

## INTRODUCTION

Special Issue: The Systemic and the Particular in European Law

# Unpacking the Multifaced Nature of the Systemic and the Particular in European Law: An Introduction

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## A. The Multifaceted Uses of the Systemic Criterion in European Law

When, how and why does a breach of legal standards acquire a “systemic” dimension in European law? Certain fields of European Union law present a long-established use of formulations with a systemic connotation to qualify violations, such as: “[G]eneral”, “generalised” or “general and persistent.” In EU environmental law, for instance, the Court of Justice of the European Union (CJEU, the Court) first acknowledged in the *Irish Waste* case the “general and persistent nature”<sup>1</sup> of the failure by Ireland to fulfil its obligations under the Waste Directive. Other yet similar qualifiers are employed with regards to breaches of law in the Area of Freedom, Security and Justice, where the Court notably recognized that “systemic or generalised”<sup>2</sup> deficiencies may be found in relation to detention conditions in Member States. Legal provisions and case-law related to the protection of the rule of law in Member States present new versions of such formulations. The Court has warned Member States against adopting processes for the appointment of the judiciary which would “give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges that are appointed at the end of that process.”<sup>3</sup> The principle of judicial independence being a component of the rule of law enshrined as an EU value under article 2 of the Treaty on European Union, it is also noteworthy that Article 7(2) TEU provides for a sanctions mechanism to be triggered in case “a serious and persistent breach by a Member State of the values referred to in Article 2” would come into existence.<sup>4</sup>

What appears as a “systemic” criterion used to qualify breaches of law can be found in further areas of EU law<sup>5</sup>, as well as in more horizontal aspects of its application. Provisions governing the

<sup>1</sup>Case C-494/01, *Commission v. Ireland*, paras, 23, 127, 136, 174 (Apr. 26, 2005). See the articles by Mariolina Eliantonio and by Luca Prete respectively in this special issue.

<sup>2</sup>Joined Cases C-404/15 & C-659/15 PPU, *Aranyosi and Căldăraru*, paras. 89, 93, 104, (Apr. 5, 2016), <https://curia.europa.eu/juris/liste.jsf?num=C-404/15&language=EN>. See the article by Leandro Mancano in this special issue.

<sup>3</sup>Case C-824/18, *A.B. and Others (Nomination des juges à la Cour suprême - Recours)*, para. 129 (Mar. 2, 2021). See the article by Mathieu Leloup in this special issue.

<sup>4</sup>Article 7(2) TEU.

<sup>5</sup>Regarding for instance the fundamental rights of asylum seekers in the EU, see in particular Joined Cases C-411/10 & C-493/10, *N.S. and Others*, para 94:

[T]o ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No 343/2003 where they cannot be unaware that *systemic*

protection of the financial interests of the EU in different legal contexts have for long known a concept of “systemic irregularities” in the handling of EU funding by Member States—irregularities arising from deficiencies in the “systems” set in place to manage and control the use of EU funding.<sup>6</sup> Similar or strengthened versions of that approach can now be observed in increasingly far ranging instruments for the protection of the EU budget.<sup>7</sup> In its 2016 Communication titled *EU law: Better results through better application*, the Commission outlined a strategy on enforcement of EU law focusing infringement actions under article 258 TFEU on “cases of incorrect application [ . . . ] raising issues of wider principle” and cases presenting “evidence of a general practice” or “of a systematic failure” by one or more Member States “to comply with EU law.”<sup>8</sup> Additional manifestations of the systemic criterion can be found beyond EU law, in legal fora which are nonetheless connected to it, such as the law of the European Convention on Human Rights,<sup>9</sup> or the law governing the interplay between national law and European systems for the protection of human rights.<sup>10</sup> Examples abound, suggesting that terms related to the “systemic” or “general” dimension of a violation play a part in its legal qualification.

Nonetheless, the precise meaning of the systemic criterion appears to vary with uses or legal contexts, remaining in some cases relatively indeterminate or at least multifaced. It is not always clear what the criterion refers to. Will a violation be considered to have a systemic dimension in relation to the frequency with which a rule will be breached (“recurrent practices or omissions by public authorities”; “persistent”)? In relation to its likelihood to occur because of inadequate procedures or control mechanisms (“high probability of occurrence in similar types of operations, which results from a serious deficiency in the effective functioning of a management and control system”)? In relation to its extent (“general,” “generalised,” “widespread”)? Its anchorage in a legal framework (as opposed to an isolated practice)? In relation to its severity (being a threat for the “essence” of rights; “serious breach”)? In relation to its importance in view of the functioning of a legal scheme or, in extreme cases, that of a legal order (“deficiency” affecting different parts of a “system” of protection)?

Seemingly obvious presuppositions concerning the basic features of the criterion, across variations in formulations, can even be challenged and nuanced. Thus, it would appear rational to consider that the systemic criterion posits a difference between the particular occurrence of a breach of law and its systemic opposite. One would have localised features or legal implications, whereas the other would exist on a wider scale. For instance, it is possible to observe situations in which a generally applicable legal provision is breached once, and situations in which violations are systematic. Yet, systemism does not mean systematicity, to the effect that the opposition between the systemic and the particular may have to be relativised in certain contexts. Particular breaches of the law may indeed be considered as threatening the system as a whole, when they are considered as of particular gravity, or as impairing the “core,” or “very essence” of that system. In the same vein, particular cases may have systemic implications, by reason of the procedural context in which they occur. This is notably illustrated in EU law by the very design of the

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*deficiencies* in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter. (Emphasis added). For analysis, see the article by Lilian Tsourdi and Cathryn Costello in this special Issue.

<sup>6</sup>For instance in article 2(33) of the Regulation 2021/1060 of June 24, 2021, Laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy 2021 O.J. (L 231) 159 [hereinafter *Common Provisions*]. See the article by Robin Gadbled in this special issue.

<sup>7</sup>See the article by Robin Gadbled in this special issue.

<sup>8</sup>*EU Law: Better Results Through Better Application*, COM (Jan. 19, 2017). See Luca Prete’s article in this special issue.

<sup>9</sup>See the article by Koen Lemmens and Sébastien Van Drooghenbroeck in this special issue.

<sup>10</sup>See the article by Cecilia Rizcallah in this special issue.

preliminary ruling procedure and of the infringement procedure.<sup>11</sup> When the Court of Justice of the EU answers a preliminary question on an EU legal provision by a national court in a particular case, this answer matters on a systemic level, regarding the application of that provision in all particular cases and in all Member States in which it applies. This in turn enables the EU legal system to function properly, by ensuring the uniform interpretation and application of EU law throughout the EU. Symmetrically, the initiation of an infringement action in a particular case of violation of EU law by a Member State has a systemic implication in that it serves to guarantee that EU law is observed and that the system is preserved as a whole against national practices violating its rules. In light of the above, there can therefore be a certain normalcy to the systemic criterion, in that “routine”<sup>12</sup> legal violations may matter in view of the very functioning of a legal system. The particular can have systemic implications—and always does in relation to certain procedures.

Adding a level of complexity to this finding, however, such systemic implications may themselves vary in intensity, from the more particular to the more systemic: This is the implication of the organisation of the Court in different formations, reserving the cases with the greatest importance for the EU legal system to Grand Chamber and Full Court formations. The same can be said of the reasoning outlined by the Commission in its 2016 Communication that it would concentrate infringement actions on cases “raising issues of wider principle,” presenting “evidence of a general practice” or “of a systematic failure” in complying with EU legal obligations – reintroducing the distinction between those and “individual cases of incorrect application” of EU law.<sup>13</sup>

## B. A Path to Clarity: A Theoretical Framework Defining the Systemic Criterion in European Law

The systemic criterion in European law is thus a multifaceted concept because it has multiple meanings and applications. The present special issue contributes to tackling that conceptual complexity, and sometimes obscurity, by looking at the formulations, functions and legal implications of the systemic criterion in concrete cases. The collection of articles offers sectoral, thematic and horizontal takes on the criterion and presents both academics and practitioners with a suggested reference point to address its legal uses and consequences in a number of contexts. However, this endeavor comes with a challenge at its very starting point: that of coming to a preliminary definition to the systemic criterion, on which the contributing authors could agree on, in order to delimit the scope of their enquiry. To tackle this challenge, a theoretical framework is hereby being submitted, distinguishing between four different—yet related—conceptual meanings of the criterion in European law.<sup>14</sup>

In a first conceptual category, a *breach with systemic implications* refers to a breach of law which puts at risk a system as such or seriously affects it negatively. For instance, a breach of the principle of independence of judges sitting in a Member State’s constitutional court may affect the very functioning of the preliminary ruling system provided for under article 267 TFEU, and considered essential to the EU legal order.<sup>15</sup> More commonly, this category is presupposed in the perspective taken above on violations of EU legal standards which would threaten the good and

<sup>11</sup>Art. 267 and 258-59 TFEU respectively. The authors are grateful to President Koen Lenaerts for pointing to these challenges to their initial thinking about the opposition between the systemic and the particular in European law.

<sup>12</sup>Contrast with Armin Von Bogdandy, *Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States*, 57 COMMON MKT. L. REV. 705, 718 (2020).

<sup>13</sup>EU Law, *supra* note 8.

<sup>14</sup>This special issue is therefore not proposing a unified doctrine of the systemic criterion, as it is argued that the different meanings given to it in different contexts may be overlapping but not always linked. This endeavor does not prevent the development of doctrines for more specific meanings of the systemic criterion, but it does caution against trying to subsume under one doctrine the overall discourse involving terms associated with the systemic criterion. *Contra*, see e.g., Von Bogdandy, *supra* note 12, at 715-20.

<sup>15</sup>See the article by Mathieu Leloup in this special issue.

uniform application of EU law without the safeguards offered by the preliminary ruling procedure and infringement actions.

In a second conceptual category, a *system deficiency* is a flaw in the functioning of a system provided for or relied upon to ensure the proper application of (EU) law, thus making more probable the occurrence of (other) breaches of law, possibly in a generalized or repetitive manner —on which, see the next category. This meaning is for instance made explicit with regards to deficiencies in the management and control “systems” provided for in Member States for the protection of the financial interests of the EU, and which may cause an increased risk of irregularities affecting the EU budget.<sup>16</sup>

In a third conceptual category, *generalized deficiencies* or *general and persistent breaches of law* refer to quantitatively important breaches of law in frequency and/or extent. Such deficiencies or breaches of law may be the consequence of system deficiencies (see above) or of flaws in generally applicable provisions, notably. They are found for instance in environmental cases.<sup>17</sup>

In a fourth conceptual category, *structural judgements* or *decisions* are judgement or decisions on particular cases which have implications for the way generally applicable legal provisions are interpreted and applied. Unlike the first category, which concerned the systemic implications of *breaches* of law, this fourth category concerns the systemic implications of the judgements or decisions made in relation to particular breaches of law.<sup>18</sup>

### C. The Functions of the Systemic Criterion

Through the different analyses presented in this special issue, various functions of the systemic criterion can be identified.

As we have just highlighted, the existence of systemic problems may influence judicial and political institutions’ methodology or approach. Indeed, the existence of systemic problems or particular violations that may have systemic consequences appears to have an impact on both the way in which both the Court of Justice and the European Court of Human Rights approach cases, from a substantial and a procedural point of view.<sup>19</sup> The criterion may also play a role in the calculation of how much funding will be withheld from Member States whose systems for the protection of the EU budget appear deficient.<sup>20</sup> In addition, the criterion seems to influence the Commission’s decision to use infringement proceedings or not.<sup>21</sup> Moreover, the systemic or repeated nature of a violation also appears to have an impact on the allocation of the burden of proof before these jurisdictions.<sup>22</sup>

On the basis of this criterion, the way in which member states interact can also be influenced. Indeed, it appears that the criterion of systemic deficiencies plays a fundamental role in the way in which the principle of mutual trust must be implemented between member states,<sup>23</sup> in the field of Asylum and in the field of criminal cooperation.<sup>24</sup>

Finally, this criterion seems to be able to have an influence on the scope of application of EU law. It appears that in certain situations, the emergence of systemic problems can lead to an extension of the scope of EU law to issues that in principle fall under national law.<sup>25</sup>

<sup>16</sup>See the article by Robin Gadbled in this special issue.

<sup>17</sup>See the articles by Mariolina Eliantonio and Luca Prete respectively in this special issue.

<sup>18</sup>See the articles by Cecilia Rizcallah and by Koen Lemmens and Sébastien Van Drooghenbroeck in this special issue.

<sup>19</sup>See the article by Koen Lemmens and Sébastien Van Drooghenbroeck in this special issue.

<sup>20</sup>See the article by Robin Gadbled in this special issue.

<sup>21</sup>See the article by Luca Prete in this special issue.

<sup>22</sup>See a.o. the article by Mariolina Eliantonio in this special issue.

<sup>23</sup>On this principle, see CECILIA RIZCALLAH, *THE PRINCIPLE OF MUTUAL TRUST IN EUROPEAN UNION LAW. AN ESSENTIAL PRINCIPLE FACING A CRISIS OF VALUES* (2022).

<sup>24</sup>See respectively the articles by Lilian Tsourdi and Cathryn Costello and by Leandro Mancano in this special issue.

<sup>25</sup>See the article by Mathieu Leloup in this special issue. See also Takis Tridimas, *Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way*, 29 Colum. J. Eur. L. 185, 202 (2023).

#### D. Structure of the Special Issue

These different uses and functions of the systemic criterion are found, in whole or in part, in the various fields where it is relied upon. The drafting of this special issue has therefore as main objective to shed light on these different uses and to provide an overview of the role played by the systemic criterion in European law. It is hoped that, with a better understanding of its meanings, a more systematic, consistent, and consequential use of this criterion will be promoted.

The special issue is structured in three main parts. The first focuses on the use of the systemic criterion in specific fields of EU law (environment,<sup>26</sup> criminal cooperation,<sup>27</sup> asylum, protection of judicial independence<sup>28</sup>). The second adopts a cross-cutting approach (focusing on the one hand on the use of this criterion in the use of infringement proceedings,<sup>29</sup> and on the other hand, on the management of EU funds and the protection of the financial interests of the EU in different legal contexts<sup>30</sup>). The third part widens the scope of enquiry by examining the use of this criterion in the field of fundamental rights protection in the legal order of the European convention on human rights,<sup>31</sup> and more generally as a tool for structuring the multi-level sources of protection of fundamental rights in Europe.<sup>32</sup>

Opening the first part, Mariolina Eliantonio delves into the analysis of the substantive<sup>33</sup> field where the systemic criterion first appeared: Environmental law. This would seem quite logical, as serious damage to the environment can result from “small” but repeated breaches of the law. As a result, the term “general and persistent breach” of EU law was first brought forward by the Commission in relation to infringement proceedings concerning the violation of EU environmental rules. In this context, the author analyses whether the existence of systemic violations has consequences on how the Court of Justice approaches violations of European environmental law. In particular, she assesses whether the repeated character of a breach could have an impact on of the admission of evidence in such cases. In this regard, she notably observes that “the gathering of this evidence might be a more cumbersome process when it comes to systemic breaches and scientifically complex questions.”

Mancano then focuses on the use of the systemic criterion in the field of criminal cooperation. He distinguishes in this field three types of use of this criterion: “Firstly, there are breaches with systemic implications and of such seriousness that would not need repetition. Secondly, the ‘system deficiency’ entails a flaw in the functioning of a system relied on to ensure the proper application of EU law (such as a system of effective remedy). Thirdly, the general and persistent breaches are characterized by a quantitative element”. Based on a sharp analysis of various instruments of European criminal law, he demonstrates how the definition of the concept of systemic violation in EU criminal law directly affects the understanding of the structural principle of mutual trust and, ultimately, the founding values of the European Union.

Tsourdji and Costello explore how the uses of the systemic criterion in EU asylum law fit into a wider legal argument involving regional and international bodies for the protection of human rights. Looking more closely at the judicial dialogue between the Court of Justice of the EU and the European Court of Human Rights, they offer a critical appraisal of how “the incorporation of the notion of ‘systemic breach’ from the caselaw of the ECtHR to the EU legal order” affects the “presumption of safety” granted to Member States for the return of asylum seekers under the

<sup>26</sup>See the article by Mariolina Eliantonio in this special issue.

<sup>27</sup>See the article by Leandro Mancano in this special issue.

<sup>28</sup>See the article by Mathieu Leloup in this special issue.

<sup>29</sup>See the article by Luca Prete in this special issue.

<sup>30</sup>See the article by Robin Gabled in this special issue.

<sup>31</sup>See the article by Koen Lemmens and Sébastien Van Drooghenbroeck in this special issue.

<sup>32</sup>See the article by Cecilia Rizcallah in this special issue.

<sup>33</sup>Note however that a version of the criterion has been in use in EU budgetary law at least since the 1990’s.

Dublin Regulation. At a deeper level, they shed light on how systemic challenges within a specific domain can give rise to rule of law concerns.

To conclude the sectoral analyses, Leloup tackles a topic that has been making headlines for several years now: The protection of judicial independence. He analyzes in this context the most recent case-law of the Court of Justice based on Article 19(1)(2) of the TFEU, which requires Member States to establish the necessary remedies to ensure effective judicial protection in areas covered by EU law. On this basis, as has become well known, the Court of Justice has established an obligation for Member States to protect the independence of national judges. However, this imperative must be balanced against the one that requires the protection of the institutional and procedural autonomy of the Member States, which derives from their national identity. According to Leloup, the systemic criterion could be a resource to find this balance. European Union law should indeed only come into play in the case of “failures that have a systemic impact on the functioning of the domestic judiciary, meaning they endanger the proper functioning of the judicial system.”

The second part of our special issue includes two cross-cutting articles, addressing the use of the systemic approach on the one hand in the context of infringement proceedings, by Prete, and on the other hand in the context of the protection of the financial interests of the EU, by Gadbled. Based on a detailed and thorough analysis of the practice of the European Commission, Prete observes that, although there is no “de minimis rule” as such for the use of Article 258 TFEU, the Commission’s policy is to prioritize systemic breaches of EU law. In particular, it seems that the Commission focuses on “major” infringements likely to have significant repercussions on multiple situations, and thus disregards individual instances of non-compliance, especially those consisting of mere misapplication of EU rules. This is quite unsurprising, given the limited resources at its disposal, which do not allow it to pursue every breach of EU law. The author notes, however, an underdeveloped use of the criterion understood as “general and persistent breach,” but points out that there could be further developments in this area. In this regard, he raises a fundamental but still pending question: “[I]s there any room for Articles 258-260 TFEU proceedings on the ground of systemic (or ‘general and persistent’) breaches of EU values?”

Gadbled on the other hand provides a panoramic view of the uses of the systemic criterion for the protection of the EU budget. He notes that, unlike other areas of law, EU budgetary law provides “a relatively clear definition of the systemic criterion.”<sup>34</sup> In this regard, failures considered to be systemic are those which put the financial interests of the European Union at risk because “the systems meant to protect these interests in a Member State are considered deficient themselves.” Such “system deficiencies” are considered to entail a higher likelihood of breaches of the law which, in turn, jeopardise the proper management and control of European funds. Financial consequences ensue: The EU may withhold funding from Member States who endanger its financial interests. Yet, the calculation of the amounts to be withheld as well as the rationale for such consequences (protecting funds? sanctioning breaches? incentivising change?) may have profound implications in defining the relationship between the EU and its Member States.

The special issue concludes with a third part that delves into the practice of certain other European courts in the field of fundamental rights protection. It quickly became apparent that this field was also very dynamic in the development of the systemic approach to breaches of the law. Lemmens and Van Drooghenbroeck provide a very detailed study of the practice of the European Court of Human Rights in this regard. The issue appears to be crucial in determining the nature of the said jurisdiction: Is it supposed to focus on the particular, to deliver “individual justice,” or on the systemic, as a provider of “constitutional justice”?<sup>35</sup> The debate on the role of the European Court of Human Rights has never been entirely settled, but the authors demonstrate how the place

<sup>34</sup>See the article by Robin Gadbled in this special issue.

<sup>35</sup>See the article by Koen Lemmens and Sébastien Van Drooghenbroeck in this special issue.



reserved for the systemic approach in the Court's practice provides important elements of an answer to this question.

Finally, Rizcallah focuses on how the systemic approach is used in European fundamental rights law to presume the equivalence of different legal orders. She shows how it is used to organize the multi-level protection system in Europe. Based on the existence of systemic equivalence in the protection of fundamental rights, a presumption of case-by-case compliance is drawn. This allows different legal orders to govern the same situations together, avoiding conflicts as much as possible. While this method is useful, it nevertheless carries risks, particularly because systemic equivalence does not necessarily mean respect for fundamental rights on a case-by-case basis.

As the articles show, important legal implications may derive from the use of terms associated with the systemic criterion; it is not desirable that core concepts remain imprecise when that is the case. It is hoped that the present collection of articles will bring added clarity on the uses and functions played by such terms in European legal discourse.

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