume.

¹⁸ For an overview of political science perspectives on compliance with EU law, see L Conant, ‘Compliance and What the EU Member States Make of It’ in M Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford, Oxford University Press, 2012).

¹⁹ *ibid* 6.

²⁰ *ibid* 22; D Beach, ‘Why Governments Comply: An Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance’ (2005) 12 *Journal of European Public Policy* 113, 118–19.

to be the case in Italy. In Poland and Hungary, on the other hand, the lacking commitment to the rule of law in general adversely affects respect for EU law in these Member States; as Papp and Varju point out, the introduction of illiberal reform largely coincides with a fall in Hungarian compliance rates. Apparently, the Polish and Hungarian governments do not accept compliance with the law as an internalised obligation but they engage in a cost–benefit analysis.²¹

B. Sectoral Protectionism: Free Movement, Schengen and Third-Country Immigration

Several chapters of this volume highlight national challenges to the authority of EU law that arise in specific substantive areas of EU law and governance. The Member States in which these resistances occur are not necessarily ideologically opposed to European integration or values. Rather, they fail to comply with EU law in fields where it departs strongly from their national policies or political preferences. Free movement of persons, especially when it requires giving welfare benefits to migrant workers and their families, and the border-free Schengen system appear to be particularly controversial areas with low rates of compliance with EU law, even in Member States generally known as Europhile. The sectoral protectionism discussed in this section can be distinguished from the fundamental threats to EU authority in Hungary and Poland discussed in the last section in two ways. First, the resistances are confined to a particular policy area. Second, the Member States in which these resistances take place are generally committed to observing the rule of law.

Warin's chapter identifies obstacles to the free movement of persons in Luxembourg. As the author explains, Luxembourg is a Member State that proudly self-identifies as Europhile. Nevertheless, the cases discussed by Warin show that Luxembourg continuously engages in indirect discrimination on grounds of residence or nationality. Luxembourgish protectionism is specifically directed against frontier workers who make up a very high proportion of the labour force of this Member State. Frontier workers have been disproportionately discriminated by the Luxembourgish income tax law. In addition, they were deprived of family benefits and student financial support for their adult children whereas residents continued to receive these benefits. These forms of discrimination against frontier workers can be explained by financial considerations. However, Luxembourg also engages in protectionism where direct financial stakes are not involved. It has actively and consistently opposed the free movement of lawyers and introduced language barriers aimed at hindering foreign lawyers from establishing themselves in Luxembourg.

²¹ Conant, 'Compliance' (2012) 7.

Luxembourg is not the only Member State that attempts to undermine the free movement of persons by diminishing social benefits of workers from other Member States. The first legislative initiative of the new Austrian Government, a coalition between the conservative ÖVP and the populist radical right FPÖ, was to curb family benefits and family tax reductions of migrant workers. New legislation that entered into force in January 2019 indexes family benefits and family tax reductions for migrant workers whose children are resident in another Member State.²² Remarkably, the Austrian Government and Parliament were perfectly aware that indexing family benefits for migrant workers will, in all likelihood, violate EU law. The European Commission and the government's own civil service had warned that this kind of indexing was incompatible with EU secondary law as interpreted by the CJEU and this view was shared by a professor of EU law who provided expert advice to the Austrian Government and Parliament.²³ A recent academic article published in a renowned Austrian law journal concludes that the new law is definitely incompatible with EU secondary law in its current state.²⁴ Unsurprisingly, the European Commission has already launched an infringement procedure against Austria.²⁵

Related to single market free movement is another area of EU law that has recently been undermined in a number of Member States: the border-free area established by the Schengen Borders Code. As Thalmann writes in his chapter, as a reaction to the so-called migration crisis of 2015–16, nine EU Member States and Schengen-associated states reintroduced temporary border controls along their borders with other Member States and six of these States continue to carry out border checks until the present day. Thalmann observes that the Member States justify these border controls by arguing that the influx of third-country nationals seeking international protection and the secondary movements of these migrants within the EU creates a serious threat to public policy or internal security in their national territory.

Challenges to the free movement of persons and the Schengen open border system might become even more acute with the rise of populist radical right parties in Member States and the European Parliament. Falkner and Plattner point out that most of the populist radical right parties support (at least sectoral) closing of their national markets. Besides, 77 per cent of the statements of populist radical right parties express opposition to free travel across national borders within the EU and the absence of internal borders. However, Falkner

²² See S Mayr, 'Quod Licet Iovi, Non Licet Bovi? Die Indexierung der Familienbeihilfe aus unionsrechtlicher Sicht' (2018) 73 *Zeitschrift für Öffentliches Recht* 317, 318.

²³ *ibid* 320–21.

²⁴ *ibid* 333.

²⁵ European Commission, Press Release, 'Indexation of Family Benefits: Commission Opens Infringement Procedure against Austria' (24 January 2019) IP/19/463; European Commission, 'Indexation of Family Benefits: Speaking Points of Commissioner Thyssen on the Launch of the Infringement Procedure against Austria' (24 January 2019) SPEECH/19/664.

and Plattner note that there is a stark difference between policy preferences of Eastern parties, which are advocating for open borders inside the EU, and Western and Northern parties, which want to restore national borders. One can speculate that Eastern European parties assume that their citizens will benefit from open borders, whereas parties from Western and Northern Member States want to protect their citizens from the influx of foreign nationals, be it third country nationals or EU migrants. Notably, all countries currently operating exceptions from the Schengen system would fall in the latter category.²⁶

Furthermore, according to Falkner's and Plattner's findings, a majority of 70 per cent of the statements of populist radical right parties favour dismantling the EU's policy on external migration into the EU. The few calls for an extension of EU migration law and policy are not necessarily contradictory because they are mainly concerned with the strengthening of the EU's external border and the idea of a "fortress Europe", as Falkner and Plattner explain.

The common feature of the sectoral protectionism described in this section is that it is directed against the influx of foreigners. By introducing obstacles to the free movement of people, Member States such as Luxembourg and Austria try to promote their own citizens by treating them differently from other EU nationals. These obstacles can deter EU nationals from moving to this Member State. Exceptions to the Schengen open borders, for their part, are an expression of these Member States' intent to protect their citizens and national legal order from the consequences of immigration from outside the EU. The same applies to the calls of populist radical right parties to dismantle the EU's policy on external migration to the EU.

Although the protectionist measures are all targeted against non-nationals, the reasons behind the introduction of these measures by Member States do not necessarily coincide. The 'worlds of compliance' typology developed by Falkner and others can help to shed light on these reasons.²⁷

In the 'world of law observance', which includes Denmark, Finland and Sweden, compliance typically overrides domestic concerns as there is an embedded compliance culture as well as legal and administrative capacity.²⁸ It might therefore seem surprising that Denmark and Sweden are among the Member States that continue to perform border controls at their borders with other EU Member States. However, Thalmann argues that these border controls may well be legitimate and proportionate and therefore compliant with EU law, although

²⁶ The Member States in question are: Austria, Denmark, France, Germany, Norway and Sweden.

²⁷ G Falkner and O Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States' (2008) 46 *Journal of Common Market Studies* 293. See also G Falkner, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge, Cambridge University Press, 2005); G Falkner, M Hartlapp and O Treib, 'Worlds of Compliance: Why Leading Approaches to European Union Implementation are only "Sometimes-true Theories"' (2007) 46 *European Journal of Political Research* 395.

²⁸ Falkner and Treib, 'Three Worlds' (2008) 296.

a lack of empirical data prevents a definite conclusion. It can be speculated that Sweden and Denmark do not refrain from border controls because they could legitimately claim that they are not breaching EU law by doing so. Even though the border controls seem to be in line with EU law, they are likely to have considerable adverse effects on European integration. Thalmann and several EU institutions rightly emphasised that open internal borders are not a minor supplement to the internal market, but one of the most important and symbolic achievements of the EU.

In the ‘world of domestic politics’, which includes Austria, Belgium, Germany, the Netherlands, Spain and the UK, governments tend to engage in a cost–benefit analysis and non-compliance is a likely outcome if EU requirements conflict with domestic political interests.²⁹ In these Member States, political resistance is at the root of most compliance problems rather than capacity problems. The indexing of family benefits for workers from other Member States in Austria is a good example of this approach.

The third group of Member States, the ‘world of transposition neglect’, includes France, Greece, Luxembourg and Portugal. In these Member States, ‘compliance with EU law is not a goal in itself’ and ‘the typical reaction to an EU-related implementation duty is inactivity’.³⁰ The most important motivation for compliance in these Member States is powerful enforcement action by supranational institutions. This description fits very well with Warin’s case study. She demonstrates that the Luxembourgish Parliament repeatedly failed to sufficiently adapt domestic legislation to the requirements of EU free movement law. Domestic implementation of the relevant provisions of EU primary and secondary law was minimalistic in this area of EU law and it relied on a trial-and-error approach. National law was only brought in line with EU law when it was expressly declared to be incompatible with EU law by the CJEU and even this change of national law took a very long time. The typical reasons for non-compliance in the ‘world of neglect’ are preferences for national solutions and capacity problems.³¹ Both reasons are apt to explain the neglect of EU law identified by Warin.

C. Obstacles Relating to Institutional, Regulatory and Constitutional Traditions

Two further types of resistance against EU law and governance emanate not so much from political policy disagreements, but from structural and constitutional discrepancies or practical problems and inabilities. These forms of

²⁹ *ibid* 297.

³⁰ *ibid*.

³¹ *ibid*.

resistance manifest themselves in the chapters of this volume that focus on the implementation and interpretation of EU law by the judiciary. This section focuses on obstacles to the implementation of EU law that are due to conflicts between EU rules and pre-existing institutional and regulatory traditions in the Member States, whereas the next one looks at practical obstacles and capacity problems.

Mayoral's contribution demonstrates that the structure of the domestic judicial system and the deeply embedded traditions that correspond to this structure can hinder compliance with EU law. In his case study on Poland, he shows that national lower-instance courts are less prepared to refer to the CJEU and to follow its judgments when this would entail going against the national constitutional court. Importantly, he emphasises that this was the case even before the recent reforms of the Polish judiciary that are seen as incompatible with the rule of law.³² Similarly, Glavina's interview study reported in this volume indicates that the engrained tradition of lower-instance courts to observe the case law of their apex court can adversely impact respect for EU law. She cites lower court judges from Slovenia who argue that complicated legal matters are best left to higher instance courts. By extension, this may also indicate that once the national supreme or constitutional court has resolved a matter, lower courts are unlikely to challenge its ruling.

Furthermore, national constitutional courts themselves might impede compliance with EU law if it directly conflicts with national constitutional law. From the EU's perspective, EU law enjoys primacy over conflicting national constitutional law and national constitutional courts have, in principle, accepted this rule of conflict.³³ However, recent case law of the German Federal Constitutional Court and of the Italian Constitutional Court indicates that these two courts are prepared to prevent the application of EU law in their jurisdiction if it infringes the identity, that is the very core, of their constitution.³⁴

The strength of lower courts' institutionalised respect for higher instances can be illustrated by a case where it was stretched to its limit. In 2009 and 2010, the Swedish Supreme Courts declined to disapply national rules allowing for criminal sanctions to be imposed on tax evaders who had already been subjected to administrative penalty proceedings;³⁵ a system that was subsequently held incompatible with EU law in *Fransson*.³⁶ Both judgments were subject to

³² See, eg, A Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 *German Law Journal* 1839.

³³ See, eg, judgment of 17 December 1970, *Internationale Handelsgesellschaft*, C-11/70, EU:C:1970:114; German Federal Constitutional Court, judgment of 22 October 1986, *Solange II*, 2 BvR 197/83, BVerfGE 73, 339.

³⁴ See, eg, German Federal Constitutional Court, Judgment of 15 December 2015, *Solange III*, 2 BvR 2735/14; Italian Constitutional Court, Order of 26 January 2017, *Taricco*, 24/2017.

³⁵ Swedish Supreme Administrative Court, judgment of 17 September 2009; Swedish Supreme Court, judgment of 31 March 2010.

³⁶ Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105.

widespread criticism from scholars who found the Swedish legislation manifestly incompatible with higher-ranking European rules.³⁷ Nevertheless, when a small number of lower-instance courts decided to disobey the supreme court rulings (which are not formally binding, anyway) to give effect to individual rights based on the European Convention on Human Rights and the Charter of Fundamental Rights, this was considered exceptional, with one commentator suggesting the lower court behaviour to be unparalleled since medieval times.³⁸ These reactions are testament to the institutional strength of the established judicial hierarchy – even in a Member State that does not apply a system of precedent proper and even when the higher courts are widely considered to be wrong.

The obstacles described in this section accord with the observation of comparative politics scholars, according to whom the degree of ‘fit’ or ‘misfit’ between EU rules and pre-existing institutional and regulatory traditions determines compliance with EU law or lack thereof. If EU law and national traditions fit well together, adaptational costs are low, which facilitates compliance. On the other hand, if EU law conflicts with deeply embedded domestic structures, adaptational costs are high, which makes compliance difficult.³⁹

D. Practical Obstacles and Capacity Problems

The final type of resistance against EU law and governance consists in practical obstacles and capacity problems. Glavina’s chapter points to a range of practical factors that determine whether national lower-instance courts are able to fulfil their EU law mandate. Drawing on interviews with Slovenian and Croatian judges, she argues that the decision of these judges to submit preliminary questions to the CJEU is determined, inter alia, by court resources, workload concerns, knowledge of EU law and the incentive structure of the specific court. Especially first-instance courts with heavy workloads and small expectations of ground-breaking legal analysis refrain from engaging with the preliminary reference system. These challenges to the full effectiveness of EU law in the Member States are not necessarily the product of political disagreements with EU policy. Instead, they emanate from the practical inability of national actors to fulfil the expectations of EU law.

We mentioned above that capacity problems are typical reasons for non-compliance in the ‘world of neglect’, which includes France, Greece, Luxembourg

³⁷ eg O Zetterquist, ‘Högsta domstolens och Regeringsrättens bedömning av förenligheten av det svenska skattetillägget/skattebrottet med dubbelbestraffningförbudet i Europakonventionen’ (2010) *Europarättslig tidskrift* 592; U Bernitz, ‘Rättighetsskyddets genomslag i svensk rätt – konventionrättsligt och unionsrättsligt’ (2010–2011) *Juridisk Tidskrift* 821, 842.

³⁸ F Stenhammar, ‘Internationell anarki i svenska domstolar? Ett folkrättsligt perspektiv på “HD-upproret” om skattetilläggen’ (2011–2011) *Juridisk Tidskrift* 477.

³⁹ Conant, ‘Compliance’ (2012) 13.

and Portugal.⁴⁰ Warin's Luxembourgish case study seems to confirm this account. As she notes, the failure of Luxembourg to respect EU rules on free movement of persons might, to some extent, be related to the fact that transposing and implementing EU law is difficult for a Member State with an administration that is proportionate to its small size. Small Member States have smaller abilities to comply with EU law for the simple reason of having smaller administrations with fewer civil servants working to implement the abundant body of EU law that is, naturally, the same whether to be implemented in Germany or Malta.

Moreover, in the 'world of dead letters', which encompasses the Czech Republic, Hungary, Ireland, Italy, Slovakia and Slovenia, severe capacity limitations lead to widespread non-compliance with EU law when it comes to practical application and enforcement.⁴¹ This cluster of Member States was identified based on the implementation of EU secondary legislation at the national level.⁴² Glavina's interview study suggests that the readiness of national courts to refer to the CJEU is also (at least partly) influenced by practical and capacity problems. From a theoretical perspective, non-compliance due to practical problems and capacity limitations is in line with management theories of compliance. According to management theorists, non-compliance emerges due to capacity limitations and ambiguities of interpretation rather than deliberate defiance.⁴³

IV. REMEDIES AND THE ROLE OF NATIONAL JUDGES AS GUARANTORS OF COMPLIANCE

A common challenge to the effectiveness of EU law in the Member States is the failure of national legislators to implement EU primary and secondary law in a correct and timely fashion. Warin's case study on Luxembourg as well as Papp and Varju's chapter on Hungary are good illustrations of this problem.

EU law has in-built mechanisms to address the problem of provisions of national law that are incompatible with EU law; most importantly the possibility of infringement procedures launched by the Commission. Furthermore, national courts must immediately disapply provisions of national law that conflict with EU law and they can (and in the case of last instance courts have to) refer to the CJEU when they have doubts on the interpretation of EU law. Overall, the contributions to this volume highlight the national judiciaries' role as guardians of EU law at the national level.

In the Luxembourgish example, the national judiciary was effective in ultimately leading the national legislator to gradually adapt national legislation

⁴⁰ See Falkner and Treib, 'Three Worlds' (2008) 297.

⁴¹ *ibid* 308–09.

⁴² *ibid* 300–07.

⁴³ Conant, 'Compliance' (2012) 7.

in line with EU law. The Luxembourgish courts were loyal to EU law. They diligently respected the CJEU's case law and disapplied national provisions that discriminated against frontier workers. Moreover, they repeatedly referred to the CJEU when they had doubts as to the compatibility of national legislation with EU free movement law.

This has not only happened in Luxembourg, which takes explicit pride in being Europhile. In Hungary, as well, it was the judiciary that stepped in to ensure compliance with EU law by forcing the executive to back down on its protectionist economic policy. According to Papp and Varju, the Hungarian courts' consideration of EU law in their own adjudication and their participation in the preliminary reference procedure were crucial for the continued application of EU law in Hungary. In this regard, it would be unfortunate if the CJEU, as it has hinted, were to deny that the ordinary courts in those Member States affected by rule of law backsliding are courts in the sense of Article 267 of the Treaty on the Functioning of the European Union (TFEU).⁴⁴

Claassen's case study on Dutch competition courts is another illustration of the contribution of national courts to the application of EU law in the Member States. Claassen argues that national courts' loyalty to EU law should no longer be measured based on how many references they send to the CJEU.⁴⁵ In his view, positive explanations of low numbers of preliminary references tend to be overlooked. For example, Dutch competition courts are loyal to the EU in that they attempt to apply EU law in their adjudication, but they only rarely refer to the CJEU because they do not feel responsible for the general development of EU law. They consider themselves primarily as dispute resolution providers and not so much as constitutional actors. Given the increasingly heavy case load of the CJEU – albeit not as heavy as that of the European Court of Human Rights – a low number of references can even have some merits. The introduction of reasoned opinions as an alternative to full judgments of the CJEU indicates that the Court itself is starting to delegate more responsibilities to national courts. This could lead to a more independent attitude from the part of national courts.

In her contribution, Wallerman depicts the type of judge – referred to as judge Ariadne in analogy to Dworkin's judge Hercules – who refrains from referring to the CJEU without being opposed to European integration. She describes judge Ariadne as loyal to the law, free from personal agendas and fully committed to the supremacy of EU law as an integral and justiciable part of the national legal system. The Dutch competition courts examined by Claassen seemingly perfectly illustrate this type of judicial behaviour.

⁴⁴ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117, para 43; judgment of 25 July 2018, *LM*, C-216/18 PPU, EU:C:2018:586, para 54.

⁴⁵ Similar points have been made in this volume by Glavina, Claassen and Wallerman. See also J Komárek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 *European Law Review* 467.

For national courts to be loyal guarantors of EU law in the Member States, and thus for this behaviour to spread beyond the context of market regulation in the Netherlands, a number of requirements must be fulfilled. One of them is education. As illustrated by Glavina's contribution, national courts' knowledge of EU law is not on par with their knowledge of national law. This observation applies even to founding Member States like Germany.⁴⁶ Overcoming this challenge will be crucial to build national courts' capacity to ensure compliance with EU law at the national level. Imparting knowledge on EU law to national judges will require resources and time, both for the individual judges and in terms of investments into the judiciary as a whole.

Moreover, and perhaps most importantly, supreme and constitutional courts need to join the movement. Inter-court competition and lower court empowerment,⁴⁷ powerful as it may have been in the formative decades of the Union, is not capable of bringing the whole national judiciary to work towards the full implementation of EU law. Although many lower courts did, and still do, refer cases to the CJEU, many more do not, and the cases delivered and actions taken by (some) lower courts are not capable of setting national precedents. As is shown in this volume by Mayoral, the CJEU has not replaced the national highest instances as the most important precedent setter. However, where supreme and constitutional courts go, lower instances will follow. Thus, for national courts to be able to function as a force against challenges to EU law by Member States, national highest instances must lead the way. There is some evidence that this is indeed happening: highest instance courts have surpassed their colleagues on the lower instances and are now the CJEU's most frequent interlocutors.⁴⁸

However, in Member States where rule of law backsliding is well advanced, there can be further limitations on national courts' ability to safeguard compliance with EU law. In particular, respect for (or fear of) national superiors may prevent national courts from fulfilling their EU law mandate. In this regard,

⁴⁶JA Mayoral, U Jaremba and T Nowak, 'Creating EU Law Judges: The Role of Generational Differences, Legal Education and Judicial Career Paths in National Judges' Assessment Regarding EU Law Knowledge' (2014) 21 *Journal of European Public Policy* 1120; T Nowak, F Amtenbrink, M Hertogh and M Wissink, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (The Hague, Eleven International Publishing, 2011); U Jaremba, 'At the Crossroads of National and European Union Law: Experiences of National Judges in a Multi-Level Legal Order' (2013) 6 *Erasmus Law Review* 191.

⁴⁷See, eg, JHH Weiler, 'The Transformation of Europe' (1992) 100 *Yale Law Journal* 2403; K Alter, 'Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration' in AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, Hart Publishing, 1998).

⁴⁸A Dyeve, A Atanasova and M Glavina, 'Who Asks Most? Institutional Incentives and Referral Activity in the European Union Legal Order' (2017) available at ssrn.com/abstract=3051659.

the disciplinary proceedings instituted against two Polish judges for having requested preliminary rulings from the CJEU are particularly worrisome.⁴⁹

Generally, commentators have been pessimistic about the national or supra-national judiciary's ability to have large-scale impact on more serious cases of Euroscepticism or rule of law backsliding.⁵⁰ Tacik's study on the Polish Government's reactions to the Białowieża Forest judgment highlights the risk that the authority of EU institutions is undermined by open defiance and/or incoherent, incorrect and incendiary speech acts. He also points to the risk of politicisation of judicial (and administrative) procedures.⁵¹ These risks to European institutions' authority and legitimacy are particularly serious in light of the lack of centralised enforcement mechanisms in the Union.⁵² Furthermore, judicial actions, be it through national courts or the CJEU, as well as administrative action, like the Article 126 TFEU procedure at the disposal of the Commission, by design can only deal with rather contained and clearly regulated matters. Fundamental values are often too vaguely regulated to be justiciable before national or supranational courts, rendering the most important norms the least protected.⁵³ One can question whether these mechanisms also lend themselves to counter more systemic challenges to the EU law and policy.⁵⁴

Nevertheless, this volume, which sought to enquire into the challenges and problems faced by the EU in its relationship with Member States, has also pointed to answers to such threats. The contributions to this volume provide several examples of how national and EU-level remedies have proven effective and individual instances of rights violations and EU law infringements have thereby been righted.

For instance, in the case study described by Tacik, where domestic administrative authorities, supported by the Polish Government, were responsible for the logging activities in the Białowieża Forest, the EU was, ultimately, appropriately equipped to address this problem. The European Commission initiated infringement proceedings and the CJEU, for the first time and as a reaction to the previous non-compliance of the Polish authorities with an interim order,

⁴⁹ 'Polish Disciplinary Prosecutor Michal Lasota Launched a Case against Judge Igor Tuleya, Who Sent Pre-Judicial Queries to Luxembourg' (13 December 2018) *IUSTITIA*, available at www.iustitia.pl/en/2722-polish-disciplinary-prosecutor-michal-lasota-launched-a-case-against-judge-igor-tuleya-who-sent-pre-judicial-queries-to-luxembourg.

⁵⁰ JW Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141, 148; M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24 *Journal of European Public Policy* 321; A Hofmann, 'Resistance against the Court of Justice of the European Union' (2018) 14 *International Journal of Law in Context* 258.

⁵¹ This risk is also highlighted by M Blauberger and RD Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU' (2017) 24 *Journal of European Public Policy* 321, 329 ff.

⁵² See Hofmann, 'Resistance' (2018) 274.

⁵³ *ibid* 274; Blauberger and Kelemen, 'Can Courts Rescue National Democracy?' (2017) 325.

⁵⁴ Müller, 'Should the EU Protect Democracy' (2015) 147; 'Editorial Comments' (2019) 18.

interpreted Article 279 and Article 260 TFEU as allowing periodic penalty payments for non-compliance with interim measures. The disrespect of EU law ceased in the end, although this might also have been related, at least partly, to a change in the composition of the Polish Government, as Tacik suggests.

The Italian case study concerning the contested Italian budget for 2019, which was the first budget presented by the populist government emerging after the 2018 Italian parliamentary elections, also suggests that EU mechanisms can be effective. In that case, it appears that the prompt reactions of the Commission and other EU institutions, including a threat to instigate for the first time proceedings against excessive budget deficits under Article 126 TFEU, critically contributed to the proposed budget being amended and brought in conformity with the financial rules of the Union and the Eurozone. Again, however, the authors also stress that features of the national government's structure, in particular the role of the non-partisan Prime Minister, were instrumental in reaching this solution.

V. CONCLUDING REMARKS

As the contributors to this volume have pointed out, there is an underlying tension between, on the one hand, the Member States and their interests in providing what is best for their own territories and peoples and, on the other, the Union and its common goals and values. This is hardly new. Nor is, strictly speaking, popular or party-based scepticism towards the European project. More than 20 years ago, Joseph Weiler already noted that it had 'been evident for some time' that 'national Sleeping Beauty has woken up and discovered that she did not like the EU Prince at all'.⁵⁵ Alternatively, one needs only recall the several referenda in the Member States whereby voters rejected the deepening of European integration: the Danish referendum on the Maastricht Treaty in 1992; the Danish and Swedish referenda on the European Monetary Union of 2000 and 2003 respectively; the referenda on the draft Constitutional Treaty in France and the Netherlands in 2005; and the first Irish referendum on the Lisbon Treaty in 2008. As Michal Bobek points out in his prologue to this volume, the EU seems to be in almost constant crisis. *Plus ça change, plus c'est la même chose*.

But although the state of crisis may start to look permanent, the face of crisis is ever changing. This volume has attempted to shed light on (one of) its current incarnation(s); that of increasingly widespread and open scepticism for the European project gradually seeping into the mainstream of Member States'

⁵⁵ JHH Weiler, 'Epilogue: The European Courts of Justice: Beyond "Beyond Doctrine" or the Legitimacy Crisis of European Constitutionalism' in AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in Its Social Context* (Oxford, Hart Publishing, 1998).

political discourse and legislative reality.⁵⁶ Taken together, the contributions to this volume show that resistance to EU law and governance encompasses a whole spectrum of positions from the hard-line, outright rejection of the EU as a whole, through fundamental disagreements about European identity and basic values or certain EU policy areas, to the unwillingness or inability to implement and embrace Union law fully and loyally. In this sense, resistance, in some form or degree, is present in most or all of the Member States – including those that are (correctly) perceived as deeply committed to the Union. Furthermore, the contributions have shown that there is indeed a difference between Eurosceptic rhetoric and Eurosceptic actions. The actors who create the most noise and attract the most attention are not always the authors of the greatest challenges (although they sometimes are).

A question that remains unanswered by this volume is if, how, and for what reasons a specific Member State, a party, or a people moves across the Eurosceptic continuum. Can one, for instance, draw a direct causal link between the myth that the EU tried to ban the British pint and the UK's current withdrawal procedure?⁵⁷ Does incomplete or delayed implementation of Union law slowly chip away at the momentum and significance of European integration? Can temporary (although now in their fourth year) border controls open the flood-gates of increased resistance to free movement and fuel xenophobia?

As for stopping and preventing such movements, we have seen examples of actors and mechanisms that may hinder such Eurosceptic sliding. In particular, courts, both at EU and Member State level, have tools available to them to counter challenges to EU law and authority. However, we have also seen that the effects of these remedies are more limited than the challenges national judges face, and several of the contributions raise questions as to whether national judges are indeed up for the task. As other commentators have concluded, judiciaries are unlikely to be the only answer to the challenge of Euroscepticism. This, however, goes for all other actors and institutions as well. This volume has endeavoured to illustrate the many faces of Euroscepticism; the remedies will likely have to be at least as numerous.

⁵⁶ See N Brack and N Startin, 'Introduction: Euroscepticism, From the Margins to the Mainstream' (2015) 36 *International Political Science Review* 239.

⁵⁷ See G Drewry, 'The Jurisprudence of British Euroscepticism: A Strange Banquet of Fish and Vegetables' (2007) 3 *Utrecht Law Review* 101, 103.