Chapter 5

Member States in the EU: The Issue of (Pooled) Sovereignty

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Abstract

It has been argued by some scholars that within the European Union, Member States are no longer sovereign. Others claim that the sovereignty of Member States is not lost, but "pooled" with the sovereignty of other members. Still others argue that the notion of sovereignty has itself has changed and it needs to be understood in a modern (or even post-modern) way. This paper analyses the notion of sovereignty, both generally and specifically in the EU context. I argue that, in practical terms, Member States remain sovereign within the EU, meaning that no decision can be taken without their consent as they wield the veto power. The relationship between the EU and its Member States thus remains horizontal in principle, without a simple hierarchy. However, this approach is challenged by the existence of qualified majority voting, which allows one Member State to be "overvoted" by others. Admittedly, this may be the price of efficient decision-making, but it dramatically changes the position of a Member State within the EU. In this context, I put forward that two conditions must be met for a Member State to retain sovereignty in such circumstances. First, the competences of the EU and the Member States need to be clearly delimitated. In particular, the Member States need to be absolutely free to decide which decisions should be subject to unanimity and qualified majority voting. And second, the power to decide whether certain competences remain with the Member State or have been transformed to the EU must remain with the Member State concerned. The number of recent *ultra vires* judgments of national constitutional courts shows that the Member State understand this in the same way.

Keywords: competences; constitutionalism; qualified majority voting; sovereignty; *ultra vires*.

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1. Introduction

In 1999, William Wallace opined in his influential essay on the concept of shared sovereignty that '[n]o government in Europe remains sovereign in the sense understood by diplomats or constitutional lawyers of half a century ago'.[1] Similar arguments had been raised before; as Neil MacCormick observed already in 1993, 'it seems obvious that no state in Western Europe any longer is a sovereign state'.[2] This has led to claims that sovereignty, if relevant at all, needs to be understood in a "modern" way, taking into account the current extent of international cooperation. The term "late sovereignty" is sometimes employed in this regard.[3]

This debate is particularly relevant within the European Union, that challenges the sovereignty of its Member States in two ways. Firstly, it puts forward to have created its *sui generis* legal order, superior to that of the Member States, which may eventually lead to conflicts between top judicial institutions, the Court of Justice of the European Union (hereinafter referred to as the CJEU), on the one hand, and national constitutional courts, at the other. And secondly, unlike in other international organisations, the decision-making within the EU is in principle not based on unanimity and consensus, but on majority voting (the so called ordinary legislative procedure),[4] which ultimately means that in a Member State, there may be a law in place that the State itself does not agree with, but which the State is obliged to enforce.

This is the context in which this paper discusses the issue of sovereignty within the EU. It strives to take into account the perspective of Central Europe, and in particular the Czech Republic as the author comes therefrom. Its main focus is the future: what shall be the relationship between the European Union and its Member States, to what extent they shall remain sovereign, would their sovereignty be passed to the EU or would it be "pooled" beyond the Member States' control?

In this regard, four questions need to be answered: (i) under what conditions may a state be considered sovereign; (ii) how does EU membership modify the sovereignty of the Member States; (iii) may state sovereignty be divided and what does "pooled" sovereignty mean; (iv) where should the boundaries between the powers of the EU and its Member States be drawn?

In order to answer these questions, the paper is structured as follows: first, it discusses the concept of sovereignty, both in its traditional and contemporary understanding (Chapter 2). Second, it focuses specifically on the European Union and its impact on the Member States' sovereignty (Chapter 3); as a case study, Czech jurisprudence and academic discussions will be introduced (Chapter 4). Finally, we shall focus on the position of a Member States within the EU and on the guarantees that need to be in place in order for a state to remain sovereign (Chapter 5).

1 Wallace, 1999, p. 503.
2 MacCormic, 1993, p. 16.
3 Walker, 2002, p. 346.
4 Arts. 289–294. Treaty on the Functioning of the European Union (hereinafter referred to as TFEU).

2. The Concept of Sovereignty

The concept of sovereignty is arguably a relatively new one, appearing at the end of the Middle Ages and gaining prominence with the establishment of modern national states. Its meaning, and indeed its purpose, has nonetheless been changing over the years. A proper understanding of this concept is crucial for answering the questions posed in this paper.

We will therefore start with the traditional approach to sovereignty, as framed in the sixteenth century, and its subsequent development. Thereafter, we will analyse the situation today, focusing on interpretation that is sometimes referred to as late sovereignty. Finally, we will focus on the question, what is the purpose of sovereignty, and what does it mean today, in practical terms, for a state to be sovereign.

2.1. The Traditional Approach

The concept of sovereignty in the traditional sense is associated with the sixteenth century writer Jean Bodin, according to whom it meant absolute power capable of expressing itself against all society.[5] This concept was employed by territorial rulers in order to justify their power within their territory, 'in justifying their aspirations to free themselves from the influence of the emperor and the pope' and to 'consolidate their territorial jurisdiction in contrast to overlapping medieval personal jurisdiction'.[6]

Sovereignty was associated with exclusiveness, in current discourse with the exclusiveness of the state's powers over all the persons and all the facts in its territory.[7] This understanding also led to describing sovereignty as indivisible; as proposed by Hugo Grotius in the seventeenth century: 'sovereignty is a unity, in itself indivisible'.[8]

Later theory started to distinguish between "internal" sovereignty, signifying the highest, original power within a territorial jurisdiction (meaning that the state's power is not subject to any foreign power), and "external" sovereignty, corresponding with the doctrine of independence and equality of states.[9] As summarised in modern legal theory by Neil MacCormic: 'a state is sovereign if the exercise of power internally to the state is not subject to external superior power or to other constraints or restrictions legal in nature'.[10]

The concept of sovereignty is inherently state-based and territorial.[11] Sovereignty is associated with a state that has absolute and exclusive power over its territory.

5 Bifulco and Nato, 2020, p. 8.
6 Lapidoth, 1992, p. 326.
7 Lapidoth, 1992, p. 330.
8 Lake, 2007, p. 225.
9 Lapidoth, 1992, p. 327.
10 MacCormic, 1993, p. 14.
11 Agnew, 2005, p. 439.

Such an understanding has multiple implications. The first is the notion of the sovereign equality of states, enshrined in the United Nations Declaration on Principles of International Law,[12] accompanied by the principle of non-intervention, meaning that 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State'.[13] The second is the principle of exclusive territorial jurisdiction and the presumption in favour of the state's competences, meaning that the sovereign state possesses the totality of powers, without a need to enumerate them.[14] The third is the crucial implication that no adjudication is binding upon a sovereign state without its consent;[15] thus, for example, the International Court of Justice has in principal jurisdiction only when the parties to the dispute have agreed to submit it to that court. For the purposes of this paper, three characteristics need to be stressed: sovereignty is in the traditional understanding connected with a specific territory, the state's power over this territory is exclusive and total, i.e. indivisible.

At this point, a final remark needs to be made. The concept of sovereignty had been traditionally associated with a single person – the ruler. With the rise of democracy, this was however no longer acceptable and '[o]ver the course of the French Revolution, […] Bodin's princely sovereignty was replaced by popular sovereignty. The people became the pouvoir constituent'.[16] Thus today, sovereignty is not associated with the ruler or with any institution of the state, but with the people that have the power to constitute the state itself.

Thus, the sovereign is currently represented only as an abstract, as the power of the people constituting the legal order, from which all the powers of the state are derived;[17] in this understanding, the sovereign stays "outside" of the state which it has constituted (as it has exercised its "constituting" powers), while the state, thus constituted, exercises from then on its "constituted" powers, derived from the sovereign.

This distinction is frequently overlooked and the state is still being identified with the personified sovereign. According to current constitutional theory, this is not precise: the sovereign exercises its powers before the state is constituted (in practical terms, before the state's constitution) and thus, the state only enjoys the powers derived from the sovereign.[18] Understood in this way, the sovereign as a constituting

12 United Nations, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Resolution 2625 (XXV), 24 October 1970.

13 Ibid.

14 Lapidoth, 1992, p. 329.

15 Ibid.

16 Volk, 2022, p. 717.

17 Belling, 2016, p. 649.

18 The Czech Constitutional Court observed this distinction already in 1993 in its seminal case concerning the lawlessness of the communist regime. In its judgment Pl. ÚS 19/93, 21 December 1993, the Constitutional Court observed that the principle of the sovereignty of the people, who are the bearers of constitutive power, means that 'Within the concept of a constitutional state, there are no longer sovereign powers, there are only competencies'.

power has unlimited and indivisible powers that cannot be delegated to any other entity. This sovereignty is by no means limited by EU membership, or by any other international organisation.

For practical purposes, however, sovereignty is associated with the state as an exclusive holder of actual powers. The notion of sovereignty thus encompasses the overall powers of the state: 'Sovereignty, strictly speaking, is a legal institution that authenticates a political order based on independent states whose governments are the principal authorities both domestically and internationally'.[19] This is the understanding of sovereignty, as it was originally crafted. We may refer to it as "practical" sovereignty, and we will discuss this issue in the rest of this Chapter, leaving aside the sovereign as a constituting power (*pouvoir constituent*).

2.2. Sovereignty Today

The traditional understanding of sovereignty based on territory, exclusivity and indivisibility, outlined above, is frequently associated with the Peace of Westphalia, symbolising the transformation of empires and statelets of the Middle Ages into modern sovereign states: 'The new sovereign state escaped from the medieval system of dispersed authority and successfully established and enforced its own centralised authority'.[20] It is by its nature "binary": 'the binary separation of internal and external, the postulation of a uniform and self-contained sovereign entity, and the search for the supreme'.[21]

Arguably, such an understanding may no longer fit the realities of today's globalised world. No state can nowadays claim an absolute power concerning all the affairs within its territory. As put forward by Ruth Lapidoth, '[s]overeignty in its classic connotation of total and indivisible state power has been eroded by modern technical and economic developments and by certain rules of modern constitutional and international law'.[22] Therefore, it might be observed that 'there is a shared sense that the conventional understanding of sovereignty as unlimited and indivisible rule by a state over a territory and the people in it is in need of serious critical scrutiny'.[23]

19 Jackson, 1999, p. 432.

20 Jackson, 1999, p. 439; In a similar vein of argument, Lake, 2007, p. 224, puts forward that 'the victors gathered at Westphalia are widely understood to have elevated secular rulers to positions of ultimate authority over other possible authorities, especially that of the universal church'. It is sometimes claimed that the traditional model of sovereignty was, indeed, only a model, that never materialised in practice. David Lake, when discussing the traditional understanding of sovereignty, talks about the "myth of Westphalia" and claims that 'the principle of sovereignty that these early thinkers developed – and which we today have largely inherited – was never meant as a description of practice nor as a foundation of a positive theory of international politics but as a normative ideal in the services of state-building'; Lake, 2007, p. 227.

21 Volk, 2022, p. 737.

22 Lapidoth, 1992, p. 345.

23 Agnew, 2005, p. 437.

The problem is specifically severe for the EU Member States, whose membership is defined precisely by surrendering part of their sovereignty. This crucial issue will be discussed in detail in Chapter 3 below, we may however start with a quote from the *Costa* ruling of the CJEU, according to which the specific characteristics of the EU law stem from the fact that 'the Member States have limited their sovereign rights'.[24] However, what does this "limitation" actually mean in practice? As famously questioned by Ole Waever: 'How does a state with two-thirds of its sovereignty look? How sovereign has the EU become? A fifth? One-quarter? Sovereignty is an indivisible quality, which a unit either enjoys or does not'.[25]

There are other examples demonstrating that the powers of a modern state are in fact limited, from the jurisdiction of the European Court of Human Rights, that is empowered to issue rulings on the claims of individuals binding on the states, to the possibility to legally use force against a state on the basis of Chapter VII of the United Nations Charter.[26]

In this connection, two questions need to be answered. Firstly, do the states exhibit the characteristics of sovereignty, as described above? I have already quoted several notable authors claiming that current European states may no longer be called sovereign in the traditional understanding of the word. I also take the view that it is hard to dispute that nowadays, no state can claim an absolute power concerning all the affairs within its territory.

Hence, the second question: are states no longer sovereign? Do we need an "updated" understanding of sovereignty, or may we abandon the concept altogether? And if we still need it, how shall we understand it?

2.3. The Relevance of Sovereignty

The importance of the concept of sovereignty is undisputed: 'The importance of the doctrine of sovereignty can hardly be overrated. It was a formidable tool in the hands of lawyers and politicians, and a decisive factor in the making of modern Europe'.[27] Still, under current discourse, the understanding of sovereignty 'oscillates – both empirically and normatively – between irrelevance and redefinition'.[28]

Some scholars propose a model not based on sovereignty at all, with a single supreme authority replaced by multiple, non-hierarchical centres:

> Can we think of a world in which our normative existence […] [is] anchored in […] a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of

24 CJEU, 1964, 6/64.
25 Waever, 1995, p. 417.
26 Charter of the United Nations, 1945, 1 UNTS XVI.
27 d'Entreves, 1970, p. 67.
28 Volk, 2022, p. 718.

> which, for most purposes, can operate without serious mutual conflict in areas of overlap?[29]

Even though appealing in theory, it is difficult to imagine the actual application of such a model; as assessed by Ondrej Hamulak, it seems 'rather like a laboratory solution with minor significance in real life'.[30]

Indeed, although sovereignty 'has lost much of its relevance, it will probably survive since it has a strong symbolic appeal'.[31] Nevertheless, apart from the "symbolic appeal", what do we actually need the concept of sovereignty for? Fundamentally, sovereignty defines the state as we understand it. It is 'that mysterious quality which a state must have in order to be a state, which is based on the institution of mutual recognition among states'.[32] It is the legal basis for the existence of states and its participation in international relations, 'the basic norm, grundnorm, upon which a society of states ultimately rests. […] [I]n a world of independent states certain norms are necessarily basic: norms of equal sovereignty, non-intervention, reciprocity, etc. That is the normative logic of the institution'.[33]

The sovereignty of states thus stands at the basis of international legal order, and I consider it to be as relevant as ever.[34] For practical purposes, the notion of sovereignty encompasses the overall powers of the state. It is however important to realise that there is no enclosed list of attributes that a state needs to possess in order to be considered sovereign:

> there is no *à priori*, timeless list of what sovereignty contains. States do not insist on certain prerogatives whose sum total equals sovereignty. Rather, they insist on sovereignty first, and on that basis collectively decide on its content. For that reason, sovereignty may be circularly defined, since states themselves define their world.[35]

In this understanding, sometimes referred to as "late sovereignty",[36] the concept of sovereignty is still relevant. It however significantly differs from its traditional understanding, because the state as a sovereign loses its exclusivity – competences within a specific territory are no longer associated only with the states, but also with

29 MacCormic, 1993, p. 76. He goes on to specify that 'it would involve a diffusion of political power centres as well as of legal authorities. It would depend on a high degree of relatively willing co-operation and relatively low degree of coercion […]'.

30 Hamuľák, 2015, p. 77.

31 Lapidoth, 1992, p. 345.

32 Waever, 1995, p. 419.

33 Jackson, 1999, p. 432. He develops this idea on p. 456, stressing that 'to date the societas of sovereign states has proved to be the only generally acceptable and practical normative basis of world politics'.

34 Waever, 1995, p. 417; current practice 'allow us to speak of post-sovereign realities. However, this does not prevent the sovereignty-based system from continuing to operate'.

35 Waever, 1995, p. 421.

36 Walker, 2002, p. 346.

other entities, serving a specific function.[37] From the external point of view, a state needs to be perceived as sovereign by other sovereign states; this remains a binary choice. Concerning the internal powers, the state no longer needs to exercise all of them; it however remains sovereign as long as it had freely decided to delegate some of its powers, and the conditions thereof. In this meaning, as a sum of powers of the state, the state sovereignty clearly is divisible,[38] and a state remains sovereign even with a significant part of its powers delegated to another entity. We can therefore conclude that a state may be understood to be sovereign even if it loses the exclusivity of powers within its territory.

Current debate concerning the question of sovereignty of a modern state, and in particular a Member State within the EU, revolves around the balance of powers of, on the one hand, the Member States, and, on the other, the EU. This is the issue of "practical" sovereignty of a Member State. In the following chapter, we will therefore discuss the details, limits and consequences of division of powers within the European Union.

3. Sovereignty and the European Union

The uniqueness of the European Union lies in its supranational character. We will therefore discuss this issue first. As the supranationality is based on the transfer of certain sovereign rights from a Member State to the EU, we will next focus on this process, including its limits and its consequences. Finally, we shall discuss what consequences the transfer of certain powers has on a state in practical terms.

3.1. The supranational character of the EU

Unlike most other international organisations, the European Union is characterised by its "supranational" character. Surprisingly, this unique characteristic was not (and still is not) enshrined in written law; instead, it was developed by the CJEU, in particular in its two seminal judgements *Van Gend en Loos* and *Costa v ENEL*, creating 'the cornerstone of an altogether new body of law'.[39]

37 Walker, 2002, p. 346. He explains that 'This is because of the emergence of polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional. That is to say, claims to ultimate legal authority are no longer limited to (state) claims to comprehensive jurisdiction over a particular territory, but now also embrace sectorally and functionally limited claims, whether such claims are also territorially limited, as in the EU, or global, as in the WTO'.

38 Lake, 2007.

39 Vauchez, 2010, p. 15.

Without going into details of these well-known cases,[40] the CJEU emphasised in *Van Gend en Loos* that the integration within the then European Communities is made unique by the Communities' "institutions endowed with sovereign rights" and therefore, EU law cannot be a typical international law; rather, it is 'a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only of Member States but also their nationals'.[41] This judgment forms the basis of the doctrine of "direct effect" of the EU law.

Even more consequentially, this thinking was developed in the *Costa v ENEL* case in order to introduce the doctrine of supremacy of EU law:

> The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.[42]

It is interesting to note that the very idea of supranationalism was from the outset criticised by notable politicians.[43] Most famously, Charles de Gaulle observed that:

> The ideas of [supranationalism] might appeal to certain minds but I entirely fail to see how they could be put into practice […]. Can we imagine France, Germany, Italy, the Netherlands, Belgium, Luxembourg being prepared on matters of importance to them in the national or international sphere, to do something that appeared wrong to them, merely because others had ordered them to do so?[44]

Whatever the criticism, however, the idea of supranationalism nevertheless managed to establish itself in the CJEU's case-law and more generally, in discourse concerning the characteristics of EU law and European integration as such. Most importantly, amounting to 'a quiet revolution in the legal orders of the Member States',[45] even the authorities of Member States adopted the doctrine and started to apply it in practice without any major complications.[46]

40 The facts of the cases are not decisive for this essay; as argued in Vauchez, 2010, p. 15; 'Van Gend en Loos soon was divested of its litigation identity and turned into a constitutive principle of EC polity. It ceased to be the mere resolution of a dispute between the transport company […] and the Dutch tax authorities, nor just an interpretation […] of the EEC Treaty. Rather, it came to represent a trail-blazing judgment founding EC law's relationship with European integration'.

41 CJEU, 26/62, 5 February 1963; emphasis added.

42 CJEU, 6/64, 15 July 1964; emphasis added.

43 De Witte, 2011, p. 350; 'the idea that EU law can claim its primacy within the national legal system on the basis of its own authority seems as implausible as Baron von Munchhausen's claim that he had lifted himself from the sand by pulling on his bootstraps'.

44 Weigall and Stirk, 1992, p. 134.

45 Weiler, 1981, p. 275.

46 De Witte, 2011, p. 196.

Many national constitutional courts, on the other hand, started to formulate theories limiting the primacy of the EU law by their respective constitutions. This may be explained by the different reference systems, employed, on the one hand, by the CJEU, and, on the other hand by national constitutional courts: whereas the CJEU 'derives primacy from the autonomy of [EU] law, […] from the viewpoint of national law primacy is justified by a specific power of constitutional law'.[47] No clear pattern has emerged yet in this regard,[48] ranging from total acceptance of the EU law's primacy, as e.g. in the Netherlands,[49] to the total primacy of national constitution, as e.g. in France.[50] Most Member States nonetheless accept the primacy of EU law with specific reservations. We will not go into details on these states, as this paper focuses on the situation of Central European Countries; specifically, we will discuss below in detail the situation in the Czech Republic as a case study.

Before that, we will return to the constitutional architecture of the EU and discuss the process of transfer of sovereign rights from Member States to the EU.

3.2. The Transfer of Sovereign Rights

The discussion on the extent of sovereignty of Member States within the EU might be obscured by differences in understanding of the term sovereignty itself, as discussed in the Chapter above. Sovereignty as the abstract power to constitute the state, the *pouvoir constituent*, is evidently indivisible and cannot be transferred. What is being transferred are the *constituted* powers of the state, which in total make the state "sovereign" *vis-à-vis* other entities of international law. In such an understanding of the notion of sovereignty, the sovereignty is divisible[51] and part of it may be transferred, if it is allowed for by the national constitution.

By all means, it might be argued with Dieter Grimm that '[e]ven a loss of sovereignty that conforms to the constitution is still a loss of sovereignty'.[52] I however take the view that this approach is not in line with how the EU actually functions. As summarised by Robert Jackson, state sovereignty is not being lost within the European Union; instead, it is being used to authorise the cooperation on supranational level:

> state sovereignty is being used to authorise certain common rules and activities in cooperation with other EU member states. Their sovereignty has not been transferred

47 Von Bogdandy and Bast, 2011, p. 84.
48 Von Bogdandy and Bast summarise it in Ibid.: 'Although in principle [the primacy of EU law] is nowadays accepted with regard to ordinary statutory law, views on the relationship between national constitutional law and Union law are controversial and inconsistent'.
49 Ibid.
50 Von Bogdandy and Bast, 2011, p. 90.
51 Lake, 2007.
52 Grimm, 2015, p. 95.

> in the permanent, non-refundable way that British sovereignty over its colonies was transferred. The EU does not involve a transfer of sovereignty.[53]

We have noted above that there is no definitive list of powers that makes a state sovereign in practical terms; thus, delegating some powers to the EU does not make the state any less sovereign as a result. This interpretation may seem at odds with the fact that the CJEU itself explicitly refers to the transfer of sovereign rights; what it actually means, however, is the fact that the Member States are delegating specific powers, traditionally associated with a sovereign state, to the EU; however, even though losing the "exclusivity" concerning some competences by delegating them to the EU, the Member States are as a result not any less sovereign than before, even though they may no longer exercise certain competences. As explained by Ole Waever,

> transfer of sovereignty' means that something that the E.U. does was the domain of states at another time. However, it is not designated by the state as an attribute of its sovereignty at the same time. […] This sovereignty is not collected anywhere, nor is the unit afterward less sovereign. Rather, the issue given away is simply no longer included in the list of issues covered by sovereignty. Sovereignty is the form, whose content changes over time.[54]

The European Union is not becoming a sovereign "instead" of its Member States, making Member States "less" sovereign and subordinate to it;[55] it is rather a division of responsibilities. Keohane and Hoffmann have argued that the European Union 'is essentially organised as a network that involves pooling and sharing of sovereignty rather than the transfer of sovereignty to a higher level'.[56] Under this interpretation, Member States do not have to, and indeed, cannot be responsible for all the activities within their territory; some competences remain with the state, and some are passed to the EU.[57]

53 Jackson, 1999, p. 453; emphasis added.

54 Waever, 1995, p. 417; emphasis added. He adds as an illustration that 'At one time, to be sovereign meant having the ability to decide the religion of one's subjects. Although this is no longer included in sovereignty, states have not become less sovereign'.

55 Waever, 1995, p. 430, summarises the situation as follows: 'the E.U. exists as an independent political voice, an independent logic acting vis-à-vis the outside world and with its own "Euro-logic" in relation to European affairs, where it is more than the sum of its members. This is what I have referred to as systemic post sovereignty. However, seen from the perspective of the states, they are still sovereign; there is no post-sovereignty at the unit level'; he concludes at p. 431 that 'This perspective enables us to analyze the curious situation where on the one hand, a post-sovereign unit, the E.U., takes on increasing importance and therefore, in a sense makes the system post-sovereign (since the system can no longer be described in sovereignty terms), while on the other hand, the states remain sovereign'.

56 Keohane and Hoffman, 1991, p. 13; emphasis added.

57 Waever, 1995, p. 422: 'The novelty lies in the fact that there is no longer a primary level. Authority and power are not generally moving toward a larger sovereign unit; the E.U. is not simply becoming

The transfer of powers to the EU is thus in principle not the question of hierarchy. The Member States exercise their powers either directly, or they delegate them to the EU, which exercises these powers instead of the Member States, or – more precisely – Member States exercise these powers on the EU level collectively. Thus, we do not have to solve the issue whether the European Union is superior to the Member States, or *vice versa*.[58]

Understood in this way, the relationship between the EU and its Member States is horizontal.[59] EU law does not have a higher legal power than national law; rather, the Member States have lost their competences in the areas transferred to the EU. Each of the legal orders (the national as well as the EU one) remain sovereign within their areas of competence.[60] National courts have to apply, in the case of a conflict, the EU law instead of the national one because the national one should not have been adopted. As summarised by the Czech Constitutional Court, any action of national authorities in areas where the competences had been transferred to the EU are *ultra vires*.[61]

At the same time, Member States are not losing control *vis-à-vis* the transferred powers: 'Legal authority is transferred to the Union as a whole but not to supranational organs as such. At the end of the day, control over the Union rests with the national governments acting collectively'.[62] In this vein of argument, the crucial advantage of delegating powers to the EU in order to exercise them together with other Member States, or "pooling" them, lies in the fact that Member States are collectively able to address issues that they would not be able to undertake individually. Again, this does not involve the issue of hierarchy – a Member State either exercise its powers individually or collectively with other Member States.

In theory, it is thus possible to reconcile the concept of state sovereignty with the EU membership, and from some point of view even to think about its strengthening, because by pooling some of its competences with other Member States, it may gain powers to solve problems too complex for a single state. Issues such as the

a territorial super-state, rather, power and authority are being disseminated'.

58 Walker, 2002, p. 346, adds another advantage of such an understanding: 'Crucially, the development of sectorally or functionally limited claims is self-reinforcing to the extent that it allows of the possibility of overlap without subsumption'.

59 MacCormick, 1993, p. 8; presents in this regard 'a view of law that allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or to some third system'; Walker, 2002; describes it as "constitutional pluralism".

60 Weiler, 2005, p. 20.

61 CCC, Pl. ÚS 50/04, 8 March 2006: 'the Government exceeded its authority; that is, it asserted its power of norm-creation in a field which […] had already been transferred to EC organs […]. [Adoption [of a national regulation] constitutes action ultra vires […], as the Government was not empowered to adopt such legal rules'.

62 Waever, 1995, p. 426; he summarises at p. 420 that 'States as the E.U. have gained to the detriment of states against the E.U'.

environment stand out as an example,[63] but common action may be significantly more effective in some "traditional" areas of cooperation, e.g. the customs union, or may be necessary for some endeavours, e.g. the monetary union.

To summarise, it is true that Member States lose the "exclusivity" of powers within their territory, and arguably, they might not be considered sovereign in the traditional understanding of that notion, as discussed above. The late sovereignty interpretation nonetheless allows for the delegation and pooling of certain powers, without the state being any less sovereign as a result.

3.3. Loss of Full Control

Notwithstanding the discussion above, it however needs to be observed that even if a Member State remains fully sovereign within the contemporary interpretation of the word, the practical position of the state *vis-à-vis* the EU changes nonetheless. The state loses its exclusivity of power; and whatever we call the process, the state is no longer individually, or exclusively empowered to decide on the affairs within its territory.

I profess that what the debate concerning "sovereignty" of Member States in the European Union is really about is the fact that ultimately, under the ordinary legislative procedure, the state loses control concerning the legislation valid in its territory,[64] as the legislation is adopted by a majority of Member States, and the state itself may be overvoted.[65]

This is not in itself a matter of sovereignty – as discussed above, the state remains sovereign even when it decides to delegate some of its powers. It is however a matter of control. Is it feasible for a modern state not to have control about the legislation in its territory? Or put more simply: does a modern state has to tolerate, and perhaps, to enforce, legislation it does not agree with? This leads us back to the question, what the delegation of specific powers to the EU actually means, and more broadly, to what extent it is realistically possible to share them and thus to "pool" the sovereignty.

To start with, this is the reality of the European Union of today. In the vast majority of quotidian issues, decisions are adopted by a qualified majority; arguably, this does not raise any legal or political concerns. Some agendas, by their very nature, should be solved on an international level, and even though such problems may in principle be

63 As summarised in Bifulco and Nato, 2020, p. 15: 'the theory of sovereignty is inadequate with respect to the environmental questions as an internal problem of the state'.

64 As summarised in Weiler, 1991, p. 2462: 'Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders'.

65 Weiler, 1991, p. 2458; describes the passage to majority voting as a key shift in equilibrium between the EU and its Member States, though interestingly, the Member States 'took this step clearly not as a dramatic political step toward a higher level of European integration in the abstract, but rather as a low-key technical necessity in realizing the "non-controversial" objectives" of EU integration'.

solved unanimously, without the "loss of control" inherent in the majority voting, the limited control is the price for effectiveness.[66] The argument of effectiveness becomes more and more persuasive with the growing number of EU Members States.

The fact that the loss of full control may be in some areas, and indeed, in many of them, a "price" worth paying for efficiency of the exercise of "pooled sovereignty", does however not mean that it can be universally applied. For this system to work, several conditions need to be met. First and foremost, Member States need to remain in power to decide in which areas they are willing to abandon their exclusivity and control; they also need to retain the power to scrutinise whether the EU exercises the powers conferred on it within the conditions and limitations of the conferral. In other words, the transfer of sovereign rights needs to be limited. And as far as the supervision of the limits is concerned, the issue of hierarchy may re-emerge.

We will return to the issue of the limits of the transfer of sovereign rights in Chapter 5. Before that, as a case study, we will first outline the jurisprudence of the Czech Constitutional Court on the issue of Czech sovereignty within the EU.

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4. Perception of Sovereignty in the Czech Republic

Discussions concerned with the question, what exactly does the transfer of sovereign rights to the EU mean, have been intense in the Czech Republic. The position was to a large extent defined by the Czech Constitutional Court (hereinafter referred to as "CCC") and thereafter broadly accepted in academic discourse.

The sovereignty of the Czech Republic is recognised in the very first provision of its Constitution; according to Article 1 (1) thereof, Czech Republic is 'a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens'.[67] As will be discussed below, the CCC concluded that this provision is not be challenged by the Czech accession to the EU and the related transfer of sovereign rights.

4.1. Constitutional Basis for the Transfer of Sovereign Powers

The Constitution was amended in 2001 in order to enable the accession of the Czech Republic to the European Union (this amendment is known as the "Euro-amendment" of the Constitution).[68] The provision of the Constitution enabling EU membership, known as the "integration clause", is contained in Article 10a, which

66 Ibid.
67 Constitution of the Czech Republic, emphasis added;
68 Ibid.

reads as follows: 'Certain powers of Czech Republic authorities may be transferred by treaty to an international organisation or institution'.

It is clear from the provision itself that although it enables the transfer of powers, it does not mention anything about the constitutional consequences of such a transfer, and in particular, nothing about the effects of EU law in the Czech legal order. This was heavily criticised and ardently discussed in the years after the Euro-amendment had been adopted; [69] the dispute was however finally settled by the CCC in its very first judgment concerning the EU law, the *Sugar Quotas III* case decided in 2006.[70]

The CCC ruled that the effects of EU law within the Czech legal order are governed by the EU law itself, without it being necessary to adopt any provision in the Constitution;[71] it would not even be possible, as the Czech Republic does not possess such powers.[72] This interpretation has been accepted by scholars[73] and has not caused any problems in practice since its adoption.[74]

4.2. Conditions for the Transfer of Sovereign Powers

It is worth mentioning that the Constitution does not mention the transfer of *sovereignty*, but rather certain *powers* of the authorities of the Czech Republic. As was discussed in Chapter 2.1 above, the sovereignty is associated with the people, who bear the constitutive power (*pouvoir constituent*);[75] this is also clear from the CCC's older jurisprudence.[76]

At the same time the CCC, right in its first EU-relevant *Sugar Quotas* judgment, described the EU as 'an international organisation to which the Czech Republic has, by virtue of its accession pursuant to Art. 10a of the Constitution of the Czech

69 Král, 2004; Kühn, 2004; Kysela, 2002; Kühn and Kysela, 2002; Kühn and Kysela, 2004; Malenovský, 2003; Malenovský, 2004; Malenovský, 2005.

70 CCC Pl. ÚS 50/04, 8 March 2006.

71 CCC Pl. ÚS 50/04, 8 March 2006: 'Article 10a of the Constitution of the Czech Republic […] operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic […]'. Thus, '[i]n contrast to international law, Community law itself determines and specifies the effects it has in the national law of the Member States'; emphasis added.

72 CCC Pl. ÚS 50/04, 8 March 2006: 'If membership in the EC brings with it a certain limitation on the powers of the national organs in favour of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to determine the effect of Community law in their national legal orders'.

73 Bříza, 2009; Komárek, 2008; Král, 2006; Malenovský, 2006; Malenovský, 2009; Maršálková, 2006; Zemánek, 2006; Zemánek, 2007.

74 Bobek, Bříza and Hubková, 2022, p. 119.

75 Belling, 2016, p. 645.

76 CCC Pl. ÚS 19/93, 21 December 1993: the Constitution is based on 'the principle of the sovereignty of the people, who are the bearers of supra-governmental power, constitutive power, while statutes are the product of an already constituted and institutionalised internal state power. Within the concept of a constitutional state, there are no longer sovereign powers, there are only competencies'; emphasis added.

Republic, transferred some portions of its state sovereignty',[77] which seems to be at odds with the traditional doctrine. According to most commentators, however, this is understood as an imprecise formulation, rather than a doctrinal shift.[78] In this interpretation, the CCC was presumably referring to sovereign powers or powers of a sovereign state, not the sovereignty itself.[79] The judgment itself supports this interpretation, distinguishing between the 'conferral of a part of […] powers [of the Czech Republic]" and the fact that "the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic'.[80]

It is however clear that the CCC itself does not distinguish consistently between the terms "sovereignty", "sovereign rights" and "powers of a sovereign", and it frequently uses them all in the same sense, as is clear from the *Lisbon I* judgment: 'It is more a linguistic question whether to describe the integration process as a "loss" of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., "lending, ceding" of part of the competence of a sovereign'.[81]

For practical purposes, this distinction is not decisive. As we have discussed in Chapter 3, what the accession to the EU actually means and what in practical discourse is referred to as the limitation of sovereignty, is in fact the loss of exclusivity of competences in the state's territory[82] and the loss of control of applicable rules within it.

In any event, the Constitution clearly allows for the transfer of certain powers to the EU and the CCC established its constitutional consequences. At the same time, the CCC formulated two limitations to the transfer of powers; firstly, the transfer needs to be limited in scope, and secondly, it is limited in time, as it is not necessarily permanent; according to the CCC, the transfer of powers is only conditional.

4.2.1. Limited Scope of the Transfer of Sovereign Rights

According to the CCC, the Constitution prohibits the "unlimited transfer of sovereignty".[83] Crucially, the Czech Republic needs to remain a sovereign state, as provided for by Article 1 (1) of the Constitution.[84] The CCC however does not go into

77 CCC Pl. ÚS 50/04, 8 March 2006.

78 Belling, 2016, p. 645.

79 This distinction is characteristic for the German constitutional doctrine and is present in the case-law of the German Constitutional Court, from which the CCC draws inspiration in its jurisprudence. See Grimm, 2015.

80 CCC Pl. ÚS 50/04, 8 March 2006.

81 CCC Pl. ÚS 19/08, 26 November 2008.

82 CCC Pl. ÚS 50/04, 8 March 2006: 'In the moment when the Treaty establishing the European Community […] became binding on the Czech Republic, a transfer was affected of those powers of national state organs which, according to EC primary law, are exercised by organs of the EC, upon those organs. […] Thus, the powers of all relevant national organs are restricted to the extent of the powers that are being exercised by EC organs, regardless of whether they are powers of norm creation or powers of individual decision-making'.

83 CCC Pl. ÚS 19/08, 26 November 2008, para. 109.

84 The CCC explains in the same paragraph that it is not possible to transfer powers, 'the transfer of which would affect Art. 1 par. 1 of the Constitution to the effect that it would no longer be possible

details concerning these limits, or more precisely, what powers need to "remain" with the Czech Republic in order to remain a sovereign state. This goes in line with the modern understanding of state sovereignty, according to which there is no precise "list" of competences of a sovereign state (see Chapter 2 above). The CCC considers this to be a matter of politics, with the court prepared to intervene only 'in a situation where the scope of discretion was clearly exceeded';[85] so far, such a situation has not arisen.

Coming back to the transfer of specific powers, the CCC added two requirements. Firstly, the powers being transferred need to be "clearly delimited", meaning that the transfer is recognisable and definitive.[86] The CCC is however rather lenient concerning the requirements on delimitation in practice,[87] which leads some commentators to question whether this requirement has any real meaning.[88] And secondly, the Czech Republic "as a sovereign state" needs to exercise "sufficient control" over the transfer of powers.[89] Similarly to the previous condition, the CCC is rather lenient here as well. According to the CCC, EU institutions, especially the CJEU, are primarily responsible for review,[90] whereas the CCC only reserves for itself the *ultima ratio* review under exceptional circumstances.[91]

At the same time, the transfer of powers is limited by the "material core" of the Constitution.[92] The "material core" of the Constitution has been extensively discussed in the academia,[93] for the purposes of this paper, however, it suffices refer to the "eternity clause", contained in Article 9 (2) of the Constitution, according to which

> any changes in the essential requirements for a democratic state governed by the rule of law are impermissible",[94] and characterisation of the Czech Republic as "a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizen in Article 1 (1) thereof.

to speak of the Czech Republic as a sovereign state. Thus, the concept of sovereignty, interpreted in the context of Art. 1 par. 1 of the Constitution and Art. 10a of the Constitution, clearly shows that there are certain limits to the transfer of sovereignty, and failure to observe them would affect both Art. 1 par. 1 and Art. 10a of the Constitution'.

85 CCC Pl. ÚS 19/08, 26 November 2008, para. 109; in this regard, the CCC directly refers to an "analogous" interpretation adopted by the Polish Constitutional Court, K 18/04, OTK ZU (2005) ser. A, nr. 5, pol. 49, 11 May 2005.

86 CCC Pl. ÚS 19/08, 26 November 2008, para. 135.

87 For example, the very general and by definition boundless "flexibility clause", contained in Article 352 SFEU, is according to CCC sufficiently delimited; CCC Pl. ÚS 19/08, 26 November 2008, para. 150.

88 Bříza, 2009, p. 204.

89 CCC Pl. ÚS 19/08, 26 November 2008, para. 135.

90 CCC Pl. ÚS 19/08, 26 November 2008, para. 138.

91 CCC Pl. ÚS 19/08, 26 November 2008, para. 139.

92 CCC Pl. ÚS 19/08, 26 November 2008, para. 110.

93 E.g. Holländer, 2005; Molek, 2014.

94 Emphasis added.

The CCC describes these two limitations as "formal" and "material":

> The formal level limits the transfer of powers by compatibility with preserving the foundations of state sovereignty of the Czech Republic. In this regard the formal level is joined with Article 1 par. 1 of the Constitution. The material level concerns the manner of exercising the transferred rights, which may not jeopardise the essence of a material law-based state; this limitation arises from Article 9 par. 2 of the Constitution, under which amending the essential requirements of a democratic state governed by the rule of law is impermissible. As the Constitutional Court emphasised, the material limits for transfer of powers are even beyond the reach of the constitutional framer itself.[95]

It is important to note that these criteria, limiting the transfer of powers to the EU, correspond with the conditions upon which the exercise of powers of the European Union is conditional in the Czech Republic, as will be discussed below. This is understandable, given the fact EU law may be applied only in areas where powers were transferred to the EU.[96]

4.2.2. Conditional Transfer of Sovereign Powers

The CCC pronounced in its *Sugar Quotas III* judgment that the transfer of sovereignty to the EU is only conditional.[97] According to the CCC, the conferral of powers is 'naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art. 1 par. 1 of the Constitution'.[98] The delegation of powers is conditional on the requirement that the EU exercises these powers in a manner, that is, firstly, 'compatible with the preservation of the foundations of state sovereignty of the Czech Republic', and secondly, which 'does not threaten the very essence of the substantive law-based state' (see above).[99] These conditions thus correspond with the limits to the transfer of sovereignty, as discussed above.

The formulation of the exemptions employed by the CCC may remind us of the *solange* jurisprudence of the German Constitutional Court, to which the CCC expressly refers in both the *Sugar Quotas III* and *Lisbon I* judgments; the Czech approach is however significantly different. Firstly, whereas the German Constitutional Court declared that it would not review individual acts of EU law as long as the EU level of protection of fundamental rights was compatible with the German

95 CCC Pl. ÚS 19/08, 26 November 2008, para. 130; emphasis added.
96 Bobek, Bříza and Hubková, 2022, p. 129.
97 Some authors have argued that because the accession to the EU was approved by a referendum without any further conditions, the transfer of powers needs to be unconditional; Tichý and Dumbrovský, 2013, p. 194; this was however a minority view and the conditionality of the transfer is broadly accepted; Belling, 2016, p. 649.
98 CCC Pl. ÚS 50/04, 8 March 2006.
99 CCC Pl. ÚS 50/04, 8 March 2006; emphasis added.

standard, the CCC is prepared to conduct individual reviews, irrespective of the situation on the EU level.[100] Secondly, and more fundamentally, whereas in the German case, the finding of incompatibility of a specific act of EU law leads to an inapplicability of that act, in case of the Czech Republic, the overall transfer of powers might be put into question.[101] If these conditions would not be met, it would be 'necessary to insist that these powers be once again taken up by the Czech Republic's state bodies'.[102]

This being said, it is important to note that these considerations are only theoretical; the CCC belongs to one of the most pro-EU constitutional courts in the EU.[103] In the only case in which the CCC decided not to apply an *ultra vires* act of EU law, it questioned the applicability of the specific act, not the delegation of powers or the EU membership in general, as will be discussed below in Chapter 4.4.

4.3. How is the Czech Sovereignty Changed?

The CCC has been the first, and in fact, the only European constitutional court, to identify with the concept of "pooled sovereignty" in its jurisprudence. Because, as discussed above, it concedes that EU membership is connected with ceding part of state's sovereignty to the EU, the CCC needed to address the issue of the sovereignty of the Czech Republic within the EU. The court based its considerations on three premises.

First, the CCC understands sovereignty as independence in international affairs and highest and exclusive power within a given territory.[104] The CCC however stresses that 'sovereignty is not an aim in and of itself';[105] thus, the actual powers of the sovereign are not decisive, it is rather what the sovereign may achieve with them. In this understanding, sovereignty is 'a means to fulfilling the […] fundamental values, on which the construction of a constitutional, law-based sate stands'.[106]

Second, the CCC concedes that in today's world, the most fundamental policy goals, including national security, cannot by realised by any state unilaterally; an international cooperation is needed, which leads to intensive integration.[107] In the CCC's view, such

100 Bobek, Bříza, and Hubková, 2022, p. 138.
101 Belling, 2016, p. 650.
102 CCC Pl. ÚS 50/04, 8 March 2006.
103 Kosař and Vyhnálek, 2018, p. 866.
104 CCC Pl. ÚS 19/08, 26 November 2008, para. 98.
105 CCC Pl. ÚS 19/08, 26 November 2008, para. 209.
106 CCC Pl. ÚS 19/08, 26 November 2008, para. 209.
107 CCC Pl. ÚS 19/08, 26 November 2008, para. 101: 'International cooperation and coordination of national policies has become an essential requirement for managing the globalisation of the world. For the first time in history, national security, which was always the core of statehood, can be effectively ensured only by sovereign states acting in concert, unifying resources, technologies, communication and information flows, power, and authority. In the globalised world the centers of power are regrouped according to factors other than simply the power and will of individual sovereign states. There is a spontaneous, undirected process of increasing intensive integration of the world's

an integration 'can ultimately lead to protection and strengthening of the sovereignty of member states vis-à-vis external, especially geopolitical and economic factors'.[108]

This is connected with the third point, that the CCC endorses the view that the traditional understanding of state sovereignty is no longer adequate to describe current international affairs.[109] Instead of trying to redefine the concept of sovereignty, the CCC tries to consider its purpose and stresses that 'sovereignty should not be understood only as a rigid legal concept'. Citing David Calleo,[110] the CCC claims that 'national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power',[111] or, more practically, that 'practical sovereignty consists in being understood as a player to whom neighbouring states listen, with whom they actively negotiate, and whose national interests are taken into consideration'.

Citing Georg Jellinek,[112] the CCC further argues that the sovereign is entitled to dispose with its sovereignty, or a part of it. Therefore, the fact that a sovereign freely decides not to exercise, or to delegate, some of its powers 'is not a sign of a sovereign's inadequacy, but of its full sovereignty'.[113] Thus, the sovereign may delegate some of its powers and still remain the sovereign.

In conclusion, the CCC endorses the concept of "pooled sovereignty" of Member States within the EU,[114] stressing that even though the EU membership is connected with limiting the State's sovereignty, it may actually lead to its strengthening.[115] The CCC adds three conditions on the actual exercise of the "pooled" powers: the powers need to be 'exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable'.[116]

countries in a single economic system. This process, with contributions from the key communication technologies of the mass media, internet, and television, subsequently influences relationships outside and inside individual states in the areas of politics, culture, social psychology and others, including the area of law'; emphasis added.

108 CCC Pl. ÚS 19/08, 26 November 2008, para. 102 ; emphasis added.

109 According to the CCC Pl. ÚS 19/08, 26 November 2008, para. 105: 'The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separate organization as classical theories assumed in the past'.

110 Calleo, 2001, p. 141.

111 CCC Pl. ÚS 19/08, 26 November 2008, para. 107.

112 The CCC refers to the Czech edition of the Allgemeine Staatslehre: Jellinek, 1906.

113 CCC in Pl. ÚS 19/08, 26 November 2008, para. 100. The CCC adds in para.104 that even though 'it may seem paradoxical', the 'key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences'.

114 CCC Pl. ÚS 19/08, 26 November 2008, para. 104.

115 CCC Pl. ÚS 19/08, 26 November 2008, para. 108: 'the transfer of certain state competences, that arises from the free will of the sovereign, […] is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the "loss" of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world'; emphasis added.

116 CCC Pl. ÚS 19/08, 26 November 2008, para. 108.

The court finally stresses that the Member States may withdraw from the EU according to Art. 50 TFEU, which 'indisputably confirms […] the continuing sovereignty of member states'.[117]

4.4. Reclaiming Czech Sovereignty

The CCC is viewed as a pro-European court[118] and requires the interpretation of Czech constitutional law in line with that of the EU.[119] This being said, the CCC has already decided to act as an *ultima ratio* defender of the Constitution.

As we have discussed above, the CCC limited the possibility of its intervention against the EU law to situations when the actions of the EU would either infringe on the "material core" of the Constitution or go beyond the powers transferred to it. Whereas in the former case, the CCC has never found a reason to intervene, it has already declared, actually as the first constitutional court in the EU, a specific act of EU law to be *ultra vires*.

We will not discuss this *Slovak pensions* case[120] here, as it has been thoroughly discussed in academic literature, even in English.[121] Even though there is no consensus on the quality of its argumentation concerning the applicability of EU law, and in particular, the fact that the CJEU had decided that the matter is within its competence, the CCC concluded that

> there were excesses on the part of a European Union body that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires;[122]

the CCC thus found the judgment of the CJEU in question inapplicable. Interestingly, the CCC has never returned to this judgment in its later case-law; conversely, it arguably returned to its pro-EU interpretation of Czech Constitution.[123]

The CCC thus still retains the (theoretical) possibility to intervene as the *ultima ratio* protector of the Constitution, it however repeats in its latest case-law that it is the CJEU who provides the binding interpretation of the EU law, including in the

117 CCC Pl. ÚS 19/08, 26 November 2008, para. 106.
118 Kosař and Vyhnálek, 2018, p. 866.
119 CCC Pl. ÚS 66/04, 3 May 2006, para.61: 'A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the Constitution, should be interpreted in conformity with the principles of European integration and cooperation between Community and Member State organs'.
120 CCC Pl. ÚS 5/12, 31 January 2012.
121 Anagnostaras, 2013; Bobek, 2014; Komárek, 2012; Pítrová, 2013; Zbíral, 2012.
122 CCC Pl. ÚS 5/12, 31 January 2012; emphasis added.
123 Bobek, Bříza, and Hubková, 2022, p. 151.

proceedings before the CCC itself,[124] and that the CCC would be itself obliged to address the CJEU with a preliminary reference in case the interpretation of the EU law was needed.[125]

4.5. Partial Conclusions

The CCC's approach to European law may well be considered a part of a "mainstream" thinking of European constitutional courts. It accepts the primacy of EU law, but not thanks to its autonomy, as the CJEU would argue, but because the Czech Constitution allowed for the transfer of certain powers to the EU.

More importantly for this paper, the CCC argues that even though the Czech Republic has transferred a significant proportion of its powers to the EU, it still remains a sovereign state. The transfer of powers however needs to be limited and their exercise on the EU level needs to remain under the supervision of national institutions. In practice, any excess on part of the EU would amount in such an act being proclaimed *ultra vires* by the CCC.

And finally, even though the powers of the Czech Republic, and in extension, its sovereignty, have been limited by EU membership, the CCC argues that the actual sovereignty, understood as the ability to perform the duties of the state for the benefit of its citizens, may actually be increased.

In the following chapter, we will discuss the conclusions of Chapter 3 in light of the jurisprudence of the CCC and propose a model for a constitutional position of a Member State within the EU.

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5. Member States in the EU

As we have discussed above, the essence of EU membership is the delegation of certain powers of Member States to the EU, where these powers are to be exercised jointly. Such a delegation does not make the Member States "less" sovereign, and the EU is not gaining sovereignty "instead" of the Member States. As a result, however, a Member State loses exclusive powers within its territory, as the competences delegated to the EU are no longer exercised by the state itself, but by the EU. This would be irreconcilable with the traditional understanding of sovereignty, it nonetheless fits with the way in which sovereignty is currently understood by most scholars.

The transfer of powers to the EU takes place on the basis of Treaties, and it needs to remain within the limits set by them. It is therefore necessary to make sure that the powers transferred to the EU are precisely delimited and exercised by the EU in

124 CCC Pl. ÚS 10/17, 3 November 2020, para. 53.
125 CCC Pl. ÚS 30/16, 7 April 2020, para. 159.

accordance with the Treaties; if not, such actions of the EU would not be covered by the Treaties and the EU would not be empowered to do them, making such actions *ultra vires*. However, who is empowered to ultimately decide the question, whether a certain act is indeed *ultra vires*? The jurisprudence of the CCC, discussed in the previous Chapter, may help to answer this question.

5.1. Delimitation of the powers

The European Union does not have its "own", original powers; it only possesses those delegated to it by the Member States; hence, the principle of conferral[126] means that only the Member States, acting in unison, may delegate competences on the EU, and that the EU does not possess any other competences than those thus conferred.[127] This requirement is very clear in the jurisprudence of the German Constitutional Court,[128] according to which the legal basis of all the EU's competences is a treaty among sovereign Member States, who, as the "Masters of the Treaties" (*Herren der Vortrage*) retain the competence to set competences (*Kompetenz-Kompetenz*); similar reasoning has been adopted by other national constitutional courts, including in the Czech Republic, as was described above, as well as other Central European constitutional courts.

The first question concerning the limits on the transfer of sovereign rights therefore is, whether the EU's competences are set in a sufficiently precise way. It is not the ambition of this paper to discuss every single competence provision, contained in the Treaties. Instead, we shall concentrate on the general provisions allowing the EU to exercise powers not expressly provided for by the Treaties, specifically the "harmonisation clause", contained in Articles 114 and 115 TFEU, and in particular the "flexibility clause", contained in Article 352 TFEU.

Starting with the flexibility clause, it allows the EU to exercise "additional" competences, not specifically provided for by the Treaties,[129] and as such, it has been criticised for giving the EU the power to create its own rules, the "self-conferral"[130] or "competence-creep".[131] It however needs to be observed that the EU itself is not

126 Art. 5 (1) of the Treaty on the European Union (hereinafter referred to as TEU).

127 According to Art. 5 (2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.

128 Everling, 1994.

129 According to Art. 352 (1) TFEU: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament'.

130 Konstadinides, 2012, p. 227.

131 Bausili, 2002.

allowed to "create" any powers; in particular, application of Article 358 TFEU needs an unanimous consensus of all the Member States within the Council. All Member States thus remain fully in control of the EU's competencies, alleviating the risk of loss of sovereignty as discussed above. In addition to that, the conditions for employing the Article 358 TFEU are highly restrictive and academic literature does not find any traces of its abuse.[132] The same applies for the harmonisation clause contained in Article 115 TFEU, where unanimity is also required.[133]

Concerning the harmonisation clause contained in Article 114 TFEU, there is a clear difference between this provision and the provisions discussed in the previous paragraph. In the case of Article 114 TFEU, the ordinary legislative procedure and thus majority voting is employed.[134] This provision is however applicable only in a relatively limited area of the internal market,[135] excluding the most sensitive topics concerning the free movement of persons and the rights and interests of employed persons,[136] for which only Article 115 TFEU may be used. Thus, in the case of Article 114 (1) TFEU, the limitation of "practical" sovereignty of Member States, as discussed in Chapter 3.3 above, cannot be excluded. The same, nonetheless, holds true for other instances of majority voting. The provisions of Article 114 TFEU are drafted in a sufficiently precise way and in themselves do not raise any major concerns regarding the delimitation of powers.

The second general question is connected to the rules, limiting the use of the EU's powers. The exercise of conferred powers is governed by three guarding principles:[137] (i) under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level;[138] (ii) under the principle of proportionality, the content and form of EU action shall not exceed what is necessary to achieve the objectives of the Treaties;[139] and (iii) the EU shall respect the equality

132 Konstadinides, 2012, p. 260, argues that 'even when resort to the flexibility clause will be taken, its application (internal or external) will not be unlimited. It follows that 'competence creep' […] is not an accurate portrayal of the result stemming from the true function of Article 352 TFEU'.

133 According to Art. 115 TFEU: 'Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure […], issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'.

134 According to Art. 114 (1) TFEU: 'Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market'.

135 TFEU, Art. 114 (1).

136 TFEU, Art. 114 (2).

137 Bifulco and Nato, 2020, p. 38.

138 TEU, Art. 5 (3).

139 TEU, Art. 5 (4).

of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.[140]

The third principle is the most controversial, as the respect for national identities was introduced only relatively recently by the Treaty of Lisbon. Its interpretation in scholarly publications varies, and its jurisprudence, both in terms of the EU and nationally, is far from settled. Given the expansion of the EU's competencies from the traditional, non-controversial ones, e.g. the internal market, to new ones, it may become decisive in the near future. Who has the ultimate jurisdiction to interpret it (as well as other competence provisions of the EU law) and to establish that the EU was acting *ultra vires*?

From the point of view of the CJEU, the answer is clear: it has 'exclusive jurisdiction to give the definitive interpretation of EU law';[141] in case of doubt, a national court, including the constitutional one, needs to make a reference for a preliminary ruling under Article 267 TFEU, but

> the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Article 267 TFEU, validly hold that the Court has delivered a judgment exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.[142]

Even though there is a strong academic support for the "unconditional supremacy" of the CJEU as the "ultimate guardian" of EU law,[143] I respectfully take the view that, due to the architecture of the division of powers between the EU and the Member States, this cannot be the correct answer; arguably, the final decision as to whether EU institutions have exceeded the powers conferred on them must stay with the Members States, as it was the Member States who decided to confer specific rights on the EU.

This seems to be the argument, adopted recently by a number of national constitutional courts in their *ultra vires* proceedings. The first one to adopt such a judgment was the Czech Constitutional Court, as was discussed in Chapter 4.4 above; even though the judgment was arguably not sufficiently reasoned and the CCC failed to make a reference for a preliminary ruling before its judgment had been passed, the CCC clearly showed with whom the ultimate supervision of the exercise of EU's powers should rest.

Other national courts followed, including the Supreme Court of Denmark in 2016[144] and the German constitutional court in 2020;[145] crucially, both these courts

140 TEU, Art. 4 (2).
141 CJEU C-430/21, 22 February 2022, para. 52.
142 Ibid, para. 72.
143 Kelemen, 2018, p. 403.
144 Madsen, Olsen and Šadl, 2017.
145 Dermine, 2020; Herzog, 2021; Wendel, 2020.

first referred a request for preliminary ruling to the CJEU, and only then, as a reaction to that ruling, delivered their *ultra vires* judgment. This may be contrasted with the practice in Central Europe, starting with the CCC, which did not address the CJEU at all, or the 2022 judgment of the Polish constitutional court.[146]

In my view, the requirement for a referral to the CJEU for a preliminary ruling before a supreme national court delivers its final judgment is vital for the *ultra vires* review from a national authority to be viewed as a "loyal opposition".[147] I put forward that even though the national authorities need to reserve this right for themselves, they must exercise it with restraint[148] and in dialogue with the CJEU.

5.2. Freedom of choice

Even though the boundaries of the EU's competences are arguably clear in principle, and the supreme national judicial authorities enjoy *ultra vires* supervision providing the EU institutions do not overstep them, the Member States need to retain the right to choose which powers and under what conditions they should be delegated to the EU.

On the first site, this requirement seems to be superfluous. A prospective Member State is free to decide whether to join the EU or not; the Treaties are known in advance. The EU cannot "create" any new competences without an explicit consent of each of the Member States, and any modifications of the Treaties are subject to unanimity voting. In short, the Member States know the rules they had agreed to follow, and they have full control over their future modifications.

I have argued in this paper that what is actually meant by the limitation of sovereignty of the Member States is their loss of full control over the exercise of delegated powers, either the impossibility to scrutinise the issue of *ultra vires* (discussed in Chapter 5.1 above) or the impossibility to influence the content of the rules, applied in its territory, due to majority voting (discussed in Chapter 3.3 above). Whilst the issue of *ultra vires* supervision seems to be settled to the benefit of national courts, the debate concerning majority voting seems to be expanding.[149]

Admittedly, majority voting enables a more efficient exercise of the powers delegated to the EU, and the connected loss of control may be viewed as a price for that efficiency. It however remains crucial that every Member State has an effective choice whether to "pay" this price. Indeed, any shift from unanimity to majority voting is subject to consensus of all the Member States;[150] but the refusal of one

146 Kiššová, 2022, pp. 43 et seq.

147 Flynn, 2021.

148 Polzin, 2022, p. 300.

149 Interestingly, the CCC did not take any serious position in this regard; it only mentions the possibility of self-limitation of the sovereignty and the obligation to follow the rules once accepted (*pacta sunt servanda*) and concludes in Pl. ÚS 19/08, 26 November 2008, para. 172, that by majority voting, 'the sovereignty of the Czech Republic [is not] reduced below an acceptable level'.

150 TFEU, Art. 48.

of them means that the others cannot proceed, which dramatically increases the political pressure on the dissenting one. A possibility to opt out however needs to remain a legitimate choice.

The "multispeed Europe" has long been discussed in theory, but it may be argued that currently, it is a reality, both economically[151] and politically.[152] It is however also necessary to accept that permanent differences in the level of involvement among the Member States may lead to inefficiencies and fragmentation.[153] I therefore contend that it is necessary to explicitly agree what is the "core" of European integration and from what policies the Member States may opt out, and under what conditions they may do so, perhaps not necessarily to completely avoid common policies but to retain the right of veto.

This means an extensive debate on the part of the Member States; without it, however, the future architecture of the EU may hardly be drawn in a satisfactory way.

6. Conclusions

I have argued in this paper that EU membership does not have a negative impact on the Member States' sovereignty, even though they cannot be understood as "sovereign" in the traditional sense of the world as they lose exclusivity of powers within their territory. The relationship between the EU and its Member States is in principle horizontal: the competences that Member States keep for themselves and the competences delegated to the EU are not hierarchical. Understood in this way, there is, in my opinion, no need to construct new theories of sovereignty or discuss its "pooling"; indeed, certain powers of the Member States are exercised collectively on an EU level, and thus "pooled". The Member States' sovereignty is however not affected.

I do not share the view that in the foreseeable future, this model will shift to an actual sovereignty of the EU. The ethos of an "ever closer Union" seems to be waning in the current political debate and no steps towards a federation are to be expected in the near future. That is not to say that that the Member States will not decide to cooperate more intensively or to delegate additional powers to the EU; even if it was the case, that the fundamentally horizontal relationship between the EU and the Member States would nonetheless not be affected.

Notwithstanding this, the issue of hierarchy comes back to the fore concerning the supervision over the exercise of the EU's powers. Despite the clear position of the CJEU, I take the view that the competence to decide whether EU institutions were

151 Califano and Gasperin, 2019.
152 Brunazzo, 2022.
153 Telle, Badulescu and Fernandes, 2022.

acting *ultra vires* needs to rest with the Member States, though this privilege should be employed in a restrained manner and in dialogue with the CJEU.

Finally, given the expansion of the EU's powers over the last decade, it would be beneficial to reassess the extent of involvement of the Member States in different policies of the EU. They should define a clear "core" of the competences the EU needs to possess in order to be effective, also including the majority voting that might be necessary in this area, policies which should remain common, where Member States should retain the right to veto, and policies that are purely "voluntary". The outcome may be very different from the situation today, and the implementation of this consensus would probably require a modification of the Treaties. Such an exercise is however necessary for the calm cohabitation of the Member States in the future.

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