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The European Council

Actor and Arena of Dominance?

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Preface

The EU has expanded in depth and breadth across a range of member states with greatly different makeups, making the European integration process more differentiated. *EU Differentiation, Dominance and Democracy* (EU3D) is a research project that specifies the conditions under which differentiation is politically acceptable, institutionally sustainable, and democratically legitimate; and singles out those forms of differentiation that engender dominance.

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The present report is a part of EU3D's work on identifying problematic forms of differentiation internally in the EU (WP 2). Of particular relevance in that connection are those aspects of the EU's distinct 'differentiation configuration' that are associated with dominance. This report's focus on the European Council is a very welcome addition to this line of inquiry. The European Council has taken on a more central role in the ordinary workings of the EU system of governance, and the European Council plays a central role in crisis handling. It is therefore important to understand what this implies for the EU as a system of governance. The report is also very topical given that it assesses the EUCO's role in three very recent crises and challenges facing the EU, namely the Covid-19 pandemic, the EU's sanctions against Russia and the rule of law crisis.

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Introduction

This report examines patterns of dominance, namely arbitrary and unjustified use of power, surrounding the European Council (EUCO), which emerged during three recent and still unresolved crises: the socio-economic costs of the COVID-19 pandemic (since March 2020), the rule of law controversy (since July 2020), and Russia's invasion of Ukraine (since February 2022). It does so by looking at both the EUCO's relations with other EU institutions (inter-institutional dominance) and negotiations between governments within the EUCO (intra-institutional dominance).

In dealing with two major crises of the past – the European sovereign debt crisis (2009-2013) and the refugee crisis (mostly 2015) – the EU's intergovernmental institutions have increasingly played a central decision-making role (Fabbrini 2013; Ripoll Servent 2015; Csehi and Puetter 2020). More specifically, the EU's response to those crises accelerated the empowerment of the EUCO vis-à-vis other EU institutions – a process which had started with the institutionalisation of the EUCO in the Lisbon Treaty (Puetter 2015; Wessels 2012). If anything, the euro crisis and the refugee crisis have shown that any European solution to such large-scale emergencies (White 2019) is only possible through a preliminary agreement in the EUCO, the highest level of decision-making (Puetter 2012). Not only did the EUCO meet much more often than in the past during those crises. It also managed to significantly shape the content of the crisis-management measures, thus exceeding its traditional, treaty-based task of establishing general guidelines for the EU's action, up to the point of assuming quasi-legislative functions (a prerogative explicitly excluded by the treaties) (Giraud 2020). At the same time, especially throughout the EU's response to the euro crisis, some

hierarchical trends emerged between governments in the context of negotiations taking place within the EUCO (Howarth and Spendzharova 2019). As the consequences of the crisis were highly asymmetric, thus hitting some member states more than others, a cleavage opened up within the Eurozone between northern European and mostly southern European member states. To this effect, due to the substantial financial contribution of creditor member states – like Germany – to the recovery of debtor ones – like Greece –, deliberation and consensus in the EUCO occasionally gave way to patterns of dominance (Fabbrini 2016).

Dominance involves informal power relations and arbitrariness (Shapiro 2016). However, the EUCO's exertion of power reflects subtle manoeuvring, and a gradual shift towards becoming a quasi-legislator, with the expectation that other EU institutions, notably the European Commission, the European Parliament and the Council, would follow its guidance (Szép 2020). As such, dominance can also imply the violation of treaty procedures. In this respect, dominance can be conceived as being related to accountability, defined as the extent to which an actor is required to provide other actors with justifications for its actions. Accountability requires formal procedures that in principle all institutions and all member states need to follow. In this respect, it strongly differs from dominance as an informal and arbitrary manifestation of power. Because accountability is a crucial attribute of politically legitimate decisions taken within a political system (Eriksen and Fossum 2002; Fossum and Schlesinger 2007; Fossum 2015), dominance by the EUCO entails a twofold risk. First, with regard to EUCO's relations with other EU institutions, the subversion of the 'federal balance' between institutions representing the interests of the centre (European Parliament and European Commission) and institutions representing the interests of the units (Council and EUCO) is at stake (Fossum 2021a). Second, as far as intergovernmental relations within the EUCO are concerned, dominance could take the form of 'tyranny of the larger states over the smaller states' (Fabbrini forthcoming), thus undermining the principle of equality among member states.

Against this background, the report asks: Which dominance patterns (if any) have emerged surrounding the EUCO, in the context of recent crises? What are the similarities and differences between these patterns? To address these questions, the report first investigates whether the stronger role of the EUCO in the EU's political system is conducive to patterns of

dominance to the detriment of other institutions such as the EP and the Commission (Fabbrini forthcoming; Wessels 2015) – so-called inter-institutional dominance. Secondly, it unpacks the concept of intra-institutional dominance, which points to a context where a group of governments within the EUCO imposes their preferences on other governments. As dominance has negative implications – the legitimacy of decisions and the accountability of the decision-makers involved – these are fundamental, yet so far under-researched, questions for democracy in the (future of the) EU. A dominant EUCO also has significant implications for the EU’s decision-making system. As a matter of fact, it further differentiates the EU’s decision-making system beyond the traditional dichotomy between the supranational or Community method and the intergovernmental regime. For instance, EUCO could play an unforeseen role in decisions taken through the Community method; or the principle of equality among governments might be violated within a specific intergovernmental context. In practice, the formally regulated supranational and intergovernmental regimes can thus appear in distinct variants depending on the EUCO’s role. As such, the more dominant the EUCO is, the more de facto differentiated the EU’s decision-making regime becomes – a differentiation which, however, ends up becoming pathological (Fossum 2019; 2021a).

Since the EUCO plays a key role during crises, it becomes particularly important to investigate patterns of dominance in crisis situations. Crises can be differentiating shocks (Fossum 2019) that often require a swift reaction. Furthermore, crises might represent critical junctures (Capocchia and Kelemen 2007), and hence lead to future path-dependency, meaning that the response to them might have long-term implications. In addition, the EU’s last ten years have been tormented by a series of interacting crises (Caporaso 2018) or polycrisis (Zeitlin, Nicoli and Laffan 2019), thus they are becoming rather the norm than the exception. Unsurprisingly, the EUCO aimed to take control of the crisis-management process, particularly when nationally sensitive ‘core state powers’ (Genschel and Jachtenfuchs 2016), like economic, foreign and security policy, were affected.

Empirically, the report investigates the role of the EUCO in the EU’s response to three crises with different origins (external or internal) and under different decision-making models (supranational or intergovernmental method) (Fabbrini 2015). The first is the crisis

generated by an external shock, the COVID-19 pandemic, and the ensuing adoption of the Recovery and Resilience Facility (RRF). The second is the Russian military invasion of Ukraine, which led the EU to adopt economic sanctions against the Russian aggressor. The third is the internal rule of law crisis, which pushed the Commission and the EP at loggerheads with Poland and Hungary. After a controversial compromise, the conflict was concluded with the adoption of the conditionality system for the protection of the Union budget. While the first crisis was addressed through the supranational ‘Community method’, the response to the second crisis was subject to intergovernmental negotiations, and the third crisis involved a mix of decision-making processes owing to the Polish-Hungarian veto. The aim is to understand whether these three crises gave rise to any dominance patterns and, if so, what their features and implications are.

The report is structured as follows. The first, following section outlines the analytical framework. The second section zooms in on the EUCO during the COVID-19 pandemic. The third section deals with the EUCO’s decision to adopt sanctions against Russia. The fourth section examines the role of the EUCO in the rule of law crisis. The final section performs a brief comparison of our findings and points to implications of dominance for differentiation and democracy in the EU.

Chapter 1

Analytical Framework: Dominance

In general terms, dominance is the 'dependence on others' unauthorised discretion' (Fossum 2019: 10). On the one hand, it stems from asymmetries in power and resources and is epitomised in decisions being arbitrary in nature, design, and/or implementation. On the other hand, it may also originate from violations of law. Dominance is first and foremost relational: an actor/some actors exercise(s) dominance over another actor /other actors both at the level of individuals and institutions (Lukes 2005; Dahl, 2006). However, dominance can also be structural if a certain political system entails mechanisms that are permanently conducive to patterns of dominance. Dominance also has a subjective dimension inasmuch as an actor perceives to be dominated by others (Fossum 2021b) without the actual encroaching of EU treaties. Dominance is a crucial issue for a federal union because it is related to the concept of accountability. Accountability refers to the extent to which an actor is legally required to provide other actors with justifications for its actions (Schedler 1999; Strøm 2000; Lührmann et al. 2020). As such, accountability is a crucial attribute of politically legitimate decisions taken within a political system (Eriksen and Fossum 2002; Fossum and Schlesinger 2007; Fossum 2015). Accountability and dominance are thus related dimensions insofar as the lack of accountability structures is conducive to patterns of dominance (Fabbrini 2021). However, in this report, we argue that dominance is more than just the lack of accountability. Dominance is

about an actor not involving others in the decision-making process, or playing a role it was not supposed to play, advancing its own interests by blackmailing other actors, and not providing adequate and due justification for this behaviour (lack of accountability). We move beyond the rich literature on accountability of the EUCO by investigating the most far-reaching consequence that the lack of accountability – together with other factors – can have, namely the rise of patterns of dominance. To do so, we unpack dominance as a concept.

In a federal-type union like the EU (Fabbrini, 2015; 2017; Fossum and Jachtenfuchs 2017), dominance can have two main dimensions. The first, inter-institutional dimension, which sees the EUCO as an ‘actor’, consists in the illicit hierarchical power exercised by a governmental institution (and the interests it represents) over other governmental and parliamentary institutions which goes beyond the provisions of the Treaties (Fabbrini, forthcoming). Inter-institutional patterns of dominance mirror the extent to which an institution is able to act on its own and control the decision-making process to the detriment of other institutions (Fossum and Laycock 2021). When patterns of inter-institutional dominance manifest, the EUCO essentially oversteps its role codified in EU primary treaties, which simultaneously means that other institutions are deprived of fulfilling their treaty-based obligations. As EU treaties provide several opportunities for EU institutions to check and balance each other, inter-institutional dominance occurs in procedural terms when an actor oversteps the role that the EU treaties attribute to it. Since the EU is a system of multiple institutions sharing power, the dominance of one institution over the others is problematic in democratic terms, because it undermines the joint involvement of institutions representing European citizens (EP), European interests (Commission), and national interests (Council and EUCO) in the decision-making process. To be precise, based on Fossum and Laycock’s (2021) scheme, inter-institutional dominance can occur in three different forms of which two have empirical relevance in our analysis. On the one hand, ‘resource-based dominance’ may arise when the legislature lacks the ability to keep the executive accountable because it is kept ill-informed or weak, thus eventually relinquishing the exercise of its powers. On the other hand, ‘venue-shopping dominance’ can be detected when the executive manages to shift decision-making either to informal forums outside the EU’s institutional framework (see the Fiscal Compact or the EU-Turkey migration deal) or to intergovernmental arrangements without legal basis

under the treaties (Fossum and Laycock 2021). Although both cases lead to executive dominance, the means to reach this outcome differ: power asymmetry (Fabbrini 2021) in the former and arena shifting (Falkner 2011) in the latter case.

The second dimension of dominance, which sees the EUCO as an 'arena', is internal or in other words intra-institutional as it concerns relations between governments in the context of intergovernmental decision-making regimes based on consensus and unanimity voting (Fabbrini, forthcoming). In such settings, each national government has the right to veto and can thus in principle block the adoption of any undesired decision. Intra-institutional dominance can occur when bargaining power asymmetries arise which undermine the consensual character of intergovernmental policy making. Crucially, the bargaining power of governments is strongly influenced by 'the structural capabilities of the member states they represent, their access to institutional resources in the European Council and their own personal qualities as negotiators' (Falkner 2011: 702-703). It might thus happen that one or more governments which initially vetoed or threatened to veto a decision eventually refrain from doing so following pressure from the other governments based on their bargaining power. We call this outcome 'tyranny of the majority'.

On other occasions, a minority of governments might veto or threaten to veto a decision on which all other governments agree. To do so, the vetoing governments engage in issue-linkage (Héritier and Reh 2012): they make the removal of their veto conditional on concessions on a different issue, thus blackmailing the other governments. In such cases, a government threatens to exercise a veto not for protecting truly vital national interests' (Tallberg 2008: 695), but rather for increasing its bargaining power on other negotiating tables. Therefore, despite the fact that the possibility to exercise veto is in the EU treaties to prevent arbitrariness, in such cases it becomes a means of arbitrary action in the hands of the blackmailing government. We call this outcome 'tyranny of the minority'.

Inter-institutional and intra-institutional dominance can affect each other. In the former, an institution - in our case, the EUCO - is the actor dominating the other EU institutions. In the latter, it is an arena where patterns of dominance can take place. Through inter-institutional dominance, the EUCO becomes the key decision-making actor on a given

issue. As a result, governments realise that to advance their preferences they need to direct efforts to the bargaining arena of the EUCO. This creates the breeding ground for what we call the tyranny of the majority and the tyranny of the minority respectively. Once the issue at stake is entirely decided within the EUCO, dominated actors cannot properly involve the Commission or the EP to counterbalance being subjected to the will of dominating actors. Therefore, only two exit strategies are possible from intra-institutional domination. In the case of 'tyranny of the majority', the minority of governments might not apply at the national level the decision they have been forced to consent to in Brussels. In the case of 'tyranny of the minority', the majority of governments might decide to go ahead with a decision vetoed by a minority of governments while granting the latter a derogation from it.

The report argues that the starting point for any analysis of inter- or intra-institutional dominance needs to be EU treaties and what they set out in terms of EUCO powers and its internal functioning. As treaty provisions vary, dominance needs to be defined in light of the different decision-making regimes (ordinary legislative procedure, intergovernmental method, etc.) in which the EUCO as well as other EU institutions are involved. The report does so in each of the sections specifically devoted to a crisis and the related policy area.

Broadly speaking, the Treaty on European Union (TEU) assigns to the EUCO the function of agenda setter, stipulating that '[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof' (Art. 15 (1) TEU). The EUCO also acts as the Union's 'constitutional architect' because the heads of State or Government determine EU treaty revisions (cf. Art. 48 TEU). However, the treaty explicitly states that the EUCO is an executive institution which shall not exercise legislative functions (Art. 15 TEU). Moreover, ever since its creation in 1974, the EUCO has acted as a 'crisis manager' by providing necessary resources and sounding out political compromises (Wessels 2015). With the Lisbon Treaty's entry into force in 2009, the EUCO gained official legal status and is now mentioned in EU primary law, along with the Union's other key institutions (Piris 2009).

In light of EUCO's treaty-based powers, patterns of dominance might manifest not only when it comes to taking final decisions; dominance can also occur in other steps of the policy cycle. Hence, the report examines

dominance during the three crises at the level of preparation (issue framing and agenda-setting), decision-making, implementation, and control (Schramm and Wessels 2022).

Chapter 2

The EU's Response to the COVID-19 pandemic: The Establishment of the Recovery and Resilience Facility (RRF)

Introduction

In the establishment of the RRF (what we identify as the EU's major response to the socio-economic consequences of the COVID-19 pandemic), the EUCO exercised major agenda-setting, policy-formulation and decision-making functions while also being accountable horizontally to the European Commission, Council and European Parliament. Such accountability is in line with the decision-making procedure adopted for the establishment of the facility, namely the Ordinary Legislative Procedure (OLP) of the supranational regime. However, the EUCO was able to play a greater role, especially in terms of policy-formulation and decision-making, than what the OLP formally provides for. Notably, it was able to interfere with the legislative process for the design and adoption of the RRF, thus exercising competences formally reserved for other EU institutions (Schramm and Wessels 2022). In particular, after the European Commission submitted the legislative proposal for the RRF regulation, the EUCO was able to shift decision-making to intergovernmental settings and modify the Commission's proposal before the European Parliament and Council could discuss it in view of the final approval. This form of 'venue-shopping' dominance was

however limited in its scope as the decisions of the EUCO required either follow-ups or outright endorsement by the European Commission, Council and European Parliament. In inter-institutional terms, the EUCO's response to the COVID-19 pandemic can thus be characterised as 'constrained pre-eminence'.

The Governance of Pandemic Politics

The RRF regulation was approved in February 2021 through the ordinary legislative procedure (OLP) of the supranational regime based on Art. 175 TFEU. The OLP is the standard decision-making system under the EU supranational governance system. Contrary to the Open Method of Coordination (OMC) of the intergovernmental system, increasingly adopted for policymaking in the EU since the 1992 Maastricht Treaty, the OLP envisages a role for both supranational institutions (i.e. the European Commission and European Parliament) and intergovernmental institutions (i.e. the EUCO and Council). Specifically, the EUCO is expected to determine the political direction and priorities of the Union. It does so mostly by adopting 'Conclusions' of its meetings, through which it tasks the European Commission to come up with a legislative proposal in line with a set of pre-defined political guidelines. As the only EU institution with a right of legislative initiative, the European Commission then elaborates its legislative proposal and submits it to the Council and European Parliament for discussion and approval. The Council and European Parliament act on an equal footing based on their voting procedures – that is, qualified and absolute majority voting respectively (Art. 294 TFEU).

In this governance system, the four institutions operate according to an institutional separation of powers and in the absence of political responsibility of the executive (EUCO and European Commission) towards the legislature (Council and European Parliament) due to the lack of a confidence relationship between the two branches of government. As a result, the EUCO is not *institutionally* accountable to the European Parliament or the Council as these latter cannot dismiss the European Council as a whole nor any of its members. However, the OLP provides for a form of *policy* accountability which stems from the roles and powers it attributes to the four decision-making institutions. While in the intergovernmental system, the EUCO takes decisions alone and thereby instructs the Council, in the supranational system the EUCO has

to come to terms with the European Commission, Council and European Parliament. Indeed, the EUCO's policy guidelines need to be elaborated in a legislative proposal by the European Commission and finally turned into legislation by the Council and European Parliament. In sum, the OLP gives rise to a governance system whereby several decision-making institutions simultaneously compete and cooperate to produce policies in the form of legislation (Fabbrini 2010).

Did the EUCO conform to the letter of the OLP in the design and adoption of the RRF between March 2020 and December 2021, or did it give rise to patterns of dominance?

Dominance Patterns in EUCO's Response to the COVID-19 Pandemic

In the first phase of the pandemic outbreak, the EUCO acted as an agenda setter as per Treaty provisions. On 17 March 2020, less than a week after the WHO declared Covid-19 a global pandemic, the EUCO advanced an interpretation of it as a European crisis that needed to be addressed at the EU level more than it could be addressed by member states alone. In his conclusions, EUCO President Charles Michel voiced the need 'to work together and to do everything necessary to tackle the crisis and its consequences'. The EUCO also invited the Eurogroup to 'adopt without delay a coordinated policy response' to the socio-economic consequences of the pandemic (European Council 2020a). On 26 March, the EUCO stressed the exceptional nature of the crisis and committed itself to stepping up the joint response to the pandemic. After taking stock of the progress made by the Eurogroup, which had presented a plan to establish a pandemic-related credit line within the ESM, the EUCO asked the Eurogroup to present further proposals 'in light of developments' (European Council 2020b).

In a second phase, throughout April 2020, the EUCO members switched hats and engaged in policy formulation. On 21 April, Charles Michel along with European Commission President Ursula von der Leyen presented a joint 'roadmap for recovery'. They reiterated that the pandemic left no room for business as usual and floated the idea of a 'Marshall-Plan type investment effort to fuel the recovery and modernise the economy', focusing on the green and digital transitions (European Commission and European Council 2020). For the first time, on 23 April,

the EUCO agreed to move beyond the ESM and to work on the establishment of a recovery fund as the major response to the pandemic crisis. However, because of continued internal disagreements between ‘inter-state coalitions’ on the exact shape of the instrument (Fabbrini 2022), the EUCO asked the European Commission to ‘analyse the exact needs and to urgently come up with a proposal that is commensurate with the challenge we are facing’ (European Council 2020c).

In a third phase, from July to December 2020, the EUCO became the single most important decision maker in the establishment of the RRF. By 28 May 2020, following the EUCO’s mandate, the European Commission had presented the first comprehensive scheme for the adoption of the RRF in the form of a legislative proposal addressed to the Council and European Parliament. The Commission defined the general features of the instrument – including its size, composition and governance – and identified it as the flagship programme within Next Generation EU (NGEU). In particular, the RRF would consist of €603 billion divided between €335 billion of non-repayable support (i.e. grants) and €268 billion of loans. The European Commission would assess Member States’ national recovery and resilience plans (NRRPs) and decide by itself on the activation of financial assistance, limiting the Council’s role to the suspension of payments on a Commission recommendation (European Commission 2020). On 19 June, the EUCO held a video-conference meeting to take stock of the progress made and discuss the Commission proposal. At the end of the meeting, EUCO President Michel officially launched negotiations with the member states and convened an in-person summit for mid-July (European Council 2020d).

The European Commission proposal had given rise to a confrontation within the EUCO between two inter-state coalitions. The first coalition, led by France and Germany and including most of the countries from Southern Europe, by and large, endorsed the presented draft scheme for the establishment of the RRF. The second coalition, led by the Dutch government and comprising the self-defined ‘Frugal Four’ (the Netherlands, Austria, Denmark and Sweden), opposed the Commission proposal, especially in terms of composition and governance (De La Porte and Jensen 2021; Schelkle 2021; Fabbrini 2022). At the EU ambassadors meeting on 8 July, Dutch EU Permanent Representative De Groot said the Netherlands demanded a decision-making role for the Council to approve NRRPs by unanimity along the lines of ESM governance. He also

suggested that the Dutch government was sceptical of grants and would not support financing them through the emission of a common debt (Politico 2020). On 10 July, one week ahead of a crucial EUCO meeting, President Michel summed up ongoing negotiations with the member states and presented his compromise proposal for the recovery instrument. He suggested preserving the size of the RRF and the balance between grants and loans as per the Commission proposals while giving concessions to the Frugal Four in terms of MFF-related rebates and the governance of the facility. Specifically, Michel suggested that the NRRPs should be approved by the Council with a qualified majority vote on a Commission recommendation (European Council 2020e). Such a governance scheme was a half-way solution between the unanimity rule advocated by the Dutch-led coalition and the outright exclusion of the Council.

It was on this basis that a crucial EUCO meeting took place on 17-21 July. While constituting an attempt to keep everyone around the negotiating table, Michel's proposal was the subject of further intense discussions among the heads of state and government. The size and composition of the instrument were negotiated jointly. The member states agreed to enlarge the size of the RRF from €603 billion to €672.5 billion but reduced the grants component (down to €312.5 billion) in favour of the loans component (up to €360 billion). In terms of governance, as a further concession to the Frugal Four, the governments agreed on the introduction of an 'emergency brake' whereby any member state could stop the approval of a NRRP and bring the matter before the EUCO in case they found a serious deviation from the relevant criteria. In any case, the EUCO would not have veto powers over the approval of the plan as the final decision on authorising the disbursement of financial assistance would continue to lie with the Council on a recommendation from the European Commission (European Council 2020f). The European Parliament was left with no formal role in the governance of the RRF. Indeed, the EP was excluded from the procedures for both the activation and the suspension of financial assistance. In sum, after four nights of heated discussions, the EUCO was able to strike a final deal on the size, composition and governance of the RRF, and submitted a revised version of the Commission proposal to the Council and European Parliament (De La Porte and Jensen 2021).

On 23 July, the European Parliament came up with a resolution on the EUCO's conclusions, stating that such conclusions 'represent no more than a political agreement between the Heads' and stressing that 'the Parliament will not rubber-stamp a *fait accompli*'. The EP criticised the EUCO position on the governance of the facility, 'which moves away from the Community method and endorses an intergovernmental approach' (European Parliament 2020a) and deplored the reduction of the grant component. It finally requested the introduction of a conditionality mechanism for the disbursement of financial assistance to the member states based on their full respect for the rule of law (European Parliament 2020a). In particular, the EP feared that RRF-based resources could be used by some governments of Eastern Europe to increase their control over the national judiciary, media and political opposition (Fabbrini 2022). The EUCO thus was asked to (re-)open negotiations on the governance of the RRF and the introduction of a rule-of-law conditionality (Drachenberg 2020). Under pressure from the President of the European Commission and in exchange for concessions on other NGEU instruments (such as increased resources for Horizon Europe, EU4Health and Erasmus+), the European Parliament eventually gave its consent to the governance scheme decided at the EUCO meeting of July (as the OLP requires) but insisted on the rule of law.

While supported by the member states of the 'solidarity' and 'frugal' coalitions, the conditionality mechanism based on the rule of law was met with strong resistance by the Hungarian and Polish governments, which perceived it as an attempt by the European Commission to prevent the activation of financial assistance to them (Van Middelaar 2021). In the EUCO meeting of October, the distance between the two blocs was so large that it was not even possible to sketch out a draft agreement. After two other months of negotiations, on 10-11 December, the EUCO agreed on the introduction of a general regime of conditionality for the protection of the Union budget, based on Member States' respect for the rule of law. The compromise provided that the conditionality mechanism could be exercised in observance of 'the national identities of the Member States inherent in their fundamental political and constitutional structures, [...] of the principle of objectivity, non-discrimination and equal treatment of Member States' (European Council 2020g). Satisfied with the concession made, Hungary and Poland eventually gave up on their veto, which led to approval of the MFF on 16 December 2020 and of the RRF regulation on 11 February 2021.

In a last phase following the establishment of the RRF, the EUCO took up the role of political watchdog of the several NRRPs presented by the member states under the RRF regulation. In particular, the EUCO has the power to discuss a NRRP when requested by one or more members of the Economic and Financial Committee (EFC), which the European Commission consults on the satisfactory fulfilment of the relevant ‘milestones’ and ‘targets’. As the RRF regulation states, ‘in such exceptional circumstances, no decision authorising the disbursement of the financial contribution [...] should be taken until the European Council has exhaustively discussed the matter’ (RRF Regulation 2021, 26), which should take no longer than three months starting from the Commission’s consultation of the EFC. Importantly though, the EUCO has no veto power over the disbursement of financial assistance. The European Commission has indeed the final say over the assessment of NRRPs, with the Council approving them on the basis of recommendations by the Commission.

Conclusion

To sum up, in the adoption of the RRF through the OLP, the EUCO was able to stretch its powers beyond the letter of the Treaties, especially with respect to policy formulation and decision-making (Wessels et al. 2022). Not only did the European Council carry out agenda-setting and policy-formulation tasks in the ‘fast-burning’ phase of the crisis, but it also performed formidable decision-making functions in a later, ‘slow-burning’ phase. In particular, the EUCO gradually adjusted the initial European Commission proposal for the establishment of the RRF before the European Parliament and Council could discuss it, and it did so by securing a series of political compromises on the size, composition and governance of the instrument as well as on a conditionality mechanism based on the respect for the rule of law. The EUCO was thus able to shift the decision-making process for the establishment of the RRF to intergovernmental settings without a basis under the treaties, anticipating discussions in the European Parliament and Council. This form of ‘venue-shopping’ dominance was however limited in its scope. In the exercise of decision-making powers, between July and December 2020, the EUCO had to come to terms with, and often accommodate, the positions of the European Commission and the European Parliament, in addition to appeasing internal divergences between different coalitions of Member State governments. Finally, in terms of control over the implementation

of the NRRPs, the EUCO can be activated by one or more members of the EFC to exercise a political form of surveillance over NRRPs, but the final decision with respect to the activation of financial assistance lies with the European Commission and Council.

While the EUCO is not institutionally responsible to the European Parliament, as the European Parliament cannot dismiss the EUCO or any of its members, in the EU's response to the pandemic crisis the EUCO was in fact held to account by the European Parliament because of the latter's role in the approval of the RRF regulation through the OLP. It was a kind of *policy*, rather than institutional, accountability. The EUCO had to give concessions to the European Parliament in terms of size of the instruments within NGEU and the introduction of a conditionality system based on the respect for the rule of law. Due to its power of legislative initiative, the European Commission kept in check the EUCO too. Indeed, as an ex officio member of the EUCO, the President of the European Commission contributed to, and agreed upon, the unanimous adjustments to the Commission proposal of 28 May. There was thus ultimately a fair degree of inter-institutional accountability between the EUCO and other EU bodies, stemming from the different but equally important decision-making roles of the European Commission, Council and European Parliament in the establishment of the RRF – all this in spite of the greater role played by the EUCO in terms of policy formulation and decision-making with respect to the standard OLP. For these reasons, in inter-institutional terms, the EUCO's response to the COVID-19 pandemic can be characterised as one of 'constrained pre-eminence'.

Internally, negotiations within the EUCO witnessed a confrontation between two inter-state coalitions – a Southern coalition, led by France and Germany, and the so-called 'Frugal Four', including the Netherlands, Austria, Denmark and Sweden. While the former coalition favoured grants and supranational governance for the RRF, the latter pushed for loans and intergovernmentalism à la ESM. The final compromise consisted in providing the RRF with a combination of loans and grants and the introduction of an 'emergency brake' whereby any Member State could stop the approval of a NRRP and bring the matter before the EUCO in case they found a serious deviation from the relevant criteria (Schelkle 2021). As it turns out, no dominance pattern took place in intra-institutional relations between Member State governments within the EUCO to address the pandemic crisis, as different coalitions confronted

each other based on their varied preferences and interests, and eventually managed to strike a political compromise. One may indeed argue that, because of how divisive the issue was, the EUCO had to take the lead in the decision-making process and secure a political agreement among government leaders before the Council and European Parliament could discuss the Commission's proposal. This may have indeed led to the 'constrained pre-eminence' in the EUCO's horizontal relations with other EU institutions.

Chapter 3

EU's Sanctions against Russia

Introduction

On 24 February 2022, Russia unjustifiably invaded Ukraine. A direct military intervention by the EU has been excluded from the outset for two main reasons. First, the EU does not have its own army. Second, in terms of military and defence issues, the EU has traditionally coordinated its action through the North Atlantic Treaty Organisation (NATO). Many but not all EU member states are also NATO members. Since Ukraine is not part of NATO, Art. 5 of the Washington Treaty, which states that if a NATO member has been attacked, the others shall help, including through the use of armed force, does not apply.

The EU responded to Russia's aggression against Ukraine through sanctions. Sanctions are targeted restrictive measures – i.e. measures limiting certain rights – against specific actors (individual sanctions) and economic and financial sanctions (sector-wide sanctions) with the aim of changing the behaviour of the target. Individual sanctions consist of travel bans (through visa restrictions to enter EU territory) and asset freezes (through making unavailable all accounts belonging to the sanctioned persons and entities in EU banks). They can also embrace other aspects of diplomatic cooperation, such as boycotting cultural and sporting events and suspending bilateral or multilateral cooperation with the EU, up to the expulsion of diplomats. Individual sanctions assure that the money of the targeted persons – in most cases, rich oligarchs – can no

longer be used to finance the war of the Russian government. Economic and financial sanctions concern both the restriction on imports of Russian goods and technologies to the EU and the restriction on exports of European goods and technologies to Russia (European Council 2022a). It can also include 'arm embargoes on military goods included in the EU's common military list' (EUR-Lex 2023). The aim of individual sanctions is to target those people that supported, financed or implemented actions related to the Russian aggression against Ukraine, or who benefitted from these actions. The aim of economic sanctions is to maximise the negative impact on Russia's economy in order to limit the country's capacity to continue the war (European Council 2022a). Usually, exemptions might be granted to allow the export of basic means of livelihood, such as food and medicines. Member states often adopt in the form of 'packages' comprising economic sanctions and sanctions against individuals. The first package of sanctions was imposed in 2014 following Russia's illegal annexation of Crimea, a former Ukrainian territory (Sjursen and Rosén 2017). As a consequence of Russia's large-scale invasion - started on 24 February 2022 - against the whole Ukrainian territory, the EU has adopted nine packages of sanctions, the last one on 25 February 2023.

This section aims to outline the role of the EUCO in the process leading to the EU's adoption of sanctions against Russia. It considers the two most controversial packages of sanction: the fifth package (8 April 2022), which was triggered by the massacre in Bucha (a small town close to Kyiv) and for the first time included a ban on imports of coal from Russia, and the sixth package (3 June 2022), which foresaw a ban on imports of crude oil and refined petroleum products from Russia. These packages were controversial because they affected products - coal and oil - with a different saliency for European member states. As a matter of fact, the economies of member states are to a different extent relying on the supply of Russian coal and oil (Bloomberg 2022). Arguably, the fifth and the sixth package of sanctions are particularly suitable cases for studying patterns of dominance surrounding the EUCO.

In order to operationalise inter-institutional dominance, the following section outlines the governance of EU sanctions.

The Governance of EU Sanctions

Sanctions are part of the provisions of the Common foreign and security policy (CFSP). The EUCO has the task to 'identify the Union's strategic

interests, determine the objectives of and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions' (Art. 26 TEU). The EUCO is not supposed to be involved in the decision on sanctions. Art. 29 TEU states that it is the Council which decides 'the approach of the Union to a particular matter of a geographical or thematic nature', like for instance travel bans and arms embargoes. Following Art. 215 TFEU, the High Representative of the Union for Foreign Affairs and Security Policy (HR) and the Commission make a specific proposal 'for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries'. Afterwards, a number of Council preparatory bodies examine the HR's proposal: first, the Council working party responsible for the geographical region to which the targeted country belongs - in the case of Ukraine and Belarus, is the Eastern Europe and Central Asia Working Party (COEST); then, the Working Party of Foreign Relations Counsellors Working Party (RELEX); ultimately, the Committee of Permanent Representatives (COREPER II). The final decision to adopt the sanctions needs to be taken unanimously (Art. 24 TEU) by the Foreign Affairs Council (FAC) (Schütze 2012), henceforth 'Council' for simplicity. In its decision, the Council can depart from the Commission's proposal. Hence, unlike in the ordinary legislative procedure or co-decision, in the case of sanctions, there is just one decision-making actor and each member of the Council can act as a veto player (Tsebelis 2000), thus blocking a decision. The European Parliament does not play an active role in the governance of EU sanctions - the Council only needs to ex post inform the European Parliament about the decision it has adopted (European Council 2022a). The Commission and the HR have the monopoly on proposing new sanctions, and the Council has the sole right to approve them. Although the HR and the Commission are involved at the stage of policy formulation, the decision-making process for the adoption of sanctions is strongly intergovernmental (Cardwell and Moret 2022) - yet the intergovernmental bargaining on the detailed content of sanctions is supposed to take place at the level of the Council, not the EUCO.

In the case of individual and economic sanctions like those taken against Russia, the Council's decision needs to be implemented through a Council regulation. The procedure to adopt a Council regulation is as follows. The HR and the Commission make a joint proposal for a Council regulation based on the previous Council's decision. RELEX and COREPER examine

the proposal. If they reach an agreement, they send the proposal to the Council. The Council can approve the regulation through unanimity. Afterwards, it informs the European Parliament. The objective of the Council's regulation is to detail the scope of the sanctions and their practical implementation. Such regulation is a legal act of general application and, thus, directly binding on any person or entity within the EU – meaning all member states. Being adopted at the same time, both the Council decision and the Council regulation simultaneously produce their effects (Wouters et al. 2021). Member states are in charge of practically implementing sanctions. The Commission monitors whether the implementation occurs in a smooth and timely manner. A constant review process assures that sanctions continue to meet their goals. EU sanctions are reviewed at least once every 12 months. Based on the evolution of the situation, the Council can unanimously decide at any time to amend, extend or temporarily suspend the sanctions (European Council 2022a).

Szép (2020) showed that since the 2014 Ukrainian crisis, the EUCO started the practice to reach an agreement on the detailed content of sanctions prior to the Commission's proposal and the Council's decision. The EUCO justified its active role through the argument that sanctions are a sensitive national issue on which it alone has the necessary authority and legitimacy to be the ultimate decision-maker (Fabbrini and Puetter 2016). According to new intergovernmentalism, the EUCO increasingly moved beyond its executive role of setter of general policy guidelines for the EU (Bickerton, Hodson and Puetter 2015). By dealing with the specific content of decisions and legislation, the EUCO played legislative functions, thus contravening the role the treaties assign to it (Art. 15 TEU).

Dominance Patterns in EUCO's Response to the Russian Aggression Against Ukraine

Operationalising Inter-institutional and Intra-institutional Dominance

This section operationalises inter-institutional dominance by the EUCO on the sanctions against Russia in a threefold way. First, it examines whether in its Conclusions the EUCO explicitly approved the detailed content of sanctions before the Commission and the Council could step in. Second, the chapter examines whether the EUCO instructed the Commission and the Council to follow its decision on sanctions. By doing

so, the Commission and the Council are deprived respectively of their agenda-setting and decision-making role on sanctions, thus becoming 'implementers' of the EUCO's decision. In both cases, we face inter-institutional dominance because the EUCO is able to act on its own, through a very high measure of control over the decision-making process to the detriment of the other institutions which according to the treaties were supposed to have a say. Such overstepping of the treaties would occur through venue-shopping because the decision-making is preliminarily shifted from the Commission and the Council away to EUCO.

With regard to intra-institutional dominance, this section first examines whether any member states threatened to veto the fifth and sixth packages of sanctions. To do so, it considers both levels – the EUCO and the Council. It assesses the reason for posing and the conditions for removing the veto. Following Art. 31 TEU, a government in the Council might abstain in a vote, thus put a veto, if it considers that the vetoed decision threatens 'vital and stated reasons of national policy' (ibid.). The condition the government poses for removing the veto is that its vital and stated reasons are taken into consideration and not threatened by the decision. In that case, the HR and the government concerned will search for an acceptable solution. If this is not possible, the Council can refer the question to the EUCO through qualified majority voting. Whereas the vetoing government is not obliged to adopt the decision at stake, it has to accept that the decision commits the EU. However, the government 'shall refrain from any action likely to conflict with or impede Union action based on that decision and the other member states shall respect its position' (ibid.). The report assesses how the other, non-vetoing governments reacted to the (threat of a) veto. If the EUCO or the Council adopt a final decision on sanctions that applies to all member states, including those that had threatened to veto it, this represents a case of tyranny of the majority because this way of proceeding undermines the consensus-oriented and unanimity-based character of decisions in the EUCO. The vetoing governments get no concessions and ultimately conform to the will of the majority not because they genuinely want to do so but because pressured by other governments through their stronger bargaining power. In other words, in that case, the EUCO does not try to find a solution that accommodates the vital interests of the vetoing government but pushes through the will of the majority.

In another context, a government might veto a decision not for reasons of vital and state interests of national policy, but for other issues which are unrelated to the decision at stake. The condition the government poses for removing the veto is that the unrelated issue is taken into consideration for the decision. If the EUCO or the Council adopt the final decision by pleasing the vetoing government, this represents a case of tyranny of the minority. The vetoing governments get concessions or derogations. Such an outcome goes against member states' obligation to 'support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity' (Art. 24 TEU). This also includes the obligation to 'refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force' (ibid.). As such, it is a case of tyranny of the minority because the vetoing government blackmails the others with an unrelated issue, thus abusing its veto right.

In terms of policy cycle, the section thus focuses on the agenda-setting and decision-making role played by the EUCO at the detriment of the Commission and the Council (inter-institutional dominance). It examines decision-making in the EUCO with regard to intra-institutional dominance. As such, the chapter does not explicitly deal with the implementation and the monitoring of implementation because the EUCO does not play any role in these phases.

For assessing inter-institutional dominance, the chapter relies on the EUCO's Conclusions adopted in view of the Commission's proposal for sanctions and the Council's agreement on them. This type of data, complemented through press articles, is used for intra-institutional dominance too. The chapter is aware of the limitation of an analysis which relies mainly on texts. Yet, the written and formal content of EUCO's decisions is not only the most visible but also the first manifestation of any pattern of dominance, from which other informal and post-decision-making patterns could follow. When it comes to EU sanctions, a problem of data availability emerges due to the politically salient issue at stake.

Analysis

Already before Russia's aggression against Ukraine, the EU had sanctions in place against Russia for the unlawful annexation of Crimea in 2014. Since then, travel sanctions and the freezing of assets have been imposed on a number of Russian individuals for their undue appropriation of

Ukrainian state funds (van Bergeijk 2022). In addition to this, sanctions hit trade with the EU in several sectors (financial, trade, energy, transport, technology, and defence). One year later, in March 2015, the EU conditioned the lifting of sanctions to the full implementation of the Minsk agreement, a series of international agreements – stipulated by Russia and Ukraine with the mediation of France and Germany – which sought to put an end to the Donbas war fought between armed Russian separatist groups and Armed Forces of Ukraine (Wittke 2019). As the Minsk agreement was not fully implemented, sanctions have been extended successively for six months at a time since July 2016. Currently, such sanctions will stay in place until 31 January 2023.

The first package of sanctions against Russia was adopted on 23 February, the day before the Russian invasion of Ukraine, as a reaction to Russia recognising the oblasts of Donetsk and Luhansk (European Council 2023a). When Russia attacked Ukraine on 24 February 2022, a special meeting of the European Council agreed on

further restrictive measures that will impose massive and severe consequences on Russia for its action, in close coordination with our partners and allies. These sanctions cover the financial sector, the energy and transport sectors, dual-use goods as well as export control and export financing, visa policy, additional listings of Russian individuals and new listing criteria. The Council will adopt without delay the proposals prepared by the Commission and the High Representative.

(European Council 2022b: 10).

Through these statements, not only did the EUCO take the decision on the adoption of sanctions. It also determined the coverage of these sanctions and instructed the Council, the Commission, and the HR to comply with the guidelines. Therefore, this was a case of the EUCO overstepping its assigned treaty role.

To this, a number of further packages of sanctions followed. The second package (25 February) led to the freezing of assets by Vladimir Putin and Sergey Lavrov, Russia's President and Foreign Minister respectively. The third package included two main measures: a ban on transactions with the Russian Central Bank; and the ban on the overflight of EU airspace and on access to EU airports by Russian carriers. On 2 March, the third package was complemented with the exclusion of major Russian banks

from the international financial system SWIFT. On 15 March, a fourth package of sanctions prohibited any transaction with state-owned Russian enterprises, new investments in the Russian energy sector, a 'comprehensive export restriction on equipment, technology and services for the energy industry' (European Council 2023a) and trade restrictions concerning iron and steel.

The mass murder of Ukrainian civilians which took place in the Ukrainian city of Bucha in late March 2022 (and became known worldwide in early April) triggered the EU to adopt a fifth, stricter package of sanctions. In its Conclusions of 24 and 25 March 2022, the EUCO affirmed that 'The European Union will phase out its dependency on Russian gas, oil and coal imports as soon as possible'. The EUCO also stressed that it remained ready for further 'coordinated robust sanctions' (European Council 2022c) on Russia and Belarus. Moreover, it called all member states to implement the sanctions, arguing that 'any attempts to circumvent sanctions or to aid Russia by other means must be stopped' (ibid.). The EUCO took the far-reaching decision to include for the first time a ban on imports of coal and other solid fossil fuels from Russia. Hence, it exercised inter-institutional dominance over the Commission and the Council. Given the implications on member state dependency on coal, the Council ultimately agreed on a transition period for the ban – the prohibition was decided to be effective starting 10 August 2022 (Council regulation 2022/576, Art. 1, paragraph 5, letter e). Thanks to this generalised derogation that applied to all member states, any threat of veto was overcome and no exemption for specific member states was introduced. Therefore, the fifth package of sanctions did not display any pattern of intra-institutional dominance.

Things went completely differently for the sixth package of sanctions, adopted on 3 June 2022 (Council of the European Union 2022). The most sensitive measure of this package was the import ban on oil (European Council 2023a). Already on 4 May 2022, in a speech in front of the European Parliament, the Commission's President, Ursula von der Leyen, outlined the proposal for the sixth package of sanctions. The proposal consisted of: new individual sanctions against high-ranking military officials who committed crimes in Bucha; the de-SWIFTing of Russia's largest bank; and the ban of Russian state-owned broadcasters. Most importantly, von der Leyen declared:

When the Leaders met in Versailles, they agreed to phase out our dependency on Russian energy. In the last sanction package, we

started with coal. Now we are addressing our dependency on Russian oil. Let us be clear: it will not be easy. Some member states are strongly dependent on Russian oil. But we simply have to work on it. We now propose a ban on Russian oil. This will be a complete import ban on all Russian oil, seaborne and pipeline, crude and refined. We will make sure that we phase out Russian oil in an orderly fashion, in a way that allows us and our partners to secure alternative supply routes and minimises the impact on global markets. This is why we will phase out Russian supply of crude oil within six months and refined products by the end of the year.

(Von der Leyen 2022).

Thus, the Commission proposed a ban on the import of Russian oil for all European member states. What was the reaction by the EUCO and ultimately, based on that, the content of the final Council regulation? In its Conclusions of the Special meeting (30-31 May 2022), the EUCO confirmed the import ban on crude oil and petroleum products. However, crucially, 'a temporary exception for crude oil delivered by pipeline will be made' (European Council 2022d: 2). EUCO also urged 'the Council to finalise and adopt [the sixth package] without delay, ensuring a well-functioning EU Single Market, fair competition, solidarity among member states and a level playing field also with regard to the phasing out of our dependency on Russian fossil fuels' (ibid.: 2). The EUCO also committed the Commission to monitor and report regularly to the Council on the implementation of these measures 'to ensure a level playing field in the EU Single Market and security of supply' (ibid.).

The EUCO was the key decision-maker in the sixth package of sanctions. It decided the content and scope of sanctions as well as the temporary exceptions. Moreover, it instructed the Council to approve the package and the Commission to monitor its implementation. It did so through venue shopping, i.e. *ex ante* moving the locus of decision-making from the Commission and the Council to itself. To be sure, the Commission could still issue its proposal and the Council could negotiate the details of the package of sanctions. Yet, both happened after the EUCO had posed the general conditions with regard to content, scope and exemptions of sanctions.

For one month, Hungary threatened to veto the sixth package unless Patriarch Kirill of Moscow, the head of the Russian Orthodox Church, was removed from the list of sanctioned individuals. Patriarch Kirill was

considered to be very close to Russia's President Putin. Ultimately, he was removed from the list. The Hungarian government did not properly mention why it pushed for such removal. Having opposed sanctions since the beginning, Hungary was able to take the EUCO hostage through issue linkage. Its condition on approving the sixth package was an issue – the 'de-listing' of Patriarch Kirill – unrelated to the sanctions themselves and not concerning vital national interests. As such, this represented a case of tyranny of the minority. The Orbán government claimed that following the removal, the package of sanctions is in line with Hungary's national security interests. Owing to Hungary's condition with regard to Patriarch Kirill, the sixth package of sanctions was adopted much later than the Commission had envisaged (Politico 2022b).

The EUCO remained vocal also with regard to the seventh and eight packages of sanctions. In its Conclusions of 24 June 2022, it made clear that

Work will continue on sanctions, including to strengthen implementation and prevent circumvention. The European Council calls on all countries to align with EU sanctions, in particular candidate countries. Work should swiftly be finalised on the Council decision adding the violation of Union restrictive measures to the list of EU crimes.

(European Council 2022e).

Similarly, after its meeting on 20 and 21 October 2022, the EUCO reaffirmed that all member states should more effectively ensure the implementation of sanctions and prevent their circumvention. Moreover, the EUCO decided 'how to further increase collective pressure on Russia to end its war of aggression' (European Council 2022f). With regard to the temporary price cap on crude oil and petroleum oils, the EUCO called 'on the Council and the Commission to urgently submit concrete decisions'. After every summit, including those of 15 December 2022 and 9 February 2023, the EUCO stressed that it stands ready to adopt new sanctions (European Council 2022g; European Council 2023b).

On 27 January 2023, Hungary stated that it will veto EU sanctions affecting nuclear energy. The reason is that the country has a nuclear plant built by the Russian company Rosatom. Consequently, the issue was not mentioned in the EUCO's conclusions of 9 February 2023. As a result, the Commission refrained from proposing to sanction Russia's nuclear sector

or its representatives because ‘Hungary doesn’t let it through, as their nuclear plant is owned by Rosatom and they say it produces 50 per cent of the country’s energy supply’ (Politico 2023). The tenth package of sanctions was imposed without including the nuclear sector.

Conclusion

The EU responded to Russia’s unjustified aggression against Ukraine through sanctions. One year after the outbreak of the war, ten packages of sanctions have been approved. Owing to the impact of member state economies, two packages have been particularly difficult to negotiate: the fifth package concerning coal and the sixth package concerning oil.

According to the TEU, the Commission and the HR are in charge of proposing sanctions, whereas the Council needs to unanimously approve them. Since the 2014 Ukrainian crisis, the EUCO started the practice to reach an agreement on the detailed content of sanctions prior to the Commission’s proposal and the Council’s decision. Hence, the EUCO increasingly moved beyond its executive role of setter of general policy guidelines for the EU (Bickerton, Hodson and Puetter 2015). By dealing with the specific content of decisions and legislation, the EUCO played legislative functions, thus contravening the role the treaties assign to it (Art. 15 TEU). The report found this trend also with regard to the EU’s sanctions against Russia.

Since the summit on the day when Russia started the war, the EUCO agreed on the scope of sanctions and instructed the Commission and the Council to adopt them. Before the fifth package of sanctions, the EUCO decided to include for the first time a ban on imports of coal and other solid fossil fuels from Russia. In view of the sixth package of sanctions, the EUCO confirmed the import ban on crude oil and petroleum products and introduced a temporary exception for crude oil delivered by pipeline. It then urged the Council to adopt that package and the Commission to monitor its implementation.

It did so through venue shopping, i.e. *ex ante* moving the locus of decision-making from the Commission and the Council to itself. To be sure, the Commission could still issue its proposal and the Council could negotiate the details of the packages of sanctions. Yet, both happened after the EUCO had posed the general conditions with regard to content, scope and exemptions of sanctions. By doing so, the EUCO overstepped its treaty

role and exercised quasi-legislative functions. It performed a key role also in the subsequent packages of sanctions. Specifically, for example, the EUCO adopted in advance the temporary price cap on crude oil and petroleum oils, and called 'on the Council and the Commission to urgently submit concrete decisions'. By so doing, it deprived the Council of its tasks to negotiate the details – in this case, the price cap, thus *de facto* marginalising it in the decision-making process.

What about intra-institutional dominance? The chapter did not find a case of tyranny of the majority, namely when a member state posed a veto which was then overcome by the other governments, without the vetoing government getting any concessions. Instead, a case of the tyranny of the minority concerned Hungary with regard to the sixth package of sanctions was found. Hungary pushed for removing Patriarch Kirill from the list of people to be sanctioned by the EU. Not only was this condition not supported by reasons of vital national interest. It was also unrelated to the main issue of the sixth package of sanctions, namely the ban on oil.

Inter-institutional dominance proved to be a breeding ground for intra-institutional dominance. In the sanctions against Russia, the EUCO played the key role of orchestrator (Szép 2020), i.e. it *ex ante* determined the main content of sanctions (through venue-shopping). By doing so, the EUCO effectively became the principal of sanctions, turning the Commission and the Council into implementing agents of its decisions. Politically, some governments, particularly Eastern European ones, claimed EUCO's centrality because sanctions are 'so important that they should be discussed by EU heads of state and government rather than their representatives in Brussel' (Politico 2022a). EUCO's inter-institutional dominance allowed specific governments to secure preliminary agreements on exemptions that subsequently bound the Council, where, however, the details could be negotiated. This was the case of the temporary exemption from the oil ban that the sixth package of sanctions granted to Hungary. Moreover, the EUCO's assertiveness on sanctions introduced a two-level game (Putnam 1988) where vetoes can be put both at the level of the EUCO and the Council. Hungary got its exemption from the oil ban in the EUCO and then successfully managed to de-list Patriarch Kirill during the negotiations in the Council (Politico 2022b). Institutionally, both inter-institutional and intra-institutional dominance are made possible by the intergovernmental decision-making on sanctions. The need for the Council to unanimously agree on sanctions

eases the shift of decision-making to the other intergovernmental institution – the EUCO. Arguably, such venue-shopping would be more difficult if also the Commission or the EP would be involved in the decision-making on sanctions.

Intra-institutional dominance, specifically the tyranny of the minority, is possible because of the veto right. Yet, there is no proper mechanism to force member states to veto an issue only due to vital national interests – as the treaties foresee. Unrelated vetoes can *de facto* be posed and they end up blackmailing the EUCO on grounds of specific political interests of a given member state. Specifically, with regard to sanctions, the need to review them every six months reiterates the unanimity problem by making a temporary derogation granted to a member state very difficult to revoke. This is problematic for the effectiveness and cohesiveness of the EU's sanctions against Russia. In sum, sanctions, thus, exposed the EU's vulnerability in relation to both recalcitrant member states and Russia. While it remains to be seen whether and how such a deadlock can be solved, it is left to further research to investigate how the two packages of sanctions are practically implemented in the member states.

Chapter 4

The Rule of Law Crisis

Introduction

The final part of this report will analyse the actions of the EUCO and its interaction with other key EU institutions while attempting to tackle the so-called Rule of Law (RoL) crisis with the establishment of the RoL conditionality mechanism. This new tool ties NGEU and MFF payments channelled to recipient countries to upholding and respecting some key RoL tenets, in order to protect the EU's budget and to make sure that the final beneficiaries are EU citizens, instead of illiberal oligarchs. The mechanism to some extent has been watered down over time (Scheppelle, Pech and Platon 2020; Baraggia and Bonelli 2022), which will be discussed in more detail later; nevertheless, the RoL conditionality still represents the only substantive instrument besides infringement procedures (Kelemen 2023) to restrain rascal member states.

In comparison to the previous case studies analysed here, the RoL crisis stands out as an exception. First of all, it signifies an internal crisis, which springs from the EU's own member states, instead of an external threat or common, outside enemy. Secondly, the initial harbingers of RoL violations inside the EU already manifested in the early 2010s, therefore, the origins of the crisis are much less imminent compared to the COVID pandemic or the Russian invasion of Ukraine. Lastly, the EUCO (as well as the Council) failed to tackle the problem with a swift, hands on approach as opposed to the other two cases, due to its commitment to avoid any possible violations of core state powers (Genschel and Jachtenfuchs 2016), especially in a highly sensitive area, which affects the

internal, institutional workings of a state. Executive inaction had been looming up until the landmark July 2020 EUCO conclusions, which put an end to idling and epitomised a novel commitment from the EUCO to finally present a solution to the crisis. Provided this report focuses on dissecting patterns of dominance which surround the EUCO while tackling crises, the period of executive inaction falls outside the scope of this analysis. However, executive inaction can also engender patterns of dominance, which will be briefly addressed before turning to the RoL conditionality mechanism.

Historical Background

For almost a decade the EUCO, as well as individual member states, demonstrated reluctance to call out their counterparts on RoL violations for fear of getting marginalised and outvoted when they happen to represent a minority position during legislative processes (Heisenberg 2005; Pech, Wachowiec, and Mazur 2021). In addition, supermajority arrangements in the Council under Article 7(1) as well as the necessity to achieve unanimity in the EUCO pursuant to Article 7(2) TEU, made existing RoL tools with substantive consequences impossible to implement. Accordingly, it can be observed that Article 7 failed to fulfil its role as a moral quarantine around ‘rogue EU members’ (Müller 2015: 144), which jeopardised a key cornerstone of EU integration, namely mutual trust between member states (Müller 2015). Furthermore, the EUCO’s weariness to deploy Article 7(2) equally resulted in the de facto violation of EU citizens’ rights, provided illiberal states keep on having a say in key decisions in Council and EUCO arrangements. Hence, executive inaction can also produce a type of domination across levels of government (the EU and the national arena). However, this report focuses solely on the EU level, where the EUCO represents both an arena of domination between member states and a central actor exerting dominance vis-à-vis other institutions. Therefore, vertical dominance across different levels of government equally falls outside the scope of this analysis.

Governance Structure

For the above reason, the upcoming sections will primarily zoom in on the immediate prelude to the 21 July 2020 EUCO conclusions and its aftermath, instead of the entire history of the EU’s internal RoL struggles.

The analysis will follow the structural blueprint of the policy cycle approach (Schramm and Wessels 2022), which has four stages: (1) issue framing, (2) decision-making, (3) control and (4) delivery. ‘Issue framing’ covers the period between the Commission’s 2018 proposal, until the 21 July 2020 EUCO conclusions (European Council, 2020f). ‘Decision-making’ is the period between the landmark July conclusions and the actual establishment of the regulation ‘on the general regime of conditionality’ on 16 December 2020 (Regulation 2020/2092). It will be showcased, on the one hand, that the EUCO was instrumental in upholding a direct, even though at times deliberately vague reference to conditionality in its conclusions (Hegedüs 2020; Anghel and Drachenberg 2020), which provided an extra layer of legitimation to the creation of the new RoL instrument. These actions demonstrated responsiveness and accountable answers to other institutions and member states. On the other hand, the EUCO played a significant role in watering down the Commission’s initial 2018 proposal and delaying the implementation of the novel RoL conditionality mechanism. Three different, interacting patterns of domination have manifested primarily during the first two phases of the policy-cycle, where the EUCO became both an arena of domination (tyranny of the minority), as well as an actor exerting a dominant role vis-à-vis other EU institutions (both resource-based and venue-shopping type). The same cannot be observed though during the periods of control and delivery. ‘Control’ signifies the leadup to the 2022 CJEU decision on the annulment request of Poland and Hungary, while ‘delivery’ refers to the Commission’s initiation of the new conditionality mechanism. Therefore, more accentuated attention will be dedicated to the issue framing and decision-making phases.

Before turning to the analysis, the legal roots and key stages of the decision-making process should be set out, which led to the creation of the regulation ‘on a general regime of conditionality’ (Regulation 2020/2092). It is an important exercise to understand the reasons why different patterns of dominance emerged over the legislating period. Firstly, the legal base of the RoL mechanism is Article 322 TFEU, which prescribes the regulation to be adopted via OLP and guarantees an equal footing for EP involvement. Nonetheless, the EP was bound to surrender and make concessions on multiple occasions, even before the Polish and Hungarian veto threat was expressed. Therefore, during the initial stages of the negotiation, a pattern of resource-based domination can be observed. In other words, the EP had the legal authorisation to make its

voice heard and influence the final outcome. However, it lacked the resources to keep certain policy elements afloat, owing to political pressure from the EUCO coupled with the support of the rotating presidency, as well as the Council. The Council Legal Services was an equally important actor during the negotiation processes, although their work was confined to assessing the legality of proposed measures. In contrast, the EUCO's actions following the expression of the Polish-Hungarian veto threat can be described as venue-shopping dominance. The RoL conditionality became indirectly susceptible to veto, and hence subject to quasi-unanimity decision as a result of issue-linkage with two policies: the MFF, and the own resources regulation (Schramm and Wessels 2022: 9; Wahl 2020). For this reason, the EUCO managed to shift the final stage of decision-making process to the intergovernmental level, circumventing OLP and elevating itself to be a quasi-legislator. Lastly, it should be noted that Poland and Hungary also became dominant actors inside the EUCO arena, and took advantage of the above mentioned issue linkage. Hence, the second stage of the legislative process is a clear manifestation of interaction between inter-institutional and intra-institutional patterns of dominance.

Dominance Patterns in EUCO's Response to the RoL Crisis

Issue Framing

The idea of a RoL conditionality instrument, which would tie EU budget payments to respecting fundamental EU values was first promoted by the EP (2016; 2018). Its 2018 resolution coined a whole-hearted support for the Commission's earlier proposal in the same year on 'the protection of the Union's budget in case of generalised deficiencies as regards the RoL' (European Commission 2018). The Commission's proposal to the EP and the Council on 2 May 2018 presented a broad interpretation of RoL violations, defined as 'generalised deficiency', which captures the complexity and multi-layered nature of the phenomenon (Scheppele, Pech and Platon 2020; Baraggia and Bonelli 2022). In addition, the plan advocated a structurally sound activation mechanism. First, provided the Commission identified substantive breaches, it was supposed to engage in a dialogue with the problematic member state. If a feasible resolution failed to emerge at the end of the consultative process, the Commission could propose appropriate punitive measures, which were supposed to

be accepted or rejected by member states in the Council by a reverse qualified majority vote (QMV) (Zalan 2020). Reverse QMV means that, unless a qualified majority of Council members had opposed the freezing of funds, the sanctions put forward by the Commission would have passed, which is a more robust guarantee for implementing the instrument than a simple qualified majority. Furthermore, according to Kirst, keeping reverse QMV arrangements would have created an even more robust tool, 'since it would have put the burden of proof upon the accused member state' (Kirst, 2021: 106). Lastly, the Commission's proposal came in one package with the MFF, which according to a German civil servant was already an indication of the conditionality mechanism's sensitive nature, and the fact that major decisions will have to be taken at the highest political level, the EUCO. Furthermore, the package approach was also necessary to quell the worries of apprehensive 'Frugal' net contributors, among which the Netherlands was the most vocal advocate, who expressed concerns over EU budget spending abuse.

The above plans enjoyed the backing not only of the EP but also of a great number of member states. The Commission launched a consultative initiative in April 2019 with the title: 'Further Strengthening the Rule of Law within the Union', which was a quasi-white paper, where member states could submit their views and evaluation of the 2018 Commission proposal (European Commission 2019). Except for Hungary and Poland, the proposal enjoyed support from all other members, which submitted an opinion, including Belgium, Finland, France, Germany, Netherlands, Slovenia, Spain, Sweden and Portugal. Remarkably, Slovakia - member of the 'Visegrád group' and a strong ally of Hungary and Poland - did not oppose the proposal either, although highlighted some issues to be clarified (Fisicaro 2019: 697), such as making sure to establish a sufficient connection between RoL violations and budgetary breaches before the tool gets activated. Thus, by the time the 17-21 special EUCO meeting took place, the RoL conditionality enjoyed a wide institutional and member state backing.

The 21 July EUCO conclusions contained a clear, although self-contradictory reference to this new instrument. On the one hand, it was a safeguard against the claims of the Hungarian and Polish Prime Ministers, who boasted about their victory right after the EUCO meeting in a joint press conference. Mateusz Morawiecki, Polish PM, went as far as stating that 'in the agreement on the EU budget and the recovery

instrument there is no direct conditionality between the so-called rule of law and the funds' (Website of the Republic of Poland 2020). On the other hand, the brief reference to the new RoL instrument was compressed into a single point in the almost 70 pages long conclusions document. Furthermore, it was imprecise, rejected reverse qualified majority, and left the door open for further EUCO meddling.

Based on this background, a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority. The European Council will revert rapidly to the matter.

(European Council 2020f).

As will be showcased below, this new direction appointed by the EUCO gave rise to the final wording of the RoL conditionality regulation, which was a compromise brokered by the German rotating presidency under the leadership of Angela Merkel (Anghel and Drachenberg 2020). Consequently, despite the fact that EUCO conclusions are not legally binding and the EUCO is not a co-legislator by its treaty role, it imposed a direct influence on the final shape of the conditionality mechanism, at the expense of the EP, which is a clear sign of the latter's structural weakness.

Decision-making

The growing influence of the EUCO was the most visible during the decision-making phase of the legislative process. The subtle manoeuvring of the EUCO to evolve as a quasi-legislator, 'with a strong expectation that other EU institutions would follow its guidance' (Szép 2020: 856), manifested in two particular ways. First, the German Council presidency felt inevitable to foster a compromise with unwilling member states and to soften the original wording of the Commission proposal, authorised by the July 2020 EUCO conclusions (Scheppele, Pech and Platon 2020), and also for the pressure of Hungary and Poland that came from the highest, Prime Ministerial level. The rotating presidency's amendments in a revision document published on 29 September 2020 are a testament to this observation (Council of the European Union 2020a). Reverse qualified majority was abandoned, even though the Council Legal Services in its earlier opinion found reverse QMV to be compatible with EU treaties (Council of the European Union 2018). This outcome is rather

unsurprising, provided Charles Michel, EUCO President already suggested during budget talks in February 2020, that a qualified majority of member states should be needed to initiate rather than stop sanctions proposed by the Commission (Zalan 2020; European Parliament 2020d). Even though a number of member states expressed varying degrees of concern about reverse QMV, such as Bulgaria, Czechia, Hungary, Poland and Slovakia; and multilateral, technical talks between counterparts happened frequently at Council level too, the first communication of a change to simple QMV came from the highest level of political representation: initially from the President of the EUCO and then in the July EUCO conclusions. The EUCO essentially acted earlier than the publication of the rotating presidency's amendments on 29 September, as well as the publication of the Council mandate the day after (Council of the European Union, 2020b).

Moreover, in line with the EUCO conclusions, the 'general deficiencies' wording was eliminated, in exchange for a narrower definition of RoL breaches, which focuses distinctly on the distribution, allocation and spending of EU funds, and to some extent on judicial freedom (Scheppele, Pech and Platon 2020). It should also be noted that the Council's Legal Services found it equally necessary to implement this change, in order to draw a clear distinction between Article 7 TEU and the new conditionality mechanism, which in principle should be a 'budgetary conditionality tool' (Staudinger 2022: 737), not a parallel mechanism to Article 7 TEU. The amended rotating presidency document became a blueprint for the 5 November interinstitutional compromise between the Council and the Parliament (European Parliament 2020b), which meant that the Parliament had to give up its hopes to reinstate reversed qualified majority and the holistic interpretation of RoL breaches (Zalan 2020). The modification, which requested a sufficient link between RoL breaches and budget irregularities in case of activation, was a necessary legal compromise, to solidify the legal basis of the regulation, and to avoid creating a parallel tool to Article 7, in line with Council Legal Services recommendations. However, trimming almost all references to the RoL, including its elimination from the title of the regulation, was a political compromise to the pressure of Hungary and Poland at the highest level of decision-making.

Consequently, it can be observed that the EUCO behaved as a dominant actor, defining not only political guidelines but also some of the RoL

mechanism's exact, key tenets. Occasionally, the Council presidency became a direct channel to apply the EUCO's guidance and implement provisions set out in EUCO conclusions, even if the Council's Legal Services did not offer unequivocal support in each and every case (see reverse QMV). Hence, as a final conclusion, it can be stated that the EP was compelled to accept significant concessions, some of which were initiated by the EUCO, despite the EP's supposedly equal role in the decision-making process to the Council, and the treaty ban on the EUCO's legislative endeavours. Therefore, the above case is a manifestation of resource-based inter-institutional dominance between the EUCO vis-à-vis the EP (and to some extent the Commission too).

An inter-institutional compromise between the Council and the EP should already indicate a deal in close reach. However, on 19 November 2020, Hungary and Poland decided to veto the MFF and the own resources borrowing plan due to the RoL conditionality mechanism, which triggered another round of emergency meetings in the EUCO on 10–11 December 2020. It could be argued that the EUCO was forced to emerge as an honest broker and embrace a dominant role in order to avoid the collapse of the MFF and NGEU deals. Yet, leaving the door open for further action in its July 2020 conclusions signals readiness to assume such a role. Moreover, the main innovation in the December EUCO conclusions was essentially delaying the implementation of the RoL mechanism, and making Commission activation subject to two conditions: first, the CJEU's decision on Poland's and Hungary's request for annulment; second, the European Commission's compilation of a thorough RoL guidance (European Council 2020g).

It should be noted that member states and EU institutions are free to initiate action for annulment at the CJEU against any regulation within 2 months of the publication of the contested measure. However, making implementation conditional to a CJEU judgement as requested in the December EUCO conclusion was a debatable move, especially since the Commission followed the instructions. In hindsight, both the CJEU judgement and the Commission's follow-up detailed implementation guidelines contributed to entrenching the legal solidity of the regulation. Nevertheless, these implementing conditions were neither debated by the EU's legislative bodies, nor were they mentioned in the final version of Regulation 2020/2092, which was officially accepted on 16 December 2020. Owing to this compromise, the EUCO managed to save the EU

budget and the COVID recovery aid. However, critics were prepared to voice their staunch discontent, provided decision-making was shifted to the intergovernmental realm and the EUCO acted as a quasi-legislator (Scheppelle, Kelemen and Morijn 2021).

Moreover, the EUCO conclusions also stated that the conditionality mechanism can be triggered only “as an integral part of the new budgetary cycle” (European Council, 2020g), which means it would not apply to ongoing projects and the previous MFF cycle. Yet again, this condition was not stated in the regulation per se. Furthermore, the Commission respected these indications when activating the mechanism against Hungary. Hence, according to an EU civil servant, who was closely involved in the negotiations of the conditionality mechanism, it is one of the most contentious points in the December 2020 EUCO conclusions. The Hungarian PM quickly announced victory, arguing that ‘the European Council conclusions are the strongest possible instrument in the European Union’, even stronger than regulations (Anghel and Drachenberg 2020). These claims support the observations of New Intergovernmentalist thinkers, who see the centre of power tilted towards intergovernmental institutions within the EU (Bickerton, Hodson and Puetter 2015). In addition, it’s a clear manifestation of the phenomenon when a small number of states (*tyranny of the minority*) actively manoeuvre decision-making towards the intergovernmental level, namely the EUCO to their own benefit (*venue-shopping*). The European Parliament (2020a; 2020c) accepted two strongly worded resolutions, both after the July and December EUCO conclusions, which reminded the EUCO not to exercise legislative functions and treaty interpretation. Nevertheless, the documents had little power to foster proper checks and balances.

Control and Delivery

The final two phases of the policy cycle will be discussed only briefly, provided the EUCO has not exercised further direct influence on the RoL instrument during these periods. During the control period, the CJEU declared unsubstantiated the annulment requests of Hungary and Poland on 16 February 2022 (Case C-156/21 and Case C-157/21, 2022). Then, once the Commission’s implementation guidance was ready, all roads were cleared ahead of the Commission to initiate the new mechanism, in line with the 10–11 December 2020 EUCO conclusions. Whereas, the delivery period is still an ongoing process, since the Commission initiated the

consultative phase of the novel conditionality mechanism against Hungary on 27 April 2022.

The control and implementation phases are a testament to the real power of EUCO conclusions since the enactment of the conditionality mechanism was delayed despite repeated calls from the EP, and even some member states such as the Netherlands to initiate the process. The strongest calls to trigger the process primarily against Poland were declared at the height of the feud between the Polish Constitutional Court and the CJEU. The former challenged the primacy of EU law in its 7 October 2021 decision (Schliephake and Beaven 2022), while the CJEU imposed a hefty periodic fine on Poland for failing to abolish its Supreme Court's Disciplinary Chamber. Mark Rutte, Dutch PM was an ardent advocate of cutting back funds channelled to Poland, the greatest beneficiary of the EU budget (Baazil 2021); while the EP went as far as taking the Commission to Court at the end of October 2021 (Bayer 2021) for failing to comply with the RoL conditionality regulation. In addition, unfortunate circumstantial factors such as the then upcoming Hungarian elections on 3 April 2022, and the tragic invasion of Ukraine by the Russian Federation imposed further pressure on the Commission. Nevertheless, the Commission still had some leeway to exert influence on unwilling member states such as Poland and Hungary without the actual triggering of the novel conditionality instrument. Despite the fact that both countries submitted their RRF plans already in May 2021 they have not benefited from any payments yet, as of February 2023. Hence, it can be stated that the Commission managed to exert some institutional counterbalance over the EUCO's decisions.

Conclusion

This section aimed to analyse dominance patterns surrounding the EUCO during its creation and to a lesser extent the implementation of the novel RoL conditionality mechanism. The EUCO's inter-institutional dominance vis-à-vis the EP and the Commission distinctly manifested during the first two phases of the policy cycle. The RoL mechanism was supposed to be debated in the framework of the OLP, yet the EUCO got involved in altering the Commission's original proposal, which simultaneously resulted in diminishing the EP's role in the legislative process. Subsequently, Poland and Hungary took advantage of issue-linkage and shifted the negotiations to the intergovernmental level, which

heavily delayed the implementation of the mechanism. Hence, the EU's response to the RoL crisis produced both resource-based and venue-shopping dominance patterns, which also interacted with the intra-institutional dominance of Hungary and Poland within the EUCO.

Overall conclusions

Dominance is an established term in the realm of Political Science. However, with a few notable exceptions (Fabbrini 2016, 2021; Fossum 2015; Fossum and Laycock 2021; Wessels 2015; Batora and Fossum, forthcoming), it has not been employed systematically when studying the EU. This report aimed at refining and adding new layers to the concept of dominance, with a primary focus on EU institutions (more specifically the EUCO). Crises, especially when core state powers are at stake, may prompt decision-makers and institutional actors to seize the moment and exert pressure on others, either in order to pursue their own interests or to achieve an ostensibly efficient, prompt compromise. Dominance has significant negative implications on the democratic nature of EU decision-making. Therefore, pinpointing and categorising the instances when dominance happens is quintessential.

The report highlighted two fundamental dimensions of dominance: intra-institutional and inter-institutional. The former encompasses dominance between the members of an institution. Meanwhile, the latter refers to dominance exerted by an EU institution over one or multiple other institutions. Further subcategories were identified in both cases, in order to shed light on the variety of pathways how dominance can be exercised. In particular, based on Fossum and Laycock's (2021) theoretical framework, inter-institutional dominance can be either 'resource-based' or 'venue-shopping'. In both cases, the EUCO oversteps the legal boundaries of its treaty role. However, if resource-based dominance happens, there remains some leeway for other institutions to retain control over the decision-making, provided they continue to be involved in the deliberation process, although without being able to exert enough influence. In contrast, venue-shopping may occur when negotiations are

entirely shifted to an informal forum, or – as it has been demonstrated in this report – to the intergovernmental arena. Furthermore, the report also coined two novel notions: ‘tyranny of the majority’ and ‘tyranny of the minority’ when it comes to intra-institutional dominance. The theoretical framework might be improved in future studies by further analysing the interaction between the intra- and inter-institutional dimensions of dominance. In addition, the framework might be also extended to examine the role of other institutions beyond the EUCO.

Empirically, we tested the occurrence of these patterns of dominance in three recent crises – the socio-economic costs of the COVID-19 pandemic (since March 2020), the rule of law controversy (since July 2020) and Russia’s invasion of Ukraine (since February 2022) – with different natures (exogenous vs. endogenous), distributional effects on the member states (symmetric vs. asymmetric) and involving different decision-making methods (Community method vs. intergovernmental coordination vs. mixed governance), securing variance along several dimensions. These crises, however, all touched upon policy areas falling within the realm of so-called ‘core state powers’ (Genschel and Jachtenfuchs 2016), that is policies traditionally at the heart of national sovereignty: money, security, and values.

The report showed that – regardless of the specific policy area and the decision-making regime involved – patterns of dominance involving the EUCO tended to emerge when core state powers were involved. Member states pushed to shape the EU’s reaction against crises at the highest decision-making level. To do so, in spite of diverging national interests, they agreed on establishing the EUCO as a key crisis-manager. Therefore, the other institutions had to find ways to counterbalance it. This led to degrees of inter-institutional dominance of the EUCO not only vis-à-vis the Commission and the EP (as occurred during the COVID-19 pandemic and as part of the rule of law controversy) but also with regard to the Council (Russia’s aggression against Ukraine). Patterns of inter-institutional dominance created a breeding ground for intra-institutional dominance. Whereas in the case of the euro crisis, a minority of powerful member states (France and Germany) imposed their own unilateral solutions to the crisis, the case studies examined here testified that also a minority of smaller and comparatively less powerful member states can trigger intra-institutional dominance by threatening to block solutions to a crisis, thus de facto holding the EUCO hostage.

Overall, the report confirmed that the upward trend of EUCO's empowerment – started with its formal institutionalisation with the 2009 Lisbon Treaty and consolidated during the euro crisis – continues. The multiple crises analysed here strongly contributed to that trend. The lowest common denominator of the EUCO's empowerment across these crises is its progressive shift from an executive institution supposed to issue general political guidelines to a quasi-legislative institution that enters into the details of specific decisions – to the detriment of the other (supranational and intergovernmental) institutions, none of which are fully able to counterbalance it. As such, the EUCO is a dominating actor. At the same time, the unanimity requirement makes the EUCO the most attractive institution for both large and small member states to negotiate outcomes in line with their preferences. As such, the EUCO has become an arena of dominance. In both cases, serious issues of accountability emerge: inter-institutional accountability with regard to the EU as a system of multiple, yet equal institutions sharing power, and intra-institutional accountability with regard to the EU as a system of different, yet formally equal, member states that need to coordinate their positions in order to produce effective and legitimate decisions for the EU as a whole.

EUCO's dominance *de facto* further differentiates the EU's decision-making system beyond the Community method and the intergovernmental regime – and more generally beyond what the EU treaties foresee. As such, the dominance of the EUCO examined in this report revealed a grey zone between the classic EU decision-making regimes which is shaped by the EUCO's entrepreneurship *vis-à-vis* other institutions (inter-institutional dominance) or the power dynamic between governments within the EUCO (intra-institutional dominance). Ultimately, dominance thus results in a pathological differentiation of the EU's decision-making system.

In a Europe still tormented by the three crises examined above, the EUCO continues to be the fundamental crisis manager. In fact, crisis responses often result in far-reaching decisions that are conditional on a green light of the EUCO. Yet, in the EU's separation of powers system, the EUCO is compelled by the treaties to interact with other institutions, while at the same time managing to seek internal compromises between 27 different national interests. Patterns of dominance and accountability of the EUCO *vis-à-vis* other institutions remain two sides of the same coin which are

crucial to be understood and carefully analysed to foster democratic legitimacy at EU level and, thus, to solidify its long-term future.

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