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Where is the EU (going): three perspectives and three Integration issues

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ABSTRACT: The present text, assuming that the option of carrying on the European integration project, as well the option of Portugal to take part in it, are still fully valid, addresses the question "where are going (now)"on the basis of three actual and relevant issues regarding the survival of the EU which concern both the relationship between the EU and International Relations and the relationship between EU legal order and national legal orders, in particular the Portuguese legal order: the new Global Strategy for the EU's Foreign and Security Policy, the new legal framework to protect EU's fundamental values, especially the rule of law, and its recent application to a member State, as well as the functioning of the special procedure on excessive budgetary deficit which led to the application of "zero"sanctions to Portugal – enouncing some questions related to such topics as well as with the interrogation on the trend towards a "centralization" at the EU level that such topics may illustrate.

KEYWORDS: external action – EU global strategy – rule of law guarantee framework – budgetary deficit procedure – "zero sanctions".

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Foreword

Considering the wide range of interrogations to be addressed within the Colloquium, a starting point for both the further observations and debate must be enunciated. For this purpose, several ideas must be underlined, from the perspective of European integration and the European Union (henceforth, EU) and, in particular, the perspective of Portugal as a Member State.

1. The European integration process has had more than 60 years with undoubtedly many successes but, in the present decade, it has been under fire like never before – the migrant crisis, (in)security in the EU territory, the risk of implosion (either regarding EMU due to the economic crisis or the abandonment of the EU as seen with the Brexit aftermath, or the conduct of some Member States regarding the rule of law) are recent examples.

1.1 Such '*crises*' situations, on one hand, have called for the application of juridical mechanisms that seem to be consecrated in the primary law as mere theoretical hypotheses. On the other hand, these 'crises' situations have also called for both, "*centralized*" answers at the EU level (v.g. banking and other financial activities supervisory system; new EU legislation and action within the Area of Freedom, Security and Justice) and intergovernmental solutions in order to minimize the risk of disaggregation in the framework of the existing treaties (v.g. budgetary treaty or conclusions within the European Council in the light of the UK referendum).

1.2 But such '*crises*' have also revealed, at the same time, a deficit of prompt and effective EU intervention (vg. coping with the refugees crisis or the '*duty*' to provide security to EU citizens within its territory).

Despite all this, the starting point in our view is that disaggregation is not a real option: it is a juridical possibility at the most but still undesirable (and most probably unrealistic) – although along with a serious reflection on centralization and subsidiarity, on which competences and areas of interventions are a priority in the present and in the near future, from the perspective of relationship between the EU and not only other international actors but also Member States, as well as on the unbending axiological main *core* of the EU (rule of law, fundamental rights) and the commitment of Member States in defending the integration *acquis*.

2. From the perspective of the participation of Portugal in the European integration process, the benefits that derived from the accession that were visible for two decades were somehow '*hidden*' by a period (from 2010 onwards) during which the national budgetary situation, within the EMU, gave place to the application of different mechanisms – both financial help mechanisms (state under financial assistance) and sanction mechanisms whose effects have not yet ceased, along with new rules and control mechanisms approved by the EU (vg. budgetary treaty or European semester). These mechanisms have raised several juridical issues, including at the constitutional level (vg. eventual constitutional modification to include the budgetary '*golden rule*' in the Fundamental Law; fulfilling of obligations deriving from the quality of Member States under financial assistance vis-a-vis compliance with constitutional rules and principles).

Also from the perspective of Portugal as a Member State, it seems that, '*against all odds*', permanence in the European project is still a valid option.

3. Therefore, assuming as a starting point, that the option of European integration in general, and the option of Portugal's participation are still valid, and being impossible to address all the "*faces*" of the Colloquium theme, my option is to address, in short words, not so much the question "*where have we arrived*" departing from what we aimed to achieve, but especially the question "*where are we going (now)*" regarding three aspects that are both actual and relevant for the survival of the EU and concerning, respectively, EU and international relations, EU and both its legal Order and national (Portuguese) legal order: *i)* the awaited and indispensable review of the *European Security Strategy* (and its role in the global governance); *ii)* the (recent) failure to fulfil the obligation to respect values (and duties) by Member States and finally; *iii)* from the Portuguese point of view, failure to comply with EMU obligations regarding budgetary deficit limits.

A) EU and international relations: the EU Global Strategy for the External Policy and Security

4. One of the areas of EU competences that has seen a greater impulse after the Maastricht Treaty and, mainly, after the Treaty of Lisbon, was the area of external relations – especially with the prevision of the "*External Action*" as such in primary EU Law. With such modification of the founding treaties, the EU clearly assumed its intention to play a major role within the International legal Order and International relations, aiming at the recognition as an International Law actor and a partner in global governance.

4.1 More than a decade after the approval of the "*European Security Strategy – A Secure Europe in a Better World*" (12/12/2003 (ESS) and several reports on the execution of such Strategy, and in the sequence of the nomination of the new High Representative of the Union for Foreign Affairs and Security Policy (HR), in June 2016 it was presented and adopted the new global strategy for the foreign and security external policy under the title "*Shared Vision, Common Action: a Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy* (GS)".

The introduction of the 2003 ESS firstly stated the following: "*Europe has never been so prosperous, so secure nor so free. The violence of the first half of the 20th Century has given way to a period of peace and stability unprecedented in the European History*". Later on, in 2008, the Executive Summary of the Report on the implementation of the ESS – Providing Security in a Changing World stated that: "*Five years on from adoption of the European Security Strategy, the European Union carries greater responsibilities than at any time in its history. The European Union remains an anchor of stability*".

The great optimism showed in these two documents unfortunately was not confirmed by the subsequent quick development of events both at the EU and at the international level – the threats that were identified then have changed radically, have become increasingly more global and '*unpredictable*' thus affecting the EU and its citizens and their security in a way that was, at that the time of the first ESE, almost unthinkable. Between the 2008 Report and 2016, the reshaping of the EU by the Treaty of Lisbon, mainly regarding External Action and, especially, the Common Foreign and Security Policy (CFS) area, has created a legal framework which seems to be more apt at designing EU external priorities and the concrete EU action in that field of competences – international relations in general and CFSP in particular, both in coherence with EU internal competences and policies which have an external dimension.

4.2 The new Global Strategy was presented by the HR in June 2016 and considered by the European Council of June 2016.[1] Far from the precedent optimism, it assumes that present times are times of 'existential crises', within and beyond the EU and that the European project is being questioned in many ways. Thus, proposing a 'stronger Europe' that EU citizens deserve and the wider world expects is based on shared interests (and values) and oriented by clear principles (and principled pragmatism), aimed at pursuing five clear priorities.

Afterwards, the EU Foreign Affairs Council approved *Conclusions on the Global Strategy for the External and Security Policy of the Union*.[2] These Council Conclusions state that the common vision and the '*framework*' laid down in the Global Strategy are shared as well as the commitment of Member States in its prompt and effective implementation. The Council raises the issue of the progressive translation of the 'political vision' into concrete initiatives regarding EU policies and concrete actions according to the mentioned *5 broad priorities* that were established in the GS: the security of the Union; promoting State and Societal Resilience to EU East and South; developing an integrated approach to conflicts and crises; promoting and supporting cooperative regional orders; and, finally, reinforcing global governance for the 21st Century, based on International law, including the principles of the UN and the Helsinki Final Act.[3]

4.3 The intention to assume the responsibility of the EU as a global stakeholder, as the Treaty of Lisbon announced, in now envisaged as a shared responsibility which means being engaged with others players and partnerships in a connected world.

Moreover, concerning the priorities established in the GS, three features must be underlined: first, with promoting security of the Union (in the fields of defence, cyber, counter terrorism, energy and strategic communications) the idea of an "*appropriate level of ambition and strategic autonomy*" is needed – possibly meaning a shift of strategy to the enhanced development of an EU defence policy. The second feature is the idea of promoting resilience (of states and societies), both at East and South, within and beyond the European neighbourhood policy, as a way to achieve transformation and attraction towards the EU. Lastly, the clear aspiration, as a global player, to aim at transformation (rather than preservation) of the existing international order.

It remains to be seen whether the path from the shared vision to concrete action, through a credible, responsive and joined-up (and therefore coherent, such as proposed by the Treaty of Lisbon), will show that the EU will be capable of achieving their (rather ambitious, although also pragmatic) priorities and goals in the field of external action and external relations, as set up by the Treaty of Lisbon and will be able to with the new and renewed international realities and fast global challenges.

B) The EU and its legal order: violation of the fundamental values of the EU, rule of law and the guarantee legal framework.

5. One of the threats to the juridical and political survival of the EU lays on the breach – or clear risk of serious breach – of EU values as referred to in Article 2 TEU, especially the rule of law and respect for human rights.

EU Member States are not immune to a procedure based on breaches of core

[1] Conclusions of the European Council, June 2016, III, External Relations, 19, on the Global Strategy for the External and Security Policy of the Union.

[2] Foreign Affairs Council (FA), 17/10/2016, CFSP/PESC 814, CSDP/PSDC 572.

[3] See 2016 GS, 3.1 to 3.5.

values, especially regarding fundamental rights. Such violations may occur and have occurred, due to structural or punctual reasons, but their existence and its consequences are not out of the reach of declaration and elimination (as far as possible) or reparation both within the framework of the rule of law at national level and of transnational guarantee systems. It is so even when EU Member States apply or execute EU Law – the case law of the European Court of Human Rights (henceforth, ECtHR) regarding asylum and *non refoulement* illustrates such phenomena (vg. *Hirsi Jamaa* or *M.S.S.* cases).[4]

5.1 The prevision in EU primary law of EU core values came along with the origins and development of the political component of European integration – it is not by chance that it was contemporary with the institution of the EU itself. However, one could not really anticipate that the political mechanism that came along with such values (Treaty of Amsterdam, as modified by the Treaty of Nice, in the sequence of the '*Haider episode*') would not remain '*dead-letter*', a mere theoretical warning of an unthinkable breach of EU values – even though at that time, the European Union had a much smaller number of Member States.

That was confirmed in the aforementioned Austrian case in which not also the launching of the procedure of Article 7 TEU was not an option but also determined its modification in order to make it more flexible (preventive phase, besides the original declaration and sanctioning phases).

The development of the European integration post subsequent enlargements mainly at east (25/27/28) and post the Treaty of Lisbon came forward the procedure laid down in Article 7 TEU, whose aim is to declare and, if that is the case, sanction a qualified breach – a serious and persistent breach by a Member State of the values referred to in Article 7 TEU. Once again, a new way in order to turn it more flexible (or, under a different perspective, to avoid its use in practice).

On one hand, since the issue of a serious breach (or of risk of a serious breach) of EU values by a Member State has been raised – which behaviour was analysed at EU institutions level, mainly the Commission and the European parliament (Resolution regarding Hungary and the death penalty).

One the other hand, the Commission, under its role of 'treaty keeper', has approved a soft law instrument – beyond the word of the treaties – which, in theory, precedes the formal opening of the procedure for a qualified breach of EU values and has already seen the daylight recently in the (2016) case involving Poland.

5.2 The competence of the Commission regarding the procedure foreseen in Article 7, TEU for breach of EU values by a Member State, goes back to 2003 with the approval of the "*Communication of the Commission to the Council and the European Parliament on Article 7 of the Treaty of the European Union. Respect and promotion of the values on which the Union is based*".[5]

However it was only in 2014 – which is not without relation with the evolution meanwhile registered and the threats to respect of EU fundamental values – that the Commission by the means of secondary law approves "*A new EU Framework to strengthen the rule of law*",[6] to which the Commission is bound when acting as 'treaty keeper' and

[4] ECHR, 23/02/2012, request No. 27765/09, *Hirsi Jamaa e o./Italy* and 21/1/2011, request No. 30696/09, M.S.S./Belgium and France (available in http://echr.coe.int).

[5] COM (2003) 606 final, de 15/10/2003.

[6] *Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the rule of law*, COM (2014) 158 final/2, of 19/03/2014. The Communication includes two annexes - Annex I on "*The rule of law as a foundational principle of the Union*" and Annex II includes a diagram of the phases of the new framework and its relationship with the infringement procedure

therefore applying equally to all Member States.

The reason behind the approval of such a '*new framework*' was double: to address a situation where there is a systemic threat to the rule of law and, therefore, to the functioning of the Union as an Area of Freedom, Security and Justice, when mechanisms established at national level to secure the rule of law cease to operate effectively – thus justifying the intervention of the Union to protect the rule of law as a fundamental value of the EU. However, a systemic threat to the rule of law in Member States cannot, in all circumstances, be effectively addressed by the existent instruments at the Union level. On one hand, due to the limits to the intervention of the Commission regarding infringement procedure based on Articles 258-260 TFEU (breach of a specific provision of EU Law and situations that fall inside the scope of EU law; on the other hand, even when it is possible to activate the special (preventive and sanctioning) infringement procedure of Article 7 TEU – even in situations that fall outside the scope of areas covered by EU law (and cannot be considered a breach of obligation deriving from the treaties, but nevertheless represent a systemic threat to the rule of law) – it can be activated only in case of "*clear risk of serious breach*" or "*serious and persistent breach*" (preventive and declarative phases) and the thresholds for activating both mechanisms of Article 7 are very high and underline the nature of this mechanism as a last resort.

The conclusion that threats related to the rule of law (revealed also by developments in certain Member States) cannot be effectively addressed by the existing mechanisms led to the adoption of the "*new framework*". By setting up this 'new framework' the Commission seeks to provide clarity and enhance predictability as to the actions it may called upon to take in the future, whilst ensuring that all Member States are treated equally – and also to complement the existing mechanisms foreseen in the EU Treaties (infringement procedure and Article 7 mechanisms) as well as the mechanisms that exist already at the level of the Council of Europe.

In practice, the new framework is complementary and previous to the special infringement procedure laid down in Article 7 TEU since its purpose is to enable the Commission to find a solution with the Member State concerned in order to prevent the emergence of a "*systemic threat*"[7] in that State that could develop into a "*clear risk of serious breach*" within the meaning of Article 7 TEU.

The "*new framework*" is composed, as a rule, of three stages: the Commission's assessment (assessment, structured dialogue and a "*rule of law opinion*"; the Commission's recommendation ("*rule of law recommendation*"); and follow-up to the Commission's recommendation - if there is no satisfactory follow-up of the mentioned recommendation by the Member State concerned within the time limit set, the assessment of the possibility of activating one of the mechanisms set out in Article 7 TEU. All the three stages will be in line with institutional interaction and regular information to the European Parliament and the Council as well as collaboration with third party expertise (such as the EU Agency for Fundamental Rights, members of judicial networks) and cooperation with the Council of Europe and/or its Venice Commission, in all cases where the matter is also under their consideration and analysis.

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foreseen in Article 7 TEU (breach of EU values referred to in Article 2 TEU) – in the case when the Commission takes the initiative to activate such procedure.

[7] Meaning a threat to the political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists (see *A new Framework*…, 4.1).

5.3 It is not irrelevant or without consequence that on the 27 May 2014, the Legal Service of the Council elaborated a legal opinion on the Communication of the Commission on the 'new framework' in which it concludes that there is no legal basis in the existing Treaties that gives competence to the institutions to create a new mechanism of supervision of the respect of the rule of law by Member States besides the Article 7 TEU mechanism nor to modify or complement such mechanism – and therefore, the Communication of the Commission does not respect the principle of conferral which applies to EU institutions. It also concludes that Member States can agree between themselves on a reviewed system on the functioning of the rule of law and its possible consequences – on the basis of an intergovernmental agreement designed to complete EU Law in this respect[8] and ensure the effective respect of the values on which the EU is based – without implying a conferral to the EU of competences that were not foreseen in the founding Treaties and also, that such a reviewed system "*can foresee that some tasks are fulfilled by the institutions of the Union*".[9]

The political response of the Council followed in December 2014 – establishing a political structured "*dialogue*" between Member States in order to promote and safeguard the rule of law within the Treaties' framework and taking place annually in the General Affairs Council and prepared by the COREPER (EU presidency).[10]

Also, the European Parliament responded later in 2016 to the Commission's 'new framework' approving – in the sequence of the Report of 10 October 2016 containing recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights[11] – the "*European Parliament Resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism of the EU on democracy, the rule of Law and fundamental rights"*.[12/13]

5.4 Despite the late reactions of the Council and of the European Parliament, it is certain that the 'new framework' adopted by the Commission has not remained mere theory but has, instead, already been (partially) applied in 2016 in respect of Poland – after a debate within the Commissioners college on the subject[14] – firstly, through

[8] See the example of the Treaty on Stability, coordination and governance in the Economic and Monetary Union of 12 March 2012, agreed between several Member States – which confer seveal competences to the EU institutions (see in particular Articles 8(1) and (2), 12 and 13).

[9] *Opinion of the Legal Service – Commission's Communication on a new EU Framework to strengthen the Rule of law: compatibility with the Treaties* (Council document 10296/14, de 27/05/2014) See III. *Legal Analysys*, 15 e ss., in special 24 a 27, e IV. *Conclusion*, 28.

[10] *Conclusions of the Council of the European Union and the Member States meeting within the Council on ensuring respect for the rule of law* – General Affairs Council meeting, Brussels, 16 December 2014 (vide Press Release de 16/12/2014, PRESSE 652 PR CO 74). These Conclusion took in consideration the Note of the Italian Presidency *Ensuring Respect for the rule of law* (16862/14 COR 1, 16 December 2014 – FREMP 225, JAI 1009, COHOM 179 e POLGEN 191). See also the previous document *Ensuring respect for the rule of law in the European Union* (15206/14, 14 November 2014 – FREMP 198, JAI 846, COHOM 152 e POLGEN 156). The Council Conclusions foresee its evaluation at the end of 2016 on the basis of the acquired experience based on the structured dialogue, already in due course.

[11] *Report of 10 October 2016 containing recommendations to the Commission on the establishment of an EU mechanism on Democracy, the rule of law and fundamental rights presented by the Committee on Civil Liberties, Justice and Home Affairs* [2015/2254 (INL)] – A8-0283/2016.

[12] P8_TA(2016)0409.

[13] See also the document *An EU mechanism on democracy, the rule of law and fundamental rights. European Added Value Assessment accompanying the legislative initiative report (Rapporteur: Sophie in't Veld)*, October 2016 – PE 579.328.

[14] See *College Orientation Debate on recent developments in Poland and the rule of law Framework: Questions*

the assessment by the Commission (in the sequence of an alert on a systemic threat to the rule of law) and afterwards through the approval, on the 1st June 2016, of a "*Rule of law Opinion on the situation of Poland*" and of the "*Commission Recommendation of 27.7.2016 regarding the rule of law in Poland*".[15/16] Later on, at the end of 2016, the Commission discussed the state of play of the ongoing procedure concerning the rule of law in Poland and decided to issue a complementary rule of law Recommendation, taking into account the latest developments in Poland that have occurred since the Commission's Recommendation of 27 July 2016.[17] In this Recommendation, the Commission considers that some of the issues raised in its July Recommendation have been addressed, important issues remain unresolved and new concerns have arisen in the meantime and therefore, there continues to be a systemic threat to the rule of law, thus setting out in detail the remaining as well as its new concerns and invites the Polish government to solve the problems it identifies as a matter of urgency, remaining ready to pursue the constructive dialogue with the Polish government.

5.5 Besides the latest developments regarding the case of Poland and the follow up of the European Parliament's recommendation to establish a new global mechanism – and the necessary issue of how to ensure coherence between the several *soft law* initiatives and instruments adopted by the three EU institutions – the mere approval of the first Recommendation by the Commission (followed by a second one), as well as its concrete action within the new framework that was set up, do raise some relevant legal issues within the competences of the Union and its institutions in an area which is nuclear to the European integration process – the core values in which the integration process is founded.

Even considering that the competence to initiate the procedure foreseen in Article 7 TEU was (with no doubt) given to the Commission (in the preventive phase), such a mechanism has a clear political nature – and that the Member States as *Herren der Verträge* deliberately wanted to leave out of the normal reach of the Court of Justice of the European Union and also to scope of the infringement procedure under Articles 258-260 TFEU.

It must be therefore asked and further debated, among other aspects, whether

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& Answers (Brussels, 13/01/2016 – MEMO 16/62) – after which a mandate was given to the first Vice-President of the Commission to send a letter to the polish authorities to initiate the structured dialogue foreseen in the new framework and establishing a date for the ulterior assessment of the matter in close cooperation with the Venice Commission.

[15] See *Commission Opinion on the rule of law in Poland and the rule of law Framework: Questions & Answers* (Brussels, 1/06/2016 – MEMO/16/2017) e *European Commission - Press release – Commission adopts rule of law Opinion on the situation in Poland* (IP/16/2015); and also *Commission Recommendation of 27.7.2016 regarding the rule of law in Poland* (C(2016) 5703 final, de 27.7.2016), European Commission – Press release – rule of law: Commission issues recommendation to Poland (27/7/2016,IP/16/2643) and *Commission Recommendation regarding the rule of law in Poland: Questions & Answers* (Brussels, 27/07/2016 – MEMO/16/2644).

[16] The European Parliament has approved on 13/04/2016 a Resolution on the situation in Poland (2015/3031(RSP)) in which it supports the decision of the Commission to initiate the structured dialogue within the *rule of law Framework*. The European Parliament, in the sequence of other previous resolutions, also adopted on 16/12/2015 a Resolution on the situation in Hungary (2015/2935(RSP)) – regarding national legislation that may affect the common law regarding international protection and asylum – in which it urges the Commission to initiate the first phase of the new framework on the rule of law, in order to assess the emergency of a systemic threat that may evolve into a clear risk of breach for the purpose of application of the procedure of Article 7 TEU.

[17] See IP/16/4476 of 21 December 2016 and Commission Recommendation of 21.12.2016 regarding the rule of law in Poland (C(2016) 8950 final of 21/12/2016.

the Commission: *i)* has competence to approve the new, although atypical (and non-binding), act or it has somehow exceeded its competence of 'treaty keeper'; *ii)* in doing so, encroaches the competence of the institution to which Article 7 gave competence to analyse and declare the serious and persistent breach (or risk of breach) of the values of the EU by a Member State – the Council; *iii)* in applying the new framework (as already occurred in the case of Poland) what are the legal consequences either from the perspective of the Member State in question or from the perspective of the Union, namely regarding challenging of the "*acts*" already approved (especially the "*recommendation*" that, although non-binding, produces a certain number of legal effects; *iv)* its legitimacy ('integration' legitimacy to promote the general interest of the Union conferred by its the appointment procedure with a vote of consent by the European Parliament) is enough to found deem its intervention (as laid down in the new framework) in an area which the founding Treaties intended to conceive as mainly political.

These interrogations, on one hand, seem to be legitimate to the extent that they express preoccupation regarding the risk of crossing the line of the conferred competences and the balance of powers within the EU institutions - shifting the political (intergovernmental) dimension into a "*community*" dimension not clearly foreseen in the founding Treaties. On the other hand, they illustrate well the "*paths*" through which the EU and its Member States should perhaps not enter into – the disregard (even if only in appearance) by the latter of the core values on which European integration is based and by the former of the principal of conferral and the balance of powers between EU institutions. In other words, whether the Member States are doing too little and the EU and its institutions are doing too much.

Finally the above major issue of overall coherence, both between different EU institutions initiatives and current (or future) non-binding instruments and between these and the formal mechanisms and procedures already foreseen in the treaties, still require further debate and clarification.

C) EU and national legal order: non fulfilment of obligations within the EMU and budgetary deficit limits – remarks around the Portuguese case

6. The Portuguese case within the EMU, regarding the non-fulfilment of the budgetary deficit limits set up in the EU primary law, is also a motive for some considerations on the "*place*" that we stand in the European integration and the (desirable) future of its further development: too much integration or still not enough integration.

On one hand, the EMU is one of the areas of EU competences in which the evolution was clearly in the sense of the reinforcement of the intervention of the (above) EU level (mainly regulatory competence and financial supervision); on the other side the use of (typical) international law instruments – which is the case of the so called Budgetary Treaty (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union of 2 March 2012). The use of such instruments revisit previous advances of the European integration through a mixed model, both 'communitarian' and intergovernmental (vg. original Schengen Treaty), within which progressions are made to some extent in a differentiated way (vg. besides Schengen, EU third pillar or even social and even EMU).

6.1 The current legal status of Portugal as a Member State fully participating in the Eurozone, reveals its double quality of beneficiary of EU solidarity towards a Member State in budgetary difficulties in economic terms as well as of 'defendant' in the special procedure to declare and sanction in case of violation of the EMU rules (precisely the deficit limits foreseen in the TFEU and Protocol (No. 12) on the excessive deficit procedure) with several consequences, without leaving apart the duty to comply with all the new rules regarding economic supervision, especially those deriving from the Budgetary Treaty and the so called European semester (cycle of economic and financial supervision).

6.2 It is well known that in December 2009, the EU Council decided that there was a situation of excessive deficit in Portugal and therefore adopted a recommendation so that it would be corrected until, at the latest, 2013. Meanwhile, Portugal required financial assistance in April 2011, that was granted by EU Council [under Article 136 (3) TFEU][18] and a "*Memorandum of Understanding"* was signed between Portugal and the EU Commission in May 2011. Since that date, the EU Council has approved two more recommendations (9 October 2012 and 21 June 2013), having postponed the delay for the correction of the deficit for one year (2014 and 2015, respectively) – meaning a deficit of 5,5% in 2013; 4% in 2014 and 2,5% in 2015). Despite the exit in 2014 of the programme of economic adjustment, the deficit goal for 2015 was not respected (4,4% in 2015 instead). So, the EU Council, on the 12th July 2016, on the basis of Article 126(8) TFEU, has considered that Portugal did not take the appropriate measures to comply with the recommendation of 21st June 2013 and to correct the deficit in 2015 (below 3% of the GDP) - and also that the fiscal effort was not enough as recommended.[19] The decision of the EU Council gave place to the further phase – sanction phase – of the special deficit procedure (sanction phase), under Article 126, TFEU, according to which the Commission can recommend the application of a fine, up to the limit of 0.2% of the GDP. Afterwards, on the 2nd August 2016, the Council approved a new decision in which it indicates the measures Portugal must apply in order to put an end to the excessive deficit[20] – and imposing the correction of the deficit into 2.5% in 2016, the adoption of measures of budgetary consolidation of 0.25% of GDP in 2016 as well as the presentation of a temporal plan of measures in respect of health and reducing the weight of budgetary transfers to finance the pensions system (see Article 1); and setting 15/10/2016 as the limit date for the adoption of effective action and presenting a report on them and the adoption of the required measures (see Article 2). Afterwards, on 5th August 2016,[21] the Council approved a decision on the application of a fine to Portugal for not having taken the necessary measures to reduce the excessive deficit. After the national request to the Commission on 18th July 2016 in order that the Council would set a "*zero*" amount sanction, the latter institution, after due consideration of the reasons invoked by Portugal – as well as, in particular, the fiscal adjustment applied during the programme of economic adjustment, along with

[18] *Council Implementing Decision 2011/344/EU of 17 May 2011 on granting Union financial assistance d Portugal* (JOUE L 159, 17/06/2011, p. 88).

[19] See *Council Decision establishing that no effective action has been taken by Portugal in response to the Council Recommendation of 21 June 2013* (10796/16, ECOFIN 678 UEM 264, 11 July 2016).

[20] See *Council Decision giving notice to Portugal to take measures for the deficit reduction judged necessary in order to remedy the situation of excessive deficit* (11553/16, ECOFIN 743 UEM 283, 2 August 2016 – adopted on 8/8/2016).

[21] See *Council Implementation Decision on imposing a fine on Portugal for failure to take effective action to address an excessive deficit* (11554/16, ECOFIN 744 UEM 284, 5 August 2016 – adopted on the 8/8/2016).

a large set of structural measures and the commitment to; *i)* adopt, if necessary, fiscal measures to correct eventual budgetary deviations that may occur in 2016; *ii)* adopt a structural adjustment of 0.25% (instead of the 0.35% which was proposed in the 2016 Stability Programme; and moreover; *iii)* implement structural reforms in key areas in order to face the existing challenges, including measures aiming at the stabilization of the banking system – the Council has concluded that such reasons would justify the "*The fine of 0.2% of GDP to be imposed on Portugal for failure to take effective action in response to the Council recommendation of 21 June 2013…*".[22/23]

6.3 Such a Decision of the Council reveals two issues: *i)* the sanctioning power of the Council within the special deficit procedure seems to be, in the end, a margin of discretion since, irrespective of the fact that the Council has declared that the Member State has not adopted the measures in order to comply with the previous recommendation to reduce the budgetary deficit, that sanction phase and the application of sanctions is not (neither legally nor politically) compulsory – the good (or apparently good) budgetary behaviour of the 'student' Member State is integral to the outcome of the sanction phase of the special deficit procedure; *ii)* whether the category of 'zero sanction' is, in any way, foreseen in the text of primary (or even secondary) law. This issue raises the further question of the possibility of challenging the zero sanction decision before the EU competent Court, as the amount of the sanction is a part of the EU's own resources.

6.4 Finally, once the Council has decided that the necessary measures have not been adopted within the time-limit given to the Member State but a "*zero sanction*" applies in the case, another sanction issue was raised: that of the application of sanctions within the rules of EU structural funds. In fact, in answering a parliamentary question (dated 13/7/2016), the European Commission, on the 11th August 2016, explained that after the adoption of Council Decision dated 12/07/2016, all the requirements in order to apply Article 23(9), a) of Regulation (EU) No. 1303/2013 of the European Parliament and of the Council of 17 December 2013[24] were fulfilled – and according to which the Commission must present to the Council a proposal to suspend (totally or partially) the commitments or payments in respect of programmes of a Member State, whenever the Council decided, under Article 126, (8), TFEU, that necessary measures to correct the excessive deficit were not adopted.[25]

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[22] *Idem*, Article 1. See also, regarding the amount of the fine within the excessive deficit procedure, Article 12 (1) of Regulation (EC) No. 1467/97 of 7 July 1997, on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2/8/1997, p. 6, as amended by Regulations (EC) No. 1056/2005 of 27 June 2005 and (EU) No. 1177/2011 of 8 November 2011 – OJ L 174, 7/7/2005, p. 5 and OJ L 306, 23/11/2011, p. 33).

[23] See afterwards the Effective Action Report of 17 October 2017 as well as the Proposal for a Council Opinion on the economic partnership programme presented by Portugal (COM/2016/0900 final/2 – 2016/0358 (NLE)) and the Communication from the Commission – Assessment of action taken by Portugal and Spain in response to the Council decisions of 8 August 2016 giving notice to take measures for the deficit reduction judged necessary in order to remedy the situation on excessive deficit (COM(2016)901 final of 16/11/2016), No. 2.

[24] OJ L 347, 20/12/2013, p. 320, as amended by Regulation (EU) Nº 2015/1839 of the European parliament and of the Council of 14 October 2015, OJ L 270, 15710/2015, p. 1. Article ("*Common provisions Regulation*").

[25] According to the English version of Article 23 ("*Measures linking effectiveness of ESI Funds to sound economic governance*"), 9, a): "*The Commission shall make a proposal to the Council to suspend part or all of the commitments or payments for the programmes of a Member State in the following cases: (a) where the Council*

However, in the framework of the "*structured dialogue*" procedure under the mentioned Article 23 (15) of Regulation (EU) Nº 1303/2013, the European Parliament (Economic Affairs and Regional Development committees) was against the suspension of structural funds for both, Spain and Portugal.[26]

Some additional issues and doubts are worth considering in this respect (link between effectiveness of ESI Funds and sound economic governance, specifically deficit procedures) for further debate: *i)* the exact legal basis allowing foresight of secondary law in addition to sanctioning measures related with the non-fulfilment of the obligation to respect the deficit limits and, within the special deficit procedure, to adopt measures to correct the excessive budgetary deficit; *ii)* whether (at least in theory) in case of a 'zero sanction' decision of the Council, the Commission should abstain to propose them – especially because the final decision on such application belongs to the Council itself[27] – and therefore, if such sanctions are compatible with the mentioned 'zero sanction' decision of the same institution; *iii)* the relationship between the amount of the sanction under Article 126 (11), TFEU and the amount of the "*suspension*" of authorisations or payments within Regulation (EU) No. 1303/2013; *iv)* the similarity (and the relationship) between the "*suspension*" sanctions foreseen in Article 23 (9) of Regulation (EU) No. 1303/2013 and the "*suspension*" sanctions (suspension of Member States' rights deriving from the Treaties, including the right to vote in the Council) under Article 7 TEU – although the latter is only allowed in the case of serious violation of EU core values.

It must be asked whether this reinforcement of the level of the Union – that seems to be in line with traditional International law sanctions of suspension of State Member rights within international organisations – does not, to some extent, have an undesirable effect on EU actors other than Member States and also on the Internal Market that is disproportionate to the intended effects, namely a dissuasive effect, inherent to the sanction itself regarding the legal sphere of the involved Member State. It must be therefore be considered whether the EU action in this respect is not, again, too much.

decides in accordance with Article 126(11) TFEU that a Member State has not taken effective action to correct its excessive deficit" (according to the French version "la Commission suggère au Conseil… dans le cas suivants…"). See further Article 29 (10) to (12) for procedure and ceilings and Annex III.

[26] See Press Release No. 20161107IPR50344 and the document "Exchange of views with Spain and Portugal on possible suspension of European Structural Funds" - REGI-CON on 8 November 2016.

[27] Either expressly (in the case of suspension of payments) or implicitly (in the case of suspension of authorizations, where an explicit "*against*" (the proposal of the Commission) act of the Council is required – a tacit consent unless express opposition - to avoid its adoption [see Article 23 (10)].