

UNEQUAL EQUALS?
THE STATUS OF MEMBER STATES IN
AN INTEGRATING EUROPEAN UNION

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UNEQUAL EQUALS? THE STATUS OF MEMBER STATES IN AN INTEGRATING EUROPEAN UNION

EDITED BY
DAVID SEHNÁLEK



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LIST OF ABBREVIATIONS

AFSJ: Area of Freedom, Security and Justice
AFSJ: Area of Freedom, Security and Justice
AI: Artificial Intelligence
AML: Anti-Money Laundering
AU: African Union
BEPS: Base Erosion and Profit Shifting
CCR: Constitutional Court of Romania
CE: Constitución Española (Spanish Constitution)
CFREU: Charter of Fundamental Rights of the European Union
CFSP: Common Foreign and Security Policy
CIS: Commonwealth of Independent States
CJEU: Court of Justice of the European Union
Cost.: Costituzione della Repubblica Italiana (Italian Constitution)
CVM: Cooperation and Verification Mechanism
CUA: Customs Union Agreement between Turkey and the EU
DCFTA: Deep and Comprehensive Free Trade Area
Dublin Convention: Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities
EAW: European Arrest Warrant
EC: European Community
ECB: European Central Bank
ECHR: Convention for the Protection of Human Rights and Fundamental Freedoms
ECI: European Citizens' Initiative
ECSC: European Coal and Steel Community
ECtHR: European Court of Human Rights
EEA: European Economic Area
EEC: European Economic Community
EFTA: European Free Trade Association
EIO: European Investigation Order
EPO: European Protection Order
EPPO: European Public Prosecutor's Office
EPRS: European Parliamentary Research Service
EU: European Union
EURATOM: European Atomic Energy Community
GA: General Assembly (of the United Nations)
GDPR: Regulation (EU) 2016/679 (General Data Protection Regulation)
GloBE: Global Anti-Base Erosion Rules (OECD Pillar Two)
ICJ: International Court of Justice
MERCOSUR: Mercado Común del Sur (Southern Common Market)
MS: Member State(s)

NATO: North Atlantic Treaty Organization
OAU: Organisation of African Unity
OECD: Organisation for Economic Co-operation and Development
OJ: Official Journal of the European Union
OLAF: European Anti-Fraud Office
OMT: Outright Monetary Transactions
P5: Permanent Five (members of the United Nations Security Council)
PBCAI: Policies on Border Checks, Asylum, and Immigration
PSPP: Public Sector Asset Purchase Programme
SAARC: South Asian Association for Regional Cooperation
SC (UNSC): United Nations Security Council
SEA: Single European Act
TCA: Trade and Cooperation Agreement (EU–UK)
TEC: Treaty establishing the European Community
TEU: Treaty on European Union
TFEU: Treaty on the Functioning of the European Union
UN: United Nations
UNASUR: Union of South American Nations
UPC: Unified Patent Court
VAT: Value Added Tax
WTO: World Trade Organization
WWII: World War II

INTRODUCTION AND RESEARCH FRAMEWORK



DAVID SEHNÁLEK

1. Context and Definition of the Research Problem

The European Union is a unique international organisation whose internal structure differs significantly from the traditional Westphalian model of state sovereignty. Under this institutional arrangement, the European Union operates as a functionally supranational entity, while its Member States retain their status as sovereign subjects of public international law – a coexistence that is never fully reconciled. This tension is most evident in the judicial sphere, where the European Union's claim to hierarchical primacy is both institutionally weakest and most contested.

The relationship between the courts of the European Union and the supreme, particularly constitutional, courts of the Member States is not clearly defined by EU primary law. Instead, it is shaped by institutional logic and overlapping claims to ultimate authority in interpreting law. Under EU law, and according to Art. 19 TEU, the Court of Justice of the European Union is considered the final authority on EU law, a position it has consistently upheld in its case law. However, from the perspective of national constitutional law, constitutional courts assert an equally valid claim to protect constitutional identity and to determine the limits of power transferred to the European Union.

The founding Treaties leave the relationship between EU law and national constitutional law unregulated, and interpretative conflicts inevitably follow. The Treaties are silent on this issue, and judicial practice varies depending on whether the CJEU or national courts address a matter. Nevertheless, the underlying functional logic is clear: a common and supranational polity can function effectively only if it acts as a

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unified legal order. At first glance, this reasoning appears to support the European Union and, by extension, the authority of the CJEU.

Such a conclusion would be overly simplistic. The relationship between the European Union and its Member States is not unilateral; it is based on mutual interdependence and the principle of loyal cooperation. Within this framework, the European Union does not exercise absolute authority over its Member States. Instead, the relationship is an asymmetrical and variable model of shared public power, where the balance between autonomy and integration depends on the policy area and the relevant institutional context.

The Preamble to the Treaty on European Union expresses the Member States' intention to 'continue the process of creating an ever closer union among the peoples of Europe'. This wording is significant because it defines a process without specifying a final goal. European integration is presented as a desired and expected path, but neither the ultimate scope of this process nor the institutional form of a 'final' European Union is clearly defined. In practice, the Union's development has depended on what is politically feasible at any given time. There is no fixed ideal model for integration; instead, the idea of an ever closer union functions as a dynamic and open-ended concept, shaped by current political conditions within the Member States.

'More Europe' can therefore be seen as the practical expression of the ambition stated in the Preamble to the TEU. It is often used in response to global challenges facing the European Union, based on the belief that European states and peoples are better able to address these challenges together than alone. From this perspective, only joint action allows for an effective response to economic pressures, climate change, external security threats, and technological developments, including those related to information and communication technologies.

'More Europe' is often linked to restrictions on Member State sovereignty and a corresponding decrease in the influence of national governments, parliaments, and, indirectly, citizens. These changes benefit centralised EU institutions, whose structures were designed in a historical context that differs significantly from current integration efforts. While these institutions were originally intended to support supranational cooperation mainly in economic areas, they may not be fully prepared to address the wider and more intrusive goals associated with deeper political and regulatory integration.

The Preamble to the TEU explicitly mentions equality, prompting the question of whether it refers only to the equality of citizens, as expressed in the revolutionary maxim '*liberté, égalité, fraternité*', or whether it also includes the equality of states. This also leads to consideration of whether such equality aligns with the nature of a supranational organisation. The Preamble's simultaneous reference to solidarity and respect for the history, culture, and traditions of Member States indicates that equality may be recognised as a value. However, whether it can also be achieved in practical and institutional terms remains uncertain.

The Preamble also calls for strengthening the democratic nature and effective functioning of the Union's institutions, so they can better carry out their

responsibilities within a unified institutional framework. This creates another interpretative issue: does this aim require expanding institutional powers that operate independently of Member State participation, possibly replacing national authorities, or is it limited to the internal structure of the Union and the adjustment of relationships among its institutions?

Given this context, the need to continue building an ever closer union among the peoples of Europe requires renewed examination, both in theory and in relation to current circumstances. Although all Member States have a shared interest in cooperation within the European Union, there is ongoing disagreement about the preferred methods of cooperation (intergovernmental or supranational) and the policy areas in which cooperation should take place. There are also questions about whether the Union's current institutional structure remains adequate. The challenge of balancing democratic governance at the EU level, the equal status of Member States, and effective decision-making within EU institutions has therefore become more prominent.

The main question this monograph addresses is whether European integration can be further advanced while maintaining the equality of Member States, and, if so, under which legal and institutional conditions. While cooperation within the European Union is widely regarded as desirable, the more complex issue is how this cooperation should be organised. Specifically, although it is generally accepted that decision-making authority lies with the European Union as a supranational organisation, it remains disputed whether the Union should always have the final say, including on matters of fundamental importance to its Member States.

Another related question arises from recent developments in the integration process. At a stage marked, among other things, by a move from harmonisation to unification and by the strengthening of supranational features, it is necessary to consider whether the principle of equality among Member States remains viable. If it does not, it is important to identify the mechanisms that legitimise such inequality and, where possible, compensate for it.

2. Methodology

This monograph primarily uses doctrinal legal analysis, which informs all chapters. The analysis relies on primary sources, especially the Treaty on European Union and the Treaty on the Functioning of the European Union. The focus is on interpreting the Treaties' competence provisions using linguistic and systematic methods. The work places particular emphasis on purposive interpretation, which has been significant in CJEU case law, especially regarding Art. 114 TFEU, where the Court has consistently adopted a broad interpretative approach.

The monograph does not use empirical research methods directly. Instead, it reflects on practice in two ways. First, it provides detailed analysis of CJEU case law and the decisions of supreme and constitutional courts of Member States. Because EU primary law remains largely indeterminate on several foundational issues, judicial interpretation has shaped the relationship between EU law and national law to a considerable degree. The same applies to constitutional law at the national level. The absence of empirical methods is further balanced by institutional and contextual analysis of how the European Union and its institutions function in practice. This approach considers not only the formal requirements of EU law, but also the practical operation of EU institutions, especially where they have discretion.

Case law is analysed as an evolving body, recognising that legal doctrine changes over time. Both the CJEU and national constitutional courts contribute to this development through judicial dialogue.

An evolutionary analysis of case law alone is insufficient. It is necessary to examine in parallel the argumentative patterns used by the CJEU and the supreme courts of the Member States. The analysis of case law is therefore complemented by comparative approaches, which help identify and explain points of friction between EU law and national constitutional law. This approach also allows an assessment of whether the relationship between the CJEU and national supreme courts is mainly competitive (characterised by efforts to maximise institutional authority) or cooperative (marked by a minimalist and dialogical approach focused on protecting fundamental values).

The comparative method is used in two ways. First, a diachronic comparison examines different phases of European integration to identify trends in the evolution of state sovereignty and its limitations. This analysis focuses on changes in decision-making procedures, such as the move from unanimity to qualified majority voting, the shift from intergovernmental decision-making to supranational governance, and examples of replacing directives with regulations, which reduces the scope for national differentiation.

Second, the comparative method is applied synchronically, comparing the position of EU Member States with that of states in other international organisations or, in some respects, federal systems. This raises the question of whether similar integration objectives could be achieved through alternative institutional arrangements. The significance of this approach lies in its ability to assess the role of state sovereignty in enabling or limiting the achievement of integration goals.

A comprehensive analysis of all areas of EU integration exceeds the feasible scope of this monograph. However, the inquiry cannot remain abstract or purely theoretical. It is necessary to examine specific examples of EU powers in selected policy areas and assess their implications for Member State sovereignty. Accordingly, the monograph includes sectoral studies and crisis-related analyses, considering how the European Union addresses new challenges and manages crises in its relations with Member States.

The monograph also aims to go beyond a descriptive account of current arrangements. By synthesising findings, it seeks to identify causal relationships between developments in EU primary law and their effects on Member State sovereignty, as well as to clarify the structure and hierarchy of the resulting legal and institutional relationships. The main objective is to provide a methodologically grounded critical assessment of the sustainability and future prospects of the current model of European integration, along with an evaluation of plausible alternatives.

3. Research Claims

This monograph examines the validity of several claims. First, absolute sovereignty does not exist in practice, even within public international law. Although legal frameworks define relations between states, factual considerations are equally important. Interstate cooperation generally requires a rational and pragmatic approach, which, in the context of the European Union, often becomes transactional. Sovereignty can therefore be seen as a negotiable resource that Member States exchange for economic benefits, such as market access, increased efficiency, greater influence internationally, and collective security.

Second, the European Union systematically uses its supranational position and the open-textured nature of the founding Treaties to expand its competences, including into areas not explicitly conferred upon it and arguably not intended to be. This practice strains the principle of conferral and creates tensions with national constitutional orders.

Third, the formal equality of Member States does not result in factual equality. Material disparities favour larger and original Member States, not only in decision-making but also in institutional expectations, standards of compliance with Union values, and the economic capacity to adapt to regulatory frameworks driven by unification.

Fourth, rational alternatives to the prevailing model of European integration face legal and political constraints, limiting their practical viability. A unified and largely undifferentiated supranational approach is widely seen as necessary for the European Union to function effectively. From this perspective, unification appears legitimate, while alternative models are often viewed as undermining the Union's coherence and legitimacy. However, this monograph critically assesses whether this assumption holds in all policy areas and considers whether, in fields such as tax law or criminal law, maintaining regulatory diversity and competition between legal systems may offer a more legitimate and effective approach.

4. Structure of the Monograph

The monograph is structured to address the identified issues systematically and coherently. It is organised into thematic parts that move from general theoretical foundations to specific sectoral analyses.

The first part places the inquiry within the broader context of public international law by examining the concept of state sovereignty and its historical development. Sovereignty is presented as a dynamic concept that has changed significantly over time. The analysis begins with the core assumption of public international law that states are formally equal. This part assesses whether this assumption is valid not only legally but also factually, considering differences in power and influence. It also examines how sovereignty has changed in relation to supranationality, focusing on the effects of shared sovereignty on the equality of Member States. Special attention is given to the constitutional foundations of these changes, including the relationship between EU law and national constitutional identity, and whether this relationship should be seen as hierarchical or heterarchical.

The second part addresses institutional practice by analysing how sovereignty and equality appear in the functioning of EU institutions. Equality is considered from two perspectives: representation of Member States within EU institutions, and equality of Member States before those institutions. The relationship between these two aspects is explored, as well as the extent to which unequal representation, whether legal or factual, may result in unequal treatment. This part also considers whether limiting direct Member State influence in favour of independent supranational institutions can improve equality among Member States, and whether increasing politicisation within institutions such as the European Commission may undermine this equality.

The third part examines mechanisms of differentiation within the European Union, mapping exemptions, transitional arrangements, and forms of enhanced co-operation, and assessing their effects on equality. Differentiation can paradoxically help maintain overall unity while allowing integration to advance. A Member State's choice not to join certain integration projects may itself represent an expression of equality. The analysis also considers forms of cooperation outside the scope of EU law that still use EU institutions and structures.

The fourth and fifth parts offer a practical analysis of sovereignty and equality in selected policy areas. Due to the monograph's scope, it does not attempt to cover all EU policies. Instead, the analysis focuses on traditional areas of tension linked to state sovereignty, such as judicial cooperation, recognition and enforcement of judgments, and the development of supranational enforcement bodies, including the European Public Prosecutor's Office (EPPO), in both civil and criminal contexts. The fourth part also presents a case study in tax law, where Member States have largely maintained their sovereign powers through unanimity-based decision-making. The fifth part extends this analysis to new regulatory fields that increasingly rely on unification, such as information and communication technologies (especially the

regulation of artificial intelligence) and data protection (the transition to the GDPR). It considers whether these developments indicate a systematic expansion of EU powers through secondary legislation.

The sixth part examines possible alternatives to the current model of integration. It assesses forms of participation in European integration without full EU membership, such as the European Economic Area, and considers alternative models that could inspire reform within the Union. Inspiration may come from other international organisations or federal systems, recognising that the Member States remain the ‘masters of the Treaties’.

This monograph aims to analyse the process of European integration critically and impartially. Its approach is not idealistic, but is based on legal doctrine and realism. It recognises that legal structures function alongside political dynamics shaped by ongoing negotiation among Member States, who often have divergent economic and political interests. These dynamics interact with the actions of supranational actors, who may interpret their mandates broadly to pursue common objectives, sometimes reducing Member State sovereignty and equality, and occasionally with the support of Member States that benefit from these changes. The monograph does not seek to criticise the European Union indiscriminately, but to analyse the limits of legitimate integration, identify mechanisms of competence expansion, and consider how to maintain a meaningful balance between efficiency, democracy, and equality among Member States. Ultimately, the work focuses on the search for mutual respect and equilibrium as essential conditions for the continued success of this voluntary integration project among sovereign states.

PART I

THE THEORETICAL
FRAMEWORK – DIVERSE,
YET EQUAL

CHAPTER 1

SOVEREIGN AND EQUAL, UNCONDITIONALLY? THE PRINCIPLE OF SOVEREIGN EQUALITY IN INTERNATIONAL LAW



KATARÍNA ŠMIGOVÁ

Abstract

According to the principle of sovereign equality, a cornerstone of international law, all states hold equal legal status and rights irrespective of their status. However, in the context of international organisations, this principle might encounter practical limitations owing to structural hierarchies and power asymmetries. This chapter examines how sovereign equality applies within the United Nations (UN), and to a lesser extent, the European Union (EU). The analysis begins with a historical and theoretical exploration of sovereign equality, tracing its foundation in the Westphalian system and being verbalised legally within the UN framework. Particular attention is given to the Security Council's veto power, emphasising the status of the UN Charter as an international treaty that has been adopted by all UN member states. Furthermore, the study explores the broader implications of globalisation and the relationship between states and international organisations, assessing how these developments reshape the relationship between these complementary international actors.

Keywords: sovereignty, equality, international law, international organisation, member states

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1. Introduction

The principle of sovereign equality, a foundational concept in international law, states that all states possess equal legal standing and rights, regardless of their size, power, or wealth. This chapter aims to critically analyse how this fundamental principle of international law manifests and encounters limitations within the current functioning of international organisations, with a particular focus on the United Nations (UN) and to some basic extent within the European Union (EU), since this international organisation is the focus of the following chapters.

In the Westphalian framework of inter-state relations, sovereignty has two dimensions: internal sovereignty, in which a state exercises exclusive authority over its territory and population, and external sovereignty, in which a state functions autonomously from external powers.¹ However, as globalisation and supranational governance evolve, the traditional view of sovereignty has been questioned, especially within international organisations where the practical application of sovereign equality is frequently limited by power asymmetries and challenged by different hierarchies.²

This chapter explores the ways in which globalisation and supranational governance have reshaped the understanding of sovereignty in international law. Questions arise as to whether States are genuinely sovereign and equal in today's international system, particularly in terms of how power dynamics and institutional frameworks shape interactions within bodies such as the UN and the EU. Despite the theoretical basis and background of sovereign equality, practical realities offer significant disparities in influence and decision-making power between states. The UN, an organisation founded to promote peace and cooperation, expressly sets forth sovereign equality in its establishment charter; however, the veto power of the Security Council's permanent members is considered to express a certain departure from this principle or its challenging manifestation. Similarly, the EU's decision-making processes, while striving for equality among Member States, frequently struggle to balance national sovereignty and collective interests within the promotion of loyal cooperation. Therefore, this chapter aims at the principle of sovereign equality from a historical and foundational perspective. It then proceeds to a subchapter focusing on its legal basis in the UN framework and its application within selected UN operations. Finally, it explores the principle from the perspective of the establishment of international organisations and examines the relationship between an international organisation and its Member States, considering their common goals, if specified and specifiable.

1 Anand, 1986, p. 22.

2 Köchler, 2013, pp. 427–444; upon legal equality and principle of non-discrimination see e.g. Casolari, 2017, p. 83.

2. Conceptual Foundations of Sovereign Equality and Its Limitations

The principle of sovereign equality means that by virtue of their sovereignty, all states are legally equal according to the international legal system. This notion, derived from natural law and social contract theory, was conceptualised in early modern political thought, particularly in the works of philosophers Hobbes, Locke, and Rousseau, who posited that states, such as individuals, retain inherent rights within a political society.³ In the international arena, this leads to the idea that states, regardless of differences in power, must respect each other's sovereignty and independence because of *pari parem non habet imperium* principle (equals have no sovereignty over each other).⁴

Sovereign equality allows states with different values and political systems to coexist without any hierarchical interference.⁵ As has already been pointed out, the consequence is present on two faces of sovereign equality: internally, it means a state's absolute authority within its territory, and externally, it denotes independence from external control.⁶ These two aspects of sovereignty create tension between equality and autonomy, which has been part of classical international law since the Treaty of Westphalia,⁷ or even before.⁸ This phase of the development of international law completed the process of creating states that had since become independent from the ecclesiastical state and the emperor.⁹ Having already started in 1555 with the Augsburg Peace with the principle *cuius regio, eius religio*, independent states came to the forefront. The primary feature of an emerging system is the coexistence of equally independent states. The state, defined by fixed borders and represented by noble families, asserted its legitimacy during this period; it no longer needed an emperor or the coronation of a pope. At this stage of its development, Europe was divided into territorially delimited units which presented themselves as sovereigns and equals.¹⁰

The beginning of the Westphalian period can be regarded as a phase in the development and emergence of sovereign equality in the state. The subsequent phase of the development, transformation, and confirmation of sovereignty can be observed in the decolonisation period of the 20th century, when new independent states were

3 Hobbes, 1660; Locke, 1690; Rousseau, 1762.

4 Higgins, 1994, p. 79.

5 Roth, 2011, p. 67.

6 Köchler, 2020, pp. 875–885.

7 Greenwood, 2013, p. 267.

8 Osiander, 2001, pp. 251–287.

9 For more information see Britannica, 2025. The biggest difference lies in the sole fact that the Treaty of Westphalia was ratified not only by the Emperor and the King but by all the states of the Empire. See the Treaty of Westphalia, see: Yale Law School, no date.

10 Klučka, 2004, pp. 12–16.

formed.¹¹ Moreover, after the Second World War, an organisation, one of the guiding principles of which is the principle of sovereign equality of all its members, was established, namely the UN.¹² It was adopted that both states and the organisation itself should act in accordance with this principle.¹³ In this phase, the existence of a system of individual sovereign states was confirmed, and state sovereignty was understood as one of the cornerstones of international law and international relations from which other rules of general international law could be derived, such as the principle of non-interference in the internal affairs of the state.¹⁴

The notion of sovereignty is closely related to the notion of mutual equality, namely, equality under law. It is the basic rule of law between nations, *ius inter gentes*, law inter nations, that is, inter-national law.¹⁵ Nevertheless, although there is no 'hierarchically supreme power' to force states to fulfil their obligations, states do not live in a vacuum: their sovereignty has its limits.¹⁶ Without sovereignty, the international community struggles to cooperate and coexist. In this context, it is important to note that the role of sovereignty in state cooperation can be viewed from two distinct perspectives. On the one hand, sovereignty is often perceived as a major obstacle that limits the potential for collaboration between states. On the other hand, sovereignty is also the most crucial expression of a state's authority and independence, making it essential for genuine and meaningful cooperation between states. Sovereignty, therefore, not only defines the limits of state interaction but also empowers states to engage in cooperative efforts on an equal footing, preserving their autonomy while pursuing shared goals.¹⁷

Since its establishment, the Westphalian system of international relations has undergone numerous stages of transformation.¹⁸ Similarly, general international law has evolved significantly over the centuries, adapting to the changing dynamics of global interactions. Recently, the undeniable influence of globalisation has further shaped this evolution. What was once perceived as the autonomy and independence of sovereign states from ecclesiastical states has gradually changed into a more complex and nuanced concept of asymmetric interdependence, which has become

11 Stacy, 2003, pp. 2029–2060.

12 Art. 2, para. 1 of the UN Charter: The organisation is based on the principle of the sovereignty equality of all its members.

13 The above also applies to non-members of the United Nations insofar as it is necessary for the maintenance of international peace and security. See Art. 2, para. 6 of the UN Charter: The organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

14 Art. 2, para. 7 of the UN Charter: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

15 Brownlie, 2003, p. 287.

16 Čepelka and Šturma, 2003, p. 12. Also Podgor, 2004, p. 3.

17 Schreuer, 2002, pp. 163–180.

18 For another understanding of the Westphalian system redefinition see e. g. ȚuȚuianu, 2013, p. 43.

an implied feature of the current coexistence of states.¹⁹ This modern understanding acknowledges that while states remain sovereign, their ability to act independently is limited by other sovereigns and increasingly influenced by global factors such as economic, political, and social considerations. This does not mean that the sovereignty of states has ceased to exist; it has only developed and, consequently, the understanding of this concept has been reshaped and even transformed. This change highlights the interconnectedness of states in which sovereignty coexists with more intense mutual dependence in a globalised world. The consequence of this transformation is not merely a desire, but also a growing necessity for states to cooperate on multiple levels and with varying degrees of intensity. In recent years, the scope and focus of the international arena has shifted significantly.

The classical understanding of international law has been redefined particularly in relation to the emerging concept that the international community is a collective entity and a common good. While states continue to hold their status as the primary actors in international law, particularly in areas such as security, the role of sovereignty has evolved. The era in which sovereignty served as the overarching, unifying principle for governance of the global system has been considered to come to an end.²⁰ Instead, the international order requires more nuanced forms of collaboration and shared governance that reflect the complexities of an interconnected world. States and the international community face challenges that create the conditions for another phase in the evolution of the concept of sovereignty.²¹ Within this framework, sovereignty can be seen as a responsibility and organising principle for the realisation of universal norms and values, such as the protection of fundamental human rights or the safeguarding of peace and security, which are also related to holding perpetrators of the most serious crimes criminally accountable under international law.²²

3. Sovereign Equality as a Set of Both Rights and Responsibilities

In the theory of international law, sovereign equality is based on the idea of legal positivism and the formal equality of states within the international legal system. The normative force of sovereign equality rests on the assertion that all States, as primary subjects of international law, share equal rights and responsibilities.²³

19 Koskeniemi, 2005, pp. 212, 234, 477, 482–483.

20 Clapham, 1999, p. 115.

21 Stacy, 2003, p. 2035.

22 Schrijver, 2000, pp. 95–98.

23 Koskeniemi, 2005, pp. 240, 583.

Within international law, this equality is not simply a political ideal but a legal mandate; States are considered equal in everyday work in the areas of diplomatic negotiations, treaty-making processes, and dispute resolution activities. However, the responsibility of states is usually omitted, and as will be pointed out, *realpolitik* might instead be the focus. Nevertheless, although the principle of sovereign equality of states remains fundamental in international law and is usually emphasised by the rights of a sovereign state, it also entails State responsibility, which ensures that sovereign equality is not abused to avoid accountability. It is a consequence of the fact that sovereign equality is not absolute; it is balanced by the duty of states to uphold international norms and avoid harm to other states.²⁴ In general, state responsibility arises from the dual nature of sovereignty, as it involves both rights and obligations towards each other. It is true that states are equal under international law; however, their sovereignty is particularly constrained by the principle of non-intervention and the prohibition of the use of force, norms that they have adopted themselves.²⁵ The concept of equality in State responsibility is interlinked with the idea that all States, regardless of their size or power, must adhere to international norms and fulfil their obligations. This principle has also been upheld by the International Court of Justice within its case-law, drawing attention to the fact that it counts regardless of the status of states as ‘great powers’ or ‘small states’.²⁶ Some authors have clearly pointed out that sovereign equality does not shield States from responsibility for international wrongdoing, especially when such actions violate human rights or threaten global peace. In contrast, sovereignty is a moral and legal responsibility, rather than a licence for impunity.²⁷

Moreover, international law recognises the collective responsibility of states to address violations of international obligations, as reflected in the UN Charter and subsequently codified specifically in the arts. *Responsibility of States for Internationally Wrongful Acts*.²⁸ The principle of sovereign equality is the basis of this collective action, ensuring that all States have an equal voice in determining their responses to breaches of peace and security.²⁹

In the everyday application of international law, the historical evolution of sovereign equality reveals the tension between formal and practical inequalities in state responsibility. It has already been presented that powerful states often avoid responsibility while as if creating a hierarchical international order that is in the contradiction with the principle of legal equality.³⁰ Nevertheless, the Friendly Rela-

24 Koskeniemi and Kari, 2020, p. 168.

25 Compare Köchler, 2020, pp. 875–885.

26 Greenwood, 2013, pp. 254–255.

27 Roth, 2011, p. 115.

28 International Law Commission, *Draft Arts. on Responsibility of States for Internationally Wrongful Acts*, Supplement No. 10 (A/56/10), chp. IV.E.1, November 2001, Arts. 40–41 covering obligations in case of breach of peremptory norms.

29 Simma et al., 2002, p. 12.

30 Upon tolerated inequalities see e.g. Simpson, 2004, p. 56.

tions Declaration of 1970³¹ reinforced the balance between sovereign equality and responsibility by affirming that States must respect the sovereignty of others while fulfilling their international obligations.³²

However, sovereign equality in international law is conditional on states' adherence to international norms. When States violate these norms, they lose their claims to certain aspects of sovereignty, such as immunity from sanctions or interventions.³³ Furthermore, it is important to emphasise the role of international jurisprudence in holding states accountable for their actions. Sovereign equality ensures that even the most powerful states are subject to the same legal standards as smaller or less-influential states.³⁴ Moreover, as already mentioned, equality without sovereignty is meaningless if States are not held accountable for actions that undermine international legal orders.³⁵

Several examples of the application of international law show how state responsibility strengthens the principles of sovereign equality. For example, in the context of international trade, state responsibility ensures fairness by preventing discriminatory practices, thereby reinforcing sovereign equality in economic relationships.³⁶ State responsibility also plays a role in enforcing international criminal law. It might be assumed that sovereignty is limited by the duty of states to prosecute crimes under international law and cooperate with international tribunals.³⁷ Finally, it has been pointed out that sovereign equality does not exempt states from liability for wrongful acts. Instead, it reinforces the principle that all States are equally subject to international legal mechanisms for dispute resolution.³⁸ Overall, the acknowledgement of State responsibility strengthens the international legal system by promoting accountability and deterring violations of international law. It has been argued that this mechanism creates a balance between political equality and legal hierarchies, ensuring that sovereignty is exercised responsibly.³⁹

31 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations adopted by General Assembly resolution 2625 (XXV) of 24 October 1970.

32 Koskeniemi and Kari, 2020, p. 166.

33 Anand, 1986, p. 44.

34 Köchler, 2020, pp. 875–885; more particularly see Simpson, 2004, p. 43.

35 Hjorth, 2014, pp. 109–124.

36 Petersmann, 2014, p. 214.

37 Cassese, 2002, p. 245.

38 Jennings and Watts, 1992, p. 155.

39 Viola, 2020, p. 163.

4. Legal and/or Functional Sovereign Equality

To discuss this controversy when discussing the equality of states while considering the different features of individual states, one might argue that the principle of sovereign equality is considered the only theory because of the *realpolitik* of international relations.⁴⁰ Powered states, often through their economic, military, or political influence, exercise dominance over weaker states, challenging their understanding of the concept of equal sovereignty. However, these power dynamics only help us understand the relationship between legal equality and the factual position of states in international affairs, realising both the rights and obligations of states as actors at the international level.

Globalisation, regional integration, and the rise of supranational organisations have questioned the concept of sovereignty, challenging the principle of sovereign equality according to law. It has already been presented that international institutions create hierarchies within a system that is based on equality of its members. Furthermore, some scholars have discussed the term ‘outlaw states’ and how great powers impose norms and sanctions that effectively create different standards for different states, thus undermining the universality of sovereign equality.⁴¹ This differentiation is evident in situations where international norms and interventions are selectively enforced and influenced by political and economic interests.⁴² On the other hand, within the development of the international law there have been efforts of a civil society accepted that e. g. an original UN based mechanism of human rights protection system control was improved from a selective approach towards ‘outlaw states’ in front of the Commission of Human Rights to an inclusive approach involving an universal periodical review ensuring that all states and their national human rights protection system are periodically under review in front of the Human Rights Council.⁴³

Moreover, the principle of sovereign equality might be analysed also *vis-à-vis* the principle of non-discrimination in international law and the related tension between equality and sovereignty themselves.⁴⁴ The principle of non-discrimination mandates that no distinction is made between states or individuals on arbitrary grounds for the sphere of this chapter, particularly in matters of international trade, human rights, or, classically, international peace and security. Tension might be detected between sovereign equality and non-discrimination when states claim sovereign prerogatives to adopt policies that differentiate and are based on national interests, potentially conflicting with universal norms that promote equality. For example, in the context of international economic law, preferential trade agreements challenge

40 Köchler, 2020, pp. 875–885; Simpson, 2004, p. 56.

41 Compare e. g. Simpson, 2004, pp. 3–22.

42 Ibid., p. 58.

43 For more information see: United Nations Human Rights Council, no date.

44 For more information see Risvas, 2017, pp. 79–112.

the uniform application of non-discrimination principles while being justified under sovereignty.⁴⁵ The balance between equality and sovereignty requires careful consideration, recognising that equality in international law does not negate state sovereignty but seeks to harmonise it with universal fairness, justice, and equity.⁴⁶ Some scholars, therefore, argue that functional equality – that is, equality within which states have differentiated responsibilities based on capabilities – can reconcile tensions by respecting both principles.⁴⁷ Ultimately, the relationship between sovereign equality and non-discrimination reflects the broader struggle between state-centric sovereignty and the increasing universality of international norms, which requires continuous dialogue and a restless process of legal refinement.⁴⁸

In conclusion, it is also important to point out that while states are expected to respect each other's sovereignty, international norms on, for example, human rights protection or the use of force prohibition sometimes challenge their understanding. Thus, sovereign equality is realised within a framework of interdependence where international norms increasingly influence domestic policies and limit state autonomy.⁴⁹ However, as the Permanent Court of International Justice (PCIJ) pointed out in its decision in the Wimbledon case, state sovereignty includes the capacity to enter international treaties and be bound by them. In this case, it was held that by signing the Treaty of Versailles, Germany voluntarily agreed to certain limitations on the realisation of its sovereignty, including the obligation to allow passage through the Kiel Canal. The PCIJ emphasised that sovereignty does not imply unlimited freedom from international commitments; rather, it includes the power, and especially the authority, to undertake international obligations and respect them.⁵⁰ Moreover, the Wimbledon case illustrates that a state's sovereign decision to adopt an international treaty carries the responsibility to comply with the treaty's terms, even if doing so conflicts with the state's changed interests or policies. The PCIJ ruling demonstrated that sovereignty, while foundational, is not absolute and must coexist with the principles of international law, such as the principle of *pacta sunt servanda*. The Wimbledon case underscores the dual nature of sovereignty: the right to govern independently and the responsibility to stand for international commitments. This highlights the evolving nature of sovereignty in an interconnected world in which states' actions are increasingly governed by international legal frameworks. This case is considered a critical reference point for understanding how international treaties can shape and limit state actions, which is especially important when discussing the

45 Petersmann, 2014, p. 214.

46 Koskeniemi, 2005, p. 258.

47 Fassbender, 2012, para. 63.

48 Besson, 2011, para. 115.

49 Köchler, 2020, pp. 875–885.

50 Permanent Court of International Justice, *Case of the S.S. Wimbledon, United Kingdom and others and Poland (intervening) v. Germany*, Intervention, Judgment, (1923) PCIJ Series A no 1, ICGJ 234 (PCIJ 1923), 28 June 1923, p. 25.

UN Charter and the functioning of the UN as a key actor in the context of universal international relations as an international intergovernmental organisation.

5. Legal and Practical Equality in the UN Charter and Other Establishing Treaties, Particularly the Treaty on European Union

The UN, established in 1945, enshrines principles of sovereign equality in its foundational documents. Art. 2(1) of the Charter states: 'The Organization is based on the principle of the sovereign equality of all its members'. This provision is fundamental to the UN's purpose of fostering peace and cooperation among states based on mutual respect for sovereignty.⁵¹

However, the structure of the UN Security Council (UNSC), which grants veto power to its five permanent members (P5, namely the United States of America, the United Kingdom of Great Britain and Northern Ireland, France, China, and the Russian Federation), poses a challenge to the practical realisation of sovereign equality. The already indicated veto power of the P5 creates a hierarchy among states, undermining the equality of member states in the decision-making processes.⁵² This structural asymmetry reflects the limitations of sovereign equality within the UN, where political power often overrides legal equality. It might be argued that the UN's operational dynamics reveal a paradox in international law: while the UN Charter advocates equality, institutional design prioritises stability and power balance, thus establishing inequality.⁵³ Such a situation might be understood as the 'moral disagreement' allowed by sovereign equality, where differing national interests and values coexist within a framework that seemingly promotes equality.⁵⁴

The EU, another international organisation, although of a regional character, represents a unique model of sovereignty and equality, since its Member States transfer the realisation of certain aspects of sovereignty for collective governance and integration. The Treaty on the European Union, particularly Arts. 4(2) and 5, emphasises respect for national identity and the equality of Member States within the EU. The principle of equality is inherent in the EU's legal order, which treats each Member State as an equal participant in decision-making processes.⁵⁵

Nevertheless, similar to the UN, there are practical indications that sovereign equality among the EU members must be understood in a complex manner.

51 Schrijver, 2000, p. 70.

52 See e.g. Roth, 2011, p. 77.

53 Koskeniemi, 2005, pp. 167, 188.

54 Roth, 2011, p. 84.

55 Blanke and Mangiameli, 2013, p. 189.

For example, the EU's emphasis on the direct effects and supremacy of EU law can conflict with national sovereignty, challenging the traditional notion of sovereign equality.⁵⁶ The legal doctrine of supremacy establishes that EU law takes precedence over national laws, transferring the sovereignty of Member States in certain policy areas.⁵⁷ While Member States are formally equal within the EU structure, in practice, larger states, such as Germany and France, are often said to have a disproportionate influence over policymaking, reflecting an asymmetry similar to that observed in the UN system (for more information on this topic, see Part 2.).⁵⁸ Moreover, when discussing EU functioning, one must consider the principles of loyal cooperation within Member States and (to) the EU.⁵⁹

The challenge in this area lies in the question of whether consideration is given to equality in the results or to equality as a starting point. Therefore, the principle of equality of sovereign states can be understood in two distinct dimensions: legal equality as a starting point, and practical equality as a result. Legal equality, as already presented, is grounded in foundational international law principles such as those articulated in the UN Charter and establishes all states as equal regardless of size, power, or influence.⁶⁰ This starting point emphasises the formal parity of states within the framework of international law, ensuring equal sovereignty and the capacity to participate in legal and diplomatic processes on an equal footing.⁶¹ This reflects the aspiration that sovereignty confers equal dignity and autonomy on all states.⁶²

By contrast, practical equality addresses how equality is realised within disparities rooted in the economic, political, and military powers of individual states.⁶³ Powerful states often tend to have a disproportionate influence on international institutions such as the UN Security Council, as if undermining the legal equality envisioned at the outset.⁶⁴ This tension between rights emphasised within legal equality and responsibilities not to be forgotten within practical equality might help understand the power dynamics of international relations creating hierarchies.⁶⁵ Furthermore, the reconciliation of these tensions may be considered essential for maintaining the legitimacy of international law.⁶⁶ Legal equality, as a starting point, provides the basis for sovereignty, non-interference, and respect among states, and

56 Casolari, 2017, pp. 83–126.

57 Granat in Schütze, 2018, pp. 273, 287.

58 Giegerich, 2020, pp. 58, 72.

59 For more information see the chapter by David Sehnálek in this publication and also Karpat, 2021, p. 68.

60 As for the GA see e.g. Anand, 1986, p. 99.

61 Greenwood, 2013, p. 254.

62 Koskenniemi, 2005, pp. 224–226, 240.

63 Simpson, 2004, p. 56.

64 Compare similar approach within international investment law and international trade law in Rivas, 2017, p. 80.

65 Compare Blanke and Mangiameli, 2013, p. 191.

66 Anand, 1986, pp. 97–98.

practical equality influences reforms in international systems to regulate the use of power.⁶⁷ To summarise the different approaches to the equality of states within a functioning system of state cooperation and interdependence, while the principle of legal equality preserves formal sovereignty and independence, practical equality challenges states to address inequalities in political impact to consider and support common universal outcomes. Only by balancing the two approaches it is possible to achieve more equitable international system. This balance understands sovereign equality as the cornerstone of the international order, in which weaker states are protected from the dominance of more powerful ones while fostering mutual respect and cooperation.⁶⁸ Practical examples of this balancing are presented in the following subchapters, which point out two main bodies of the UN system: the legal equality of sovereign states within the UN General Assembly and the practical equality of sovereign states in the UN Security Council.

5.1. UN General Assembly: Equal Representation and Voting Rights

The UN General Assembly (GA) is a good example of the operationalisation of sovereign equality of states through its structure and voting system, where each member state is afforded one vote, regardless of population or economic power. This ‘one state, one vote’ system reflects the legal and formal equality of states, as outlined in the UN Charter itself.⁶⁹ Thus, the GA voting framework ensures equal representation, allowing even the smallest states to participate in global decision-making.⁷⁰

The equality principle within the GA was essential during the decolonisation period of the development of international law and the UN itself. Such an institutional approach towards sovereign equality in the form of an egalitarian voting system creates an inclusive space for discussion and provides smaller or less-powerful states with a forum to challenge the dominance of the major powers. This structural respect contrasts strongly with other international organisations, such as the World Bank or the IMF, where voting power is weighted by financial contributions.⁷¹ However, the GA’s principle of equal representation has been criticised. Critics usually argue that the ‘one state, one vote’ system can disproportionately strengthen the influence of microstates, whose populations are significantly smaller than those of major powers since the dynamic of the GA forum may lead to imbalances where the voting power of populous states like India or China is equivalent to that of much smaller nations, such as disappearing Tuvalu.⁷² Despite these challenges, the UN General Assembly remains an important forum for advancing equality. Its resolutions, although not legally binding *per se* often reflect a consensus on key global issues.

67 Koskenniemi and Kari, 2020, pp. 167, 180.

68 Roth, 2011, p. 53.

69 Art. 18(1) of the UN Charter: Each member of the General Assembly shall have one vote.

70 Anand, 1986, p. 99.

71 Petersmann, 2014, p. 279.

72 Viola, 2020, p. 163.

5.2. *UN Security Council: Power Asymmetries and the Veto System*

In contrast to the UN General Assembly's egalitarian structure, the UN Security Council (UNSC) reveals significant power asymmetries, particularly through the veto power held by its five permanent members. While the UNSC was designed to ensure effective decision making in maintaining international peace and security, its structure challenges the principle of sovereign equality. It is usually criticised that the veto system institutionalises inequality by granting disproportionate power to P5 or even non-consensual legislative power.⁷³

The veto system enables any permanent member to block substantive resolutions, even if they would otherwise receive widespread support from other UNSC members. This has led to accusations of 'Great Power privilege', meaning that the P5 use their status to protect national interests rather than to uphold collective security.⁷⁴ This could reflect the inherent contradictions between legal equality and geopolitical realities, as smaller states often emphasise that their concerns are put aside compared to the priorities of P5.⁷⁵ This perspective has led to efforts to reform the SC's structure, including calls for expanding permanent membership or limiting veto use, while pointing out the tension between sovereign equality and power asymmetry. Despite widespread support for SC reform, no real change has been realised. This has partially been caused by the fact that for the UN Charter to be amended, the approval of all permanent members of the UN Security Council is required.⁷⁶

The UN Security Council's dual role as guarantor of peace and arbiter of power politics reflects the broader challenge of balancing sovereign equality with effective universal cooperation among states. As has been argued, the veto system might be understood as undermining the equality of sovereign states; nevertheless, it also ensures that decisions with major global consequences are not made without the consent of the most powerful states. To summarise, the SC's structure is a perfect example of the tension between equality and hierarchy within the international legal order. To understand both the workability and necessity of such an approach to sovereign equality, it is important to understand the background of the process that led to its creation.

5.3. *Understanding the Reasoning Behind the Establishment of Two Main UN Bodies*

The previous subchapter demonstrated that, while the UN Charter emphasises the sovereign equality of UN member states as one of its fundamental principles,

73 Greenwood, 2013, p. 261.

74 To examine original intent, see e.g. Koskeniemi and Kari, 2020, p. 176.

75 Roth, 2011, pp. 53, 61.

76 See Art. 108 of the UN Charter.

its implementation within the UN General Assembly and the UN Security Council reveals both successes and limitations.

To enable a fuller understanding of international law and its application, it is important to understand why the two main UN bodies were designed such that the UN Charter regulates their establishment and functioning.

The establishment of the UN General Assembly on the principle of ‘one state, one vote’ and the UN Security Council based on a dual structure of permanent members with veto power and non-permanent members reflects a pragmatic compromise between the sovereign equality from the legal perspective and the sovereign equality in result that considers similarly the realities of international power hierarchies that include also responsibilities of individual actors and that were more obvious after the World War II (WWII).

Having experienced the failure of the League of Nations, states that were creating the international community of that era knew that another system with stronger key actor competencies had to be established. This was especially true in relation to world powers, without which the system protecting international peace and security would not have been workable. To get the most relevant actors ‘into the club’, veto was considered as an option. On the other hand, it was necessary to include all states, even those only probable or planned to be formed, so that the emerging international community could be created by as many states as possible, since only in such a case could a universal legal framework be created. This makes even the Westphalian system of sovereign equality which has been confirmed and is central to the international legal order, which ensures universal representation through the inclusive participation of all states in decision-making processes.⁷⁷ By granting equal voting rights, the GA promotes legitimacy and inclusivity in the universal system, adhering to the principle of non-discrimination in international law. This represents the egalitarian ideals of international societies.⁷⁸ Without the ‘one state, one vote’ principle in GA, smaller states would lack meaningful participation in global governance, leading to potential marginalisation.⁷⁹ The GA, with its equal voting system, plays a crucial role in respecting international norms such as human rights standards, which reflect the collective will of the international community. Although non-binding, GA resolutions present important moral and political weights and reinforce the principle of legal equality among states.⁸⁰

In contrast, the UNSC is based on power asymmetry. The veto power of its five permanent members reflects the geopolitical realities of 1945 when the UN was established. The UNSC was planned to stand for stability and enforcement, ensuring that the major powers, as permanent members, have their word in maintained international peace and security. Without veto power, the P5 is likely to resist collective

77 Azud, 2008, p. 183.

78 Koskenniemi, 2005, p. 237.

79 Anand, 1986, p. 99.

80 Wolfrum, 2012, para. 3.

enforcement.⁸¹ They would probably have resisted becoming members of the organisation. Currently, power asymmetry is discussed further because the position of the permanent member has changed. WWII winning powers (especially the UK and France) have already lost their strong position as world powers compared to the postwar situation; for example, the UK has no longer been considered a world power since it has lost its colonial hegemony, and all its colonies have gained the independent status of a state sovereign. However, historical justifications are still important because they explain the veto power acknowledgement of the historical role of the P5 in shaping the post-World War II order by ensuring its continued participation in multilateral decision-making processes.⁸²

Overall, it is fair to submit that the chosen ways to set up a new, more effective system of institutionalised cooperation among states have included a combination of the egalitarian GA with the hierarchical SC. Such a combination reflects a practical compromise between idealism and realism in international law; it balances the legal requirements of equality, especially the rights of actors, and greater responsibilities in the case of bigger powers. As it has been pointed out, such dual structure considers both sovereignty and cooperation among unequal states.⁸³ The balance between the egalitarian ideals in the GA and power realities in the SC ensures both inclusivity and effectiveness in global governance, promoting stability while accommodating the complexities of international politics.

Nevertheless, although the SC structure and voting system were originally designed to prevent gridlock since veto power was meant to ensure that powerful states could not bypass their national interests because it included the prevention of conflicts among major powers, the situation after the Russian invasion of Ukraine has not proved the efficacy of such prevention. Similarly, even though non-permanent SC members were planned not only to ensure that smaller states participate in decision-making, but also to mitigate some of the concentration of power in P5, such an idea has not helped ensure respect and primary responsibility for the system of international law and security from all permanent SC members.⁸⁴ Overall, the system that was established to prevent armed conflict among states and thus ensure that powerful states act within an institutional framework⁸⁵ has not prevented unilateral actions that have led to international anarchy because of the flagrant violation of fundamental UN Charter principles.

The SC's hierarchical structure was designed to preserve international order and to enforce binding resolutions under Chapter VII of the UN Charter what underscores

81 Zimmermann, 2012, paras. 13–48.

82 Ibid.

83 Köchler, 2013, pp. 427–444.

84 See Art. 24(1) of the UN Charter: In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

85 Schrijver, 2000, p. 74.

its unique role in addressing threats to international peace and security,⁸⁶ on the other hand, the GA's egalitarian approach helps to ensure that all states, including weaker ones, can contribute to shaping international law. This arrangement reflects constitutional pluralism, in which different principles, namely sovereign equality and power-based hierarchy, coexist within a single institutional framework to address the diverse needs of the international community.⁸⁷

Although an SC's permanent membership is often considered to perpetuate inequality, the system is widely seen as a necessary compromise to secure the co-operation of major powers. Nevertheless, while the UN's dual structure remains a compromise, ongoing calls for SC reform reflect the evolving nature of power dynamics and the enduring tension between equality and hierarchy in international law.⁸⁸ It has been discussed for more than 20 years that there have been new world powers coming to the international forum asking for acknowledgement of their role in shaping the universal order.⁸⁹ Proposals for reform often highlight the need to balance efficiency and representativeness because an excessively large SC can hinder its ability to respond quickly to crises.⁹⁰ Nevertheless, expanding the SC's membership, particularly by including rising powers such as India, Brazil, Germany, and Japan (G4 nations), is frequently proposed to enhance its legitimacy and better represent the global population.⁹¹ On the other hand, according to academia, regional representation, such as granting permanent seats to the African Union or other regional entities, could improve inclusivity and reduce feelings of marginalisation among member states.⁹² While looking for another solution to the crisis, limiting or abolishing veto power has also been proposed to improve the legitimacy of the UNSC, although this is strongly opposed by P5, who sees veto as essential to maintain its influence. Since non-refusal by the P5 is inevitable to make any reform effective, other possibilities have been analysed, such as revision of the SC's working methods or increase of non-permanent membership, which have been considered to represent a more feasible path forward, given the lack of consensus on more substantive changes limiting the sovereignty of the P5.⁹³ Finally, a rotating presidency and improved communication with the GA have been proposed, allowing respect for the sovereignty of the P5 without any change except the procedural one.⁹⁴

86 Brierly, 1963, pp. 110–117.

87 Jaklic, 2014, pp. 13–30, 122, 135.

88 For more information upon UN reform see Simma, 2012, pp. 28–70.

89 Ibid.

90 König, 2007, pp. 89–91, 99.

91 Similarly is the position of E10 presented, see e.g. Evans, 2021, p. 218.

92 Mahbubani, 2013, pp. 4–5.

93 Simma, 2012, p. 55.

94 ACT Group, 2015.

5.4. Application and Challenges of Sovereign Equality Principle in UN Operations

Having looked into the theoretical background of the principle of sovereign equality and the legal framework of sovereign equality within the UN, this concept should also be analysed within its application in UN operations.

It is not only the UN Charter itself; the principle of sovereign equality has also been replicated in the Friendly Relations Declaration, which prohibits coercion from undermining the sovereign equality of states and their choices of political, social, economic, and cultural systems.⁹⁵ Moreover, it has also been confirmed by the ICJ in its Advisory Opinion on Kosovo, which emphasised that state sovereignty must be respected in UN operations, even in cases of humanitarian intervention, depending on the interim measures adopted by the UNSC in that particular case.⁹⁶

The principle of sovereign equality is often challenged by P5 veto powers, which allow these states to override collective decisions.⁹⁷ There have been other cases in which the principle of sovereign equality has been pointed out, recalling Art. 1 of the UN Charter, which mandates that the UN maintain international peace without violating state sovereignty.⁹⁸ The UN Mission in the Democratic Republic of the Congo (MONUC) faced resistance from the Congolese government regarding troop deployment, recalling sovereignty concerns.⁹⁹ In Somalia (UNOSOM II, 1993-1995), UN operations were perceived as infringing national sovereignty, leading to local opposition.¹⁰⁰ The UN Mission in Sudan (UNMIS) struggled with the limitations imposed by the Sudanese government, which resisted the peacekeeper movements (helping aid) as violations of sovereignty.¹⁰¹

Even at the level of perception of the UNSC resolutions by the UNSC members, there have been challenges in implementing sovereign equality when adopting them. The Bosnia and Herzegovina conflict (UNPROFOR, 1992–1995) highlighted disparities in sovereign equality, as some UNSC members favoured intervention, while others opposed it.¹⁰² UN-led intervention in Haiti (MINUSTAH, 2004–2017) was criticised for prioritising the interests of powerful states over Haitian sovereignty.¹⁰³ Furthermore, Libyan intervention (2011, UNSCR 1973) was contested as a violation of Libya's sovereignty, despite being framed under the new concept of that

95 UNGA Res. 2625 (XXV), 1970, p. 121 of the resolutions adopted on the reports of the Sixth Committee.

96 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 22 July 2010, pp. 44–45.

97 Kuziemko and Werker, 2006, p. 907.

98 Art. 2(1) of the UN Charter: The Organization is based on the principle of the sovereign equality of all its Members.

99 Bellamy and Williams, 2013, p. 134.

100 Durch, 1996, p. 204.

101 Seybolt, 2007, p. 97.

102 Gow, 1997, p. 67.

103 Dupuy, 2014; see the chapter Haiti before and after the Earthquake.

time, namely the Responsibility to Protect.¹⁰⁴ From another perspective, the 2003 Iraq invasion was conducted without explicit UN Security Council authorisation,¹⁰⁵ especially when considering Art. 2, para. 7 of the UN Charter.¹⁰⁶ Finally, the Syrian conflict (post-2011) exposed the limits of sovereign equality as the UNSC remained deadlocked due to Russian and Chinese vetoes.¹⁰⁷

Humanitarian interventions can even cause problems. The Rwandan Genocide (1994) exposed UN failures to intervene due to sovereignty concerns as the Security Council hesitated to act.¹⁰⁸ On the other hand, the Yemeni conflict in the post-2015 era illustrates how UN resolutions can favour some states over others, affecting sovereign equality.¹⁰⁹ Finally, regarding the call for humanitarian intervention, the UN's role in Myanmar's 2017 Rohingya crisis was limited due to Myanmar's insistence on sovereignty.¹¹⁰

To summarise this set of examples, if sovereign equality is analysed, factual sovereignty and sovereignty as a result are applied more effectively than legal sovereign equality. Nevertheless, there are even examples that point out the application of sovereign equality of an individual state as less than disrespect for the common good of respecting the fundamental rules agreed upon after WWII.

5.5. Different Approach to the Same Challenge of the Act of Aggression as a Consequence of Different Position of Sovereign States Within the UN System

Even before the invasion of Ukraine by the Russian armed forces in February 2022, there were some examples presenting a different approach to the violation of the fundamental principles of the UN Charter. To include annexation attempts after 2022, all scenarios point out distinct yet comparable instances of breach of *ius cogens*, prohibiting the use of force against the territorial integrity and political independence of a sovereign state.¹¹¹ Each case involves complex geopolitical motivations, international legal considerations, and varied global responses to draw attention to basic factual and legal backgrounds.

On 2 August 1990 under President Saddam Hussein, Iraq invaded Kuwait, citing historical territorial claims and economic disputes, particularly regarding oil

104 Bellamy, 2014, pp. 187–204.

105 Malone, 2006, pp. 185–221.

106 Art. 2(7) of the UN Charter: Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

107 Morris, 2013, p. 1274.

108 United Nations Peacekeeping, no date.

109 2216 (2015) For more information, including SC member statement see United Nations, 2015.

110 Southwick, 2018, p. 134.

111 Art. 2(4) of the UN Charter: All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

production and pricing. Iraq accused Kuwait of exceeding its oil production quotas, lowering prices and harming the economy.¹¹² This invasion led to Iraq's declaration of Kuwait as the 19th province.¹¹³ The international community, led by the UN, condemned the act that finally resulted in UNSC Resolution 678, which authorised the use of force under Chapter VII of the UN Charter if Iraq did not withdraw by 15 January 1991.¹¹⁴ The subsequent Gulf War, initiated by a U.S.-led coalition, expelled Iraqi forces from Kuwait and restored Kuwait's sovereignty.

In February 2014, following a political upheaval in Ukraine, Russian troops without insignia occupied Crimea.¹¹⁵ A controversial referendum was held in March 2014 with official results indicating overwhelming support for joining Russia.¹¹⁶ Russia swiftly annexed Crimea, considering the referendum a legitimate expression of self-determination. However, the international community has largely viewed annexation as a violation of international law, particularly the principle of territorial integrity based on Art. 2(4) of the UN Charter.¹¹⁷

Following the annexation of Crimea, pro-Russian separatists in Eastern Ukraine declared their independence, leading to ongoing conflict.¹¹⁸ In 2022, Russia launched a full-scale invasion of Ukraine, presenting security concerns, and protecting the Russian-speaking population.¹¹⁹ The action has been widely condemned by the international community as aggressive.¹²⁰

Each annexation involves the forceful acquisition of territory; however, international responses and legal justifications in the submitted cases differ. Iraq's annexation of Kuwait was met with prompt military involvement under UN authorisation, emphasising the global community's commitment to uphold international law and sovereignty. In contrast, Russia's annexation of Crimea, though widely condemned, did not result in intervention with the use of force, but rather highlighted challenges in enforcing international norms against powerful states and manifested that sovereign equality of states means equality before law, not equality as a result. The ongoing conflict in Ukraine further complicates the international response as it involves broader geopolitical tensions and the complexities of international law, particularly Russia's membership in the UNSC with veto power.

From the perspective of the sovereign equality of states in international law, the annexations of Kuwait, Crimea, and parts of Ukraine violate the fundamental principles of the UN Charter, since sovereign equality ensures that all states, regardless of

112 ADST, no date.

113 Office of the Historian, no date.

114 S/RES/678 adopted on 29 November 1990.

115 BBC News, 2015.

116 The Guardian, 2014.

117 Ibid.

118 For more information see Britannica, 2024.

119 Claimed in the speech of Vladimir Putin, see: United Nations Security Council, 2022.

120 UNGA resolution ES-11/1 from 2 March 2022, more information. See: United Nations, 2022.

size or power, have equal rights to territorial integrity and political independence.¹²¹ Iraq's invasion of Kuwait was a clear disregard of this principle, as it attempted to erase Kuwait's sovereignty by force. Similarly, Russia's annexation of Crimea and its actions in Ukraine violated Ukraine's right to political independence and territorial integrity, despite Russian claims to protect ethnic Russians.¹²² The UN's response to Kuwait's annexation was immediate and forceful, demonstrating a strong commitment to respect the prohibition of force. However, the response to Russia's actions has been less direct, relying on sanctions and diplomatic pressure rather than military intervention because of the incapability of the UNSC to adopt a legally binding resolution that requires Russia to end its legally wrongful acts because of its veto power. This discrepancy suggests that geopolitical considerations and the relative power of the aggressor state often influence the enforcement of sovereign equality. Nevertheless, one has to emphasise that, originally, it was rather a case of disrespect for adopted commitments, a violation of the basic principle *pacta sunt servanda*, and not a violation of the principle of sovereign equality. All the states concerned have become UN member states by freely adopting the UN Charter, respecting the whole design of this international organisation, which is considered to be a manifestation of sovereign equality. While Iraq faced military expulsion, Russia retained control over Crimea, exposing the limitations of international law when powerful States were involved. Nevertheless, it is primarily the act of aggression, which is a violation of the fundamental principles of the UN Charter, and not the missing adoption of a resolution by the main UN body primarily responsible for the maintenance of international peace. The ongoing war in Ukraine proves that Russia continues to challenge Ukraine's sovereignty first, and the agreed legal framework containing the principle of sovereign equality is its second aim. This is not to deny that the selected cases illustrate the fragile nature of sovereign equality in practice, since enforcement mechanisms depend on global political will and power dynamics that might change over time. In contrast, because of the current situation, critics have become stronger than the existing structure of the UN, especially the veto power held by the P5, which might lead to paralysis in decision-making, as seen in conflicts where P5 interests are involved. For instance, the inability to pass resolutions due to vetoes demoralises the UN's capacity to maintain international peace and security, which is its primary responsibility, according to the UN Charter. Despite these initiatives, substantial reforms have been elusive.

The requirement for a consensus among member states, particularly P5, poses a significant barrier to change. While improvements have been made in areas such as management efficiency and development coordination, core structural reforms, especially those concerning the Security Council's composition and veto power, have remained hindered.

121 Art. 2(1) in conjunction with Art. 2(4) of the UN Charter.

122 E.g. for claimed right to self-defence, basic preconditions were not met since there was no armed attack on Russia and the condition of proportionality was not fulfilled either.

Moreover, it is not only SC composition and voting rights that are often considered in the institutionalisation of inequality. It has already been pointed out that the IMF allocates voting power based on financial contributions, granting wealthier countries greater sway over their policies. As previously observed,

Sovereign equality starts with rules on lawmaking, law application, and immunity, but we cannot truly understand its contours or justice without examining the arenas where claims about the equality of states most often arise, namely international organisations.¹²³

It is important, then, why they have actually been established and, when accepting their irreplaceable role in the system of international law, how their role and function could be improved and achieved more efficiently.

6. International Organisations and Their Member States as Complementing Sovereign Actors

As for the establishment of international institutions, sovereign equality has been instrumental since its aim usually seeks equal representation and participation opportunities for all member states to achieve an agreed goal. For instance, even the ‘Pact for the Future’, adopted by the UN General Assembly in September 2024, reflects a collective commitment to address global challenges through inclusive multilateralism. This pact underscores the importance of equal participation in decision-making processes when dealing with issues such as security and human rights. To strengthen the application of sovereign equality in addressing global challenges, several attitudes should be considered, including adopting differentiated approaches that respect the diverse circumstances of states within the global community.

International organisations possess legal personalities that are distinct from those of their member states, granting them rights and responsibilities under international law.¹²⁴ In general, this separate existence allows them, apart from other, to enter into agreements, to acquire and manage assets independently, and especially to initiate legal proceedings to defend their interests. As the ICJ affirmed in the *Reparations for Injuries* case, they hold distinct legal personality: ... the United Nations ‘was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality’.¹²⁵

¹²³ Ratner, 2015, p. 220.

¹²⁴ Valuch, Rišová and Seman, 2011, p. 8.

¹²⁵ International Court of Justice, 1949, p. 179.

Together with distinct legal personalities, the capacity of international organisations to bear responsibility for their actions has been confirmed. This means they can be held accountable for breaches of international obligations attributable to them. This has been elaborated upon in the Draft Arts. on the Responsibility of International Organisations adopted by the International Law Commission, which outlines the principles governing such responsibility.¹²⁶

Comparably to the Arts. on the Responsibility of States for Internationally Wrongful Acts, they state that an international organisation is responsible for its internationally wrongful acts, which consist of conduct attributable to the organisation that constitutes a breach of international obligation.¹²⁷ However, challenges arise in attributing conduct and determining accountability, especially when actions involve both the organisation and its member states. The complexity of these relationships requires a clear framework for defining responsibilities and ensuring compliance with international law.

International law provides a structured system for states to engage with each other, offering mechanisms to resolve disputes, establish norms, and promote collective interests. However, the effectiveness of international law can be challenged by issues such as non-compliance and especially different interpretation among states or between states and international organisations.¹²⁸

This special feature of international law that lies in the application challenges of international legal norms by actors that have adopted them is multiplied within international organisations that have been established to make international cooperation more effective: to manage issues that transcend national borders and require coordinated action, and to provide platforms for dialogue, standard-setting, and implementation of collective decisions or even dispute resolution.¹²⁹

States usually establish international organisations through international treaties, which serve as foundational legal instruments defining the organisation's purposes, structures, and functions. These treaties are binding agreements that outline the rights and obligations of both the international organisation and its member states. The principle of *pacta sunt servanda*, enshrined in Art. 26 of the Vienna Convention on the Law of Treaties, mandates that every treaty in force is binding upon the parties and must be performed in good faith.¹³⁰ This principle ensures that both the international organisation and its member states are obliged to adhere to the terms of the establishing treaty. This means that the international organisation is bound to perform its functions in good faith, adhering to the terms used to establish the treaty. Any action taken by the international organisation must be within the scope of its mandate, as defined by the treaty. Similarly, member states are obligated to

126 International Law Commission, 2011, Part II.

127 Ibid., Art. 4.

128 Evans, 2006, pp. 553–555.

129 Valuch, Rišová and Seman, 2011, p. 10.

130 Vienna Convention on the Law of Treaties, 1969, Art. 26.

respect the autonomy of the international organisation and refrain from actions that would undermine its independent functioning.

Nevertheless, upon establishment, international organisations are endowed with a distinct legal personality, granting them rights and responsibilities separate from those of their member states. Moreover, although there is no application of the principle of *Kompetenz-Kompetenz* (or *compétence de la compétence*), which refers to a judicial body's authority to determine the scope of its own competence, for international organisations, one has to consider the attribution of powers conferred to them by an establishing treaty.¹³¹ In the context of international organisations, these powers might be considered implied, i.e. they do not have to be specified expressly.¹³²

However, while international organisations possess a degree of independence, they must operate within the confines of the authority granted by their treaties. Member States, as the 'parents' of the international organisation, retain certain controls to ensure that the organisation does not exceed its mandate. This balance is crucial for maintaining the trust and cooperation of member states, ensuring that the international organisation's actions occur even in the collective interests of its members.

In practice, tensions can arise when there are differing interpretations of an international organisation's mandate or when an international organisation's actions are perceived to intrude into the sovereignty of member states. The relationship between states and the international organisations they establish is complex, similar to that of parents guiding a child towards independence. While international organisations are granted a degree of autonomy through legal personality and the principle of *implied powers*, they must operate within the boundaries set by their founding treaties. The principle of *pacta sunt servanda* ensures that both international organisations and member states are bound to perform their obligations in good faith, maintaining a balance between organizational independence and state sovereignty.¹³³ Moreover, sometimes even interests of an international or especially European community as such are submitted.¹³⁴

The fact that it is a rather complicated task indeed is possible to be analysed within the principle of loyalty, enshrined in Art. 4(3) of the Treaty on European Union mandating that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.¹³⁵ This principle, also referred to as the duty of sincere cooperation, serves as the cornerstone of the Union's legal framework, ensuring cohesion and effective functioning between EU institutions and Member States. The duty of loyalty obliges Member

131 Weiss, 2009, p. 434.

132 For explicit implied powers see e.g. Blokker, 2008, paras. 20–22.

133 Vienna Convention on the Law of Treaties, 1969, Art. 31.

134 Gadkowski, 2022, p. 111.

135 For more information see Karpat, 2021.

States to take all appropriate measures to ensure the fulfilment of their obligations under EU law and refrain from any action that could jeopardise the attainment of the EU's objectives. This includes both positive obligations, such as implementing EU directives and negative obligations, such as abstaining from measures that conflict with EU law. Moreover, the Court of Justice of the European Union pointed out that this principle also covers inaction, that is, when state authorities should adopt appropriate measures. The Court of Justice of the European Union emphasised that this duty is binding to all authorities of Member States.¹³⁶ Loyalty plays a pivotal role in external relationships. Given the complex distribution of competencies between the EU and its Member States, particularly in areas of shared or mixed competencies, true cooperation is essential. The Court of Justice of the European Union, in its Opinion 1/94 of the WTO Agreement, highlighted that Member States must coordinate their actions within international organisations to uphold the unity of the EU's external representation.¹³⁷ The duty of loyalty also extends to situations where Member States negotiate international agreements: The Court of Justice of the EU held that Sweden breached its duty of sincere cooperation by unilaterally negotiating a bilateral agreement in an area of shared competence without coordinating with EU institutions.¹³⁸ Furthermore, the principle of loyalty requires Member States to interpret and apply national law in a manner consistent with EU law, i.e. also in light of the wording and purpose of EU directives, to achieve the results envisaged by EU law.¹³⁹ However, the application of the loyalty principle is not unidirectional; it imposes obligations on EU institutions. Institutions must respect the competencies of Member States and assist them in fulfilling their obligations. This mutual respect ensures a balance between the autonomy of Member States and their sovereignty, and the effective functioning of the EU. To conclude, the principle of loyalty is very important to the EU's legal order, since it encourages cooperation and coherence between the EU and its Member States; however, it will be analysed in detail in the following chapters.

7. Summary

The origins of sovereign equality can be traced back to the Peace of Westphalia in 1648, which laid the foundation for the classical inter-state system in which all states are sovereign and equal. The UN Charter builds upon this by reinforcing that

¹³⁶ *Commission v. France case*, C-265/95, 1997 E.C.R. I-6959.

¹³⁷ Opinion 1/94, 1994 E.C.R. I-5267.

¹³⁸ *Commission v. Sweden case*, C-246/07, 2010 E.C.R. I-3317.

¹³⁹ *Pupino case* (C-105/03, 2005 E.C.R. I-5285).

all member states should retain independence and equal rights while respecting their collective responsibilities under international law.

It has been emphasised that the principle of sovereign equality represents ‘formal equality’ in law, ensuring that even smaller or less powerful nations have a voice in international governance.¹⁴⁰ Moreover, this principle underlines that sovereignty remains inviolable unless the states themselves agree with specific limitations such as those outlined in the UN Charter.¹⁴¹ Nevertheless, challenges to sovereign equality arise because of power asymmetries within the international system, which offers an understanding of sovereign equality as a result of equality. Similarly to other scenarios of state cooperation within international organisations, it might be criticised that the ‘ideal’ of sovereign equality is limited by the geopolitical realities of international system which often favour dominant states. Despite this, the UN Charter’s reaffirmation of sovereign equality provides a legal basis for addressing inequalities and encouraging cooperation between States, as it does not consider sovereignty and equality as separate concepts, but sovereign equality as a concept integrating not only rights but also responsibilities.¹⁴²

Several UN peacekeeping missions, including those in the Democratic Republic of Congo, Somalia, and Sudan, have demonstrated how sovereignty concerns often complicate international interventions. Furthermore, Security Council dynamics, particularly P5 veto power, frequently undermine the equitable application of sovereign equality, as evidenced by conflicts in Bosnia, Haiti, Libya, and Syria. Cases such as the 2003 Iraq invasion and the 2011 Libyan intervention illustrate how international responses to sovereignty violations are inconsistent and are often shaped by the interests of powerful states rather than by legal principles alone. Finally, humanitarian interventions such as those in Rwanda and Myanmar further expose the delicate balance between respecting state sovereignty and protecting human rights.

The annexation of Kuwait and Crimea, as well as the ongoing war in Ukraine, highlight disparities in international responses, where geopolitical considerations have dictated enforcement rather than legal norms. Ultimately, while sovereign equality is a basic legal principle, its effectiveness in practice might depend on the willingness and capacity of the international community to uphold it, or on the dynamic understanding of the principle.¹⁴³ Undoubtedly, this principle remains indispensable in international law, although its enforcement is frequently subordinated to power dynamics and strategic interests. As a result, strengthening mechanisms to ensure the consistent and impartial application of sovereign equality remains a crucial challenge for the UN and the broader international legal system which is based on the principle *pacta sunt servanda* in the area of the law of international organisations.

140 Koskeniemi and Kari, 2020, p. 168.

141 Fassbender, 2012, para. 63.

142 Ibid., para. 64.

143 Amoroso, 2023, p. 35.

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CHAPTER 2

SHARED SOVEREIGNTY, LIMITED EQUALITY: THE TENSION BETWEEN MEMBER STATES AND SUPRANATIONALISM



TUDOREL TOADER AND MARIETA SAFTA

Abstract

The Chapter investigates the evolving concept of sovereignty within the EU, highlighting the balance between national autonomy and European integration. Thus, Member States have transferred aspects of their sovereign powers to EU institutions, creating a governance framework that is polycentric and non-hierarchical. This model allows for collective decision-making, enhancing the EU's global influence, but it also generates tensions and questions concerning the undermining of national sovereignty and inequalities in decision-making processes. Additionally, disputes over the supremacy of EU law versus the supremacy of national constitutions and constitutional identity highlight persistent challenges in the integration process.

The study explores the constitutional aspects of sovereignty within the EU, focusing on the principle of conferred competencies and the relationship between national and supranational governance. It examines the evolution of the EU as an autonomous legal order, specifically addressing areas such as fundamental rights protection and criminal law, which have traditionally been associated with national sovereignty. The analysis weighs up how various crises, such as those related to the rule of law, and contemporary challenges like cybersecurity and artificial intelligence highlight the necessity for supranational solutions. It also examines whether the strengthening of supranational authority undermines state sovereignty or contributes to a more cohesive and resilient Union. The main conclusion is that the concept of 'shared and responsible sovereignty' better describes balanced development and provides a solid framework for the future evolution of the EU.

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1. Introduction

In the light of the evolution of the concept of sovereignty, detailed in the first chapter of this book, our study will focus on the dynamics of this concept in the context of the EU, as a one-of-a-kind structure, where the Member States have common legislation, currency, and citizenship status. A delicate balance between national sovereignty and European integration, which emphasises concepts such as shared sovereignty,¹ pooled sovereignty,² supranationality³ or constitutional pluralism⁴ has shaped the EU's legal, political, and economic landscape, and remains one of the most challenging issues in the Union's history.

The importance and the evolution of sovereignty within the EU can be traced back to the Union's foundational principles and objectives. After World War II, European leaders aimed to establish a cooperative system to prevent future conflicts and promote stability and prosperity across the continent. The founding of the European Coal and Steel Community in 1951 marked the first step in a series of treaties designed to integrate the economies of Western European states. Central to this process was the understanding that pooling sovereignty – especially in economic policy – could lead to mutual benefits and a stronger, more interconnected Europe. This vision progressed with the formation of the European Economic Community in 1957 and eventually culminated in the establishment of the EU in 1993, with the Maastricht Treaty, which introduced the concept of European citizenship and expanded cooperation into new policy areas, including justice, home affairs, and foreign policy. The Lisbon Treaty clarified the competences of the Member States and the EU, incorporating many elements from the proposed Constitution for Europe into the Treaties. In this way, but also via the *praetorian* method, with CJEU as the main ‘architect’, the institutions of the EU have been consolidated, and the competences of the EU have expanded. A supranational, autonomous legal order⁵ has been created.

This integration process has consistently required Member States to relinquish elements of their sovereign rights, in exchange for the benefits of collective governance. The development of the single market, the Schengen Agreement allowing for free movement, and the introduction of the euro as currency for part of the

1 Bickerton et al., 2022.

2 Petr, 2025.

3 Brack, Coman and Crespy, 2019, pp. 3–30; Peterson, 1997, pp. 559–578.

4 Wilkinson, 2019, pp. 6–23.

5 Lenaerts, 2019, pp.1–11.

Member States, all represent milestones in this process that some authors call ‘shared sovereignty’.⁶ Each of these initiatives has necessitated a redefinition of state sovereignty within the EU framework, where individual Member States retain authority over a number of domestic issues, but also transfer powers to EU institutions, a process described as ‘pooled sovereignty’.⁷ Consequently, although Member States continue to declare themselves sovereign, in practice many powers that traditionally give expression to sovereignty were transferred to a supranational level. In this manner, the process of governing is no longer conducted exclusively by the states, but by a variety of supranational, state and non-state actors in a ‘polycentric and non-hierarchical’ system of governance.⁸ From this perspective, a key question is where we currently stand and where we are heading as Member States of the EU and the EU itself.

These questions are more relevant since the evolution of sovereignty within the EU has been both a source of strength and a point of tension. On the one hand, the ability of Member States to collectively pool their resources and decision-making powers has allowed the EU to become one of the most influential economic and political blocs in the world. On the other hand, the perceived erosion of national sovereignty has sparked criticism, especially from those who view the EU as overly bureaucratic and unresponsive to local concerns, as well as from those who feel a sense of inequality between Member States, especially in the decision-making process. The ongoing tensions between the courts and disputes over the supremacy of EU law have brought attention to national and constitutional identity, the limits of EU powers and the future path of EU integration.⁹

Based on these premises, the chapter examines the concept of sovereignty from the perspective of the Member States. It outlines the ‘state of play’ in terms of constitutional foundations of sovereignty and explores the constitutional limits of the sovereignty within the EU framework. Considering the dynamic nature of sovereignty and the principle of conferred competencies enshrined in the EU Treaties, the analysis also delves into the ideas of shared sovereignty, supranationality, and the constitutionality of the EU. This creates a base for analysing how this specific model of shared sovereignty continuously shapes the constitutional foundations of Member States. This discussion will explore several aspects of the consolidation of EU supranationalism, particularly its definition as an independent legal order with a constitutional aim and a distinct identity, examining the harmonisation of fundamental rights protection and the development of EU law, especially in the context of criminal law, which is traditionally closely tied to national sovereignty. Additionally, the study will address how various crises have reinforced this supranational approach while considering contemporary challenges related to security risks, particularly in the

6 Wallace, 1999, pp. 503–521.

7 Petr, 2025.

8 Marks, Hooghe and Blank, 1996, pp. 341–378.

9 Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

areas of cybersecurity and the rapid advancement of artificial intelligence. The main research questions are: What does sovereignty mean within the EU today? What elements comprise what we might refer to as ‘shared sovereignty’ and how has this concept evolved within the EU framework, particularly concerning supranationality and constitutionality? Is the concept of shared sovereignty workable? What are the most challenging aspects of the relationship between sovereignty and supranationality, and which state actors are involved? Are EU Member States truly sovereign, or has the principle of supranationality undermined their sovereignty? What are the implications of these evolutions for a more integrated EU?

2. Constitutional Foundations of Sovereignty in EU Member States

2.1. *Sovereignty in National Constitutions*

The Constitutions of Member States present a varied approach to sovereignty. Some Constitutions highlight the ‘sovereignty of the state’. For example, the Constitution of Cyprus states in Art. 1 that ‘the State of Cyprus is an independent and sovereign Republic’.¹⁰ Similarly, the Constitution of the Czech Republic¹¹ asserts in Art. 1, para. 1, that ‘the 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’. The Constitution of Slovakia¹² declares in Art. 1 that ‘the Slovak Republic is a sovereign, democratic state governed by the rule of law’.

Other Constitutions highlight the ‘sovereignty of the nation’. The Constitution of Ireland¹³ affirms in Art. 1 that

the Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of government, to determine its relations with other nations, and to develop its life – political, economic, and cultural – according to its own genius and traditions.

Similarly, the Constitution of Lithuania¹⁴ states in Art. 2 that ‘the State of Lithuania shall be created by the Nation. Sovereignty shall belong to the Nation’. The

10 CODICES, 1960.

11 CODICES, 1992a.

12 CODICES, 1992c.

13 CODICES, 1937.

14 CODICES, 1992b.

Polish Constitution emphasises this as well in Art. 4, stating ‘Supreme power in the Republic of Poland shall be vested in the Nation’.¹⁵

Various Constitutions incorporate the concept of ‘popular sovereignty’ like the Constitution of Greece¹⁶ which states in Art. 1, para. 2, that ‘popular sovereignty is the foundation of government’ or establishes that sovereignty belongs to the people as the Constitution of Bulgaria¹⁷ which declares in Art. 1, para. 2, that ‘the people shall be the sole fountain of state power. The people shall exercise this power directly and through the bodies provided for in this Constitution’. Additionally, para. 3 of the same article specifies that ‘no part of the people, political party or any other organization, government institution, or individual may usurp the implementation of the sovereignty of the people’. The Constitution of Finland¹⁸ establishes in Art. 2 that ‘the powers of the State in Finland are vested in the people, who are represented by the Parliament’ and the Constitution of Latvia¹⁹ asserts in Art. 2 that ‘the sovereign power of the State of Latvia is vested in the people of Latvia’. In Italy, Art. 1, para. 2 of the Constitution²⁰ affirms that ‘sovereignty belongs to the people and is exercised by the people in the forms and within the limits of the Constitution’. The Romanian Constitution²¹ states in Art. 1, para. 1, that ‘Romania is a national, sovereign, independent, unitary, and indivisible State’ and in Art. 2, titled ‘Sovereignty’, it declares that ‘National sovereignty resides within the Romanian people, who exercise it through their representative bodies, resulting from free, periodic, and fair elections, as well as by referendum. No group or person may exercise sovereignty in their own name’. Similarly, the Constitution of Estonia²² establishes in Art. 1 that ‘Estonia is an independent and sovereign democratic republic wherein the supreme power of the state is vested in the people’. The Portuguese Constitution²³ establishes in Art. 1 that ‘Portugal is a sovereign Republic’, and in Art. 2 refers to ‘the sovereignty of the people’. The Constitution of Spain specifies in Sec. 1, para. 2 that ‘national sovereignty belongs to the Spanish people, from whom all state powers emanate’.

The Constitutions of France and Croatia are remarkable in providing detailed regulations on sovereignty and explicitly defining the concept’s meaning and content. Accordingly, in France²⁴ the first title, On Sovereignty, contains three Arts. that encompass various values typically found in separate sections of other constitutions. Art. 2 states:

15 CODICES, 1997.

16 CODICES, 1975.

17 CODICES, 1991b.

18 CODICES, 1999.

19 CODICES, 1922.

20 CODICES, 1947.

21 CODICES, 1991a.

22 CODICES, 2007.

23 CODICES, 2005.

24 CODICES, 1958.

The language of the Republic shall be French. The national emblem shall be the blue, white, and red tricolor flag. The national anthem shall be '*La Marseillaise*'. The maxim of the Republic shall be 'Liberty, Equality, Fraternity'. The principle of the Republic shall be governance of the people, by the people, and for the people.

Art. 3 emphasises that 'national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum. No group of people or individual may claim the exercise of sovereignty for themselves'. Art. 4 states that 'political parties and groups shall contribute to the exercise of suffrage. They shall form and carry out their activities freely while respecting the principles of national sovereignty and democracy'. As regards Croatia,²⁵ an entire chapter, titled Historical foundation, discusses that

the millennial national identity of the Croatian nation and the continuity of its statehood, confirmed by the course of its entire historical experience in various political forms and by the perpetuation and development of a state-building idea grounded on the historical right of the Croatian nation to full sovereignty,

citing all the constitutional steps in this regard. Further, the Constitution states that

the inalienable and indivisible, non-transferable and perpetual right of the Croatian nation to self-determination and state sovereignty, including the inviolable right to secession and association as the fundamental conditions for peace and stability of the international order, the Republic of Croatia is hereby established as the nation state of the Croatian nation and the state of the members of its national minorities

and 'the will of the Croatian nation and all citizens so unwaveringly expressed in free elections' to establish and shall further develop Republic of Croatia 'as a sovereign and democratic state in which equality, freedoms and the rights of man and citizen are guaranteed and secured, and economic and cultural advancement and social welfare are promoted'. According to Art. 2 of the Constitution, the sovereignty of the Republic of Croatia is 'inalienable, indivisible and non-transferable' and 'encompasses its land, rivers, lakes, canals, internal maritime waters, territorial sea, and all air space above these'. The Republic of Croatia, in accordance with international law, 'shall exercise sovereign rights and jurisdiction over the maritime zones and seabed of the Adriatic Sea outside its state territory up to the borders of neighbouring countries'. The Croatian Parliament and people

shall directly, independently, and in accordance with the Constitution and law, decide upon: the regulation of economic, legal and political matters in the Republic

25 CODICES, 2014.

of Croatia; the preservation of natural and cultural wealth and use of the same; alliances with other states. The Republic of Croatia shall conclude alliances with other states, retaining its sovereign right to decide upon the powers to be so delegated and the right to freely withdraw therefrom.

Some constitutions, like those of Belgium, Netherland or Luxembourg, do not explicitly mention the concept of sovereignty and other constitutions refer to the idea of ‘power’, specifically in relation to the people as its source. For example, the Constitution of Austria²⁶ states in Art. 1 that ‘Austria is a democratic republic. Its law emanates from the people’, and the Constitution of Hungary²⁷ states in Art. B, para. 3 that ‘the source of public power shall be the people’. The Constitution of Sweden²⁸ also emphasises this idea, declaring in Art. 1 that ‘all public power in Sweden proceeds from the people’. The Constitution of Slovenia²⁹ asserts in Art. 3 that

Slovenia is a state of all its citizens and is based on the permanent and inalienable right of the Slovenian people to self-determination. In Slovenia, supreme power is vested in the people. Citizens exercise that power directly, and most notably, at elections, and consistently with the principle of the separation of legislative, executive and judicial powers.

Similarly, the German Constitution,³⁰ in Art. 20, titled ‘Constitutional Principles – Right of Resistance’ para. (2) states that ‘all state authority is derived from the people. It shall be exercised by the people through elections and other votes, as well as through specific legislative, executive, and judicial bodies’. Para. (3) further asserts that ‘all Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedies are available’. The concept of sovereignty in the German Constitution is used in the context of regulation of the exercise of state power by the *Länder* (federal states), as expressed in Art. 30, titled ‘Sovereign Powers of the *Länder*’. This article explains that ‘except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*’.

The Constitution of Denmark³¹ refers to the ‘exercise of sovereignty’ in Art. 9, according to which

Provisions relating to the exercising of sovereign power in the event of the minority, illness, or absence of the King shall be laid down by Statutes. Where on the vacancy

26 CODICES, 1920.

27 CODICES, 2011a.

28 CODICES, 2011b.

29 CODICES, 1991c.

30 CODICES, 1949.

31 CODICES, 1953.

of the Throne there is no Successor to the Throne, the Folketing shall elect a King and establish the future order of succession to the Throne.

This overview highlights that sovereignty is a fundamental principle enshrined in the Member States Constitutions, serving as a defining characteristic of the state. The various forms in which it is enshrined, i.e. ‘national sovereignty’, ‘popular sovereignty’, ‘state sovereignty’, cover overlapping realities, but point to distinct theoretical justifications for state power.³² Thus, sovereignty that originates from the people, often referred to as ‘popular sovereignty’, is based on Enlightenment ideas from philosophers like John Locke, Jean-Jacques Rousseau, and Thomas Hobbes. This concept asserts that ultimate political power lies with the people as a collective body within a state. Popular sovereignty emphasises collective decision-making through institutions and laws that reflect the common good. In modern democratic states, this principle is institutionalised through mechanisms such as constitutions, elections, and representation. The idea of ‘the power of the people’ highlights the actual exercise of power, going beyond a mere abstract notion of sovereignty by exploring how power is distributed and practiced within a political community. In democracies, the power of the people is exercised through representative institutions and direct forms of democratic engagement, such as referenda, exemplifying this principle in action. For example, in the works of the Drafting Commission for the Romanian Constitution, the decision to establish that sovereignty belongs to the people was justified by the assertion that

national sovereignty, which reflects the supremacy of state power and its independence, is held by the people. This sovereignty is unique, inalienable, indivisible, and imprescriptible. The people, as the sole and exclusive holders of power, exercise their rights through their representative bodies and through referendums. This approach not only emphasizes the fundamental principle of the people’s omnipotence but also aims to merge direct democracy with representative democracy.³³

In contrast, ‘national sovereignty’ centres authority within the nation as a distinct community, often defined by objective elements like origin, language, religion, culture, and the recollection of a common history. Therefore, unlike popular sovereignty, which focuses on individual citizens, national sovereignty concerns the collective identity and historical continuity of the nation. It asserts that political power should serve the interests of the nation – defined by shared language, culture, ethnicity, or history – rather than solely the individuals within it. This notion is often tied to nationalist ideologies, which view sovereignty as a means of safeguarding the nation’s interests against external or internal threats. This can create tensions with liberal democratic principles, especially when the interests of the nation are

32 Tănăsescu and Muraru, 2008, p. 20.

33 Deleanu, 1998, p. 63.

interpreted in exclusionary, populist or authoritarian ways. Some Constitutions, such as that of Romania, seem to put the sign of equality between popular sovereignty and national sovereignty as long as it states that national sovereignty belongs to the Romanian people, a view in which it can be concluded that in this case sovereignty ‘is based on both theories equally’.³⁴

This variety of approaches help to define the unique constitutional profile of each state, showing that in modern political thought, sovereignty is understood to have arisen from multiple sources, most notably the people and the nation. Each of these perspectives offers a view on where ultimate authority lies and how power is exercised within a political community. The key distinctions between sovereignty derived from the people and the power of the people. The power of the nation reveals the tensions between individual and collective authority within democratic and national frameworks, which can also be relevant to the European integration process,³⁵ reflecting the way in which Member States and their citizens refer to EU integration.

2.2. Limits of Sovereignty and the Transfer of Powers to the EU

Enshrining the principle of sovereignty regardless of its various forms, the constitutions of the Member States also refer, many of them explicitly, to the limits of sovereignty, internal or external.

Thus, regarding the internal limits, for example, the Italian Constitution³⁶ enshrining the principle that ‘sovereignty belongs to the people’ expressly mentions that it is exercised ‘in the forms and within the limits of the Constitution’. Likewise, the Portuguese Constitution refers in Art. 3 to the exercise of sovereignty³⁷ ‘in the forms provided for in the Constitution’.

The external limits of sovereignty can take various forms, but in light of our study, we will particularly focus on the relationships with the EU. Some constitutions have specific regulations regarding the EU, while others treat them similarly to international relations and their associated limitations.

With regard to the first category, we refer to the example of France, where a special title (Title XV – On the European Union) regulates the relationship with EU in detail. According to Art. 88–1 of the Constitution,

the Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007.

34 Tănăsescu and Muraru, 2008, p. 24.

35 Martucci, 2021, p. 126.

36 CODICES, 1947.

37 CODICES, 2005.

The Hungarian Constitution³⁸ also expressly refers to the transfer of powers to the EU in Art. E, para. 2 according to which,

with a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this para. shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure. (3) The law of the European Union may stipulate generally binding rules of conduct subject to the conditions set out in para. (2). (4) The authorisation for expressing consent to be bound by an international treaty referred to in para. (2) shall require the votes of two-thirds of all Members of Parliament.

In Art. 7 of the Constitution Slovakia³⁹ establishes that it may enter into a state union with other states upon its free decision;

the Slovak Republic may, by an international treaty ratified and promulgated in a manner laid down by law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and European Union.

Lithuania has a specific profile, where from the moment of accession, the Constitutional Act on accession is an integral part of the Constitution of the Republic of Lithuania. It provides in Art. 1 that

the Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its State institutions in the areas provided for in the founding Treaties of the European Union and to the extent that, together with the other Member States of the European Union, it would, together with other Member States of the European Union, meet its membership commitments in those areas as well as enjoy the membership rights.

In Art. 65(1) of the Constitution Malta provides that

Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international

38 CODICES, 2011a.

39 CONSTITUTE, 2017.

and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003.

As mentioned earlier, other constitutions define the limits of sovereignty regarding the transfer of power. For example, the Austrian Constitution specifies in Art. 9, para. 2 that this can occur through laws or state treaties:

Austrian law may allow the transfer of specific federal competences to other states or intergovernmental organisations. The same way, the activity of agents of foreign states or intergovernmental organisations inside Austria and the activity of Austrian agents abroad may be regulated. The transfer of single federal competences from other states or intergovernmental organisations to Austrian agents can be provided for.

According to Art. 34 of the Belgian Constitution ‘the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law’. The Constitution of Croatia, which, as stated above, has an extensive regulation of the issue of sovereignty, but also refers to the limitation by ‘alliances with other states (...) retaining its sovereign right to decide upon the powers to be so delegated and the right to freely withdraw therefrom’ (Art. 2) or military alliances ‘assistance in the protection of the sovereignty and independence and defence of territorial integrity may also be rendered to the Republic of Croatia by allied states in pursuit of ratified international treaties’ (Art. 7), the various international acts/treaties the states are parties to.⁴⁰ Czech Constitution⁴¹ provides in Art. 10a (1) that

The Constitution of the Czech Republic allows for the transfer of certain powers by authorities to international organisations or institutions via treaty. (2) The ratification of the treaty in the para. requires the consent of Parliament, unless the constitutional act provides that such ratification requires an approval obtained via referendum.

The German Constitution enshrines in Art. 24 – Transfer of sovereign powers – System of collective security, that

The Federation may by a law transfer sovereign powers to international organisations. Insofar as the Länder are competent to exercise state powers and to perform state functions, they may, with the consent of the Federal Government, transfer sovereign powers to trans frontier institutions in neighbouring regions. With a view to maintaining peace, the Federation may enter into a system of mutual collective security; in doing so it shall consent to such limitations upon its sovereign powers as

40 CODICES, 2014.

41 CONSTITUTE, 2002.

will bring about and secure a lasting peace in Europe and among the nations of the world (...).

According to Art. 68 of the Latvian Constitution, ‘upon entering into international agreements, Latvia, with the purpose of strengthening democracy, may delegate a part of its State institution competencies to international institutions’. Luxembourg⁴² establishes in Art. 49bis of the Constitution that the exercise of the attributions reserved by the constitution to the legislative, executive and judicial powers may be temporarily vested by the treaty in institutions of international law. Similarly, the Constitution of Poland provides in Art. 90 that

The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters (...) Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Art. 125.

According to Art. 3 A of the Constitution of Slovenia⁴³

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values. Before ratifying a treaty referred to in the preceding para., the National Assembly may call a referendum. A proposal shall pass at the referendum if a majority of voters who have cast valid votes vote in favour of such. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.⁴⁴

Other constitutions do not address the transfer of (sovereign) powers or limitation of sovereignty explicitly. Instead, they specifically regulate relationships with the EU and the obligations that arise from these relationships. For example, the Constitution of Romania, in Art. 148 - Integration into the European Union, establishes that

As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence

42 CONSTITUTE, 2009.

43 CODICES, 1989.

44 Art. 3a was added by the Constitutional Act Amending the Constitution of the Republic of Slovenia (UZ3a, 47, 68), adopted in 2003 (Official Gazette of the Republic of Slovenia, No. 24/03).

over the opposite provisions of the national laws, in compliance with the provisions of the accession act. (para. 2)

and

The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of para. (2) are implemented (para. 4).

It is interesting to note, however, when examining the works of the Constituent Assembly, that the proposal to introduce sovereignty within the limits of the revision of the constitution was criticised as it would raise ‘some difficulties in the EU integration process’. The question raised was ‘how to integrate into this formula of political organisation of Europe if you do not accept the priority, within the limits of the ‘European Constitution’ of the decisions of the structures at the Union level?’⁴⁵ Currently, sovereignty is not confined to the boundaries set by Art. 152 of the Romanian Constitution. However, the concept of independence has been introduced as a defining limit.

In any case, to understand the limits of sovereignty in relation to the EU, it is essential to examine how these limits are interpreted in the case law of constitutional courts. Notable cases illustrate the idea that transferring competencies from the national level to the EU level in pursuit of common goals constitutes a joint exercise of specific sovereign powers, rather than a transfer of sovereignty itself to the EU.

For example, a landmark case of the Constitutional Court of Romania (CCR) was about the initiative to revise the Constitution in 2003,⁴⁶ where the Court stated that the text proposed in Art. 145–1 (Integration into the EU) indicated that the legislator intended ‘the creation of a constitutional framework suitable for Romania’s integration into the EU’, also noting that ‘membership in this Union entails the transfer of certain powers related to state sovereignty to the EU’. According to the Court, ‘the creation of this constitutional framework is necessary’, ‘considering the strategic objectives of Romania, objectives that enjoy broad popular support’. The CCR emphasised that the new provisions ‘are intended to establish the rule according to which accession to the European Union is performed by law, adopted in the joint session of the Chamber of Deputies and the Senate, with a qualified majority of two thirds of the number of members of the Parliament’, expression of the constitutional provisions according to which ‘the Parliament is the supreme representative body of the Romanian people and the only legislative authority of the country’. The Court appreciated that

45 Iorgovan, 1998, p. 314.

46 Decision no 148/2003, Official Gazette of no. 317 13 May 2023.

the provision of accession by law aims to bring to the attention of the supreme representative body not only the importance of accession to the European Union, but also the responsibility that falls on the Romanian state, in the conditions in which it acquires the status of a member of the European Union. This responsibility stems, first of all, from the positive or negative consequences that can arise from the accession process, some stemming even from the act of ‘transferring some attributions to the community institutions’, which can call into question the issue of national sovereignty.

With reference to the problem of the transfer of some powers of Romania to the community institutions, the Court stated that

the act of accession has a double consequence, namely, on the one hand, the transfer of some powers to the community institutions, and on the other hand, the joint exercise, with the other states’ members, of the competences provided for in these treaties.

Regarding the first consequence, the CCR held that,

by the simple membership of a state to an international treaty, it diminishes its competences within the limits established by international regulation. From this first point of view, Romania’s membership in the United Nations Organization, the Council of Europe, the Organization of European Community States, the Central European Free Trade Agreement, etc. or Romania’s capacity as a party to the Convention for the Protection of Human Rights and Fundamental Freedoms or to other international treaties has the meaning of a restriction of the competences of the state authority, a relativisation of national sovereignty.

Correlating this statute with the issue of Romania’s integration into the EU, the CCR held that ‘the act of integration has the meaning of sharing the exercise of these sovereign attributes with the other component states of the international body’ but

through the acts of transfer of some attributions to the structures of the European Union, they do not acquire, through endowment, a ‘supercompetence’, a sovereignty of its own. In reality, the Member States of the European Union have decided to jointly exercise certain powers that, traditionally, belong to the field of national sovereignty.

The CCR rulings thus took into account the dynamics of the concept of sovereignty, the fact that ‘in the current era (...), the concept of national sovereignty can no longer be conceived as absolute and indivisible, without the risk of an unacceptable isolation’ and that ‘Romania’s desire to join the Euro-Atlantic structures is legitimised by the country’s interest’ and ‘sovereignty cannot be opposed to the goal of accession’. Further, based on its competencies provided by the Constitution, examining

whether the provisions related to accession to Euro-Atlantic structures affect the limits of constitutional revision, the CCR found⁴⁷ that the state's sovereignty 'does not fall under the scope of Art. 148 of the Constitution, which establishes the limits of constitutional revision'. However, the independent nature of the Romanian state does fall within this scope. From this perspective, the Court noted that 'it is obvious that accession to the Euro-Atlantic structures will be based on the independent expression of the will of the Romanian state, and is not a manifestation of the will imposed by an external entity'. Thus, the Court concluded that inserting two new Arts. into the constitution regarding EU integration does not violate any constitutional provisions concerning the limits of the amendment of the constitution.

Consequently, the CCR interprets the meaning of accession to the EU as a transfer of certain attributes related to the sovereignty to EU, limited and determined by law, as established by the supreme representative authority of the Romanian people: the Parliament. According to the CCR, vertical collaboration does not entail a transfer of sovereignty in itself, in the sense that the EU does not become sovereign. Therefore, the EU's legal framework should be understood as complementary to the national legal systems.

Similarly, in the judgments concerning compatibility with the constitution of the amendments of EU treaties by the Lisbon Treaty, the German Constitutional Court⁴⁸ pointed out that the Treaty would not lead to the formation of an EU State. Under the Lisbon Treaty, the EU would remain an association of sovereign states to which 'the principle of conferral applies:

Art. 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (Staatenverbund). The concept of Verbund covers a close long-term association of states which remain sovereign, a treaty-based association that exercises public authority but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation.

The Court underlined that

the special responsibility is incumbent on the legislative bodies, in addition to the Federal Government, within the context of participation which in Germany has to comply internally with the requirements under Art. 23.1 of the Basic Law (responsibility for integration) and which may be invoked in any proceedings before the Federal Constitutional Court.

⁴⁷ Ibid.

⁴⁸ Judgment of 30 June 2009 - 2 BvE 2/08.

A clear image of the dynamics of sovereignty is given by the Czech Constitutional Court,⁴⁹ in the sense in which despite the semantics, the EU *sui generis* construction needs a new perspective on sovereignty in order to achieve common goals:

The EU has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity *sui generis*, which is difficult to classify in classical political science categories. 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. It may seem paradoxical that their 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. (para. 104);

The transfer of powers of the bodies of the Czech Republic to an international organisation under Art. 10a of the Constitution of the Czech Republic (the 'Constitution') cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Art. 9 para. 2 in connection with Art. 1 para. 1 of the Constitution). If, on the basis of a transfer of powers, an international organisation could continue to change its powers at will, and independently of its members, i.e. if a constitutional competence (competence relating to competence) were transferred to it, this would be a transfer inconsistent with Art. 1 para. 1 and Art. 10a of the Constitution. The Treaty of Lisbon does not have such consequences in relation to the European Union, and the reviewed provisions thereof are consistent with the constitutional order of the Czech Republic.

In conclusion, when examining the constitutional foundations of sovereignty and its limits, it is evident that sovereignty remains a fundamental principle of Member States, as their own DNA. Most constitutions address the boundaries of sovereignty, reflecting its dynamics in today's complex international relations. The limitations imposed by EU membership are often explicitly outlined, with some constitutions delineating the relationship between norms in this new legal context. Even when constitutions directly reference the EU, the language generally indicates a limited and conditional transfer of powers, suggesting that states freely choose to exercise some of their powers collectively. Analysing how sovereignty and its exercise are articulated in constitutions reveals that further limitations on sovereignty may trigger mechanisms of direct democracy, such as referendums or semi-direct democracy. In these cases, laws adopted by Parliament may require qualified majorities, distinct from standard legislative procedures. These findings contribute to the understanding of the ongoing debate about expanding the EU's competencies in ways other than

amending the treaties, particularly through the jurisprudence of the CJEU, the revival of the topic of constitutional identity and the so called ‘battles’ of the Courts as challenges of the consolidation of EU supranationalism.

3. Exercise of Sovereignty in Terms of the EU Treaties. The EU Competences and Institutions

3.1. The Principle of Conferral of Competences

Over time, the evolution of the EU has created a unique institutional structure comprising as core institutions the European Commission, the European Parliament, the Council of the EU, the European Council, along with the CJEU, acting more or less in a separation of functions (similar with the classic separation of powers within the state). The European Commission acts as ‘the executive arm’, proposing legislation and managing daily affairs, the European Parliament, elected by EU citizens, shares legislative power with the Council of the EU, shaping laws, budgets, and agreements to ensure accountability, the Council of the EU represents Member States governments, collaborating with the Parliament on legislation, the European Council, consisting of heads of states or governments sets strategic priorities, and the CJEU ensures the uniform application of EU law across Member States. These institutions balance supranational and intergovernmental principles, allowing the EU to function cohesively while assuming to respect the autonomy of Member States and their equality. In such a complex constitutional environment, an essential aspect of answering the sovereignty question is understanding the distribution of competences between the Union and the Member States, as well as among the Union institutions.⁵⁰

For a long time, the competencies of the Union were not explicitly defined; instead, they were inferred from the objectives outlined in the Treaties. This ambiguity led to the emergence of the concept of vertical conflicts of competencies between the Member States and the Union. However, with the Lisbon Treaty, a framework of competencies was established, classifying areas as exclusive, shared, supporting, or in relation to the EU and its Member States. Thus, the TEU expressly provides in Art. 5 that ‘the limits of Union competences are governed by the principle of conferral’ and described this principle in the sense that

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.

50 See: Azoulai, 2014, p. 1.

Treaty on the Functioning of the EU ‘organises the functioning of the EU and determines the areas of, delimitation of, and arrangements for exercising its competences’. (Art. 1). According to Art. 2, paras. 1 and 2 TFEU,

When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

TFEU describes categories and areas of EU competence, establishing in Art. 3 that the EU

shall have exclusive competence in the following areas: (a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.

The Union

shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

Art. 4 of the TFEU outlines the ‘principal areas’ of ‘shared competence between the Union and the Member States’. These areas include: the internal market, social policy, as defined in this Treaty, economic, social and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; environmental protection; consumer protection; transport; trans-European networks; energy; the area of freedom, security and justice; common safety concerns in public health matters, as defined in this Treaty. Para. 3 of Art. 4 TFEU provides that

In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement

programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs,

and para. 4 provides that

In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

The Member States shall coordinate their economic policies according to Art. 5 TFEU, specific provisions applying to those Member States whose currency is the euro. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies and may take initiatives to ensure coordination of Member States' social policies. Art. 6 establishes the areas where the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, meaning protection and improvement of human health, industry, culture, tourism, education, vocational training, youth and sport, civil protection and administrative cooperation. According to Art. 4, para. 1 TEU, 'in accordance with Art. 5, competences not conferred upon the Union in the Treaties remain with the Member States'.

However, this distribution of competencies appears to address criticism⁵¹ that the scope of Community activity was so broad that few, if any, areas of national policy remained unaffected and the powers of the Community were sufficiently vague, making it difficult to determine their limits without considering how they impacted Member States' interests and the consequences of these actions for them. To facilitate its application ('the use'), the principle of conferral is complemented with two other important principles, enshrined in the same Art. 5 TEU, that is the principle of subsidiarity and proportionality.

3.2. Subsidiarity and Proportionality Protecting the Sovereignty Within the EU

According to the principle of subsidiarity,

in areas which do not fall within its exclusive competence, the Union 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 Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and

51 Gareth, 2006, pp. 63–84.

proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

This principle was formally enshrined by the TEU, signed in 1992, but until the entry into force of the Lisbon Treaty, the assessment of the subsidiarity was in the ‘hands’ of the EU institutions, a fact that raised criticism because ‘subsidiarity may protect the right of Member States to be co-opted by the Community to do its work, but it does not protect their right to do their own work’.⁵² What the latest amendment to the treaties brings positively is the role of national Parliaments in subsidiarity control, in the sense of an *ex ante* ‘early warning’ control of legislation and thus the involvement of national parliaments in the decision-making mechanism at EU level. This appears as a crucial step in terms of the exercise of shared sovereignty, since ‘the national Parliaments have a particular interest to verify that the transferred powers are not abused, because it is they who initially gave away these powers to be shared within the EU’.⁵³

National Parliaments oversee compliance with the principle of subsidiarity according to the procedure outlined in Protocol No. 2.⁵⁴ Under the *ex ante* ‘early warning’ mechanism, any national parliament or chamber of a national parliament has eight weeks from the date a draft legislative act is forwarded to send a reasoned opinion to the Presidents of the European Parliament, the Council, and the Commission, explaining why the draft does not comply with the principle of subsidiarity. If reasoned opinions represent at least one-third of the votes allocated to national parliaments (one vote per chamber for bicameral systems and two votes for unicameral systems), the draft must be reviewed (this is referred to as a ‘yellow card’). The institution that produced the draft legislative act can choose to maintain, amend, or withdraw it, providing reasons for its decision. For draft acts related to police cooperation or judicial cooperation in criminal matters, the threshold is lower, requiring only one-quarter of the votes. In the context of the ordinary legislative procedure, if a simple majority of the votes allocated to national Parliaments challenges a proposal for a legislative act’s compliance with the principle of subsidiarity, and the Commission decides to keep its proposal, the matter is referred to the legislator (Parliament and the Council). They will then make a decision at first reading. If the legislator determines that the legislative proposal is incompatible with the principle of subsidiarity, it may reject it, requiring a majority of 55 percent of the members of the Council or a majority of the votes cast in the European Parliament (this is known as an ‘orange card’).

However, in order to effectively fulfil this role, subsidiarity control must be realised with awareness and involvement from national institutions. Besides, the scrutiny of national Parliaments under the Protocol on the application of the

52 Ibid.

53 Hettne and Langdal, 2011, pp. 350–355.

54 Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

principles of subsidiarity is limited. Thus, only a draft of a legislative act, and not a non-legislative act, could be within their competence to review. Additionally, Parliaments can only comment on why they considered a draft to be inconsistent with the principle of subsidiarity and not whether a proposal appears to be incompatible with the principle of conferral. From the perspective of the recurrent debates concerning the interpretation and application of Art. 4 of the TEU concerning national identity, a noteworthy remark is that ‘there is no explicit provisions for the national parliaments to object if they believe that national identity has been violated within the meaning of Art. 4.2 of the EU Treaty’.⁵⁵ At the same time, this type of control involves two practical assessments: the sufficiency test and the added value test. The sufficiency test evaluates whether the state can adequately achieve the objectives of the proposed action, while the added value test examines whether the EU can achieve the same objectives more effectively. It has been noted⁵⁶ that measuring the impact using only quantitative parameters is often very challenging. Consequently, relying solely on qualitative assessments can limit decision-making authority, as qualitative methods may make way for political interpretation.

According to the principle of proportionality,

the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

Its role ‘of guaranteeing that the European political centre does not exceed what is strictly necessary’⁵⁷ should not be underestimated either, ‘as its value is recognised by its place of honour within the principles of European law’.⁵⁸ The assessment of proportionality is also a challenging issue, because the margin of appreciation of the legislator is difficult to define.

In this regard, CJEU stated that

in the exercise of the powers conferred on it, the EU legislature must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations. Thus, the criterion to be applied is not whether a measure adopted in such an area was the only or the best possible measure, since its legality can be affected only if the measure is manifestly inappropriate having regard to the objective which the

55 Hettne and Langdal, 2011, p. 352.

56 Enache and Deaconu, 2024, p. 106.

57 Ibid., p. 108.

58 Vida and Vida, 2016, p. 86.

competent institutions are seeking to pursue (judgement of 3 December 2019, Czech Republic v Parliament and Council, C-482/17, EU:C:2019:1035, para. 77).⁵⁹

Taking into account these challenges, and to apply more effectively the principle of subsidiarity and proportionality, in March 2017 the European Commission created a dedicated ‘Task Force on subsidiarity, proportionality and doing less more efficiently’, as part of the Better Regulation agenda. In 2018 the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions was published on ‘The principles of subsidiarity and proportionality: Strengthening their role in the EU’s policymaking’,⁶⁰ in which ‘actions to strengthen the role of subsidiarity and proportionality’ are established: promoting a common understanding of subsidiarity and proportionality (the Commission intends to: incorporate the grid for assessing subsidiarity and proportionality in its better regulation guidance and use the grid to present its findings in impact assessments, evaluations and explanatory memoranda; use the grid as guidance in its communication with national Parliaments; make more visible the feedback it receives about its proposals from local and regional authorities to the European Parliament and the Council in each legislative procedure); enabling national Parliaments to scrutinise more effectively (sense in which the term of response is discussed and the idea to

give greater visibility to the views of national Parliaments’ reasoned opinions by providing aggregated responses, where relevant, and targeting their concerns and identifying proposals raising most comments in its annual reports on subsidiarity and Protocol No. 2 of the Treaties’), more active involvement of local and regional authorities, improving assessment and presentation of relevant impacts, evaluating existing legislation from the perspective of subsidiarity.

Further, to effectively fulfil its intended role and ensure genuine coherence between the Constitutions of Member States and EU treaties regarding transferred powers, it is essential to coordinate and clarify the performance of subsidiarity controls by national Parliaments.

3.3. More Competences for the EU?

Although there may seem to be a division of competences outlined in the Treaties, it is not simple to define the EU’s competence *ratione materiae*. To determine the legal basis that defines the scope of the competence conferred on the EU in a specific area

59 Case C-626/18, ACTION for annulment under Art. 263 TFEU, Republic of Poland, para. 95.

60 COM/2018/703 final.

and to achieve its stated objective, a systematic examination of the Treaty provisions is necessary. This analysis should also take into account the case law of the CJEU.

In the light of this, legal literature distinguishes competences ‘conferred expressly or impliedly by the Treaties’.⁶¹ As concerns the ‘implied competences’, it was observed that

some Treaty provisions do not expressly provide for all the necessary means in order to attain the objectives of the competence *ratione materiae* in question. In such cases, the Court of Justice has recognised that it is implicit in the Union competence that additional means may be used in order to achieve the objectives.⁶²

Thus, examining the jurisprudence of the CJEU it was found that the Union is entitled to rely on an implied competence when it is necessary to ensure the practical effect of the Union competence at issue.⁶³ For example in the case C-176/03, the CJEU found that

while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective. That competence of the Community legislature in relation to the implementation of environmental policy cannot be called into question by the fact that Arts. 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community’s financial interests respectively, the application of national criminal law and the administration of justice.

Also noting that the list of exclusive and shared competences enshrined in the TFEU is not exhaustive and limiting,⁶⁴ the doctrine has argued that the EU will reserve the right to annex new areas as long as the provisions of the former Arts. 95 and 308 TEC (current Arts. 114 and 352 TFEU) exist. The legal literature also brought to the attention the exercise of the exclusive competences, provided by Art. 3 TFEU, which remains free from further influences, since in those contexts a unitary action is considered to be necessary.⁶⁵ Other authors⁶⁶ discuss the way in which the EU competences can be interpreted extensively by the ‘appetite’ of the various Union

61 Lenaerts and Nuffel, 2021, p. 90.

62 Ibid., p. 91.

63 C-295/90; *ibid.*, p. 90.

64 Dumitraşcu, 2012, p. 52.; Enache and Deaconu, 2024, pp. 102–129.

65 Di Stasi, 2020, pp. 131–154.

66 Lupu, 2023, pp. 148–159.

structures to acquire more competencies, an evolution whose engine was especially the Commission and the CJEU by introducing new areas of regulation into discussion as *'a fait accompli'*.⁶⁷ The establishment of competencies through the Lisbon Treaty represented a significant transfer of competencies from individual states to the European Union in areas such as monetary policy, agriculture, and transport. However, in the case of new areas like artificial intelligence, the states themselves did not have sufficient time to develop regulations. In these cases we are no longer talking about a transfer from the Member States, but rather about a unilateral assumption by the Union. The lack of regulations and, above all, the lack of vision of the majority of national governments regarding regulation in new areas of social relations granted the EU to take the first steps, implementing the principle of 'occupying the field' specific to federal constructions.⁶⁸ In the light of this, the question 'until which point can we envisage the exercise of sovereign competences by a union of states, in some way *sui generis*, as it is the EU 'outside' the state body'?'⁶⁹ remains an interesting issue to analyse based on the continuous dynamics of EU relationships.

4. Transformation of Sovereignty Within the EU: Reshaped but Still Present

4.1. 'Shared Sovereignty' and Related Concepts

The overview of the regulations outlined in the constitutions of the Member States and the EU treaties reveals a normative framework that is continuously evolving, also influenced by the interpretation in institutional practices. This evolution follows the general dynamics of sovereignty in the modern world, where the concept is necessarily connected with the state's willingness and will to participate in venues of international cooperation, and to share its competences with other subjects of the international community,⁷⁰ but has its own specifics. The complex relationship between 'State sovereignty' and the supremacy of EU law – law that does not originate from any state – can be summarised by a thought-provoking question: how can EU Member States be considered sovereign when EU law automatically becomes part of their internal legal system upon enactment, without the need for any ratification? Furthermore, in such circumstances, do the Member States remain sovereign states? Due to this intriguing specific, scholars have endeavoured to find an appropriate way

67 For a comparative analysis see Sagar, 2013, pp. 251–274.

68 Sagar, 2013, pp. 251–274.

69 Di Stasi, 2020, pp. 131–154.

70 Hamulak, 2016, p. 60.

to describe the relationships of sovereignty within the EU and the legal order that emerges from it.

In legal literature and political studies, the process by which certain powers, traditionally viewed as sovereign, are exercised jointly at a supranational level within the EU is often referred to as ‘shared sovereignty’. This concept generally involves⁷¹ the engagement of external actors in some of the domestic authority structures of states for an indefinite period of time and implies⁷² some pre-conditions: there must be international sovereignty, the agreement must be voluntary, the arrangement must not ask the third party to contribute large resources. The states cede their autonomy by pooling their resources into a multilateral structure also limited to specific issue areas and become bound by adherence to international norms developed as a result of this collective action or cooperation.⁷³ The essence of the ‘shared sovereignty’ is the decision of the state of pooling sovereign rights/competences. It was noted⁷⁴ (distinguishing in relation to the delegation of competence) that in the course of pooling sovereignty, a state transfers authority to a collective decision-making body, to set a policy in a given area. This transfer of authority can either be conditional and revocable, or unconditional, and the State may retain residual rights of control, or opt not to; in pooling sovereignty, states are making trade-offs between a unilateral policy that aligns more closely with their individual preferences and a collective policy that is more effective in addressing common issues. In other words, states are compromising to some extent on their ideal policies in order to adopt solutions that actually ‘work’ and resolve the problems they face. In relation to the specificity of the EU, there are diverse theoretical proposals of reconciliation of national sovereignty with European integration, such as the theories of constitutional pluralism, multi-level constitutionalism or the idea of constitutional tolerance.⁷⁵

Thus, regarding the theory of constitutional pluralism, there is a rich literature exploring the construction of Neil MacCormick that starts from the premise of the existence of a plurality of legal orders, and proposes pluralistic and non-monistic, interactive and non-hierarchical as the most appropriate method of analysis. According to this theory, the ordering of the Member States and the ordering of the EU are distinct but partially overlapping and interactive, and between them the hierarchical relationships do not determine a general superiority of one system over the other.⁷⁶ In relation to the premises of pluralism, the type of sovereignty that would be appropriate for the EU order, as well as all the multidimensional legal orders, is called ‘late sovereignty’, as opposed to ‘early sovereignty’, which belongs to traditional state political organisations.⁷⁷

71 Krasner, 2005, pp. 69–83.

72 Ibid.

73 Mamudu and Studlar, 2009, pp. 73–97.

74 Lake, 2017, pp. 219–237.

75 See Bifulco and Nato, 2020.

76 Menendez, 2011; Borowski, 2011, pp. 185–209.

77 Mac Amhlaigh and Cormac, 2011.

The theory of multilevel constitutionalism claims that the EU would constitute a composed constitutional system ‘from a national level and from a supranational level of legitimate public power, which influence each other, involving the individual citizens or other subjects of law in different dimensions’.⁷⁸ In terms of sovereignty, this European construction determines the necessary rethinking of the relationship between the national authority and the supranational authority. Answering to the fear that ‘this empowerment of common institutions at the European level is often understood as a loss of autonomy and sovereignty for the state, as well as a threat to democracy and the rights of individuals’, theoreticians of the multilevel constitutionalism⁷⁹ underlined that

one must remember that the principle of subsidiarity, in a broader meaning, governs not only the attribution of these powers to the Union, but it governs particularly their exercise by its institutions. This means that European powers are limited to what the MS cannot effectively achieve individually. Thus, the creation of European institutions to implement such policies results not in a loss of sovereignty for a Member State’s citizens, but rather in a gain in the form of new opportunities available to promote their interests;

yet this is not national sovereignty in the traditional sense, but another kind of sovereignty: it is not so much autonomy or autarchy (which, thanks to globalisation pressures and dependencies, does not exist anymore), but rather the ‘capacity to participate in transgovernmental networks of all types of sovereignty as participation’. Multilevel constitutionalism considers ‘not only supranational constitutional processes such as European integration, but also understands such processes as part of, and in close relation to, constitutional development at the national level’.⁸⁰ It implies national constitutions change with the progress of supranational constitutional arrangements, ‘as much as the states themselves change their face, political structure, and nature as a result of their integration in supranational organizations’.

Starting with the idea that Europe may have a constitutional legal order, but an absence of traditional constitutional legitimation, Joseph Weiler argues that Europe has not approved its constitutional order in a way that grants it the legitimacy needed to meet the demands and autonomy necessary to transcend state authority. He believes that Europe has already found its ‘federal way’, even though this path is not anchored in a state-like constitution. Instead, it is based on the principle of ‘constitutional tolerance’. Weiler asserts⁸¹ that

78 Bifulco and Nato, 2020.

79 Pernice, 2009, pp. 349–407, also with the reference, as regards the concept of ‘cooperative sovereignty’, to Besson, 2004.

80 Ibid.

81 Weiler, 2000, pp. 1–16.

Europe represents this alternative, civilizing strategy of dealing with the ‘other’. This is, more than peace and prosperity, Europe’s true soul. The constitutional expression of this strategy is the principle of Constitutional Tolerance and it is encapsulated in that most basic articulation of its meta-political objective in the Preamble to the EC Treaty.

To lay the foundations of an ever closer union among the peoples of Europe, Weiler showed that

no matter how close the Union, it is to remain among distinct peoples. An ever closer union could be achieved by an amalgam of distinct peoples into one nation – which is both the ideal and/or the de facto experience of most federal and non-federal states. The rejection by Europe of that One Nation ideal or destiny is usually understood one as intended to preserve the rich diversity – cultural and other – of the distinct European peoples as well as to respect their political self-determination. But the European choice has an even deeper spiritual meaning. An ever closer union is altogether easier if differences among the components are eliminated, if they come to resemble each other, if they aspire to become one.

Here – the opinion of Weiler resides on the Principle of Constitutional Tolerance:

inevitably, I define my distinct identity by a boundary which differentiates me from those who are unlike me. My continued existence as a distinct identity depends, ontologically, on that boundary and, psychologically and sociologically, on preserving that sentiment of otherness. The call to bond with those very others in an ever closer union demands an internalization (individual and societal) of a very high degree of toleration.

Beyond theoretical analyses and semantic nuances, what is important is whether this one-of-a-kind ‘*modus vivendi*’ ensures a coexistence of states in the spirit of the vision that led to the foundation of the EU. From this perspective, the challenges regarding sovereignty in the EU focus on balancing national autonomy with supra-national governance, highlighting the need for ongoing negotiation and adjustment of sovereignty concepts to align with the evolving framework of the EU. As we mentioned before, the continuous adjustments in the exercise of sovereignty have sparked debates and challenges, particularly regarding the expansion of EU competencies through informal means rather than through an explicit agreement among the states to modify the foundational treaties, since this ongoing process gradually implicitly restricts the competence of Member States. Considering the various crises that the EU has experienced over time, their effects can provide insights into the feasibility of sharing sovereignty within the EU.

4.2. The Dynamics of ‘Shared’ Sovereignty in the EU: Achievements and Vulnerabilities

4.2.1. The Autonomy of EU Legal Order, ‘A Shield’ and ‘A Sword’.⁸² The Identity of the EU as a Common Legal Order

In an Art. on the crisis of the European rule of law, Stefan Braum suggestively pointed out that ‘Europe is in a permanent mode of crisis’,⁸³ showing that global problems – such as the economy, migration, and crime – are overwhelming Europe, which seems unable to act decisively and lacks true sovereignty; this situation fosters a desire for traditional state power and strong politics. Paradoxically (or not), the solution lay in embracing Europe more and more fully to protect the democracy and the rule of law. Practically, these crises seem to have functioned as a kind of testing and strengthening of the Union’s immune system, contributing to the building of what the CJEU President called in a recent article.⁸⁴ the EU’s ‘shield’ and ‘sword’, that is its own identity as a common legal order.

Thus, from the early days of European construction to the present, the legal framework of the EU has developed into a well-organised and structured set of legal rules. This framework is based on the foundational treaties and their subsequent amendments, but it has also been significantly shaped by the integration of principles that have been established as essential constitutional foundations, largely through the actions of the CJEU, beginning with landmark rulings in cases such as *Van Gend & Loos v. Nederlandse Administratie der belastingen* (Case C 26/62), *Flaminio Costa v. E.N.E.L.* (Case C 6/64), and *Amministrazione delle Finanze dello Stato v. Simmenthal SA* (Case C 106/77). These decisions have significantly contributed to the constitutional framework of the EU as well as to the preliminary ruling mechanism in itself, facilitating legal, economic, and political integration. With the entry into force of the Lisbon Treaty, the EU no longer acts through ‘community law measures and non-Community measures’ but the measures on ‘Union law’.⁸⁵

This way, the autonomy of EU law itself was built, an idea expressed by the CJEU in its Opinion 2/13⁸⁶ as follows:

the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in

⁸² Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

⁸³ Braum, 2018, pp. 429–431.

⁸⁴ Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

⁸⁵ Lenaerts and Nuffel, 2021, p. 45.

⁸⁶ Opinion 2/13 of the Court (Full Court), 18 December 2014

particular, judgments in *Van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, para. 65);⁸⁷

the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.⁸⁸

As explained from a normative perspective, the autonomy of EU law reflects the idea that the Treaties lay down a ‘constitutional order’, given that they have established ‘an autonomous, self-sufficient and coherent system of norms’, meaning a ‘constitutional order’ that has to be distinguished from ordinary international law’.⁸⁹

A crucial step in this construction in terms of the exercise of shared sovereignty was the affirmation of the own identity of the EU. One of the ‘catalysts’ of such development was the revival of the discussion concerning constitutional identity, promoted by Member States’ constitutional courts as a limit that the EU cannot exceed in exercising its competencies (based on the notion of ‘national identity’, enshrined in Art. 4(2) TEU). In order to balance different approaches and debates on constitutional identity, it is important to take into account the respect of the constitutional identity recognised in Art. 4 of the TEU, while being aware of the rise of populist and extremist movements in Europe, often exploiting the concept of constitutional identity to gain political support, rather than to promote genuine democratic values. This ‘mix’ and afferent crises lead the CJEU to construct a ‘doctrine’ of the constitutional identity based on its interpretation of Art. 4 TEU⁹⁰ and even a concept of EU identity as a common legal order. Thus, in the so-called Conditionality Judgments, the Court of Justice provided some valuable insights into what the ‘identity of the EU’ is:

Art. 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States. Even though, as is apparent from Art. 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept

⁸⁷ Opinion 2/13 of the Court (Full Court), 18 December 2014, para. 157.

⁸⁸ Opinion 2/13 of the Court (Full Court), 18 December 2014, para. 158.

⁸⁹ Lenaerts, 2019, p. 10.

⁹⁰ Faraguna and Drinóczi, 2022.

of ‘the rule of law’ which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.⁹¹

Thus, the CJEU proceeded to stress the cardinal importance of the values on which the EU is founded: before accession, a candidate state for EU membership must align its own constitution and national identity with those values and once accession takes place, it is therefore presumed that the new Member State respects the values on which the EU is founded and thus may join a legal structure based on the principle of mutual trust. In the light of that principle, each Member State is equally committed to upholding those values and in so doing, to respecting EU law provisions that implement them.⁹²

It was correctly concluded in this regard that ‘according to this normative conception of constitutional identity, the ‘particular’ aspect of constitutional identity could not contradict its ‘general’ aspect’.⁹³ Declaring the identity of the EU as the ‘bedrock’ on which to build ‘the process of creating an ever-closer union among the peoples of Europe’⁹⁴ compels the involved partners, including Member States and their institutions, to seek standardised, harmonised solutions, ‘allowing room for openness towards the laws of the Member States and international law’.⁹⁵ Regarding how much ‘room’ is allowed, it should be noted that the CJEU established its exclusive jurisdiction to provide the definitive interpretation of Art. 4 TEU, stating, for example in the case C-430/21 *RS*, that

If a constitutional court of a Member State considers that a provision of secondary EU law, as interpreted by the Court, infringes the obligation to respect the national identity of that Member State, that constitutional court must stay the proceedings and make a reference to the Court for a preliminary ruling under Art. 267 TFEU, in order to assess the validity of that provision in the light of Art. 4(2) TEU, the Court alone having jurisdiction to declare an EU act invalid (see, to that effect, judgements of 22 October 1987, *Foto-Frost*, 314/85, EU:C:1987:452, para. 20, and of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, para. 96).⁹⁶

In addition, since, as has been pointed out in para. 52 above, the Court has exclusive jurisdiction to provide the definitive interpretation of EU law, the constitutional court of a Member State cannot, on the basis of its own interpretation of provisions of EU law, including Art. 267 TFEU, validly hold that the Court has delivered a judgement

91 Judgments in Cases C-156/21 *Hungary v Parliament and Council* and C-157/21 *Poland v Parliament and Council*.

92 Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

93 Faraguna and Drinóczi, 2022.

94 Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

95 Ibid.

96 C-430/21 *RS*, para. 71.

exceeding its jurisdiction and, therefore, refuse to give effect to a preliminary ruling from the Court.⁹⁷

Although this evolution proves the resilience of EU construction faced with populist and illiberal movements, the constitutional identity issue remains a point of tension⁹⁸ in terms of shared sovereignty, at least between courts within the EU, taking into account that although the treaties discuss national identity rather than sovereignty, the constitutional courts' focus on constitutional identity is based on a specific understanding of sovereignty (supremacy of the national constitutions).⁹⁹

4.2.2. *Uniform Standards of Protection of Human Rights*

The need for the effective protection of fundamental rights has long fuelled the opposition of constitutional courts to the action of EU institutions, an opposition based, in essence, on the lack of a catalogue of fundamental rights in the EU. There are well-known examples in this regard, such as the decisions of the German Federal Constitutional Court in the so-called 'Solange' cases.¹⁰⁰ However, with the Lisbon Treaty, the EU now has its own binding catalogue of human rights, as the EU Charter of Fundamental Rights holds the same legal status as the treaties. Now, the points of tension in the field have moved to other coordinates, which are inter-linked: the EU's accession to the Council of Europe's Convention for the Protection of Fundamental Rights and the ensuring of uniform standards for the protection of fundamental rights in the EU.

The issue at hand lies in the number and variety of instruments available for the protection of human rights in Europe. Citizens and legal practitioners must navigate various binding texts – both national and international – that may need to be applied simultaneously, each with its own specific nuances, structures, terminology, and qualifications. As a result, the interpretation and application of this extensive array of regulations and case law present significant challenges in establishing uniform standards for the protection of fundamental rights within the EU. This complexity is noteworthy; however, for the purpose of our study, we find it particularly interesting to examine the role of the CJEU in developing a methodology for applying these instruments and standards of protection and the actions of some constitutional courts, such as the Romanian one, which seeks to align its national constitution with the standards established by the CJEU.

Thus, in prominent cases like *Melloni*¹⁰¹ and *Akerberg Fransson*¹⁰² the CJEU has created its own 'doctrine' of standards of protection of human rights within the

97 C-430/21 RS, para. 72.

98 For a comprehensive approach of the topic see Zs. Varga and Berkes, 2023.

99 Cloots, 2016, pp. 82–98.

100 Hilpold, 2016.

101 *Stefano Melloni v Ministerio Fiscal*, Case C-399/11.

102 *Case C-617/10, Åklagaren v Hans Åkerberg Fransson*.

EU,¹⁰³ establishing the supremacy of the Charter of Fundamental Rights over national (constitutional) law and the ECHR. It essentially explained by the President of the Court as follows:

where EU law allows room for such a plurality, national standards must comply with three cumulative conditions. First, those standards must comply with the level of protection guaranteed by the Charter. Second, national standards may only be applied where the EU has not adopted a uniform level of protection which, needless to say, must itself comply with the Charter. Last but not least, a higher level of protection provided for by national law must not jeopardise the objectives pursued by EU law;¹⁰⁴

it follows from these two examples that neither European unity nor national diversity is absolute, as they must both comply with the level of protection provided for by the Charter. In addition, national diversity must not jeopardise the EU integration project, since it must take due account of the primacy, unity and effectiveness of EU law.¹⁰⁵

However, the CJEU's 'doctrine' regarding human rights standards prompts a re-evaluation of sovereignty since the Member State must align with uniform standards of human rights protection within the EU, even 'prohibiting a national constitutional court from providing for a higher level of fundamental rights protection because that would infringe the primacy and uniformity of Union law'.¹⁰⁶ The outcome looks more problematic taking into account that even the TEU establishes in Art. 6, para. 2 that 'the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties', the accession is still far away.

It is interesting to note in this regard approaches like those embraced by the Romanian Constitutional Court in terms of interpreting the limits of the revision of the Constitution (the core of Romanian Constitutional identity)¹⁰⁷ in order to align the national law with supranational standards of human rights. Thus, according to Art. 152(2) of the Romanian Constitution, 'no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof'. In applying the provisions providing the international connection of the Romanian Constitution – specifically Art. 20, which stipulates that the Constitution should be interpreted in accordance with international human rights treaties to which Romania is a party, prioritising the most favourable provisions, and Art. 148, which establishes the priority of EU law over national law, the CCR created the 'doctrine' of the

103 Lavranos, 2013, pp. 133–141.

104 Lenaerts, 2019, p. 10.

105 Ibid.

106 Lavranos, 2013, pp. 133–141.

107 Toader and Safta, 2023, pp. 271–352.

amendment of the Constitution only in the sense of the ‘upward protection’ of human rights. According to Decision No. 80/2014, para. 65 and Decision No. 465/2019, para. 29, the protection of these rights and freedoms must always progress in an upward direction. Since the CCR has referenced both the Convention for the Protection of Fundamental Rights and Freedoms, and the Charter of Fundamental Rights of the EU, along with the jurisprudence of the ECtHR and the CJEU. The CJEU has already developed its own doctrine that prohibits a higher level of protection than what is provided by the Charta. Therefore, it may be challenging to define what is meant by this upward protection. From this perspective, it is essential to have a coherence at the supranational level to align the national Constitution (which means sovereignty and identity) in itself.

The few aspects mentioned are meant to highlight that the protection of fundamental rights remains a vulnerability within the shared sovereignty in the EU, and achieving uniform protection standards is still a distant goal and a challenge for the Member States and the Union itself.

4.2.3. Building the European Criminal Law

It is often said that whoever punishes is sovereign, and those who punish fairly – or legitimately – are considered sovereign.¹⁰⁸ EU proves that these statements should be reconsidered since now we have a part of this power in the competence of EU institutions.

Thus, the Maastricht Treaty established the EU’s three pillars, each with distinct legislative powers. While a genuine European criminal law did not emerge, the goal was to create an area of freedom, security, and justice without frontiers. The Amsterdam Treaty introduced the Framework Decision for cooperation in criminal matters, requiring Member States to meet specific objectives while maintaining some flexibility. This harmonisation of criminal legislation advanced with the Lisbon Treaty which ended the three-pillar structure and established a unitary legislative approach. Now, the area of freedom, security, and justice is a shared competence between the EU and its Member States. Chapter 4 of the TFEU focuses on cooperation in criminal matters. Art. 82 states that the European Parliament and the Council may adopt directives to approximate minimum rules concerning criminal procedures that have a cross-border dimension. This includes aspects such as the mutual admissibility of evidence, the rights of individuals involved in these procedures, and the rights of victims. Other elements may also fall under this category if they are unanimously identified by the Council and subsequently approved by the European Parliament. Moreover, Art. 83 grants the EU legislative competence in the area of substantive criminal law. This article allows the Parliament and the Council to establish minimum rules for defining offences and sanctions in serious crimes that have a cross-border impact. While there is a non-exhaustive list of offences for

108 Braum, 2021, pp. 14–22.

the EU to address – such as terrorism, human trafficking, drug trafficking, and corruption – the Council can also adopt a unanimous decision, with the European Parliament’s approval, to extend these substantive criminal law powers to other relevant offences that meet the criteria.¹⁰⁹ At the same time, the evolution of principles such as mutual recognition, mutual trust, constitutional loyalty, and effective protection of the EU’s financial interests has consistently influenced national legal systems by aligning them with common standards for the protection of fundamental rights, ensuring a uniform interpretation of concepts that have acquired an autonomous meaning in EU law, and eliminating the application of domestic criminal laws that conflict with EU law. The establishment of a European approach to criminal law in a broad sense is also evident in the creation of various European bodies that operate at different stages of the criminal justice process, working to ensure coordination in investigations, prosecutions, and the enforcement of decisions. Europol, Eurojust, and the European Public Prosecutor’s Office have brought, at the supranational level, an important task that traditionally belongs to a sovereign state. As criminal law is central to national sovereignty, the question of whether any aspects of criminal law should fall under the exclusive competence of the EU is contested. Despite these contestations and the significant challenges and tensions arising from the EU’s involvement in criminal law,¹¹⁰ developments in this area continue. Global crises like the Russian aggression against Ukraine¹¹¹ serve as a catalyst for new measures in the field like, for example, adoption of the Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673. According to the Directive, the Member States have to establish ‘minimum rules concerning the definition of criminal offences and penalties’ for the violation of Union restrictive measures. This aims to close existing legal loopholes and enhance the deterrent effect against violating EU sanctions. Additionally, the rules will include improved provisions for freezing and confiscating assets and proceeds that are subject to EU sanctions and will strengthen cooperation and communication among the competent authorities within each Member State and between Member States across the Union.

However, a uniform approach to criminal regulations, sanctions, and penalties across Europe poses both a vulnerability and a challenge to shared sovereignty, as well as to the interpretation of criminal regulations in relation to human rights. For example, the degree to which constitutional courts examine the constitutional foundations of criminal provisions varies significantly and is influenced by national traditions. This variation may help us better understand the conflicts of the national

109 See Stewart, 2024.

110 Craig and de Burca, 2017, p. 1113.

111 See European Commission, 2024a.

courts and the CJEU in cases like *Tarico*,¹¹² *MAS*,¹¹³ and *Lin*, where in the centre of the discussions was the approach to the limitation period for criminal liability versus the imperative of protection of financial interest of the EU and the idea that protecting the Union's Financial Interests Prevails over national standards of fundamental rights.¹¹⁴ Nevertheless, there is an increasing constitutionalist approach to issues of criminal law, transforming this field into a 'laboratory' for constitutional law. This shift focuses on advancing fundamental constitutional questions and leads to a new understanding of sovereignty.¹¹⁵

4.2.4. *The Rule of Law Toolbox. The Power of Soft Law*

The various crises within the EU have determined the identification of adequate responses. The most appropriate 'key' has been provided by the concept and requirements of the rule of law,¹¹⁶ the 'heart' of the common values around which the EU was built. The comprehensive and continuously evolving meaning of this concept has the ability and versatility necessary to substantiate and apply a diversified set of measures designed to ensure a framework for joint development. In this generous framework we can discuss the legal approach and enforceability of values enshrined in the treaties, starting from the premise that their upholding is a shared responsibility of all EU institutions and all the Member States.

112 Case C-105/14: The CJEU decided that 'national rule in relation to the limitation periods for criminal offences such as that laid down by the last subparagraph of Art. 160 of the Penal Code, as amended by Law No 251 of 5 December 2005, read in conjunction with Art. 161 of that Code – which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration – is liable to have an adverse effect on the fulfilment of the Member States' obligations under Art. 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, which is for the national court to verify. The national court must give full effect to Art. 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Art. 325(1) and (2) TFEU'.

113 Case C-42/17: The CJEU decided that 'Art. 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation, forming part of national substantive law, which prevent the application of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or which lay down shorter limitation periods for cases of serious fraud affecting those interests than for those affecting the financial interests of the Member State concerned, unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed'.

114 Haupt, 2023.

115 See Stewart, 2024.

116 See Bóka, 2024.

Thus, under the broad description of a ‘Rule of Law Toolbox’, various instruments have been developed to address specific situations with the goal of promoting, preventing, or responding to rule of law issues. The most comprehensive is the Rule of Law Mechanism, which encompasses all Member States and includes annual reporting by the European Commission. In July 2019, the Commission adopted its Communication on Strengthening the rule of law within the Union – a blueprint for action, setting out some of the features of such a mechanism,¹¹⁷ designed as a preventive tool that provides a framework for continuous monitoring, verification, and evaluation of Member States, aiming to follow significant developments – both positive and negative – related to the rule of law. The mechanism prioritises four essential pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances. In 2020, the Commission issued its first report, including recommendations for all Member States. From the perspective of this study’s subject, we wish to emphasise a key positive aspect that the mechanism referred to provides, as well as a problem or vulnerability that tends to grow within the EU’s regulatory framework.

As regards the positive aspect, the Rule of Law mechanism is remarkable in terms of the equality among Member States and their will to promote the same values within the EU, satisfying, at least to a point, the approach in terms of equal partnership in the EU. The application of similar mechanisms to some states only (such as the Mechanism of Cooperation and Verification i.e. CVM in Bulgaria and Romania) has brought the feeling of frustration of unequal treatment, fuelling the resentment of the citizens and the populist discourse regarding ‘second-class citizens’. Other instruments and recent developments have also had positive significance in terms of equality, like the unanimous decision by the Council to lift internal land border controls with Romania and Bulgaria as of 1 January 2025,¹¹⁸ characterised as

the important step completes the full entry of both countries into the Schengen area. This not only strengthens the Schengen area but it will further strengthen the internal market, increase travel, trade and tourism. A robust Schengen area reinforces the EU’s unity and makes the EU stronger at a global scale.

In terms of vulnerabilities, we should carefully analyse the increasing amount and power of ‘soft law’ within the EU. Although it is generally characterised as not granting the EU any new powers to enforce common values and as a purely political instrument, largely depending on the willingness of the Member States to cooperate, the implementation of the Rule of law mechanism (meaning the ‘recommendations’ issued by the Commission) benefits from the groundwork laid by previous similar mechanisms. With reference to the CVM, the CJEU has incorporated

¹¹⁷ COM(2019) 343 final.

¹¹⁸ See European Commission, 2024b.

these recommendations (called ‘soft law norms’) into the framework of sincere cooperation, thus giving them a specific strength and enforceability. In regard to this, it is important to note that the preliminary referrals addressed to the CJEU by the Romanian courts of law on the issue of whether and to what extent the requirements and recommendations formulated in the reports of the European Commission adopted pursuant to Decision 2006/928 establishing the CVM are binding on Romania. In its response, in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația ‘Forumul Judecătorilor din România’ and Others*, the CJEU invoked the principle of sincere cooperation, establishing that the benchmarks established by the decision to establish the CVM

are intended to ensure that this Member State complies with the value of the rule of law, set out in Art. 2 TEU, and are binding on it, in the sense that the latter is required to take the appropriate measures for the purposes of meeting those benchmarks, taking due account, under the principle of sincere cooperation laid down in Art. 4(3) TEU, of the reports drawn up by the Commission on the basis of Decision 2006/928, and in particular the recommendations made in those reports.

The Rule of Law Report and recommendations addressed to all Member States every year can now be approached based on these coordinates and the same disputes surrounding them. The soft law might be good¹¹⁹ in terms of influence and harmonise areas where binding regulations have not yet been adopted or are not able to fully regulate or effectively reach, but this raises questions about whether they truly reflect the intent of the Member States in accordance with the competencies outlined in the treaties.

4.2.5. *‘Battles’ of the Courts, the Independence of Judges and the Constitutional Review Within the EU*

In each of the previous sections, we have referred in one way or another to the constitutional courts and their role as guardians of the Constitutions. Given the enshrinement of national sovereignty in the constitutions of the Member States, the role of the constitutional courts is that of guarantors of national sovereignty as well. This is an important perspective for analysis and reflection on the sometimes tense moments of ‘negotiation’ between the constitutional courts and the CJEU regarding constitutional identity, the interpretation of the standards of protection of fundamental rights, including in correlation with criminal law, or the power of soft law to which we have briefly referred to in the previous sections.

The supremacy or primacy of EU law in itself was a topic of endless debates¹²⁰ in the history of the consolidation of the EU as an autonomous legal order which can

119 For a comprehensive approach on the topic see Ștefan, 2024, pp. 671–692.

120 Toader and Safta, 2023, pp. 271–352.

also be viewed as a conflict between national constitutions (upheld by constitutional courts) and EU law (upheld by the CJEU)¹²¹ and, consequently, in the fundamentals of sovereignty. It was well noted that when the independence of a legal system is questioned and efforts are made to subordinate it to another legal system through a claim of supremacy, the sovereignty of the state to which that legal system belongs is put into question.¹²²

In view of this, the more recent jurisprudence of the CJEU, in Cases like the Joined Cases C357/19, C379/19, C547/19, C811/19 and C840/19 Euro Box Promotion SRL and C430/21-RS, 116, have a high relevance not only in terms of positioning and rethinking the role of constitutional courts in relation to courts of law at the national level, but also in terms of rethinking national sovereignty itself, based on the supremacy of the Constitutions. We should bear in mind that in the cited cases the CJEU stated that

the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgement of the Court of Justice, that that case-law is contrary to the second Subpara. of Art. 19(1) TEU, Art. 325(1) TFEU or Decision 2006/928;

1. The second Subpara. of Art. 19(1) TEU, read in conjunction with Art. 2 and Art. 4(2) and (3) TEU, with Art. 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law.

2. The second Subpara. of Art. 19(1) TEU, read in conjunction with Art. 2 and Art. 4(2) and (3) TEU, with Art. 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law.

There is no doubt that these cases reinforce the independence of judges in the courts of law. However, what do they signify regarding the role and position of constitutional

121 For an analysis on the judicial reaction concerning the primacy principle see Berger, 2024, pp. 4–45.

122 See MacCormick, 1993, p. 8.

courts as guarantors of the constitution (and sovereignty) within the Member States since CJEU established that the courts of law can effectively ‘override’ the decisions of the constitutional courts? In the logic of these jurisprudential developments, we are witnessing the consolidation of ordinary courts and the shift of the centre of gravity, particularly with regard to the fundamental rights component, in the relational triangle courts of law – CJEU, ECtHR, with a secondary role assigned to constitutional courts. Essentially, as long as national courts, such as those in Romania, can directly apply the ECtHR and set aside domestic rules that contradict the Charter of Fundamental Rights of the EU, the need for appeals to the Constitutional Court may arise less frequently. This situation depends, of course, on the constitutional regulations of each EU Member State. In this context, constitutional courts may gradually revert to the traditional, political-jurisdictional role described by Kelsen, which is primarily focused on the abstract control of rules. However, this role, too, is becoming increasingly limited due to the shared competences between the given state and the EU). As for the concrete control of the norms, we are witnessing the construction of a *sui generis* model of constitutionality control, just as the EU itself is a *sui generis* model of state construction. Thus, the centralised constitutional review of the norms emanating from the national system, exercised by the constitutional courts, is combined with a decentralised control of the norms in the interference of national/international plans, having as supreme authority the CJEU and the courts of law as actors, that have the mechanism of preliminary reference and the dialogue with the CJEU at their disposal. In one way or another, in various contexts, any union court of law can also become a ‘constitutional’ court of the EU, in the sense that they ensure the priority and effectiveness of European law.¹²³ The final arbiter in this case is the CJEU, the guarantor of the EU (constitutional) order rather than the constitutional courts, the guarantor of national Constitutions (the pillars of states sovereignty).

In terms of a healthy and balanced exercise of shared sovereignty, we believe it is essential to continue supporting constitutional courts and constitutional dialogue within the EU, by strengthening them both externally and internally, in terms of both the abstract and the concrete control of legal norms. Constitutional courts have established a reputation and a vital role in the structure of states as a crucial factor for balance and authority. They can serve as a filtering mechanism; without them, the ECtHR and the CJEU would face an increasing caseload. Additionally, constitutional courts can help limit potential excesses from supranational and international courts, because the ECtHR and the CJEU are not infallible either. Strengthening external support requires legislative efforts to regulate and promote constitutional justice, as well as the appointment of judges who meet the necessary qualifications for such a role. Internal strengthening involves ensuring independence, constitutional loyalty, accountability, balance, and competence within the courts.

123 Safta, 2024, pp. 209–218.

Without these standards, there is a risk that constitutional courts may be marginalised or left ‘out of the game’.¹²⁴

4.3. New Challenges. The ‘Digital Sovereignty’ of the EU. Politics and Algorithms

One of the most important challenges of our time is the rapid evolution of Artificial Intelligence (AI). Concerning our topic, studies in the field reveal the power of data as a ‘key aspect of sovereignty’,¹²⁵ since sovereignty is facing a new transformation with the emergence of the digital sphere. The concept of ‘data sovereignty’ refers to the principle that any information located within a nation’s borders is subject to that nation’s laws. While this principle pertains in the physical world, it becomes less clear in the online environment. The mobility, fragmentation, and dispersed nature of data make it challenging to confine information within specific geographical boundaries. Additionally, the longstanding practice of self-regulation in cyberspace limits the involvement of sovereign governments in the global data governance system. Furthermore, the stakeholder model, which promotes equal participation from international organisations, businesses, technical groups, and private institutions, often marginalises sovereign governments in the decision-making process. It was shown¹²⁶ in this regard that the digital realm is a fluid, borderless, and ever-changing universe governed by physical laws. Individuals and entities of various identities can access this space, creating independent network nodes and exchanging information. Their creativity and the diverse data they generate are key components of the digital environment. Some technological groups aspire to establish a new order in this digital space, believing that the traditional concept of sovereignty is becoming obsolete. The new technological revolution significantly impacts society, economy, and politics, restructuring traditional power systems. In this changed environment, power sources and contents are diverse, making it difficult for a single actor to hold concentrated power. Attempting to replicate the Westphalian system in this context is both technically unfeasible and counterproductive to the interests of all participants, including sovereign states. Susan Strange suggestively describes this process as ‘leakage’,¹²⁷ in the sense that national sovereignty is gradually eroded, weakened, or even partially replaced.

In terms of the evolution of sovereignty within the EU, the AI phenomenon determined the adaptation of EU instruments, being a ‘catalyst’ for the evolution of the supranational regulations and the emergence of new concepts such as the ‘digital sovereignty’. As stated earlier,¹²⁸ the concept of digital sovereignty in public dis-

¹²⁴ See for details Florczak-Wątor, 2023.

¹²⁵ Gu, 2024, pp. 591–612.

¹²⁶ Ibid.

¹²⁷ Strange, 1995, pp. 55–74.

¹²⁸ Lupu, 2023, pp. 148–159.

course was subsequent to the emergence of another one, which sparked a heated debate: EU ‘strategic autonomy’. It was used for the first time in an official EU document in the European Council conclusions of December 2013¹²⁹ (where ‘for the first time since the entry into force of the Lisbon Treaty, the European Council held a thematic debate on defence’), referring to increasing Europe’s strategic autonomy by developing a technological and industrial base capable of supporting and developing defence capabilities. The term was taken up and placed at the heart of the Global Strategy for the EU’s Foreign and Security Policy, published in June 2016¹³⁰ and the EU’s New Strategic Agenda 2019-2024 which highlights ‘the need to pursue a strategic course of action and increase the EU’s capacity to act autonomously’.¹³¹ According to the documents of the European Parliament, the notion of ‘technological’ or ‘digital sovereignty’ emerged as a means of promoting the notion of European leadership and strategic autonomy in the digital field; ‘digital sovereignty’ refers to ‘Europe’s ability to act independently in the digital world and should be understood in terms of both protective mechanisms and offensive tools to foster digital innovation (also in cooperation with non-EU companies)’.¹³²

The EU has evolved along this path as an autonomous actor profile, a strategist, a quasi-state actor, that tries to ensure the exclusivity or, at least, the primacy of its actions in certain essential areas, with the implicit acceptance of the Member States and without operating in this sense any resizing of the powers in the treaties. Steps in this regard were the adoption of The Digital Services Act package,¹³³ i.e. the Digital Services Act and Digital Markets Act with the aim to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses,¹³⁴ based on the idea that ‘the diverging national laws negatively affect the internal market’, and ‘in order to safeguard and improve the functioning of the internal market’. The AI Act has recently entered into force (Regulation (EU) 2024/1689),¹³⁵ characterised as ‘the first-ever legal framework on AI, which addresses the risks of AI and positions Europe to play a leading role globally’. The AI Act is a component of a broader set of policy measures aimed at fostering the development of trustworthy AI. This package also includes the AI Innovation Package and the Coordinated Plan on AI. Together, these measures ensure the safety

129 European Council, 2013.

130 European Union Global Strategy, 2016.

131 European Defence Matters, 2024.

132 Madiega, 2020.

133 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance).

134 European Commission, 2024c.

135 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act).

and fundamental rights of individuals and businesses regarding AI. Additionally, they promote investment, innovation, and the adoption of AI throughout the EU.

The steps towards the ‘digital sovereignty’ should be linked with the Europeanisation of the economic and financial policy (it is important to recognise that a socially just economic policy necessitates a common economic governance framework, which may impose limitations on the budgetary sovereignty of national parliaments)¹³⁶ but also, increasingly important, with security policy. AI is a complex challenge in this regard, in many ways. In the light of very recent developments in Romania, the political dimension (closely related to the expression of the sovereignty) should be highlighted. There is no doubt that technology is inherently political; in its many forms, it plays a significant role in the human experience, conveying and mediating changes in human perception and consciousness, affecting society and even influencing political decisions. The recent influence on the Romanian presidential election is a case that deserves a closer analysis in this regard. In an unprecedented decision in the history of Romania, the CCR (the Constitutional Court of Romania) ordered the annulment of the presidential election of Romania in 2024 (Ruling no. 32 of December 6, 2024). Based on the declassification of confidential documents on December 4, 2024 and their public release, the court found that the electoral process for the election of the President of Romania was flawed in all stages by multiple irregularities and the violations of electoral legislation that distorted the free and fair nature of the vote and the equal opportunity of electoral competitors (para. 5). The flaw in the electoral process, according to the ruling of the CCR, was the violation of the freely expressed nature of the vote mainly through the exploitation of social media platform algorithms, alteration of the right to be elected by violating the equal opportunity of electoral competitors through the use of digital technologies and artificial intelligence without transparency and breach of the legislation on the legal and transparent financing of the electoral campaign. As a consequence in terms of measures at the EU level, the EU Commission opened formal proceedings against TikTok on election risks under the Digital Services Act in relation to TikTok’s obligation to properly assess and mitigate systemic risks linked to election integrity.¹³⁷ According to the position of the Commission,

the proceedings will focus on the management of risks to elections and civic discourse, linked to the following areas: TikTok’s recommender systems, notably the risks related to the coordinated inauthentic manipulation or automated exploitation of the service; TikTok’s policies on political advertisements and paid-for political content.

It is similarly important to note the consequences in terms of the next steps at the supranational level:

¹³⁶ Braum, 2018, pp. 429–431.

¹³⁷ European Council, 2024.

the opening of formal proceedings empowers the Commission to take further enforcement steps, such as interim measures, and non-compliance decisions. The Commission is also empowered to accept any commitment made by TikTok to remedy the matters subject to the proceedings.¹³⁸

As a brief conclusion on these very recent developments, we believe that the emergence of the concept of ‘digital sovereignty’ of the EU and the assumption of a strategic and leading role of the EU in this area has a profound significance in terms of reshaping the sovereignty of the Member States. It is widely acknowledged invoking sovereignty often involves power dynamics. In the context of the EU, this necessitates a reevaluation of the competences outlined in the treaties. According to Art. 4, para. (3) TFEU, the Union can regulate in the areas of research and technological development, but this should not limit the competences of the Member States. Furthermore, security issues will play a significant role in consolidating leadership, which will require adjustments to policies related to the Member States.

5. Conclusions. The Concept of ‘Shared and Responsible’ Sovereignty

When answering the question of what sovereignty means in today’s EU – whether Member States still possess sovereignty or if the EU’s principle of supranationality negates it – we can agree with the assertions that today EU Member States *are neither totally sovereign nor fully bound to one another*¹³⁹ or to a supranational structure.¹⁴⁰ As explained in the first section, Member States strongly affirm the sovereignty in their Constitutions and retain the right to withdraw from the EU, as explicitly enshrined in the Treaties. The relationship with the EU is outlined in their constitutions, and the transfer of powers is restricted by the very same constitutions (as interpreted by the Constitutional Courts). In terms of international law and in relation to third states, they act as independent states on an equal footing, to maintain diplomatic and consular relations, and to exerting influence on the development of international law.¹⁴¹

However, when examining the exercise of sovereignty, we find that the Lisbon Treaty established a distinction between exclusive and shared competences within the EU, while also establishing mechanisms that facilitate more integration and the transfer of competences to the supranational level. Along this legislative framework,

138 Ibid.

139 Piattoni, 2017, pp. 385–411.

140 Fassbender, 2023, pp. 1629–1643.

141 Ibid.

state competences are subject to a continuous erosion phenomenon, partly the result of supranational actions – specifically, the interpretation of competences outlined in the treaties, and partly due to the actions or inactions of national political actors. Time to time, more or less *vivid* conflicts, bring to the attention the debate of the supremacy of the EU legal order versus the supremacy of the constitution of the Member States. It is clear that ‘supranational supremacy is hardly compatible with a vision of integration limited to coordination of the Member States’.¹⁴² Consequently, both parts (at the national and supranational level) should embrace a more nuanced vision, taking into account the texts of the constitutions and treaties, but also the reality of the ‘leakage’ of elements of classic sovereignty in so many ways and actions of the national and supranational institutional actors.

Is the concept of shared sovereignty a workable idea? The answer could be affirmative, at least to some point, since the unique EU model led to a highly developed phase across various areas of integration, including the fields of Economic and Monetary Union, Social Policy, Environmental Regulations, Foreign and Security Policy, and Justice and Home Affairs. Nevertheless, this model presupposes the acceptance of the fact that sovereignty no longer implies the supreme power of the Member States to regulate in any field, but rather the ability to be the final decision-maker over a set of fields (seemingly getting smaller and smaller), as well as the relativisation of the territorial element of sovereignty, more visible in the case of the development of AI. As briefly indicated in the previous sections of our study, various crises that have affected the EU have, in one way or another, shaped the search for solutions regarding shared sovereignty, ultimately strengthening the EU and proving the resilience of EU construction (‘all crises ‘verticalise’ power’).¹⁴³ The ‘battle’ for the constitutional identity of the EU states has led to the development of the concept of EU identity, to which the identity of the states must align. The ‘battle’ for the highest standards of protection of fundamental rights resulted in the adoption of the Charter of Fundamental Rights and the establishment of the CJEU ‘doctrine’ aimed at ensuring uniform protection standards that do not compromise the interests of the EU. The ‘battles’ with the criminal phenomenon across the EU facilitated the development of a European criminal law framework. The crises concerning the rule of law have led to the implementation of a comprehensive mechanism designed to uphold the values outlined in Art. 2 of the TEU, also proving the potential for EU mechanisms to promote equality among Member States and the balance between national interests with collective EU objectives. However, each of this ‘triumphs’ came with some vulnerabilities which requires a careful analysis and solutions with the equal involvement of Member States and national institutions in order to ensure that the strengthening of supranational authority does not undermine state sovereignty (in terms of ‘the will of the people’) but contributes to a more cohesive and resilient

¹⁴² Perju, 2020, p. 28.

¹⁴³ Piattoni, 2017, pp. 385–411.

Union. The other chapters of this book will thoroughly examine some sensitive topics we have briefly identified.

What are the most challenging aspects of the relationship between sovereignty and supranationality, and which state actors are involved? Perhaps one of the most challenging aspects is finding a common voice in our shared endeavours within the EU while balancing the traditions and identities of each Member State, also trusting that this represents our democratic voice. Accession to the EU was a constitutional momentum for each Member State, in terms of assuming the same core values. Since those values do not mean the obligation of the Member States to adopt a specific constitutional model, but to provide ‘a framework of reference within which the Member States may make their own constitutional choices’¹⁴⁴ it is clear that having a shared understanding of them is essential for the coherence of the EU model of coexistence. Once the Member State joined the EU, the citizens of the state are affected by the decisions taken ‘by the EU’ and even by other Member States. Identifying the way to learn and trust this new understanding of democracy is challenging in itself, but even more when ‘values of the EU’ are opposed (or perceived as opposed) to a ‘way of life’ rooted in communities and traditions. In fact, this sentiment is speculated by undemocratic populist movements when they put the sovereignty claims on the table, feeding ‘the politics of fear’. Another challenge is to ensure equality among the Member States and to foster a sense of trust and fairness among them. Placing the rule of law at the core of the EU’s identity and establishing a system to evaluate, to varying degrees, all actions of the Member States in the same light helped to create an image of states on equal footing. But who is responsible for this evaluation, and what are the limits within which it can be performed? The Rule of Law Mechanism relies on the agreement of the Member States. However, the authority of the soft law issued under this framework looks mandatory, as has been defined by the CJEU based on the principle of sincere cooperation. While this interpretation is a logical conclusion in terms of the effectiveness of this mechanism, it raises questions regarding the margin of appreciation granted to the European Commission and creates an image of ‘centralised’ power at the supranational level, calling into question the intentions of the Member States when they agreed to establish this Mechanism.

Consequently, in terms of a ‘more integrated EU’, possibly the concept of a ‘shared and responsible sovereignty’ advanced by Simone Piattoni¹⁴⁵ could be a suggestive one. In our understanding, this concept also extends to the idea of responsibility of the national institutions, taking into account the axiological dimension of the EU construction, as ‘a community that springs from the dream of coming together and the reality of (still) living apart’.¹⁴⁶ We should remember the goals of the EU and not get lost in this ‘constitutional imagination’ which combines more and more texts, precedents, policies, competences, and inflated egos. The challenge and the success

144 Lenaerts and Gutiérrez-Fons, 2023, pp. 1495–1511.

145 Piattoni, 2016, pp. 385–411.

146 Koncewicz, 2024, p. 113.

also reside in ‘paddling together’, the expression used by Tomasz Tadeusz Koncewicz in a recent study,¹⁴⁷ ‘finding the right balance between building a truly supranational consensus around basic values on the one hand, while catering to the existing domestic overlapping consensuses on the other’.

147 Koncewicz, 2024, pp. 85–120.

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CHAPTER 3

EQUALITY AS A CONSTITUTIONAL VALUE: THE PRINCIPLE OF EQUALITY IN EU LAW



FRANE STANIČIĆ

Regnum regno non praescribit leges.

Viceroy count Ivan Erdődy as the head of
the Croatian parliamentary delegation at the
session of the joint Parliament in Požun
(today Bratislava) on 4 July 1790.

Abstract

The principle of equality should be considered as a fundamental legal principle in any system of law. It can be considered as a principle governing people's rights (everyone is equal before the law) and/or as a principle governing equality among states. This study explores the latter. First, it provides a theoretical definition of the principle of equality as considered by legal theorists. Thereafter, it discusses its implementation in international organisations and its possible limitations considering the membership in an international organisation. In the next part this principle will be analysed as a central principle of EU law, particularly its development in its use between EU Member States and the differentiation mechanisms used in the European Union's integration process. The aim of this study cannot be achieved without considering the insights from the case law of the CJEU, therefore, its overview will be provided in the next part. Special focus will be placed on the identity clause enshrined in Art. 4(2) of the TEU as this is crucial in the context of the correct implementation of the principle of equality of Member States. A special focus will be placed on the meaning of the identity clause in the context of the principle of supremacy of EU law

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as the absolute interpretation if this principle in the case law of the CJEU threatens to endanger the principle of equality with regard to Member States.

Keywords: principle of equality, sovereignty, member states, domestic legal order, international and supranational legal order

1. Introduction

The principle of equality should be considered as a fundamental legal principle in any system of law. It can be considered as a principle governing people's rights (everyone is equal before the law) and/or as a principle governing equality among states. This study explores the latter. Therefore, what is the meaning of principle of equality of states? It is a well-known principle that can also be called the non-discrimination principle. Its implementation is significant when discussing relations between states, particularly relations between states in international organisations and/or supranational legal orders.

The best example is the EU legal framework and the equality principle in EU. This principle was first introduced by the Constitutional Treaty, and thereafter, reaffirmed by the Lisbon Treaty (Art. 4(2) TEU). However, its interpretation and implementation in legal practice is crucial.

Therefore, this study first provides a theoretical definition of the principle of equality as considered by legal theorists. Thereafter, it discusses its implementation in international organisations and its possible limitations considering the membership in an international organisation. In the next part this principle will be analysed as a central principle of EU law, particularly its development in its use between EU Member States and the differentiation mechanisms used in the European Union's integration process. The aim of this study cannot be achieved without considering the insights from the case law of the CJEU, therefore, its overview will be provided in the next part. Special focus will be placed on the identity clause enshrined in Art. 4(2) of the TEU as this is crucial in the context of the correct implementation of the principle of equality of Member States. A special focus will be placed on the meaning of the identity clause in the context of the principle of supremacy of EU law as the absolute interpretation if this principle in the case law of the CJEU threatens to endanger the principle of equality with regard to Member States.

All Member States opted to accept the subordination of their legal orders to the new, independent legal order of the EU, however, is this acceptance absolute or with some safeguards. The principle of equality dictates that every sovereign state has a right to be considered equal to other states, and it recognises no superior authority, therefore, sending a statement of formal or legal equality before the law, with the

intention to protect the smaller and/or weaker states.¹ Thus, the supranationalisation of the EU legal order has only occurred within the framework of the principle of conferral and cannot be considered without it as it is an inherent part of supranationalisation.² Therefore, the EU is an association of states, constitutions, administrations and jurisdiction and its Member States have accepted a far-reaching relativisation of fundamental national legal decisions in the common European interest by opening up their own legal systems. Its legal order, which no doubtfully exists, has a very elaborate interconnected nature.³

Moreover, this is why the principle of equality is so important in the context of EU law and the relations between EU law and Member States and those among Member States. It must ensure the equality of all Member States forming this supranational organisation and a working and effective relation between the layers of its legal systems, constitutions, administration and jurisdictions. Particularly after the *ultra vires*-decision by the German Federal Constitutional Court in the *PSPP/Weiss* case, it has been argued that Art. 4(2) TEU would underpin the supremacy of EU law by requiring the equality of Member States ‘before the law’.⁴ Therefore, this study aims to explore the impact of the principle of equality on EU law and the relation of EU law and national legislative systems.

2. Principle of Equality as a Legal Principle in Legal Theory

As Guastini states, the concept of equality is an elementary (‘primitive’, ‘atomic’) concept, a concept that does not require further analysis, but can be used in the logical analysis of other complex (‘molecular’) concepts – political, social, legal equality, and the like.⁵ Apart from the evident conceptual differences between ‘equality’ and ‘obligation’ (e.g. ‘obligation’ is a property while ‘equality’ is a relation), equality in the realm of legal or political philosophy appears to have more or less the same logical status, as the concept of obligation in deontic language: in the sense that one can use ‘obligation’ to define ‘prohibition’ and ‘permission’, as one can use ‘equality’ to define inequality as well as sex-equality, wage-equality, and so on.⁶

Legal principles are ‘fundamental norms’ in two ways: first, they are fundamental because ‘they give foundation and/or axiological (ethical-political) justification to other norms’ and second, because they ‘do not have or do not require axiological basis, no ethical-political justification, because in a given legal culture they

1 Rossi, 2017, p. 5.

2 Riedl, 2024, p. 178.

3 Riedl, 2024, p. 181.

4 Klamert, 2022, p. 82.

5 Guastini, 2023a, p. 187.

6 Guastini, 2023a, p. 188.

are considered as evidently ‘just’ or ‘correct’ norms’.⁷ This fundamental character of legal principles is ‘axiological, and not factual’ and that ascribing fundamentality to a norm ‘depends on evaluation, namely on value-judgment about the relative importance of that norm within the legal system as a whole and/or within some particular part of the system’.⁸

According to Guastini, principles are also non-determined norms in the sense that their content is undetermined in at least one of the following forms: first, they can have an open factual state (open antecedent) which means that for all facts when manifesting themselves, not all legal consequence provided by the principle are listed. Second, principles can be defeasible or derogable. Derogable norms allow for implicit exceptions that are not specified by them or by any other norm in the legal order. Derogable norms cannot be applied by simple deductive reasoning.⁹ According to Guastini, a derogable norm (one that allows for unspecified implicit exceptions) does not apply to all the facts to which its antecedent refers, therefore, the occurrence of one of the facts covered by the antecedent is not a sufficient condition for the intended legal consequence.¹⁰ Principles are *prima facie* reasons and as such are subject to weighing against other principles with which they may come into normative conflict.¹¹ Third, principles can be general, that is, principles are norms that need to be made concrete to be suitable for solving specific cases. Making a principle concrete means formulating other norms by which the principles are ‘implemented’ or ‘executed’. Therefore, principles cannot (owing to their logical form, evasiveness and susceptibility to weighing) be directly applied to a specific case without prior concretisation.¹²

Therefore, defining the principle of equality in its legal meaning is important. Legal scholars claim that equality before the law has at least two fundamentally different meanings. On the one hand, it pertains to the rights and duties contained in positive law, that is, the content of the law, and mandates something like the absence of certain distinctions in the distribution of these. On the other hand, it pertains to the practices of the courts, police officers, ministries, etc., that is, the process of the law, and mandates something like the absence of certain distinctions in its application.¹³ Thus, the concept of equality before the law at stake is procedural. It pertains to how legal institutions treat persons, specifically to whether such institutions treat persons equally or differently. The concept of equality before the law is often summed up in what is sometimes referred to as an Aristotelian principle of justice that the court must ‘treat like cases alike’.¹⁴ However, when discussing the

7 Guastini, 2023b, p. 78.

8 Guastini, 2016, p. 242.

9 Guastini, 2023b, p. 80.

10 Ibid.

11 Guastini, 2016, pp. 242–243.

12 Guastini, 2016, p. 243. See Burazin and Keršić, 2024, pp. 493–495.

13 Thomsen, 2018, p. 105.

14 Ibid.

principle of equality in the context of equal treatment of Member States, particularly in the EU context, we must consider the fact that we have an interaction of two legal orders – the Member State legal order and the EU legal order. When discussing legal orders, two relations can exist between them – relation of mutual independence or the relation of superiorities-subordinations. Thus, the subordinated legal order is not in a real sense an independent legal order as it is a part of another legal order. The superior legal order is a ‘complete’ legal order which includes the subordinate legal order; for example, Kelsen advocated that state legal orders are subordinate to the international legal order.¹⁵ However, when discussing legal orders of Member States and that of the EU as a supranational entity, we cannot state that domestic legal orders are a part of the ‘higher’ legal ‘supranational’ order as the latter, according to the supremacy principle, excludes the former as domestic law does not apply when in conflict with EU law. This notwithstanding the fact that the domestic legal orders of Member States are, according to the CJEU case law, subordinate to the norms of EU law.

One must reflect that there are such views by which there is no such relation between EU and national law. Some authors state that they avoid using the monistic expression ‘primacy’ of EU law. ‘Primacy’ points to the existence of a hierarchy, as it refers to a position or condition of being first as in rank. At least implicitly it presupposes that in the national legal order EU law takes the supreme position because of its inherent superiority, supranational features, and constitutional nature. However, this is not what the precedence doctrine of the CJEU is about as the EU precedence rule is essentially a collision rule, although of a special nature. Similar to the priority rule in traffic legislation, what matters is the result, not the higher rank or origin of the rule as such.¹⁶

Therefore, multiple, independent, and incommensurable claims of constitutional autonomy in a non-hierarchical system of norms exist.¹⁷ As sovereignty in legal terms is no longer an exclusive characteristic of territorial entities, that is states, but belongs to the functional entities as well, it is possible to conceive the existence of multiple claims towards ultimate legal authority within a particular territory. It follows from its epistemic dimension that when conflicts occur between the competing national and supranational levels, there is no plausible perspective, no sure basis of historical knowledge, no Archimedean point, from which their claims could be reconciled as long as EU legal order and legal orders of the Member States are to be treated as different unities.¹⁸

This is why the principle of equality is strongly connected with sovereignty. Sovereignty is no longer located in nation-states but rather functionally differentiated into various competing and overlapping sites of authority. Furthermore, how this

15 Guastini, 2023b, pp. 267–268.

16 Barents, 2009, p. 423.

17 Walker, 2002, pp. 317, 320.

18 Walker, 2002, p. 338.

does not negate the relevance of sovereignty as a conceptual tool but rather requires for us to imagine a new constitutional vocabulary that is suitable for the post-Westphalian constitutional order.¹⁹ However, there is no ‘overlord’ or ‘the most sovereign’ to rule us all as Walker notes.²⁰ Thus, we should become more interested in the question of ‘how do we govern?’. From this perspective, constitutional discourses and identities become central. This calls for mutual accommodation and learning by the competing constitutional authorities. In practice judicial dialogues between courts and other relevant institutions is one way to materialise this, while the activities of legal scholars are another.²¹

Walker believes that the questions on inter-systemic coherence as well as that of intra-systemic coherence, clearly cast doubt on the plausibility of a traditional Kelsenian or Hartian notion of a legal order as a hierarchical structure of norms organised around a point of legally self-validating sovereignty assumed or claimed to be grounded in social or political authority.²²

3. Principle of Equality and International Organisations

The doctrine of the equality of states is one of the most reaffirmed principles of the law of nations. So many assertions of state equality have been made since the principle’s inception in the 17th century that it can be said to be firmly established in international law. This doctrine of equality of states became a postulate of the law of nations through the pens of 17th and 18th century publicists influenced by the natural law writings of Thomas Hobbes.²³ This is very important for all international organisations, including the EU and its Member States. This principle is firmly linked with the principle of sovereignty of states. Hobbes believed that men in a state of nature had equal capacity to do one another harm; therefore, men in a state of nature had equal rights. This equality of rights of man was set forth as a law of nature, and, as publicists in the field of international law were ‘natural law’ men, it was simple to take Hobbes’ thesis and transfer the theory of such a right to the international person, the state. By analogising the state to the natural body, the state was said to be nothing more than an artificial man.²⁴

By principle, a sovereign state does not answer to any other state. If there are international organisations a state is a part of, or if there are international legal

19 Tuominen, 2021, p. 81.

20 Walker, 2005, p. 592.

21 Tuominen, 2021, p. 81.

22 Walker, 2005, p. 592.

23 Thomas and Thomas, 1951, p. 791.

24 Thomas and Thomas, 1951, p. 793.

sources, such affiliation and/or source can bond a state only if it chooses to do so. Therefore, according to the principle of equality, all activities in international or supranational legal order are consensual. Clearly, there are those who believe otherwise, and such views are called monistic in legal theory.²⁵

For example, Kelsen believed that state legal orders are subordinate to international legal order, and consequently, state legal orders are not independent with regard to other state legal orders but coordinated as they are all equally subordinated to the international legal order.²⁶ However, others advocate a opposite claim – called dualist – according to which state legal orders and international legal order are independent and ‘drive parallel routes’. Therefore, the notion of sovereignty is crucial for this issue.

Bodin considered sovereignty as ‘absolute and perpetual power’, other than before god. Similarly, Hobbes considers the ‘Leviathan’ or sovereign as the absolute wielder of power and the mechanism to avoid war between others who would fight for power.²⁷ As early as 1943, in the anticipation of the founding of the United Nations, the Governments of the United States of America, the United Kingdom, the Soviet Union, and China jointly declared that they recognised:

the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving States, and open to membership by all such States, large and small, for the maintenance of international peace and security.

The famous legal theorist Hans Kelsen wrote, in 1944, that the term ‘sovereign equality’ probably means sovereignty and equality, two generally recognised characteristics of the States as subjects of international law; for to speak of ‘sovereign equality’ is justified only insofar as both qualities are considered to be connected with each other.²⁸ Therefore, clearly, Kelsen connects equality with sovereignty as only sovereign states can be equal. However, sovereignty cannot mean real supreme authority as states are bound by norms of international law. Therefore, Kelsen concludes that state’s sovereignty under international law means its legal independence from other states.²⁹ However, the term ‘equality’ would appear to signify that all states have the same duties and rights. However, this is not correct as different states provide different rights and duties as Kelsen indicates by using the example of littoral and inland states who evidently do not have the same rights and duties under international law.³⁰

25 Guastini, 2023a, p. 268.

26 Kelsen, 2015, p. 366

27 Dobbs, 2014, p. 299.

28 Kelsen, 1944, p. 207.

29 Kelsen, 1944, p. 208.

30 Ibid.

Therefore, Kelsen concludes that equality means not the equality of duties and rights but equality of capacity for duties and rights – the principle of equality means that under the same conditions states have the same duties and same rights. However, he finds that the principle of equality so formulated is but a tautological expression of the principle of legality and represents an empty principle (he uses the example of significant powers who alone enjoy certain privileges).³¹ According to Kelsen, this is why scholars attempt to attribute more substantial import to the concept of equality, excluding the majority vote principle and establishing that no state has jurisdiction over another state. In this way, the principle of equality is the principle of autonomy of states as subjects of international law.³²

This doctrine was affirmed in the United Nations Charter providing the principle a character of universality which cannot too readily be contravened and ignored: The Organisation is based on the principle of the sovereign equality of all its Members.³³ The principle of sovereign equality among states was asserted once more by the UN General Assembly in its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in 1970.³⁴ The principle of equality must be preserved as its negation would endanger a state's continued existence as such.³⁵ Equality is not a right in itself, nor an essential attribute of a state, but is simply a characteristic or basic rule of the system of international law.³⁶

This is why Kooijmans states that a correct understanding of the principle of equality can certainly contribute towards the view that international relations, too, are legal relations and that establishing a legal order, comprising the whole world, will bring peace and security to each individual and every nation, a peace and security in which all share equally.³⁷ In this context, sovereign equality functions as a weapon of weaker states that seek protection against imperial ambitions and the greed of greater powers. Irrespective of the differences in terms of culture, geography, military and economic power, the law demands that states be treated as equals.³⁸

Some jurists, and this is particularly true of those influenced by natural law reasoning, define equality as a natural right of states, or as an absolute, primordial or fundamental right. Others regard equality not as a right in itself but as an essential attribute of a state owing to its international personality. It is irrelevant whether equality is classified as a right or as an essential attribute. In both instances the idea

31 Kelsen, 1944, p. 209.

32 Ibid.

33 Art. 2, para. 1 of the UN Charter. See also in Rossi, 2017, p. 6.

34 Rossi, 2017, p. 6.

35 Thomas and Thomas, 1951, p. 796.

36 Ibid.

37 Kooijmans, 1964, p. 247.

38 Nijman and Werner, 2013, p. 13.

is present that the negation of equality would endanger a state's continued existence as such, thus, the compelling force underlying both viewpoints is the same.³⁹

The principle of sovereign equality has been connected to the right of states to assess for themselves what justice, morality and law demand in concrete situations. Sovereign equality then rests on the idea that no state has the right to arrogate the power to determine for one of its peers what certain legal and moral obligations entail.⁴⁰ However, this principle creates tensions in the context of international organisations. Often the authority of international organisations are challenged in the name of sovereign equality.⁴¹ This is also valid for the EU and its Member States. The nature of the EU and its relationship with its Member States makes any question over sovereignty and the balance of power a complex and contentious issue, that revolves around overlapping questions such as *Kompetenz-Kompetenz*, subsidiarity, direct effect, and primacy (or supremacy).⁴² It is self-evident that member states of any international organisation voluntarily agree to give up some of their own sovereignty so as to confer powers on the organisation itself.⁴³ There are two criteria – quantitative representation and the weight carried by different states and voting majorities.⁴⁴ Evident examples being the UN Security Council which in effect negates the principle of equality of Member States of the UN with regard to the 'one state one vote' principle. Regarding majority voting, the principle should be that no majority of states can impose anything on any single state contrary to its will, which it would translate into the principle of unanimous voting. Therefore, every state should have a veto power irrespective of its size and/or strength.⁴⁵ Certainly, this principle can lead to the impossibility to make (any) decision(s).

Therefore, the question on principle of equality in international law or in supranational organisations revolves about the concept of sovereignty and the equality of states which enter into international organisations and/or are a member of a supranational organisation. However, as Dobbs points out, the nature of the EU and its relationship with its Member States makes any question over sovereignty and the balance of power a complex and contentious issue, that revolves around overlapping questions such as *Kompetenz-Kompetenz*, subsidiarity, direct effect, and primacy (or supremacy).⁴⁶

39 Thomas and Thomas, 1951, p. 796.

40 Ibid.

41 The tension between equality between states and forms of international organisation has structured many debates throughout the history of international law, as the examples of the Concert of Europe, the League of Nations, the United Nations or the coalition against Libya attest. In the 1960's, debates regarding this tension primarily focused on two issues: the power of the Security Council and voting rules of international conferences and organisations. Nijman and Warner, 2013, p. 16.

42 Dobbs, 2014, p. 300.

43 Rossi, 2017, p. 7.

44 Ibid.

45 Rossi, 2017, p. 9.

46 Dobbs, 2014, p. 300.

4. Principle of Equality as a Central Principle of EU Law

4.1. Development of Principle of Equality Between EU Member States

When discussing the principle of equality, we must consider that EU law constitutes a separate legal order. This legal order was established by the framework of treaties which represents a ‘constitutional charter formerly of the European Community, and now of the European Union’.⁴⁷ This view was formulated by the CJEU who additionally took for granted that these treaties (or this constitutional charter) naturally awarded themselves the final authority in their interpretation. Therefore, treaties and set of legal rules brought according to them (regulations, directives etc.) represent a new legal order with direct effect for the Member State’s themselves.⁴⁸ This new legal order differentiates itself with regard to international and state legal orders, and therefore constitutes an independent legal order.⁴⁹

The principle of equality or non-discrimination constitutes one of the cornerstones of the process of European integration. The pursuit of equality among the people and states is a primary objective. This has long been perceived as a precondition to progressing towards ‘an ever closer union among the peoples of Europe’ – to the extent that the Union is actually ‘founded’ on the value of equality.⁵⁰ Compliance with the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified.⁵¹

Rossi provides a clear and precise overview of the development of this principle from the early beginning of the development of what we call today the EU. As is known, the first step was the establishment of the European Coal and Steel Community (ECSC) which comprised six states. In the High Authority there were more members than Member States (nine, eight appointed by Member States by agreement or by five-sixths majority and the ninth was elected by the eight designated), its Court had seven judges and decisions of the Special Council were made by absolute majority (this majority had to include a state producing at least 20% of steel and coal production of the ECSC). Therefore, the ECSC system was framed by rules of formal parity, also considering the weight each Member State carried depending on its output and population.⁵²

The system of the European Economic Community (EEC) was different, although in part based on the ECSC system. The voting system within the Council was mostly based on unanimity, except for rare occasions on which decisions were made by

47 MacCormick, 2014, p. 77.

48 Ibid.

49 Ibid.

50 Muir, 2019, p. 817.

51 Muir, 2019, p. 818.

52 Rossi, 2017, p. 11.

simple majority or by qualified majority. Regarding qualified majority voting, larger states were allotted more votes, but with a corrective skewed in favour of the smaller states. Therefore, as a whole, the Community system was designed to pursue a 'substantive' equality, tweaking the system in favour of the smaller states.⁵³

Changes began to occur since the Single European Act when more policy areas went from unanimity to qualified-majority voting, with a consequent elimination of veto power. Simultaneously, the grooving lawmaking role assigned to the European Parliament contributed to increasing the weight of larger states. The Treaty of Nice readjusted the weighting of votes by increasing the gap between larger and smaller states and it introduced a new method for calculating what counts as a qualified majority in the Council by taking a triple threshold: the number of votes, the number of Member States (a simple majority if the proposal comes from the Commission, or a two-thirds majority in all other cases) and EU population (at least 62%).⁵⁴

The Lisbon Treaty provided a reform of the system from November 2014. Qualified-majority voting has since been based on double-majority voting. It now requires 55% of Member States voting in favour (at least 15 states) representing at least 65% of population (the 55% threshold increases to 72% when deliberating on a proposal not originating from the Commission). A blocking minority must comprise at least four Member States or the act will be deemed to have been adopted.⁵⁵

It is evident that the EU as a supranational organisation/entity requires far more relinquishing of sovereignty than would be entailed by membership in an international organisation. This is why it is extremely important that the EU 'delivers' what is expected or, as Rossi states, that it can look after the common interest of all Member States.⁵⁶ Therefore, it is important to see whether EU institutions provide a framework which respects the principle of equality which Rossi defines as equality before the law.⁵⁷ He finds that if equal protection under the law is to be insured and loss of sovereignty justified, it will be necessary to rebalance the system by reinforcing the Commission and preserving the strength and independence of other EU institution charged with ensuring the equality among the Member States before the law – the CJEU. Moreover, he finds that the power of the European Council is excessive as it primarily deals with political coalitions.⁵⁸ Other authors also find that the case law of the CJEU exceeds its judicial authority, thereby disrupting the balance of power and the intended division of responsibilities among the EU institutions laid down in the Treaties.⁵⁹ They believe that, as the *van Gend & Loos* and *Costa v. ENEL* judgments turned an international law alliance into a supranational

53 Rossi, 2017, pp. 11–12.

54 Ibid., pp. 12–13.

55 Ibid., p. 13.

56 Ibid., p. 15.

57 Ibid., p. 16.

58 Ibid., p. 18.

59 Riedl, 2024, p. 182. The reference point being the *Juizes Portugueses* judgment (C-64/16 from 27 February 2018).

organisation, the *Juízes Portugueses* judgment and subsequent case law may represent the beginning of the transformation of the European constitutional system into a federal constitutional state.⁶⁰

4.2. Principle of Equality Among Member States and the Differentiation Mechanisms Used in the European Union's Integration Process

Can the principle of equality even be reconciled with the very idea of differentiated integration? Are these concepts in any legal relation? Or rather, does the principle of legality limit the possibilities for differentiation at the level of primary EU law? One must stress that the prohibition of discrimination is banned by Art. 18 TFEU and there are numerous other provisions clarifying that equality is one of the 'most fundamental' legal principles of EU law. As Muir states, the principle of equality or non-discrimination constitutes one of the cornerstones of the process of European integration. The pursuit of equality among the people and states is a primary objective.⁶¹ Compliance with the principle of equal treatment requires that comparable situations must not be treated differently, and that different situations must not be treated in the same way unless such treatment is objectively justified.⁶²

As early as 2005, Walker asked: Did the idea of 'differentiated integration' not pose an oxymoronic challenge to the very idea of unitary legal order?⁶³

Wouters and Schmitt find, using the practice of CJEU in free movement cases, that the principle of equality acts as a limitation on the scope of the Treaties' freedoms and as a limit to the intrusion of EU law into national law.⁶⁴ Moreover, equality between the Member States serves as a constitutional principle of EU law, which is of crucial importance for ongoing differentiation mechanisms within the EU institutional context.⁶⁵ The reason for such thesis is evidently – as was reiterated in this chapter many times – the principle of sovereignty of states, notwithstanding the fact that they are a part of a supranational organisation. As is highlighted in literature, this principle is reflected in the institutional rules of the EU in various ways – most prominent is the principle in the representation of each Member State in the Council of the EU and in the rotating office of the President of the Council. This is followed by the rule of equal voting rights when the Council decides by a majority, equal availability of the veto right when unanimous action is required, the composition of the Commission by one member from each Member State and the equal rights of standing of all Member States before the EU courts.⁶⁶

60 Riedl, 2024, p. 183.

61 Muir, 2019, p. 817.

62 Muir, 2019, p. 818.

63 Walker, 2005, p. 591.

64 Wouters and Schmitt, 2017, p. 48.

65 Ibid., p. 50.

66 Ibid., p. 51.

How does differentiated integration fit into the principle of equality of Member States? Differentiation mechanisms are often devised by the ‘High Contracting Parties’ at the level of primary EU law, and are used since the beginning of the European integration process.⁶⁷ For example, the Maastricht Treaty provided the rules on the Economic and Monetary Union (EMU), the Amsterdam Treaty enabled certain Member States not to participate in rules concerning civil cooperation, immigration and asylum etc. There are different treaties between EU Member States in fields closely connected to EMU,⁶⁸ the decisions regarding the ‘special’ status of the UK in the EU etc. However, are not all Member States equal and does the principle of equality limit the possibilities for differentiation at the level of primary EU law is a question that deserves answering. The CJEU case law indicates that there are certain areas in which the principles of EU law such as independence of EU judiciary system and the binding nature of its decisions and the unity in interpretation of application of EU law are ‘untouchable’.⁶⁹

The CJEU defends ‘autonomy of the Community legal system’ as its exclusive jurisdiction forms ‘part of the very foundations of the Community’.⁷⁰ It reaffirmed the importance of autonomy of EU legal order in its Opinion 2/13 with regard to the EU accession to the ECHR.⁷¹ Thus, it can be construed that, as the principle of equality is a fundamental principle of EU legal order, it cannot be touched by the EU constitutional legislature.⁷² This would mean that EU law also includes a component that is unchangeable – even for the Member States. Therefore, EU law would also include perpetuity clauses, as does the constitutional law of Member States.

However, the practice indicates differently as Member States did not refrain from attaining special and/or different status to certain Member States (British and Danish opt-out from stage three of EMU, non-inclusion of the UK in the Protocol and Agreement on Social Policy (Maastricht), special position of UK; Ireland and Denmark with regard to the provisions on Schengen in the Amsterdam Treaty). Notably, there are certain restrictions regarding the possibility of differentiated integration flowing from international law,⁷³ and the restrictions flowing from national constitutions.

67 Wouters and Schmitt, 2017, p. 56.

68 Treaty on the European Stabilisation Mechanism, Fiscal Compact Treaty, Agreement in the Single Resolution Mechanism.

69 Wouters and Schmitt, 2017, p. 58.

70 Kadi judgment, Case ECLI:EU:C:2008:461, para. 4.

71 Wouters and Schmitt, 2017, p. 59.

72 Wouters and Schmitt, 2017, p. 60.

73 See, in more detail, Wouters and Schmitt, 2017, pp. 63–66.

5. The Practice of CJEU and the Principle of Equality

CJEU case law on the principle of equality revolves mostly on the application of Art. 4(2) TEU and ensuring that variety of national prerogatives is upheld. This section provides an overview of the CJEU case law on the matter to elucidate how the CJEU considers Art. 4(2) TEU. The CJEU dealt with notions linked to the form of government, use of official languages, fundamental rights and other issues.

In *Sayn-Wittgenstein*,⁷⁴ national characteristics have prevailed over individual rights and free movement. In this case, Mrs Sayn-Wittgenstein, an Austrian national resident in Germany, challenged the decision of an Austrian authority to correct the entry of the register of civil status and change her surname from '*Fürstin von Sayn-Wittgenstein*' to '*Sayn-Wittgenstein*'. In its judgment, the Court began by pointing out, as in *Runevič-Vardyn*, that a person's name was a constituent element of his or her identity and of his or her private life, and that an amendment of the surname '*Fürstin von Sayn-Wittgenstein*', which she had used continuously for fifteen years following her adoption by a German prince (Fürst), constituted interference with the right to respect for family life. However, the CJEU eventually upheld the Austrian government's claim under which the Law on the abolition of the nobility, which prohibits Austrian citizens from bearing titles of nobility, including those of foreign origin, was an element of national identity.⁷⁵

In *Runevič-Vardyn*,⁷⁶ the CJEU was seized in the context of rules in Lithuania that provide that a person's surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language. The Court began by insisting on the fact that a person's forename and surname are a constituent element of his identity and of his private life. However, it left it for the referring court to decide whether the refusal by the Lithuanian authorities to amend the joined surname of the applicants (who wanted their names to be written on certificates of civil status in Lithuania in a form which complies with the rules governing Polish spelling) was liable to cause serious inconvenience to those concerned. To that effect, the referring court would have to examine whether such refusal reflects a fair balance between fundamental rights and national identity, that is between the applicants' right to respect for their private life and the legitimate protection by the Member State concerned about its official national language and its traditions.⁷⁷

In *Las*,⁷⁸ the CJEU found that, according to the fourth subparagraph of Art. 3(3) TEU and Art. 22 of the Charter of Fundamental Rights of the European Union, the Union must respect its rich cultural and linguistic diversity. In accordance with Art.

⁷⁴ Case C-208/09, EU:C:2010:806.

⁷⁵ Millet, 2021, p. 580.

⁷⁶ Case C-391/09, EU:C:2011:291.

⁷⁷ Millet, 2021, p. 579.

⁷⁸ Case C-202/11, ECLI:EU:C:2013:239.

4(2) TEU, the Union must also respect the national identity of its Member States, which includes protection of the official language or languages of those States. Accordingly, the objective of promoting and encouraging the use of Dutch, which is one of the official languages of the Kingdom of Belgium, constitutes a legitimate interest which, in principle, justifies a restriction on the obligations imposed by Art. 45 TFEU.

In *Commission v. Spain*⁷⁹ the CJEU found that the defendant Member State had failed to adopt all the measures necessary to transpose the EU Water Framework Directive. In particular, while the provisions on intracommunal basins had been transposed into the Spanish legal order, there had been no implementation of the rules on intercommunal basins, the latter being a competence reserved to the single Autonomous Communities. Insisting on the supplementing clause foreseen in Art. 149(3) CE – whose effectiveness could be doubted in that instance – the Spanish government argued that by activating Art. 258 TFEU ‘the Commission, disregarding Art. 4(2) TEU and the third paragraph of Art. 288 TFEU, sought to stipulate the manner in which the transposition was to be achieved in that Member State’.⁸⁰ However, according to the CJEU, such constitutional specificities were irrelevant as the argument rests on a ‘misreading’ of the Commission’s allegations. In fact, the Commission never tried to ‘impose, in breach of Art. 4(2) TEU and the third paragraph of Art. 288 TFEU, the manner in which the transposition of the provisions at issue was to be achieved’.⁸¹

In *Digibet and Albers*⁸² the Third Chamber of the CJEU accepted that: ‘the division of competences between the Länder cannot be called into question, since it benefits from the protection conferred by Art. 4(2) TEU’ and found that Art. 56 TFEU did not preclude the majority of the Länder from prohibiting the organisation of games of chance online where a Land has concomitantly opted for a more liberal legislation, provided the measures were proportionate – a determination that was left to the national judge.

Building upon *Digibet and Albers*, in *Remondis*⁸³ the CJEU clarified that Art. 4(2) TEU also covers the ‘internal reorganisations of powers within a Member State’ and accepted that the transfer by the Region of Hannover of waste treatment tasks that were its responsibility to a public body (a special-purpose association) created within the Region Hannover did constitute a ‘public contract’ within the meaning of the otherwise applicable Public Procurement Directive.⁸⁴

In *Torresi*,⁸⁵ the CJEU scrutinised Italian rules on access to legal profession. It was reserved for holders of a five-year university diploma in law and who participated in

79 Case C-151/12, ECLI:EU:C:2013:690.

80 Para. 23 of the *Commission v. Spain* judgment.

81 Para. 37 of the *Commission v. Spain* judgment; Di Federico, 2019, p. 360.

82 Case C-156/13, ECLI:EU:C:2014:1756.

83 Case C-51/15, ECLI:EU:C:2016:985.

84 Di Federico, 2019, p. 361.

85 Joined Cases C-58/13 and C-59/13 ECLI:EU:C:2014:208.

an apprenticeship of at least 18 months and passed a state examination. On average, over 61% of applicants do not succeed in passing this examination.⁸⁶ This prompted significant number of Italian law graduates to seek recognition of their university degree in other Member States, obtain a lawyer's position and return to Italy to practice law. Consiglio Nazionale Forense considered that the effect of Art. 3 of Directive 98/5,⁸⁷ in so far as it enables Italian nationals who obtain their professional legal qualification in a Member State other than the Italian Republic to practise their profession in the Italian Republic, is to circumvent Art. 33(5) of the Italian Constitution, under which access to the profession of lawyer is dependent on having successfully passed a State examination. Consequently, that provision of European Union secondary law, since it permits the circumvention of rules which form part of the Italian national identity, is contrary to Art. 4(2) TEU and should therefore, be held to be invalid. CJEU interpreted Art. 3 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the legal profession permanently in a Member State other than that in which the qualification was obtained must be interpreted as meaning that no abuse can be identified in the fact that a national of a Member State who after successfully obtaining a university degree travels to another Member State to acquire there the professional qualification of lawyer and returns to the Member State of which he is a national to practice there the profession of lawyer under the professional title obtained in the Member State where that professional qualification was acquired. The CJEU found that such deliberation cannot, in any way, affect either the fundamental political and constitutional structures or the essential functions of the host Member State within the meaning of Art. 4(2) TEU.⁸⁸

In *Bogendorff von Wolffersdorff*⁸⁹ the competent state body in Germany refused to register the daughter of the applicant under her British name as it contained 'nobility addendum' (she had dual nationality – German and British, and this addendum was in her British name). The court referred to the CJEU for a preliminary ruling with the following question – Are Arts. 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is simultaneously a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name? One of the chief

⁸⁶ Mastroianni and Arena, 2015, p. 373.

⁸⁷ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, pp. 36–43.

⁸⁸ Para. 58 of the *Torresi* judgment.

⁸⁹ Case C-438/14, ECLI:EU:C:2016:401.

facts was that it was argued that the abolition of privileges (and nobility being one of them) was one of the chief identity clauses in the constitution and thereby justifying a restriction on the right to freedom of movement considering Art. 4 (2) TEU. The CJEU upheld its earlier judgment in *Sayn-Wittgenstein* stating that notably, in accordance with Art. 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic.

In *Coman*,⁹⁰ the Court has given precedence to fundamental rights (and, together with them, to unfettered freedom of movement across the EU) over national features.⁹¹ The Court was to decide whether a third country national of the same sex of a Union citizen, who lawfully concluded a marriage in another Member State with that citizen, had a right of residence in the EU as a spouse. In its judgment, the Court acknowledged, although only implicitly, that the traditional institution of marriage (between a man and a woman) was an element of Romanian national identity. Nevertheless, it made a clear choice in favour of EU citizens' right to lead a normal family life and insisted on the fact that a national measure that is liable to obstruct the exercise of the freedom of movement for persons was justified only where such a measure was consistent with the fundamental rights guaranteed by the Charter. In doing so, the Court astutely distinguished between marriage itself and the legal consequences of marriage. It held:

the obligation for a Member State to recognize a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, does not undermine the institution of marriage in the first Member State. Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex.⁹²

In *Izsák and Dabis v. Commission*⁹³ the CJEU was resolving an issue with citizen's initiative filed according to Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative.⁹⁴ The appellants, together with five other persons, sent the Commission a proposed European citizens' initiative (ECI) titled 'Cohesion policy for the equality of the regions and sustainability of the regional cultures' ('the proposed ECI at issue'). By the decision at issue, the Commission refused to register the proposed ECI at issue, on the ground that it was apparent from an in-depth examination of the provisions of the Treaties cited in the proposal, and of all the other possible legal bases, that the proposed ECI fell manifestly outside the framework of its powers to submit a proposal for a legal

⁹⁰ Case C-673/16, EU:C:2018:385.

⁹¹ Millet, 2021, p. 580.

⁹² Para. 45 of the *Coman* judgment.

⁹³ Case C-420/16 P, ECLI:EU:C:2019:177.

⁹⁴ OJ 2011 L 65, p. 1.

act of the Union for implementing the Treaties. Among other reasons, they specified infringement of Arts. 4(2) and 174 TFEU. However, CJEU found that the general Court, by excluding, in Paras. 85 to 89 of the judgment under appeal, the possibility that a national minority region may because of its specific ethnic, cultural, religious or linguistic characteristics systematically form part of the ‘regions which suffer from severe and permanent natural or demographic handicaps’ within the meaning of the third paragraph of Art. 174 TFEU, the General Court correctly interpreted the concept of ‘regions concerned’ in that provision, and did not therefore err in law on this point. Interestingly, the General Court, in dismissing the action, claimed that independently of the absence of an adequate legal basis in the treaties (nor in the Charter) the EU legislator could not adopt a measure within the framework of EU cohesion policy defining national minority regions without infringing Art. 4(2) TEU. The adoption of such act would unduly impinge on the internal structure of a Member State and thus be invalid.⁹⁵

In *M.A.S. and M.B.* in response to the request for a preliminary ruling on behalf of the Italian Constitutional Court, the CJEU delivered a conciliatory decision in which it accepted that, aiming to ensure respect to the principle of legality as understood by the Italian Constitutional Court, the national judges could apply the Italian provisions concerning the statute of limitations even if this would result in a violation of the Member States’ duty to protect the financial interests of the Union (the *Tarrico II* case⁹⁶). However, in *Tarrico II* decision the CJEU continued to uphold the doctrine of EU law’s supremacy but provided Member States discretion regarding ongoing criminal cases in a procedural field of law, that is limitation periods, provided that the matter had not yet been harmonised by EU law. Thus, the CJEU in *Tarrico II* did not accept an attenuation of nor an exception to the primacy of EU law, but showed itself conciliatory. Simultaneously, the Court avoided a direct confrontation over whether and how to resolve a discrepancy between EU law and national constitutional law principles.⁹⁷ The response of the Italian Constitutional Court came⁹⁸ shortly after and the Court affirmed that, while the Court of Justice had the sole authority to interpret EU law uniformly and determine whether it has direct effect, it was also undeniable that, as recognised by the *M.A.S. and M.B.* judgment, the Italian legal system could not accept an interpretive result that violated the principle of legal certainty in criminal matters.⁹⁹

However, maybe the strongest way in which Art. 4(2) is invoked by national constitutional courts is to deny applicability of EU law. This use of Art. 4(2) TEU ‘has been firmly rejected by the Court of Justice’.¹⁰⁰

95 Di Federico, 2019, p. 357.

96 Case C-42/17 *M.A.S. and M.B.* ECLI:EU:C:2017:936.

97 Capelli, 2023, p. 101.

98 Judgment No. 115/2018.

99 Capelli, 2023, p. 102.

100 Di Federico, 2019, p. 362.

For example, in *Affatato*,¹⁰¹ the referring judge had doubts as to the very applicability, in accordance with Art. 4(2) TEU of Clause No. 5 of the Framework Agreement on fixed-term work to the Italian Republic, at least insofar as it prescribed the conversion, also in the public sector, of such contracts into contracts of indefinite duration. According to the Italian Constitutional Court Art. 97 Cost. demands that public employees be recruited through public competitions to guarantee impartiality and the right to sound administration. The CJEU underlined that Member States continue to enjoy a certain margin of discretion in determining when and under what conditions fixed term employment contracts are to be deemed to be contracts of indefinite duration and consequently found that Clause No. 5 of the Framework Agreement, in itself, is not capable of hampering the fundamental structures, political and constitutional, nor the essential functions of the Italian Republic within the meaning of Art. 4(2) TEU.¹⁰²

Moreover, in *O'Brien*,¹⁰³ the UK Supreme Court evoked the independence of the judiciary to know whether judges could be included in the scope of application of the Framework Agreement on part-time work and Directive 97/81.¹⁰⁴ In its observations the Latvian Government contended that the application of EU law to the judiciary violated Art. 4(2) TEU. The Second Chamber firmly dismissed the argument. Although the definition of ‘workers’ is left to the national judge, an exclusion from the protection afforded under the Directive is allowed only insofar as the distinctive features of the relationship between judges and the Ministry of Justice are established. Otherwise, the application of Directive 97/81 and the Framework Agreement on part-time work cannot affect national identity.¹⁰⁵

In *ZZ*,¹⁰⁶ the CJEU rejected Italian Government claims on inadmissibility of the case. The Italian Government claimed:

it is clear from Art. 4(2) TEU and Art. 346(1)(a) TFEU that State security remains the responsibility of solely the Member States. The question referred thus relates to an area governed by national law and, for that reason, does not fall within European Union competence.¹⁰⁷

However, the CJEU stated that although it is for Member States to take the appropriate measures to ensure their internal and external security, the mere fact

101 Case C-3/10, ECLI:EU:C: 2010:574.

102 Di Federico, 2019, p. 362.

103 Case C-393/10, ECLI:EU:C: 2012:110.

104 Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC – Annex: Framework agreement on part-time work, OJ L 14, 20.1.1998, pp. 9–14.

105 Ibid.

106 Case C-300/11, ECLI:EU:C:2013:363.

107 Case C-300/11, ECLI:EU:C:2013:363, para. 35.

that a decision concerns State security cannot result in European Union law being inapplicable.¹⁰⁸

From the case law, it appears that the notion of Member States on what comprises ‘national (constitutional) identity’ is very broad. The list would include: sound administration of justice (*Torresi*); Republican form of government (*Sayn-Wittgenstein and Bogendorff von Wolffersdorff*); protection of national languages (*Runevic-Vardyn and Las*); allocation of competences within the Member States, at the central and regional and local level (*Commission v. Spain, Digibet and Albers, Remondis and Izsák and Dabis v. Commission*); principle of impartiality of the public administration (*Affattato*); independence of the judiciary (*O’Brien*); ZZ and public policy and morality (*Coman*).¹⁰⁹ It is worth noticing that, in *M.A.S. and M.B.* the CJEU did not address the Italian’s argument that configured the principle of legality as a component of national identity.¹¹⁰

However, the case law of the CJEU indicates that national (constitutional) identity does not appear to have developed its potential, or better, the CJEU appears to narrow down the scope of Art. 4 (2) so that it cannot be used to curtail the implementation of EU law and ‘further integration’. The case-law of the CJEU has clarified that, against the expectations and the claims of some Member States, Art. 4(2) TEU cannot act as a ‘competence clause’ nor as an exception to the principle of the primacy of EU law. Conversely, the CJEU has often admitted that the respect for national identity could justify a derogation from free movement provisions, provided that, in line with its traditional approach, the national measures at stake complied with the principle of proportionality and did not result in a disproportionate contraction of fundamental rights.¹¹¹ However, there are some who advocate even narrower interpretation of Art. 4(2) TEU – even, for example to omit the status of a country’s official language from its scope.¹¹²

Moreover, the CJEU, chose, on its own initiative, to use the clause as an aid to interpreting other norms of EU law – respectively, the free movement of services and a public procurement directive. This, as De Witte argues, was an appropriate judicial use of Art. 4(2) TEU.¹¹³

The CJEU clearly indicated its conviction that the CJEU is in charge of defining what belongs to the idea of national identity or constitutional structure of Member States, national Constitutional Courts or the CJEU. Moreover, some believe that Art. 4(2) TEU should only be used as a ‘supportive’ norm to interpret other norms of EU law.

108 Case C-300/11, ECLI:EU:C:2013:363, para. 38.

109 Di Federico, 2019, p. 364.

110 Capelli, 2023, p. 109.

111 Capelli, 2023, p. 110.

112 De Witte, 2021, p. 567. De Witte justifies this by stating that respect for the Member States’ linguistic policies is protected elsewhere in primary law, in the Arts. 3(3) TEU and 22 of the Charter. Ibid.

113 De Witte, 2021, p. 565.

6. Identity Clause in Art. 4 TEU and the Principle of Equality

6.1. Identity Clause in the Context of National Identity

Art. 4(2) TEU provides:

[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structure, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.¹¹⁴

The formulation and constitutional positioning¹¹⁵ of Art. 4(2) TEU suggest that the provision is autonomous, to be distinguished from other provisions concerning the cultural, linguistic and religious specificities of the Member States, as well as from those relating to the protection of fundamental rights, and should be read jointly with the principles of conferral, sincere cooperation, subsidiarity and proportionality.¹¹⁶

The respect for the national identities of the Member States, whose systems of government are founded on the principles of democracy, can be found in primary law since the Maastricht Treaty, when it was mentioned in Art. F, which also affirmed the duty to respect fundamental rights, as they result from the constitutional traditions common to the Member States.¹¹⁷

The development of identity clause, particularly its iteration in the Lisbon Treaty, made this clause fully justiciable. Art. 4(2) TEU is meant to operate as a parameter of validity (in the context of actions for annulment and preliminary rulings) or as hermeneutical criterion (in the context of infringements procedures and preliminary rulings) to scrutinise the acts adopted by the EU institutions, bodies, offices and agencies vis à vis exceptions invoked by the Member States to resist the full application of EU primary and secondary law.¹¹⁸ However, to date the Court of Justice has failed to assign to Art. 4(2) TEU an autonomous function in managing constitutional conflicts. In particular, it has not clarified the reasons for recurring to the identity clause, nor has it insisted on the dichotomy fundamental structure/essential functions resulting therefrom.¹¹⁹

¹¹⁴ Dobbs, 2014, p. 300.

¹¹⁵ The importance of the national identity clause is emphasised by the fact that it is reproduced verbatim in the Preamble to the CFREU. Kaczorowska-Ireland, 2019, p. 57.

¹¹⁶ Di Federico, 2019, p. 348.

¹¹⁷ Ibid., p. 353.

¹¹⁸ Ibid., p. 355.

¹¹⁹ Ibid., p. 378.

Therefore, Art. 4(2) TEU has been the subject of intensive debate amongst scholars. In particular the debate focuses on two issues, first, how to identify matters which should be regarded as falling within the national identity clause, or how to define what constitutes the national identity of any particular Member State within the meaning of Art. 4(2) TEU, and second, what body should have the final authority on the interpretation and application of Art. 4(2) TEU.¹²⁰

Rodin wrote, as early as 2011, that in the context of Art. 4(2) TEU, this can mean that Member States are at liberty to define the core of national constitutional identity, while the CJEU retains the power to interpret the broader normative framework within which national identity operates in the EU. Too extensive an interpretation of the national identity clause has the potential to block or even reverse the course of European integration. However, too narrow an interpretation would render Art. 4(2) devoid of its useful effect.¹²¹

Moreover, in 2011, von Bogdandy and Schill described Art. 4(2) TEU as one of the most important novelties of the Lisbon Treaty, reading this provision as an exception to primacy provided for under EU law itself, and that it could guide the way to a more nuanced understanding beyond the categorical positions of the CJEU on the one side and that of most domestic constitutional courts.¹²²

Respect for national identity under the Lisbon Treaty should be interpreted as a way to ‘overcoming absolute primacy’ and ‘can be understood as permitting domestic Constitutional Courts to invoke under certain limited circumstances constitutional limits to the primacy of EU law’. In these readings, the concept of ‘national identity’ is identified with the concept of ‘constitutional identity’ and framed within the discourse of CJEU and national constitutional Court’s different claims to sovereign authority.¹²³ The German Constitutional court said it plainly in its *Lisbon*¹²⁴ judgment: ‘the duty, under European law, to respect identity... (is) the expression of the foundation of Union authority in the constitutional law of the Member States’.

However, it is, in legal theory, but also in CJEU case law, clear that ‘constitutional identity’ is stated to be different from the ‘national identity’ referred to in the broadly drafted provision of Art. 4(2) TEU, and it is also a fact that CJEU’s interpretation of Art. 4(2) TEU appears to be undermining constitutional identity.¹²⁵ CJEU has established that national identity as protected by Art. 4(2) TEU is a rather limited concept. It neither constitutes a catch-all tool to limit the transfer of sovereign powers to the EU nor is it an exception to the principle of EU law supremacy.¹²⁶

120 Kaczorowska-Ireland, 2019, p. 58.

121 Rodin, 2011, p. 41.

122 Von Bogdandy and Schill, 2011, pp. 1417–1418.

123 Guastafarro, 2012, p. 7.

124 30 June 2009 – 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08 and 2 BvR 182/09, para. 234.

125 Konstadinides, 2015, p. 130.

126 Konstadinides, 2015, p. 131.

Sensitive questions, concerning areas where legislative competences have not been conferred to the EU, continue to arrive in Luxembourg, perhaps even more often than ever. In some of these cases, Member States attempt to protect themselves from the interference of EU law by relying, in different fashions, on the national identity clause of Art. 4(2) TEU.¹²⁷ This is the reason constitutional courts of Member States use Art. 4(2) as a weapon to battle the, as they see it, interference from the side of EU law and EU institutions in domestic affairs.

Both German and Polish constitutional courts argued that constitutional identity is a question of EU law. For instance, the German Constitutional Court claimed in its *Lisbon* judgment that the institution of identity review was the only way to ensure compliance of EU institutions with Art. 4(2) of the TEU. Similarly, the Polish Constitutional Tribunal argued that constitutional identity was the equivalent to the concept of national identity in Art. 4(2) of the TEU.¹²⁸ This indicates that national constitutional courts attempt to place a sign of equation between national and constitutional identity, therefore successfully advocating the use of Art. 4(2).

More recently, in its reference triggering the *Gauweiler* case,¹²⁹ the German Constitutional Court *expressis verbis* said that ‘the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art. 4 TEU section 2 sentence 1 by the Court of Justice of the European Union’. On that occasion, the German Constitutional Court admitted its ‘discomfort’ with Art. 4(2) TEU and all those EU law provisions referring to national law, opening the door to different readings of the same concept, a concept introduced in the Treaties to contain constitutional conflicts.¹³⁰

Some authors argue that this identity review violates the principle of sincere co-operation (Art. 4(3) TEU). However, the German Court answered, in its decision on the European Arrest Warrant:

127 Bonello, 2021, p. 553.

128 Scholtes, 2021, pp. 539–540.

129 In this case, the CJEU answered the first preliminary ruling ever raised by the *Bundesverfassungsgericht* (BVerfG), concerning the legality of the Outright Monetary Transaction (OMT) programme designed by the European Central Bank (ECB) at the height of the Euro-crisis. The OMT programme – which followed on ECB President Mario Draghi’s pledge to do ‘whatever it takes’ to save the euro – allowed the ECB to purchase government bonds on the secondary market when necessary to restore the normal transmission of monetary policy stimulus, on the condition that the Member State(s) concerned entered a programme of economic adjustment. In its preliminary reference, the BVerfG had been explicit in describing the OMT programme as in violation of EU law and asking the CJEU to strike down the challenged measure as *ultra vires*. Moreover, the BVerfG had reserved to itself a right to invalidate the OMT programme in Germany if the CJEU had not followed its interpretation. However, in *Gauweiler*, the CJEU soundly rejected the view that the OMT programme exceeded the powers conferred to the ECB by the EU Treaties and that violated the prohibition of monetary financing, fully backing the action of the ECB. Fabbri, 2015, p. 1004.

130 Martinico, 2021, p. 449.

the identity review does not violate the principle of sincere cooperation within the meaning of Art. 4 section 3 TEU. It is rather inherent in the concept of Art. 4 section 2 sentence 1 TEU [...] and corresponds to the special nature of the European Union.

Furthermore, it stated:

As ‘masters of the treaties’ (*Herren der Verträge*), Member States decide through national legal arrangements if and to what extent Union law is applicable and is accorded precedence in the respective national legal order.¹³¹

However, the claims that the identity clause excludes certain matters from the purview of CJEU have so far constantly failed. Although national identity may influence the concrete application of EU law to a specific case, it does not, by itself, exclude some areas, even if sensitive and close to the core areas of state activities, from the reach of EU law. Thus, and even if that may have been the expectations of (some) Member States when drafting the Rome and Lisbon Treaties, Art. 4(2) TEU is unable to provoke a return to ‘limited integration’.¹³² Therefore, some believe that there are many reasons to not conflate the constitutional identity advanced by the Member States with the national identity of Art. 4(2).¹³³ Scholtes argues that this provision’s practical significance of the Art. has been reduced to little more than a generalised public policy clause.¹³⁴ As he sees it, rather than categorical limits to the primacy of EU law, identity concerns under Art. 4(2) TEU are merely another aspect to be weighed as part of a proportionality test.

Millet finds that CJEU does not operate any explicit distinction among the different Art. 4(2) TEU-based claims between ‘elements of national identity’ and genuine elements of national constitutional identity despite the abundant doctrinal discussion.¹³⁵ However, he also claims that there are elements that make national constitutional identity an item CJEU must accept and adhere by. In order for a national constitutional identity claim to be ‘admissible’ for the CJEU it must be circumscribed to core constitutional commitments that are not only unique, but also crucial for the ethos and psyche of the national political community, as notably interpreted by constitutional courts.¹³⁶ To fulfil this criteria, a national constitutional claim should be distinctive (specifically national), should relate to substantive elements of the national identity (this is a negation of the German Constitutional Court *ultra vires*

131 2 BvR 2735/14, para. 44.

132 Bonello, 2021, p. 554.

133 Scholtes, 2021, p. 540.

134 Ibid.

135 Millet, 2021, p. 586.

136 Ibid.

claim) and bound to relate to an axiologically crucial feature for the national ethos (a fundamental value).¹³⁷

6.2. Identity Clause in the Context of the Principle of Supremacy of EU Law

...the European Union is obliged to respect the constitutional identity of the Member States. That obligation has existed from the outset. It indeed forms part of the very essence of the European project initiated at the beginning of the 1950s, which consists of following the path of integration whilst maintaining the political existence of the States.¹³⁸

Although Art. 4(2) TEU provides:

[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structure, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State,

the CJEU created the principle of supremacy through its practice. The Lisbon Treaty added to this conundrum over primacy and national sovereignty, 15 as reflected in its inclusion of Declaration 17 expressly recognising the principle of primacy as developed within the case law, while simultaneously strengthening the status and developing the content of Art. 4(2) TEU.¹³⁹

The principle of the supremacy (also referred to as ‘precedence’ or ‘primacy’) of EU law is based on the idea that where a conflict arises between an aspect of EU law and an aspect of law in an EU Member State (national law), EU law will prevail. If this were not the case, Member States could simply allow their national laws to take precedence over primary or secondary EU legislation, and the pursuit of EU policies would become unworkable.

The principle of supremacy of EU law has developed over time by means of the case law (jurisprudence) of the CJEU. It is not enshrined in the EU treaties, although there is a brief declaration annexed to the Lisbon Treaty in regard to it. As the CJEU stated in its famous judgment *van Gend & Loos*, the EU constitutes a new legal order of international law for the benefit of which the Member States have limited their

¹³⁷ Millet, 2021, pp. 586–587. For example, traditional marriage between a man and a woman is certainly still part of the social contract in some Member States, in particular those where religion remains highly influential within society, while laïcité stands high as a national value in a country such as France. Millet, 2021, p. 588.

¹³⁸ Advocate General Poiares Maduro in Case C-160/03 *Spain v. Eurojust* ECLI:EU:C:2005:168, para. 31.

¹³⁹ Scholtes, 2021, p. 540.

sovereign rights, although within limited fields, and the subjects of which comprise not only Member States but also their nationals.¹⁴⁰

In *van Gend & Loos v. Nederlandse Administratie der Belastingen*,¹⁴¹ CJEU declared that the laws adopted by EU institutions were capable of creating legal rights which could be enforced by both natural and legal persons before the courts of the Member States. Therefore, EU law has direct effect. According to the principle of supremacy of EU law, in case of a conflict between EU law and the law of the Member States, EU law prevails. However, this principle does not signify that the CJEU can invalidate the national law, which conflicts with EU law. It rather means that in case of a conflict between national law and directly effective EU law, which cannot be solved by consistent interpretation of national law, national courts of the Member States must apply EU law instead of the national law.¹⁴²

In *Costa v. ENEL*,¹⁴³ the Court further built on the principle of direct effect and captured the idea that the aims of the treaties would be undermined if EU law could be made subordinate to national law. As the Member States transferred certain powers to the EU, they limited their sovereign rights, and thus for EU norms to be effective they must take precedence over any provision of national law, including constitutions. This view of absolute primacy of EU law is echoed through the CJEU's case law ever since.¹⁴⁴ In the narrative of the CJEU, the doctrine of supremacy was laid down in *Costa v. ENEL* in 1964, but was part of EU law from the outset.¹⁴⁵ However,

140 Trstenjak, 2013, p. 71.

141 Case 26/62 ECLI:EU:C:1963:1.

142 Trstenjak, 2013, p. 72.

143 Case 6/64 ECLI:EU:C:1964:66.

144 Bruggeman and Larin cite Case C-119/05 *Lucchini*, ECLI:EU:C:2007:434, para. 61; C-213/89 *Factor-tame*, ECLI:EU:C:1990:257, paras. 17–18; Case C-409/06 *Winner Wetten*, ECLI:EU:C:2010:503, para. 61, see Bruggeman and Larin, 2020, p. 22. The only two possible exceptions, that is, where a relative interpretation of the primacy of EU law is used, could be seen in *Omega* and *Sayn Wittgenstein*. In these, the CJEU appeared to depart from the strict, unconditional hierarchy it maintained in its case law discussed above, and which was taken up again later. In *Omega*, the German Federal Administrative Court (*Bundesverwaltungsgericht*) asked the CJEU whether it could prohibit a laser gaming facility from providing services deemed to infringe the principle of human dignity as enshrined in the German constitution, even if it were to restrict the free movement of goods and services in EU law. The Court found this prohibition to be justified based on public policy exceptions provided for in the EU Treaties. In *Sayn Wittgenstein*, the question arose whether a law abolishing nobility as an expression of the constitutional principle of equality in Austria posed a legitimate restriction to the free movement of persons in EU law. The CJEU explicitly relied on Art. 4(2) TEU in justifying the derogation based on public policy grounds. In both cases the Court allowed for limitations to the EU's fundamental freedoms, but not stemming (only) from domestic constitutional principles, but based on policy objectives it deemed legitimate in EU law. Bruggeman and Larin, 2020, p. 22.

145 Nagy, 2024, p. 72. Some authors believe that although it is usually argued that this doctrine emerged in the well-known judgment *Costa v. Enel* this is not the case. As they say, it is true that in this judgment the CJEU postulated the autonomous precedence of EU law over conflicting national law in explicit terms. However, its foundations were already laid down in previous judgments, including the case-law on the ECSC Treaty. This background is important as it demonstrates that the precedence doctrine does not constitute a political invention of an activist CJEU, but rather that it results from the legal nature of the Communities. Barents, 2009, p. 423.

supremacy in fact became a reality when it was accepted by national courts, and different national courts accepted it at different times, with uniform acceptance not being achieved until the early 1990s.¹⁴⁶

Further examples of cases in which the CJEU affirmed the supremacy of EU law include *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,¹⁴⁷ *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*,¹⁴⁸ *Marleasing SA v. La Comercial Internacional de Alimentacion SA*.¹⁴⁹

Most recently the CJEU stated, in *Pelham and Others*:

by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law in the territory of that State.¹⁵⁰

Therefore, the CJEU stands firm in its traditional stance on supremacy of EU law.

In these cases, CJEU clarified that the primacy of EU law must be applied to all national acts, whether they were adopted before or after the EU act in question. Where EU law takes precedence over conflicting national law, the national provisions are not automatically annulled or invalidated. However, national authorities and courts must refuse to apply those provisions as long as the overriding EU norms are in force. Therefore, the principle of supremacy seeks to ensure that people are uniformly protected by an EU law across all EU territories.

Notably, the supremacy of EU law only applies where Member States have ceded sovereignty to the EU – in fields such as the single market, environment, transport, etc. However, it does not apply in areas such as education, culture or tourism.

It is well argued that the duty set out in Art. 4(2) TEU has been construed to uphold various national prerogatives capable, in principle, of justifying an exception to the full application of EU (primary and secondary) law; most notably: the form of government of the Member States; national choices related to the use of the official language(s); domestic understanding of fundamental rights; internal allocation of competences at the regional or local level. More recently, public policy concerns have also been linked to Art. 4(2) TEU.¹⁵¹

Some scholars argue that the notion of ‘constitutional identity’ is used by various constitutional courts (out of whom some are less and less politically independent) to carve out ever-larger areas of ‘constitutional identity’ by themselves and thus undermine the supremacy of EU law. National constitutional and supreme courts as well as other Member State institutions play a crucial part in both cooperating

146 Ibid.

147 Case 11-70 ECLI:EU:C:1970:114.

148 Case 106/77 ECLI:EU:C:1978:49.

149 Case C-106/89 ECLI:EU:C:1990:395.

150 Case C-476/17, EU:C:2019:624, para. 78.

151 Di Federico, 2019, p. 358.

with and in counterbalancing the CJEU.¹⁵² However, the CJEU further expanded its powers after the Charter of Fundamental Rights came into force because this enabled the CJEU to act as a constitutional court. Its slow broadening of powers with special reference to *Fransson*¹⁵³ erodes the functioning of national courts even in situations which are only ‘in the reach’ of EU law.¹⁵⁴

Notably, some authors set the thesis that supremacy of EU law ensures the principle of equality – preventing each country of the EU from cherry-picking which provisions of EU it likes or not. They argue that the supremacy of EU law is not an arbitrary imposition of supranational authority over the will of a Member State. Rather, it is the guarantee that Member States will remain equal under the EU Treaties. As Member States have accepted to become members of the EU, limiting their sovereignty on a reciprocal basis, if a Member State (its highest court) could unilaterally decide to redefine the terms of its participation to the EU, this would undermine the equal position of all the Member State *vis-à-vis* EU law. Some states would be more equal than others.¹⁵⁵

The activation of Art. 4(2) TEU is potentially disruptive inasmuch as it can – if taken seriously – lead to the differentiated application of EU law throughout the Union. Most notably, when it is relied upon to challenge the validity of a provision of secondary law under Art. 263 TFEU the CJEU will have to determine whether the legislator has overstepped the boundaries of its wide discretionary power unduly impinging on the fundamental structure or the essential functions of a given Member State. The violation of the duty set forth in the provision would entail the annulment (total or partial) of the relevant measure with *erga omnes*, and – at least in principle – *ex tunc* effects.¹⁵⁶ Moreover, the argument based on the ‘effectiveness’ of EU law may be tempting but arguably is not compelling. Effectiveness has emerged from loyalty as a means to ensure that EU law takes full effect in national law.¹⁵⁷

However, constitutional identities represent the third frontier of limitation to supremacy, after the ‘fundamental rights’ reservation inaugurated with *Solange*, and the ‘competence’ reservation inaugurated with the *Maastricht* judgment. The identity review would be based upon Art. 4(2) TEU, which, while protecting national constitutional identities, prevents some of the norms of the Treaty to claim primacy upon them.¹⁵⁸ However, notably, the CJEU is not always reluctant to accept various ‘elements of national identity’, as it calls them. Millet lists the abolition of nobility titles in Austria (as a result of the latter’s status as a Republic) and in Germany (as a result of the latter’s constitutional choice); the protection of the State’s official national language in Lithuania and Belgium; or the protection of the domestic division

¹⁵² Bruggeman and Larik, 2020, p. 21.

¹⁵³ C-617/10 *Åklagaren v. Hans Åkerberg Fransson*. ECLI:EU:C:2013:105.

¹⁵⁴ Horvat Vuković, 2019, p. 254.

¹⁵⁵ Fabbrini, 2015, pp. 1022–1023.

¹⁵⁶ Di Federico, 2019, p. 355.

¹⁵⁷ Klamert, 2022, p. 85.

¹⁵⁸ Guastaferrero, 2012, p. 10.

of competences in Germany, be it between Länder or merely regarding the internal reorganisation of powers between local public bodies.¹⁵⁹

The first remote hints at today's notion of constitutional identity trace back to the German and Italian Constitutional Courts' reactions to the CJEU doctrine of supremacy of EU law. The Italian Constitutional Court, in its 1973 *Frontini* judgment, began developing its *controlimiti* doctrine, a version of which remains current to this day.¹⁶⁰ The German Constitutional Court's *Solange* case law provides another early trace of constitutional identity, extended by its *Maastricht* judgment, which framed national limitations to the reach of EU law as a matter of sovereignty as *Kompetenz-Kompetenz*, or the capacity to decide who is competent.¹⁶¹ In *Mr R*¹⁶² case the German Constitutional Court ruled that German courts now always have to guarantee compliance with the German constitutional principle of human dignity, thus expanding its powers towards the scrutiny of EU law as it abandoned the exceptional conditionality element from its *Solange* cases.¹⁶³

Both the Spanish and French Constitutional Courts read this clause as 'containing an implicit limit to the primacy of European law whenever that law would affect national constitutions, or at least their fundamental structures'.¹⁶⁴ The Czech Constitutional Court went down a similar route, using the eternity clause in Art. 9 of the Czech Constitution as the beginning point for staking out a 'material core' of

159 Millet, 2021, pp. 573–574. In contrast, the Court did not recognise the employee participation system in social negotiations as an element of (German) national identity. By the same token, although the Court implicitly acknowledged the institution of marriage between a man and woman as an element of national identity in Romania, it considered that same-sex marriages celebrated abroad were to be recognised in that Member State. Millet, 2021, p. 574.

160 Scholtes, 2021, p. 536. The Italian Constitutional Court developed similar objections to absolute primacy in what is termed the *controlimiti* doctrine as developed in *Frontini*, *Granital*, and *Fragd*. When activated, the Italian Constitutional Court can declare the legislation incorporating EU law unconstitutional. See Bruggeman and Larik, 2020, p. 23.

161 Scholtes, 2021, p. 537.

162 2 BvR 2735/14, 15 December 2015.

163 Bruggeman and Larik, 2020, p. 23.

164 Scholtes, 2021, p. 537.

The German Constitutional Court was the most direct in its judgment, instituting an identity review (Identitätskontrolle) against EU law. In the judgment, the Court declared itself competent to review European Union legislation, including any new treaties, for compliance with German constitutional identity. An anchor for the Court's conception of constitutional identity was the 'eternity clause' in Art. 79(3) of the German Constitution. The clause precludes the constitutional legislator from changing certain essential provisions of the constitution, Art. 127 – which enshrines the inviolability of human dignity and mandating respect for human rights – and Art. 2028 – which, among other things, establishes the federal, democratic, and social nature of the German state, as well as the principles of popular sovereignty and the rule of law. Thus, the German Constitution binds even the constitution-amending power to the constitution's fundamental principles. By extension, the inviolable core content of the constitution, protected by the eternity clause, must be equally protected against encroachment through European Union law. The identity of the *Grundgesetz* is thus 'integration-proof'. Any change of constitutional identity through European integration must be legitimated through an act of the constituent power, that is, through the enactment of a new constitution in a referendum. Scholtes, 2021, p. 538.

the Constitution. In the case of a conflict between EU Law and the Czech Constitution, the Court upheld that ‘the constitutional order of the Czech Republic, in particular its material core, must take precedence’.¹⁶⁵ The Polish Constitutional Court, in its judgment, referred extensively to the German Constitutional Court’s precedent and similarly invoked Art. 4(2) of the TEU. In developing its conception of constitutional identity, it argues that the latter is the ‘normative manifestation’ of Polish sovereignty, and as such, it expresses the ‘matters which constitute ‘the heart of the matter’ i.e. are fundamental to the basis of the political system of a given state’. In addition to Poland and the Czech Republic, other countries such as Hungary and Belgium have all adopted their own forms of constitutional identity discourse to protect from European encroachment.¹⁶⁶

Therefore, it is safe to say that constitutional identity has become a ‘weapon’ in the hands of national constitutional courts which they use to suppress the CJEU doctrine of absolute supremacy of EU law. As we can see, the ‘line of defense’ is, again, national sovereignty and the existence of a national constitutional essence which cannot be overcome by the doctrine of supremacy of EU law and the fact that there are some exclusive reservoirs of sovereignty that cannot be ceded to the EU.

However, as for now, the CJEU appears ‘reluctant to explicitly refer to Art. 4(2) TEU’ and use the case law of the Member States constitutional courts to ‘delimit the outer limits of constitutional identity’.¹⁶⁷ This situation, as Di Federico states, serves three distinct but highly interrelated purposes. First, it indicates that the issues at stake are particularly sensitive. Second, it supports the conclusion that the full application of EU law will depend on the interpretation offered by the CJEU and its compliance with the national constitutional order. Third, it offers the Luxembourg judges a legal ground for accepting the relevant national specificities.¹⁶⁸ Therefore, some scholars invite the CJEU to ‘confine the EU law concept of national identity to the precise scope given to it by the drafters of the Lisbon Treaty’ as ‘many other norms and principles of EU law are available to protect the variety of legitimate public interests of the Member States’.¹⁶⁹

6.3. The Relation of Art. 4(2) and Art. 4(3)

When discussing the implementation of Art. 4(2), one could argue that it conflicts, as described above, with the principle of sincere cooperation enshrined in Art. 4(3) TEU. However, the German Constitutional Court argued that the need to uphold the constitutional identity of the Member States upon which the Union is founded – and to disapply EU law conflicting with the German constitutional identity – does

¹⁶⁵ Ibid.

¹⁶⁶ Scholtes, 2021, p. 539.

¹⁶⁷ Bruggeman and Larik, 2020, p. 25.

¹⁶⁸ Di Federico, 2019, p. 350.

¹⁶⁹ De Witte, 2021, p. 570.

not infringe the principle of sincere cooperation laid down on Art. 4(3) TEU precisely because of the duty set out in Art. 4(2) TEU.¹⁷⁰

7. Conclusion

Years after the introduction of the national identity clause, it can be concluded that Art. 4(2) has not fundamentally transformed the relationship between European and domestic legal orders.¹⁷¹ This is why some authors believe that it was never intended as such.¹⁷² The CJEU's case law does provide reason to believe such a thesis as it never in reality accepted such meaning of this provision. It is also true that it never dismissed it either. Thus, what is the function of Art. 4(2) TEU? Is it in reality only a 'policy statement' as some would have us believe? Or does it have a more fundamental meaning and purpose? Who is to interpret it with a firm and without doubt voice – the CJEU or the ones whose interests it (should) defends – the constitutional courts? Rodin's answer in 2011 was that the role of Art. 4(2) TEU is twofold. As a competence rule, it imposes limits on EU regulation, even in cases where such regulation would otherwise be permissible. As an interpretative rule, it provides guidance for the CJEU and national courts on how to interpret the relationship between EU and national law.¹⁷³ Further, he stated that Member States are under an obligation under Art. 2 TEU not to construe national identity in a way that is in confrontation with the fundamental rules, principles and values of the EU. However, the CJEU, within the limits of its jurisdiction, determines to what extent the Treaties are to be interpreted as allowing a margin of discretion in national identity claims, or as treating such claims as an ordinary public policy justification. Certainly, national constitutional courts retain the right to rule on the application of national constitutional law even after the CJEU has spoken, and this can lead to a collision between national constitutional and EU law.¹⁷⁴ In contrast with the innovative interpretation of the provision Member States put forth, the CJEU has interpreted the identity clause in a very conservative way: the only successful claims grounded on Art. 4(2) TEU were the ones that could be framed according to the CJEU's consolidated jurisprudence on derogations to free movement rights.¹⁷⁵

Rodin was evidently right as subsequent development clearly indicated that the Member States constitutional courts came into conflict with CJEU regarding the application of EU law regarding their constitutional provisions and the concept of

170 Di Federico, 2019, p. 351.

171 Capelli, 2023, p. 112.

172 Bonello, 2021, p. 538.

173 Rodin, 2011, p. 41.

174 Ibid.

175 Capelli, 2023, p. 112.

supremacy of EU law. This concept, although strongly confirmed by CJEU is not accepted regarding, particularly, the questions of national constitutional identity. Therefore, the question we should ask ourselves is – did the creators of the TEU (the Member States) intend for Art. 4(2) to be a mere ‘policy statement’ or a tool for Member States, if they believe that CJEU and EU integration has become more than they bargained for?

The role of national constitutions as the utmost expression of sovereignty has been an overlying theme of European integration with respect to setting the conditions for the interaction between the national and European legal orders. After all, every Member State joined based on its national constitution, either on the grounds of general provisions regarding membership in international obligations, or on the grounds of specific provisions specifically enacted to prepare the national legal order for EU accession.¹⁷⁶ Considering this, one can only agree with the thesis that the Treaty’s identity clause appears to be providing a means of protecting the fundamental interests which defending Member States may resort to against the otherwise tidal force of EU law. The purpose underlying it is to safeguard diversity and preserve certain national competences that remain dear to the Member States.¹⁷⁷

As Walker states, the EU and EU law are works in progress.¹⁷⁸ That was true in 2005 and is true in 2024. There is no way of knowing whether the course set is the correct one and this is why it is absolutely necessary to establish a real dialogue of courts on the matters of principle of equality and its meaning in EU law. There cannot be, as was already stated in this chapter, an overlord with regard to the concept of sovereignty. We constantly question law’s role in mobilising and co-ordinating collective action without the luxury of knowing that it has already answered these questions elsewhere, thereby underscoring our uncertainty as to whether it can answer these questions.¹⁷⁹ National courts will continue to contest EU law primacy, and in doing so, they will most likely retain the vocabulary of constitutional identity. For better or worse, the European legal space is best conceived of in pluralistic terms as a space where authority is heterarchically negotiated rather than hierarchically settled. The language of constitutional identity is key to this negotiation.¹⁸⁰

However, as ‘masters of the treaties’ (*Herren der Verträge*), Member States decide through national legal arrangements if and to what extent EU law is applicable and is accorded precedence in the respective national legal order’, as was firmly said by the German Constitutional Court.

176 Konstadinides, 2015, pp. 127–128.

177 Konstadinides, 2015, p. 130.

178 Walker, 2005, p. 590.

179 Walker, 2005, p. 591.

180 Sholtes, 2021, p. 548.

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CHAPTER 4

THE VIEW FROM OUTSIDE: EQUALITY OF MEMBER STATES FROM THE PERSPECTIVE OF NATIONAL CONSTITUTIONAL LAWS AND COURTS



ANDRÁS ZS. VARGA

Abstract

This study focuses on the development of the relationship between national courts and the European Union's supranational legal institutions as part of the changes in the understanding of the concept of the rule of law. These changes have led to complex relationships between sovereignty, legal authority, and judicial independence.

The disintegration of empires after the World Wars and the formation of international institutions have changed the global power balance, and through these changes, the rule of law concept became a cornerstone of modern European legal systems. This development also embraced the increasing prominence of courts. The 20th century required new constitutional frameworks, which were often enforced by independent constitutional courts, and the role of the courts, especially constitutional courts, has changed. They have become crucial in maintaining the balance of power within states, particularly in newly democratised countries. This process has often led to judicial activism coupled with supranational influences, which have led to tensions within the state and between national sovereignty and EU law.

This study discusses the challenges posed by the increasing authority of the Court of justice of the European Union (CJEU) and how the concept of constitutional dialogue has given way to a more hierarchical relationship between the CJEU and national courts. The study further suggests the need for greater cooperation among national, supreme, and constitutional courts.

András Zs. Varga (2026) 'The View From Outside: Equality of Member States From the Perspective of National Constitutional Laws and Courts'. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 155–174. Miskolc–Budapest, Central European Academic Publishing.



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Keywords: rule of law, sovereignty, judiciary, supranational courts, European Union

1. Introduction

As a result of one of the previous studies¹ of the Central European Professor's Network, we concluded that, after about 2000 years of transformation of the institutional architecture of Europe, the imperial heritage of Rome, broken by Westphalia, led to the replacement of the double – public and spiritual – interdependent but autonomous authorities with the single sovereignty of the monarch of the state, and later by the authority of the institutions of sovereign states. Spiritual authority (the institution of the common religion, the Christian Church) became subordinated to the monarch. Since then, the sovereign single authority has been the essence of the new structure. Many centuries passed, and Europe's genetic willingness to create an empire was combined with the long experience of personal, later institutional, and national sovereignty.

The predominance of Westphalia over Roman heritage came to a quick but bloody end during the two World Wars. By forming the United Nations, Council of Europe, the European Communities, and European Union, a special recombination of the past is at stake. Formally, in continuity with Westphalia, sovereignty belongs to the Member States, while inter- and supranational institutions have been extended without limits on their range of influence. The principles of 'ever closer union', primacy of European law, and common values synthesised in the new dogma of the rule of law are intended to substitute the missing common spiritual braid (lost with the authority of the Church), limiting the mere physical power of sovereignty.

This conclusion raises a new question: Who decides the values and who decides the rule of law? At this point we face the situation – a consequence of Westphalia – that the authority of values, of rule of law, is the same as the authority of public power. The two authorities in Rome have been integrated into a unique superpower: a single final authority. As a visible manifestation, we have a pattern of double authority – common principles and sovereign power replacing formal spiritual and public ones – but because of their integration, there is no institutional autonomy affecting their mutual control. We have a single final authority that controls both the principles and public power.

How is this new inter- or supranational order operated? As a chapter of the Roma – Westphalia – Internationalism development of Europe radiates into the world order, we find national and international courts as centres of power. This is the reason why we should focus on courts or jurisdictions if we want to understand the real or apparent equality Member States of the EU.

1 Varga and Berkes, 2024.

2. How Have Courts Won the Apex Position Within Public Institutions?

When the role of courts is in the focus of the description of the actual model of constitutionalism based on the principle of the rule of law, the development of the legal thinking of the 19th century cannot be avoided.

The global (and nowadays normative) paradigm of the rule of law did not arise suddenly but had direct historical and legal antecedents. This paradigm necessarily places it in both historical and legal-theoretical contexts. Thinking about the nature of law and state has always been concerned with the issue of the limits of the exercise of power. On the one hand, is the sovereign, the holder of the main state power – about whom the main proposition is precisely that there is no authority superior to him in a given area (otherwise, he would not be the sovereign) – bound in the exercise of power by any limitations independent of him?

There were at least three answers to the limitations of the law and the exercise of state power, different in terms of their appearance and wording, yet similar in their consequences, the elements of which appear in today's paradigm of the rule of law. These are French constitutionalism, English rule of law, and German *Rechtsstaat*.² The rule of law (or constitutionalism, used in the same sense) can therefore be directly traced back to the basic legal values, which are partly historical (they have origins and continuity and refer to a specific legal system) and partly universal (they follow from the concept of law and cannot be abandoned by a single legal system or in its time state). Historicity and universality, the two abstract core values, are actually identical to the concepts of natural law.

Attention should be paid to this role within European culture. The role of the Roman Civil law '*ius civile*' does not require further argument. However, the role of the Old Testament and its respect for the law also have an important impact as another source of the Christian concept of law. The historical and theological descriptions of the five books of Moses (*Pentateuch*, *Torah*) are interwoven into various legal texts. Their form and origin are different (as a result of the different redactions of the text), but they are united in that they attribute 'divine authority to the legislation of Israel'. The legal order is, therefore, of a sacred nature, regardless of whether it has a theological, ritualistic, or specifically social purpose.³ This legal order also included respect for the dignity of man (considered to be derived from his divinity), requirements of freedom and justice, and social responsibility (as a prototype of social rights). Christianity first adopted this theory in moral, theological, and then

² The Council of Europe and the Rule of Law – An overview. CM(2008)170.

³ Rózsa, 2016, p. 156.

legal forms.⁴ After becoming the official religion, this concept of law that limits and defines state action became general.⁵

After reviewing the ideological history of the rule of law – from the Old Testament and the Roman respect for the law, which formed the foundations of European legal culture, to Christian natural law and the doctrine of the rule of law, which has become normative today – we can now present a closer history of the development of the idea of the rule of law.

The 19th century was the era of great codifications.⁶ Undoubtedly, since the Middle Ages, there have been efforts to collect and systematise the norms governing individual legal relationships, such as the *Decretum Gratiani*,⁷ *Sachsenspiegel*,⁸ or Werbőczy's half-millennium *Tripartitum*.⁹ However, the large law books compiled on the basis of codified, well-thought-out principles and uniform dogmatics begin with the Napoleonic *Code Civile*¹⁰ and go through the Austrian *Allgemeines Bürgerliches Gesetzbuch*¹¹ to the German *Bürgerliches Gesetzbuch*.¹² We can say that the concept of the 19th century's rule of law is determined by the primacy of the codifying legislation. Legal sources discussed by the legislative body, codified and accessible to everyone, seemed to be the appropriate antidote to random decisions, which carry the possibility of arbitrariness. This process of legal development was affected by the unstable period of state disintegration and state birth in the beginning of the 20th century. The legal consequence of this was the need for organisation of the new states, which was legally carried out by the charter constitutions.¹³ The new charter constitutions had to be enforced; Kelsen's Austrian constitutional court, which then spread as a continental model in many European countries, seemed to be a suitable tool for this.¹⁴ As described by Professor Béla Pokol nearly a quarter of a century ago, constitutional adjudication in the 1920s could not be entrusted to ordinary courts.¹⁵ In fact, judges of the ordinary courts, who absolutely respected the authoritative codes, were not expected to set aside the time-tested codes in the event of a dispute and base judgments on an abstract constitutional law developed during political debates. That is why an independent constitutional court was necessary. Kelsen is right in this respect that the German Imperial Court was incompetent to protect the Weimar-constitution.¹⁶

4 Beran and Lenhardt, 2021, pp. 29–42.

5 Beran and Lenhardt, 2021, pp. 44–46.

6 Vékás, 2014.

7 Erdő, 1998, pp. 36–46.

8 Künssberg, 1933

9 Máthé, 2014.

10 Vékás, 2014.

11 Brauneder, 2011, pp. 127–135.

12 Vékás, 2014.

13 Póczy, 2012, p. 123.

14 Paczolay, 1995.

15 Pokol, 1994, pp. 35, 94–95.

16 De Visser, 2014, p. 63.

Thus, this model proved to be suitable not only for other countries but also for other eras. It is no coincidence that many countries, including Hungary, consider this type of constitutional court necessary to restore the rule of law after dictatorships. However, these dictatorships – in Western Europe in the first half of the 20th century and in Central Europe almost all the way up to the system changes of 1989–1990 – were based on the exclusivity of the executive power. Therefore, the constitutional adjudication in the new systems necessarily did not only aim to achieve constitutionally compliant practices of the legislative power (and the legislature in general) but also – correctly – sought to limit and adapt the operation of the executive power to the system of separation of powers in the rule of law.

Simultaneously, from the middle of the 20th century, strong international and supranational institutions were created, including the United Nations, Council of Europe, and European Communities, which later became the European Union. The effectiveness of the new supranational institutions was marked by the creation and operation of their own courts, independent of the Member States (International Criminal Court, ECtHR, and CJEU). However, these strong institutions were only communities of law, and their creators and members could provide them with rights but not political or social values. This meant that powerful courts could only consider their own substantive law, not any other values, but their decisions significantly shaped the law of the institutions in question, binding everyone, and also affected the rights of their founders.¹⁷ It should be mentioned that international and supranational institutions have also recognised the advantages of free judicial law-making, of which a vivid example is the *van Gend & Loos* case (Court of Justice of the European Communities), which declared the primacy of the law of the European Union (or, at that time, the Communities) as early as 1963. The consequence of the declaration of primacy was as follows: political accountability remained the ‘burden’ of the Member States, but their freedom of decision-making was significantly reduced after EU law became enforceable on them through integrationist judicial control.¹⁸

This judicial pattern – reinforced by the particularly activist practice of the United States Supreme Court¹⁹ during this period – prefers the judicial rule of law.²⁰ Based on the Central European experience, it seems that the model of the activist judicial interpretation of the rule of law can be a suitable and effective tool for the protection of the Constitution in short periods of time (after political transitions), but it cannot be maintained in the long term in the same way as any state model based on the dominance of any other branch of power. It also leads to arbitrariness, and in the case of constitutional courts, this danger is particularly strong since there is no control over them. It is precisely this uncontrollability that demands that, except for short transitional periods, constitutional courts voluntarily reintegrate into

17 Pünköszt, 2014.

18 Harlow, 2003, pp. 79–83; Craig, 2006, pp. 329–343; MacCormick, 2002.

19 Lindquist and Cross, 2009, pp. 3, 47, 105.

20 Pokol, 2014, pp. 56–64.

power-sharing systems. The separation of powers means that no branch of power has unlimited power, including the courts. In any case, the court practice relies on the normative concept of the rule of law.

3. The Principle of the Rule of Law Left in the Hand of the Courts

The victory of the rule of law over all other legal principles (and values) was led by the Treaty of Maastricht (1992) and achieved by the Lisbon Treaty (2007) and the Report on the Rule of Law by the Venice Commission (2011).

Parties who signed the Treaty of Maastricht confirmed ‘their attachment to the principles of liberty, democracy, and respect for human rights and fundamental freedoms and to the rule of law’ at the beginning of the preamble (and later the text of the treaty mentioned this principle several times). It was the Lisbon Treaty that (after the fall of the Treaty Establishing a Constitution for Europe) elevated the principle of rule of law to a normative rank in its Art. 1a (known as Art. 2 of the consolidated version of the Treaty on European Union in force from 1st December, 2009):

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

However, this normative principle of the rule of law of the EU was not active for several years. It was the Venice Commission that breathed life into it. Its immediate precursor was the Decision in 2007 of the Parliamentary Assembly on the principle of the rule of law,²¹ as well as the Overview on the rule of law discussed in 2008 by the Committee of Ministers of the Council of Europe.²² This Overview expressed the mutual dependence of three pillars:

There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law.²³

21 Parliamentary Assembly, Resolution 1594 (2007).

22 Ministers’ Deputies, CM(2008)170.

23 Ministers’ Deputies, CM(2008)170, Sec. 27.

The 2011 Report of the Venice Commission on the rule of law was built on this background. The thesis sentence in the Report is Tom Bingham's definition of the rule of law.

...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.²⁴

With this report, Europe got a comprehensive theory of rule of law and the courts of justice as instruments for enforcement of this principle.

However, the Venice Commission is an institution of the Council of Europe and not of the EU, so it could not provide direct protection for the normative principle of rule of law of the Treaty on European Union (and its Art. 2). This goal was achieved indirectly.

Upon the request of the Council and Parliament, by 2014, the European Commission elaborated a new device entitled A new EU framework to strengthen the Rule of Law²⁵ which, in fact, is partially a political and partially a legal procedure. The main characteristic of this framework is that it elevates the concept of the rule of law from Art. 2. This concept is protected with special emphasis in every case when some kind of systemic threat is imposed against the rule of law (4.1) that needs to be handled. This wording leaves no doubt that the content of the rule of law is uncertain, leaving space to formulate different charges of violation.

The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national 'rule of law safeguards' do not seem capable of effectively addressing those threats.²⁶

Besides the theoretical aspects, the Communication contains a practical surprise:

The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.²⁷

24 CDL-AD(2011)003rev. Sec. 36, reference in the Report: Bingham 2010.

25 Communication from the Commission to the European Parliament and the Council. A new EU framework for strengthening the rule of law, COM(2014) 158 final.

26 COM(2014) 158 final, Sec. 4.1.

27 COM(2014) 158 final, Sec. 4.2.

The question of whether the Member State violates the value of the rule of law is not necessarily assessed by the European Commission. The European Commission might take over the findings of the constitutional consulting body of the Council of Europe, which the Venice Commission assessed by informal procedures. The framework states that, although the approach to the rule of law might be different on the national level, the decisions of the CJEU and of the ECtHR, as well as the documents compiled by the Council of Europe ‘building notably on the expertise of the Venice Commission [...] define the core meaning of the rule of law as a common value of the EU’.

The Commission attached several appendices to the communication, of which the first details the sources of the rule of law paradigm: the decisions of the CJEU (with special attention to the decisions regarding the EU Charter of Fundamental Rights) and further remarks that the Council of Europe and the ECtHR do not define the concept of the rule of law. This refers to a report by the Venice Commission in 2011. The definition in this report is almost identical to that in the quoted framework.

The ‘framework’ therefore connected the rule of law protection mechanism of the supranational European Union, which bears the hallmarks of statehood, with the legal practice based on the ‘soft’ opinions of the pan-European international organisation based on a much wider membership (47 member states), the constitutional advisory body of the Council of Europe, the Venice Commission. This solution was surprising but neither accidental nor unprecedented. This is no coincidence, as all EU Member States are members of the European Council. It is not without precedent because, in 2011, the Venice Commission drafted a basic document (according to its form, a report) on the protection of the rule of law.²⁸

As a result of everything, an unprecedented institutional connection (European Commission + Venice Commission, then ECtHR + European Parliament + CJEU) was formed. Owing to the normative formulation of the rule-of-law paradigm, its selection from the range of other basic values, and its applicability to any other internal or international legal regulations, it enables free interpretation and use of any legislation or even the constitution of any country.

Hence, the principle of primacy established by the treaty cannot be contested: all constitutional and ordinary courts of the EU’s Member States are obliged to align their jurisprudence with its provisions and, consequently, with the principle of the rule of law. Apparently, there is no difficulty in doing so. With respect to law, a brief rule of law is a common constitutional heritage of Europe (see Art. 6 of the treaty). On the other hand, every legal family, all the Member States of the EU, have their particular legal history manifested in various considerations on rule of law. What does it mean? It means that respect of rule of law does not lead to uniform interpretations. And, in the end, who will decide on the authentic, compulsory interpretation of this principle? Of course, the final interpreter of the Treaty, the Court of Justice of the European Union.

28 CDL-AD(2011)003rev, Report on the Rule of Law.

These two dimensions outline the equality or inequality of courts when the rule of law is at stake. The first dimension is the equality of the structure of the judiciary of the Member States, and the second dimension is the congruency of standards of independence of the CJEU and the courts of the Member States.

4. First Dimension: Equality of Structure of the Judiciary and the Date of Accession to the EU

The importance of the framework and the institutional link between the Venice Commission and the European Commission is outlined by the incoherent approach of the Venice Commission to the structure, administration, and functioning of the judiciary.

Looking at the opinions of the Venice Commission, we find that almost all of them answer the question of how judicial reform should be performed. However, there is no answer as to why judicial reform is needed. This is dubious if we consider that the stability of the judiciary is one of its basic characteristics (almost evident if compared with the executive, almost in permanent change). Such reforms are rare in Western Europe; they are more frequent in Central Europe and quite common in the Balkans and Eastern states. Two main motives were identified: (a) First, it is a historical experience that political transitions at the end of the 20th century did not affect judges, courts, and the judicial system. The missed lustration led to the frustration of political branches in later decades. Political institutions responsible to their voters saw in courts obstructive factors: parliaments could adopt new laws or even constitutions, and courts could and did prevent their prevalence. For example, this was the case in Hungary. The Constitutional Court declared in one of its first decisions in 1990 that its practice is influenced by the so called ‘invisible constitution’, a set of rights and principles not included in the charter constitution but ‘melted out’ by the Court. (b) On the institutional side, Western Europe invented the judicial councils composed by elected judges and other – elected or ex officio – members, as a new form of administration of courts that reduced or even abrogated the role of the executive and of ministries of justice. However, many of the important legal families did not go along the road. In France, Germany, and Austria, ministries of justice still have an important (or even decisive) role in the administration of the courts. The Venice Commission does not criticise this, but at the same time, in the case of Central, Balkanic, and Eastern states, deliverance of administrative power over the judiciary (from the ministries of justice to the judicial councils) is definitely expected. The official explication of the double standard is originated from the different assessment of the so called ‘old’ and ‘new’ democracies:

In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.²⁹

The double standard is not, of course, well founded, but EU institutions have strong instruments to enforce it. As previously mentioned, this was the first flaming factor in debates among EU institutions and Member States. This appears to be the root cause of these disagreements. In Central Europe, it has been 35 years since this transition. Was Germany or Italy in 1980 a 'new democracy'? We will not remember this word here. On the contrary, in 1973, in Copenhagen, the nine Member States of the European Communities, Germany and Italy among them, formulated for the first time a Declaration on European Identity.³⁰ If 35 years after the end of World War II, 31 years after the foundation of the Council of Europe, and 29 years after the foundation of the European Coal and Steel Community, the first predecessor institution of the EU, Germany and Italy were among the parents of the new dream of European identity and were not called 'new' democracies, what is the ground to use this humiliating 'title' today for states of Central Europe?

Over time, this argument has lost substance. First, an ontological argument may be raised: What is the starting point of this comparison? The fall of the Roman Empire? Westphalia? The Glorious Revolution? French Revolution? 1848? 1920? The end of World War II? Or the Foundation of the European Council? The farther our starting point is, the less Member States qualify as 'old' democracies. Second, a mathematical argument should be considered: the ratio of the age difference between the 'old' and 'new' democracies decreases each year. Thirdly, this difference may be disobliging to peoples of the different 'new' democracies (by way of example: Poland was the country attacked by nazis; this caused the second World War, but this country together with Czechoslovakia did not choose their authoritarian communist regime. They were left in the hands of Stalin by 'old' democracies. However, these two countries could serve as examples for any democracy: Poland was the first 'new' democracy that performed a transition in a truly democratic and peaceful way, and the people of Czechoslovakia managed the 'divorce' that resulted in the creation of the Czech Republic and the Slovak Republic in a manner that may stand as an example to the whole world).

29 CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, Sec. 2.2.3.1., based on CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, § 2–3, 59 and 12–17.

30 Declaration on European Identity (Copenhagen, 14 December 1973), Bulletin of the European Communities. December 1973, No 12, pp. 118–122.

However, the reality is that the Venice Commission, and following it, the European Commission, expects from some countries implementation of a judiciary model that is not realised in Western states. It is not realised for good reasons. The permanent reforms in states that built up judicial councils proves that this experiment is not definitely successful.³¹ However, not only the practice (jurisdiction) but also the administration of justice is kept under control in order to have courts under supranational control. It causes conflicts, but not only in this dimension.

When speaking about the normative principle of the rule of law protected by the courts, this declared inequality is highly disturbing. If the different member states of the Council of Europe and the European Union and their courts are unequal by doctrine, their interpretations of the law (of constitutional principles and finally of the rule of law) also have different weights. Even the same conclusions of the different courts may be correct and binding in one case and false and void in another, depending on the 'age' of the democracy (of the state as a member of the inter- or supranational institutions).

5. Second Dimension: Are National Courts Equal Parties When Engaged in Dialogue With the CJEU?

The relationship between EU law and the laws of Member States was initially characterised by parallelism. Parallel legal orders coexist based on plurality.³² Competencies emerging from sovereignty were either conferred on the EU (at the beginning of the communities) or kept within the national constitutional field (with some exercised jointly). This plurality of legal orders was completed with a plurality of jurisdictions: the final interpretation of EU law fell in the jurisdiction of the CJEU; the guardians of national constitutions were constitutional courts, while interpreters of the rest of the national laws were the supreme courts (one or more in a specific country, depending on their legal history).

Necessarily, situations arose from the beginning when interpretations by different courts clashed³³ (e.g. *Internationale Handelsgesellschaft* and the *Solange* answers by the German Bundesverfassungsgericht). The CJEU has excluded step-by-step exceptions to the primacy of EU law emerging from different phases of legal collisions. The symbolic beginnings of the first stage were the *Van Gend & Loos*

31 48. Although public trust over the past 20 years in the efficiency of this approach has not been unequivocal in some countries, no other more efficient form of guarantee has been developed and accepted since. (...) 49. On the other hand, the establishment of a judicial council, even if it is endowed with sufficient constitutional guarantees, is no guarantee for ensuring judicial independence in itself. See: CDL-AD(2018)003.

32 Thym, 2012, pp. 246–247; CJEU C-16/65 (Schwarze).

33 Belov, 2018, pp. 45–46, 54.

(C-26/62) and *Costa Enel* (C-6/64) cases, in which the CJEU (or its predecessor), without any binding rule of the treaties, formulated the concept of new legal order of European Community Law and the obligation of application of the courts of the Member State, which led to the obligation to disregard the law of the Member State. The second phase was opened by the *Internationale Handelsgesellschaft* (C-11/70), which already formulated the primacy of the law of the European Communities vis-à-vis the constitutions of the Member States, which was confirmed in the *Simmenthal* case (C-106/77) by stating that the ordinary courts of the Member States cannot wait for the enforcement of primacy to the national legislature or constitutional court in order to resolve the collision, but they have to do it themselves. The last phase was more recent. In case *C.I.* C-107/23, answering a preliminary ruling request by a Romanian Court, the CJEU ruled that the primacy of European Union law requires that the ordinary court of a Member State disregard the decision of the constitutional court or supreme court of the same Member State, which is binding under national law, if the ordinary court deems it necessary to fulfil its obligation arising from a directly enforceable provision of EU law. With this step, the CJEU entered as an actor into relations among the different national courts of a particular state, and moreover, ruled that not only must a legislative act be left out of consideration if it contradicts EU law, but that this stipulation must apply even to a final judgment of a national court.

Until this point, the magic word for the relationship between courts was dialogue.³⁴ The process of constitutional dialogue essentially began with the Lisbon Treaty, which, in Art. 5 (as Art. 4 of the consolidated text of the Treaty on European Union), adopted the provisions of Art. F of the Maastricht Treaty and clearly formulated the obligation to respect national identity, which obviously binds the institutions of the European Union. In the past decade and a half, the constitutional courts of the Member States have continuously interpreted the rule based on the obligation to respect national (or constitutional) identity, which includes areas of law that cannot be touched by the law of the European Union and its institutions. This process was closed by the *C.I.* decision, eliminating the reasonable balance between the law of the European Union and the law of the Member States. With *C.I.*, the CJEU extended the conflict between national legislation and CJEU to the third branch of power. In other words, such a decision ended the so-called constitutional dialogue and recognise a single binding legal authority, the CJEU itself. Since this, the courts are no more equal.

Several signs indicate that the national courts, even the constitutional courts of the Member States, can never win the collision.³⁵

Opinion 2/2013, issued by the CJEU on December 18, 2014, prohibited the application of Art. 6, Sec. (2) of the TEU which required the European Union to join the European Convention on Human Rights (which would have entailed the operation of

³⁴ Berkes, 2023, pp. 75–77.

³⁵ Kochenov and van Wolferen, 2018, p. 14; Karakamisheva-Jovanovska, 2023, p. 72; Sehnálek and Stelík, 2019, p. 197; Mayer, 2005, p. 1505.; Petr, 2023, pp. 153–155, 158.

the European Union coming under the jurisdiction of the ECtHR). This breach of obligation that can be filed upon prejudice to the rule of law, initiated by the European Commission and pursued by the CJEU, is hardly favourable for the Member States. Pursuant to the TEU Art. 6, Sec. (2):

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

The TEU unambiguously states that the union *accedes*. A sentence formulated in the indicative mode is obviously prescriptive for accession. In this regard, the Commission asked for an opinion from the CJEU in its draft of the accession treaty.

The CJEU took the stance that the EU has a newly formulated legal order, which enjoys priority with regard to the legal orders of the Member States. It protects the fundamental rights via the Charter, and this protection (the content analysis of the rights) shall remain within the autonomy of the EU law. Accomplishing the process of integration is the fundamental aim of the Union. The ECtHR would be able to undermine the autonomy of the EU law; this is the reason why the draft version of the accession of the EU to the European Convention on Human Rights is not in harmony with Art. 6, Sec. (2) of the TEU.³⁶ It is difficult to interpret this otherwise than the CJEU having rewritten the TEU (that is, the rule enshrined in the international treaty passed and ratified by each of the Member States). This is the very Treaty the CJEU is meant to protect. The CJEU opposed the unambiguous provision of the TEU, and there is no legal device to counter its decision due to the CJEU's unaccountability. The arbitrary decision is surprising, mostly in the light of the presumption that, in the name of the value of the rule of law, the CJEU would never accept similar opposition with the ECtHR from the Member States.

The position of the President of the CJEU, published in a journal,³⁷ should be interpreted as a similar signal.

If a Member State calls into question the primacy of EU law as interpreted by the Court of Justice and engages in a unilateral course of action, it shows disrespect towards the other Member States and their peoples that continue to honour the Treaties on a reciprocal basis. Such a unilateral course of action also sends the message that EU law does not apply with the same force throughout the EU and that 'some Member States are more equal than others'. However, there is no place for unilateralism in the EU, since it stands in the way of upholding the values of respect for unity (*Einigkeit*), the law (*Recht*), and freedom (*Freiheit*) to which we Europeans are all reciprocally committed.

³⁶ Avis 2/13 – Avis au titre de l'Art. 218, para. 11, TFUE, 158, 166, 168, 170, 172, 194.

³⁷ Lenaerts, 2020.

This opinion, even if personal, deems unacceptable on the part of the Member States, any interpretation narrowing the unconditional primacy of the law of the European Union.

Cases related to the Polish Constitutional Court and the Supreme Court should also be considered as such a sign. The CJEU in cases of *A.K. and others* (C 585/18, C 624/18, and C 625/18) stated that CJEU is entitled to determine whether a Member State court fulfils the criteria of independence. It applied this immediately and did not classify the Polish disciplinary court system as sufficiently independent. As a result of the unprecedented institutional merger between the European Commission and the Council of Europe described above, the Venice Commission adopted it in its emergency opinion issued on January 16, 2020 (CDL-PI(2020)002, 12-16, 20-23), referring to CJEU interpretation as a mandatory criterion under international law. After such a history, it should not have been surprising that, in the ruling of the CJEU in *C-791/19 R Commission v. Poland*, citing judicial independence and impartiality, it was ordered that the operation of the statutory Polish disciplinary court should be suspended, and, as a result, a Polish court established by law may not rule in the proceedings initiated, among other things, due to the political involvement of judges.

At first glance, the decision of the CJEU appears to be appropriate, but this is not the case. There is no authority for any institution in the EU to determine the judicial system of its Member States, but it is even worse that a judgment is an obvious challenge to judicial independence, even if it is apparently done in the name of judicial independence. Independence is a *sine qua non* condition of the judiciary. Moreover, it was not invented in the postmodern age. We can safely say that judicial independence in Europe, including its central part, is an achievement of our historical constitutions,³⁸ which have been solidified as an element of identity and would, therefore, be difficult to renounce even if someone wants to do so. However, this ruling of the CJEU not only allows, but actually expects, that Member States, even traditionally constitutional democracies, resign themselves to the independence of their courts.

Judicial independence is not privileged or unlimited. The power inherent in case-by-case legal interpretation makes this requirement significant, the essence of which is that no one can influence the judge or force him to decide against the laws. As a limit to independence, the judge cannot deviate from the text of the legislation during interpretation. The unlimited freedom of legal interpretation unilaterally elevates judicial power over legislative power. From that point, it is only a step away if we formally allow judges to ignore the law. Added to this is the consequence of the decision and the permissibility of the political involvement of judges.

Judicial independence as a constitutional principle requires courts to be protected from the influence of the political branches of power. However, on the other side of this, the courts do not participate in the contest of power either, and they have to renounce political power.

38 Stępkowski, 2023, p. 254.

Therefore, the Judiciary is a politically neutral branch of power. Of course, there is no doubt that judges have and can have a worldview; they may even have political preferences, but we expect them to not reflect their preferences directly in their judgments, and we should expect similar restraints in their public activities. It is difficult to imagine that judicial independence could be extended to the extent that it would allow courts to question the Constitution or state laws, the legitimacy of constitutional institutions, or the independence of other courts in general.

Therefore, the decision of the CJEU, in cases initiated by Polish judges, was dangerous. When it is ruled as a violation of judicial independence if a Parliament adopts a law with which the judges do not agree, this does not mean strengthening independence, but actually renouncing independence. The asymmetric interpretation of independence, which prevents judges or, even more so, judicial organisations, from undertaking political contests (because they cannot undertake them) but, at the same time, enables attempts to influence public opinion and even the legislative power, is absurd.

The position of the CJEU is a challenge, in the face of which the urgent task is to rediscover and enforce the natural limits of judicial independence. Unconditional limits include legislation from which the courts cannot deviate. If they were to secede, the basis of their own independence would be called into question, as the Constitutional Court in Hungary has repeatedly pointed out. Abstention from political activity should be required as an internal limitation. Judges may therefore not engage in direct political activity, neither in the form of a movement (in their private life) nor (in fact, even less) while sitting on the bench. Moreover, this can be formulated in one more dimension: judicial independence not only against the other two branches of power of one's own state, not only against other states and international institutions, but also against the influence of judicial self-interest protection. Perhaps it is not an exaggeration to add to this (as the conflict of interest and exclusion rules clearly indicate this) that a kind of independence is also required in the face of personal self-interest.

Other disturbing cases could be mentioned, including case *WZ*, C-487/19 against Poland; case *IS*, C-564/19 against Hungary; and the preparation of infringement procedures due to the PSPP decision of the German *Bundesverfassungsgericht* (2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, and 2 BvR 1651/15).

6. The Challenge and Possible Antidote

As argued, the CJEU increases its assumption that it functions as a supranational Supreme Court above the Supreme and constitutional courts of Member States, in the same manner as national Supreme Courts have precedence over the lower courts in

Member States.³⁹ It gradually took over the general task of the Supreme Court of the Member States (the uniform application of law) only now on an EU scale, ensuring the uniform application of EU law.⁴⁰ Significant support was granted by the Charter of Fundamental Rights, which abolished this parallel legal system. Because of this uniform interpretation, all legal issues came under the primacy of the CJEU.⁴¹ If we add to this that the CJEU refused to accept the jurisdiction of the ECtHR while the national courts were bound by it, it seems that the principle of equality of courts is a thing of legal history.

This phenomenon is not only important at the theoretical level but also has direct practical consequences. It affects the future of the Supreme Court and the constitutional courts of EU Member States. First, it raises the question of whether there is a need for the Supreme Court in the architecture of today's judicial system. The fact is that the current judicial organisation within the EU would work very well without Supreme Courts and often without national constitutional courts.

The CJEU can be involved in proceedings from any level of the court of Member States by initiating a preliminary ruling procedure at any stage of the proceedings. The involvement of the National Supreme Court in this procedure is not inevitable. This situation shows that, from the viewpoint of both the parties to a case and the CJEU, the national Supreme Court can safely be disregarded. This is what the CJEU expressed several times: The task of national courts, including Supreme courts and constitutional courts, is to guarantee the primacy of the law of the European Union. With this toolkit, the lower courts are actually ahead of the Supreme Court, obtaining a binding legal interpretation from the CJEU, and the Supreme Court cannot do anything about it; the supreme courts are obliged to accept it.

There is another new 'development': the LIBE Committee of the European Parliament has submitted a draft resolution to the European Parliament (2022/2143(INI)) (which was later accepted) in which it stated the same point. National, Supreme, and constitutional courts are obligated to enforce the primacy of EU law at all costs. It is added to this that it was very sad that the primacy of the rule of law of the European Union was not mentioned in the Treaty on European Union and that it ought to be included in the very next amendment. Seemingly, there has been no notable reaction to France and the Netherlands stating in a referendum that they did not want this.

If national supreme courts are not focusing on their tasks emerging from the national constitutions (that is, to ensure uniform application of law and to protect the primacy of the national constitution), we will lose our importance. From the point of view of the primacy of the European law, these courts can be forgotten.

Therefore, the way out is the cooperation of the Supreme Court and the constitutional courts of the Member States. The legal institution of a constitutional complaint can provide great help through which constitutional courts can offset the influence

39 Dyevre, 2013, p. 34.

40 Paris, 2018, p. 223.

41 Nagy, 2023, pp. 9, 35.

of the CJEU. If a constitutional court annuls decisions of the lower courts or even the Supreme Court that follow the legal interpretation of the CJEU but are contrary to the constitution, they create an obstacle against which only a formal tool (the infringement procedure against the Member State) is available. However, this did not have an immediate effect.

Fortunately, serious arguments can be enshrined through these infringement procedures. According to Art. 4 of the TEU, not all powers conferred on the Union by the Treaties remain with Member States. Furthermore, the Union respects the equality of the Member States before the treaties, as well as their national identity, which is an inseparable part of their basic political and constitutional system. Namely, the structure of the Member State's legal system, the constitution of the Member States as the basis of the legal system, the court organisation of the Member State, and the binding effect of the decisions of some Member State courts on other courts are issues on which neither the TEU, the accession treaties, nor any other international convention entrusted with the decision by the CJEU can adjudicate.

At the same time, the procedural rules and the establishment of the judicial system remain clearly within the competence of the Member States; therefore, the protection of rights derived from EU law and the development of procedural rules regarding court remedies provided to legal entities are the responsibility of the internal legislators of each Member State (the non-exhaustive position by the Court of Justice of the European Union, for example: *ÖBB Personenverkehr* judgment, C 417/13, EU:C:2015:38, Point 61, *Fiamingo and others* judgment, C 362/13, C 363/13 and C 407/13, EU:C:2014:2044, Point 63).

In this context, the rulings of the CJEU can be interpreted as defining an exception (*exceptio iuris*) from the binding force of the decision of the constitutional courts of the Member States: the decision of the constitutional court is binding to everyone unless it is excluded by the CJEU. This position would, therefore, eliminate all limitations on the unconditional enforcement of EU law in such a way that the courts of the Member States would essentially be removed from the sovereignty of the Member State. In essence, there would no longer be powers that remained with the Member State by virtue of the TEU; the CJEU could remove them without limit.

However, the system of legal remedies within the Member States and the determination of which court is bound by the decision of a judicial (constitutional) forum is an internal legal issue on which the Court of Justice of the European Union could not take a position; consequently, it would not even arise, for example, that the ordinary court should ignore the binding decision of the constitutional court based on the rules of the Member States. If such a lower court does and the Constitutional Court reviews the constitutionality of the legislation applied in the individual case based on a constitutional complaint, the decision will be annulled.

Sooner or later, the relevant Supreme Court must find a solution that is in line with the Constitution and EU law. It is a slow and laborious solution, but currently, it is the only solution that can restore the equality of judges.

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PART II

INSTITUTIONALIZING
EQUALITY – UNITED TO
BE STRONGER

THE BALANCE OF POWER: EQUAL REPRESENTATION OF MEMBER STATES IN EU INSTITUTIONS



LÁSZLÓ TRÓCSÁNYI AND LÉNÁRD SÁNDOR

Abstract

The principle of (sovereign) equality has been one of the most important building blocks of modern public international law and it has also been one of the founding principles of European integration. While the Founding Treaties include this principle, Member States remain different in many respects in terms of their size, population and economic output, but also in terms of historical experiences, cultural heritage or constitutional identity. In light of this controversy, the present chapter investigates the different aspects of the ‘principle of equality’ and the dilemma it has been posing throughout the evolution of the integration as well as in its institutional arrangement and before its law. In the course of this study, the Chapter aims to shed light on questions such as European democracy and the principle of equality as well as on its relation to the primacy of European law or its process of ‘constitutionalisation’.

Keywords: principle of sovereign equality, European integration, European institutions, equality between Member States of the EU, the constitutionalising of European law, ‘constitutionalisation’ of European law, primacy of European law

1. Introduction

The principle of equality between States has been long considered as a fundamental – *constitutional* – element of both interstate relations and the international

László Trócsányi and Lénárd Sándor (2026) ‘The Balance of Power: Equal Representation of Member States in EU Institutions’. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 177–209. Miskolc–Budapest, Central European Academic Publishing.



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community governed by public international law¹ as well as – being part of the European construction – of the European cooperation governed by the European law.² The capacity of states to interact with each other or form a treaty alliance based on the law is secured by their equality. However, as simple as this principle sounds, it becomes much more complicated and difficult to envision, conceptualise and promote in practice.

States are different from each other in terms of their size, population, resources, geographical locations, outputs and so on, and therefore they are in different positions. These factors define or even delimit their capacities to act and their way acting. Their equality therefore refers to their capacities in law and their equality in rights. The question becomes even more complex within the European cooperation. The principle of equality might raise different questions and challenges when Member States act as state entities that are individual sovereigns according to international law (*pouvoir constitutants*) and as part of the European community (*pouvoir constutés*). Besides the dual meaning of the principle of equality – under international and European law – the question of equality between Member States and equality between the citizens can be also raised. Within the context of the European cooperation, a further question is whether the principle of equality is designed to protect the Member States and their participation in the cooperation or the European institutional and legal construction. These dilemmas stem from the dichotomy between the principles of ‘unanimity’ and ‘majority’ and the question of priority that has run through the historical path and evolution of the European integration.³ The Chapter seeks to provide adequate response to some of these dilemmas.

The Chapter first outlines the historical origin, concept and functions of the principle of equality under public international law as well as under the European cooperation. This part will also shed light on the major turning points of the evolution of the European cooperation that have relevance to or have influenced this principle. The following section will explore the question of how the principle of equality is present in the institutional structure and arrangement of the European Union. Both the supranational institutions as well as the participation of the national institutions in the European cooperation will be highlighted. The analysis of the institutional arrangement is followed by the decision-making process and how the principle of equality applies throughout these processes. After the institutional and decision-making process, the Chapter will explore the normative aspects of the principle of equality, i.e. how this principle is enforced under the European law and in its application. Last but not least, the Chapter offers an assessment highlighting

1 See Art. 2, para. 1 of the United Nation Charter: ‘The Organization is based on the principle of the sovereign equality of all its Members’.

2 See Art. 4, para. 2 of the Treaty on the European Union (hereinafter: TEU): ‘The Union shall respect the equality 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’.

3 Van Middelaar, 2012, pp. 99–138.

both the importance and limits of the principle of equality in the European cooperation. Furthermore, it also puts forward some reform proposals to better achieve the equality of the Member States as the basis of the European cooperation, as well as the equal protection of Member States. The Chapter will summarise its findings in a concluding part with the objective to enrich the currently ongoing public and legal discourse about the equality of Member States or a multispeed European cooperation in the future.

1.1. Sovereignty and Equality Under Public International Law

The following considerations are based on the earlier chapters on the general question of the principle of equality and are put forward to offer further insights into the relations of this fundamental principle and the institutional arrangement of the European Union.⁴ The principle of sovereignty gained acceptance in international law after the end of the Thirty Years' War, and with the conclusion of the Treaty of Westphalia in 1648.⁵ The era was characterised by the rise of positivism and positivist thinking emphasising the supreme power of the sovereign and led to notions of the sovereignty of states.⁶ By virtue of sovereignty, the states are the primary subjects of international law and the doctrine of the equality of states was added to this capacity by Emer de Vattel in the 18th century. Even though the dominant view of the post-Westphalia era was positivist, the doctrine of equality rather owes its origins to Natural Law thinking. The Montevideo Convention of 1933 on the Rights and Duties of States codified this principle.⁷ Art. 4 of this Convention provides that the 'states are juridically equal, enjoy the same rights, and have equal capacity in their exercise'. The rights of States solely depend on its existence as a person under international law.

This conception was adopted by States in the United Nations Charter of 1945.⁸ Art. 2, para. 1 sets out that the 'organization is based on the principle of the sovereign equality of all its Members'. The principle has become part of the peremptory norms of international law and was further detailed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1971.⁹ As the Declaration points out 'states have equal rights and duties and are equal members of the international community notwithstanding differences of an economic, social, political or other nature'. The formal expression of sovereign equality presents itself as a juridical condition attached to states as subjects of

4 See, cross reference to earlier Chapter of Smigova.

5 See, for example, Nagy, 1999, pp. 82–84.

6 Malcolm and Shaw, 2003, pp. 25–26.

7 The text of the Convention on Rights and Duties of States adopted by the Seventh International Conference of American States.

8 The text of the Charter of the United Nations.

9 The text of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

international law. It also has a significant substantive consequence as international legal rules ought to have a neutral and general application and therefore international law rules apply equally to all international actors.¹⁰

The doctrine of equality between states has become influential in many areas of international law. For example, the state immunity that a state enjoys in the courts of another state derives from the principle of sovereign equality. According to the principle of '*par in parem non habet imperium*' and the 'act of state', no sovereign state should sit in judgment over another sovereign state, because from the perspective of international law, every sovereign state is on an equal footing. The principle of equality between states is also expressed by the rule of one state, one vote in the United Nations General Assembly. Other provisions of international law also reflect this principle, for example, a treaty text is equally authoritative in each language if the treaty has been authenticated in two or more languages.¹¹

However, the doctrine of equality between states remains a 'juridical or legal fiction' and has its limits. On the one hand, states are different from each other in terms of size, population, resources, geographical location, economic output etc. These differences result in factual differences as well as diverse situations along with various leverages to act between sovereign states. On the other hand, even though the principle of equality relates to equal rights and duties, the doctrine has its limitations in regard to law, international legal capacity and institutional arrangements as well.

The doctrine of equality has not fully applied the creation of public international law. The differences between states have had a large influence, for example, in the formation of customary international law. The larger states will always have an influence commensurate with their status since their perspectives and concerns are much wider, their interests much deeper and their power more effective and therefore they are generally in a leading position of customary law formation.¹² The practice that is consistently followed by states in leading positions might have greater weight in the formation of customary rule. One of the lessons of the *Scotia* case decided upon by the US Supreme Court in 1871 was that Great Britain had been in a leading position in shaping the navigational procedures on the high seas.¹³ Similarly, the United States and the Soviet Union were in a leading position of forming the international rules of the outer space.¹⁴

The institutional arrangement has also reflected the differences among states. Accordingly, the collective security mechanism of the United Nations includes the large powers and victors of the Second World War, the United States, Russia, China, France and the United Kingdom. They are permanent members of the UN Security

10 Bederman, 2002, pp. 116–118.

11 See, Art. 33, para. 1 of the Vienna Convention on the Law of Treaties.

12 Malcolm and Shaw, 2003, pp. 192–193.

13 See, for example, Dodge, 2017, pp. 12–31.

14 See, for example, Malcolm and Shaw, 2003, pp. 75–76.

Council and certain measures can only be adopted by their unanimous agreement. Furthermore, the UN Charter can only be amended by their unanimous ratifications. Therefore, the institutional architecture of international law differentiates among states according to their differing situations. Furthermore, the doctrine of equality does not apply to financial institutions such as the World Bank or the IMF as their member states have influence according to the capital they provide.

In summary, the doctrine of equality among sovereigns is one of the constitutive pillars and also peremptory norms of modern international law. It provides that international legal rules ought to have neutral and general application and be equally applied. It also aims to provide states with equal rights and duties as well as equal membership in the international community. Nevertheless, the principle has limitations that reflect factual differences in terms of resources, power, size or populations among states. The doctrine of equality under international law is relevant and important within the European cooperation too, as Member States, who have various capacities, are considered ‘Masters of the Treaties’ when they act as subjects of international law.

1.2. Equality Under the European Law and Throughout the History of the European Construction

The European construction began as an international legal arrangement among states that were regulated by the Paris (1952) and Rome (1957) Treaties.¹⁵ The founding moment was an act of international law, and the founding states acted as sovereigns under international law. Furthermore, by establishing the European cooperation or by creating their subsequent forms by treaty modifications,¹⁶ the Member States have continued to remain sovereign equals within the meaning and scope of international law and when they act under this legal regime. The decisions of some of the national constitutional and apex courts reinforced this characteristic as, according to their view, the Lisbon Treaty of 2007 was signed and ratified by sovereign states who did not create a ‘superstate’, but merely shared and continued to exercise some of their competences.¹⁷ Consequently, the Member States remain sovereign equals under international law whenever they act as constituting powers (*pouvoir constituant*s) of the European cooperation.

The principle of equality is also reflected, albeit from a different perspective, in Art. 4, para. 2 of the Treaty on the European Union (TEU) which declares that ‘[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and

15 The Treaty establishing the European Coal and Steel Community was signed in 1952, while the Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community were signed in 1957.

16 The Member States remained the ‘Masters of the Treaties as the European construction is not able to renew or reform itself on its own’. See van Middelhaar, 2009, pp. 161–191.

17 See, for example, Decision no. 143/2010 (VII.14.) of the Constitutional Court of Hungary.

constitutional, inclusive of regional and local self-government'.¹⁸ Under this Art., the principle of equality appears as an obligation of the European Union and their institutions *vis-à-vis* the Member States. Consequently, the principle of equality applies to the States as Member States of the European integration.

The European dimension of the principle of equality has multiple and also increasing aspects, as it has had an increasing importance and relevance throughout the historical evolution of the European cooperation. Three major turning points can be identified that gave new layers and readings to this principle.

The first essential turning point was the separation of European law from international law by the judicial recognition of the doctrine of direct effect in 1963¹⁹ and of the priority of the European law over national law in 1964.²⁰ Prior to these judgments, the European Treaties were considered as arrangements under international law that created rights and obligations among the contracting Member States. However, as a consequence of these judgments, the European law, under certain circumstances, contains rights and obligations for private persons that can be applied and enforced *vis-à-vis* the Member States. The reasoning of the judgment goes:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.²¹

The overall objective of these regulations was to create or facilitate the creation of an internal market, which require the free movement of goods, services, persons and capital along with competition and state aid rules. These require the same, mainly negative, role and conduct from each Member State. To this end, the founding Treaties and regulations impose a largely restrictive legal framework on Member States that they need to observe. In this sense the principle of equality first requires that the European law shall have neutral and general application in every Member State of the European integration. At the same time, a closely related question is the enforcement of this law by the institutions of the European integration. The neutral and general characteristics of the European law requires the limitation or elimination of discretionary decision in those procedures that aim to scrutinise Member States and their implementation of European law. The even-handed application of the European law is therefore considered as a necessary element of their neutral and general characteristics.

A further aspect of the principle of equality is the equal participation or representation of Member States in the institutional setting of the European cooperation as

18 Consolidated version of the Treaty on European Union – Title I Common Provisions – Art. 4.

19 Judgment of the Court of 5 February 1963 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62.

20 Judgment of the Court of 15 July 1964 *Flaminio Costa v. E.N.E.L.*, Case 6-64.

21 See, Grounds of Judgment, on the application of Art. 177.

well as in the decision-making process. The Member States not only act as constitutive powers of the European institutions, but they and their national institutions are also participants as constituted powers in the European governmental arrangement.²² The ways and competences of their participations raise the questions of equality. Furthermore, the European cooperation has increasingly embraced the objective of becoming democratic since the 1970s.²³ It has been searching for the various ways of how to include the peoples of Europe in the European decision-making processes and how to make the questions of the European cooperation part of the national public discourses.²⁴ Some of the democratic aspirations pose challenges to the principles of equality. The equality of the Member States and the equality of the citizens reflected in some of the aspirations are difficult to reconcile as the concept of the 'Union of citizens' would no longer reflect the original setting that has been based on the arrangement of sovereign and equal states.

This aspect of equality between Member States have come to the forefront after the Fall of the Berlin Wall and the subsequent decision by the Maastricht Treaty of 1993 to extend the cooperation beyond market integration to political domains including questions of internal and external security. In these areas, the Founding Treaties and the European law do not only impose obligations, but they rather create a legal basis and opportunity for governance and for adopting normative and individual decisions that also relate to core functions of states. In this dimension, the question of equality between Member States takes a different form and relates to their participation in the decision-making process. In the meantime, the path from the Treaty of Maastricht in 1993 to the failed Constitutional Treaty in 2005 planned to shift constituting power from the states to the citizens and thus contravene to the doctrine of equality.

The major third turning point might rather embrace a longer process by which the Member States of the European Union have become more diverse in terms of their historical experiences, the reasons for their accession as well as their primary expectations from the European Union. Instead of one specific point in time, the process has taken a longer period. However, the Eastward enlargement in 2004 and the subsequent Lisbon Treaty of 2007 can be considered as a defining period in this process. As the European cooperation has deepened but also become more diverse, the question of equality is increasingly linked to the respect and protection of national and constitutional identities of Member States. These dilemmas mostly involve and are present in the procedures of the European Commission as well as of the Court of Justice of the European Union. The doctrine of equality would require the even-handed approach to and protection of national identities. On the other hand,

22 Van Middelaar, 2009, pp. 161–202.

23 The term 'democratic deficit' was introduced and first used by David Ian Marquand in his book, see: Marquand, 1979. Also, the first direct election of the representatives of the European Parliament was held in 1979 as result of an earlier Franco-German compromise.

24 Van Middelaar, 2009, pp. 415–417.

the increasingly diverse European integration has prompted discussions on a broadening enhanced cooperation or multispeed European integration. These proposals, of course, concern and would raise serious questions around the principle of equality between Member States.

The question of equality under European law and between members of a community of states was therefore present throughout the entire evolution and history of the European integration, albeit different aspects of equality was characterised by and posed challenges to the different phases of the integration. The Chapter aims to explore this dynamic by examining the institutional and decision-making aspects and subsequently, the normative aspect of equality.

2. Equality Between Member States in the Structure of the EU Institutions

The second section of the Chapter aims to explore the institutional aspects of the principle of equality between the Member States within the European Union that is the participation of the Member States in the institutional arrangement of the European integration. In this regard, the Chapter differentiates between the supranational institutions and the national institutions that are involved in the European cooperation as constituted powers.

2.1. Equality and Equal Representation in the Supranational Institutions

One of the novelties of the European cooperation was that Member States aimed to establish a supranational structure since the very beginning. As the Schuman Declaration of 1950 pointed out: ‘it proposes that Franco-German production of coal and steel as a whole be placed under a common High Authority, within the framework of an organisation open to the participation of the other countries of Europe’. The Declaration continued: ‘[t]he common High Authority entrusted with the management of the scheme will be composed of independent persons appointed by the governments, giving equal representation’.²⁵ Accordingly, the Paris Treaty established the ‘High Authority of the European Coal and Steel Community’ while the Rome Treaties created the Commission(s).

The supranational institutions were created by, but are independent from the constituting Member States and their institutional arrangements. Their further characteristics include the adoption of binding decisions or norms on the Member States that may have direct effects in their domestic legal systems.²⁶ Therefore, they rep-

²⁵ The Schuman Declaration.

²⁶ Boytha, 2007, pp. 47. and 55.

resent the ‘inner sphere’ of the European integration. Whether and how the principle of equality or equal representation effectuate regarding the supranational institutions is of key importance. The question has two dimensions or aspects.

On the one hand, equality refers to equal representation within the institutional setting of the European Union that is the equal participation in the decision-making process. On the other hand, the principle of equality also includes the equality – and the equal protection and treatment – of Member States before the institutions, i.e. in the course of their operations and application of the law. The reason that these two dimensions or aspects have important intersections is because the legislator, who makes the law and the subjects of the law, as it is the case in public international law, partly overlap in European law, since European law is ultimately rooted in state consensus reflected by public international law.²⁷ Whether and what conception of the principle of equality applies will reveal some of the tensions that characterise the European cooperation. The supranational institutions that define the European cooperation have been the European Commission, the European Parliament and the Court of Justice. The Chapter thus aims to examine the question of the principle of equality and equal representation at each of these organisations.

2.1.1. *European Commission*

The main function of the European Commission as well as its predecessor, the ‘High Authority’ (*la Haute Autorité*) has been to effectuate the objectives of the Treaties as well as to fulfil a ‘guardian’ role over them.²⁸ One of the most influential novelties of the Founding Treaties was, as Robert Schuman once emphasised, that these Treaties establish supranational institutions that are independent, have autonomous authority and pursue the general interests of the Community instead of providing venue for the resolution of the clash of various national interests.²⁹ Therefore, the supranational structure and its institutions, and especially the Commission, was designed to act in the interest of the ‘spirit of the Community’ (*esprit communautaire*) by overcoming and taking aside the questions of balance of power or diplomatic practice. For these reasons, the Founding Treaties stipulate that members of the Commission carry out their functions in the overall interest of the Community (*‘dans l’intérêt général de la Communauté’*)³⁰ and thus define their independence from

27 First and foremost, the European Council and the Council of the European Union embody these intersections.

28 See, Art. 155 of the Rome Treaty of 1957.

29 Schuman, 1951, pp. 84–92.

30 See, Arts. 8–9 of the Paris Treaty of 1952 and Art. 157 of the Rome Treaty of 1957.

the national governments and set the fundamental rules of conflicts of interests.³¹ Therefore, the dynamic, the opportunities but also the constraints of the operation of the Commission were determined by the parameters of the Treaties and the realisation of the ‘European project’ throughout the first half of the evolution of the European integration. It is for this reason that the Commission holds the monopoly of initiating legislation since the Commission is assumed to act without state or political interests. This dynamic set the stage for a technocratic approach which turned out to be essential throughout the process of market integration as well as in the creation of the internal European market.³²

However, this general framework did not result in a watershed isolation between the commissioners and the Member States. On the one hand, even though the commissioners were not allowed to receive instructions from the authorities of their respective countries, they oftentimes underline certain aspects of a case that are important to their countries of origin.³³ On the other hand, which has significant relevance from the perspective of the equality between Member States within the Commission, the Member States insisted on their right to nominate one commissioner. Until the adoption of the Treaty of Nice in 2002, the large Member States – Germany, France, Italy, Spain and the United Kingdom – nominated two commissioners. The Nice Treaty of 2002 would have introduced a ceiling for the number of commissioners. After the Eastward enlargement, Member States would nominate the commissioners according to the basis of ‘equal rotation’. Consequently, not every Member State could nominate – and be ‘represented’ – in the Commission within a term. The Lisbon Treaty of 2009 would have kept the ceiling provision and the principle of equal rotation; however, the European Council reserved the right to decide otherwise.³⁴ In light of the negative Irish referendum concerning the ratification of the Lisbon Treaty, which demanded that each Member State retain its right to nominate a Commissioner, the European Council in its meeting in December 2008, decided to continue to uphold the permanent and equal representation of Member States in the Commission.³⁵ On the one hand, the Council’s decision clearly reflects the important place the European Commission has been playing in the institutional setting of the European cooperation, especially its monopoly to initiate legislation process³⁶ as well as to monitor the compliance with the Treaties and launch infringement procedures

31 See, Art. 157 of the Rome Treaty of 1957 (*‘Dans l’accomplissement de leurs devoirs, ils ne sollicitent ni n’acceptent d’instructions d’aucun gouvernement ni d’aucun organisme. Ils s’abstiennent de tout acte incompatible avec le caractère de leurs fonctions. Chaque État membre s’engage à respecter ce caractère et à ne pas chercher à influencer les membres de la Commission dans l’exécution de leur tâche’*.) or Art. 9 of the Paris Treaty of 1952.

32 See van Middelaar, 2023, pp. 236–238.

33 See Bertoncini and Chopin, 2010, pp. 163–164.

34 See, Art. 17, para. 2 of the Lisbon Treaty of 2009.

35 See, 17271/1/08 Council of the European Union.

36 Except for the area of common foreign and security policy as set out in Art. 30 of the TEU in the area of common foreign and security policy where the other actors, such as any Member State or the High Representative of the Union for Foreign Affairs and Security Policy can also initiate proposals.

before the Court of Justice of the European Union (CJEU) as it sees necessary. Based on its monopoly to initiate legislation, the Commission can decide whether it wants to formulate a legislative proposal and if so, it can define the precise content and direction of its first draft. On the other hand, the Council's decision is also important as it has expressed the principle of equality between the Member States within the Commission. However, beyond the principle of equality between Member States within the Commission, it increasingly refers to and includes the question of equality between Member States before the Commission.

The dynamic of the operation of the Commission, originally envisioned by the Paris and Rome Treaties of the 1950s, has begun to shift since the early 2000s. One of the primary reasons of this transformation was the extension of the cooperation to non-market or non-economic i.e. more political areas, including issues of internal and external security after the Maastricht Treaty of 1993. In addition (and in parallel) to this development, the Lisbon Treaty of 2009 established the requirement for the European Parliament to provide a vote of consent for the European Commission as a body before it can be appointed. Furthermore, the Treaty also provides that the Commission, as a body, shall be accountable to the European Parliament. Besides the European Parliament's role in the appointment process of the Commission, its enhanced role in stipulating political responsibility has shifted the Commission's character from a technocratic to a more political one. In addition to this, the Lisbon Treaty of 2009 provided a new role to the Commission to initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.³⁷ This treaty provision has increasingly included the Commission in drafting the strategic framework that sets the stage for concrete legislative projects. These new provisions shaped and increased the Commission's ambitions in defining the general interests of the European cooperation or the '*esprit communautaire*'. The Commission's self-image has shifted from an administrative (chief regulator) role to a governmental (leadership) role.³⁸ The 'politicisation' of the Commission has had wide practical implications including, for example, its President's, Ursula von der Leyen's announcement in December 2019 that she wants to envision a 'geopolitical Commission' that would aim to concentrate on external relations as well as on the role of the European Union in the world.³⁹ As the character of the Commission has been transformed and as its weight in the institutional setting increased, the principle of the equality of Member States both within and before the Commission has much greater stake and is increasingly seen as a lever to preserve its impartial and independent or technocratic nature. In light of these shifts along with the guardian role of the institution, the Chapter will subsequently explore the question of equality before and the equal treatment by the Commission.

37 See, Art. 17 of the Treaty on the European Union.

38 Van Middelaar, 2023, pp. 236–241.

39 See, for example, European Commission (no date b).

2.1.2. *The European Parliament*

The question of democracy and democratic oversight of the supranational entity – the ‘High Authority’ and then the ‘Commission’ – have been present since the beginning the cooperation. However, the institutionalisation along with the ultimate aim of this oversight underwent major shifts throughout the early history of European construction. This shift has considerable relevance to the equality or equal representation of Member States as it has posed a dilemma of how to reconcile the principle of equality of the Member States with the equality of citizens of the Member States.⁴⁰ It also posed the question of what role the principle of equality of Member States shall play in today’s European integration.

The six founding Member States originally agreed to provide the arrangement of their national parliaments with oversight functions over the ‘High Authority’.⁴¹ To this end, the Paris Treaty of 1952 envisioned an ‘Assembly’ – *l’Assemblée* – that consisted of 78 representatives from the national parliaments of the Member States. These representatives would be chosen either through direct elections held by a Member State or based on the proportion of each state’s population. Under the institutional structure of the ECSC, the national parliaments were entrusted to fulfil a quite strong (national) democratic control over the operation of the supranational ‘High Authority’. In this model, the democratic oversight was established by the agreement and exercised through the democratic institutions of the Member States and therefore the interests and considerations of the Member States as distinct political communities were also present and represented on an equal basis. Considering these early experiences, the Rome Treaty of 1957 established a common ‘Assembly’ for the European Communities⁴² and accordingly, the delegations of national parliaments continued to provide democratic oversight, and their numbers were increased.⁴³ The scope of competence of the new ‘Assembly’ was more limited compared to the ‘Assembly’ of the ECSC as it only assumed an advisory role and their opinions had no binding effects on the Council of Ministers.⁴⁴

However, at the same time, the Rome Treaty also envisioned the creation of a European election with direct universal suffrage.⁴⁵ This treaty provision set the stage for the transformation of the Assembly as well as for the contemplation about and the

40 Dubout, 2022, p. 23.

41 The model for the arrangement was the previously established Council of Europe and its ‘Consultative Assembly’.

42 The separate Assembly of the ECSC ceased its operation in 1958 and a common Assembly was established for the ECSC as well as for the European Economic Community and for the European Atomic Energy Community.

43 Art. 138, para. 2 of the Treaty of Rome.

44 It is also true, however, that the gradual formation of the common and then internal market rather required the technocratic mindset and approach of the European Commission (the previous ‘High Authority’).

45 See, Art. 138 of the Treaty of Rome of 1957, ‘*L’Assemblée élaborera des projets en vue de permettre l’élection au suffrage universel direct selon une procédure uniforme dans tous les États membres*’.

evolution of a European democracy.⁴⁶ On the one hand, the Assembly has begun to increasingly assume a supranational function. On the other hand, the *demos* problem that is the concept of who is or are represented by the Assembly has become increasingly blurred or subject to debates and undergone a major transformation that has led to tensions with the principle of equality or equal representation of the Member States. The Founding Treaties partly reflect this transformation. While the Maastricht Treaty of 1992 provided that the ‘European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty’, the Lisbon Treaty of 2007 states that ‘(1) the functioning of the Union shall be founded on representative democracy and (2) citizens are directly represented at Union level in the European Parliament’.⁴⁷ If the European Parliament is an institution or power that is constituted by the treaty arrangement of the (equal) Member States, then its ultimate function is to represent the political communities and peoples of the Member States. However, in contrast, if the European Parliament is a (future) constituting power of the European Union, then what it aspires to represent is a single people. The former is based on the principle of equality between the peoples and citizens as members of political communities (along with the corresponding Member States), while the latter is rather based on the formal equality between the citizens. Furthermore, in connection with this, the direction of the Parliament’s development has also been raising tensions because it reflects a growing divide between what the European Parliament envisions and what the treaty arrangement lays down as well as between the public discourses in the Member States and the political discourse and action on a European level.

The European Parliament reflects the (equal) representation of the Member States in terms of the allocation of seats as well as in terms of the *de facto* presence and influence of national interests in their operation.⁴⁸ The European Parliament’s elections are organised by and within the Member States (constituency) and the number of seats of the Members of Parliaments are allocated according to the principle of ‘degressive proportionality’ that fulfils a balancing role. Its role is to provide smaller Member States to have more MEPs per population so that they are adequately

46 The process began with a semantic and thus rather symbolic debate on the denomination of the ‘Assembly’. Even though its official name was ‘Assembly’ in the treaty text, the Assembly adopted a ‘Rules of Procedure’ to declare itself a ‘Parliament’ in March 1958. The primary motivation and objective were to show its desire to represent the European (sovereign) people on the one hand and to become gradually a legislative forum on the other. For a long time, many of the Member States – including France and the United Kingdom – refused to accept this semantic shift. Only the Single European Act of 1986 adopted and incorporated the name ‘European Parliament’ in the text of the treaty.

47 See, Art. 189 of the Maastricht Treaty (Nice consolidated version) and Art. 10 of the Lisbon Treaty (Treaty on the European Union).

48 Bertoincini and Chopin, 2010, pp. 164–166.

represented.⁴⁹ Consequently, the number of people that each MEP represents is subject to significant variations.⁵⁰ Even though it has been criticised as violating the formal equality between citizens, the principle, in fact, aims to protect the equality of the political communities and Member States within the cooperation and, consequently, the substantial (or informal) equality of citizens.⁵¹ The presence of national or Member States' interests in the European Parliament is reflected in the multiple roles the MEPs have. The MEPs, being aware of their own country's legislative, financial, cultural and other aspects, are also representing and defending the interests of their countries or their European characteristics. They are working together separately within the political groups which are divided into national delegations. National delegations usually formulate the common positions they represent or coordinate their votes within the political group or in the work of the committees as well as in the plenary sessions of the European Parliament. The treaty arrangement therefore envisioned and aimed to protect the equal representation of the various peoples within the cooperation.

Nevertheless, since the introduction of the notion of a 'democratic deficit' into European academic and political discourse in the 1970s,⁵² the progressive expansion of the competences and scope of action of the supranational European Parliament has been repeatedly – though misleadingly – justified as a necessary correction, often at the expense of institutional balance with the Council as co-legislator. This development has been coupled with the – as the Rome Treaty of 1957 set out in its Art. 138, para. 3 – establishment of the direct election of the representatives of the European Parliament. It has created not only a further reference point of direct legitimacy and thus a basis for a continuous increase of the competence of the European Parliament but also a shift away from the potential roles and equality of the national political communities, democracies and parliaments towards an integration into *one demos*. This way of development has accelerated after the adoption of the Maastricht Treaty in 1992 and has continued after and even despite of the failure of the adoption of the Constitutional Treaty in 2005.⁵³ The proposal of the European Parliament to introduce a 'transnational list' that would gradually replace the constituencies of the Member States represents a further step in this direction.⁵⁴

These aspirations of the European Parliament aim to create a supranational structure along the lines of unitary democratic considerations with a single European

49 See, Art. 14, para. 2 of the Treaty on the European Union: 'Representation of citizens shall be progressively proportional, with a minimum threshold of six members per Member State. No Member State shall be allocated more than ninety-six seats'.

50 For example, the constituency of a German MEP is much larger than the constituency of an MEP from Malta therefore represents much more electors.

51 See, Cheneval, 2022, pp. 307–308.

52 See, for example, van Middelaar, 2009, pp. 417–437.

53 For a detailed description, see Sándor, 2023, pp. 14–17.

54 European Parliament Resolution of 26 November 2020 on Stocktaking of European Elections [2020/2088(INI)].

political space. For these reasons, they refer to and rely on the formal equality between citizens. However, at the same time, the formal equality of citizens actually acts against and weakens the principle of equality between Member States. Furthermore, it also decreases the equality of the voting weights of citizens as members of various political communities because the formal equality of citizens ignores the divides and fault lines created by, amongst others, historical experiences, cultural roots, the level of development in an arrangement that consists of multiple states or political communities that have their own public discourses. The European political space can be built instead on the multiplicity of national public discourses.⁵⁵ The equality between Member States therefore functions as a balancing principle that empowers the meaningful political participation of the citizens as members of their political communities and thus as European citizens. For these reasons, the principle of equality between Member States, in fulfilling its balancing role, substantially contributes to the solidification of European democracy.

2.1.3. *The Court of Justice of the European Union*

Even though the operation and adjudication of the CJEU seems more behind the scenes than that of the Commission and the Parliament, it has been decisive throughout the evolution of the European cooperation since the early 1960s. The European law as a different subset of law with its direct effect and primacy was a landmark and so were the innovative judgments of the CJEU in the *Van Gend & Loos* (1963)⁵⁶ and in the *Costa v. E.N.E.L.* (1964)⁵⁷ cases. These early judgments, rather than the Member States or the treaty arrangement, shaped the nature and characteristics of European law. They also distinguished it from public international law in an era of market integration. This set the stage for the autonomy of European law, as guaranteed by the CJEU, and allowed for its evolution. Additionally, it sparked various academic and judicial debates regarding the coexistence and relationship between European law and national law, especially in an era characterised by an increasing level of political cooperation.⁵⁸ The European law fulfils an essential role and has a cohesive force in the European construction because it is first and foremost a legal (and judicial) construction. But since it is a legal construction, the role of the judge as well as the role of the court (and who is judging) are central.⁵⁹

Even though this dynamic was present since the birth of the European construction, it has further amplified in recent decades for multiple reasons. On the one

55 See also, van Middelaar, 2009, pp. 466–467.

56 Judgment of the Court of 5 February 1963. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*. Reference for a preliminary ruling: Tariefcommissie, Pays-Bas, Case 26-62.

57 Judgment of the Court of 15 July 1964. *Flaminio Costa v. E.N.E.L.* Reference for a preliminary ruling: *Giudice conciliatore di Milano*, Italy. Case 6/64.

58 See, for example, Kwiecień, 2019, pp. 13–38.

59 See Bertonecini and Chopin, 2010, pp. 245–246.

hand, as mentioned before, the integration process has been extended to political areas and increasingly includes questions of values,⁶⁰ identity and (fundamental) rights,⁶¹ hierarchy and competences. A process of ‘constitutionalisation’⁶² has begun during the regime change and continued even after the failure of the adoption of the Constitutional Treaty in 2005. Furthermore, the legal and institutional structure of the European construction is being envisaged as separate or autonomous and not irreducible to that of the Member States. Amongst these developments, the CJEU increasingly assumes a constitutional adjudication power. This includes acting as the final arbiter in interinstitutional and competence issues between the Member States and the European Union. The Court is also responsible for interpreting, applying, and protecting fundamental rights, as well as ensuring the coherence, autonomy, and uniform application of European law. This ‘constitutional adjudication’ role, exercised through the various competences of CJEU, is also used *vis-à-vis* Member States to discipline them in order to reach compliance with European law. Relatedly, the CJEU has also seen its own role or function as a ‘centraliser’ or a ‘force of centralisation’ in the institutional arrangement of the European cooperation. On the other hand, (and the same time), the European cooperation has become much more diverse due to the Eastward enlargement in 2004, 2007 and 2013. As a result, not only has a group of 15 Member States become a group of 28 with 13 new Member countries but the newly joined countries have different historical experiences, different reasons for joining the integration and therefore different expectations compared to the original countries.⁶³ The two parallel developments – the ‘constitutionalisation’ dynamic of the European law and the increased diversity of an enlarged cooperation – have led to significant tensions within the cooperation⁶⁴ and also heightened academic and public debates around the role of the CJEU as well as on its relations to national constitutional or apex courts or on the judicial dialogue in the European cooperation.⁶⁵ How can this complex dynamic of ‘constitutionalisation’ accommodate the increasing diversity of Member States and the European cooperation?

Against this background, as the role of the CJEU increased, the principle of equality between the Member States both within the CJEU and before the CJEU

60 Art. 2 of the Treaty on the European Union enumerates these values.

61 The adoption of the Charter of Fundamental Rights of the European Union that became effective with the Lisbon Treaty in 2009 aims to introduce the concept of fundamental rights on a European level.

62 In its case-law, the CJEU elevated the Treaties on the level of ‘constitution’, see e.g. the Judgment of the Court of 23 April 1986. *Parti écologiste ‘Les Verts’ v. European Parliament*. Action for annulment – Information campaign for the elections to the European Parliament, Case 294/83.

63 Former U.S. Secretary of Defense Donald Rumsfeld used the term ‘Old’ and ‘New’ Europe to illustrate the different characteristics and approaches. See: U.S. Department of Defense, 2003. Also see, Sándor, 2024, pp. 120–135. about the different evolutionary paths of the European countries, see, Todd, 2024, pp. 117–136.

64 One of the most intense debates during the Brexit negotiations was the jurisdiction of the CJEU over the United Kingdom.

65 See, for example, Grabenwarter et al., 2021, pp. 43–61.

has become increasingly important. The participation in the operation of the CJEU would represent the aspect of equal opportunities of the Member States. To this end, the Lisbon Treaty provides for a one state/one judge principle or provides for an equal number of judges principle both in the case of the Court of Justice as well as the General Court.⁶⁶ A related question was the number of Advocate Generals whose role is to assist the Court with their impartial reasoned briefs. The Treaties of Paris and Rome provided for two Advocate Generals, and they were appointed by the two most populous countries, France and Germany.⁶⁷ With the subsequent enlargements of the European cooperation, France, Germany, Spain, Italy and the United Kingdom could appoint one permanent Advocate General out of the eleven. Over the intergovernmental conference of Lisbon Treaty, Poland asked and obtained a permanent Advocate General seat while the United Kingdom left the European integration. Therefore, the remaining 6 Advocate General seats are shared by the rest of the Member States on a rotational basis. This could raise potential problems in regard to the principle of equality between Member States *within* the CJEU. So far, for example, amongst others, Hungary could not appoint an Attorney General.

The other side of the principle of equality is whether the CJEU could or is willing to accommodate the increased diversity and different historical experiences of the cooperation. This aspect can be called the equal treatment or equal protection of Member States by the CJEU and the way it applies the doctrines of European law.

2.2. Equality Between the National Institutions Participating in the European Construction

The European construction has been constituted by the common will of the sovereign equal Member States, as constituting powers, which manifest itself in the form of international – founding – treaties. The European construction thus exists and operates, and it could be reformed within the parameters constituted by the founders. In parallel, some of their institutions have been participating and acting, as constituted powers, in the decision-making of this cooperation since the very beginnings. The Member States therefore have a double role, on the one hand, acting as constituting powers of the European cooperation and, on the other hand, acting as part of the institutional arrangement of the construction. The complex relationship between the Member States' governments and the Community has been subject to intense debates, and tensions at times since the founding, but their central role in the evolution and operation of the cooperation is beyond doubts. Accordingly, the Paris Treaty of 1952 already included the Council of Ministers in the institutional structure of the ECSC.⁶⁸ The role and weight of the Council of Ministers have dramatically increased in the Rome Treaty of 1957 as the chief institution where decisions

66 See, Art. 19, para. 2 of the Treaty on the European Union.

67 See, Art. 10 of the Treaty of Paris in 1952 and Art. 166 of the Treaty of Rome in 1957.

68 Arts. 26–30 of the ECSC.

are adopted.⁶⁹ Furthermore, as the institutionalised form of the European concert and summits, the heads of states and governments, as a leadership institution, have been fulfilling an increasingly important function since the 1970s. The dynamic of the evolution of the European construction also shows that national parliaments and constitutional courts are increasingly considered to be acting as constituted power and therefore the question of equality could arise in their respective relations, too.

This section will primarily focus on the principle of equality in the European Council and in the Council of Ministers and it will also raise some of the dilemmas of the contemporary participation of national parliaments in the European cooperation.

2.2.1. European Council

The European concerts have a longstanding historical tradition in Europe since the 19th century. Its main purpose was to define and maintain the European balance of power within and between the spheres of influence out of Europe. These summits provided a regular venue for the heads of states and governments of European powers. The early decades of the history of the European cooperation already raised the question of how the cooperation can represent their political, geopolitical or other interests *vis-à-vis* third countries and how is it able to elaborate and form their strategy and vision. While the market integration advanced according to the pace and within the framework of the Founding Treaties, the cooperation was in a need of a ‘focus of authority’ and broader leadership outside of the treaty arrangement.

Based on the initiation of the French President, Giscard d’Estaing, the informal summits that were based on classic diplomacy and international law gave place to the more formal, yet not institutionalised European Council in 1974.⁷⁰ The European Council soon became a so-called ‘*Chefsache*’, that is the leadership institution of the European construction and began to fulfil a widespread role as the European integration embraced various aspects and dimensions of political cooperation since the 1990s and entered into a period of several internal, such as the financial crises, and external, such as the migration or coronavirus crises, since the 2000s. The European Council can act in situations which the other institutions are incapable of resolving or deciding upon. These can include crises or situations which the other institutions could not decide on or when a strategic decision or a general direction needs to be adopted or when the founding structure or the scope of membership needs to be changed for reasons of enlargement or withdrawal.⁷¹

The source of the legitimacy and authority of the decisions of the European Council is rooted in the democratically elected or legitimised and accountable heads

69 Arts. 145–154 of the Treaty of Rome.

70 Van Middelaar, 2009, pp. 62–65. and 277–280.

71 Van Middelaar, 2023, pp. 212–217.

of state or government.⁷² Partly because of their strong democratic legitimacy and partly because of the weight of their decisions, the meetings and debates of the European Council attracts the most attention across Europe. The voting scheme also significantly contributes to the ‘political drama’ of their meetings as ‘the decisions of the European Council shall be taken by consensus’.⁷³ The requirement of unanimity creates an atmosphere that prefers and stimulates compromises and avoids hard and dividing votes and at the same time also reflects the dual characteristics of the European Council that serves as a bridge between the relations of the Member States and the institutional arrangements of the European construction. Furthermore, based on its unique position, the European Council could provide the general programme and legislation of the European construction with legitimacy in the national democratic communities.⁷⁴

Considering this arrangement, both the participation on an equal footing and the unanimity rule genuinely reflect the principle of equality between the national democratic communities, as the heads of state and governments act as the representatives of their respective (*sovereign*) states. The unanimity rule allows the Member State to oppose a proposal or decision that they, for some reason, consider undesirable and it also guarantees the equal protection of each national democratic community in the European Union.⁷⁵ However, the unanimity rule also highlights the shared framework that unites the Member States, fostering ongoing discussions until a mutual compromise is reached.

2.2.2. Council of Ministers

In contrast to the European Council, the Council of Ministers has been an integral part of the institutional arrangement of the European construction since its foundation. Furthermore, the Council, holding the main legislative and decision-making power of the European Union, has been also involved in the dynamic of the power and legitimacy rivalry with the European Parliament for the past 50 years.⁷⁶ At the same time, however, the Council itself has been a primary site of rivalry among Member States with their relations and dynamics or evolution reflected within this institution. It is highly relevant and important because the Council adopts decisions and norms that are binding on the Member States. This dynamic also reveals that Member States, while working together in this institute as constituted powers of the European construction,⁷⁷ are no longer necessarily on an equal footing in the sense of public international law.

72 Art. 10 of the Treaty on the European Union.

73 Art. 15, para. 4 of the Treaty on the European Union.

74 Weiler, 1999, p. 85.

75 Also see, Cheneval, 2022, pp. 299–309.

76 Bertoincini and Chopin, 2010, pp. 191–201.

77 Art. 10, para. 2 of the Treaty on the European Union.

While each Member State participates and thus has retained the right to be represented in the Council's meetings, the weight of their decision-making power or vote began to change with the introduction of the majority rule. This raises questions not only about the principle of equality but also, even more fundamentally, about the relationship between the Member States and the European construction and the formation of a political community. One of the unique developments of the European cooperation is the transition from a construction that is based on the unanimous operation of the Member States to a community that embraces the rule of majority in various forms. Many of the historical turning points of the development of the European cooperation as well as its ongoing dialogue and discussion on its future reforms⁷⁸ is a true reflection of the tensions between the principle of unanimity and majority.⁷⁹

The majority rule also provides a more efficient decision-making process in a cooperation that has a much larger membership, increasing from the initial six to twenty-seven Member States, as well as a much more complex operation that embraces multiple areas of cooperation. The introduction of the majority rule thus helps avoid the paralysation of the European integration. Accordingly, the Treaties provide for three methods of decision-making in the Council: (1) unanimity (2) simple majority (3) qualified majority. Among the three methods, the qualified majority decision-making has become the principal method within the institutional arrangement of the European Union. The principle of 'qualified majority' rule envisions an intermediary voting system between the unanimity and the simple majority and is based on a unique legitimacy that somehow aims to consider a sufficiently large number of Member States to accept a decision and, at the same time, as it opens the opportunity for a limited number of them to block a decision. Therefore, the qualified majority principle aims to create a balance between the sovereign equality of the Member States and their heterogeneity and actual differences in terms of population, territory and other factors. Different votes are granted to different Member States based on their population and other political considerations including, for example, the Member State's allocated seats in other institutions, such as in the European Parliament or in the European Commission. The voting power of a certain Member State in the Council is therefore also a result of complex negotiations and ultimately a political compromise.

The calculation of qualified majority has been also subject to compromises. While the Treaty of Nice introduced three criteria (the majority of Member States (1), the qualified majority of votes (2) and demographic criteria (3)),⁸⁰ the Lisbon Treaty provides for a system of double majority of States and population (55% of the States and

78 For example, the Conference on the Future of Europe and the paper of the Franco-German working group in 2023: *Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century*.

79 See, van Middelaar, 2009, pp. 73–80.

80 See, Protocols Art. 3 (Provisions concerning the weighting of votes in the Council) of the Treaty of Nice of 2001.

65% of the population). The voting scheme of the Lisbon Treaty can be conceived as and broken down into a two-step process. In the first vote each Member State retains one vote which also reflects the principle of equality between them. Nevertheless, the second step stresses the equality between the (European) citizens which, in turn, provides more leverage to more populous Member States. However, this way the qualified majority rule increased the inequality between Member States. At the same time, it also reveals a more profound contradiction and tension between the rival theories behind the direction of the European cooperation. On the one hand, the introduction of the demographic criteria is built on the concept of the equality of votes between the European citizens, that is the ‘one person, one vote’ principle. This concept aims to express and manifest that the European citizens form – or at least are on the way to forge – a single political body and *European demos* while, in the meantime, it leads to greater inequality between national democratic communities in the decision-making process of the Council. On the other hand, Art. 10, para. 2 of the Treaty on the European Union stipulates that national democratic communities are represented in the Council and thus it provides for the equality between democratic communities that is the equality of the votes between national democratic communities and Member States. The two opposing requirements highlight the ambivalent and double nature of democracy or democratic legitimacy in Europe and embody two different visions of the European cooperation.⁸¹

Although the method of qualified majority voting is now frequently used and has become a common approach to decision-making, the lasting legacy of the 1965 empty chair crisis and the 1966 Luxembourg compromise is still evident. When a vital or fundamental interest of a Member State is at stake, Member States ‘will endeavour, within a reasonable time, to reach solutions which can be adopted by all the members of the Council’. Discussions must continue until unanimous agreement is reached. The Luxembourg Compromise did not become treaty text, it has taken the form of a ‘political compromise’. While this political compromise highlighted the importance of a ‘common table’ along with the community character of the European Union, it also secured the right of objection (or veto) for every Member State under certain circumstances by inducing the requirement of unanimity.⁸² The practice introduced by the Luxembourg Compromise led to consensus decision-making in practically all instances where a majority decision was possible. It thus revealed the political and practical reality of the European construction: that European decisions need to be based on the consensus of the Member States in order to be implemented and enforced. While the shadow of the Luxembourg Compromise has created a strong culture and tendency of compromise during the decision-making process, it also sheds light on some aspects of the equality of the Member States. Even though the different voting powers reflect the differences among the Member States, the decision-making in the Council is generally characterised by a willingness of consensus and

81 See Rittleng, 2022, pp. 196–201.

82 Van Middelaar, 2009, pp. 99–138.

compromise. This reflects the ultimate foundations of the European construction that are the sovereign and equal Member States as well as its ultimate purpose which is to settle difficult questions of cooperation in a peaceful manner.⁸³ Even though the Luxemburg compromise was officially abandoned with the adoption of the Lisbon Treaty along with the introduction of the ‘ordinary legislative procedure’ and a new ‘*Ionianina compromise*’, ample and also recent examples show the continued existence of the rationale and consequences of the Luxembourg Compromise as an informal commitment or political reality instead of a legal obligation. It is still being used in the debates on fundamental questions which is partly due to the increased diversity and political characteristics of the integration.⁸⁴ One of the factors that tends to weaken this commitment is the increasing role and influence of the CJEU and the values set forth in Art. 2 of the TEU in European public discourse and politics. In addition, the increased number of Member States as well as the strengthening of the German-Franco views as a result of Brexit also contributed to this process.

One of the legacies of the Compromise is a culture or commitment of possible consensus seeking. The qualified majority method therefore incites to search for compromise in various situations.⁸⁵ This culture or atmosphere of compromise might also include ‘package deals’ or ‘cross-compromises’ among various subjects as well as derogation clauses that provide temporal exemptions under accepted decisions that contravene the vital interests of a Member State. One of the recent examples of this is the derogation under the sanctions against Russia that concerns the crude oil import via pipeline.⁸⁶

To summarise, even though the Council is the institution where the interests of Member States meet and are to be represented, it also provides a venue or crossroad for the different ideas of the European construction based on the various voting systems. It is therefore a meeting point of the different conceptions on the basis of democratic legitimacy of the European construction. One that envisions a single European *demos* as the basis of legitimacy and relies on the national democratic communities. It is also the institution that ultimately reflects the political reality of the European cooperation that is based on the will of the Member States and its success depends on their compromise.

2.2.3. *National Parliaments*

The participation of the national parliaments in the European integration can be considered as an ‘old-new’ phenomenon and, at the same time, it sheds light on the question of the sources of democratic legitimacy. In the first decades of the European cooperation, national democracies have provided the democratic oversight of the

83 Bertoncini and Chopin, 2010, p. 161.

84 See also Beukers, 2017.

85 Dubout, 2022, p. 197.

86 European Council, no date b.

supranational institutions. The ‘Assembly’ was composed of the delegates of the national -parliaments and was the representative of the peoples of the (equal) Member States.⁸⁷ The period between the 1970s and the draft Constitutional Treaty of the early 2000s was marked by a continuous transformation of the representation of the peoples in which the national democratic communities would have given place to a transnational concept European democracy.⁸⁸

Apart from a weaker attempt,⁸⁹ the role of national democratic communities re-emerged after the failure of the Constitutional Treaty in 2005 and with the adoption of the Lisbon Treaty in 2007.⁹⁰ A reduced participatory role, called early warning system (hereinafter; EWS) has included the national parliaments in the legislative process by providing them with the right to indicate whether a proposal would fall under national competence and exceed the competence of the European Union. In other words, the community of national parliaments gained a right of *subsidiarity* review and, as a main rule, where reasoned opinions on a draft legislative act’s non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments, the draft must be reviewed. However, the reasoned opinions of the national parliaments – both the so-called yellow and orange card procedures⁹¹ – have remained non-binding throughout the decision-making process. In this process, each national Parliament has two votes, equally divided between two chambers in case of a bicameral Parliamentary system.⁹² This allocation reflects the principle of equality between Member States and also between the national democratic communities that have constituted and forged the European cooperation.

Even though the EWS – partly due to its relatively weak involvement in the European decision-making process – has so far failed to live up to the original

87 According to Art. 137 of the Rome Treaty, ‘*L’Assemblée, composée de représentants des peuples des États réunis dans la Communauté, exerce les pouvoirs de délibération et de contrôle qui lui sont attribués par le présent traité.*’

88 Sándor, 2024, pp. 120–135.

89 The Conference of Parliamentary Committees for European Union Affairs (COSAC) has served as a consultative forum for members of the relevant committees since its establishment in 1989. The Conference of the National Parliaments of the European Communities comprised the members of the national and European Parliaments, however, despite of an ambitious launch in the aftermath of the fall of the Berlin Wall, it only held one meeting in November 1990. Van Middelaar, 2009, pp. 450–454.

90 See, Arts. 4–9 of the Protocol (No 2) to the Treaty on the European Union on the application of the principles of subsidiarity and proportionality.

91 In the case of the so-called ‘orange card’ procedure, the reasoned opinions of the national parliaments represent at least a simple majority of all the votes allocated to them, the European Commission must review the proposal and decide whether to maintain it. See, Protocol (No. 2) to the Treaty on the on the Functioning of the European Union on the application of the principles of subsidiarity and proportionality.

92 Art. 7 of the Protocol (No. 2) to the Treaty on the on the Functioning of the European Union.

expectations,⁹³ its setting up reveals a general line of thinking of how national institutions could be involved as and could become constituted powers, on an equal footing, of the European integration. Furthermore, this development has been reinforced by the idea of a ‘green card’ procedure that has a more active role in the national parliaments, whereby they would assume a role of initiating legislation.⁹⁴ The same development can be seen in the academic discourse on how to include the national constitution and apex court in the European judicial process by creating a European judicial network.⁹⁵ While the better involvement of national constitutional institutions as constituted powers in the institutional arrangement and decision-making process of the European cooperation not only expresses the principle of equality between Member States but also aims to reinforce the democratic legitimacy of the whole European construction. While placing the democratic sources of the European cooperation in the hands of national communities, this approach, at the same time, would help preserve and strengthen the equality between Member States.⁹⁶

Beyond the question of the equality of Member States as participants and ‘constructors’ of the institutional arrangement of the European cooperation, this principle also presents itself in another context that is the equality before the European law including the institutional competences. The next section will investigate whether Member States can be considered and treated equal before the European law and the ‘*acquis communautaire*’.

3. Equality Between Member States Before the EU Law

One of the structural similarities between public international law and EU law is that – as a main rule – both are built on (voluntary) state consensus and the common will or consensus seeking of sovereign states. At the same time, however, one of the major differences between the two legal regimes is the lack of compulsory adjudicatory or juridical machinery and the subsequent autonomy of international law. In contrast, as Walter Hallstein, the first president of the European Commission

93 The EWS so far has only been activated three times and in none of these three occasions did this process prompt the European Commission to withdraw its proposal based on subsidiarity control. See, Controlling Subsidiarity in today’s EU: the Role of the European Parliament and the National Parliaments (Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies PE 732.058 – April 2022), see: European Parliament, 2022. Boronska-Hryniewiecka, 2017, p. 248.

94 It was first formulated in the 2013 COSAC meeting in Dublin: ‘(...) national parliaments should be more effectively involved in the legislative process of the EU not just as the guardians of the subsidiary principle but also as active contributors of that process’. Contribution of the XLIX COSAC Dublin, 23-25 June 2013. Also, see, Boronska-Hryniewiecka, 2017, pp. 254–257.

95 Grabenwarter et al., 2021, pp. 43–61.

96 Cheneval, 2022, pp. 306–308.

pointed out, the European cooperation is essentially a ‘community of law’. The early judgments of the European Court, which departed from what the Member States initially anticipated,⁹⁷ identified the direct effect and primacy as the distinctive characteristics of European law that have helped create a ‘new legal order’.⁹⁸ The (voluntary) establishment of a treaty framework therefore set up a separate institutional mechanism, whereby Member States jointly exercise certain sovereign competences to create secondary law (directive and regulation) that forges an autonomous legal regime and imposes various binding requirements (obligations and rights) on Member States. However, Member States are inherently different not only in terms of their size, population, wealth or economic structure, and output but also in terms of their culture and historical route. Furthermore, the ultimate reasons that led to their membership in the European construction and thus the expectations they have from the integration are also different. They are the inheritors of a common European civilisation that bounds them together, but they remain inherently different in many ways.⁹⁹ It raises the dilemma of equality or equal treatment before an autonomous European law that enjoys, as a main rule, superiority. One of the relevant questions is therefore whether European law respects the equality of the Member States by taking into consideration their own situations on an equal footing and by treating them equally in equal situations.

From this perspective, it is important to recall that the CJEU introduced the fundamental doctrines of direct effect and primacy throughout the ‘60s to efficiently achieve the central objective of the Treaty of Rome, in other words the formation of an internal market. Consequently, the European community of law was initially built around market integration. This first period was followed by the continuously broadening areas of various political cooperation since the early ‘90s. As Member States play fundamentally different roles and therefore are in different situations in these two big phases of the European cooperation, it is important to properly distinguish them and discuss them separately from the perspective of the principle of equality.

3.1. The Principle of Equality Under Market Integration

For geopolitical factors as well as for other reasons, the gradual achievement of an internal market had been in the forefront of the first three decades of the European cooperation. The establishment of a lasting European alliance was expected as a result of the linkage of markets and economies of participating countries. The economic prosperity, often referred to as the thirty glorious years (*Les Trentes*

97 In their submissions to the European Court, the Member States did not support the position of the Court that overstepped the classic (interstate) structure of public international law by the introduction of these two doctrines. See van Middelaar, 2009, pp. 95–96.

98 See, 2.1.3. of the present Chapter.

99 The European civilisation heritage has been illustrated by the three hills of Europe: the Greek philosophy, the Roman law and Christianity. See Koschacker, 1947.

Glorieuses),¹⁰⁰ that accompanied the first period of the European cooperation justified the assumption that the participating countries were more successful together than they would have been separately. The continued assumption is that economic success of the integration outpaces the necessary disadvantages. The common economic success is still one of the most important factors that holds the countries of the cooperation together.

At the heart of the internal market and ‘economic constitution’¹⁰¹ of the integration lies the implementation of the non-discrimination principle that has played a paramount role in achieving the objective of an internal market.¹⁰² The internal market, as the Treaty on the Functioning of European Union defines, is an ‘area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties’.¹⁰³ Together with the common competition policy and state aid regulation, the four freedoms comprise the main pillars of the internal market. What they expect from the Member States is not to block or hinder the free flow of the factors of production. In this sense the Member States are required to implement the non-discrimination (or equality) principle but also to provide a ‘level playing field’ for market players under the competition and state aid rules. These European rules typically have direct effect to limit the regulatory powers of the Member States in favour of the internal market.

Consequently, under the economic integration, it is the markets and companies who play leading roles instead of the Member States.¹⁰⁴ The overwhelming majority of the rules in this area are therefore neutral and treat each Member State equally while pursuing the goal of achieving an internal market. Furthermore, duly circumscribed exemption regimes, such as public morality or public security as part of the broader public order are provided by the TFEU partly to accommodate Member States and to take their differences and specific and legitimate societal, moral, security or other needs into consideration. Each fundamental freedom has its own exemption regime which has been shaped by the relevant case-law of the CJEU.¹⁰⁵ In its case-law, the CJEU recognises and protects the autonomy of the Member States, for example, to define and protect the circumstances and requirements of public morality as part of the public order which might serve as an exemption under the free movement of goods.¹⁰⁶ Member States can reasonably have different views on what they consider essential components of the public interest (public order, public

100 See Le Guern, 2023.

101 Gerber, 1988, pp. 232–265.

102 Art. 18, para. 1 of the TFEU.

103 Art. 26, para. 2 of the TFEU.

104 See van Middelaar, 2009, pp. 297–298.

105 Art. 36 of the TFEU provides the exemption regime for the free movement of goods, Art. 52 for the right of establishment, Art. 62 provides the exemptions for the free movement of services while Art. 65 details the exemption rules for the free movement of capital.

106 See, for example, CJEU, *Regina v. Maurice Donald Henn and John Frederick Ernest Darby*, Case 34/79 (ECLI:EU:C:1979:295).

morality, public security, etc.). These differences reflect their conceptions of social structure, way of life, and coexistence as a political community. The exemption regime of the four freedoms allows them to uphold these differences in a non-discriminative manner. This way, the exemption regime could provide the necessary flexibility to consider different situations on an equal footing and thus helps enhance the principle of equality between the Member States.

In addition, the application of the European law by the Member States is checked, among others, within the framework of the infringement proceedings of Art. 258 of the TFEU. The number of single market related infringement proceedings have been continuously decreasing compared to the total number of such proceedings that include common European policies.¹⁰⁷ This ratio also shows that the single market requirements are well-accepted and implemented by the Member States partly because this rather mechanic and neutral framework affects them in an equal manner or at least does not raise significant concerns in terms of the principle of equality between them.

While the European cooperation began as a market integration, it evolved into an alignment with increasing constitutional and political aspects that pose more difficult questions in terms of equality before the European law.

3.2. The Principle of Equality Under ‘Political Integration’

In contrast with market integration, the political integration that has accelerated since the adoption of the Maastricht Treaty of 1992 places the Member States in a much different position. On the one hand, rather than having a passive and mechanical role, Member States and their community assume a more active, governance or leadership role in a cooperation of political nature partly because of the primary democratic legitimacy they possess. On the other hand, the decisions and rulemaking within such a cooperation necessarily entail and relate to value-choices, the question of a certain way of life and the way a society is organised, the conviction or the internal and external security of the political communities.

In order to remain viable in the long run, a cooperation that has a political nature is ultimately organised and arranged under a common narrative and a common story that the different and, in many respects, unequal, participants of the cooperation can identify with. Furthermore, measuring the success of the market integration is more straightforward: a common method is to determine whether the economies of European countries are more competitive together than when they operate separately. In contrast, measuring the success of a political cooperation poses much more difficult dilemmas. One of its components entails the alignment of the expectations the cooperation can fulfil in the future. It requires intense and continuous consensus-seeking in more challenging situations and in more divisive questions, as well as more complex compromises. For example, the free movement of citizens

¹⁰⁷ See European Commission, no date a.

is not equal with the free movement between the Member States. Because of the security aspects, the abolition of border controls between Member States was first achieved outside of the institutional framework of the European cooperation. The Schengen Treaties were respectively signed in 1985 and in '90 as international interstate treaties by a narrower range of Member States without Italy, the United Kingdom, Ireland, Denmark and Greece. Borders, border protection and immigration policy are integral parts of sovereignty. Only the Treaty of Amsterdam of 1997 integrated the Schengen *acquis* into the institutional framework of the European Union. From the time when the financial crises of 2008 and '09 broke out, the Members States of the European cooperation had been undergoing multiple external and internal crises, including the Euro area crisis, migration crises, the Russo-Ukrainian war or the coronavirus health crises that have revealed and magnified the difficulties of consensus-seeking and political cooperation. In parallel, the 'decision-making' or 'interventions' of the European Union in the public policies of Member States has taken an increasing number of forms from normative to financial or budgetary to juridical, and has been representing growing weight in recent decades. The '*acquis communautaire*' the Member States need to assume has been continuously increasing over the years.¹⁰⁸

Since the developing European legal regulation in this area affects and could interfere with inherited convictions and sovereign democratic choices of political communities, it could more likely raise concerns regarding the principle of equality and equal treatment of Member States, which are, in many respects, different and are in various circumstances. Furthermore, as it was mentioned earlier, a process of 'constitutionalisation' has begun within the European law that was extended beyond the areas of market integration. This forms part of a broader development, whereby elements of a 'European identity' and the 'Europeanisation of public policy and public space' have been formed. This development dates all the way back to the 1970s with the adoption of the Copenhagen Declaration on European Identity¹⁰⁹ as well as of the Copenhagen accession criteria of 1993. The early solidification of the elements of a 'European identity' serves as a basis for unity both within the community and for those states aspiring to join. It aims to consolidate cooperation into a single unit *vis-à-vis* third countries. In the subsequent decades, it set the stage for the further 'treatification' of values and requirements, a process whereby values and certain readings or interpretation of values have become part of the primary European law. The introduction of both 'the rule of law mechanism'¹¹⁰ and 'the general regime of conditionality for the protection of the Union budget'¹¹¹ reflects a significant development in the governance of the European Union. This advancement

108 Bertoncini and Chopin, 2010, pp. 436–437.

109 Document on The European Identity published by the Nine Foreign Ministers on 14 December 1973, in Copenhagen.

110 European Council, no date a.

111 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

has been further reinforced by the case-law of the CJEU, which includes the doctrine of effective protection of EU law.¹¹² Additionally, the adoption of various ‘symbols’, such as the flag and anthem of the European Union, underscores this progress. The question here is whether this broader process respects the principle of equality by considering the unique situation of each Member State and treats them equally.

Since the European cooperation is first and foremost a community of law originated in the Founding Treaties, the respect of the ‘*acquis communautaire*’ by the Member States remains essential for preserving its cohesion. At the same time, however, the political cooperation has so far revealed tensions, raising the question whether Member States are treated equally. From this perspective, two relevant and important factors need to be considered.

On the one hand, the political cooperation has been achieved largely by the extension of the same (supranational) institutions and the same methods used in the process of market integration. Since Member States are in different positions and have a varying nature of engagements under market integration and under political cooperation, the organisational structure of the market integration offers inadequate institutional guarantees for the principle of equality to prevail under co-operations that have a political nature. While the ‘constitutionalisation’ process of European law has begun and made significant progress within the political cooperation for the past decades, neither the content and precise meaning, nor the institutional check of the principle of equality between the Member States has been elaborated.

Secondly, the proposals, such as the Conference on the Future of Europe or the Franco-German paper¹¹³ that favours the majority decisions at the expense of the requirement of consensus are deactivating one of the guarantees of the principle of equality. The primacy of European law and the essential requirement for consensus-seeking and consensus among Member States have been the core elements of European cooperation. While the primacy of European law guarantees its coherence and autonomy, the requirement of consensus considers the political reality of the integration that is based on the cooperation of equal sovereign states.

4. Conclusion

The Chapter highlighted that while the principle of (sovereign) equality has been one of the most important building blocks of modern public international law, it has been also one of the focal points of the European integration. While Member States agreed to declare the principle of equality in the Founding Treaty, they remain different in many respects even beyond their size or population. They are and remain

¹¹² Ravo, 2012, pp. 110–111.

¹¹³ Report of the Franco-German working group on EU institutional reform, 2023.

different in terms of their own historical experience, their cultural heritage and identities, the reasons that led them to join the European cooperation as well as their expectations.

Nevertheless, the question of equality between Member States has been present and poses a core question throughout the entire evolution of the European integration, albeit the different aspects of equality have come to the forefront and the question of equality raised different dilemmas. One of the major turning points was the evolution of the European cooperation beyond market integration. Two main sides of the principle of equality can be distinguished. One of them secures the equal participation in the institutional arrangement of the European Union while the other one raises the question of equality before the European law. Although interrelated, the two aspects need to be examined separately.

One of the core dilemmas of the principle of equality within the institutional arrangement is the question of European democracy that is how to reconcile the principle of equality of the Member States with the equality of citizens. Two fundamentally different and conflicting European visions lie behind this question of equality. However, as the chapter explained, this conflict is not irreversible and the equality between Member States has a balancing role that empowers the meaningful political participation of the citizens as members of their political communities and thus as European citizens.

The principle of equality, as the chapter concludes, should have an increasing role in securing equality before the European law. The original process of integrating the markets of Member States into a single market and the legal regime or institutional framework necessary to achieve this have not seriously challenged the principle of equality between Member States before European law. In contrast, the extension of the cooperation into political areas revealed that Member States, in many respects, have remained different. Respecting equality means paying closer attention to the unique characteristics of each Member State to avoid unequal treatment when applying the same text to very different contexts. Furthermore, it also brought a process of 'constitutionalisation' of European law which should place a significant balancing role on the principles of equality between Member States. However, so far neither the interpretation of the meaning, nor the institutional guarantees of this principle are sufficiently strong to shield the equality of Member States in the areas of political integration.

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CHAPTER 6

EQUALITY IN INSTITUTIONAL PRACTICE: THE TREATMENT OF MEMBER STATES BY EU INSTITUTIONS



DAVID SEHNÁLEK

Abstract

The Chapter addresses the issue of the equality of Member States before EU institutions, based on the rule of law. The EU subscribes to six fundamental principles of the rule of law: legality, legal certainty, prohibition of arbitrary exercise of power, effective judicial protection, separation of powers and equality before the law, as enshrined in Art. 2 TEU. The author points out that while the EU consistently monitors Member States' compliance with the rule of law, less attention is paid to whether the EU itself complies with this principle. Member States have ceded part of their sovereignty to the EU, trusting that the EU institutions will treat them all fairly and equally. The key question of this chapter is therefore 'Are EU Member States truly equal before its institutions?' The study does not focus on legal differences arising from legislation, such as different contributions to the EU budget or different levels of funding from the funds, nor does it address the issue of unequal representation of Member States in the institutions (for example, the ratio of MEPs in the European Parliament). A key question is whether EU institutions treat all Member States according to the same rules.

The study concludes that there is currently no reason to suspect the European Parliament of treating Member States differently. This institution does not have the power to adopt decisions that could lead to discrimination between Member States. Its influence is limited to political resolutions, which are not legally binding. However, its increasing politicisation and increasing competences may pose a risk in the future. Nor does the European Council have significant powers to treat Member States unequally. For inequality to manifest itself where it does have powers, i.e. in the Art.

David Sehnálek (2026) 'Equality in Institutional Practice: The Treatment of Member States by EU Institutions'. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 211–231. Miskolc–Budapest, Central European Academic Publishing.



https://doi.org/10.54237/profnet.2026.dsuesmsieu_6

7 TEU procedure, the unanimity of voting is a safeguard. By contrast, the Council can exercise considerable discretion, particularly in matters of fiscal discipline. For example, it has so far refrained from imposing sanctions on Germany and France for breaching the rules of fiscal responsibility, whereas it would be unlikely to do so against other states. As the ‘guardian of the treaties’, the European Commission should be a guarantor of equal treatment. However, its practices show its politicisation, leading to the uneven enforcement of EU law and principles across Member States. While some states face severe measures, others are tolerated. This shift from a technocratic to a political body, resulting from changes in the Commission’s conceptualisation of its mission, increases the risk of inequality. The CJEU on the other hand is a true guarantee of equality between Member States. The CJEU rules independently and ensures a uniform interpretation of EU law. While subordinate to the EU law, Member States are equal among themselves in their jurisprudence.

The study confirms that formally Member States are legally equal, but in practice there are differences. The greatest problems relate to the Council and the Commission, where historical cases show the different treatment. Some states are privileged, while the others are subject to more stringent scrutiny. The politicisation of the Commission increases the risk that it will not be able to act impartially in the future. Paradoxically, the growing inequality between Member States is a direct result of the EU’s well-intentioned transformations. The desire to address the EU’s democratic deficit has led to the Commission being more closely tied to the Parliament. However, this has unintentionally and inadvertently led to the Commission being seen less as a neutral, technocratic and professional body and more as the political equivalent of national governments. Careful monitoring of changes to the powers of the European Parliament and the Commission when primary law is amended is therefore essential in the future, as their increasing politicisation could lead to a systematic erosion of the equality of Member States before the EU institutions.

Keywords: equality of Member States, the rule of law, politicisation of EU institutions, discretionary powers, unequal treatment, democratic deficit, EU institutional structure, justice and equality, enforcement of EU law, political actors in the EU, protection of EU values

1. Introduction

If we are to discuss the equality of EU Member States before the EU institutions, we must first deal with the underlying principle, which is the rule of law. The EU actively and vigorously (and rightly so) adheres to this principle. According to the Commission, referring generally to the case law of the CJEU and the ECtHR, there are six core principles that form the fundamentals of the rule of law:

legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts with effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.¹

The importance of these values is underlined by their enshrinement in primary law in Art. 2 TEU.

All the current attention of the Commission, and indeed other EU institutions, in enforcing the rule of law is focused on the Member States. The reasons for this can hardly be questioned: a functioning rule of law in the Member States is essential for the proper functioning of the internal market and all other EU policies. The interconnectedness of EU Member States, mediated by EU law and implemented through the principle of mutual recognition, requires a high level of mutual trust in EU law, without which the cooperation mechanisms could not function.² Trust that all Member States respect EU law, including of course the values set out in Art. 2 TEU.³ The Commission currently plays a significant role in upholding the rule of law and has taken over this role within the EU.

However, a long-neglected issue that seems to be completely overlooked by the EU is *quis custodiet ipsos custodes*? For the same reasons, attention should also be paid to the question of whether the EU itself is a state governed by the rule of law. The close link mentioned in the previous paragraph exists not only between the Member States, but also between the Member States on the one hand and the EU on the other. The very existence of the EU is based on the trust of the Member States that, at the cost of reducing their sovereignty, they will become part of a larger and more effective whole. So who controls the controller in the EU?

The fact that the EU is supposed to function as a rule of law 'state' is given. Indeed, the relevant articles of EU primary law do not in principle distinguish between the scope of the values contained therein. According to Art. 2 TEU, the EU is founded on the values of respect for the rule of law in the same way as its Member States. But if the EU is normatively supposed to be a rule of law, does this correspond to reality? Do EU institutions respect EU law so that the exercise of their activities is not arbitrary? Is the judicial review genuinely secured by effective independent and judicial bodies ensured in all cases and, finally, is the equality of Member States before EU law ensured? And is the system of institutions appropriately set up to favour equality among Member States? For there is no doubt that equality of treatment with Member States is very closely linked to the rule of law. Surprisingly, little attention has been paid to these questions in the literature. In fact, it stands aside from the mainstream of the examination of the rule of law in EU law. Indeed, all the focus and attention

1 European Commission, no date.

2 Boháček, 2022, p. 50.

3 Opinion 2/13, para. 191.

of EU institutions is on the Member States – on whether they meet the defined standards in their individual manifestations of the rule of law.

The questions I have raised in the previous paragraph would deserve deeper consideration, but their careful analysis and answer would exceed the reasonable limit and space allotted for this chapter. I will therefore focus exclusively on the question of whether equality, as one of the principles that make up the rule of law in its entirety, also applies to the Member States as its beneficiaries. In other words, I will address the question of whether the Member States in the European Union are equal before its institutions. We will not be concerned with equality in the sense of the status of Member States as sovereign subjects of international law (see Chapter 1 of this monograph). Neither will we examine those cases where the different treatment of Member States results directly from the legislation and its purpose (I am referring, for example, to the different levels of Member States' contributions to the EU budget, as well as the different levels of EU funding from various programmes and grants). Similarly, it is not the purpose of this chapter to examine the unequal representation of Member States in the EU institutions (such as the representation of EU citizens of each country in the European Parliament, or the differences in the possibility of filling Advocate General positions). Our focus will only be on the key question: 'do EU institutions measure Member States by the same yardstick'?

Our concern will be equality before EU law. It is obvious that the EU Member States have never been and never will be absolutely equal; they are too diverse for that. In fact, it is not even factually possible. I can demonstrate this with a number of examples, e.g. during its membership in the EU, the UK was necessarily advantaged because it was able to benefit from the fact that its people were native speakers of the EU's main language of communication and one of its working languages. Similarly, those Member States in which the main EU institutions are located are effectively advantaged. They are at the centre of the action, not on its periphery. There are considerable economic and other benefits associated with such a location.⁴ The law can address these realities through the mechanisms of positive discrimination or affirmative action. However, their nature and cause are irremovable. It is therefore neither the point nor the purpose of this chapter to examine them.

Before turning in this chapter to the specific relations of the EU institutions to the Member States from an equality perspective, one more point needs to be addressed. Certain inequalities may arise directly from legislation. In such a case, this different regulation cannot be regarded as a prohibited inequality. For example, there are specific, and quite typically transitional, arrangements that concern a newly acceding Member State in primary law. In the field of secondary legislation, pertinent examples encompass the Value Added Tax (VAT) arrangements concerning

4 The capital city effect is a non-negligible economic problem, whereby conclusions relating to national capitals, in principle, may also be transferable to the 'capitals' of supranational organisations. From an economic perspective, see for example this article by Petar Filipić. See: Filipić, 2016, pp. 893–922.

specific Member States, along with the potential implementation of reduced rates – colloquially designated as ‘parking rates’.⁵ These situations will also not be the focus of this chapter. That does not mean that these inequalities are correct. While the inequalities in the first case are understandable due to the specificities of the candidate countries, they also reflect the negotiating skills of their delegations. By contrast, the latter are probably just a simple consequence of politics, namely the desire to adopt certain legislation at any cost. In this chapter, the focus will be on situations where the legislation does not differentiate, and only on the actions of the EU institutions.

I will start by outlining some hypotheses regarding the equality of Member States. Firstly, it is my belief that equal treatment of Member States is more likely to be taken by institutions that are truly supranational in nature. The EU’s Court of Justice is a typical institution of this type, as is the Commission, subject to certain reservations which will be discussed below. In contrast, intergovernmental institutions composed of Member States, such as the Council and the European Council, will be more attuned to the political dynamics of EU events, which will prevail over the legal aspect. The European Parliament is a challenging institution to categorise, but it is generally considered to be supranational in nature, which would suggest a greater degree of parity with the Member States. However, the political nature and composition of this institution suggests otherwise.

Secondly, it could be assumed that an unequal treatment would be applied in relation to the new Member States. The possibility is twofold. Firstly, the EU institutions will be more lenient towards these states, within the framework of a legally undefined, yet potentially existing, period of protection. Secondly, after this period (alternatively and contrary to the first premise, from the very beginning of their membership), the assessment will be more stringent, because while the old Member States have already proved themselves and proven to be problem-free, this is not the case for the new Member States and therefore more careful supervision is needed. This could be a reason for greater caution and perhaps even rigour on the part of the EU institutions.

Thirdly, in the spirit of *quod licet Iovi, non licet bovi*, it can be posited that the EU institutions may approach large states differently. However, the challenge lies in defining what constitutes a ‘large’ state. A potential criterion might be geographical size, but a more robust measure would be an economically developed state or a populous state, along with its political influence. Typical examples of such states include Germany and France, which are economically significant, populous states that have traditionally played a leading role in European integration.

Fourthly and finally, it is reasonable to assume that the current political representation of the Member States will have an impact on equal treatment. The European Parliament has already been mentioned as an institution potentially vulnerable to such tensions arising between an EU institution and a Member State due to differences in political opinion. However, it can also be assumed that the Commission

5 Art. 105b VAT Directive.

will be a similarly exposed institution. The problem on the part of this institution is that it has been politicised by the Lisbon Treaty, which increases the risk of unequal treatment of Member States considerably.

2. European Parliament and Equality Between Member States

In this text, I will follow the systematics of primary law. The European Parliament is the first of the EU institutions to consider. This institution is indeed unique. It is an organ of an international organisation, yet it is directly elected by the people; it is not professional in nature, in the sense that even a layman can be its member if elected; in addition to that, the members of this organ of an international organisation do not represent their Member States or are not subject to national governments. This institution thus combines an element of a supranational nature with a political element.

The European Parliament's capacity to treat Member States unequally is very limited. Indeed, I believe that this institution does not possess the necessary prerequisites for this. It does not have the powers that would allow it to treat EU Member States differently at all. After all, the original and dominant role of this body in the system of the three Community institutions was to supervise the Commission, not the Member States.

Should any arbitrary, i.e. unjustified, differences between Member States in the area of legislation arise attributable to Parliament, these can be eliminated by the Commission and the Council, with whom Parliament participates in the legislative process. Therefore, such differences are highly improbable. The power of inquiry under Art. 226 TFEU is also limited, as Parliament does not have the means to directly enforce any findings against Member States. Indeed, the current practice does not suggest the existence of any problem in this area.

Parliament's action *vis-à-vis* the Member States, in the context of which it could perhaps be argued that there is some bias and partiality, is therefore limited to non-legally binding resolutions.⁶ However, these resolutions require either the voluntary submission of the offending Member State concerned or action by another EU body with the necessary powers. From a legal standpoint, the Parliament has been established in a way that ensures there is no risk of inequality between Member States. From a political point of view, however, certain risks exist. The level of risk will increase in proportion to the extent of discrepancy between the current political representation of Parliament and that of the Member State in question. However, this is an unavoidable circumstance. A rational approach by Parliament would be

6 For example, see European Parliament resolution of 18 January 2024 on the situation in Hungary and frozen EU funds (2024/2512(RSP), see: European Parliament, 2024.

to exercise this mechanism in a moderate manner, adopting a restrictive approach. An excessive use of this mechanism could result in Parliament's voice being disregarded by the state concerned without any legal consequences.

Parliament has the potential to treat Member States differently in the future, more so than any other EU institution. Therefore, the possible extension of this institution's powers in future revisions of the founding treaties must be closely monitored and carefully considered. The reason for my concerns is that Parliament is a purely political body whose political composition may not correspond to the representation of the parties in national parliaments. This could result in a divergence of political perspectives between the political representatives of Member States and the national coalitions within their respective national parliaments and governments. Furthermore, the European Parliament, by its very nature, is not a body composed of experts, as was the original technocratic Commission. This means that Members of the European Parliament (MEPs) inherently lack the necessary expertise to act in a supranational capacity (and purely within its limits) and therefore maintain a neutral stance towards Member States. This dynamic does not appear to support the concept of equal treatment with the Member States. For these reasons, I find any further extension of Parliament's powers extremely problematic. However, I acknowledge the argument regarding the EU's democratic deficit.

3. European Council and Council of the EU and Equality Between Member States

The second body in the order of regulation in primary law is the European Council. The only area where this body can realistically and with legal consequences treat Member States unequally is in the procedure laid down in Art. 7 TEU. However, the requirement of a unanimous vote of the European Council to determine that there has been a serious and persistent breach by a Member State of the values set out in Art. 2 SEE virtually eliminates any real risk of unequal treatment. In summary, the European Council does not possess the necessary powers to result in the unequal treatment of Member States.

The situation is becoming more complex with the Council, an intergovernmental body representing Member States with extensive legislative and executive powers. It has the capacity to treat Member States differently, though I believe this is not feasible in the context of protecting the values outlined in Art. 2 TEU, specifically in the proceedings under Art. 7 TEU. The Council's authority to make decisions is contingent on the European Council. It is highly improbable that the necessary number of votes will be achieved in the European Council, which means it is also unlikely that the Council will ever have the opportunity to treat Member States differently in this particular area.

However, the situation becomes particularly intriguing in terms of the Council's authority over the fiscal discipline of Member States. While the Commission oversees compliance with the pertinent regulations, it possesses the right of initiative but lacks decision-making authority in the excessive deficit procedure. The Council is the body authorised to take decisions in the excessive deficit procedure under Art. 126 TFEU, as it is a political, not a judicial, mechanism for enforcing fiscal discipline. Art. 126(8), (9) and (11) TFEU use the term 'may', which implies that it is solely and exclusively at the discretion of the Council how to proceed and whether to enforce fiscal discipline at all. Consequently, if the Commission proposes a restrictive decision and the Council does not adopt it, the Commission's action for annulment is not admissible.⁷ The Council therefore has a significant degree of discretion and is able to pursue its own objectives. After all, it is comprised of representatives of national governments, and it is they who are responsible for public budgets within their respective countries. And historical experience shows that the Council has no problem in exercising this discretion, an example of which will be discussed below.

It is accurate to state that the regulations governing the excessive deficit procedure have been tightened by secondary legislation during the course of their development. Consequently, some decision-making processes have become automated.⁸ This has reduced the Council's margin of discretion, but the non-judicial nature of the procedure remains. In reality, the political nature of the procedure is not, in my view, a matter of concern. On the contrary, it is rational, as it allows national governments to take account of the political situation on the domestic scene.⁹ The lack of funds in the public budget, the resulting mechanical budget cuts and their negative effects on society can have the potential to destabilise the Member State concerned, radicalise society and threaten EU membership, and this is a risk that must be taken into account. The political nature of this procedure allows for this. From the EU's point of view, its interests and its existence, it is much better to deal with potential problems by means of national law. The Fiscal Compact provides a framework for this by enshrining a debt brake requirement, ideally in national constitutional law, but this is addressed in a subsequent chapter of this monograph.

It is evident that there are rational reasons for not applying the otherwise established maxim *nemo iudex in causa sua* in the narrow segment of EU law enforcement. However, this fact entails the risk of overusing or even abusing the wide discretionary powers available to the Council. The fact that the Member States are not entirely equal, and that some are more equal than others, was demonstrated more than twenty years ago precisely in the Council's deliberations. For instance, the Council meeting (economic and financial affairs) of 25 November 2003 decided against

7 Petr, 2022, pp. 504–505.

8 For an overview of these instruments, see Petr, 2022, p. 505.

9 Indeed, Brexit is often cited as an example of the consequences of the European sovereign debt crisis, where the EU came to be perceived by a part of the political spectrum as a 'sinking ship'. See Liberto, 2024.

adopting formal measures contained in the Commission's recommendations in the event of excessive spending by Germany and France.¹⁰ The practical consequence of this failure of the Council to act was that the rules were not enforced against two countries, in fact only because they were Germany and France.¹¹ Any other Member State would then have been punished for such a breach of the rules laid out in the stability and growth pact. The paradoxical thing is that, *de facto*, the unequal treatment is being perpetrated by the Member States themselves and not by the EU. Formally and legally speaking, however, this behaviour is clearly attributable to the European Union. Indeed, the decision not to enforce the rules of budgetary responsibility unanimously agreed upon by the Member States was taken by an EU body, albeit an intergovernmental one.

This situation gives rise to yet unresolved legal question concerning voting in the Council (and, by analogy, in the European Council). If the Council decides on the misconduct of a Member State, that State is excluded from voting. This applies both to the enforcement of fiscal discipline rules and to the enforcement of the values enshrined in Art. 2 TEU. In the former case, Art. 126(13) TFEU provides that:

When the Council adopts the measures referred to in Paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.

In the latter case, the provision in Art. 354 TFEU applies, according to which:

For the purposes of Art. 7 of the Treaty on European Union on the suspension of certain rights resulting from Union membership, the member of the European Council or of the Council representing the Member State in question shall not take part in the vote and the Member State in question shall not be counted in the calculation of the one third or four fifths of Member States referred to in Paragraphs 1 and 2 of that Art..

Both solutions presuppose that only one State is guilty in principle, while the rest of the rules are firstly respected and secondly have the will to enforce against the guilty State. Their weakness is therefore the case where the offending state in question is able to win over allies to its side. In the event of a decision by the European Council in the procedure provided for in Art. 7(2), which allows to determine the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2 TEU, even a single such ally among Member States is sufficient. It then renders these procedures, in particular the one under Art. 7(2) TEU, completely inapplicable if it is activated against more than one backsliding Member State at the same time.

¹⁰ C-27/04, paras. 9–13.

¹¹ For more information see e.g. Tran, 2003.

Kochenov proposes a solution to this problem, arguing that Art. 354 TFEU can and should be interpreted differently. He states that

Although Art. 354 TFEU refers to the concrete Member States, which is to be excluded from voting in such cases, the wording clearly implies that in the cases where several Member States are suspected of failing to adhere to EU values all such Member States should not be given a chance to derail the application of Art. 7 TEU.¹²

This conclusion would also apply, according to this logic, to the procedure under Art. 126(12) TFEU. Kochenov justifies this conclusion by the principle of *effet utile*,¹³ and he is right in saying that an opposing interpretation could indeed undermine the *effet utile* of Art. 7 TEU.

However, it is my professional opinion that the aforementioned argumentation on the principle of *effet utile* would constitute a maximalist application of that principle, coupled with a breach of the procedural rules. While the Court of Justice has occasionally applied this principle very widely in the past, it has never done so at the cost of violating the law. However, in my judgment, such a breach would have occurred. Indeed, Kochenov's proposed procedure violates procedural rules. Proceedings under Art. 7(2) TEU (and Art. 126(12) TFEU) are always brought against one particular State, and are therefore not collective proceedings. The provisions in the founding treaties therefore provide for the exclusion of backsliding by a State precisely because of that one particular proceeding. The solution proposed by Kochenov can only be considered as legally permissible in one single case – if several Member States were to violate the values contained in Art. 2 TEU by acting jointly and in solidarity. In the case of the enforcement of fiscal discipline rules, such a situation cannot realistically arise.¹⁴ It should be noted that Kochenov's solution is considered rather radical in the literature, or rejected on grounds of non-legality.¹⁵

4. The European Commission and Equality Between Member States

The European Commission is the next institution in the order of regulation in primary law. Regarding the Commission, in principle there should be no difference of treatment between Member States without a proper objective reason. Indeed, this

¹² Kochenov, 2019, p. 2081.

¹³ Ibid.

¹⁴ Šmejkal, 2022, p. 1170.

¹⁵ Dismissal is based on trust theory. Kartalova, 2024, pp. 128–151.

institution was set up in its form to allow matters to be dealt with in a way that will potentially have a disparate impact on the Member States, as it will be justified by the objective pursued jointly by the Community. From my perspective, the fundamental role of the Commission is to ensure the equal treatment of Member States before the founding treaties, rather than to promote equality between them.

It is therefore perhaps a little paradoxical that there is, after all, a certain inequality between Member States in the Commission that is unjustified from the point of view of the Treaties. However, this is an area that falls outside the scope of this research. Indeed, it is evident that large states are more likely to occupy a more influential portfolio. A citizen of small Luxembourg, on the other hand, has historically been more likely to become President of the European Commission.¹⁶

The European Commission should hence be a neutral professional (technocratic) apparatus in the EU's institutional structure, which by its very nature cannot discriminate against some Member States against others. This nature is literally in the European Commission's genes. Indeed, even the High Authority as the predecessor to the European Commission was, according to the Schuman Declaration, supposed to have a clearly defined objective; a nature independent of the Member States; and a supranational status that should enable it to take decisions binding on the Member States. All this was to achieve the purpose of the existence of the European Communities. These imperatives were subsequently transposed into the High Authority's legislation, and with modifications into that of the Commission in the founding Treaties as well.

The original configuration of the Commission, which I consider to be optimal in terms of the objective pursued, has been modified by the recent amendments to the primary law made by the Lisbon Treaty. I consider these changes to be detrimental, as they distance the Commission from the original ideal. In particular, I find the requirement under Art. 17(7) TEU that the European Council propose a candidate 'taking into account the elections to the European Parliament' (the *Spitzenkandidat* process) problematic. While the intention behind this requirement is praiseworthy, as it is intended to address the so-called democratic deficit, it does represent a significant shift in the Commission's role, moving it from a professional and neutral entity to a rather political body. The risks of creating tensions and differences of opinion on fundamental, and above all initial, questions of the political nature of the EU's direction between the representation represented in the Commission and in the Member States are obvious.

Any potential unequal treatment of Member States by the European Commission is likely to manifest itself in the area of EU law enforcement mechanisms. This applies to all stages, from the receipt of a complaint, or the assessment of whether the Commission will initiate a complaint against a Member State on its own initiative,

16 Luxembourg has so far had three Presidents of the European Commission, large countries such as France, Germany and Italy have had two each, and the United Kingdom and Spain have had only one. The remaining states are still waiting.

through its own administrative procedure, to the decision whether to bring an action before the CJEU or to enforce, by means of fines, an earlier decision of this Court if a Member State has not complied and remedied the problem. I will start from the end with the least problematic one. The Commission's proposals for the level of penalties outlined in Art. 260 TFEU proceedings are objectively defined, thereby pre-emptively eliminating the risk of arbitrary action and discrimination between Member States.¹⁷ However, I perceive the issue to lie elsewhere. The Commission possesses significant discretion in determining whether to address any complaint lodged by a Member State or an individual against another Member State. It also holds ample discretion in deciding whether to initiate infringement proceedings under Art. 258 TFEU. These actions align with the Commission's original mandate as an autonomous, non-political entity that is professional and therefore unbiased. However, a potential challenge arises from the absence of independent monitoring of the Commission's exercise of discretionary powers. Given the nature of the case, judicial review is not feasible as it would eliminate the Commission's discretion. Currently, there is no review process capable of determining whether the Commission is exercising its discretion in accordance with the rule of law. Some may argue that the Commission's discretion negates the need for reasons in its decisions. I respectfully disagree with this assertion. The discretion of the European Commission is not affected in any way by the fact that it explains why it has taken the decisions it has taken. Discretion and transparency are not contradictory; on the contrary, they are complementary within the rule of law.

It is important to emphasise that the Commission was clearly designated to exercise its discretion in determining whether or not to initiate an infringement procedure, consistent with the EU's institutional framework. Historically, the Commission has functioned as a non-political, neutral and professional entity, and I have no reservations about this approach. However, the current state of affairs, where the Commission has room for making political decisions that it does not have to justify and explain to anyone, and no longer has that neutral character (professionalism hopefully remains), is potentially problematic. It is the changes made by the Lisbon Treaty that unfortunately create the potential for problems in the future.

The Commission's publication of statistics only provides an overview of the aggregate figures. However, it does not offer insight into the rationale behind the Commission's decision to either address a particular case or to initiate proceedings before the Court of Justice. If I have defined the importance of the rule of law for the EU in the introduction, then the Commission fails in its ability to control those aspects of the rule of law that concern legal certainty and the prohibition of the arbitrary exercise of executive power. Greater transparency would in any case be appropriate here. Indeed, the published figures say more about the Commission's overall workload and its development over time than about how well it handles individual cases and whether it is actually handling them according to objective professional

17 Communication from the Commission – Implementation of Art. 260(3) of the Treaty. 2011/C 12/01.

considerations and not its own particular political interests. The only truly objective data with a telling value (for Member States) is information on the number of late transposition infringements.

The academic literature and the European Parliament Committee on Petitions have both noted that the Commission's enforcement activity is evolving in a rather negative direction.¹⁸ Infringement procedures are being used less and less, and are now a strategic tool for enforcing EU law rather than a tool for day-to-day use.¹⁹ Particularly striking was the apparent relative decline in the number of proceedings initiated in the period following the EU's major enlargement in 2004.²⁰ This could be explained with the help of the newly introduced EU Pilot and Solvit mechanisms. However, their influence and impact has been limited and therefore does not explain this decline in its entirety. Kelemen and Pavone 'argue that the Commission dramatically decreased its use of infringements through what Holland calls a politics of 'forbearance' – the deliberate and revocable under-enforcement of the law'. They see the reason for this in the fact that the institution has become too politicised.²¹ Parliament's report also comes to the same conclusion.²² Enforcement of the law is not, as a rule, associated with an increase in popularity. However, a politically oriented body must strive to achieve this. Investigative journalists Hansens, Schumann and Peigné have also pointed out that the Commission is failing in its role as a body that enforces EU law. They quote the French Professor Alemanno in this connection, who very strongly expresses that 'The rule of law is not the same for all'. Alberto Alemanno is a European law professor at the HEC business school in Paris. In many cases 'nothing happens' but in others 'the Commission takes action in just a few months, such as in Hungarian or Polish cases', Alemanno says.²³

From a formal legal perspective, the Commission is not in violation of the founding treaties, as it is within its discretion to do so. However, according to the rule of law, prioritising certain proceedings or even Member States is problematic and constitutes a violation of this important principle. I believe that the solution lies in the Commission returning to the original position it had within the European Communities. Conversely, the risk lies in the Commission's further strengthening of its political character. This shift is evident even in non-legal aspects, as evidenced by the European Commission President's request to propose a male and a female candidate for the role of Commissioner. This is a well-intentioned move, women really shouldn't be underrepresented, but unfortunately it further politicises the Commission as it weakens the influence of Member States, and reduces the Commission's ability to

18 Cuyvers et al., 2022, p. 73.

19 Kelemen and Pavone state that 'Between 2004 and 2018, infringements opened by the Commission dropped by 67%, and infringements referred to the CJEU dropped by 87%'. See Kelemen and Pavone, 2022, p. 2.

20 Koops, 2014, p. 98.

21 Kelemen and Pavone, 2022, p. 2.

22 Cuyvers et al., 2022, p. 83.

23 Hansens, Schumann and Peigné, 2024.

function as an autonomous body of experts- technocrats selected by Member States. I believe that the Commission is now ceasing to fulfil its role as guardian of the founding treaties and, in this context, as executor of the will of the Member States (as interpreted by the CJEU). It is instead becoming a primarily policy-making body and is therefore dependent on politics. This, however, creates systemic risks that the structure of the EU institutions does not foresee and which may logically lead to unequal treatment of Member States before the founding treaties. Given the supranational nature of the EU, Member States then only have very limited tools to defend themselves effectively. As a lawyer, what concerns me about this is that this transition from a technocratic supranational body to a political body of a federal nature is taking place partly extra-legally and, above all, without the necessary systemic changes to the founding treaties having been approved by all the Member States.

It is simple to accuse the Commission of promoting its own political objectives by introducing inequalities between Member States within the European Union. While its activities are clearly visible across the EU, there are other factors that, although important, are not so obvious. Thus, it is important to consider whether the Commission is at fault, or whether it is actually the fault of Member States that support or pursue this approach. These Member States can do so because it suits them and allows them to achieve their own political interests (with the intended impact on their national political landscape), and because EU law, particularly the founding treaties, does not directly prevent them from doing so. The discrepancy in approach towards Member States can be illustrated by various cases, notably Austria (the FPÖ victory in the 2000 elections) and Poland (the PiS's reform of the justice system).²⁴ The common denominator in both cases is that, within the EU, it is generally considered inconsequential if a Member State's government exhibits a significant left-leaning orientation (as communist or successor parties are not prohibited). However, a far-right orientation is typically viewed with greater concern. This text is a legal analysis, not a political commentary, and thus, we will focus exclusively on the legal aspects. Nevertheless, the need to protect the human rights is a common argument to support action against far right parties.²⁵ As Merlingen, Mudde and Sedelmeier point out, the real motives are different as:

the self-interest of politicians played an important role in the decision to boycott Austria. This evidence helps us to understand why in particular the French and Belgian governments pushed hard for sanctions. Politicians in these countries saw

24 Another example of a more closely watched country is Italy – see the reaction of EU and European leaders to the victory of Giorgia Meloni and the Brothers of Italy in the 2022 elections, or the controversial cancellation of the elections in Romania after the surprising first round victory of the problematic Călin Georgescu. What I am concerned about is where the space for democracy ends – because in each of these cases the parties in question had a strong mandate from the electorate; and where the need for protection begins. And how to prevent abuse in a situation where the balance of power turns and the existing, now established, procedure is used as a precedent.

25 Nevertheless, the same argument may also be raised against far-left parties.

them also as a weapon against their home-grown extreme right parties which threatened their own hold on power.²⁶

The legal difference between the two cases of Austria and Poland is that while in the case of Austria EU law did not have mechanisms to enforce legal values, in the case of Poland these mechanisms were already available. As a result, diplomatic sanctions against Austria, which meant interfering in the internal affairs of one Member State, were therefore adopted against this state by the other Member States – which had left-wing governments. This procedure was, however, unreasonable because, as it later turned out, the report of the three wise men clearly declared that the action of the 14 Member States of the EU towards Austria was inappropriate.²⁷ Austria adhered to European values and the standards of treatment of immigrants were higher than in many other Member States. The report therefore called for the measures taken to be revoked.²⁸

In the case of Poland, whose judicial reform has proven problematic in many respects, remedial measures have been taken, primarily following pressure from EU institutions, particularly the Commission. What I see as problematic is the fact that the EU's rhetoric towards Poland changed right after the elections, which were unsuccessful for the PIS. Yet, the repair of the damage caused by the reformation carried out by the PIS has the potential to cause similar damage to the functioning of the rule of law in Poland. It therefore deserves no less attention from the EU institutions, which, unlike before, it does not seem to be receiving. Thus, to conclude this part the question posed by Calingaert in 2000 'to put it another way, given that 11 of the 15 EU countries currently have centre-left governments, would the same action have been taken against Austria if the majority had been from the centre-right?'²⁹ therefore remains valid. It has just been extended to include not only the Member States but also the Commission. The legal changes made by the Lisbon Treaty to promote the protection of the important values enshrined in Art. 2 TEU in the Member States have therefore not changed the nature of the problem, but have only brought the EU institutions into the national political game. Legally speaking, Member States are equal, but politically they are not. It is unfortunate that the law is used for justifying this inequality.

26 Merlingen, Mudde and Sedelmeier, 2001, p. 74.

27 Citace three wise man.

28 Ahtisaari, Frowein and Oreja, 2001, pp. 119 and 120.

29 Calingaert, 2000.

5. The EU Court of Justice and Equality Between Member States

The CJEU is an institution that treats all Member States equally and without discrimination and there is no doubt about that. It is tasked with ensuring equality between Member States and this is at the core of its operations. Lenaerts has identified three direct implications of the principle of ‘equality of the Member States before the Treaties’. Firstly, it ensures a uniform interpretation and application of the law. Secondly, it guarantees such interpretation by a single supreme court. Thirdly, it establishes the primacy of EU law. Lenaerts also highlights the pivotal role of the German delegation in shaping the future of this court from its inception in the creation of the Community. He cites Rasmussen’s remarks on the role of the Court of Justice, stating that when discussing the future of ECSC,

[the] head of [the German] delegation, Hallstein, supported by the delegate from the Foreign Ministry, *Ophüls*, wanted to create a Federal Court similar to the new German *Bundesverfassungsgericht* that would ensure the development of a European *Rechtsstaat*. Over time they believe a Federal Court would create a European consciousness and thus play a role similar to that of the American Supreme Court. Therefore, the German delegation insisted on the need to develop a uniform jurisprudence with the Court holding exclusive rights to interpret the Treaty.³⁰

The CJEU has always prioritised the interests of the EU as a whole, and the interpretative argument of ‘ever closer union between the peoples of Europe’ is clearly evident in its decision-making. This can be seen as an expression of the legislator’s intention, or more abstractly as one of the arguments within the framework of teleological interpretation (*argumentum ad Unionis Europaeae*).³¹ The use of this argument implies that the Member States are completely equal among themselves in their subordination to EU law. At the same time, the CJEU often interprets EU law creatively and extensively, thus paradoxically fulfilling Monnet’s expectation that the CJEU will play the role of ‘*gouvernement des juges*’ in the EU. However, Monnet feared the CJEU would compete with the Commission in its functions.³² Nevertheless, it is evident that this is not the case. In fact, the CJEU has proven to be a valuable complement to the Commission, primarily exercising its creative interpretation within the domain of primary law (and thus did not compete with the Commission, but more with the Member States as masters of the Treaties that are nevertheless not able

30 Lenaerts, 2020 and also the work cited by him, Rasmussen, 2008, pp. 77–98.

31 Sehnálek, 2019, p. 10.

32 Rasmussen, 2008, p. 83. I would like to thank and give credit to Lenaerts for directing me in his work to this great article.

to interpret their own will), whereas the Commission exercised its powers primarily through secondary law and in the context of its executive powers.

I believe that the CJEU's role as the EU's 'constitutional court' is key to preventing the unequal treatment of Member States. The CJEU's sole policy is to enforce EU law, and it is not politically accountable to anyone. The opinions of the judges and the way they rule can only be speculated upon, and the system is set up to protect them from Member States and other EU institutions. The CJEU is not in a position to influence the law by picking and choosing the cases it hears, and even the way judges are selected prevents direct political pressure on its composition. In this respect, I consider the system of appointments to the CJEU to be better than the purely federal and republican system by nature applied in the case of the US Supreme Court. Furthermore, I have never seen a case where the CJEU Court of Justice could be suspected of applying EU law differently for different Member States.

The principle of equal treatment of Member States applies uniformly also to all new Member States, as stipulated by the CJEU. These states are bound by all aspects of EU law with neither exception nor the implementation of unwritten transitional regimes. In this regard, the Court of Justice aligns its approach with that of the Commission, as it is contingent upon the Commission initiating legal action. For instance, in the Central European region, the Commission initiated first infringement proceedings against the Czech Republic, Poland and Slovakia in 2006, and against Hungary in 2007. This timeframe for bringing an infringement action is consistent with the standard time between accession and the initiation of court proceedings, allowing for the settlement of all previous administrative proceedings. Notably, all these proceedings were settled lawfully and in due time. The fact that the new Member States also have to comply with EU law without distinction or exception has already been clarified in earlier case-law and confirmed by new case-law relating to the states in our region. As Kopa Bončková and Týč have stated:

It follows from the principle of equality in the context of EU enlargement that, although the Acts of Accession may temporarily provide for different treatment and exceptions for newly acceding States, according to the CJEU it would be contrary to the principle of equality of Member States before EU law if such inequalities were allowed to continue indefinitely (231/78 *Commission v. United Kingdom*, para. 17; C-273/04 *Poland v. Council*, para. 87).³³

³³ Kopa Bončková and Týč, 2022, p. 1212.

6. Conclusion

The EU institutions are based on the intergovernmental and supranational principle, but this division does not provide a clear answer to the first hypothesis. In fact, it is not evident that this has a direct bearing on whether the EU institutions in question treat the Member States equally. What seems to matter more is whether the body in question is politicised and, consequently, what powers it has. From this perspective, the European Parliament is not a real problem. While it is indeed a political body, its limited powers *vis-à-vis* the Member States leave it with virtually no room to treat them differently (with legal consequences). The CJEU is also not a problem, as it is a typically independent and impartial judicial body that is effectively removed from all politics.

In the case of the Council, there is evidence of past cases of unequal treatment of Member States. However, this was part of the plan, which is why the relevant competences were conferred to this body. Unfortunately, these competences have not been used appropriately, in a way that would be in line with EU law. Indeed, the Council has favoured large Member States (Germany and France) without an objective reason, while it would not have done so to others. This lends weight to the third hypothesis, i.e. that Member States are not equally represented in the EU, with some being ‘more equal’. In other words, while from a legal perspective the answer is ‘equality is assured’, from a political perspective this is not the case and inequalities do exist. What is more, the EU legal framework directly permits this.

The Commission, as the guardian of the Treaties, should by nature treat Member States in a non-discriminatory way. However, as this body becomes more politicised over the years, this assumption is no longer valid. The changes to primary law risk the body moving from being neutral and technocratic to being a political decision-making body. While well-intentioned, these changes pose a risk to the EU’s internal functioning, a risk that will only intensify as the trend towards further strengthening these changes continues.

In contrast, the EU has been consistent in its approach to new Member States. I haven’t noticed anything to suggest that these states have either a privileged or disadvantaged position in the EU *vis-à-vis* the EU institutions. A similar conclusion does not hold for hypothesis four. History shows that the EU exhibits a high sensitivity to far-right parties, while the far left is not perceived as being problematic. This is probably a consequence of historical experience, which is, after all, diverse in the case of old and new Member States. However, both extremes can be associated with serious risks to the functioning of the EU. It is therefore a positive development that a mechanism has been introduced into primary law in Art. 7 TEU, which allows other Member States to react appropriately and lawfully.

However, as this chapter has shown, this kind of sensitivity may also be a result of purely internal political developments in the Member States. Ideally, it would help if EU values were promoted to some extent by the Commission. And this is clearly the direction the reforms in the EU are taking. But the crux of the problem is that

these rational and logical changes are being accompanied by other changes that are no longer positive. In fact, the Commission's greater attachment to the Parliament and its politicisation transfer the essence of the problem from the Member States to the European Union. For the Commission to be able to enforce EU law independently and impartially, it must itself be an independent and neutral body. Limiting its technocratic nature is, from this perspective, a grave mistake. Future changes to primary law concerning the relationship between the Commission and Parliament and the powers of both institutions should therefore be very carefully monitored and considered.

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PART III

THE LIMITS OF
UNIFORMITY – UNITY IN
DIVERSITY

EQUALITY THROUGH DIFFERENTIATION: OPT-OUTS AND ENHANCED COOPERATION AS EXPRESSIONS OF SOVEREIGNTY



MICHAEL SIMAN

Abstract

This chapter addresses the equality of Member States in the context of the EU's internal framework, focusing on legal and factual changes in the founding Treaties, exemptions to primary law, enhanced cooperation, and the potential for suspension of cooperation and termination of membership.

The EU's founding treaties establish a framework of equality among its Member States, while allowing for flexibility through exemptions and special arrangements in primary law. This principle of equality is balanced by provisions that accommodate the unique circumstances of Member States, such as accession exceptions and opt-out clauses for states that are unwilling to participate in certain policies. Conversely, opt-in clauses enable selective participation in policies of interest; enhanced cooperation mechanisms provide a legal basis for subsets of Member States to advance integration in specific areas without obligating all members. Cooperation within the EU may be suspended when a Member State violates the EU's principles or obligations, or disrupts its functioning; such actions can trigger infringement proceedings, conditional funding measures, or the Art. 7 Treaty on European Union (TEU) procedure. Provisions for membership termination, as outlined in Art. 50 of the TEU, raise questions regarding the potential application of the *rebus sic stantibus* clause.

Keywords: EU founding treaties, equality of Member States, exemptions to primary law, accession exceptions, opt-out clause, opt-in, enhanced cooperation, membership termination, *rebus sic stantibus* clause

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1. Introduction

The equality of Member States is one of the most enduring and fundamental principles of the EU, deeply embedded in its founding treaties and repeatedly affirmed in its political discourse and institutional practice. Since the earliest days of European integration, equality has been understood not merely as a formal rule of representation or voting, but as a normative commitment ensuring that all Member States – regardless of size, population, or economic strength – participate on an equal footing in the governance of the EU. This principle has been both a source of legitimacy and safeguard against domination by larger states or supranational bodies.

However, the historical development of the EU has shown that the application of equality is neither absolute nor static. The EU's growth in membership, competence, and policy scope has introduced new tensions between formal legal commitments to equality and practical needs of effective decision-making in a heterogeneous political community. From the foundational legal and institutional reforms of the Rome Treaties through to the Single European Act (SEA), Maastricht, Amsterdam, Nice, and Lisbon treaties, each stage of treaty revision has required a recalibration of the relationship between equality, sovereignty, and integration.

The objective of this chapter is to analyse, from the perspective of EU primary law, the various ways in which the principle of equality is maintained, adjusted, or challenged in the EU's internal dimension. Specifically, it aims to (a) examine the legal and factual changes to the founding treaties and assess how these developments have influenced the principle of equality between Member States, (b) identify and evaluate the role of exemptions to primary law – both permanent and temporary – with particular attention to accession exceptions, territorial derogations, and opt-out clauses, (c) assess the operation of enhanced cooperation as a form of differentiated integration that allows willing Member States to deepen cooperation without binding all members, and its implications for equality, (d) analyse mechanisms for suspension of cooperation (infringement proceedings, conditional funding measures, and the Art. 7 TEU procedure) and their potential to impact equal treatment among Member States and (e) consider the legal framework for membership termination, including Art. 50 TEU and the potential application of the *rebus sic stantibus* doctrine under international law, as a safeguard of sovereign equality.

Following this structure, the chapter situates the principle of equality in the broader constitutional framework of the EU, exploring both its normative significance and pragmatic adaptations. It argues that while differentiated integration mechanisms and exceptions may at times appear to undermine equality, they can also serve as instruments for preserving unity in diversity, allowing integration to proceed without coercion and accommodating legitimate differences among Member States. The analysis thus seeks to clarify the conditions under which equality is upheld or compromised, and to offer reflections on how it can be preserved in the face of evolving challenges.

2. Legal and Factual Changes of Founding Treaties

Since its creation, the EU has undergone significant legal and factual changes, with each reform reflecting its evolving nature. These changes, embedded in the founding treaties, have shaped the legal framework, governance structures, and operational mechanisms of the EU, while testing the principle of equality among its Member States.

The EU's journey began with the Treaty of Paris in 1951, which established the European Coal and Steel Community (ECSC). This was followed by various treaty amendments, culminating in the 2007 Lisbon Treaty. These treaties introduced key legal reforms, facilitating the EU's expansion, integration, and cooperation. The reforms addressed issues such as the creation of a single market, introduction of a common currency, and establishment of new governance mechanisms to ensure effective decision-making.

This section also examines how these changes have reinforced the equality of Member States, striking a balance between deeper integration and respect for national sovereignty.

2.1. The Establishment of the European Coal and Steel Community

On April 18, 1951, the Treaty establishing the ECSC was signed; after rapid ratification, it came into force on July 23, 1952. As the only founding treaty, it was concluded with a limited duration of 50 years. The negotiating states (France, Germany, Italy, Belgium, Luxembourg, and the Netherlands) had to accept its supranational character. Through this treaty, Member States transferred part of their competences in the coal and steel sectors to the ECSC. The Community was recognised as a legal entity, and in international relations, had the capacity to exercise rights and undertake legal acts necessary for fulfilling its functions and achieving its objectives.¹ The goal of the Treaty establishing the ECSC was to create a common market for coal and steel to ensure the most rational division of production and highest level of productivity in these sectors.

The ECSC was represented by its institutions,² each with precisely defined competences. The High Authority (*Haute Autorité*) was entirely independent from the time of its appointment, and was composed of individuals who were selected based on their personal capabilities, ensuring complete independence.³ Its members were not representatives of any state and were prohibited from following instructions or advice from state authorities or from providing them with information. Instead, they

1 In each Member State, the Community had the broadest capacity for rights and legal acts that their law granted to domestic legal entities; it could, in particular, acquire and dispose of movable and immovable property and act before the court.

2 Art. 6 of the ECSC Treaty.

3 Art. 9, para. 1 of the ECSC Treaty.

were obligated to perform their functions solely in the general interest of the ECSC. Each Member State pledged to respect this principle and to refrain from influencing members of the High Authority in performing their duties. Concerns that the High Authority may fall under the influence of the two largest partners – France and Germany – and overlook the interests of smaller states led to the establishment of the Special Council of Ministers (*‘Conseil spécial de ministres’*). Another institution was the Assembly, composed of representatives of people from the states united in the Community, which exercised supervisory authority over the High Authority.⁴ However, these representatives were not elected through general and direct elections but were delegated by their respective parliaments from among their members.⁵ Members of the Assembly voted and acted freely, not forming groups based on nationality but instead aligning themselves within political clubs and parties (Christian democrats, socialists, liberals). The final institution was the Court of Justice, which ensured adherence to the law in the interpretation and application of the Treaty establishing the ECSC and the acts adopted for its implementation.⁶

2.2. The Establishment of the European Economic Community and the European Atomic Energy Community

After the establishment of the ECSC, European integration continued to deepen until the signing of the Treaty establishing the European Atomic Energy Community (EURATOM)⁷ and the Treaty establishing the European Economic Community (EEC)⁸ on March 25, 1957 in Rome. Both treaties came into force on January 1, 1958 for an indefinite period, and remain in effect to this day. Included in these two founding Rome Treaties was the Convention on Certain Institutions Common to the European Communities.⁹ According to the Convention, the Assembly created by the EEC Treaty and EURATOM Treaty was shared with the Assembly of the ECSC. Similarly, the Court of Justice of the ECSC also served as the Court of Justice for all three supranational Communities. Additionally, two new separate institutions were established: the Council and the Commission, specifically for the EEC and EURATOM. The Council and the Commission were assisted by the Economic and Social Committee in an advisory capacity.

The essence of the EEC and EURATOM was primarily the expansion of the common market. While the EURATOM market was strictly defined as a common market for nuclear and fissile materials, the EEC common market was incomparably broader, with no parallel market anywhere else in the world. The EEC common market included, in particular, the free movement of goods within the EEC (elimination

4 Art. 20 of the ECSC Treaty.

5 Art. 23 of the ECSC Treaty.

6 Art. 31 of the ECSC Treaty.

7 See: *La Convention relative à certaines institutions communes aux Communautés Européennes*.

8 Ibid.

9 Ibid.

of customs duties, import, and export restrictions); customs unions (adoption of a common customs tariff for goods originating from third countries); free movement of persons, services, and capital, including the right of establishment; common competition rules; harmonisation of tax regulations, and a common trade policy.¹⁰

The institutions of the Communities were explicitly authorized to adopt so-called Community legal acts with direct effect concerning Member States, as well as natural and legal persons. Under the EEC Treaty, the Council could, upon the proposal of the Commission, adopt regulations, directives to approximate national legislation or decisions.¹¹

2.3. Fulfilling the Economic Goals of the European Communities

The six founding Member States of the European Communities experienced economic expansion and were stimulated by the prospect of an ever-expanding common market. Businesses anticipated increases in production, investment, and productivity, while economic and financial disparities between Member States diminished, as all benefited from trade liberalisation. Public opinion also became significantly invested in European integration, and the idea of a European economic grouping grew in popularity. However, not every sector achieved the same level of success.

The customs union was successfully achieved by June 1, 1968. Progress in the Common Agricultural Policy was the most challenging, as this sector faced the greatest differences between Member States and regular vetoes from French President Charles de Gaulle until the establishment of the European Agricultural Guidance and Guarantee Fund. The free movement of workers was widely implemented starting in 1958, and was nearly complete by 1968. In contrast, liberalisation in the free movement of capital was only partial. The European Social Fund was created to increase employment opportunities and enhance the geographical and professional mobility of workers. Similarly, the Regional Development Fund was established as part of the Community's regional policy aimed at countering deepening disparities between regions. However, the EEC achieved significant success in external relations, becoming a major global trading power alongside the United States, Japan, and the United Kingdom.¹²

10 See: Chalmers and Tomkins, 2007, p. 8.

11 See also: Craig and De Búrca, 2008.

12 The six Member States also acted unanimously during negotiations within the framework of GATT, which enhanced the credibility of the EEC as a reliable partner. The EEC established privileged trade relations primarily with African countries through the Yaoundé Agreements of 1964. Association agreements with the prospect of future membership were signed with Greece in 1961, Turkey in 1963, Malta in 1970, and Cyprus in 1972. Without the possibility of future membership, association agreements were concluded with Tunisia and Morocco in 1969. Additionally, preferential agreements were signed with countries such as Spain, Israel, Yugoslavia, Brazil, and Argentina, among others.

2.4. The Fouchet Plan and Other Political Integration Proposals

French President Charles de Gaulle opposed the development of the supranational principle underpinning the functioning of European Communities, instead advocating for integration based on political cooperation between sovereign states. In 1959, he initiated preparatory negotiations to establish cooperation among the six Member States in foreign policy, proposing regular quarterly meetings of foreign ministers to address foreign policy matters. In 1961 and 1962, France presented the *Fouchet Plan*, which aimed to approve a common foreign policy, a common defence policy, and the development of cooperation in science and culture. It also proposed the creation of new (non-supranational) institutions: a Council, a Parliamentary Assembly, and a European Political Commission. The plan did not interfere with the legal framework of the existing founding treaties.

However, other states insisted on preserving the principle of supranationality, maintaining defence cooperation within NATO, and accepting the United Kingdom into the EEC. France's initiative for a political union ultimately collapsed during the Paris Conference on April 17, 1962.

2.5. Institutional Crisis, Luxembourg Compromise, and the Merger Treaty

Since 1959, efforts have been made to merge the High Authority of the ECSC, the EEC Commission, and the EURATOM Commission, as the Court of Justice and the Assembly were formally unified institutions for the Communities, and the Council of Ministers operated as a single body in practice. The Assembly¹³ demanded the creation of a 15-member Commission which it would be authorised to elect, and subsequently called for general and direct elections for its members. After complex negotiations, the Treaty Establishing a Single Council and Single Commission of the European Communities (commonly referred to as the Merger Treaty)¹⁴ was signed on April 8, 1965. This treaty established a single commission and council tasked with implementing the founding treaties for all three Communities.

However, French President Charles de Gaulle opposed the introduction of majority voting in the Council of Ministers, which was to be implemented for most decisions from January 1, 1966. The decisive conflict arose during the adoption of a common market for agricultural products, a measure de Gaulle had been advocating since October 1964. Before its adoption, changes were required in the financial arrangements and budgetary provisions of Arts. 201 and 203 of the Treaty establishing the EEC. On July 1, 1965, the French government declared that obligations regarding

13 On March 30, 1962, the Assembly decided to adopt the name 'European Parliament'.

14 OJ, p. 152, 13.7.1967. The Merger Treaty was later repealed by the Amsterdam Treaty of 1997. It is also worth noting that on October 23, 1963, the Council of Ministers approved the principle of merging the institutions with the prospect of merging all three Communities. However, this full merger never materialized.

the financial arrangements of the EEC had not been met. Consequently, it recalled its permanent ambassador to the European Communities to Paris, prohibited French officials from travelling to Brussels for working group meetings, and withdrew French ministers from the operations of the Communities, an approach known as the ‘empty-chair policy’. This impasse persisted until January 1966. To resolve the deadlock, the representatives of the Member States met in the Council from January 28–30, 1966, and agreed on a *modus vivendi* known as the Luxembourg Compromise.¹⁵ This compromise was based on the following principles: (a) in cases where decisions, under the treaties, could be adopted by majority voting on a proposal from the Commission, and where significant national interests of one or more states were at stake, Council members would endeavour, within a reasonable timeframe, to reach a solution acceptable to all members, respecting their interests and those of the Communities under Art. 2 of the ECSC Treaty; (b) the French government asserted that in matters of vital importance, negotiations must continue until unanimous agreement was reached; (c) despite the above, the six governments recognized differing views on what should happen if unanimity could not be achieved; (d) the six governments agreed that these differences of opinion should not hinder the normal resumption of the Community’s work.

The Luxembourg Compromise represented a significant *de facto* modification of the founding treaties. The institutional crisis it caused had a profound impact on European integration, leading to weakening of the Community. The planned transition to majority voting in areas specified in the treaties was effectively blocked. Furthermore, the compromise extended the principle of unanimity to secondary matters, resulting in increased rigidity in the Council’s decision-making processes.

2.6. The Factual Formation of the European Council and Budgetary Treaties

The revival of European integration was also aimed at by reforming the EEC budget, which involved introducing its own financial resources and providing the Assembly (European Parliament) with control over this budget. The Member States adopted the Treaty of April 22, 1970, which amended and supplemented certain budgetary provisions of the founding treaties of the European Communities and the Treaty establishing the Common Council and the Common Commission of the European Communities.¹⁶ This allowed the Assembly to control its own budget, with the Council being unable to amend it. Furthermore, the Treaty of July 22, 1975, amending certain financial provisions,¹⁷ introduced the so-called ‘rebate system’ for Member States facing an unacceptable economic situation.

15 Council Agreement of 29 January 1966 on majority votes within the Council (Luxembourg Compromise).

16 OJ L 2, 2.1.1971, p. 1. This treaty entered into force on January 1, 1971.

17 OJ L 359, 31.12.1977, p. 4. This treaty entered into force on June 1, 1977.

2.7. Factually Shaping the European Council

On December 1 and 2, 1969, a meeting was convened in The Hague with the French president, heads of government of other Member States, and foreign ministers. The President of the Commission participated on the second day of the conference. The foreign ministers were to meet at least twice a year, and a political committee was established which was to meet at least four times a year. Later, the new French president, V. G. d'Estaing, convened a meeting on October 14, 1973, at the Élysée Palace with the heads of government of the other EEC countries and the President of the Commission, managing to reach an agreement for regular meetings every three or four months to confront differing views. This was formally confirmed by the highest representatives in December 1974.

These so-called 'European Councils', which had no legal basis in the founding treaties, aimed to help political leaders gain a global approach to issues and carry out a synthesis of community matters related to political cooperation. The discussions did not cover all the issues still handled by the Council, but only urgent matters. The representatives reaffirmed their intention not to take over the competences of the community institutions, to refrain from unanimous voting in the Council of Ministers on all issues, and to return to the Luxembourg Compromise of 1965, which applied only in the case of protecting major national interests.

2.8. Direct Elections to the European Parliament

Twenty years after the creation of the Common Assembly, this institution was democratised through the introduction of universal and direct suffrage. The so-called Brussels Act of September 20, 1976 (an Act concerning the election of the representatives of the Assembly by direct universal suffrage)¹⁸ was adopted. Subsequently, the representatives of Member States meeting with regard to this Act set the date for the first European Parliament elections in mid-June 1978. From that point on, Members of the European Parliament were elected for five years; however, they could combine their national and European mandates. Member States could not agree on a unified electoral system, and each retained the right to decide its own rules.

¹⁸ OJ L 278, 8.10.1976, p. 5.

2.9. *The Single European Act*

The SEA,¹⁹ the first official revision of the founding treaties, was signed by the Member States in two stages: on February 17, 1986 (with nine out of twelve Member States in Luxembourg) and on February 28, 1986, in The Hague (Denmark, Greece, and Italy). This Act legally enshrined structural dualism: on one hand, the European Communities operated,²⁰ and on the other, European Political Cooperation (EPC) was outside the community framework (not incorporated into the founding treaties), aimed at formulating a common foreign policy for the European Communities. Because the EPC area was outside the community framework (based on the original founding treaties, the first pillar), it functioned under the traditional principles of international law (intergovernmental negotiations), meaning that the jurisdiction of the Court of Justice of the European Communities in this area was excluded. The main objective of the SEA was to create the necessary space for completing the internal market. The SEA also granted the EEC so-called monetary competence,²¹ a legal basis necessary for progress towards economic and monetary unions.

The SEA institutionalised and legally established the European Council, which had proven itself as a forum for bringing forward proposals and political cooperation, although the Act did not specify its competence or scope. A key change introduced by the SEA was the improvement of the decision-making process through the extension of qualified majority voting in the Council of Ministers, which limited the Luxembourg compromise. The SEA also partially strengthened the competences of the European Parliament²² by introducing a cooperative legislative procedure. Furthermore, the Commission's position was strengthened, allowing it to receive delegated executive competences from the Council (known as comitology).²³

19 OJ L 169, 29.6.1987. The term 'Act on the European Union' was not adopted, as Denmark and the UK rejected the idea of union, and the Benelux countries disagreed with this proposed name for the opposite reason: the treaty significantly fell short of what a union should represent. Therefore, the name of the treaty 'Single European Act' was not intended to be seen as a final goal, but rather as a means to achieve progress through the continued use of the community method and political cooperation.

20 Art. 1, para. 2 of the SEA also defined what the European Communities are, as until then, this term did not have an explicit legal definition: 'The European Communities shall be founded on the Treaties establishing the European Coal and Steel Community, the European Economic Community, the European Atomic Energy Community and on the subsequent Treaties and Acts modifying or supplementing them'.

21 Art. 20 of the SEA.

22 The SEA renamed the 'Assembly' to the 'European Parliament' in the founding treaties (see Art. 6, Paragraph 2 of the SEA), even though the members had already adopted this name themselves in 1962.

23 See: Craig and De Búrca, 2008, p. 12.

2.10. Treaty on the European Union (Maastricht Treaty)

The TEU was signed in Maastricht, the Netherlands, on February 7, 1992, and entered into force on November 1, 1993, following a complex ratification process. The structure of the EU itself was presented in the form of a Greek temple consisting of three pillars: the first, the most significant community pillar, represented the European Communities, while the remaining two pillars of the EU were no longer supranational but merely intergovernmental – the common foreign and security policy, and cooperation in justice and home affairs. As a result, there was also a distinction between the ways in which legal acts were adopted, their binding nature, and their effects on the first supranational pillar (community law), versus the acts adopted in the second and third intergovernmental pillars (union law).²⁴

However, no provision granted the EU legal personality so that it could act independently. The EU was declared to have a unified institutional framework from its inception: the European Parliament, Council, Commission, Court of Justice, and Court of Auditors. The TEU responded to the nearly twenty-year request of the European Parliament to introduce a co-decision procedure in the legislative process, which fully equalised the position of the European Parliament and the Council in the adoption of secondary acts, although only in the areas of the internal market, research, environment, consumer protection, education, culture, and healthcare. The TEU also established the principles of subsidiarity and proportionality, as well as EU citizenship. Furthermore, the TEU introduced a three-stage process for creating a monetary union.

2.11. Amsterdam Treaty

The Maastricht Treaty of 1992²⁵ assumed that necessary changes to the founding treaties would be adopted later. The Amsterdam Treaty was signed on October 2, 1997, and entered into force on May 1, 1999. The Amsterdam Treaty partially ‘communitarised’ the third pillar, specifically visa, asylum, immigration policies, and other policies related to the free movement of persons, as well as judicial cooperation in civil matters. The third pillar was reduced to police and judicial cooperation in criminal matters. A significant change was the incorporation of the Schengen acquis into the EU framework.²⁶ Within the second pillar, the responsibility of the European Council was expanded to include defence matters. The Amsterdam Treaty also clarified the representation of the EU in the context of the Common Foreign and Security Policy, confirming that the EU would be represented by a Member State holding the

24 See: Chalmers and Tomkins, 2007, p. 23.

25 OJ C 191, 29.7.1992, p. 1.

26 See in details the Protocol by which the Schengen acquis is incorporated into the framework of the European Union, attached to the TEU and TFEU.

presidency and assisted by the General Secretary of the Council, who would also serve as the High Representative for the CFSP.

Majority voting in the Council and co-decision legislative procedures were expanded. The Amsterdam Treaty also sought to clarify the founding treaties by re-numbering, amending, and removing obsolete provisions.²⁷

2.12. Treaty of Nice

Institutional reform was an ongoing issue for the EU and posed an obstacle to further expansion. Therefore, the December 2000 meeting of the European Council in Nice concluded the fifth intergovernmental conference and adopted another revision of the founding treaties. The Treaty of Nice²⁸ was signed by the Member States on February 26, 2001, and entered into force on February 1, 2003.

From an institutional perspective, Member States were to have only one commissioner. The Council continued to decide by qualified majority when appointing the President of the Commission, as well as the entire Commission, a new procedure that freed the Commission from depending on unanimous consent of the Member States' governments and strengthened the competences of its president. The number of members of the European Parliament was increased, and its competence were partially enhanced. The Nice Treaty extended the adoption of secondary acts by qualified majorities to many additional areas, as well as co-decision procedures. The qualified majority system was also adjusted in connection with the EU's further enlargement.

2.13. Lisbon Treaty

The failure of the previous revision of the treaty to establish a Constitution for Europe²⁹ had to be overcome as soon as possible with new negotiations to recodify the founding treaties. The Lisbon Treaty³⁰ was approved at an intergovernmental conference of heads of state and government on October 18, 2007. It was signed on December 13, 2007 in Lisbon, and came into force on December 1, 2009. This treaty does not replace the previous founding treaties of the EU and EC, as the unsuccessful treaty establishing a Constitution for Europe intended to do, but only amends these treaties.

According to the Lisbon version of Art. 1 of the TEU, the EU is founded on two treaties with equal legal force: the TEU and the Treaty on the Functioning of the European Union (TFEU) (formerly the Treaty establishing the EU). As of December 1, 2009, the EU became a legal successor to the European Community, which ceased

²⁷ See: Craig and Be Búrca, 2008, p. 25.

²⁸ OJ C 80, 10.3.2001, p. 1.

²⁹ OJ C 310, 16.12.2004, p. 1.

³⁰ OJ C 306, 17.12.2007, p. 1.

to exist. The Treaty establishing the EURATOM remains in force. Thus, the Lisbon Treaty removed the three-pillar structure of the EU, although it preserved the specificities of acts from the second pillar of the EU. Community law was replaced with the term ‘Union law’ or ‘EU law’. The Lisbon Treaty, for the second time after the Amsterdam Treaty, renumbered the Arts. of the founding treaties.

The Lisbon Treaty also addressed the issue of a Member State’s withdrawal from the EU, which had not previously been regulated. The competences of the EU were categorised and clearly defined in relation to those of the Member States. The Lisbon Treaty introduced a direct connection between the election of the Commission’s president and the results of the European Parliament elections. The competences of the European Parliament were strengthened in areas such as adopting EU acts, budgets, and concluding international agreements. It also established cooperation between national parliaments regarding EU legislative activity, which ensured that the principles of subsidiarity and proportionality were respected. To increase the stability and continuity of the European Council’s work, which had previously been disrupted by the semi-annual rotation of the presidency, the Lisbon Treaty created the position of President of the European Council, elected for a term of two and a half years. The Charter of Fundamental Rights of the EU, adopted in 2000 in Nice and amended in 2007 in Strasbourg, became part of the primary law. The EU can also accede to the European Convention on Human Rights.³¹

2.14. Concluding Remarks

The legal and factual changes to the founding treaties of the EU illustrate the increasing complexity and diversity of the EU while continuously grappling with the principle of equality among Member States. This principle has been a cornerstone of the EU since its inception, ensuring that all Member States, regardless of size or influence, play an integral role in shaping the EU’s policies and governance.

From the Treaty of Rome in 1957 to the present, the evolution of the EU’s treaties has marked a gradual shift in how equality is balanced with the need for efficient decision-making. Early treaties prioritised unanimity and equal participation, preserving Member States’ sovereignty. However, as the EU expanded and its responsibilities grew, reforms introduced mechanisms, such as qualified majority voting and institutional restructuring, which altered the balance of power between Member States. The introduction of qualified majority voting, first seen in the SEA and expanded in later treaties, streamlined decision making in specific policy areas. While promoting efficiency, this system also meant that individual Member States could occasionally be outvoted, raising questions about the traditional concept of equality. Institutional changes such as enhanced competences for the European Parliament and a reweighted voting system in the council further shaped the interplay between equality and effective governance. The Lisbon Treaty (2009) marked a significant

31 See Art. 6(2) of the TEU.

effort to reconcile these competing demands. By introducing a double-majority voting system that considers both population size and number of Member States, it aimed to strike a balance between larger and smaller countries. Additionally, the treaty emphasised the principle of subsidiarity, ensuring that decisions were made as close to citizens as possible, thus safeguarding national sovereignty.

However, these changes were introduced through amendments to the primary law. This suggests that the shift in the perception of equality among Member States stemmed less from the actions of supranational institutions and more from the will and preferences of the Member States themselves. Despite these adaptations, the EU continues to face challenges in maintaining the principle of equality amidst growing diversity and complexity. Differing levels of economic development, varying national interests, and the shifting balance between larger and smaller Member States remain sources of tension. Nonetheless, equality remains a defining feature of the EU legal framework and identity. As the EU evolves, it must navigate the ongoing challenge of harmonising equality with the practical realities of governance. The EU's ability to manage these tensions will be critical as it addresses emerging challenges, including economic disparities, geopolitical shifts, and societal transformations, all within the framework of an increasingly diverse membership.

3. Exemptions to Primary Law

The territorial scope of the EU's legal order is generally confined to the territories of its Member States, with certain exceptions. In practice, these exceptions could appear to create an unequal status among Member States because they are not applied uniformly across all Member States, as is demonstrated in this paper. Are these exceptions objectively justified, or do they lead to an undesirable fragmentation of EU law in affected areas?

As for the primary law of the EU, it is difficult to find a legal basis for exceptions to its territorial scope outside of the primary law itself, which consists of the founding treaties, their revisions, the Charter of Fundamental Rights of the EU, accession treaties, and other supplementary acts. Exceptions to primary law, which are directly reflected not only in primary law but also in other sources adopted on its basis, could be classified based on their presumed duration as exceptions of a permanent or temporary nature. The aim of this section is to define exceptions to primary law, categorise them based on their nature, and assess the practical impacts these exceptions may have on the consistency of EU law and the equal status of Member States.

3.1. Accession Exceptions

The EU accession treaties often include transitional periods and exemptions to facilitate the integration of new Member States. These provisions, negotiated during the accession process, reflect the candidate country's economic, legal, and institutional realities. They aim to balance the gradual adaptation of new members, while maintaining the EU's overall stability.

3.1.1. Accession Treaties

In general, international treaties are considered binding sources of law, and we are inclined to agree that they are binding as a whole, including the preambular part, which serves as an important tool for their interpretation.³² The EU possesses exclusive external competence to conclude international agreements with third countries, primarily in areas that, from an internal perspective, also fall within the EU's exclusive competence. Accession treaties are also included.³³ All conditions of accession of the future Member States of the EU are regulated in acts on the conditions of accession, which are attached to the accession treaties and have the same legal force as these treaties. Acts on the conditions of accession mainly contain changes to the founding treaties related to the enlargement of the EU. These include changes in the composition and functioning of its institutions and bodies and the establishment of exceptions and transitional periods for Member States during which certain provisions of EU law temporarily do not apply. Exceptions and the transitional period can be separately regulated for each acceding state in a separate annex to the act on the conditions of accession.

The provisions of the acts on the conditions of accession are in fact provisions of primary law that can only be changed or repealed by the procedure applied in the revision of primary law, unless the act of accession itself provides otherwise. These provisions include protocols and annexes which are part of the accession treaties and which directly contain changes to the acts of institutions of the EU. Therefore, the Court of Justice cannot assess the validity of these provisions. In this context, however, it is necessary to remember that the legal nature of the secondary acts themselves, changed by the act of accession, remains unaffected, and institutions of the EU can later amend, supplement, or cancel the secondary acts concerned by standard legislative procedures. However, they cannot change the specific provisions of an act concerning the conditions of accession which contain changes to these secondary acts. Meanwhile, secondary law includes provisions of acts on the conditions of accession, which authorise institutions of the EU to adopt the necessary changes to acts related to the accession of new states to the EU.

32 Moravcová, 2024, pp. 865–876.

33 Opinion of 19 March 1993, Convention no. 170 de l'OIT, 2/91, EU:C:1993:106, para 8. Judgment of 5 May 1981, *Commission v United Kingdom*, C-804/79, EU:C:1981:93, paras. 17, 18.

3.1.2. *Transitional Periods and Permanent Exemptions*

EU law is effective in the territory of Member States upon accession, with the presumption that it does not apply retroactively.³⁴ Transitional periods are temporary measures that allow new Member States to delay the implementation of specific EU rules. These arrangements help new members adapt economically, legally, and institutionally, while minimising potential disruptions for existing Member States.

A key aspect of transitional periods is the free movement of workers. Existing Member States sometimes fear labour market disruptions due to an influx of workers from new members. For instance, after the 2004 enlargement, countries such as Germany, Austria, and France imposed a seven-year transition period restricting access to their labour markets, gradually lifting these restrictions based on economic conditions. In agricultural and structural funds, new members may initially receive reduced subsidies to allow the EU to adjust its budget. For example, Poland's farmers received 25% of the standard subsidy upon joining in 2004, with gradual increases reaching parity by 2013. Environmental standards also require transitional periods, as meeting strict EU directives often necessitates significant investment. Bulgaria, for example, was granted time to comply with the Industrial Emissions Directive, enabling the modernisation of its power plants and industries. Transitional periods also apply to competition law, allowing states to phase out subsidies incompatible with EU rules, and to euro adoption, in which new members must meet the Maastricht convergence criteria before joining the euro area.

In contrast, exemptions are permanent provisions excusing a Member State from certain EU rules or policies. These are rare and usually linked to national interests or unique circumstances. Unlike transitional periods, exemptions create long-term differentiation among Member States, as they do not aim for eventual alignment with EU rules.

3.1.3. *Concluding Remarks*

Both transitional accession periods and exemptions raise concerns about equality among Member States, as they treat some countries differently. Transitional accession periods, while temporary, may create perceptions of second-class membership. Accession exemptions present an even greater challenge to equality, as they create permanent differentiation.

To mitigate these concerns, the EU uses several mechanisms: progress monitoring tools such as the cooperation and verification mechanism, tracking reforms in different areas, safeguard clauses allowing the EU to take corrective action if a new Member State fails to meet obligations or disrupts the internal market, and sunset clauses, ensuring that transitional periods expire after a specific timeframe.

34 Bobek, Bříza and Komárek, 2011, p. 544.

3.2. *Exceptions in Founding Treaties*

These exceptions were not negotiated for a fixed period, making them permanent. Among these permanent exceptions, we included opt-out clauses specifically associated with Member States such as Denmark, Ireland, and Poland. The United Kingdom has also negotiated such an opt-out; however, this paper will not address the case of the United Kingdom, given its withdrawal from the EU. In addition to these permanent opt-out clauses, we can classify permanent exceptions related to overseas or outlying territories within this category.

3.2.1. *European Territories of Member States*

The scope of primary EU law is not uniform in Europe and overseas, or in outlying territories of Member States. In accordance with Art. 52 of the TEU, any part of the European territory of Member States falls under the territorial scope of EU law. In addition, the primary law of the EU also applies to European territories for which the Member State is responsible for foreign relations.³⁵ The above also applies to Gibraltar.³⁶

The founding treaties also regulate exceptions to the territorial scope, for example, they do not apply in their entirety to the Faroe Islands. They partially apply to the sovereign territories of the United Kingdom of Akrotiri and Dhekelia in Cyprus to the extent specified in Protocol no. 3 of the Act on the Conditions of Accession from 2003. The treaties apply to the Channel Islands and the Isle of Man to the extent specified in the Accession Treaty from 1972, and to the Åland Islands to the extent specified in Protocol no. 2 of the Act on the Conditions of Accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden.³⁷

Moreover, the Provision of Art. 52 of the TEU states that the primary law of the EU applies to the Republic of Cyprus as a whole. However, this must be applied in connection with Protocol no. 10 on Cyprus, annexed to the Accession Treaty of 2003. According to Art. 1 of this Protocol, the application of EU law is postponed in those parts of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective administration.

In addition to that mentioned so far, Art. 349 of the TFEU provides for the possibility of adopting special measures for the application of treaties to defined overseas territories of Member States (Guadeloupe, French Guiana, Martinique, Réunion, Saint Bartholomew, Saint Martin, Azores, Madeira, and the Canary Islands), whose

35 See Art. 355(3) of the Consolidated version of the Treaty on the Functioning of the European Union (TFEU) (OJ C 326, 26.10.2012, pp. 47–390).

36 See Declaration no. 55. of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland: ‘The Treaties apply to Gibraltar as a European territory for whose foreign relations a Member State is responsible. This does not imply changes to the respective positions of the Member States concerned’.

37 See Art. 355(4)(5) of the TFEU.

development is due to the economic and social structure being negatively affected by their remoteness, island location, small area, unfavourable topographical and climatic conditions, or economic dependence on a small amount of products.

These special measures may be adopted by the Council on a proposal from the Commission, after consulting the European Parliament in the areas of customs, trade or tax policy, free zones, agricultural and fisheries policy, supply of raw materials and basic consumer goods, state aid and access to structural funds, and horizontal programme of the EU. The measures take into account the particularities and limitations of these overseas territories without disrupting their integrity and the coherence of the EU's legal order.³⁸ Therefore, EU law may apply to the aforementioned territories with the possibility of accepting exceptions through secondary law acts.

To the EU are in accordance with Art. 355, para. 2 of the TFEU associated some non-European countries and territories that have special (constitutional) relations with Denmark, France, the Netherlands and the United Kingdom. A taxative calculation of these countries and territories is given in Annex II to the founding treaties.³⁹ These overseas countries and territories (OCTs) are subject to special arrangements for association listed in the fourth part of the TFEU, Arts. 198 to 204, and Protocol no. 34 on special arrangements for Greenland.⁴⁰

The aim of this association is to support the economic and social development of the OCT and to establish close economic relations between the OCT and the EU as a whole. Its essence is based on equal treatment (expansion of the scope of contracts) in trade relations between Member States and these countries, equal participation in public tenders and supplies financed by the EU, freedom of establishment,⁴¹ and free movement of goods.⁴²

Overseas countries and territories are constitutionally linked to their Member States, but are not part of the EU as such.⁴³ On the basis of Art. 355, para. 2 TFEU, the provisions of the treaty do not, in principle, apply to the OCTs, except for the fourth part of the treaty, which is devoted exclusively to the OCT-EU association.

38 Art. 355(1) of the TFEU.

39 Greenland, New Caledonia and Dependencies, French Polynesia, French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, Saint Pierre and Miquelon, Aruba, Netherlands Antilles (Bonaire, Curaçao, Saba, Sint Eustatius, Sint Maarten), Anguilla, Cayman Islands, Falkland Islands, South Georgia and the South Sandwich Islands, Montserrat, Pitcairn, Saint Helena and Dependencies, British Antarctic Territories, British Indian Ocean Territories, Turks and Caicos Islands, British Virgin Islands and Bermuda. This list varied considerably and after the Second World War it mainly included the French and Belgian colonies in Africa, which gradually gained full independence and today have contractual relations with the EU based on Art. 217 TFEU (see in particular the Partnership Agreement between the African, Caribbean and Pacific Group of States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000).

40 See also Declaration no. 60 of the Kingdom of the Netherlands to Art. 355 of the TFEU.

41 Art. 199(1–5) of the TFEU.

42 Art. 200 of the TFEU.

43 See e.g. Judgment of the Court of 11 February 1999, *Antillean Rice Mills and Others*, C-390/95 P, EU:C:1999:66.

Between the OCTs and the outlying territories listed in no. 355 para. 1 TFEU there is a fundamental difference. In contrast to the OCT, the outlying territories are not only constitutionally connected to the relevant Member State, but also form an indivisible part of the EU and are in principle bound by EU law in its entirety. Therefore, it is not appropriate to make any quantitative or qualitative comparison of OCTs with the outermost regions in terms of benefits provided by the EU and obligations towards the EU.⁴⁴

There are great differences between OCTs⁴⁵ themselves in terms of the degree of autonomy *vis-à-vis* the respective Member State with which they are linked, but also in the economic and social sphere. However, no overseas country or territory is a sovereign state. In addition, they are dependent on the import of goods and energy. Exports of goods from the OCTs to the EU or within their respective geographic regions remain generally limited.⁴⁶

3.2.2. Opt-Out Clauses

Permanent opt-out clauses may also pertain to primary law itself, meaning that the legal basis for these exceptions cannot be found in any lower-force legal norm but solely within the ‘constitutional framework’ of EU law. These exceptions limit the territorial scope of relevant EU law because the Member States in question are excluded from the *ratione loci* application of the EU law from which they have opted out.⁴⁷

44 See Commission Green Paper ‘Future relations between the EU and overseas countries and territories’, SEC(2008) 2067, COM(2008) 383 final, Point 2.1.

45 Regarding OCTs see e.g. judgment of 8 February 2000, *Emesa Sugar*, C-17/98, EU:C:2000:70.

46 Unlike third countries, all nationals of the OCT are in principle citizens of the Union within the meaning of Art. 9 TEU. More precisely, all nationals of Greenland and the French and Dutch OCTs automatically also have the nationality of these Member States. From 21 May 2002, citizens of the British OCTs also became British citizens, but they can renounce this citizenship and remain citizens of the British Overseas Territories only and are not required to have a passport identifying them as British citizens. As citizens of the Union, nationals of the OCT are also entitled to rights arising from Union citizenship, such as the right to free movement and residence (but not work) in the territory of the Member States. Citizens of the OCT may also have the right to vote or stand for election to the European Parliament if the conditions set by the relevant Member States in accordance with Union legislation are met. This is the case, for example, with nationals of the French OCTs. In the case of the islands of Saint-Pierre, Miquelon and Mayotte, their specific connection with the Union is also reflected in the use of the euro in these OCTs, although their monetary regime is not specified in the TFEU as they are not part of the Union (Council Decision (EC) No. 1999/ 95 of 31 December 1998 concerning monetary adjustments in the French territorial communities of Saint-Pierre and Miquelon (OJ L 30, 4.2.1999, pp. 29–30)). No other OCTs use the euro, but the French Pacific OCTs are exploring the possibility of replacing their currency with the euro. It may also be noted that, although the general provisions of the treaties do not apply to the OCTs, unless there is a specific reference to them, the jurisdiction of the CJEU includes proceedings on a preliminary question which, in accordance with the TFEU, is requested by a court whose jurisdiction includes the OCTs, as well as actions brought under the conditions laid down in the TFEU by plaintiffs from the OCT, which are directed against legal acts adopted by the EU.

47 Geursen, 2024, p. 370.

As mentioned earlier, all exceptions to primary law naturally impact secondary acts adopted on the basis of primary law. These opt-out clauses may appear to be unjust in terms of the position of Member States. As T. Duttie et al. state, opt-outs allow less integration-friendly Member States to maintain their preferred level of integration without exercising a veto over the more ambitious projects of the majority, a concept referred to as ‘constitutional differentiation’.⁴⁸

The creation of these clauses presupposes that the majority of Member States have a shared interest in advancing integration within a specific area, where consensus among all Member States is necessary. This issue arises when a Member State is unable to contribute to a consensus. In such cases, the solution is either to refrain from integration in the relevant area or to establish a mechanism by which integration remains viable despite the disinterest of one or more Member States. Notably, opt-outs have occurred exclusively among acceding countries, and never among the original founders of the integration process.

These clauses should be viewed from two perspectives. On the one hand, they may appear unjust, as they were granted only to certain Member States, and if another Member State sought a similar exception, it would likely require a revision of primary law – a complex process that would definitely not be simple. Opt-out clauses were introduced in cases where consensus among Member States was necessary to advance integration, such as the introduction of a new EU policy, or significant changes to primary law, such as the inclusion of the EU Charter of Fundamental Rights in primary law.

From a more positive perspective, these clauses allowed a Member State, despite not wishing to pursue a particular degree of integration, to refrain from obstructing other Member States and permit progress in the integration process with the insertion of an exception. It remains an open question whether similar clauses may be accepted during potential future revisions of primary law. However, it is difficult to envision such clauses being introduced *ex post* into policies in which these states actively participate in the policymaking process.

We will now briefly examine Member States’ opt-outs. First, several provisions of EU law regulating economic and monetary unions that do not automatically bind Denmark can be cited.⁴⁹ We can therefore say that it is the only country exempted from the obligation to adopt the Euro. Owing to the negotiated clause, a key referendum was passed in Denmark, and the Danish government accepted the treaty.⁵⁰ Denmark negotiated specific exemptions within EU law, as outlined by the European Council. These provisions apply only to Denmark, both currently and in the future. Regarding the third stage of the Economic and Monetary Union (EMU), Denmark has opted out, meaning it will not adopt the euro or be bound by the economic policy

48 Duttie et al., 2017, pp. 406–428, 408.

49 Protocol on certain provisions relating to Denmark, annexed to the Treaty establishing the European Community (1992).

50 Adler-Nissen, 2014, pp. 6–7.

rules of EMU members. Denmark retains control over its own monetary policy and continue to participate in the European Monetary System. Additionally, Denmark maintains autonomy over its social welfare and income distribution policies.⁵¹ Based on Protocol no. 22 on Denmark's position, Denmark has to opt out of defence policy, justice, and home affairs. As a leader in opt-out clauses and in accordance with the protocol, Denmark will not prevent other Member States from cooperating on these matters.

With regard to Protocol no. 21 on the position of the United Kingdom and Ireland in respect of freedom, security and justice, Ireland has an opt-out in these areas. The last permanent opt-out is that of Poland, which, by virtue of Protocol no. 30 on the application of the Charter of Fundamental Rights of the EU to Poland and the United Kingdom, binds itself to the Charter.

It is fundamentally difficult to dispute that permanent opt-outs create a form of multilevel cooperation within founding treaties,⁵² which may, to some extent, negatively affect the equal standing of Member States within the EU. Through these clauses, Member States naturally safeguard their sovereignty by creating differentiation. However, we also concur with the view that opt-outs are generally perceived as controversial, potentially leading to a fragmentation of the EU⁵³ and its legal order. We discuss these impacts further in the concluding remarks.

Finally, we consider it necessary to add that the difference between the exceptions that apply to islands, outlying territories and permanent opt-outs is a possibility or option for a Member State with a permanent opt-out to decide whether or not to make use of the clause. Even this option can be changed subsequently.⁵⁴ Therefore, Member States that have negotiated permanent opt-outs can, within the limits of the scope of these block opt-outs for individual policies, moderate the extent to which they are bound by the acts adopted under that policy in the future. A model example is Denmark; based on a referendum held in June 2022, it has been participating in the Common Security and Defence Policy of the EU since July 1 2022.⁵⁵

3.2.3. Concluding Remarks

Diverging views emerge regarding permanent opt-out clauses. How should we perceive permanent opt-outs negotiated by current Member States of the EU:

51 EUR-lex, 2006.

52 Duttie et al., 2017, pp. 406–428, 422.

53 Adler-Nissen, 2014, p. 2.

54 For example, in the case of the Brussels I bis Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, pp. 1–32), where we find in the preambular part that it does not participate, but subsequently concluded Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ, 2005 11 16, L299).

55 Heimig, 2023.

Denmark in certain areas, Ireland in other areas, and Poland in relation to the Charter of Fundamental Rights? We agree with the assumption that differentiated integration responds to the increasing heterogeneity of preferences and capabilities resulting from the EU's expansion into additional policy areas, higher levels of centralisation, and new Member States.⁵⁶ It is objectively undeniable that the negotiation of these opt-outs by the concerned Member States was driven by political motivations. The prerequisite for these agreements was the desire of Member States to secure the adoption of amendments to the founding treaties, which would have been unattainable without their participation. From this perspective, it is difficult to dispute that opt-outs contribute to the EU's integration process, as they allow Member States to moderate their positions on specific issues during treaty negotiations, rather than issuing a full rejection. The legal basis for these opt-outs lies in the protocols annexed to the founding treaties, which constitute primary EU law. The question of why other Member States did not avail themselves of this option at the time of treaty adoption is irrelevant; what is more pertinent is why it would be difficult to adopt such opt-outs retrospectively. Given that this concerns EU primary law, introducing new opt-outs would necessitate revising primary law, a process that requires consensus. In our view, this question could be raised during future revisions of the founding treaties, although we do not anticipate a retroactive application to existing policies but rather to any new measures introduced by future revisions. Therefore, the perceived disadvantage faced by other Member States stems purely from their failure to raise objections at the time of the treaty's adoption or during the introduction of new policies from which they may wish to opt out.

Additionally, one could argue in favour of opt-outs by drawing on international public law. From the perspective of Member States, founding treaties are, in essence, international treaties, albeit with special status within EU law, as they form the constitutional foundation of EU primary law. Nevertheless, Member States can typically attach unilateral reservations to international treaties, whereas this option is absent in EU primary law and is to some extent replaced by the opt-out mechanism. This, however, requires the consent of all other Member States. A valid argument against opt-outs is that the unequal status of Member States and their unequal participation in the integration process could lead to the fragmentation of EU law. As such, opt-outs can be viewed both as a threat to the uniformity of EU law and as a means to advance integration despite the disinterest of certain Member States, thus overcoming the issue at hand. Ultimately, the objective outcome is that not all Member States are treated equally.

If the principle of equality among EU Member States is to be maintained, the current reality is that while most Member States have achieved the same level of integration, some have not reached this level. In the case of opt-ins, certain Member States have even exceeded it.

56 Winzen and Schimmelfennig, 2015.

In the context of future proposals and considerations, the possibility of introducing new opt-outs could be excluded. However, one could support the opt-in cooperation model in the form of enhanced cooperation, although this mechanism also has certain shortcomings and has been subject to criticism. As R. Böttner notes:

The files on establishing and implementing enhanced cooperation are all characterised by different timeframes and intensity of discussions and different levels of political controversy, all of which are factors that eventually led to enhanced cooperation'. Enhanced cooperation agreements, such as the European Public Prosecutor's Office and cooperation on European patents, have been discussed for many years. On the contrary, 'the proposal for the financial transaction tax met strong resistance in principle so that willing Member States resorted to enhanced cooperation relatively quickly'.⁵⁷

Here, I would strongly recommend establishing an obligation to explore all possible avenues to reach a consensus, with negotiations being sufficiently long and thoughtful, allowing Member States adequate time to consider options rather than rushing into decisions. I believe this is an appropriate form of cooperation, provided that the conditions are met, and that it is only used when a reasonable amount of time has been allocated for states to attempt to reach a consensus. If after ample time and all possible efforts, a consensus cannot be achieved, only then should the mechanism of enhanced cooperation follow as a last resort.

However, the status quo undeniably leads to a lack of clarity and uniformity in EU law. This also raises the question of the 'free rider' issue in terms of equality. To what extent should the non-participation of Member States be reflected in the rules governing budget contributions? Since even Member States benefitting from their exemptions may, to some degree, benefit from the areas they opt out of, we propose that the first step towards ensuring equality without unnecessary doubt could be to draw a clear line and refrain from applying corrective mechanisms to adjust the contributions of these Member States.

4. Enhanced Cooperation

One of the temporary exceptions in EU law is the exception of the so-called opt-in clause, which manifests itself in the form of enhanced cooperation. The provision that was enshrined in the Treaty of Amsterdam has been replaced with a new provision, which has been renamed 'enhanced cooperation' rather than 'closer cooperation'.⁵⁸

⁵⁷ Böttner, 2022, pp. 1145–1164.

⁵⁸ Craig and De Búrca, 2008, p. 29.

The establishment of this form of cooperation was a response to political demands for a mechanism that would facilitate deeper integration of selected Member States.⁵⁹ In the case of a permanent opt-out, consensus among Member States is a prerequisite, allowing a state to join only under the condition of opting out. Conversely, an opt-in requires a lack of consensus among Member States and a subsequent interest from certain Member States to engage in enhanced cooperation.

The EU has grown over the last few decades, increasing the number of Member States from 6 to 27. Despite the progress made so far, it is necessary to note reservations on the part of Member States related to their various conceptions of the EU. Furthermore, objective factors are likely to complicate uniform integration, which consist of economic and legal differences due to different national legal systems. For this reason, the principle of coherence, based on the idea of uniform integration at the economic, political, and legal levels, will be difficult to achieve, given that the EU is characterised by continuous enlargement and consequent heterogeneity.

As such, it is necessary to progress in a differentiated manner, for example, by allowing cooperation with only some Member States or leaving Member States free to participate in cooperation. However, in this regard, the system of enhanced cooperation is so far the only one to be codified in the founding treaties. Thanks to enhanced cooperation, Member States wishing to collaborate closely may use the EU's institutions, bodies, mechanisms, and procedures to achieve the goals of such cooperation. Enhanced cooperation allows participating Member States to organise broader cooperation than that initially provided for by treaties within the framework of the policy concerned. It allows for establishment of a more flexible decision-making mechanism to authorise a limited number of Member States to advance EU integration more quickly when not all Member States are capable of adopting the same pace. With this regulation in the founding treaties, it is possible to overcome blockages in certain EU policies, including common foreign and security policies.

Furthermore, enhanced cooperation can be regarded as forefront integration that can be followed, even in stages, by the subsequent accession of the remaining Member States to that cooperation. Two sets of provisions implement a mechanism for enhanced cooperation in the founding treaties. First, Art. 20 TEU which governs the general authorisation and conditions of enhanced cooperation in the EU, and second, Art. 326 TFEU et seq. which governs the conditions, rights, and duties relating to enhanced cooperation incumbent on the Member States, notwithstanding their participation. According to Art. 20 TEU, enhanced cooperation is permitted in all EU competences, except for exclusive ones. It must promote the EU's objectives, protect its interests, and strengthen its integration process. The participation of at least nine Member States is required, which makes enhanced cooperation more open and flexible, given that the EU currently has 27 Member States.

Enhanced cooperation remains as *ultima ratio* respecting the principle of subsidiarity, since it can be triggered only if the objectives pursued cannot be achieved by

59 Malíř, 2019.

all Member States within an acceptable period. In this regard, the Court of Justice ruled that the EU's interests and the process of integration would not be protected if all fruitless negotiations led to enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the EU as a whole. The expression 'as a last resort' highlights the fact that only those situations in which it is impossible to adopt such legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.⁶⁰

Of course, any acts adopted within the enhanced cooperation are addressed exclusively to participating Member States and are not part of the EU's *acquis* regarding the accession of candidate countries to the EU. It follows from the wording of Art. 326 of the TFEU that the provisions of acts adopted within the framework of enhanced cooperation cannot conflict with EU law.

In this context, founding treaties require respect for the equality of Member States and the principle of loyalty, as enhanced cooperation must not under any circumstances undermine economic and social cohesion, nor lead to obstacles or discrimination in trade between Member States.⁶¹ Art. 327 of the TFEU establishes an obligation of mutual respect and loyalty, since enhanced cooperation must respect the competences, rights, and obligations of non-participating Member States, and vice versa. Non-participating Member States cannot prevent the development of such cooperation.

The equality of access by Member States to closer integration within the EU is also ensured by the fact that enhanced cooperation is open – not only at the stage of its establishment but also after its implementation – to all Member States, provided that they fulfil the required conditions. This provision underlines the provisional nature of the enhanced cooperation regime, which should lead to the gradual participation of all Member States in such cooperation and its subsequent incorporation into EU *acquis*. Participating Member States should, in this regard, encourage other Member States to join the established enhanced cooperation.

According to Art. 329 of the TFEU, which describes the initial establishment of enhanced cooperation, a minimum of nine Member States wishing to cooperate must submit a request to the Commission, which has a margin of discretion to check whether the formal conditions for cooperation are met. It is not clear whether the Commission is authorised to control the possible political consequences of such cooperation. The Commission may then submit the cooperation proposal to the Council which, after obtaining the consent of the European Parliament, can give authorisation to proceed with enhanced cooperation.⁶²

60 See Judgment of 16 April 2013, *Spain and Italy v Council*, C-274/11 and C-295/11, EU:C:2013:240 paras. 49 and 50.

61 See Art. 327 of the TFEU.

62 Regarding the enhance cooperation falling within the scope of the Common Foreign Affairs and Security Policy, the process is slightly different: the request of the Member State is addressed to the Council first and then forwarded for the opinion to the High Representative for Foreign and Security Affairs and to the Commission and notified to the European Parliament.

Once the conditions required for implementation of enhanced cooperation are met and the Council has adopted a corresponding decision, the participating states are entitled to use the bodies, procedures, and legal instruments of the EU within the limits of the objectives pursued by enhanced cooperation. According to Art. 330 of the TFEU, all Member States may participate in deliberations, but only the members of the enhanced cooperation Council have the right to vote, since they are the only ones bound by the law adopted in this framework. This is to ensure that nonparticipating Member States are informed about the activities of enhanced cooperation, which would facilitate their subsequent accession.

According to Art. 331 TFEU, which describes the process of accession to the existing enhanced cooperation, the Member State wishing to participate in that cooperation must fulfil the conditions for such participation, adopt all provisions of that cooperation, and notify its intention to the Council and Commission. The Commission then examines whether the conditions of participation have been fulfilled, and either confirms the participation of the Member State concerned or indicates the arrangements to be adopted to fulfil those conditions.

The Council and Commission ensure that activities conducted under enhanced cooperation align with the EU's other policies and initiatives.⁶³ Some authors have also proposed a judicial review by the EU Court of Justice of the compliance of the proposed enhanced cooperation with the founding treaties.⁶⁴

The provisions of the founding treaties on enhanced cooperation are still used relatively rarely. So far, strengthened cooperation based on Art. 20 of the TEU has been established in the following areas: divorce and legal separation,⁶⁵ matrimonial and registered partnership property issues,⁶⁶ Unitary EU patents,⁶⁷ and the European Public Prosecutor's Office.⁶⁸ Permanent structured cooperation⁶⁹ should also be considered a special type of enhanced cooperation based on Art. 42 of the TEU.

63 See Art. 334 of the TFEU.

64 Piris, 2014.

65 Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) (OJ L 343, 29.12.2010, pp. 10–16).

66 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, 8.7.2016, p. 1). Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, 8.7.2016, p. 30).

67 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361, 31.12.2012, p. 1).

68 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1).

69 Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing permanent structured cooperation (PESCO) and determining the list of participating Member States (OJ L 331, 14.12.2017, p. 57).

All existing cases of enhanced cooperation have arisen as an ultima ratio measure following the impossibility of finding an agreement in the Council voting unanimously on a draft legislative proposal by the Commission. There is a great variety in the number of participating Member States, the regulatory technique used, the type of secretariat or other administrative bodies chosen for the operational stage, and the financing and staffing provisions. The number of participating Member States is usually far beyond the necessary threshold of 9, and varies between 17 and 26. In terms of participation it is also interesting to note that Austria, Belgium, France, Germany, Greece, Italy, Portugal, and Slovenia participate in all cases of enhanced cooperation (all of them among euro area Member States), while Eastern, Northern, and opt-out Member States are less likely to engage in enhanced cooperation.

The enhanced cooperation framework is governed by subsidiarity, because if there is a contradiction between the enhanced cooperation provision and standard EU provision, it is possible to deduce from Art. 326 of the TFEU the primacy of standard EU law over enhanced cooperation law. However, the proportionality of the scope of enhanced cooperation regime is not explicitly defined. The question of the extent to which a cooperation regime is permitted outside the procedure provided for by the founding treaties remains unresolved.

Furthermore, although Art. 20 of the EU states that Member States may establish enhanced cooperation, it does not explicitly exclude the possibility of other forms of cooperation (this issue is examined further in Chapters 8 and 9). Thus, cooperation outside the EU seems, in fact, possible, following the example of the Initial Intergovernmental Schengen Convention. Some specific cases of enhanced cooperation could provoke free riding by non-participating Member States; therefore, it is important to continuously support other Member States in joining that cooperation.

4.1. Concluding Remarks

In addition to the negative exceptions to the application of EU law, there are also positively framed exceptions, specifically the opt-in mechanism, which enables Member States to engage in enhanced cooperation. Apart from permanent opt-outs and, to some extent, the fragmentation of law associated with opt-ins, the remaining exceptions do not provoke significant debate. However, initial practical experience indicates that enhanced cooperation is better suited for the implementation of specific legislative projects rather than for the ongoing development of broader regulatory frameworks.⁷⁰

⁷⁰ Böttner, 2022, pp. 1145–1164.

5. Potential for Suspension of Cooperation

The potential for suspension of cooperation within the EU arises when a Member State violates its principles and obligations, or disrupts its functioning. The EU has developed several mechanisms to address violations of its fundamental values or legal frameworks by its Member States. These include infringement actions, conditional funding measures, and the Art. 7 procedure. Each serves as a tool to ensure compliance and safeguard the EU's core principles, although each faces significant challenges in its implementation.

5.1. *Infringement Proceedings*

Under Art. 258 of the TFEU, the European Commission holds the authority to initiate infringement proceedings against Member States that fail to fulfil their obligations under EU law. This process begins with the issuance of a reasoned opinion after a Member State is given an opportunity to present its observations.⁷¹ If the State does not comply within a specified timeframe, the Commission may refer the matter to the Court of Justice of the European Union (CJEU). In this context, the Commission's discretion is extensive, and encompasses both substantive and procedural dimensions. Substantive discretion allows the Commission to decide the reasons for pursuing an infringement action, whereas procedural discretion governs how the process unfolds.

The CJEU has consistently confirmed that the Commission exercises its discretion in full autonomy. The Court's role is strictly limited to assessing whether an objective violation of EU law has occurred, and whether the Commission has adhered to procedural requirements. It does not review the legal or political motivations behind the Commission's decision to initiate proceedings. Moreover, arguments from Member States challenging the Commission's legal interests in pursuing a case have been consistently dismissed by the Court. Despite this broad discretion, the Commission is bound by two procedural limits: Member States must be given a reasonable timeframe to address concerns, and the Commission must base its legal pleas on the reasoned opinion presented during the pre-litigation phase.

In comparison to competition law, in which the Commission's decisions affect private actors and are subject to strict judicial review, infringement actions target Member States and are treated differently. This distinction allows the Commission greater flexibility, as the CJEU does not apply the same level of scrutiny to infringement proceedings. However, this extensive discretion carries significant risks. For instance, infringement proceedings can remain open for indefinite periods,

71 The opportunity granted to Member States is required by the treaties; however, even if a Member State does not avail itself of this possibility, its preservation constitutes a fundamental formal requirement of proceedings within the meaning of Art. 258 TFEU. See: Judgment of 17 February 1970, C-31/69, *Commission v Italy*, EU:C:1970:10.

with sanctions sometimes imposed many years after the initial violation. In some cases, proceedings continue even after the violation has ceased, particularly if the Commission anticipates the recurrence of similar issues or waits for all implicated Member States to comply simultaneously. Additionally, the Commission's ability to selectively pursue cases raises concerns about unequal treatment and potential discrimination among Member States.

To address these risks, the Commission has sought to self-regulate its discretion through its 2017 Communication titled 'EU Law: Better Results through Better Application'.⁷² This policy emphasises the strategic use of discretionary power to prioritise enforcement efforts for significant breaches affecting EU citizens and businesses. Key priorities include addressing breaches that undermine EU policy objectives, targeting failures to transpose directives or comply with CJEU judgments, and protecting EU financial interests. Despite these efforts, the self-limitation measures are not legally binding, and the Commission retains the flexibility to deviate from these guidelines in individual cases. Furthermore, individuals lack legal standing to challenge the Commission's discretion under Art. 265 of the TFEU, leaving them without remedies to contest the Commission's decisions.

5.1.1. Concluding Remarks

The absence of judicial or political limits on the Commission's discretion within infringement proceedings has broader implications. Originally justified by its technical expertise, the Commission's discretion has increasingly taken on political dimensions, raising concerns about accountability. While some oversight has been delegated to specialised EU agencies in specific fields, extending such mechanisms to general infringement proceedings would likely require treaty revisions. The principle of equal treatment among Member States remains a particular concern, as the current framework does not ensure uniform application of EU law.

In conclusion, the Commission's broad discretion in infringement proceedings is a double-edged sword. While it enables strategic enforcement of EU law, it also raises risks of inefficiency, unequal treatment, and diminished public trust. Until clearer boundaries are established, either through CJEU case law or treaty amendments, concerns about the transparency and fairness of the Commission's actions will persist. Political oversight, potentially through the European Parliament or Council, may offer a viable avenue for addressing these issues; however, such reforms would require significant institutional changes.

5.2. Conditional Funding Measures

The EU has established conditional funding regulations to ensure that its financial resources are used effectively and in alignment with its fundamental values

72 OJ C 18, 19.1.2017, p. 10.

such as the rule of law, democracy, and good governance. These regulations tie access to EU funds to compliance with specific conditions such as maintaining judicial independence, fighting corruption, achieving economic reforms, and meeting performance targets.

A central pillar of this framework is Regulation (EU, EURATOM) 2020/2092, the Rule of Law Conditionality Mechanism.⁷³ It allows the EU to suspend or reduce funding to Member States where breaches of the rule of law jeopardise the financial interests of the EU. Examples include threats to judicial independence, systemic corruption, or failure to address fraud. The mechanism is activated through a proposal by the European Commission, and must be approved by a qualified majority of the Council. Measures under the Conditionality Regulation may be proposed solely when the Commission determines that violations of the rule of law principles have a direct impact or pose a serious and sufficiently direct risk to the sound financial management of EU budgets or financial interests.⁷⁴

Another Regulation (EU) 2021/241, governs the Recovery and Resilience Facility,⁷⁵ a cornerstone of the €723.8 billion Next Generation EU recovery package. This regulation links funding disbursements to achieving milestones and targets set in Member States' recovery plans. These focus on EU priorities such as climate neutrality, digital transformation, and social cohesion. Failure to meet these targets can delay payments or reduce funding allocations.

Similarly, Common Provisions Regulation (EU) 1303/2013 outlines conditionality rules for the European Structural and Investment Funds, including the Cohesion Fund and the European Social Fund.⁷⁶ Funding from these sources is contingent on compliance with EU economic governance standards such as the Stability and Growth Pact. Failure to address excessive deficits or implement the necessary reforms can result in funding suspensions. This regulation also includes a performance-based approach, in which payments are tied to meeting specific goals.

The overarching financial regulations (EU, EURATOM) of 2024/2509 governs the financial management of the EU budget.⁷⁷ It emphasises the principles of sound

73 Regulation (EU, EURATOM) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget; OJ L 433, 22.12.2020, p. 1.

74 European Commission, no date.

75 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility; OJ L 57, 18.2.2021, p. 17.

76 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund; OJ L 347, 20.12.2013, p. 320.

77 Regulation (EU, EURATOM) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union; OJ L, 26.9.2024, p. 1.

financial management, strict fraud prevention, and recovery of misused funds, ensuring robust safeguards for EU financial resources.

Conditionality extends to external relations. The Instrument for Pre-Accession Assistance provides funding to candidate and potential candidate countries conditioned on progress in governance, judicial reform, and alignment with EU standards. Similarly, the European Neighbourhood Instrument (Regulation (EU) No. 232/2014) and Global Europe Instrument (Regulation (EU) 2021/947) tie financial aid to progress in democracy, human rights, and sustainable development.

The enforcement of these regulations involves multiple bodies. The European Commission monitors compliance and proposes corrective measures, whereas the Council approves actions such as fund suspension. Agencies such as the European Anti-Fraud Office and European Public Prosecutor's Office investigate and prosecute financial misconduct. The CJEU resolves legal disputes related to these mechanisms.

Recent cases illustrate the applications of these regulations. In 2022, the EU froze billions of euros in funding to Hungary over concerns regarding corruption and threats to judicial independence. Similarly, Poland faced delays in the disbursement of recovery funds due to judicial reforms deemed incompatible with EU principles. These examples underscore the dual purpose of the EU's conditional funding regulations: protecting financial interests and promoting adherence to the EU's core values.

5.2.1. Concluding Remarks

Conditional funding measures in the EU are designed to ensure that financial resources are used effectively and in alignment with the EU's fundamental values, such as the rule of law, democracy, and good governance. However, these mechanisms often raise questions about equality among Member States, particularly when some countries feel disproportionately targeted or argue that these measures undermine their sovereignty.

Conditional funding mechanisms, including Rule of Law Conditionality,⁷⁸ are theoretically applied uniformly based on transparent criteria. This mechanism links access to EU funds to respect for the rule of law, which is a foundational principle necessary for the proper management of EU resources. While this applies equally to all Member States, critics, particularly Hungary and Poland, have argued that the mechanism disproportionately targets them, alleging that it is wielded as a political tool by older or larger Member States to enforce values in a way that infringes on their sovereignty. However, proponents contend that measures are necessary to protect EU taxpayers and ensure that financial resources are managed responsibly, with decisions based on objective assessments rather than political considerations.

⁷⁸ Regulation (EU, EURATOM) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I, 22.12.2020, pp. 1–10).

Uniform enforcement of conditionality across all Member States is critical for maintaining equality. The European Commission is responsible for monitoring compliance and proposing corrective measures, and mechanisms such as the Rule of Law Conditionality are triggered based on clear evidence of risks to EU financial interests. However, differences in governance capacity and political influence among Member States can lead to perceptions of unequal treatment, especially when newer or smaller Member States feel disproportionately scrutinised compared to their larger counterparts.

5.3. Art. 7 TEU Procedure

The founding treaties of the EU anticipate the possibility that a Member State, after joining the EU, may violate the fundamental values outlined in Art. 2 of the TEU. In such cases, preventive and sanction mechanisms are associated with the suspension of membership rights.⁷⁹ Art. 7 of the TEU is distinctive in that it lays down the procedural framework for determining the existence or imminent risk of a breach of fundamental EU values by a Member State, as well as for the potential imposition of sanctions aimed at restoring compliance. Notably, this mechanism operates beyond the conventional constraints of the EU's competence, ensuring an effective response to systemic violations.⁸⁰

In the preventive phase, the Council may adopt a decision recognising the existence of a clear risk of a serious breach of fundamental EU values. Such a decision does not affect the membership rights of the Member State.⁸¹ The Member State is invited to present its position and propose remedies. This phase focuses on dialogue and diplomacy without imposing sanctions. Art. 7 of the TEU highlights the EU's commitment to upholding its fundamental values and holding Member States accountable. Without reaching the sanctions phase, the activation of Art. 7 places significant political pressure on the Member State, often prompting reforms or dialogue.

In the later sanctions phase, a reasoned proposal regarding the existence of a serious or persistent breach of the EU's fundamental values can be submitted by one third of the Member States or the European Commission. The Council decides on the proposal unanimously after obtaining the consent of the European Parliament and hearing from the Member State in question. Based on this decision, the Council may, by a qualified majority, suspend the membership rights of the Member State in question, such as its voting rights in the Council vote.⁸² The Member State remains bound by EU law, but loses access to specified privileges.

⁷⁹ Art. 7 TEU.

⁸⁰ Kochenov, 2017.

⁸¹ Art. 7(1) TEU.

⁸² See Art. 7(2) and (3) TEU and Art. 354 TFEU.

The suspension of membership rights in the EU involves the restriction of certain rights derived from membership, including the right to vote in the Council, in situations where a Member State seriously or persistently breaches the EU's fundamental values. When applying this sanctions mechanism, it is essential to consider its potential impact on the rights and obligations of individuals and legal entities. However, the obligations of the Member State under EU law remain unaffected.

In 2017, the European Commission triggered Art. 7(1) over concerns about judicial reforms introduced by the Polish government. These reforms were widely criticised for undermining judicial independence and violating the principle of separation of powers, which are key components of the rule of law. In 2018, the European Parliament activated Art. 7(1), citing issues related to the rule of law, corruption, press freedom, and academic independence in Hungary. Both cases remained in the preventive phase, as the unanimity required for sanctions was not reached. Hungary, a close ally of Poland, consistently opposed sanctions, demonstrating the political complexities of this mechanism.

5.3.1. Concluding Remarks

While Art. 7 TEU is an essential mechanism for safeguarding the EU's core principles, its effectiveness is hindered by procedural and political challenges. One of the primary issues is the unanimity requirement. Imposing sanctions under Art. 7 requires all other Member States to agree unanimously, which is a high bar to clear. Another significant challenge is mutual support among states. Member States that face similar scrutiny or potential investigations under Art. 7 often form alliances to protect each other. Finally, the lengthy process involved in activating and implementing Art. 7 reduces its efficiency. Procedural requirements such as gathering evidence, initiating discussions, and reaching consensus result in delays. This slow pace diminishes the urgency and impact of the mechanism, allowing violations of EU values to persist for extended periods.

Although all EU nations are bound by the same obligations, the selective application of Art. 7 may create the perception that some states are treated differently. The process of triggering Art. 7 depends on political and institutional decisions, which may lead to accusations of bias or inconsistency. For instance, states under investigation may feel that they are being disproportionately targeted, whereas others in similar situations remain unaffected. The unanimity required for sanctions further complicates matters, as politically or strategically aligned states can block actions, reinforcing disparities in treatment. Larger or more influential Member States may appear less likely to face consequences, whereas smaller or less politically connected countries may feel more exposed to scrutiny. This dynamic can create tensions and foster perceptions of unequal treatment within the EU.

6. Membership Termination

Within the framework of EU law, therefore, the sole mechanism for withdrawal is the activation of Art. 50 of the TEU, introduced by the Lisbon Treaty revision and utilised by the United Kingdom in practice. From the perspective of EU law, it may appear that situations in which the principle of *rebus sic stantibus* could potentially be invoked within the bounds of public international law are addressed by separate Arts. in the founding treaties, which allow for adaptation to defined changes in circumstances.

6.1. Withdrawal Under Art. 50 TEU

The EU provides a legal framework for Member States to voluntarily terminate their membership, primarily through Art. 50 of the TEU. Introduced by the Lisbon Treaty in 2007, Art. 50 establishes the steps and conditions for a Member State to withdraw from the EU.

Every Member State has the right to decide on withdrawal in accordance with its own constitutional requirements. After making the decision to withdraw, the state formally notifies the European Council of its intention. Following this notification, negotiations begin between the EU and the withdrawing state to conclude a withdrawal agreement. The negotiations are conducted by the European Commission and the agreement is concluded by the Council, which acts by a qualified majority, subject to the consent of the European Parliament.⁸³ This agreement defines the conditions and procedures for withdrawal, including a framework for their future relationship. Unless an extension is mutually agreed upon, withdrawal automatically takes effect two years after notification.

The United Kingdom's withdrawal from the EU, commonly referred to as Brexit, is the only instance of membership termination to date. Following a 2016 referendum in which a majority of UK citizens voted to leave, the UK invoked Art. 50 in 2017. After extensive and complex negotiations, the UK formally exited the EU on January 31, 2020. Brexit demonstrated the significant challenges of separating from the EU, including the legal disentanglement of decades of shared regulations, economic uncertainties, and political divisions within the departing state and among remaining Member States.

Termination of EU membership poses several challenges. The geopolitical shift caused by Brexit highlights deep-seated socioeconomic divisions both within the UK and on a global scale. It has exposed regional and generational disparities, reshaped trade and diplomatic relations, and altered the balance of power within the EU, reflecting broader trends of economic nationalism and shifting global alliances.⁸⁴ Economically, the departing state must address disruptions to trade, market access,

⁸³ See Art. 50(1) and (2) TEU, Art. 218(3) TFEU.

⁸⁴ O'Reilly et al., 2016, pp. 807–854.

and financial obligations. Legally, EU laws embedded within the national framework must be replaced or repealed. Politically, withdrawal often exacerbates domestic divisions and may strain relationships with remaining Member States. Geopolitically, the departure of a Member State can affect the EU's global influence and internal cohesion.

While Art. 50 allows for voluntary withdrawal, there is no legal provision for the EU to expel a Member State. However, mechanisms such as Art. 7 of the TEU enable the suspension of certain rights, such as voting, for violations of core EU values, potentially creating indirect pressure to leave.

If a state that has withdrawn from the EU later seeks to rejoin, its application is subject to the standard accession procedure for joining.

6.1.1. *Concluding Remarks*

The introduction of the possibility of withdrawal from the EU represents a highly positive development, as it ensures that Member States retain sovereign autonomy not only in their decision to accede but also in their right to depart. Given the far-reaching legal, economic, and political consequences of such a withdrawal, the procedural framework established under Art. 50 of the TEU is rightly designed to be lengthy and intricate, ensuring sufficient time for negotiation, mitigation of disruptions, and preservation of stability within both the departing state and the EU as a whole. Thus, the option of unilateral withdrawal reinforces Member States' equality by safeguarding them against both the majority and the supranational institutions.

6.2. *Exploring Termination of EU Membership Under International Law*

Art. 61 of the Vienna Convention establishes the conditions that must be cumulatively fulfilled in order to invoke a fundamental change of circumstances for the purpose of termination or withdrawal from the treaty. It must be a fundamental change that has arisen regarding the circumstances existing at the time of the conclusion of the contract and which was not previously foreseen by the parties. These circumstances must have constituted an essential basis for the consent of the parties to be bound by the contract, and the change must fundamentally transform the extent of the obligations still to be performed under the treaty. Conversely, it cannot be invoked in two exceptions: where the treaty establishes national boundaries or where the change in question is the result of a breach by the party invoking it, either of an obligation under the treaty or of any other international obligation owed by it to any other party to the treaty.⁸⁵ The second exception essentially materialises the principle *ex turpi causa non oritur actio*.⁸⁶

⁸⁵ Art. 61 of The Vienna Convention on the Law of Treaties.

⁸⁶ Case *Factory at Chorzow* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26), para. 31.

We agree with the view that this is not a principle of interpretation, but a substantive principle of law that allows exemption from a contractual obligation, regardless of the intention of the parties. However, intention is decisive in determining the circumstances that a party considers to be fundamental and that constitute a fundamental change in the context of the clause. Therefore, the objective nature of the change is legally based on the intentions of the parties.⁸⁷ The International Court of Justice has stated that Art. 61 of the Vienna Convention contains a rule in which the customary rule-making process has been consummated.⁸⁸

From the foregoing, it may be presumed that the change in circumstances envisaged by the international treaty in question would hardly fulfil all conditions, particularly the condition of unforeseeability under Art. 61 of the Vienna Convention. Based on the *Gabčíkovo-Nagymaros* decision,⁸⁹ it is not possible to rule out entirely the impact of political considerations on a substantial change of circumstances, to the extent that, for example, a change of government could undermine consistency with the principles underlying the treaty in question.⁹⁰ Scholars point out that it is important for the principle to be associated exclusively with state sovereignty, according to which it is solely for the state invoking the substantial change to determine whether it is applicable in a particular case.⁹¹

Although the rule in Art. 61 of the Vienna Convention can be considered objective in terms of its criteria, it does not provide for the automatic termination of a treaty.⁹² International law experts point out that it would be misleading to think only in terms of termination or withdrawal from the treaty. The principle of *rebus sic stantibus* can also produce fewer radical consequences, such as revising the treaty or adapting it to new circumstances.⁹³

Before addressing the impact of the principle of *rebus sic stantibus* on the EU's founding treaties, it should be recalled that the Court of Justice has consistently held that the EU's competences must be exercised in compliance with international law.⁹⁴ It has also explicitly confirmed that 'the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order'.⁹⁵ However, the present case cannot

87 Shaw and Fournet, 2011, pp. 1415, 1424.

88 Case *Fishekies Jurisdiction (United Kingdom v. Iceland)*, Judgment, 2 February 1973, ICJ Reports 1973, para. 40.

89 Case *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, para. 51.

90 Brownlie, 2013, p. 675.

91 Shaw and Fournet, 2011, p. 1426.

92 Brownlie, 2013, p. 375.

93 United Nations, Committee of the Whole, 1986.

94 Judgment of the Court of 3 September 2008., *Kadi a Al Barakaat International Foundation/Rada a Komisja*, C-402/05 P a C-415/05 P, EU:C:2008:461, para. 291.

95 Judgment of the Court of 16 June 1998, *Racke v. Hauptzollamt Mainz*, C-162/96, EU:C:1998:293, para. 46.

be generalised to the founding treaties, since the judgment in question concerned external agreements of the EU.

The founding treaties of the EU are generally governed by the regime of the Vienna Convention on the Law of Treaties, albeit with a specific status compared to other international treaties. The Community, now the EU, was established for an indefinite duration, with Member States relinquishing certain sovereign rights in its favour and transferring part of their sovereignty, in defined areas, to the EU. The CJEU has affirmed that this transfer constitutes a definitive limitation of Member States' sovereign rights, which cannot be unilaterally abrogated by subsequent acts incompatible with EU law.⁹⁶ This has established a new legal order under international law.

Based on the foregoing, it is indisputable from the perspective of international law that Member States, as sovereign entities under public international law, may unilaterally withdraw from their obligations under international treaties pursuant to the *rebus sic stantibus* doctrine, provided that the specified requirements are met. From the viewpoint of Member States, the founding treaties are international treaties; however, from the perspective of EU law, these treaties are distinct from ordinary international treaties, as they establish the primary law of the EU, standing at the apex of its legal hierarchy. Consequently, it remains debatable how the doctrine of *rebus sic stantibus* could materialise in practice in the case of the EU's founding treaties.

It should be noted that the EU respects international law,⁹⁷ and the CJEU has addressed the principle of *rebus sic stantibus* in its case law⁹⁸ on several occasions, although never in the context of a Member State's unilateral withdrawal from the founding treaties. The most extensive treatment of this doctrine was in the *Racke* judgment; on the basis of a fundamental change of circumstances, the Court permitted the adoption of restrictive measures against 'those parties which did not observe the Ceasefire Agreement of 4 October 1991 which they had signed in the presence of the President of the Council and the President of the Conference on Yugoslavia'. In this judgment, the Court tacitly affirmed that the doctrine itself, as opposed to the related specific procedural requirements, constituted an international custom.⁹⁹

Although the EU's founding treaties do not provide a legal basis for the activation of the doctrine in relation to those treaties, this does not constitute an obstacle *per se*, since the doctrine derives from the rules of public international law, as discussed in the first part of this paper. The possibility of withdrawal from the EU, as the only means of terminating membership introduced by the Lisbon revision of the treaties, presupposes a consensus, a necessity that is absent in the application of *rebus sic*

96 Judgment of the Court of 15 July 1964, *Costa/E.N.E.L.*, C-6/64, EU:C:1964:66.

97 Art. 3(5) of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, pp. 3–390).

98 E.g. Judgment of the Court of 3 March 2009, *Commission v. Sweden*, C-249/06, EU:C:2009:119.

99 Judgment of the Court of 16 June 1998, *Racke v Hauptzollamt Mainz*, C-162/96, EU:C:1998:293, paras. 58, 59.

stantibus. Therefore, from the perspective of EU law, it is plausible to conclude that withdrawal from the EU on the basis of a unilateral invocation of the doctrine of *rebus sic stantibus* was likely not envisaged.

Some authors point to the conceptual incompatibility of the doctrine of *rebus sic stantibus* with EU law and, probably correctly, argue that it would not withstand an EU legal assessment.¹⁰⁰ However, such an argument cannot in itself limit the sovereign rights of individual states to invoke the doctrine. Conversely, by establishing the present EU, Member States have permanently limited the part of their sovereignty that has been conferred upon the EU.¹⁰¹ Therefore, it should be noted that within the scope of the competences conferred upon the EU, the application of the doctrine of *rebus sic stantibus* by Member States cannot be asserted against the exercise of those competences by the EU. As some authors have noted, the situation may differ if the EU acted *ultra vires*, in contravention of the treaties themselves. In such a scenario, in which recourse to available mechanisms would be ineffective, a Member State may find itself with no option but to respond to the situation by unilaterally withdrawing.¹⁰²

Additionally, it remains debatable whether the doctrine could be activated in exceptional situations. A key condition of the doctrine is unforeseeability. If circumstances arise that the treaties anticipate and address, the conditions for the applicability of the doctrine are unlikely to be met. For example, Art. 4(2) of the TEU addresses respect for national identity and designates national security as the sole responsibility of the Member State. Similarly, other potential circumstances, such as internal:

disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security are envisaged by the treaties, which allow for measures to be taken in derogation from the treaty.¹⁰³

By anticipating these situations and providing for specific solutions, the unforeseeability requirement, a *sine qua non* for the application of *rebus sic stantibus*, remains unfulfilled.

Equally, the doctrine cannot be invoked on the grounds that a Member State is breaching the treaties, as the treaties provide mechanisms to address such situations. Should a Member State seriously violate the values enshrined in the treaties and the available mechanisms prove ineffective, Art. 7 of the TEU provides a legal basis under which certain rights under the treaties may be suspended in relation to

100 Athanassiou, 2009.

101 Judgment of the Court of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, C 6/64, EU:C:1964:66.

102 Athanassiou, 2009.

103 Art. 347 of the Consolidated version of the TFEU (OJ C 326, 26.10.2012, pp. 47–390).

that state.¹⁰⁴ Moreover, the CJEU has repeatedly confirmed that, within the context of EU law, the principle of reciprocity, as known in international law for breaches of international obligations, cannot apply between Member States in the event of a breach of EU law by a Member State.¹⁰⁵

Therefore, we concur with the authors who argue against the application of the doctrine in situations where the treaties anticipate and adequately address the issues.¹⁰⁶ One potential pathway to establishing unforeseeability in these situations could be the point at which all available mechanisms fail, leaving the State to invoke the doctrine as a last resort. The unforeseeability in this scenario would stem from the treaties not contemplating the failure of all EU recourse mechanisms. At the same time, it is conceivable that it could be used in situations that the treaties do not foresee, which are difficult to identify in practice. Nevertheless, apart from unforeseeability, in each instance all conditions for the application of the doctrine of *rebus sic stantibus* under international law must be met cumulatively.

Another condition for the doctrine's applicability is that it must be invoked within a reasonable period of time following the fundamental change of circumstances; this requirement will not be satisfied in the context of a long-standing EU policy. As noted above, compliance with the condition of fundamentality would remain questionable. In this chapter, we have also discussed changes in political considerations, such as France's invocation of this doctrine in relation to NATO in 1966.¹⁰⁷ Under such circumstances, it is conceivable that these conditions could be met; however, within the EU, it is challenging to identify a specific situation that would, from a legal standpoint, sufficiently satisfy all the conditions of the doctrine of *rebus sic stantibus* while also being unforeseen by the founding treaties.

Therefore, we must again refer to the *Gabčíkovo-Nagymaros* case, where it was acknowledged that the impact of political considerations on the application of *rebus sic stantibus* cannot be entirely ruled out, particularly in instances where a change of government undermines compliance with the principles upon which the relevant treaty is based.¹⁰⁸ However, in order for such an event to cause a change in EU policy, it is possible to envisage that all the conditions of the doctrine would be satisfied, particularly in the case of *ultra vires* EU action. It is more plausible to envisage the doctrine being invoked in extra-EU cases relating to its actions, which may involve relations with third countries or external measures taken by the EU.

104 Art. 7 of the Consolidated version of the Treaty on European Union (OJ C 326, 26.10.2012, pp. 13–390).

105 Judgment of the Court of 11 January 1990, *Blanguernon*, C-38/89, EU:C:1990:11, paras. 7, 8; Judgment of the Court of 26 February 1976, *Commission v. Italy*, C-52/75, EU:C:1976:29, para. 11.

106 Athanassiou, 2009.

107 Dhondt, 2013.

108 Brownlie, 2013, p. 675.

6.2.1. Concluding Remarks

The mere fact that the founding treaties do not explicitly provide for the doctrine of *rebus sic stantibus* does not affect its existence within the rules of public international law, which are respected by the EU. However, its application is significantly limited by the specific features of EU law and the status of the founding treaties. Considering all the conditions required by international law for the application of *rebus sic stantibus*, it can be asserted that neither the EU's long-standing policies nor the situations envisaged by the founding treaties would formally fulfil those conditions.

The situation is different in cases not anticipated by the founding treaties that may simultaneously meet all these conditions, or in cases where, although envisaged by the treaties, all available mechanisms fail, leaving the Member State with no other option. We also hold the opinion that, given the EU's ability to act only within the limits of the competences conferred upon it by the Member States, if the EU were to act *ultra vires*, the conditions for a Member State to activate the doctrine of *rebus sic stantibus* in relation to the other contracting parties to the treaties establishing the EU could be met under certain circumstances.

7. Conclusion

The historical and legal evolution of the EU demonstrates that the principle of equality among Member States is both foundational and dynamic. From the early supranational experiments of the ECSC to the far-reaching institutional reforms of the Lisbon Treaty, the EU has continuously adapted its decision-making structures, legal provisions, and mechanisms for differentiated integration. These adaptations have been driven by the dual imperatives of preserving equality and ensuring the EU's capacity to function effectively in an increasingly diverse membership.

The examination of treaty reforms shows that equality has been preserved through safeguards such as unanimity requirements and balanced institutional representation, even as qualified majority voting and weighted voting systems were introduced to improve efficiency. The analysis of exemptions to primary law highlights the tension between flexibility and uniformity. While transitional arrangements, territorial derogations, and opt-out clauses enable consensus and respect for national sovereignty, they also create lasting asymmetries in Member States' rights and obligations. Enhanced cooperation, in turn, offers a structured means of allowing willing states to move ahead without forcing integration on unwilling states. However, this must be carefully managed to ensure openness and prevent fragmentation.

Mechanisms for suspension of cooperation – whether through infringement proceedings, conditional funding, or the Art. 7 of the TEU procedure – reveal another

dimension of equality: the need for consistent and impartial application of enforcement tools to avoid perceptions of political bias. Finally, the possibility of withdrawal, enshrined in Art. 50 of the TEU and complemented by the theoretical application of the *rebus sic stantibus* principle, underscores that equality also entails the sovereign right to leave the EU, thereby protecting Member States from irreversible subordination to the majority or supranational authority.

Taken together, these findings suggest that equality in the EU is not a static guarantee, but a principle that must be continuously defended and reinterpreted in light of changing political, legal, and institutional realities. The challenge for the future lies in ensuring that mechanisms of differentiation – whether temporary or permanent, voluntary or imposed – are designed and applied in ways that preserve mutual trust, maintain the coherence of the EU's legal order, and reaffirm the equal standing of all its members. As the EU confronts new geopolitical, economic, and societal challenges, the resilience of the principle of equality will remain a decisive factor in the legitimacy and durability of the European project.

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- Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.
- Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office.

- Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III).
- Declaration n. 55. of the Kingdom of Spain and the United Kingdom of Great Britain and Northern Ireland.
- Declaration no. 60 of the Kingdom of the Netherlands to Art. 355 of the TFEU.
- Judgment of 16 April 2013, *Spain and Italy v. Council*, C-274/11 and C-295/11, EU:C:2013:240 paras. 49 and 50.
- Judgment of 17 February 1970, C-31/69, *Commission v. Italy*, EU:C:1970:10.
- Judgment of 5 May 1981, *Commission v. United Kingdom*, C-804/79, EU:C:1981:93, paras. 17, 18.
- Judgment of 8 February 2000, *Emesa Sugar*, C-17/98, EU:C:2000:70.
- Judgment of the Court of 11 February 1999, *Antillean Rice Mills and Others*, C-390/95 P, EU:C:1999:66.
- Judgment of the Court of 11 January 1990, *Blanguernon*, C-38/89, EU:C:1990:11.
- Judgment of the Court of 15 July 1964, *Flaminio Costa v. E.N.E.L.*, C 6/64, EU:C:1964:66.
- Judgment of the Court of 16 June 1998, *Racke v. Hauptzollamt Mainz*, C-162/96, EU:C:1998:293.
- Judgment of the Court of 26 February 1976, *Commission v. Italy*, C-52/75, EU:C:1976:29.
- Judgment of the Court of 3 March 2009, *Commission v. Sweden*, C-249/06, EU:C:2009:119.
- Judgment of the Court of 3 September 2008., *Kadi a Al Barakaat International Foundation/ Rada a Komisia*, C-402/05 P a C-415/05 P, EU:C:2008:461.
- Opinion of 19 March 1993, Convention n° 170 de l'OIT, 2/91, EU:C:1993:106, para. 8.
- Protocol on certain provisions relating to Denmark, annexed to the Treaty establishing the European Community (1992).
- Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.
- Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection (OJ L 361, 31.12.2012, p. 1).
- Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013.
- Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
- Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
- Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union.
- Regulation (Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
- Treaty establishing the European Coal and Steel Community.
- Vienna Convention on the Law of Treaties.

CHAPTER 8

THE INTERGOVERNMENTAL ALTERNATIVE: 'TERTIAL LAW' AND AGREEMENTS OUTSIDE THE FRAMEWORK OF TREATIES



DAVID SEHNÁLEK

Abstract

In this chapter of the monograph, I will deal with the legal status of so-called subsidiary treaties concluded among EU Member States outside the framework of EU law, but with a close legal link to it. I will analyse their relationship to primary and secondary EU law, compare them to interstate compacts in the USA, and examine their nature on the basis of their interpretation by the CJEU. I will also address the question of EU and Member State competences in the context of these treaties, and the implications of the Lisbon Treaty on their existence. In particular, my analysis will focus on whether these treaties constitute a source of international or EU law. The key question is then whether these treaties represent a possible alternative to cooperation between EU Member States *vis-à-vis* the European Union. Finally, I will focus on the scope and future of subsidiary treaties within European integration.

Keywords: subsidiary treaties, interstate compacts, Art. 293 EC Treaty, intergovernmental cooperation, federalism, democratic legitimacy, EU competences

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1. Overview of the Chapter's Purpose

European integration is a gradual process, conditional on the willingness of EU Member States to cooperate on issues of common interest. It follows that for cooperation to work out, two conditions must be met. Firstly, cooperation is possible where Member States consider it jointly meaningful. This is not the case, for example, on issues that do not have a general impact on most or all Member States. Secondly, all Member States must agree to cooperate within the European Union. The problem therefore arises in a situation where cooperation is desirable, but touches on an issue perceived by some Member States as sensitive, potentially impinging on the sovereignty of a given state. In such a case, the consent of all Member States is not a given.

Over time, mechanisms have evolved to overcome the absence of the second condition in situations where the first condition was met. One such mechanism is the European Union in its pre-Lisbon form, i.e. as originally established in 1993. The introduction of the so-called pillars made it possible to overcome national resistance to further limit the sovereignty of Member States, while at the same time ensuring their cooperation on necessary issues of common interest. The creation of the European Union in 1993 was, however, a rather revolutionary step, simultaneously affecting a few areas of cooperation. Therefore, the adoption of the Maastricht Treaty was also relatively challenging and certainly could not be described as simple and unproblematic.

The aim of this chapter is therefore to explore the possibilities of alternative forms of cooperation outside of the legal framework and competences of the European Union, but with the close and active involvement of some of its main institutions. At the same time, the possibilities of using these forms of cooperation in the current conditions of European integration should be identified. The reason for this study is the fact that alternative forms of cooperation are neglected in current legal scholarship and are thus positioned outside the scope of the literature. The starting premise is that these alternative forms do seem to weaken the EU, or at least to not strengthen it. Nevertheless, they can effectively contribute to the effective realisation of the project of European integration.

2. The Phenomenon of Subsidiary Treaties

Even before the Maastricht Treaty, Member States had already established effective mechanisms for mutual cooperation, which had the advantage of overcoming the lack of compliance with the second condition defined in the first paragraph of this text. At the same time, these mechanisms did not require any amendments to primary law. It should be kept in mind that any change in primary law is very

sensitively perceived, is generally unwelcome and is closely monitored by States, politicians and citizens. It is therefore not easy to implement successfully. It is much simpler and quicker (not least because it is not necessary to use the rather complicated mechanism foreseen by EU law for changes to primary law) to cooperate outside the framework of EU law. The Brussels Convention¹ and the Rome Convention are undoubtedly the best known, but not the only, examples of this form of cooperation.² Both of these treaties were concluded to provide for judicial cooperation in private international law – a matter falling at the time of their conclusion outside the scope of EU competences.

The possibility of cooperation between EU Member States outside the legal framework of EU law, but still in relation to it, has been foreseen by Member States since the EEC was created. In fact, the Treaty of Rome provided in Art. 220:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: (a) the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals, (b) the abolition of double taxation within the Community, (c) the mutual recognition of companies or firms within the meaning of the second para. of Art. 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries, (d) the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

This provision was part of primary law, later as Art. 293 EC Treaty, until the adoption of the Lisbon Treaty, which repealed it without replacement.³ The possible consequences of this repeal will not be discussed right now, but later in this chapter.

Art. 293 of the EC Treaty can be understood as a provision which provided that certain issues relevant to European integration would be regulated by the Member States amongst themselves. The phrase ‘enter into negotiations’ used in the provision implies that the negotiations between the States would result in an international treaty. However, I believe that this would be a narrow interpretation. Nevertheless, it was the international treaties that the Member States negotiated between themselves based in Art. 293 EC Treaty. In view of their complementary and subsidiary nature to the integration secured by primary law, they can be referred to as ‘subsidiary treaties’ or as ‘tertiary law’. The first designation better describes the situation where these treaties are considered as a part of international law, subsidiary (complementary) to the activities of the EU and its law. The second designation is

1 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.

2 Convention on the law applicable to contractual obligations.

3 For this reason, this now repealed provision will be referred to in this text as Art. 293 EC Treaty.

particularly applicable when we consider any treaties concluded on the basis of Art. 293 EC Treaty as a broader part of EU law. Since I am convinced, for reasons I will explain later, that these treaties are not a source of EU law, the first term will be used in this study.

Art. 293 EC Treaty can be understood to confirm the otherwise obvious fact that Member States, as fully-fledged subjects of public international law, may conclude international treaties among themselves. These treaties, given the supranational nature of the EU and its law, cannot conflict with EU law, and can only comply with it. And according to the cited provision, in some cases such treaties are even considered as foreseen, wanted and therefore desirable by EU law. This may create conditions for the active involvement of EU institutions. At the same time, Art. 293 EC Treaty regulates an obligation that Member States themselves have imposed on themselves in primary law – the use of the word ‘shall’ indicates this. I therefore conclude that if it were necessary to establish this form of cooperation and the Member States had still failed to do so, the European Commission and the Court of Justice would have to enforce this obligation. However I should stress that this is an unlikely scenario. Moreover, the Member States have by the Art. 293 EC Treaty only undertaken to make an effort, that is to say, to act, not to actually achieve the result of concluding an international treaty. Actual enforcement of this obligation in infringement proceedings has therefore never been very likely.

In many ways, the EU resembles the US. As with the EU, the sub-states of the US federation can regulate their affairs among themselves by treaties between the individual states. Thus, as in the EU, in addition to federal/union law on the one hand and state/national law on the other, there is a category that goes beyond the sub-state level, but at the same time is not created by the actions of the federal/union legislature. The United States Constitution in Art. I, Sec. 10, Clause 3 states that:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

A specific, yet not very relevant legal difference lies in the fact that while Art. 293 EC Treaty, in my view, in principle presupposes the involvement of a majority or all Member States, in the American legal environment the possibility of concluding treaties between States has been used even in purely bilateral matters, such as the delimitation of a disputed border between two States of the American Federation. It is my understanding that in principal, Art. 293 EC Treaty was not intended for such situations.

The regulation in US law presupposes the consent of the federation granted through Congress. Such consent may be given by Congress either explicitly or

implicitly.⁴ It must be explicitly granted, according to the jurisprudence of the Supreme Court of the USA, in particular if the agreement between the States would be ‘directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States’.⁵ If I were to use terminology characteristic of EU law, this would mean that such agreements must be approved by the federation if they are entered into outside the competence of the states, i.e. on matters where the federation exercises exclusive or shared competence. Implied consent, on the other hand, is sufficient where the agreement is to regulate an internal, non-federal area of activity of the States concerned.

The fact is that the U.S. Constitution presumes Congressional consent has implications for the legal status of these agreements. Indeed, according to the Supreme Court’s decision, ‘where Congress has authorised the States to enter into a cooperative agreement and the subject matter of that agreement is an appropriate subject for congressional legislation, Congress’ consent transforms the States’ agreement into federal law under the Compact Clause, and construction of that agreement presents a federal question’.⁶

The opportunity to enter into an interstate compact was used, for example, to adopt the National Popular Vote Interstate Compact. This compact establishes a mechanism among the participating states that will modify the way they implement Art. II, Sec. 1, Clause 2 of the U.S. Constitution for selecting electors in presidential elections.⁷ It is thus an example of closer cooperation among the states of the American federation on an issue that is within their exclusive jurisdiction (albeit affecting the affairs of the federation), and thus outside the scope of the federation’s authority.⁸

There are other subtle differences between the EU and US regulation of these treaties. The wording of Art. 293 of the EC Treaty suggests that the scope of this provision was restricted to just some specific areas of cooperation, whereas the American clause is not so specifically limited. Ultimately however, at least in this respect, the two regulations do not differ. While the text of Art. 293 EC Treaty might suggest that the list contained in this provision is exhaustive, I believe that this is not the case, and that cooperation through a subsidiary treaty could be established in other areas if the Member States so wished as demonstrated in the subsequent chapter. Art. 293 of the EC Treaty outlines specific areas where Member States could choose, if needed, to cooperate with one another. In doing so it indicates the possibility of involving EU institutions in facilitating such cooperation. Since Member States are still sovereign, they can conclude a treaty under public international law in any area where they have not delegated their powers to the EU.

4 *Virginia v. Tennessee*, 148 U.S. 503 (1893).

5 *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978).

6 *Cuyler v. Adams*, 449 U.S. 433 (1981).

7 Wikipedia, no date b. For general information on these contracts, see: Wikipedia, no date a.

8 Although this is not a clear-cut conclusion, as the expert discussion on this issue proves. See: Brody, 2013, p. 33.

Despite subtle differences, subsidiarity agreements resemble Interstate Compacts in several aspects. One notable similarity is their role in enabling, or rather, confirming the possibility of cooperation between EU Member States outside the scope of EU competences. This function is irreplaceable, as it is both necessary and practical for Member States to coordinate and reach agreements at national level without the direct involvement of a supranational entity imposing the 'right' solution.

However, the difference between subsidiary treaties and Interstate Compacts lies in their intended purpose. Subsidiary treaties are primarily designed to be used in areas implicitly or explicitly anticipated by the 'constitution', meaning primary law, and in alignment with the objectives pursued by the supranational entity, which in this context resembles a federation. In contrast, Interstate Compacts in the United States can be employed by states even in matters unrelated to the functioning of the federal government. Thus, the two types of agreements differ fundamentally in their purpose.

Furthermore, subsidiary treaties cannot interfere with competences already conferred on the EU. There is no mechanism for prior or subsequent consent by an EU institution. On the contrary, the US Constitution, as conceived, offers the possibility of a broader application of the Interstate Compacts, although it does not appear from the available literature that it has actually been used in practice. The general mechanism in the EU law is set up in the opposite way. The EU has the possibility to empower Member States to regulate by their own laws (either national or international), with certain issues falling within the competence of the EU. Nevertheless, although subsequent joint action conceived by an international treaty is not excluded, it is not a solution used by Member States in practice.

The legal status of subsidiary treaties and Interstate Compacts is also different. The latter becomes a part of federal law by granting consent, according to the jurisprudence of the Supreme Court of the USA. If EU law were to work the same way, it would mean that subsidiary treaties would become a part of EU law. However this is not clear-cut, and legal scholarship has diverged on this issue. Some authors have considered subsidiary treaties as a source of public international law,⁹ while others have considered them as a source of so-called tertiary EU law,¹⁰ and have therefore considered them as another source of EU law.¹¹ For reasons that will be explained later in this chapter I believe that subsidiary treaties are not part of EU law.

A provision similar to Art. 293 EC Treaty was also contained in the EU Treaty (MAA), in Art. K.3.(2)(c). This provision provided that the Council may:

without prejudice to Art. 220 of the Treaty establishing the European Community, draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Unless otherwise

9 Bělohávek, 2004, pp. 15–19.

10 Rozehnalová and Týč, 2000, p. 36.

11 Horspool and Humphreys, 2006, p. 71.

provided by such conventions, measures implementing them shall be adopted within the Council by a majority of two-thirds of the High Contracting Parties. Such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down.

This provision constituted a *lex specialis* to Art. 293 of the EC Treaty and was intended for cooperation in the field of internal security and justice. Compared to Art. 293 EC Treaty, it was more modern in the sense that it explicitly regulated the involvement of EU institutions in the drafting of the text of the Treaties, their implementation and interpretation. However, the practical purpose of both provisions was identical, to ensure cooperation between Member States in areas falling within their competence, insofar as they were related to the objectives pursued by the EU. This provision has also now been repealed, or more precisely, absorbed into EU law because of the transfer of competences. Finally, in the case of treaties concluded based on Art. K.3 of the EU Treaty (MAA), there can be no doubt about their legal status. Given the intergovernmental nature of the EU's third pillar, they must contain an international legal character. The Brussels Convention adopted on its basis will be dealt with in the following chapter.

3. Legal Status of Subsidiary Treaties

The legal status of subsidiary treaties is not directly regulated by primary law. They may either be regular international treaties and therefore a source of public international law or, they might also be considered as a source of EU law. Firstly, I consider it important to stress that the former Art. 293 EC Treaty cannot be understood as a legal basis for the adoption of legislative measures by Member States outside the legislative procedures inherent in EU law. This provision is simply a confirmation of the fact that at the time of the conclusion of the EC Treaty, Member States did not consider that the EEC and later the EC had the relevant competence to regulate certain areas. Art. 293 of the EC Treaty is therefore not analogous to Arts. 114 TFEU or 115 TFEU et al., which do in fact constitute such a legal basis. I am further convinced that the subsidiary treaties would not extend the EU's spheres of activity to new areas of cooperation. This would have meant changes in the functioning of the EU made outside the framework of the primary law, changes to which can only be made by means of the prescribed procedural procedures. These treaties therefore only extended cooperation between Member States, i.e. cooperation of an intergovernmental nature, but did not extend supranational cooperation within (intra-) the EU. This is a seemingly insignificant difference, but it had a practical impact in situations where national constitutions provided different approval mechanisms for

international treaties that limited the powers of Member States on the one hand, and for ‘ordinary’ international treaties on the other.

Not only is the primary law silent on the legal status of these treaties, but the treaties themselves do not provide a conclusive answer. Both the Brussels Convention and the Convention on the Mutual Recognition of Companies and Legal Persons, which never entered into force, do not address this issue. An indication is provided by the Rome Convention – a treaty which, although not foreseen by Art. 293 EC Treaty, can be considered a *de facto* subsidiary treaty in all respects. The Rome Convention provides, *inter alia*, in Art. 18 governing interpretation, that ‘interpretation and application of the preceding uniform rules, regard shall be had to their international character’. The Rome Convention is not a subsidiary treaty concluded directly based on Art. 293 of the EC Treaty, which in the field of private international law concerns only the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration. However, as already mentioned, this text does not presuppose or exclude cooperation in other areas, such as the issue of determining the applicable law, which is covered by the Rome Convention. Moreover, despite this different basis of the Rome and Brussels Conventions (which, unlike the former, is based on Art. 293 EC Treaty), there is not a single indication in the case-law of the Court of Justice that these treaties have a different legal status. The Rome Convention was modelled on the Brussels Convention, so if there were to be a difference between the two, it would certainly be reflected in the case law of the Court of Justice. It can therefore be concluded that this shows their nature is identical and that they both therefore have an international law character.

Art. 293 EC Treaty was an important link between the subsidiary treaty and primary law. This was made possible by the then Art. 239 EC Treaty (now Art. 273 TFEU), which provided: ‘The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of this Treaty if the dispute is submitted to it under a special agreement between the parties’. That provision has been broadly interpreted to mean that ‘the dispute’ could also be a dispute over the interpretation of a subsidiary treaty which could not be resolved in any other way. This created a mechanism of preliminary references which could be cited to ensure a uniform and correct interpretation of the Brussels and Rome Conventions. The broad interpretation concerned the notion of ‘relates to the subject matter’, since Art. 293 EC Treaty was an acknowledgement that the cooperation established by the Member States by the subsidiary treaty was related to EU activities (but this did not necessarily mean that it was part of EU activities).

However, the institution of preliminary references does not in itself mean that the rules which the Court of Justice can interpret are part of EU law. There are other arguments which support the contentions laid out here that Art. 293 EC Treaty, read in conjunction with Art. 273 TFEU, does not confirm that subsidiary treaties are a source of EU law. First, the Court’s jurisdiction was established *ex post* by the protocols negotiated from the two conventions. It was not therefore part of the original arrangement. I do not consider that the protocols in themselves could change the

legal status of the two conventions and make them a source of international law into a source of EU law. Such a transformation is legally possible, but if that was indeed the intention of the Member States, it would be assumed that this would have been explicitly expressed in the protocols.

If that argument is not enough, then a second one can be offered. According to the literature, Art. 273 TFEU was employed to ensure a uniform interpretation in a purely bilateral treaty between Germany and Austria (Austro-German Convention).¹² This is an extremely interesting matter that deserves deeper attention in this text. The purpose of this treaty was to avoid double taxation – hence the thematic link to EU law, which is confirmed by Art. 293 EC Treaty. It should be stressed, however, that in this case, a simple bilateral international treaty was concluded. There was no doubt that this treaty was a source of international law and not EU law. The Austro-German Convention contained this remarkable provision:

In the case of difficulties or doubts concerning the interpretation or the application of this convention, for which no solution can be found during a mutual agreement procedure between the competent authorities arranged in accordance with the preceding Paras of this Art. within a period of three years from the initiation of that procedure, the States Parties are obliged, at the request of the person referred to in Para. 1, to submit the dispute to the Court of Justice [of the European Union] under an arbitration procedure pursuant to Art. [273 TFEU].¹³

In principle, therefore, like the Brussels Convention, it envisaged ensuring uniform interpretation through the decisions of the Court of Justice. Hence this illustrates that Art. 273 TFEU simply cannot be used as an argument to support the claim that subsidiary treaties are part of EU law. Indeed, Art. 273 TFEU applies to those cases where jurisdiction is based on an objectively identifiable link to EU law. On the other hand, there is no need for any requirement that the subject matter be the same as the subject matter of the Treaties.¹⁴ In this way, the Court of Justice can resolve disputes for Member States, including those on interpretation, which concern international law.¹⁵

However, arguments to the contrary can also be found and put forward, confirming the EU nature of subsidiary treaties. In my view, the Brussels Convention

12 *The Abkommen zwischen der Republik Österreich und der Bundesrepublik Deutschland zur Vermeidung der Doppelbesteuerung auf dem Gebiet der Steuern vom Einkommen und vom Vermögen.*

13 See Art. 25(5) of the Austro-German Convention (translation by the Court of Justice).

14 Judgment of the Court (Grand Chamber) of 12 September 2017 C-648/15 – *Austria v Germany*, paras. 23–25.

15 Indeed, the interpretation under international law and on the basis of the Vienna Convention on the Law of Treaties was applied by the Court in the present case. Cf. paras. 39 and 39 of the cited decision, where this Court refers to the necessity of interpretation according to the methods proper to international law, and where it referred to the rules of interpretation in the Vienna Convention.

was negotiated in a spirit which, suggested a closer connection with EU law.¹⁶ This treaty stated in its preamble:

Desiring to implement the provisions of Art. 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, Anxious to strengthen in the Community the legal protection of persons therein established, ...¹⁷

The link to the EEC (EC) was further confirmed by other facts, in particular that in the event of a revision of the Treaty, a revision conference was to be convened by the President of the Council of the European Communities.¹⁸ However, none of this was intended to imply that this subsidiary treaty was to become directly part of EU law. This can be inferred from the way in which the mechanism for extending the contracting parties to the Brussels Convention was set up in relation to the extension of the EEC (EC) membership base. The Brussels Convention provided that:

The Contracting States recognize that any State which becomes a member of the European Economic Community shall be required to accept this Convention as a basis for the negotiations between the Contracting States and that State necessary to ensure the implementation of the last Para. of Art. 220 of the Treaty establishing the European Economic Community.

The necessary adjustments may be the subject of a special convention between the Contracting States of the one part and the new Member States of the other part.

Of course, the Rome Convention did not contain a similar link to EU law in its preamble. Nevertheless, it also declared its close connection to EU law. Indeed, the Rome Convention specified in a joint declaration that Member States 'express the view that any State which becomes a member of the European Communities should accede to this Convention'. The decision of a new Member State to accede and become a contracting party was therefore an entirely voluntarily action made by that State. Membership of the EU was merely a prerequisite for the possibility of being a party to this Treaty, nothing more. If the convention were part of EU (then EC) law, enlargement would have been provided for directly in the Accession Treaty. Thus, it was only subsidiary and complementary to EU law.

16 Similar text was also contained in the preamble of the Convention on the Mutual Recognition of Companies and Legal Persons *'in dem Wunsch, die in Artikel 220 des genannten Vertrags getroffenen Bestimmungen über die gegenseitige Anerkennung der Gesellschaften im Sinne des Artikels 58 Absatz 2...'*

17 Preamble to the Brussels Convention.

18 Art. 67 of the Brussels Convention.

The case law of the CJEU that could clarify this issue is either missing or does not give a clear answer, only indications. For example, in *Mund & Fester* case, the Court stated:

By providing that the Member States shall, so far as is necessary, enter into negotiations with each other ... the purpose of the fourth indent of Art. 220 of the Treaty is to facilitate the working of the common market through the adoption of rules of jurisdiction for disputes relating thereto and the elimination, as far as is possible, of difficulties concerning the recognition and enforcement of judgments in the territory of the Contracting States. It follows that the provisions of the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, concluded on the basis of that Art. and within the framework defined by it, and also the national provisions to which the Convention refers, are linked to the EEC Treaty.¹⁹

In this decision, the Court emphasises the Brussels Convention's link to EU law, but it is also clear that it places it in the same category as national provisions governing private international law. It is obvious that the national provisions to which the Convention refers have not become part of EU law. There is therefore no reason to argue that it should be otherwise in the case of a treaty concluded between Member States. Nor does the cited decision suggest any such thing.

However, two other decisions of the Court suggest a different approach. In the first judgment, in case *Duijnstee*, this Court stated:

The principle of legal certainty in the Community legal order and the aims pursued by the Convention in accordance with Art. 220 of the Treaty, on which it is based, require that the equality and uniformity of rights and obligations arising from the Convention for contracting states and the persons concerned must be ensured, regardless of the rules laid down in that regards in the laws of those states. It must be concluded that the Convention, which seeks to determine the jurisdiction of the courts of the contracting states in civil matters, must override national provisions which are incompatible with it.²⁰

This decision could imply the preferential application of the Brussels Convention (and other subsidiary treaties) over national law. The principle of primacy of application is characteristic of supranational EU law. On the contrary, it could not be inferred by the Court if the subsidiary treaties were ordinary international treaties. The question of the relationship between international and national law is thus

19 Judgment of the Court (Sixth Chamber) of 10 February 1994. Case 398/92 – *Mund & Fester v. Hatrex Internationaal Transport*.

20 Judgment of the Court (Fourth Chamber) of 15 November 1983. Case 288/82 – *Ferdinand M.J.J. Duijnstee v. Lodewijk Goderbauer*, paras. 13 and 14.

determined by national constitutional law. However, I consider that this would be a misinterpretation of the cited decision. In fact, the Court's decision gives a very precise answer to the question it has received from the national court. The question is whether the provisions of the Brussels Convention override the provisions of the national Code of Civil Procedure. The Court's answer is therefore understandable; it held that it does, and provided its reasoning. In doing so, the Court did not need to address the context, as that was not what the national court had asked. Indeed, since it was a Dutch court, it did not need to do so, because The Netherlands is a state with a monist approach to public international law, which has no problem with the primacy of that law over domestic law. I am convinced that the question would have been resolved differently in the case of a state with a dualist approach. In such a scenario, the courts of that state would not be able to apply the Brussels Convention in priority per se, and there would be an obligation on the legislator to ensure that the legislation in national law complied with its international obligations.

The second decision suggesting that subsidiary treaties could be a direct part of EU law is the *Truck Center* case. In that case, the Court of Justice used the phrase

It should be noted at the outset that, in the absence of any unifying or harmonising measures at Community level, in particular under the second indent of Art. 293 EC, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation.²¹

However, the phrase 'at Community level' is again, in my view, to be interpreted broadly, i.e. to include both activities within the EC(EEC) and those related to their subject matter based on Art. 293 EC Treaty. I am convinced that if the Court were to regard subsidiary treaties as a source of EU law, it would say so explicitly.

It should be emphasised that the situation was different in the case of the accession of Romania and Bulgaria to the EU. Accession to both conventions was foreseen directly in the Accession Treaty itself (and it is part of EU law), and for existing Member States the consent to accession had to be given by a Council decision.²² However, the reason for this change was the transfer of competence in the field of private international law, which was implemented by the Treaty of Amsterdam. Member States conferred their own competence in this branch of law in question on the EU, which began to exercise it for them. Hence the change in the procedure for expanding the treaty base (and the subsequent replacement of both treaties by EU regulations). The legal status of the subsidiary treaties in question as

21 Judgment of the Court (Fourth Chamber) of 22 December 2008. Case C-282/07 – *Belgian State – SPF Finances v. Truck Center SA*, para. 22.

22 2007/856/EC: Council Decision of 8 November 2007 concerning the accession of the Republic of Bulgaria and of Romania to the Convention on the Law applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980.

such has not changed, only the entity under whose jurisdiction the selected issues of private international law henceforth fell.

The nature of subsidiary treaties (including those that bear a similar to them) may have been made clear by Brexit. The UK was a party to both the Brussels Convention (a subsidiary treaty provided for by EU law) and the Rome Convention (a similar treaty, just not expressly provided for by EU law). Following the adoption of the regulations which replaced both conventions for most proceedings, the UK was bound by those regulations. However, both conventions were never formally repealed. The relationship between the EU and the UK following the exact date that Brexit came into force has been governed by the Agreement on Trade and Cooperation between the European Union and the European Atomic Energy Community on the one hand, and the United Kingdom of Great Britain and Northern Ireland on the other. This treaty provides for arrangements for judicial cooperation, but only in criminal matters. There has therefore been a ‘hard Brexit’ in judicial cooperation in civil matters. In my opinion, this absence of direct regulation in civil law matters could be resolved in two ways. If both conventions are part of EU law, Brexit would mean that the UK would no longer be a party to them and would not be bound by them. If they were international treaties, then the UK’s withdrawal from the EU cannot affect their legal status. While the Rome Convention was, under Art. 28, open for signature only by EU Member States, none of its provisions address the situation where a contracting state to that treaty ceases to be a party to the treaties establishing the EU.

However, this approach is not the only conceivable one. One can also imagine the opposite argument. According to this view, the United Kingdom is no longer bound by the Rome Convention, for the following mutually alternative reasons. Firstly, the purpose of the treaty was not to regulate relations with third countries, which is what the United Kingdom became as a result of Brexit.²³ Secondly, from an internationalist perspective, the treaty has been superseded by later regulations adopted by the EU in the same area. It is therefore no longer a valid convention. Thirdly, the Rome Convention can be seen as a subsidiary treaty, i.e. viewed as part of EU law more broadly, so-called tertiary law. Therefore, by ‘leaving’ the EU, the UK will also cease to be a party to the Rome Convention.

23 This is how Sada and Drusian argued in their article. They argue that the reason is a material change of circumstances under Art. 62 of the Vienna Convention. ‘Since the accession to the Brussels Convention of 1968 was the first step in the implementation of the European project, the spirit of such Convention is diametrically opposed to the exit of the United Kingdom from the European Union, with the consequent inapplicability of the same post-Brexit’. I believe that they interpret Art. 62 too broadly. The fact that a state will withdraw from the EU is not something that could not have been foreseen and could not have been directly provided for in the relevant treaties. However, I concede that it is a possible interpretation. See: Sada and Drusian, 2024.

However, the reality is that post-Brexit, the UK is using its own domestic law,²⁴ which in a modified form has taken over the content of the Rome I Regulation rather than the Rome Convention.²⁵

The Rome Convention applied to the UK during the UK-EU transition period.²⁶ At the end of the transition period (at 11.00 pm (UK time) on 31 December 2020) the Rome Convention stopped applying to the UK on a reciprocal basis.²⁷

The EU takes a similar approach, applying the Rome I Regulation, being the EU's 'national law' which has universal application, rather than the Rome Convention.²⁸ Thus, the current practice of both parties therefore does not provide a clear answer, only a distinct desire not to continue to apply these treaties.

4. Interpretation of Subsidiary Treaties

For further interpretation, it can be taken as a given that subsidiary treaties were not part of supranational (Community and then EU) law. The principles of primacy and direct effect were therefore not applicable in their case. Nevertheless, these treaties were more intertwined with EU law than other ordinary international treaties. The reasoning for this conclusion are twofold. Firstly, the Court of Justice used a specific approach to their interpretation, taking into account the links to EU law and its content. Secondly, the Court has again, in interpreting these treaties, treated them not as a normal international treaty, but as an instrument of an autonomous nature on the national law of the Member States. It is however true that the first approach is closely related to, and a prerequisite to the second.

Firstly, it should be explained how and why the Court of Justice provided the interpretation of these treaties. Art. 293 of the EC Treaty did not confer any such power on this Court. Its competence to interpret these treaties is therefore not

24 The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834) (Regulations).

25 Attenborough, 2021.

26 UK-EU transition period.

27 Rome Convention.

28 The Court specifically addressed the issue of the application of the Rome Convention in its judgment of the Court (Seventh Chamber) of 14 September 2023. Case C-632/21 – *JF and NS v. Diamond Resorts Europe Limited (Branch in Spain) and Others* paras. 54 and 55: 'the United Kingdom's withdrawal from the European Union has no bearing on the application of the provisions of the Rome I Regulation to the dispute in the main proceedings. As regards the rules applicable during the transition period, laid down in Art. 66(a) and Art. 126 of the Withdrawal Agreement, they were drawn up with regard to the cases pending before the courts and institutions of the United Kingdom and as such do not affect the position of the Spanish court hearing the dispute in the main proceedings'.

implicit (automatic). It is, however, based on the agreement of the Member States (the contracting parties to both Conventions) and is made possible by the already quoted Art. 239 EC Treaty (now Art. 273 TFEU). In both cases, the power of the EU and, within it, of the Court of Justice to ensure a uniform interpretation was based on the Protocols negotiated by the Member States to the two Conventions.²⁹

The Court's first approach to the interpretation of the two Conventions can be demonstrated in the Eurocontrol case.³⁰ Here the Court used the following reasoning:

the principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Art. 220 of the EEC Treaty, which is at its origin, require in all Member States a uniform application of the legal concepts and legal classifications developed by the court in the context of the Brussels convention.³¹

What is particularly noteworthy about this paragraph is that the Court uses reasoning that is not based on the norms and rules of public international law when interpreting an international treaty. The rules and principles of European Union law are used to interpret this international treaty. The latter approach necessarily follows from the former. The interpretation of both conventions is autonomous to national law. This means that it is not up to the Member States to independently determine the meaning of words, concepts and institutes in these Conventions through the filter of their own national law. Both conventions are independent of national law.³² From a public international law perspective, such a solution is possible. Both the Vienna Convention on the Law of Treaties and international customs do not preclude this approach to interpretation, and the exclusion of self-interpretation of an international treaty by the contracting parties is permitted,³³ without modifying their international legal status in any way.

At the same time, the CJEU's interpretation is fully in line with the Vienna Convention and thus public international law. In fact, this method of interpretation takes into account the purpose pursued by the contracting states of the subsidiary treaties in negotiating them, which was the close link to EU law. In this respect, it is again Art. 293 EC Treaty that plays a very important role, although the same approach

29 Protocol on the interpretation of the 1968 Convention by the Court of Justice; the First Protocol on the interpretation of the Convention on the law applicable to contractual obligations, opened for signature at Rome on 19 June 1980, by the Court of Justice of the European Communities; and the Second Protocol on the delegation of certain powers concerning the interpretation of the Convention on the law applicable to contractual obligations, opened for signature at Rome on 19 June 1980, to the Court of Justice of the European Communities.

30 Judgment of the Court of 14 July 1977. Joined cases 9 and 10–77 – *Bavaria Fluggesellschaft Schwabe & Co. KG and Germanair Bedarfsluftfahrt GmbH & Co. KG v. Eurocontrol*.

31 *Ibid.*, para 4.

32 *Ibid.*

33 Sehnálek, 2019, p. 14.

was also applied to the Rome Convention. The Vienna Convention places teleological interpretation among the general rules of interpretation.³⁴

5. *Ratione Materiae* of Subsidiary Treaties

With regard to the scope of possible cooperation between Member States, the following can be stated: as regards the positive definition of the possibility of concluding them, firstly, I believe that subsidiary treaties could also be concluded in areas that were not explicitly mentioned in Art. 293 EC Treaty; secondly, I believe that they can be concluded even today, even though neither Art. 293 EC Treaty nor any other similar provision is part of primary law anymore. As for the negative definition, I believe that the conclusion of a subsidiary treaty is generally precluded by the existence of EU competence. Member States cannot therefore conclude such a treaty where the EU has exclusive competence to regulate an issue, or where its competence is shared, and the EU has already exercised it (thus emptying the space for regulation by national law of the Member States).

In the previous paragraph, I stated that the existence of exclusive competence excludes the possibility of regulation by national law of the Member States, and therefore also by subsidiary treaties (pre-emption). A subsidiary treaty should not be permissible in such cases, even in the case of internal regulatory gaps. I.e. in cases where the EU has competence over an issue but has not yet used it. However, the situation may be more complicated if we consider that the transfer of competence may only concern the possibility to regulate a certain issue. It is therefore a situation where there has been a transfer of legislative competence to adopt standards of regulation in a given area. Equally, however, it may relate to issues of an institutional nature where there may not have been a transfer of power, and even where the power to legislate is exclusive. This can be demonstrated by the example of customs. The EU has exclusive competence to set external tariffs on imported goods. Yet it does not have this competence at institutional level. The customs administrations that administer customs duties, and therefore EU regulations in everyday practice, are governed by national law and not EU law. A subsidiary treaty ensuring cooperation between the customs administrations of the Member States in such a defined segment of customs matters would therefore, in my view, be perfectly permissible.

Indeed, the Court of Justice has interpreted the notion of ‘so far as is necessary’ used in Art. 293 EC Treaty in an interesting way. On first reading, it would appear that this provision softens the obligation imposed on Member States to initiate negotiations. This is because the Member States themselves can assess whether this is

34 See Art. 31(1) of the Vienna Convention.

necessary. The Court of Justice has also taken an alternative approach to this connection, stating in *Überseering*:

As the Advocate General maintained at point 42 of his Opinion, Art. 293 EC does not constitute a reserve of legislative competence vested in the Member States. Although Art. 293 EC gives Member States the opportunity to enter into negotiations with a view, *inter alia*, to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one country to another, it does so solely 'so far as is necessary', that is to say if the provisions of the Treaty do not enable its objectives to be attained.³⁵

In this sense, the text 'so far as is necessary' represents limit, which is nevertheless not related to the Member States' obligation to act as it relates to the scope of Art. 293 EC Treaty instead. It therefore limits the breadth of the list of areas where Member States may cooperate under this provision. The Court of Justice has thus rejected the essentially contradictory argument in the cited case that Art. 293 EC Treaty is, on the contrary, a confirmation of the absence of EU competence to regulate certain issues (here, certain aspects of the freedom of establishment) by EU law. This means that the Court of Justice has allowed a narrow interpretation of this provision so that it cannot, by its broad scope, restrict the functionality of the fundamental freedoms of the internal market or of EU law in general.

So what is the relationship between Art. 293 EC Treaty, and what it allows to be regulated by subsidiary treaties and the competence provisions contained in primary law? I believe that this can be demonstrated by the freedom of establishment and its possible use by those who practise the law. Firstly, it is a relationship between two parallel independent areas, one governed by EU law and the other which can be governed by subsidiary treaties. This was the case of the so-called primary establishment dealt with in the *Daily Mail*³⁶ case, in which the Court of Justice allowed that the provisions of the freedom of establishment do not directly create the possibility of primary establishment (but this right may be enshrined by Member States in a convention under Art. 293 EC Treaty). Secondly, it is a competing relationship where an issue can be regulated under both EU law provisions and a subsidiary treaty. I can illustrate this relationship with the example of the never adopted so-called 14th Directive on the transfer of the registered office of a company. It is interesting to note that the issue of the transfer of the registered office of a company has moved from the first to the second category over time as the internal market

35 Judgment of the Court of 5 November 2002. Case 208/00 – *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, para. 54.

36 Judgment of the Court of 27 September 1988. Case 81/87. – *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*.

has developed.³⁷ This is a consequence of the dynamic development of the internal market and the general nature of the EU legislative competence under Art. 114 TFEU. Certain issues that could not be regulated in the past because they did not pose a threat to the functioning of the internal market can be regulated now if they have become an obstacle to its functioning in the meantime.

The problem lies in the fact that the scope for cooperation between Member States in the form of subsidiary treaties has been shrinking over time. The reasons for this contraction are twofold. Firstly, there is the gradual increase in the EU's competences, which occurs with every primary law revision. The second reason is the internal hollowing out of the scope for the use of these treaties. This is linked to the EU's legislative activity, i.e. in the form of secondary law or acts implementing secondary law. In any case, over time, the supranational method of regulation seems to be clearly prevailing over the intergovernmental method typical of subsidiary treaties.

The final question that should be addressed in this chapter in relation to Art. 293 EC Treaty is what is meant by its annulment without any successor in primary law. There is currently no similar provision in the current text of the TEU and the TFEU. The first possibility is that, by repealing Art. 293 EC Treaty by the Lisbon Treaty, the Member States have expressed the belief that subsidiary treaties are a special category of law created between themselves that has already been overtaken. This type of treaty has therefore ceased to exist not only in fact (by replacing the existing Brussels Convention with a regulation),³⁸ but also in law. I do not share this view.

The second, and to me more likely, possibility is that the Member States eliminated Art. 293 EC Treaty only to indicate that the preferred form of integration is that which already exists within the EU. This is understandable, since most of the areas covered by Art. 293 EC Treaty have in the meantime been emptied by the transfer of competences to the EU (private international law and the area of companies and the transfer of their seats). It can therefore be assumed that a similar shift is expected in the other areas previously covered by Art. 293 EC Treaty. This provision has therefore become hollowed out in its current form and therefore redundant. New areas of cooperation have apparently not been identified by the Member States. However, this does not mean that they do not exist and that subsidiary treaties could

37 The proposal was based on Art. 50(2) (f) which provides for progressive abolition of restrictions on freedom of establishment and Art. 50(2) (g) which provides for coordination measures concerning the protection of interests of companies' members and other stakeholders. In the beginnings of the common market, there were no such restrictions as the number of companies seeking the transfer of a company seat was limited, thus, there was no legal basis for any European regulation.

38 The Brussels Convention was replaced in relations between EU Member States by Council regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which was subsequently replaced by regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

not be concluded within them, quite the contrary. The following chapter will be devoted to the subsidiary treaties concluded between Member States to date.

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RESPECTING EQUALITY: PRACTICAL MANIFESTATIONS OF INTERGOVERNMENTAL INTEGRATION OUTSIDE THE TREATIES



DAVID SEHNÁLEK

Abstract

In this chapter I will examine the effectiveness of intergovernmental cooperation in the EU through an analysis of subsidiary treaties concluded between Member States. I will focus on the Brussels and Rome Conventions, the Fiscal Compact, Convention on the protection of the European Communities' financial interests, and the UPC Convention. I will assess their success and impact on the development of the EU, arguing that these intergovernmental agreements, despite being limited in number, represent important milestones of integration and may offer solutions to the shortcomings of the current supranational model of the EU. I will also explore the question of whether and in what areas this approach could be developed further. That is, whether these treaties could be a model for further development of the EU. From the perspective of equality between Member States, it is important that these forms of cooperation do not circumvent cooperation within the EU. In other words, not only is the interest of those states that wish to participate in cooperation important, but the perspective of those states that may not be interested in cooperation should also be considered. From the perspective of equality between Member States, it is essential that these forms of cooperation do not bypass or undermine cooperation within the EU framework. In other words, not only do the interests of the participating states matter, but also the perspectives and concerns of those Member States that choose not to take part, which must be duly considered.

Keywords: subsidiary treaties, interstate compacts, Art. 293 EC Treaty, intergovernmental cooperation, federalism, democratic legitimacy, EU competences

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1. Introduction

In this part of this book the individual treaties that have been concluded between EU Member States will be focussed on. Their specificities will be analysed. The key question that this section will attempt to answer is whether these treaties represent a systemic solution that allows Member States to cooperate with each other. The essence of such cooperation should be the achievement of common objectives, but with respect for the interests of all Member States, i.e. with minimal or even no manifestation of the supranational principle in the functioning of such cooperation. This so important because they may be the answer on the shortcomings of the current model of EU integration. Therefore these problems will first be identified and conceptualised.

Today, the EU's regulatory activity has gone far beyond the core of integration. We are in a situation where the EU is also seeking to centrally regulate the areas of European cooperation that were originally peripheral in nature. The core can be primarily understood as an economic cooperation, while the periphery includes, for example, matters relating to border protection, the rights of family members of static EU citizens, etc. Nowadays, it seems as if there are no limits to European law. Indeed, the principles of subsidiarity and proportionality, which limit the exercise of EU powers, are only formally considered.¹ This phenomenon is further fuelled by factors that originate in the nature of the rules that the EU can adopt. The use of directives, or indeed regulations, but which in their conception resemble directives to some extent (GDPR is a prime example), allows the EU to regulate matters that in the US, which for example, remain related to state, not federal, law. Ultimately, the EU is increasingly manifesting itself as a federation without actually being one. In some areas, it even seems to go beyond what US federal law provides and therefore interferes with state law more than the US federation does.

Finally, the problem with the EU is that regulation moves along two poles. On the one hand, it is the over-constitutionalising of EU law. The EU 'constitution', which is generally considered to be primary law, contains regulations that both traditionally belong in constitutions, as well as a range of economic policies, policies related to them, and policies that have no direct link to them at all. This regulation is interpreted by the Court of Justice, and hence its often activist decisions become part of this EU 'constitution'. And within the framework of interpretation, the general 'constitutional rules' are supplemented by the specific regulation of 'statutory law' contained in secondary law, thus effectively elevating it to that 'constitutional' level. This mass of law is extremely difficult to change. Changes to primary law must be approved by all Member States, which is fine, but this is how it can work with real constitutional rules, where stability is a priority. Conversely, it is inappropriate in the case of a regulation that is essentially a part of the 'constitution' by chance. In its case, on the other hand, it is reasonable to require a degree of flexibility. But this is

1 Pauknerová, 2017, p. 185.

not the case with the EU and its law. The case law of the Court of Justice adopted in these materially unconstitutional areas of regulation is similarly stable.

But over-constitutionalising is just one of the same kind of problems. The other is the fact that Member States leave too much room for the European Commission to promote its own ideology and to implement it through regulatory acts, which are actually sub-legislative legislation. In this way, regulations binding on businesses in the internal market are adopted on a large scale, and this is done in a way that does not guarantee real democratic control. The Member States are involved in the process of adopting them, but only at a bureaucratic level, through their executive in the comitology process. The democratic legitimacy of legislation adopted in this way is very low. However, problems also arise at the level between ‘constitutional’ law and sub-legislative legislation, namely at the level of secondary law. The latter is increasingly showing fundamental legislative and technical deficiencies. The legislation is fragmented into many separate acts. It is extremely difficult for the addressee of such legislation to navigate it and understand it. The verbosity of the regulations, both in their normative part and in the preamble, does not help to solve this problem. It is clear that there is little willingness on the part of the EU to address this in a truly systemic way. The piecemeal efforts of the past, such as the small-scale reform of consumer law, cannot be regarded as real success and a beneficial solution.

In addition to all the above, the very set-up of the EU itself, in particular the European Commission, is problematic. The EU solves problems with an ordoliberal approach. In practice, this manifests itself in an emphasis on the earliest and widest possible regulation by EU law. This has contributed to the perception captured by the often-cited slogan ‘the US innovates, the EU regulates’. On the EU’s side, the prevailing belief is that it has only to regulate problems even loosely related to the functioning of the internal market, ideally with a global reach. It is therefore expected that not only Member States but also third countries will adapt. But all this ultimately means creating a space in which there is over-regulation that is difficult to change and often incomprehensible to its addressees – see the problems described in the previous paragraph. The consequence is undermined economic growth in the EU compared to USA and limited scope for creativity and innovation. Repeatedly, lofty goals are set but not met – for example, the Lisbon Strategy,² and how it (infamously) it ended.³ In the meantime, new targets have been set. As to whether they will be met is also questionable.

It is becoming increasingly clear that a solution from within the EU is not possible. The EU is clearly incapable of any other approach. So, the question is what to do about it and how to respond to the problems described. I believe that an

2 The original target was to be achieved by 2010 and was as follows: ‘to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’. Presidency conclusions, Lisbon European Council, 23 and 24 March 2000.

3 Feás, 2024.

intergovernmental method of integration, closely linked to the EU, implemented through subsidiary treaties, may be such a solution. It is therefore necessary to look more closely at these existing treaties, which will be the aim of this chapter.

2. Brussels Convention

The Brussels Convention is the only treaty ever adopted directly on the basis of Art. 293 EC Treaty. It is

a dual convention governing, within its field of application, direct jurisdiction of the courts in the States that are bound by the Convention, coordination between courts in the event of competing jurisdiction, conditions for the recognition of judgments, and a simplified procedure for their enforcement.⁴

The EU was directly involved in its creation. In fact, the negotiations for this treaty were initiated by the European Commission the year after the EEC was created. This involvement of an international organisation is not unusual, on the one hand. International treaties are regularly negotiated in international forums by international organisations. In this case, however, it was an activity that did not fall directly within the competence of that international organisation, the EEC, and Art. 293 of the EC Treaty was the only connection. The motive for this treaty was to contribute to the creation of an internal market by ensuring adequate legal protection and legal certainty for individuals in the common market.⁵ The conclusion of the additional protocol to the Brussels Convention involved the Court of Justice in its interpretation by means of the preliminary ruling mechanism, on the basis of Art. 273 TFEU.⁶

The origin of the Brussels Convention was not easy,⁷ and at the time of its adoption it was perceived as a necessary, and it must be added, not very successful compromise. It was a compromise because its content reflected the influence of the United Kingdom and its common law. Thus, some of the accepted solutions were in some respects incompatible with the solutions inherent in continental law. It can be argued however, that the convention was in fact a huge success for the EU and the Member States.

4 Professor Pocar spoke these words about the Lugano Convention. Since this Convention mirrors the Brussels Convention, his words apply equally to both treaties. See Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 – Explanatory report by Professor Fausto Pocar (Holder of the Chair of International Law at the University of Milan) OJ C 319, 23.12.2009. Pocar, 2009, p. 4.

5 eur-lex.europa.eu, 1979.

6 Protocol on the interpretation of the 1968 Convention by the Court of Justice.

7 This convention was signed only after nine years of negotiations. See: eur-lex.europa.eu, 1979.

I have several reasons for a positive assessment of the importance of this international treaty. Firstly, there are reasons of substance. The legal provisions adopted in this treaty were subsequently incorporated into the EU legal framework following the transfer of powers to the EU by the Treaty of Amsterdam, which was executed in 2001 via the Brussels I Regulation. It was only in the second step, the adoption of the Brussels I bis Regulation in 2012, that a more substantial revision took place. The success of this Convention is demonstrated by the fact that it has become the basis for determining jurisdiction and for the recognition of foreign judgments not only between Member States but also *vis-à-vis* certain third countries. The rules it introduced were taken over in the 1988 Lugano Convention, which the Member States concluded with the EFTA States.⁸ The Lugano Convention thus became the legal instrument for the extended application of the rules agreed and contained in the Brussels Convention. Even the Lugano Convention, as a successful project, exists today, only the rules for jurisdiction and the recognition and enforcement of judgments in civil and commercial matters have been updated (mirroring developments within the EU). Therefore, the original Lugano Convention was also replaced by the 'New Lugano Convention' in 2009.⁹ How else to measure the success of a piece of legislation other than by the fact that it has stood the test of time and inspired other states? In this respect, the Brussels Convention has indeed been an extremely successful venture, not least in the area of justice, an area that is very sensitive to the Member States.

Once again, it is necessary to emphasise the fact that the Brussels Convention was the product of intergovernmental cooperation between Member States, which gradually led to supranational cooperation. The Member States were therefore able, as equals, to define the parameters of the cooperation and the legislation adopted based on it. With modifications, this has persisted to the present day. The regulation adopted by the supranational method is therefore based on rules that were originally agreed intergovernmentally.

The success of the Convention is further underlined by the fact that it has acted as an inspiration to Member States for their further codification work in the field of private international law. The spillover effect has worked very effectively. Indeed, cooperation in the area of determining the jurisdiction of the courts had, by necessity, to be supplemented by another form of cooperation in the area of determining the

8 88/592/EEC: Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988.

9 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters OJ L 147, 10.6.2009, pp. 5–43

applicable law.¹⁰ This was the only way to solve the problems associated with fundamentally negative phenomena such as forum shopping.¹¹ Unification of the rules for determining applicable law is a sensible answer to this problem, which brings us to the Rome Convention.

3. Rome Convention

The Rome Convention was the second convention adopted in the field of private international law. It was negotiated in 1980 but did not enter into force until 1991. It is now only applicable in relation to Denmark.¹² Denmark has a special regime – an opt-out from cooperation in the area of freedom, security and justice. This treaty was built on the Brussels Convention by establishing universally applicable rules for determining the applicable law in disputes with an international element.

The Rome Convention is remarkable in many respects. This is mainly because it is not a true subsidiary treaty, since Art. 293 EC Treaty did not envisage a unification of the rules for determining the applicable law, even on an expansive interpretation. Nevertheless, the treaty is in all respects a *de facto* subsidiary treaty. It originated with the EU Member States and only the EU Member States could become a party to it.¹³ Protocol to this treaty established the power of the Court of Justice to ensure a uniform and correct interpretation of the Rome Convention.¹⁴ Finally, in a joint declaration, the Member States declared their interest in sharing with the Court of Justice and with other Member States information on judgments which have become *res judicata* and have been handed down pursuant to the Convention on the law applicable to contractual obligations by the courts,¹⁵ which were empowered to ask preliminary questions, i.e. the highest courts of the Member States.

10 The Guiliiano-Lagarde Report explicitly states: ‘As for the legal basis of the work, it was the unanimous view that the proposed harmonization, without being specifically connected with the provisions of Art. 220 of the EEC Treaty, would be a natural sequel to the Convention on jurisdiction and enforcement of judgments’. Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris IOJ C 282, 31.10.1980, pp. 1–50

11 Forum shopping in international private law refers to the practice of litigants taking actions in jurisdictions where they believe that the court will in their case most likely to provide a favourable judgment.

12 And some overseas territories of EU countries.

13 See Art. 28 of the Rome Convention and the condition contained therein that signature is possible only in case of the States that party to the Treaty establishing the European Economic Community

14 First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version) / 1980 Rome Convention Official Journal C 027, 26/01/1998 P. 0047–0051

15 Joint Declaration to the Rome Convention.

The Rome Convention can also be considered an example of a very successful integration project.¹⁶ The reasons for this conclusion are the same as those applied in the case of the Brussels Convention. The development of these treaties went hand in hand with the development of EU competences. After the intergovernmental method of agreeing on the rules had proved its worth, the Rome Convention was also materially transformed into EU law. Valdhans and Myšáková refer to the conversion of existing rules into an EU regulation.¹⁷ When adopting the EU Regulation, the Commission also introduced amendments, i.e. the Rome Convention was not taken over as it was. However, this is understandable as the successor regulation¹⁸ was adopted after almost three decades, so it was indeed necessary to update the rules.

4. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact)

This treaty is not a conceptually subsidiary treaty, as Art. 293 EC Treaty does not envisage that at all. Its focus is on issues relating to the national economy and its limits, areas which are not regulated by this provision. It was adopted to reinforce the budget discipline of euro area governments. As regards its legal status, there is no doubt that this treaty is an intergovernmental international treaty.¹⁹ Nevertheless, this treaty has significant similarities with subsidiary treaties, and it is for these that it belongs in this chapter. In the interim since its adoption, EU institutions have attempted to incorporate it into EU law, arguing that this is an obligation under Art. 16 of this treaty, as this provision requires the incorporation of this treaty into EU law. However, I believe that this is an obligation imposed on the Member States, as they are the signatories to this treaty, and not on EU institutions, namely the European Commission. For some reason, the Member States have not yet taken this step.

The European Commission argues that the benefits of incorporating this treaty into EU law will be:

Consistency of EU fiscal rules within the Economic and Monetary Union; Voluntary participation of non-euro area Member States; Complementing and strengthening the Stability and Growth Pact, taking into account the appropriate flexibility built into the Pact; Simplification of the legal framework; Better monitoring and enforcement of

16 At the time this treaty was adopted, it was not generally accepted in this way. On the contrary, its shortcomings were pointed out. See Horlacher, 1994, p. 173.

17 Valdhans and Myšáková, 2008.

18 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

19 This is also how it is referred to by official EU sources. See: European Union, no date.

fiscal rules; Incorporating the Treaty into the EU's legal and institutional framework will enhance its democratic legitimacy.²⁰

Neither of these reasons appear to be convincing. The last claim comes across as the most problematic. One might also interpret this argument to mean that the European Commission does not consider the approval of an international treaty by national parliaments to be sufficiently democratic. Nevertheless, it is hoped that this is not the case. However, I believe that this Commission's statement confirms the observation made at the beginning of this chapter that EU legislation (including its accompanying documents) too often uses a lot of words which, as they sound more grandiose, actually become emptier. Playing on the democratic deficit is one of the EU's favourites actions.

In fact, there are only two relevant arguments for incorporating this Treaty into EU law. Firstly, there is the aforementioned commitment in its Art. 16. There is no reason for this treaty to exist on its own outside EU law once Member States have become signatories to it. The second argument is that incorporating this treaty into EU law would remedy the current problematic relationship of this treaty with the regulation contained in primary EU law in the same area.²¹

So let us look at where the problematic nature of the Fiscal Compact lies. It is a fact that Member States can conclude any international agreement between themselves, so long as they do not interfere with EU competences. It is true that economic policy is only coordinated by EU law. The EU's competence in this area is therefore very limited. However, the Fiscal Compact lays down rules for the management of Member States' economies that complement, concretise and ultimately modify the rules of EU law adopted for the same area. The Fiscal Compact further modifies voting in the EU institutions. Art. 7 of the treaty introduces in effect, the 'automatic adoption of a proposed measure or recommendation by the Commission against the euro area Member State concerned in the excessive deficit procedure, unless a qualified majority of the contracting parties whose currency is the euro is opposed'.²² This means that the intergovernmental treaty is intertwined with the EU's internal arrangements and decision-making of EU institutions.

The Fiscal Compact also introduces its own enforcement mechanism, which is unusual in international law.²³ Similarly to the Brussels and Rome Conventions, Art. 273 TFEU is used, which establishes the Court of Justice's power to enforce the treaty. The difference is that the Court's primary task is not to ensure a uniform interpretation of the Fiscal Compact in the Member States, but to enforce compliance with it. It is therefore not analogous to the procedure under Art. 267 TFEU, but rather to

20 European Commission, Directorate General for Economic and Financial Affairs, 2017.

21 In particular those contained in Protocol No 12 of the excessive deficit procedure. OJ C 202, 7.6.2016, p. 279-280.

22 Kusák et al., 2012, p. 55.

23 Týč, 2012, p. 110; Tomášek, 2012, p. 39; Týč and Sehnálek, 2017, pp. 192 and subseq.

Art. 259 TFEU. What is worth noting is that the Commission cannot bring an action before the Court of Justice under Art. 273 TFEU itself. All the above suggests that if the primary objective of the Member States was to regulate the issue by amending primary law, then such an amendment would be legally sound. However, this was not possible for reasons of time and due to the opposition of some Member States (namely the United Kingdom and the Czech Republic). The remaining states therefore used the international treaty as a standard instrument of public international law, which essentially bypassed the factual impossibility of changing EU primary law in a non-standard way. An attempt to ensure compliance with EU law is contained in Art. 2 of the Fiscal Compact, but this provision is only relevant from an internationalist perspective. It confirms that the Fiscal Compact is not a later treaty that replaces to some extent an earlier treaty (which is the TFEU), but merely supplements existing rules with new ones. However, this is clear and a given from the perspective of EU law, and nothing in the Fiscal Compact can alter this. From this point of view, Art. 2 of the Fiscal Compact is a rather obvious statement, but it cannot justify the fact that this treaty regulates matters already regulated by EU law.

The Fiscal Compact is, in my opinion, a clear demonstration that the EU, despite all the federal language in its law and in its activities, remains merely an international organisation. In my opinion, it is unthinkable that the sub-states of a federation should in any way circumvent federal law by their own jointly adopted arrangements. This treaty is also proof that, if necessary, EU institutions are willing and able to accept a solution that is pragmatic and effective, even if it is a controversial solution from the point of view of EU law. However, despite any reservations I may have as a lawyer, this solution is legitimate and democratic. It has been ratified by standard processes in the Member States.²⁴

5. Convention on the Protection of the European Communities' Financial Interests

In principle, a similar treaty to the Fiscal Compact was the Convention on the protection of the European Communities' financial interests, which was also adopted to make part of the national law of the Member States the rules envisaged by that treaty, which were linked to the EU and its law. This treaty was also not the treaty envisaged by Art. 293 of the EC Treaty. Nevertheless, it had a clear subsidiary nature, by virtue of Art. K.3 TEU (MAA). This provision allowed the Council to draw

24 In the Czech Republic, the question was whether the qualified procedure for the adoption of treaties (under Art. 10a of the Constitution) or the ordinary procedure (under Art. 10 of the Constitution) should be used. It was noted that the Treaty did not confer new powers on the EU and that the latter procedure was therefore sufficient.

up conventions for Member States, which could adopt them in accordance with their respective constitutional requirements.²⁵ The difference with the Fiscal Compact was that the Convention on the protection of the European Communities' financial interests did not regulate in a new and different way issues already regulated by EU law. It built on EU rules and aimed to contribute to the better functioning of EU law by uniformly defining, criminalising and sanctioning fraud in the management of EU funds. In this respect, the Convention was closer to the Brussels and Rome Conventions in terms of its relationship with EU law. It also shared the same fate. Following the extension of the EU's competences by the Lisbon Treaty, the Convention was in principle replaced by secondary EU law.²⁶

6. Agreement on a Unified Patent Court

The Agreement on a Unified Patent Court is another international treaty that was not foreseen by Art. 293 EC Treaty but meets the parameters allowing itself to be considered a subsidiary treaty. However, like the Fiscal Compact, the Agreement on a Unified Patent Court has certain specific characteristics that make it unique. The aim of this treaty is to create a common three-instance court of participating Member States for the settlement of disputes relating to European patents and European patents with unitary effect. It is therefore an international treaty that can only be concluded between Member States and not necessarily by all of them. This treaty establishes a court which has a dual nature. From a national perspective, this court is international in nature. It does not form part of the national judicial system, and from the viewpoint of each respective Member State, it may operate in a foreign language, apply its own procedural rules, and involve judges of foreign nationality. However, from the perspective of EU law, this court is regarded as a national court of the respective Member State. In fact, it has jurisdiction over cases that have been decided by national courts, with the proviso that it will enforce the rules contained in EU law in the field of patents, and national rules in international law. This very specific solution was adopted because, on the one hand, the Member States clearly did not have the will to create new EU courts and thus federalise the EU judiciary. At the same time, however, it was necessary to preserve the primacy of the EU judiciary and to ensure the priority application of EU law, which the national nature of the Unified Patent Court allows and ensures.

²⁵ See Art. K.3 Sec. 2(c). TEU.

²⁶ Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law. See Point 25 of its Preamble and its Art. 16.

From the Member States' perspective, the treaty touches upon a sensitive area of justice. Nevertheless, given its predominantly technical focus, the transfer of competences in this domain was presumably more politically acceptable. Indeed, patents cannot be regarded as a subject closely related to the security of the State and its public order. However, it should also not be forgotten that the potential economic and financial consequences in this area can also be considerable. This may further complicate the existing and evidently difficult position of manufacturers from new EU Member States, who on the one hand lack the innovative potential of competitors from the old Member States, nor do they have the necessary know-how and financial resources to consistently protect their own intellectual and industrial property. This is probably the reason why the Czech Republic, Hungary, Slovakia and others have signed but not ratified the treaty. Poland, Croatia (and, outside our region, Spain) have not even signed it.

7. Conclusion

The number of subsidiary treaties concluded between Member States is not high. In this case, however, quantity does not outweigh quality. Indeed, each of these treaties was a significant milestone in the development of European integration and most of them have contributed significantly to the current supranational form of the EU. The question that was sought to be answered in this chapter was whether these treaties represent a systemic solution to cooperation between Member States. I believe that this is indeed the case. Several reasons can be identified to make this conclusion. These treaties provide detailed regulation of certain issues and do so without the risk of 'surprises' that can occur when EU secondary law is adopted. I am referring to those situations where the EU adopts very specific legislation on a very general basis in primary law which, although approved by national governments in the Council, would never be approved by national parliaments. This is not the case with subsidiary treaties. Their democratic legitimacy is therefore higher compared to the EU legislation. It should also be said that the process of their discussion in national parliaments is more judicious, more thorough and more professional than the process of discussing secondary legislation in legislative procedures. In fairness, however, it must be admitted that both positive arguments also have a disadvantage – the time-consuming nature of the adoption of these treaties.

These treaties also make it possible to regulate matters that are politically sensitive and where the transfer of powers is unwelcome in some Member States. Still, history shows that they act as a precursor to future EU regulation. Any functional cooperation established between Member States based on a subsidiary treaty may be later transformed into intra-EU cooperation once it is established and proven. In line with the bicycle theory, they can be deemed a progressive instrument of EU

federalisation in a way that will be more generally acceptable than the 'Brussels dictates' currently criticised in many countries.

These treaties offer the advantage of accommodating national interests and needs while simultaneously making use of the existing EU institutional framework. The Court of Justice can ensure their uniform interpretation and effective enforcement, and the Commission may play a key role as an initiator and impartial mediator in the negotiation process between Member States. These are significant benefits. Nevertheless, the EU has recently shown reluctance to acknowledge or build upon them.

However, there is also the question concerning in which areas such treaties can be concluded. It appears that the gradual expansion of the EU's competences has in essence, narrowed or even eliminated the space for concluding such agreements. And where such space still exists – such as in the field of double taxation – there seems to be little political will among the Member States to make use of it. Both these aspects represent a genuine problem. In my view, the EU requires a more fundamental reform of its system of competences. Only once such a reform has taken place can the broader use of subsidiary treaties be meaningfully considered. I believe that the EU has reached a stage where it is no longer sufficient merely to define the areas in which it has competence. It is equally important that primary law explicitly and clearly identifies those areas which remain fully within the competence of the Member States. In federal systems, such a division is standard practice. This delimitation should be declaratory in nature. Its function would not be to establish Member State competences *ex novo*, but rather to set clear limits to EU action. Within those limits, there would be greater scope for the use of subsidiary treaties. This process can be envisaged being accompanied by both a reduction in the scope of certain existing EU competences and, conversely, by a form of functional federalisation in those areas where EU powers would be retained. In this context, subsidiary treaties could play a valuable role in fields such as migration, social policy, taxation, health care, education, and other similar domains.

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PART IV

COOPERATION WITHOUT
UNIFICATION – EQUAL,
DIVERSE, TRUSTING

CHAPTER 10

BRIDGING THE GAPS: MUTUAL TRUST AND RECOGNITION AS TOOLS FOR COOPERATION OF EQUALS



RADOVAN MALACHTA

Abstract

This chapter assesses the formal equality of Member States of the European Union in situations where they must rely on other Member States and fully accept the other's sovereign decisions. It primarily focuses on the area of freedom, security and justice, particularly on judicial cooperation in civil and criminal matters, where the need for the recognition and enforcement of judicial and extrajudicial decisions arises. Only a marginal mention has been made of related areas. First, the focus is on developmental trends in the unification of law in this area, that is, judicial cooperation in civil and criminal matters, particularly after the Amsterdam Treaty. Subsequently, based on an analysis of the case law of the Court of Justice of the European Union, relevant EU regulations, and legal scholarship, this chapter defines and synthesises the concept of mutual trust and examines the relationship between mutual trust and mutual recognition. This issue has been discussed separately in civil and criminal matters. On the one hand is a requirement for recognition without special proceedings, and on the other hand are various regulations and framework decisions that lay the grounds for refusing the recognition of a judgment or its non-execution. All these aspects are evaluated against the background of equality or inequality between Member States, which are obliged to cooperate under EU law, even in the absence of fully uniform rules.

Keywords: equality of EU Member States, area of Freedom, security and Justice, mutual recognition, mutual trust, judicial cooperation

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1. Introduction

The essence of the European Union as a supranational organisation lies in the fact that its Member States have voluntarily transferred the exercise of powers in certain areas to the institutions of the EU. While the Member States remain sovereign, in those areas where they have conferred powers on the European Union, whether exclusively or shared, EU institutions have the authority to adopt legally binding acts. In these areas, the European Union holds a position of supremacy over its Member States. The Treaty establishing the European Economic Community (Treaty of Rome, 1957) has created its own legal system that became an integral part of the legal systems of Member States.¹ The existence of its own legal system, which in present-day terminology can be broadly referred to as EU law, constitutes the first prerequisite for assessing the issue under examination.

The second aspect to consider is the question of equality or inequality among the Member States. Secondary acts adopted by the EU reveal the inequality, which is primarily reflected in the European Parliament, where each Member State has a different number of Members of the European Parliament depending on the State's population. Similarly, in the Council of the EU, the weight of the vote of each Member State minister varies according to that State's population. However, one could argue that despite these differences, each State has representation in EU institutions and, therefore, Member States are at least formally equal. This formal equality is further demonstrated by the fact that EU law is equally authoritative in all 24 official languages, with no language superior to any other. Finally, equality can also be seen in the fact that all Member States are equally responsible for compliance with EU law, in relation to both EU institutions and other Member States.²

At the same time, the question of equality must not be confined to an institutional level. Although the EU functions as a federation in the field of law, in terms of institutions, it does so only to a limited extent. Much of EU law, including sensitive areas such as the judiciary, is implemented by national authorities. In many domains, regulation remains purely national, with EU law merely mediating its effects. Consequently, the issue of equality between Member States must also be examined considering the national authorities responsible for implementing EU law.

The responsibility of a Member State for ensuring compliance with EU law *vis-à-vis* other Member States is particularly evident in the area of freedom, security and justice, particularly in the field of judicial cooperation in civil and criminal matters. While judicial cooperation in civil matters with cross-border implications is based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases, judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and other judicial decisions. In both cases, this cooperation entails approximation of the laws and regulations of the Member States in the areas

1 Judgment of the Court of 15 July 1964, Case 6/64.

2 Křepelka, 2021, pp. 118–119.

defined in Arts. 81 and 82 of the Treaty on the Functioning of the European Union ('TFEU').³ Mutual recognition is also evident in other areas, such as the single internal market and free movement of goods, where the different requirements for goods are recognised in the absence of EU regulations or for the recognition of professional qualifications.

The principle of mutual recognition is closely related to, or intertwined with, the principle of mutual trust. This section is particularly focused on these principles. This chapter aims to answer the following fundamental research question: Are EU Member States truly equal if they must rely on other Member States and fully accept their sovereign decisions? The chapter thus assesses developmental tendencies in the field of the unification of law and their results, covering developments since the Treaty of Amsterdam. The specific aim is to determine whether the loss of equality is a reasonable price to pay for the benefits of a common EU regime. This analysis contributes to the broader goal of the publication by identifying whether it is possible to secure closer and more integrated European cooperation among Member States while respecting their equality.

Therefore, the focus is primarily on the mutual recognition of foreign judgments in the context of the outlined issues and objectives. For completeness, this topic is briefly addressed in relation to other areas of EU law.

2. Historical Overview: Evolution of Judicial Cooperation and the Emergence of Mutual Recognition in the EU

The original objectives of the European Union (known as the European Economic Community at the time) were primarily economic. Economic integration was manifested in the establishment of a customs union and a common market, the latter evolving into a single internal market characterised by four freedoms of movement: free movement of goods, persons, services, and capital. Attention has also been paid to issues linked to economic integration, particularly the treatment of foreign judicial decisions. As early as September 1968, the Member States of the European Communities (currently the European Union), in accordance with the fourth indent of Art. 220 of the Treaty Establishing the European Economic Community, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Convention dealt with the question of determining the international jurisdiction of courts and the recognition and enforcement of judgments from one Contracting State in another Contracting State in civil matters. In 1980, the Convention on the Law Applicable to Contractual Obligations was

³ Arts. 81 and 82 of the Treaty on the Functioning of the European Union.

adopted to establish conflicts of law rules. Initially, civil and commercial matters were dealt with in terms of court judgments.

The primary reason for intergovernmental treaty-based cooperation initially forming the basis of this legal framework was the limited competence of the Community as was explained in chapters 8 and 9 of this monograph. From the perspective of concluding international agreements, these powers remained unchanged even after the adoption of the Treaty on European Union ('TEU'; the Maastricht Treaty, which came into force in 1993). The Treaty introduced a three-pillar structure. This is the first time cooperation in the fields of justice (civil and criminal) and home affairs has been mentioned explicitly. This cooperation was placed within the third pillar, which rested on intergovernmental principles. To adopt rules in this area, all Member States had to reach an agreement on an international treaty. Although the Maastricht Treaty establishes an institutional framework for various EU institutions, the Amsterdam Treaty (which came into force in 1999) was of much greater significance, as it was a revision of the Maastricht Treaty. For the sake of completeness, it should be noted that, despite the existence of several proposed agreements, no international conventions in the field of judicial cooperation entered into force in the period between the Maastricht and Amsterdam Treaties.⁴

The Amsterdam Treaty is important to the topic under examination from several points of view. It establishes the area of freedom, security and justice, which consists of civil and criminal law components. Under this Treaty, judicial cooperation in civil matters was transferred from the third intergovernmental pillar to the first supranational pillar. The practical consequence of this shift was that the institutions of the European Communities/European Union could adopt legally binding secondary legislation in the field of civil cooperation, and international treaties in this area could no longer be concluded through the unanimous agreement of all Member States. This marked the end of the era of subsidiary agreements, as discussed in Chapter 8. From this moment onwards, civil judicial cooperation changed from treaty law to unilateral universalism because conventions were transformed into regulations, and new regulations in various areas were adopted.⁵ Therefore, the Brussels I Regulation was adopted in 2000 to replace the earlier Brussels Convention. Other EU regulations followed later, both in procedural matters (determining international jurisdiction, recognition, and enforcement of judgments) and in matters of conflict of law (determining applicable law). Another significant change was that the CJEU also acquired the power to interpret these acts, contributing to the uniform application and interpretation of legal concepts across the Member States. Three States retained their special positions: Denmark, Ireland, and the currently irrelevant United Kingdom. Denmark does not participate in judicial cooperation in civil matters; in other words, EU regulations in the field of European private international law do not apply to Danish courts and authorities. Bilateral treaties govern the legal

4 Rozehnalová, 2018, pp. 25–26.

5 Fallon and Kruger, 2013, p. 16.

rules between Denmark and the European Union. Ireland (and previously the United Kingdom) can opt-in to individual adopted acts, and the EU secondary acts are then applicable before Irish courts.⁶

Police and judicial cooperation in criminal matters remained within the third pillar. This cooperation was implemented through framework decisions aimed at harmonising the laws of the Member States.⁷ However, with the abolition of the third pillar by the Lisbon Treaty, this cooperation was also integrated into the area of freedom, security and justice.⁸ Nevertheless, the Amsterdam Treaty had an impact on judicial cooperation in criminal matters, at least to the extent that this area was governed by the Schengen Agreement on the gradual abolition of checks at their common borders (1985) and the Convention implementing the Schengen Agreement (1990).⁹ The Schengen agreements and their implementing rules were incorporated into EU law (the Schengen *acquis*) through the Protocol on the Schengen *acquis* integrated into the framework of the European Union.¹⁰

The final significant change introduced by the Amsterdam Treaty was the establishment of the institute of enhanced cooperation. Under Art. 20 of the Treaty on European Union, Member States can integrate more quickly in certain areas under specific conditions. The institute of enhanced cooperation is most often used in the area of judicial cooperation in both civil and criminal matters.¹¹ Examples include the Regulation implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office,¹² the Regulation implementing enhanced cooperation in the area of the law applicable to divorce and legal separation,¹³ and the Regulation implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes¹⁴ and in matters of the property consequences of registered partnerships.¹⁵ Since the latter two Regulations also lay down rules on the recognition of judgments, it is relevant to note here that integration among certain Member States is deeper, and those participating in enhanced cooperation demonstrate a higher level of mutual trust.

6 Rozehnalová, 2021, pp. 377–378.

7 Mádr, 2022, p. 289.

8 Týč, 2017, p. 212.

9 Syková, 2019, pp. 375–377.

10 Craig and de Búrca, 2020, p. 997; Týč, 2017, p. 213.

11 Kadlec and Malachta, 2024, pp. 124–149.

12 Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

13 Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

14 Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.

15 Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

The Treaty of Nice did not introduce any significant changes relevant to this topic, and the impact of the Lisbon Treaty has already been mentioned. Currently, the EU has shared competence in the area of freedom, security and justice.¹⁶ Legal acts in the field of judicial cooperation in both civil and criminal matters are adopted through the ordinary legislative procedure, except for specific exceptions (e.g., in family law with cross-border implications).¹⁷

It should be noted that mutual trust and mutual recognition are not only matters of the area of freedom, security and justice but also concern other areas of the Union. For example, in the area of the single internal market and the free movement of goods, changes were seen in the transformation of the common market into an internal market. The key difference was the elimination of internal border controls on goods concerning technical, safety, sanitary, or other standards, as well as the abolition of formalities at internal borders for statistical and tax purposes.¹⁸ The abolition of controls presupposes mutual trust between Member States. This happens in a situation where the requirements for goods may differ from one Member State to another. These differences or varying requirements for goods placed on the market, including imported goods, are dealt with in two ways. First, through legal harmonisation, where the conditions of standards are approximated; this means EU legislation exists (based on Art. 114 TFEU). Second, in the absence of EU legislation, the principle of mutual recognition applies, under which the importing state recognises the standards of the producing state, even if each state has its own regulations and standards. Thus, differences are eliminated without harmonisation. The principle of mutual recognition was originally an unwritten principle derived from the case law of the CJEU. At present, it is reflected in the Regulation on the mutual recognition of goods lawfully marketed in another Member State.¹⁹ This regulation had its predecessors; however, in this version, the preamble, for the first time, explicitly mentions the mutual trust in this area.²⁰ The shift towards mutual recognition and trust can also be seen in the historical development in this mentioned area.

Historical developments are reflected even further in the context of mutual trust and mutual recognition. The following subchapter deals with the concept of mutual trust as defined by the case law of the CJEU and the scholarly literature.

16 Art. 4 of the Treaty on the Functioning of the European Union.

17 Arts. 81 and 82 of the Treaty on the Functioning of the European Union.

18 Týč, 2017, p. 169.

19 Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008.

20 Ibid., recital 48.

3. Mutual Trust and Mutual Recognition Explained

First, there is no widely accepted definition of mutual trust in the context of the EU law,²¹ particularly in civil matters.²² Second, it cannot be simply stated whether mutual trust is a legal or a political concept, as both perspectives are feasible. Arenas García defines mutual trust on the one hand as a legal obligation and on the other as a fact. The former implies that all authorities of a Member State trust the authorities of another Member State. The latter refers to the issue of whether Member States genuinely trust each other.²³ It is only one definition, a rather general one at that. It should be noted that different expert authors use this term differently and address mutual trust either within specific areas of EU law (judicial cooperation in civil and criminal matters, the internal market, competition) or from the perspective of constitutional law and human rights protection.²⁴

Although mutual trust is referred to in several secondary law provisions (see below), it is not explicitly mentioned in primary law. Generally, the principle of mutual trust is derived from Art. 2 TEU. This article states that the Union is founded on values, such as respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, which are values common to all Member States.²⁵ Art. 2 TEU is frequently referenced in connection with mutual trust in numerous judgments, in which the Court of Justice emphasises that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded.²⁶ Art. 2 TEU does not merely state policy guidelines or intentions, but also contains values that are an integral part of the very identity of the European Union as a common legal order – values that are given concrete expression in principles containing legally binding obligations for the Member States.²⁷ This premise implies and justifies the existence of mutual trust between Member States. It also ensures that Member States recognise these values and respect the EU law that implements them. It also signifies the trust of Member States in the capacity of their national legal systems to provide equivalent and effective protection for the fundamental rights recognised by the Charter of Fundamental Rights of the EU, including Arts. 1 and 4 of the Charter, which enshrine one of the fundamental values

21 Kramer, 2011, p. 218; Hazelhorst, 2017, p. 27.

22 Kramer, 2013, p. 364.

23 Arenas García, 2011, p. 372.

24 Boháček, 2024, pp. 17–18.

25 Art. 2 of the Treaty on European Union.

26 Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/1, para. 160; Judgment of the Court (Grand Chamber) of 15 July 2021, Case C-791/19, para. 50; Judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19, para. 62; Judgment of the Court (Grand Chamber) of 27 February 2018, Case C-64/16, para. 30; Judgment of the Court (Grand Chamber) of 5 June 2023, Case C-204/21, para. 66.

27 Judgment of the Court (Grand Chamber) of 5 June 2023, Case C-204/21, para. 67; Judgment of the Court (Grand Chamber) of 16 February 2022, Case C-156/21, para. 232.

of the European Union and its Member States, namely human dignity.²⁸ It also applies to newly acceding States, which join the EU legal system on the basic premise that each Member State shares a set of common values with all others and recognises that the other Member States share these values.²⁹

Some authors derive the principle of mutual trust from another articles of the TEU. Prechal believes that mutual trust could be subsumed under the principle of sincere (loyal) cooperation. Such a principle is expressed in Art. 4, para. 3 of the Treaty on European Union.³⁰ Kramer also points to the connection with Art. 4, para. 3 TEU, but in conjunction with mutual respect.³¹ It should be noted, however, that a review of case law reveals that the Court of Justice does not refer to Art. 4 para.3 TEU in its rulings on the principle of mutual trust. If we consider that case law refers to Art. 2 TEU, while legal scholarship sometimes points to Art. 4 TEU, it may be concluded that the principle of mutual trust is indirectly derived from the primary law of the European Union.

In secondary law provisions, mutual trust is explicitly expressed. However, it is found in the preambles of individual acts, some of which are listed below. Preambles are not legally binding. They primarily serve as an interpretative guide. The concept of mutual trust is therefore most extensively developed in the case law of the CJEU, with the understanding that its judgments carry argumentative authority.

Based on the research, it can be stated that, thus far, many of the Court of Justice's judgments relate to the area of freedom, security and justice, specifically judicial cooperation in civil matters, followed by judicial cooperation in criminal matters, which is closely linked to the aforementioned human rights. Mutual trust is also mentioned to a lesser extent in other areas, such as asylum policy and the customs union. In the context of judicial cooperation, mutual trust is intrinsically linked to the principle of mutual recognition of judicial and extrajudicial decisions.

Moraru points out that, within the area of freedom, security and justice, the mandate of national courts of the Member States is significantly more complex than in other areas of law. This is primarily because, when granting effect to foreign judgments, they must step outside their own legal order and possess an understanding of other legal systems. At the same time, EU law and the case law of the CJEU attribute different meanings and effects to mutual trust, depending on the specific field of application within the area of freedom, security and justice. In relation to human rights, national courts must also contend with the differing case law of the CJEU and the ECtHR.³²

28 Judgment of the Court (Second Chamber) of 19 December 2024, joined Cases C-185/24 and C-189/24, para. 30; Judgment of the Court (Second Chamber) of 30 November 2023, joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/2, para. 130.

29 Judgment of the Court (Full Court) of 16 February 2022, Case C-157/21, para. 143.

30 Prechal, 2017, pp. 91–92.

31 Kramer, 2013, p. 364.

32 Moraru, 2016, s. 37.

The principle of mutual trust between Member States is therefore of fundamental importance in EU law, as it enables the creation and maintenance of an area without internal borders. In particular, in the context of the area of freedom, security and justice, this principle specifically requires each Member State, except in exceptional circumstances, to presume that all other Member States comply with EU law, especially the fundamental rights recognised by EU law.³³ However, the principle of mutual trust is not in itself a standard of review and does not create legal effects. The principle is applied together with the provisions of secondary law where specific measures are established.³⁴

The principle of mutual trust is not only an objective of the area of freedom, security and justice but also of the entire integration project. This project is built on trust, solidarity, and respect, and integration itself requires assistance and cooperation among Member States, which would be unlikely without mutual trust and solidarity. In the EU, Member States share common principles and values and are interconnected through an elaborate institutional framework. This explains why a high level of trust exists or should exist within the Union, facilitating a high degree of cooperation among Member States through the principle of mutual recognition.³⁵

Boháček distinguishes three ‘faces’ of mutual trust – the existing genuine trust among Member States, which serves as the basis for EU legislation legitimising the legal framework governing mutual recognition; the process of building genuine mutual trust between Member States to ensure the smooth practical functioning of mutual recognition rules; and the legal principle of mutual trust, which requires Member States to operate on the assumption of compliance – that is, the presumption that Member States comply with EU law when applying mutual recognition. These ‘faces’ presuppose the equivalence of the legal systems of all Member States. The last face, however, is particularly relevant at the application level of mutual recognition, where the presumption of compliance should be considered. According to the author, this is not a matter of real trust but rather a legal presumption of compliance. This presumption can be rebutted through the procedure under Art. 7 TEU, by exceptions to mutual recognition in legislation, and by the case law of the Court of Justice.³⁶

In general, this principle reflects the trust that all Member States comply with EU law, particularly the fundamental rights recognised by it,³⁷ as well as the recognition of the values set out in Art. 2 TEU and, accordingly, of the EU law that implements those values.³⁸ The trust in compliance with EU law is further specified for each area.

33 Judgment of the Court (Second Chamber) of 19 December 2024, joined Cases C-185/24 and C-189/24, para. 31; Judgment of the Court (Full Chamber) of 29 April 2022, Case C-665/20 PPU, para. 53.

34 Prechal, 2017, p. 79.

35 Janssens, 2013, pp. 150–151.

36 Boháček, 2024, pp. 228–233; Boháček, 2022, pp. 49–63.

37 Janssens, 2013, pp. 150–151.

38 Judgment of the Court (Full Court) of 16 February 2022, Case C-157/21, para. 143.

3.1. *Civil Law Area*

In the context of judicial cooperation in civil matters, this refers (according to the judgments of the Court of Justice) to the trust that Member States have in each other's legal systems and judicial institutions,³⁹ or in the administration of justice in the EU.⁴⁰ It is the trust that Member States accord to each other's legal systems and judicial institutions.⁴¹ The case law of the Court of Justice largely reproduces the formulation found in some (though not all) preambles of EU regulations, namely, that mutual trust in the administration of justice within EU is a fundamental principle.⁴²

Mutual trust is reflected in cases where the courts of the Member States are required to apply common rules on jurisdiction.⁴³ It is precisely this mutual trust that has enabled a compulsory system of jurisdiction to be established. All courts are obliged to respect it and it is closely linked to the abandonment by Member States of their national rules on recognition and the exequatur procedure in favour of a simplified mechanism for the recognition and enforcement of foreign judgments.⁴⁴ Personally, this consideration should extend to all common rules within this field that have been adopted through the ordinary or special legislative procedure by the institutions of the European Union, resulting in the adoption of binding legal acts. Even though some Member States may have been outvoted, or may be in the future, on the basis of majority or qualified majority voting, this method of decision-making is one to which all Member States agreed either when establishing the European Union or when they joined the Union. It is the set of uniform rules of the EU that is the necessary condition for mutual trust to be established and applied between the courts of the Member States.⁴⁵

39 Judgment of the Court (Third Chamber) of 7 September 2023, Case C-590/21, para. 24

40 Judgment of the Court (Third Chamber) of 8 June 2023, Case C-567/21 para. 45; Judgment of the Court (Fourth Chamber) of 16 February 2023, Case C-393/21, para. 41; Judgment of the Court (Grand Chamber) of 20 June 2022, Case C-700/20; paras. 56 and 57; Judgment of the Court (Third Chamber) of 7 April 2022, Case C-568/20, para. 26; Judgment of the Court (First Chamber) of 12 December 2019, Case C-433/18, para. 23; Judgment of the Court (Sixth Chamber) of 6 June 2019, Case C-361/18, para. 29 and many others.

41 Judgment of the Court (First Chamber) of 25 May 2016, Case C-559/14, para. 47.

42 See, e.g., Recital 26 of the Preamble to the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('Brussels I bis Regulation'); Recital 27 of the Preamble to the Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure ('European Payment Order Regulation'); Recital 18 of the Preamble to the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims ('European Enforcement Order Regulation').

43 Judgment of the Court (Third Chamber) of 8 June 2023, Case C-567/21, para. 45.

44 Judgment of the Court (Second Chamber) of 26 April 2012, Case C-92/12 PPU, para. 103; Judgment of the Court (Second Chamber) of 15 July 2010, Case C-256/09, para. 72; Judgment of the Court (First Chamber) of 21 January 2010, Case C-444/07, para. 28.

45 Judgment of the Court (Grand Chamber) of 10 February 2009, Case C-185/07, para. 15.

In this context, a question might arise on whether it is trust in justice or trust in legislation. According to the CJEU, it concerns trust in justice. Likewise, the literature emphasises that Member States should trust the legal systems of other Member States and their courts, particularly the courts in their application of EU law rather than national law.⁴⁶ According to *Dickinson*, mutual trust would prevent any review of the jurisdiction of the court of origin and preclude any challenge to the judgment based on a failure by the court of origin to apply EU law correctly. However, mutual trust cannot prevent a review based on grounds unrelated to EU law.⁴⁷ In the field of civil cooperation, this includes, for example, the institution of the public policy exception of the requested Member State. It is therefore a trust in justice that the national courts are applying the law correctly. This trust reaches a higher level when decisions are made based on unified EU law rules, which is the case in judicial co-operation, as this area is primarily governed by EU regulations. In my view, trust in legislation is therefore a prerequisite or a stepping stone to trust in justice. It is important to recall that in the area of freedom, security and justice, the European Union has shared competence.⁴⁸

Such mutual trust then allows automatic recognition of judgments given in a Member State and leads to judgments not being reviewed on their merits.⁴⁹ The emphasis is that this is not merely about recognising the judgment of one Member State in another Member State without further conditions, but rather about ensuring that a procedure for enforcement in the latter is both efficient and rapid. This is why the review should be limited strictly to a formal examination of the required documents.⁵⁰ However, this is not entirely automatic recognition, as there are grounds on which the recognition of a foreign judgment may be refused. These grounds vary to some extent from one regulation to another. Nonetheless, in general, such grounds or exceptions to the principle of mutual recognition must be interpreted restrictively.⁵¹

Here, a close connection and overlap with the principle of mutual recognition can be observed. Mutual recognition presupposes mutual trust,⁵² or mutual recognition implies the practical application of mutual trust.⁵³ While some point out that mutual

46 Dickinson, 2012, pp. 141–142; Kramer, 2013, pp. 364–365.

47 Dickinson, 2012, pp. 141–142.

48 Malachta, 2019, pp. 215–216.

49 Judgment of the Court (Third Chamber) of 8 June 2023, Case C-567/21, para. 46.

50 Judgment of the Court (First Chamber) of 12 December 2019, Case C-433/18, para. 23; Judgment of the Court (Third Chamber) of 23 October 2014, Case C-302/13, para. 45; Judgment of the Court (Sixth Chamber) of 6 June 2019, Case C-361/18, para. 29; Judgment of the Court (Fourth Chamber) of 26 September 2013, Case C-157/12, para. 32; Judgment of the Court (First Chamber) of 6 September 2012, Case C-619/10, para. 40 and many others.

51 Judgment of the Court (Third Chamber) of 8 June 2023, Case C-567/21, para. 46.

52 Storskrubb, 2016, p. 16.

53 Hazelhorst, 2017, p. 41.

trust is the factual and political justification for implementing mutual recognition,⁵⁴ others perceive mutual trust to be a consequence of mutual recognition.⁵⁵

As I have stated in another study,⁵⁶ the latter perspective is also true in the context of the development of European integration. Mutual recognition can be found in the Treaty establishing the European Economic Community, signed in 1957, whereas the concept of mutual trust has been discussed only since the turn of the millennium. The principle of mutual recognition has been regarded as the cornerstone of judicial cooperation in both civil and criminal matters since the European Council meeting in Tampere in 1999, where this principle was formally endorsed. However, the principle of mutual trust was not explicitly mentioned at that meeting. The importance of building trust and mutual trust was subsequently emphasised in the 2004 Hague Programme (a multiannual programme for 2005–2009), the 2010 Stockholm Programme (a multiannual programme for 2010–2014), and the EU Justice Agenda 2020. The focus of these programmes was generally on strengthening mutual confidence. The objective of the Justice Agenda was to ensure trust regardless of the Member State in which a decision was rendered. According to this Agenda, respect for fundamental rights, judicial training, operational cooperation (rapid and secure exchange of information), and codification of existing legislation and procedures are essential to strengthen trust.⁵⁷

Mutual trust and mutual recognition are the two main principles of judicial cooperation. In my view, it is immaterial whether mutual trust serves as the justification for mutual recognition or whether mutual trust is the result of mutual recognition. Clearly, the principle of mutual recognition was explicitly promoted much earlier than the principle of mutual trust. From this perspective, mutual trust appears to be a consequence of recognition. Alternatively, it is the justification for mutual recognition. If we trust in the proper application of EU law, it constitutes a reason for mutual recognition.⁵⁸

Case law, often referring to the preambles of individual EU regulations, emphasises that both the principle of mutual trust and the principle of mutual recognition are of fundamental importance in EU law, as they enable the creation of an area without internal borders⁵⁹ or are essential for the proper functioning of the internal market.⁶⁰ The principle of mutual recognition of judicial decisions is thus a cornerstone in the creation of a genuine judicial area, and such recognition should be based on the principle of mutual trust.⁶¹

54 Arenas García, 2011, p. 361.

55 Weller, 2015, pp. 74–75.

56 Malachta, 2019, pp. 219–222.

57 Ibid., and the literature cited therein.

58 Ibid., p. 223.

59 Judgment of the Court (Second Chamber) of 9 March 2017, Case C-551/15, para. 51.

60 Judgment of the Court (Grand Chamber) of 4 May 2010, Case C-533/08, para. 50.

61 Judgment of the Court (Second Chamber) of 15 July 2010, Case C-256/09, paras. 70 and 71.

Regarding the mutual recognition of decisions, the principle of state sovereignty generally prevails, implying that a decision produces legal effects only within the territory of the state in which it is rendered (principle of territoriality). However, the area of freedom, security and justice is precisely where extraterritorial effects are granted. Such extraterritorial effects require a high level of trust between the authorities of the Member States.⁶²

Nevertheless, a decision does not automatically have such effects. It must first be recognised in the requested state and subsequently enforced. In some cases, an intermediate step may also be required between recognition and enforcement, namely, a declaration of enforceability. It depends on the individual regulations governing recognition and enforcement in civil law matters. Generally, decisions given in a Member State should be recognised in all Member States without the need for special proceedings. In practice, this means that recognition is considered within the framework of other proceedings, such as enforcement proceedings. Although the wording of the various regulations differs slightly, it is recognition without a special procedure that is common to all Member States.⁶³

Some regulations require *exequatur* (a declaration of enforceability) and specific grounds for refusal of recognition (this applies to the Succession Regulation, the Matrimonial Property Regimes Regulation, and the Regulation on the Property Consequences of Registered Partnerships). In other regulations, a declaration of enforceability is not required, but grounds for refusal of recognition remain (this is the case for the Brussels I bis Regulation and the Brussels II ter Regulation). Neither *exequatur* nor grounds for refusal of recognition are provided for in most cases in the Maintenance Regulation – that is, for decisions given in a Member State bound by the 2007 Hague Protocol, in the cases of the Regulation on the European Enforcement Order for uncontested claims, in the Regulation on Small Claims Procedure, and in the Regulation on the European order for payment. For the latter three, minimum standards, such as rules governing the service of documents, have been established to ensure legal proceedings and the right to a fair trial in the Member State where the decision was given; hence, there are no grounds for refusal of recognition. In other words, the level of mutual trust varies across different legal regulations.

Although mutual recognition happens without special proceedings, certain regulations establish grounds on which recognition may be refused. In such cases, recognition is not entirely automatic but rather semi-automatic – the decision is recognised until a ground for refusal is applied.⁶⁴ Mutual recognition implies that a Member State can rely on the decision of another Member State without necessarily having to follow any formal procedure or register the decision.⁶⁵

62 Mitsilegas, 2012, p. 322.

63 Malachta, 2019, pp. 224–226.

64 Siehr, 2017, p. 384.

65 Wautelet, 2016, p. 818.

In the group of three legal regulations where the minimum standards are set, no grounds for refusal of recognition are provided. Although, in practice, these minimum standards may not be respected despite the existence of unified procedural rules, they contribute to mutual trust.⁶⁶ In the case of the Maintenance Regulation for States bound by the 2007 Hague Protocol, no grounds for refusal of recognition are established. As a result, recognition is fully automatic. In the Insolvency Regulation, only one ground has been established for refusal of recognition of insolvency proceedings, which is that the effects of such recognition are manifestly contrary to the public policy of the State in which recognition is sought. By contrast, all other regulations, in addition to manifest incompatibility with the public policy of the requested State, provide further grounds for refusal of recognition, typically relating to procedural aspects. These include, for example, failure to serve the document instituting proceedings on the defendant, incompatibility with a judgment given in the requested State between the same parties, incompatibility with an earlier judgment between the same parties in the same subject matter, or breach of rules on jurisdiction.

Public policy constitutes a ground for refusal of recognition, but its application undermines trust between Member States. It can be applied (either upon request or ex officio, depending on the applicable regulation) only in exceptional cases where the effects of the decision are manifestly contrary to the public policy of the requested State. Although the concept of public policy is not defined anywhere, in general, it refers to the values or principles that a State abides by unconditionally. Its content is thus determined by each State individually. Consequently, while one Member State may recognise a decision from another Member State without reservation, another may refuse to recognise it because its effects may be manifestly contrary to its public policy. Recognition therefore depends on the values of the State in question and, to some extent, on the discretion of the deciding authority. The purpose of this mechanism is to remedy any inconsistencies in the requested State that emerged in the State of origin due to differences between legal systems that persist despite unified EU regulations.

The so-called public policy exception (*ordre public*) remains a national legal concept. Although there is some consideration of Union public policy or international public policy of the European Union, its existence cannot yet be affirmed.⁶⁷ The Court of Justice of the European Union does not have the competence to define the content of the concept of public policy of a Member State. However, it does have the authority to control the limits within which a national court may invoke the public policy exception to refuse recognition of a decision.⁶⁸ In particular, the concept of

⁶⁶ Hazelhorst, 2017, p. 393.

⁶⁷ Malachta, 2023, pp. 129–149.

⁶⁸ Judgment of the Court of 28 March 2000, Case C-7/98, para. 23; Judgment of the Court (Third Chamber) of 7 September 2023, Case C-590/21, para. 34; Judgment of the Court (First Chamber) of 21 March 2024, Case C-90/22, para. 64.

public policy must be interpreted restrictively,⁶⁹ which is one of the reasons for this ground not being frequently applied and not often addressed before the CJEU.

3.2. Criminal Law Area

In the context of criminal law, particularly with regard to the principle of *ne bis in idem* and the Convention implementing the Schengen Agreement, case law has held that there is mutual trust in the criminal justice systems of the Contracting States to the Convention and the trust that each of them consents to the application of the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.⁷⁰ Mutual trust requires the relevant competent authorities of one Member State to accept at face value a final decision communicated to them, which has been decided in another Member State,⁷¹ or that the Member State of recognition agree to consider relevant legal information that they might receive from the Member State of origin of the case.⁷² It is this inseparable link between mutual trust and mutual recognition that first appears in the area in question in the 2003 decision.⁷³

The most significant instrument in the field of EU criminal law, superseding previous instruments, is the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. The European arrest warrant mechanism is founded on a high degree of mutual trust among Member States, as explicitly stated in the preamble to the Framework Decision.⁷⁴ It is precisely this trust that has enabled the establishment of a simplified system for the surrender of individuals convicted or suspected of criminal offences between Member States, for the purpose of enforcing a judgment or initiating

69 Judgment of the Court (Third Chamber) of 7 September 2023, Case C-590/21, para. 32; Judgment of the Court (First Chamber) of 21 March 2024, Case C-90/22, para. 62.

70 Judgment of the Court (Third Chamber) of 19 October 2023, Case C-147/22, para. 42; Judgment of the Court (First Chamber) of 12 October 2023, Case C-726/21, para. 56; Judgment of the Court (Grand Chamber) of 28 October 2022, Case C-435/22 PPU, para. 93; Judgment of the Court (Grand Chamber) of 12 May 2021, Case C-505/19, para. 80; Judgment of the Court (Grand Chamber) of 29 June 2016, Case C-486/14, para. 50; Judgment of the Court (First Chamber) of 28 September 2006, Case C-150/05, para. 43; Judgment of the Court (First Chamber) of 28 September 2006, Case C-467/04, para. 30; Judgment of the Court (Second Chamber) of 9 March 2006, Case C-436/04, para. 30; Judgment of the Court of 11 February 2003, joined Cases C-187/01 and C-385/01, para. 33.

71 Judgment of the Court (Third Chamber) of 19 October 2023, Case C-147/22, para. 42; Judgment of the Court (Grand Chamber) of 28 October 2022, Case C-435/22 PPU, para. 93; Judgment of the Court (Grand Chamber) of 12 May 2021, Case C-505/19, para. 81; Judgment of the Court (Grand Chamber) of 29 June 2016, Case C-486/14, para. 51.

72 Judgment of the Court (First Chamber) of 12 October 2023, Case C-726/21, para. 56.

73 Judgment of the Court of 11 February 2003, joined Cases C-187/01 and C-385/01, para. 33; Janssens, 2013, p. 141.

74 Recital 10 of the Preamble to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

criminal prosecution. The mutual recognition of the European arrest warrant is, in principle, automatic as the grounds for refusing execution are narrowly defined.⁷⁵

However, it would be more accurate to characterise this recognition as semi-automatic, as the Framework Decision sets out both mandatory and optional grounds on which the executing judicial authority must, or may, refuse to execute the warrant.⁷⁶ The case law of the CJEU has consistently emphasised that the principle of mutual recognition is grounded in mutual trust, namely, the presumption that the legal systems of all Member States are capable of ensuring equivalent and effective protection of fundamental rights as recognised at the Union level. However, this principle may be limited under exceptional circumstances.⁷⁷

A related instrument is the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. This instrument similarly refers, in its preamble, to the concept of mutual trust – described as a ‘special mutual confidence’ in the legal systems of the Member States, which underpins the recognition of judicial decisions across borders. Procedural rights in criminal proceedings are critical components of building and maintaining mutual trust.⁷⁸ However, as in the case of the European arrest warrant, recognition under this framework is not fully automatic. The instrument sets specific grounds for refusing the recognition and enforcement of judgments.⁷⁹

Interestingly, in another Council Framework Decision of the same date, applying the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, no reference to mutual trust is found even in the preamble.⁸⁰ Similarly, there is no reference to mutual trust in the Framework Decision on the application of the principle of mutual recognition to financial penalties.⁸¹

In 2018, the Regulation on mutual recognition of freezing orders and confiscation orders was adopted. It establishes the rules under which a Member State

75 Rizcallah, 2022, p. 83.

76 Arts. 3 and 4 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

77 Judgment of the Court (Grand Chamber) of 5 April 2016, joined Cases C-404/15 and C-659/15 PPU, para. 77-78.

78 Recital 5 of the Preamble to the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

79 Art. 9 of the Council Framework Decision 2008/909/JHA.

80 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions.

81 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

recognises and executes in its territory freezing and confiscation orders issued by another Member State in the context of criminal proceedings.⁸² The preamble provides that cooperation between Member States is based on the principle of mutual recognition and the immediate execution of judicial decisions. This cooperation presupposes confidence that decisions will always be in compliance with the principles of legality, subsidiarity, and proportionality. Such a specification does not appear in the existing preambles. The Regulation further provides in its preamble that the area of freedom, security and justice is based on mutual trust and the presumption of respect for EU law, in particular fundamental rights, by other Member States.⁸³ Again, recognition is not automatic, as the Regulation establishes grounds for refusing recognition and execution of both freezing and confiscation orders.⁸⁴

Nevertheless, some authors imply mutual trust even in legislative acts where it is not explicitly mentioned. This is the case of the Regulation implementing enhanced cooperation for the establishment of the European Public Prosecutor's Office.⁸⁵ Růžicková derives the principle of mutual trust from this regulation, including its limits, as well as mutual recognition. She distinguishes them into three categories: limitations (a) established directly in the regulation itself; (b) comprising rules laid down in the legal instruments providing for the mutual trust and mutual recognition mechanisms, whose scope and content may differ according to the particular legal source; and (c) imposed by the case law of the Court of Justice.⁸⁶

It should be noted that the principle of mutual trust does not entail blind or unlimited trust, thus distinguishing it from pure loyalty. In exceptional cases, the outcome of another Member State's legal system may not be trusted.⁸⁷

3.3. *Asylum Policy*

In the area of the common asylum policy, measures are adopted under the Common European Asylum System based on Art. 78 TFEU. Currently, the Dublin III regulation⁸⁸ is in force, which deals with the responsibility of a particular Member State to examine an application for asylum or another form of international protection submitted by a third-country national in a Member State. The purpose is to prevent an asylum seeker from submitting their application simultaneously or

82 Art. 1, para. 1 of the Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

83 Recitals 15 and 34 of the Preamble to the Regulation 2018/1805.

84 Arts. 8 and 19 of the Regulation 2018/1805.

85 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

86 Růžicková, 2022, pp. 81–83.

87 Cambien, 2017, p. 103.

88 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

successively in several Member States and thus to avoid the examination of several applications by the same person in several States. The Regulation sets out the criteria and their order for determining the Member State responsible for examining an application for international protection.⁸⁹ Its preamble emphasises the development of mutual trust among Member States, which is closely linked to solidarity. To improve and implement concrete measures supporting genuine and practical solidarity with Member States, aimed at assisting the concerned Member States and asylum seekers in particular, a process for early warning, preparedness, and the management of asylum crises should be established.⁹⁰ Among other things, the previous regulation governing the same matter (Regulation 343/2003) was adopted precisely because of the principle of mutual trust.⁹¹

In the legal literature, this system is recognised as relying on a high level of mutual trust, based on respect for fundamental rights by EU Member States. Certain rules and criteria for determining responsibility have been adopted based on mutual trust, whereby all Member States fulfil their obligation to respect human rights established by international human rights law and EU law. Member States trust each other to such an extent that there is no room for questioning each other's compliance with legal requirements. However, under very strict and extreme circumstances, the presumption of mutual trust may be limited, specifically in cases of violations of Art. 3 of the European Convention on Human Rights or Art. 4 of the Charter of Fundamental Rights of the EU, where the applicant believes he/she would face a real risk of inhuman or degrading treatment in the applicant's relocation decision.⁹² The Court of Justice also addressed mutual trust and its potential limitations in its judgment from December 2024. However, it did not find a systemic deficiency in the fact that a Member State had unilaterally suspended taking charge of and taking back these applicants.⁹³

4. Equality vs. Inequality of Member States and the Absence of Uniform Rules?

Despite the supremacy of EU law (and the consequent inequality of States in the adoption of secondary acts), a principle of equality exists between Member States, which is explicitly laid down in Art. 4, para. 2 TEU, from which, *inter alia*, mutual

⁸⁹ Ibid., Arts. 7 to 15.

⁹⁰ Recital 22 of the Preamble to the Regulation (EU) No 604/2013.

⁹¹ Judgment of the Court (Grand Chamber) of 21 December 2011, joined Cases C-411/10 and C-493/10, para. 79.

⁹² Xanthopoulou, 2020, pp. 28–29.

⁹³ Judgment of the Court (Second Chamber) of 19 December 2024, joined Cases C-185/24 and C-189/24, para. 47.

trust is derived (see above). Member States are thus equal before EU law. It is presumed that, based on this equality, they comply with EU law and the values set out in Art. 2 TEU. The Court of Justice also refers to this provision when deriving the principle of mutual trust, which in turn presupposes that Member States duly apply EU law within their territories. Therefore, on the grounds of equality of States, one Member State cannot claim the right to judge another Member State in the application of EU law.⁹⁴ Such mutual trust between Member States is fundamental to the European Union. However, this trust can only be built and maintained if all Member States respect the rule of law. For any violation of the values of the rule of law, which would eventually undermine the very foundations of the EU and the trust between Member States, the European Union has provided a mechanism of prevention and sanctions, in Art. 7 TEU.⁹⁵ Rizcallah further points out that the principle of mutual trust lies at the crossroads of unity, diversity, and equality between Member States. Despite differences in national substantive and procedural legal norms, the borders between Member States are, in a sense, artificially blurred, as a legal solution adopted in one Member State encounters no obstacles in another Member State. In this way, the principle of mutual trust unifies divergent national legal orders while maintaining their equivalence.⁹⁶

However, equality among Member States is a nuanced concept that reflects the balance between national sovereignty and the powers conferred on EU institutions. It is not the same type of equality known from public international law, where states are equal and operate on the principle of sovereign equality (see Chapter 1 for a more detailed explanation). In the field of public international law, the adoption of international treaties typically requires the unanimous agreement of all states, with each state having one vote. There is no transfer of competences (powers) to an international organisation. In international law, therefore, the decision of a state to enter an international relationship with another state or other states rests entirely with the state itself. Within the European Union, however, this competence is practically delegated to the institutions of the Union, with all the consequences that such delegation entails. Within the European Union, reciprocity (neither formal nor material) is not required, as this is determined by the very nature of the Union. As a consequence of this, Member States are not entirely equal.

Furthermore, inequality can also be manifested in the process of recognition of a foreign decision. As mentioned above, recognition is not automatic but semi-automatic for most rules – there are grounds on which recognition can be refused. Applying these grounds to refuse recognition is left to the discretion of the authorities of the respective Member State. On some grounds for refusing recognition, all authorities can be expected to decide in the same way (e.g., failure to serve the document instituting proceedings on a defendant, incompatibility with a judgment

94 Rizcallah, 2022, pp. 448–449.

95 European Commission, 2014.

96 Rizcallah, 2021.

given in the requested state between the same parties, incompatibility with an earlier judgment between the same parties in the same subject matter, or breach of the rules on jurisdiction). However, a higher degree of discretion may be expected with regard to the ground of manifest incompatibility with the public policy of the addressed Member State, as the content of this concept – namely, what constitutes public policy – is a matter that concerns each State individually. Therefore, theoretically, it may be a case where the decision of a court of Member State A is recognised in Member State B but not in Member State C, because in State C the effects of recognition would be manifestly contrary to public policy in that State.

A certain degree of inequality, albeit permitted by primary law, can also be observed in the area of enhanced cooperation. Some Member States may initiate advanced or deeper integration or cooperation in areas where the Union does not have exclusive competence, and where the objectives of such cooperation cannot be achieved within a reasonable timeframe by the Union as a whole, under the conditions set out in Art. 20 TEU. This results in what is often referred to as a ‘two-speed Europe’. Member States may have various reasons for not participating in enhanced cooperation. Consequently, the regulations adopted within the framework of enhanced cooperation are not binding on non-participating Member States and are therefore not applied before their courts. As noted above, such regulations exist even in the field under discussion. It can therefore be concluded that, in certain areas, mutual trust between certain Member States is higher, because they allow for the recognition and enforcement of foreign judgments in a wider range of matters (e.g., the Regulation on matrimonial property regimes and the Regulation on the property consequences of registered partnerships). Interestingly, although these rules are based on the principle of mutual recognition, they do not explicitly mention mutual trust in their preambles.

Equality of states can certainly be a topic of discussion (although the author acknowledges the logical inconsistency, this can be described as the ‘higher’ equality of states if there were unified procedural and substantive legal rules. To some extent, this is a matter of conferred competences, since the EU does not have the power to adopt legally binding rules in certain areas. There is no such thing as a Union civil code, a Union labour code, or a Union criminal code. Likewise, there is no comprehensive procedural law, and no such thing as a Union civil procedure code. In such a scenario, the essence of mutual trust, the fact that each Member State trusts other Member States to apply EU law correctly, would take on a new dimension. However, such a situation is utopian. Nevertheless, for the present, fully unified rules are absent. They are partly laid down, as mentioned above – for determining international jurisdiction of courts and for the recognition of foreign judgments, with some of them setting minimum standards and other rules. For now, states rely on the correct application of these unified rules while simultaneously trusting national legal systems, at least to the extent that they do not contradict EU law and do not violate fundamental human rights or, more broadly, the values and principles of the rule of law. To provide further context, this is relevant not only to the recognition of judicial

decisions but also to the mutual recognition of products, which essentially operates on the same principle – either the regulation is harmonised or unified, or the principle of mutual recognition applies. However, a question remains: if legislation were fully harmonised or unified, would mutual trust (and mutual recognition) really be necessary?

5. Conclusion

In evaluating the question posed in the introduction, it is necessary to look at the issue more comprehensively. First, it is necessary to consider the nature of the European Union as a supranational organization has authority over the Member States – at least in the areas where Member States have conferred the exercise of powers on the European Union. This is also the case in the area of freedom, security and justice, where the European Union has shared competence with the Member States in terms of adopting secondary legislation – particularly regulations and Council framework decisions, which are relevant to the issue under examination. As a result, the legal framework is unified. Assuming that the rules were only harmonised (through EU directives), the law might not be the same in all Member States, which could then affect mutual trust and equality between States as well.

Secondary acts are adopted based on primary law to which all Member States have agreed (either at the time of adoption or by accepting it upon accession to the European Union). They have also agreed to the legislative procedures for adopting secondary law acts, which, in the area of freedom, security and justice, are mostly adopted through the ordinary legislative procedure. Therefore, inequality of Member States arises at the stage of adopting these acts; however, this is a consequence of voluntary membership in the EU and voluntary acceptance of the principles and functioning of the European Union.

In the area under review, these are rules governing, *inter alia*, mutual recognition of judicial or extra-judicial decisions in civil and criminal matters in the field of judicial cooperation. Mutual recognition of decisions is based on the assumption of mutual trust between Member States. A close relationship exists between these two principles, which sometimes overlap. However, the level of mutual trust varies from one area of legislation to another.

Based on the preambles of the relevant EU legal instruments and a thorough analysis of the case law of the Court of Justice, mutual trust primarily concerns trust in the judicial systems, legal systems, and the administration of justice within the Union. Member States are expected to trust that the courts of another Member State will correctly apply EU law while respecting fundamental human rights and freedoms. This trust stems from the values shared by all Member States and recognised by the Union. It should be noted that mutual trust is not explicitly mentioned

in primary law; it is merely implied. In secondary law, it is addressed only in legally non-binding preambles of certain legal instruments – only some, as not all instruments governing mutual recognition refer to it.

A Member State thus ‘admits’ into its territory a decision of a court from another Member State, leading to the extraterritorial extension of its effects. However, as long as grounds for refusal of recognition or the requirement for a declaration of enforceability remain, recognition is not truly automatic or unconditional. As a result, a certain level of distrust may exist between the Member States. Nonetheless, these grounds for refusal should be applied restrictively to avoid obstructing the purpose and objectives of the European Union. At the same time, this approach confirms that mutual trust is not unlimited, and mechanisms are provided by law and case law for not ‘allowing’ another Member State’s decision into its territory. The State of origin of the decision may be at fault.

Member States also apply their national law, both substantive and procedural, or the substantive rules of the applicable law, in judicial (or extrajudicial) proceedings. This is because EU law does not regulate these norms in all areas. The legal systems of the Member States are therefore different – if they were not, conflicts of laws would not arise. It is precisely the absence of unified rules that ‘forces’ states to cooperate. This is where the European Union plays a role – through its legal framework, it facilitates and accelerates such cooperation. However, this comes at the cost of Member States not having the same degree of sovereignty as traditionally understood in international law. Nevertheless, even within the European Union, there is at least formal equality, although considerations of factual inequality are entirely justified. This equality is also reflected in the fact that Member States are responsible for compliance with EU law – both in relation to other Member States and in relation to the institutions of the European Union.

The central thesis of this study – that, despite the absence of fully unified rules, Member States remain distinct yet equal and cooperative – can indeed be confirmed. This cooperation appears to be in the interests of the Member States, even though they are not equal within the European Union in the same sense as under public international law. Therefore, it is not accurate to speak of ‘full’ equality – Member States trade it, to some extent, for the benefits of effective cooperation within the EU legal framework. It is a compromise that appears to suit them, as evidenced by their continued engagement. This is demonstrated not only by the long history of accepting foreign decisions, but also by the creation and adoption of new rules regulating particular areas of law, albeit some within the framework of enhanced cooperation. In this chapter, the development and adoption of the most important regulations and framework decisions in the area under review have been presented, with new regulations continuing to be adopted in practice. This demonstrates the willingness of States to not only cooperate in new areas, but also facilitate cooperation in revising existing regulations when accepting another Member State’s decision. It can be reasonably expected that these trends will continue. The existence

of a common regime brings advantages in this area, not just for the Member States, but for the individuals whose rights are at stake.

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- Judgment of the Court (Third Chamber) of 23 October 2014, Case C-302/13.
- Judgment of the Court (Grand Chamber) of 5 April 2016, joined Cases C-404/15 and C-659/15 PPU.
- Judgment of the Court (First Chamber) of 25 May 2016, Case C-559/14.
- Judgment of the Court (Grand Chamber) of 29 June 2016, Case C-486/14.
- Judgment of the Court (Second Chamber) of 9 March 2017, Case C-551/15.
- Judgment of the Court (Grand Chamber) of 27 February 2018, Case C-64/16.
- Judgment of the Court (Sixth Chamber) of 6 June 2019, Case C-361/18.
- Judgment of the Court (First Chamber) of 12 December 2019, Case C-433/18.
- Judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19.
- Judgment of the Court (Grand Chamber) of 12 May 2021, Case C-505/19.
- Judgment of the Court (Grand Chamber) of 15 July 2021, Case C-791/19.
- Judgment of the Court (Grand Chamber) of 21 December 2021, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/1.
- Judgment of the Court (Grand Chamber) of 16 February 2022, Case C-156/21.
- Judgment of the Court (Full Court) of 16 February 2022, Case C-157/21.
- Judgment of the Court (Third Chamber) of 7 April 2022, Case C-568/20.
- Judgment of the Court (Full Chamber) of 29 April 2022, Case C-665/20 PPU.

- Judgment of the Court (Grand Chamber) of 20 June 2022, Case C-700/20.
- Judgment of the Court (Grand Chamber) of 28 October 2022, Case C-435/22 PPU.
- Judgment of the Court (Fourth Chamber) of 16 February 2023, Case C-393/21.
- Judgment of the Court (Grand Chamber) of 5 June 2023, Case C-204/21.
- Judgment of the Court (Third Chamber) of 8 June 2023, Case C-567/21.
- Judgment of the Court (Third Chamber) of 7 September 2023, Case C-590/21.
- Judgment of the Court (First Chamber) of 12 October 2023, Case C-726/21.
- Judgment of the Court (Third Chamber) of 19 October 2023, Case C-147/22.
- Judgment of the Court (Third Chamber) of 19 October 2023, Case C-147/22.
- Judgment of the Court (Second Chamber) of 30 November 2023, joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/2.
- Judgment of the Court (First Chamber) of 21 March 2024, Case C-90/22.
- Judgment of the Court (Second Chamber) of 19 December 2024, joined Cases C-185/24 and C-189/24.
- Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European enforcement order for uncontested claims.
- Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure.
- Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
- Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.
- Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of matrimonial property regimes.
- Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law, and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.
- Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.
- Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008.
- Treaty on European Union.
- Treaty on the Functioning of the European Union.

CIVIL JUSTICE AND THE LIMITS OF TRUST: BALANCING INTEGRATION, NATIONAL DIVERSITY, AND EQUALITY



SANJA SAVČIĆ

Abstract

The evolution of judicial cooperation in civil matters within the European Union (EU) reflects the Union's growing commitment to creating an integrated legal framework that enhances cross-border cooperation and legal certainty. Starting with the Maastricht Treaty in 1993, judicial cooperation was formalised, setting the foundation for later developments. The Amsterdam Treaty (1997) institutionalised cooperation further, particularly through Title IV of the EC Treaty, emphasising the importance of an integrated approach to justice. The Tampere European Council (1999) marked a significant shift, establishing mutual recognition of judgments as a central principle to foster trust among Member States' legal systems. This principle aimed to simplify the recognition and enforcement of legal judgments across borders, which was seen as crucial for the EU's objectives of freedom, security, and justice.

The Lisbon Treaty (2009) further cemented these efforts by incorporating judicial cooperation into Title V of the Treaty on the Functioning of the European Union (TFEU), aligning it with the ordinary legislative procedure to enhance democratic accountability and efficiency. Despite these advances, the principle of mutual trust remains one of the most ambiguous concepts in EU law, with its exact nature and limits not fully defined, particularly regarding the protection of fundamental rights and varying standards of judicial independence across Member States.

Instruments like the Brussels I Regulation and the European Small Claims Procedure have contributed to enhancing access to justice by offering streamlined, efficient mechanisms for resolving cross-border disputes, thus promoting legal certainty and fostering trust in the EU's legal system. However, challenges remain due to differing

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national interpretations of mutual trust, which can lead to legal uncertainty and inconsistencies in the application of EU law, particularly when fundamental rights protections vary between Member States. The ongoing evolution of EU legal instruments and jurisprudence from the Court of Justice of the European Union (CJEU) will be critical in addressing these challenges, ensuring that mutual trust and legal protection for individuals are consistently upheld across Member States. However, the EU continues to navigate the balance between legal integration and respect for national legal differences, aiming to strengthen the internal market and enhance the protection of rights across Member States.

Keywords: judicial cooperation, mutual recognition, mutual trust, legal certainty, national legal systems

1. Introduction

Issues of procedural law are often considered in isolation from debates that take place within the context of substantive law.¹ The core question is usually perceived to be how a particular legal relationship should be regulated. However, although it attracts less attention, procedural law serves as a key instrument for the protection of rights, entrusted to one branch of government – the judiciary. In this respect, it is difficult to discuss interpretation outside of the system within which a legal norm is to be applied.

Even before the process of Europeanisation moved decisively toward unification, it was necessary to harmonise the rules within the conflict-of-law system in order to achieve a balanced and coherent application of law. In this context, as early as the 1980s, efforts were already underway to unify conflict-of-law rules at the level of the European Union.² Nevertheless, procedural rules largely remain outside the scope of the European Union's competences. The procedural autonomy of the Member States has been constrained by various amendments in substantive law, which – through secondary legislation – has, in some Member States or specific legal areas, moved

- 1 In the field of civil procedure, certain legal instruments focus specifically on cross-border judicial cooperation – for instance, Regulation (EC) No 1206/2001 on the taking of evidence, Directive 2002/8/EC on legal aid in cross-border disputes, and Regulation (EC) No 805/2004 establishing a European Enforcement Order. In parallel, other instruments introduce optional, autonomous EU-wide procedures, such as Regulation (EC) No 861/2007 on the European Small Claims Procedure and Regulation (EC) No 1896/2006 on the European Order for Payment. Due to the cross-border requirement built into their legal bases, these EU civil procedure instruments do not apply to purely domestic cases, distinguishing them from measures adopted under Art. 114 TFEU, which are not subject to the same cross-border limitation. Maňko, 2015, p. 12.
- 2 Červenkova, 2008, p. 5.

away from traditional conceptions. Still, the primary guiding principles in the procedural domain remain equivalence and effectiveness, as established by the case law of the CJEU as early as 1976. These principles essentially mean that, in the absence of relevant EU procedural rules, national legal systems are required to establish detailed procedural provisions that ensure the enforcement of EU rights.³ Although in recent years there have been significant EU interventions aimed at harmonising procedural rules – particularly in the areas of intellectual property, competition law, and consumer protection – the EU’s general approach continues to emphasise the preservation of national procedural autonomy while developing a framework for effective judicial cooperation.⁴ On the one hand, judicial institutions play a crucial role in maintaining citizens’ trust in legal certainty, particularly regarding the enforcement and protection of their rights. On the other hand, preserving procedural autonomy serves as a safeguard for the legal traditions of the Member States, given that judicial interpretation is often rooted in the traditional values of a particular society. Nevertheless, the removal of internal borders within the European Union necessarily brings the issue of cross-border judicial cooperation to the forefront, making it a priority in the development of a coherent and functional area of justice.

The evolution of judicial cooperation in civil matters within the EU reflects a growing commitment to integrating Member States’ legal systems and enhancing cooperation. The Maastricht Treaty of 1993 initiated this process by establishing a framework for judicial cooperation. With the Amsterdam Treaty, this cooperation was further institutionalised under Title IV of the EC Treaty, emphasising the importance of an integrated approach to justice in the context of freedom, security, and justice (AFSJ).

The Tampere European Council in 1999 marked a pivotal moment by establishing mutual recognition of judgments as a fundamental principle. This principle aimed to foster trust among Member States’ legal systems, facilitating smoother cross-border judicial processes.

The Lisbon Treaty, effective as from December 2009, further solidified these efforts by incorporating judicial cooperation in civil matters into Title V of the TFEU. This move aligned judicial cooperation with the ordinary legislative procedure, enhancing democratic accountability and efficiency in decision-making, except for family law matters, which retain a more intergovernmental approach.

Overall, these developments underscore the EU’s commitment to creating a cohesive legal framework that promotes cooperation, mutual trust, and the protection of rights across Member States.

Importance of the often overlooked aspect of judicial cooperation in the EU is the respect of procedural diversity among Member States. The EU choose not to impose uniform procedural standards, but to acknowledge differences among States, to treat them as formally equal, and to continue the development and facilitation of effective

3 Storskrubb, 2019, p. 13.

4 Ibid., p. 15.

cross-border cooperation. Respect for national legal tradition is an approach that reflects that balance between legal diversity and unity is possible.

2. Judicial Cooperation in Civil Matters in the Maastricht Treaty (1993) Framework: Respect for National Procedural Autonomy

The Maastricht Treaty marked a significant step in the integration of the European Union, establishing the European Community (EC) and setting the stage for deeper cooperation in various fields, including justice. Judicial cooperation in civil matters was introduced in Title VI of the Treaty. With the establishment of the European Union's 'three-pillar' structure, cooperation in justice and home affairs was placed within the third pillar, underscoring its importance for the broader process of European integration.⁵ This initial framework aimed to enhance cooperation among Member States on legal issues, particularly regarding the recognition and enforcement of judgments. This approach reflected an intergovernmental model, but enhancing cooperation among Member States in the recognition and enforcement of judgments is limited by supranational oversight.

Specifically, Art. K.1 prescribed that, Member States shall regard judicial cooperation, among other areas, as a matter of common interest, for achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community. Member States were required to inform and consult one another within the Council, thereby coordinating through inter-administrative action. To that end, they shall launch collaboration between the relevant departments of their administrations.⁶

In relation to judicial cooperation in civil matters, any Member State or the Commission can initiate actions within the Council. The Council may adopt joint positions, by a majority of two-thirds of the High Contracting Parties, to promote cooperation, using the appropriate form and procedures that contributes to the goals of the Union. This could involve adopting joint actions when such collaboration is more effective than individual actions Member States, due to the scale or impact of the proposes action; the Council may also decide that measures implementing joint actions should be adopted by a qualified majority. Additionally, the Council can draft conventions and recommend them to the Member States for adoption in line with

5 Weber, 2013, p. 292.

6 Art. K.3.

their respective constitutional requirements.⁷ To be precise, Art. K.3 mandates that Member States inform and consult each other within the Council to coordinate their actions effectively. The Council has the authority to adopt joint positions, developed through collaboration. When individual actions are less effective, the Council may decide on joint actions to achieve better outcomes, more effective for achieving Union objectives. This may include voting by a qualified majority in certain decisions. The Council can also draft conventions to be recommended for adoption by Member States, stipulating that the CJEU may interpret these conventions and resolve disputes regarding their application.

Further, Art. K.4 facilitates better cooperation by establishing a Coordinating Committee composed of senior officials. This Committee will not only coordinate efforts but also provide opinions to the Council, whether requested or on its own initiative. The Commission is expected to actively engage in judicial cooperation in civil matters of importance.

Pursuant to Art. K.6, the Presidency and the Commission have the responsibility to regularly inform the European Parliament about discussions in the area of judicial cooperation (and other issues of importance). They must also consult the Parliament regarding the significant aspects of their activities, allowing the Parliament to raise questions or make recommendations. An annual debate was aimed to review progress in these matters, in order to provide a platform to assess the advancements made and the challenges faced in implementing these cooperative measures. Finally, the Council, upon the initiative of the Commission or a Member State, may opt to apply broader provisions of the Treaty establishing the European Community to the areas outlined in Art. K.1. This flexibility allows for more comprehensive approaches to cooperation and requires Member States to adopt relevant decisions according to their constitutional processes.⁸

Despite the Maastricht Treaty's lack of clearly defined objectives, suitable legal instruments, and efficient decision-making mechanisms in the field of Justice and Home Affairs (JHA), it nonetheless represented a pivotal turning point in the evolution of this policy area. The Treaty laid the groundwork for structured, institutionalised cooperation among Member States, fostering the emergence of a shared understanding of key challenges and facilitating consensus on fundamental goals and principles. These early developments later enabled the swift and substantial advancement of what is now known as the Union's AFSJ – particularly after the Treaty of Amsterdam addressed many of the legal and institutional limitations that had persisted under the Maastricht framework.⁹

7 Without prejudice to Art. 220 of the Treaty establishing the European Community. Furthermore, when the Council is required to act by a qualified majority, the votes of its members are weighted as laid down in Art. 148(2) of the Treaty establishing the European Community. For the Council's to be adopted, at least fifty-four votes in favour are needed, and these must be cast by at least eight members. Art. K.4/2/3.

8 Art. K.9.

9 Monar, 2012, p. 717.

3. Transferring Civil Judicial Cooperation: From Intergovernmental to Community Framework – Amsterdam Treaty (1999)

The Amsterdam Treaty represented a major turning point by transferring judicial cooperation in civil matters from the intergovernmental pillar to the Community framework. Under Title IV of the EC Treaty (Art. 65), it became part of the AFSJ. This reposition within the ‘first pillar’ aimed to create a more coherent approach to justice, aligning it with the broader objectives of the EU, including the free movement of people and goods.

According to Art. 65 of Amsterdam Treaty, in the context of the European Union, judicial cooperation in civil matters with cross-border implications is essential for ensuring the proper functioning of the internal market. To this end, several key measures have been proposed.¹⁰

First and foremost, there is a strong emphasis on improving and simplifying various systems. This includes enhancing the processes for the cross-border service of judicial and extrajudicial documents, which is vital for ensuring that parties are appropriately informed and can participate in legal proceedings. Additionally, cooperation in the taking of evidence across borders is a priority, as it facilitates more efficient legal processes.¹¹

Another crucial area is the recognition and enforcement of decisions in civil and commercial cases. This encompasses not only judicial decisions but also those made in extrajudicial contexts, ensuring that outcomes are respected and upheld across Member States. Furthermore, promoting compatibility in the rules applicable in Member States regarding conflicts of laws and jurisdiction is essential. This helps to prevent inconsistencies and confusion that can surface when legal disputes cross borders,¹² since judgments have to be ‘checked at the entrance’ into the Member States.¹³

Lastly, there is a concerted effort to eliminate obstacles that hinder the effective functioning of civil proceedings.¹⁴ This may involve promoting the alignment of rules on civil procedure across Member States, making it easier for individuals and businesses to navigate the legal landscape.¹⁵

By implementing these measures, the EU aims to create a more cohesive and efficient judicial framework that supports cross-border legal interactions, ultimately

¹⁰ Art. 65(1).

¹¹ Art. 65(1)(a).

¹² Art. 65(1)(b).

¹³ Zilinsky, 2017, p. 116.

¹⁴ Effective judicial protection is inseparable from judicial cooperation in civil and commercial matters. Establishing judicial cooperation and integration would be impossible without trust. Covelo de Abreu, 2014, pp. 150, 161.

¹⁵ Art. 65(1)(c).

benefiting the internal market and enhancing legal certainty for all citizens. The EU retains national procedural autonomy, as long as compliance with the principle of equivalence and effectiveness is preserved.¹⁶ Nevertheless, the original formulation of national procedural autonomy appears to establish merely a default, permissive rule that gives away to positive EU legislation.¹⁷

One of the key outcomes of the Amsterdam Treaty was the emphasis on mutual recognition of judgments, which integrated judicial cooperation into the Community legal order. The Tampere European Council, held in October 1999, underscored this principle as a cornerstone of judicial cooperation. The idea was that if a judgment was issued in one Member State, it should be recognised and enforced in others without the need for additional procedures. This principle sought to simplify cross-border legal processes and build trust among Member States' judicial systems.

4. The Tampere Summit – Milestone in the Formation of an European Area of Civil Justice

Soon after the Amsterdam Treaty entered into legal force, the European Council held a special meeting¹⁸ on establishing an AFSJ in the European Union (Tampere Summit). The Tampere Summit was crucial in defining the EU's approach to justice and home affairs.

In the Presidency Conclusions regarding the European area of justice,¹⁹ it was highlighted that individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States.²⁰

With respect to this, the European Council recognises that enhancing mutual recognition of judicial decisions and the alignment of legislation is essential for effective cooperation among authorities and for safeguarding individual rights. It emphasises that mutual recognition should serve as the foundation for judicial cooperation in both civil and criminal matters within the EU. This principle should apply not only to judicial rulings but also to decisions made by judicial authorities.²¹

In civil matters, the European Council urged the Commission to propose measures aimed at reducing the intermediate steps currently required for the recognition and enforcement of decisions in other Member States. As an initial step, it suggests eliminating these procedures for small consumer and commercial claims, as well as

16 Blazo, 2023, pp. 82–83.

17 Halberstam, 2021, p. 130.

18 Meeting was held on 15th and 16th October 1999, in Tampere (Finland).

19 European Parliament, 1999.

20 Ad 28.

21 Ad 33.

certain family law judgments, such as maintenance claims and visitation rights. This was supposed to allow such decisions to be automatically recognised throughout the Union without requiring additional proceedings or justifications for enforcement. Additionally, the establishment of minimum common standards for specific aspects of civil procedural law was encouraged, with the aim of enhancing mutual trust and ensuring the effective and consistent application of justice in cross-border cases.²²

The principle of mutual recognition should extend to pre-trial orders as well, particularly those that allow authorities to swiftly secure evidence and seize easily movable assets. Evidence collected legally by one Member State should be admissible in the courts of another, adhering to the relevant standards.²³ Furthermore, the European Council has tasked the Council and the Commission with adopting a programme of measures²⁴ to implement the principle of mutual recognition. This programme should include the development of a European Enforcement Order and establish common minimum standards for procedural law, respecting the fundamental legal principles of Member States.²⁵ Regarding the matter of civil law convergence, the European Council encourages the Council and the Commission to draft new procedural legislation for cross-border cases. This legislation should address key elements necessary for smooth judicial cooperation and improved access to law, including provisional measures, evidence gathering, payment orders, and time limits.²⁶ Finally, the Council was requested to conduct a comprehensive study on the need for harmonising substantive laws among Member States in civil matters to eliminate obstacles that hinder effective civil proceedings, with a report due by 2001.²⁷

4.1. The Impact of the Tampere Summit on EU Justice and Home Affairs

Undoubtedly, the Tampere Summit was influential in shaping policies that would facilitate cooperation among Member States in legal matters, emphasising the importance of mutual recognition as a cornerstone of judicial collaboration. The Council not only reinforced the principle of mutual recognition but also highlighted the need for common minimum standards regarding judicial cooperation. It aimed to foster a shared understanding of legal norms, thereby enhancing cooperation in civil and criminal matters. The focus on mutual recognition marked a shift from traditional notions of sovereignty towards a more integrated European legal space.²⁸

At the heart of the discussions was the principle of mutual recognition, which asserts that judicial decisions made in one Member State should be recognised and enforced in others. This principle is crucial for fostering trust between different legal

22 Ad 34.

23 Ad 36.

24 This activity was to be completed within a short time, by December 2000.

25 Ad 37.

26 Ad 38.

27 Ad 39.

28 Weller, 2015, pp. 75–77.

systems, enabling individuals and businesses to operate more freely across borders. By reinforcing this principle, the Council aimed to create a more integrated legal environment within the EU, where citizens could expect their rights to be upheld consistently, regardless of where they were in the Union.²⁹

In addition to encouraging mutual recognition, the Summit addressed the need for common minimum standards in judicial cooperation. By establishing these common guidelines, the Summit aimed to streamline legal processes, making it easier to navigate cross-border disputes and reduce the complexities that often arise in international legal contexts.

The focus on mutual recognition and common standards marked a significant withdrawal from traditional notions of national sovereignty. Rather than viewing legal authority as confined within the borders of particular states, the Tampere Summit encouraged the development of a more integrated European legal space. Moreover, the decisions made at the Tampere Summit laid the foundation for various initiatives aimed at enhancing judicial cooperation. This included efforts to improve the efficiency of cross-border legal proceedings, to facilitate the exchange of information among judicial authorities, and to establish mechanisms for better coordination in handling legal matters that span multiple jurisdictions.³⁰

Overall, the Tampere Summit was a transformative occasion that significantly impacted the EU's approach to justice and home affairs. By prioritising mutual recognition and common minimum standards, the summit not only strengthened the legal framework within the Union but also fostered a sense of solidarity among Member States. Even though not explicitly, settled guidelines provide a framework for strengthening the Union further, rather than sustaining the traditional approach of each Member State.

5. Mutual Trust in the Context of Judicial Cooperation

Mutual trust represents one of the key principles of European Union law, playing a central role in guiding relations between Member States and ensuring the coherence of the EU legal system. This principle is generally considered the cornerstone of the EU's internal policy. However, cooperation with third countries – which is highly relevant for trade outside the EU – remains unjustifiably neglected.³¹ The fact that this has been identified as a 'blind spot' in foreign trade additionally highlights the importance of a well-functioning system of justice in the context of internal trade. While mutual trust is recognised as a fundamental pillar in many

29 Hamenstädt, 2021, pp. 9–10.

30 Cambien, 2017, pp. 99–102.

31 Weller, 2018, p. 63.

aspects of the EU's functioning, the precise nature, limits, consequences, and scope of this principle have yet to be fully defined by the CJEU. For this reason, mutual trust is often described as one of the most ambiguous concepts in EU law, and its deeper understanding and clarification remain a challenge for legal theorists and practitioners.³² In its most simplified form, the concept of mutual trust may be understood as the presumption that all Member States are committed to and endorse the same fundamental values.³³

In academic literature, most research focuses on specific areas of the application of this principle, particularly in the context of the protection of fundamental rights, which are crucial in many areas of EU law, including the freedom of movement, justice, security, and the internal market.³⁴ The concept of mutual trust is also often analysed in relation to specific legal instruments, among which is the mutual recognition of judicial decisions between Member States.

However, despite its widespread application in various fields, a comprehensive analysis of mutual trust as a general principle, which integrates all relevant legal and societal aspects and considers the broader implications of its application across different areas of EU law, is still lacking.³⁵ Furthermore, the specific nature of this principle remains a subject of various interpretations, which creates room for different approaches to its application, thereby contributing to legal uncertainty.

One of the key challenges related to the application of mutual trust lies in the lack of consensus among Member States about what this principle actually entails. The absence of clearly defined guidelines for applying mutual trust can cause uncertainty in the legal system and complicate the legal protection of individuals who rely on the stability and predictability of the law. In this sense, the challenges surrounding the application of mutual trust raise serious questions regarding the effectiveness and cohesion of EU law.³⁶ Nevertheless, mutual trust implies respect for differences, which is a key element of the principle 'united in diversity'.³⁷

6. Mutual Recognition of Judicial Decisions

One of the most concrete aspects of the application of mutual trust within the EU is the institution of the mutual recognition of judicial decisions between Member States. This institution enables judicial decisions made in one Member State to be recognised and enforced in other Member States, which is crucial for the efficient

32 Boháček, 2022, p. 105.

33 Bárd, 2022, p. 210.

34 Boháček, 2022, p. 105.

35 Wischmeyer, 2016, p. 344.

36 Arroyo Jimenez, 2021, pp. 354–355; Cherednychenko, 2023, pp. 456, 457.

37 Prechal, 2017, p. 84.

functioning of the internal market and the protection of individuals' rights. Mutual trust is recognised here as the fundamental principle that ensures that judicial decisions are treated equally, and there are no obstacles to their recognition, except in very specific cases, such as the serious violation of fundamental rights.³⁸ Apart from its direct effect, mutual recognition has been seen by European scholars as a means of spontaneous harmonisation. This form of harmonisation is considered a 'low-level' approach, in contrast to full harmonisation, which involves replacing national laws with a unified European legal framework.³⁹

In the European Union, the process of enforcing a judgment across borders has been simplified significantly, allowing for more efficient cross-border legal cooperation within the EU. Under EU law, a judgment rendered in one Member State can be directly enforced in another Member State without the need for an additional intermediary procedure, known as *exequatur* (which used to be required to recognise a foreign judgment as enforceable).

This streamlined process is particularly beneficial for creditors seeking to recover debts. For instance, if a creditor is owed money by someone in another EU country, they can have the judgment from their home country recognised and enforced in the country where the debtor has assets. This means that the creditor can bypass lengthy procedures and directly approach the enforcement authorities in the country where the debtor resides or where their assets are located.

To initiate the enforcement process, the creditor must provide the relevant enforcement authority with two key documents: a certificate issued by the court that rendered the original judgment, which confirms that the judgment is enforceable and provides the necessary details about the judgment, as well as a copy of the judgment itself.

However, the debtor has the right to challenge the enforcement in the country where the enforcement is sought. If the debtor believes that enforcing the judgment would violate the public policy principles of the country in question, they can apply to the local court to have the enforcement rejected. Public policy exceptions are generally limited,⁴⁰ but they provide a safeguard to ensure that enforcement does not contravene fundamental principles of law in the country where enforcement is being sought.⁴¹ This mechanism ensures that the process respects the legal and con-

38 Ralli, 2017, pp. 7–9.

39 Smits, 2006, p. 66.

40 Although the concept of 'public policy' within EU law retains a degree of inherent ambiguity, the CJEU has consistently applied a restrictive interpretation. The threshold for invoking the public policy exception is set at a notably high level, rendering it challenging in practice to establish that this criterion has been met successfully. Pozdnakova, 2018, p. 9.

41 Variance should be to an unacceptable degree with the legal order of the State in which enforcement is sought. See: Judgment CJEU of the Court (Grand Chamber) of 28 April 2009, *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Case C-420/07, Judgment of the Court (Fifth Chamber) of 11 May 2000. *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, Case C-38/98.

stitutional standards of each Member State while facilitating smoother enforcement of judgments across borders.⁴²

This system simplifies the enforcement process, making it faster and more predictable for creditors while also protecting the interests of debtors by allowing them to challenge enforcement under specific conditions.

In addition, this approach should reaffirm that the Member States are ‘different, but equal’. From the perspective of constructing a single market and harmonising legal standards within the EU, the mutual recognition of judicial decisions is designed to overcome the obstacles to deeper integration that arise when Member States operate within different legal frameworks or standards. The recognition of judicial decisions across borders is essential for facilitating cooperation and ensuring legal certainty in cross-border situations.⁴³

Thus, the importance of mutual recognition is especially emphasised in areas of law that have not been fully harmonised within the EU. This includes legal domains where differences still exist in national legal systems, practices, or substantive laws. The assumption underlying this process is that Member States can trust each other’s legal systems to uphold certain core principles, such as the protection of fundamental rights, fair trials, and the overall integrity of the legal process.

It is implied that the successful implementation of mutual recognition rules relies heavily on the principle of mutual trust among Member States. This principle assumes that each Member State’s legal system ensures an adequate level of legal protection and that judicial decisions in one Member State will be respected and enforced in another. Mutual trust is based on the expectation that every Member State guarantees a sufficient level of fairness, legal safeguards, and respect for human rights, regardless of the potential differences in their legal cultures or procedural approaches.

Even though the Amsterdam Treaty put mutual trust in the ‘first pillar’ of the EU law, there was and still is insufficient understanding about what the mutual trust exactly means in practice.

To some extent, the CJEU provided an interpretation in its Opinion No. 2/13.⁴⁴ Namely, in Opinion 2/13, as well as in subsequent rulings in various areas of EU law, the CJEU adopted a universalistic approach to justify the principle of mutual trust. The Court’s reasoning is based on the idea that the European Union is founded on fundamental values specified in Art. 2 of the Treaty on European Union (TEU), such as democracy, the rule of law, freedom, and respect for human rights. These values are considered common to all EU Member States. As the Court explains, this common foundation ‘implies and justifies the existence of mutual trust’ between Member States. Specifically, this mutual trust is based on the belief that each Member State respects these fundamental values and, in turn, complies with EU laws designed to enforce them.

42 Ruehl, 2018, p. 2.

43 Düsterhaus, 2015, p. 156.

44 European Union, 2014.

Although the language used by the CJEU may initially seem to suggest that the principle of mutual trust functions more as an expectation than an obligation, the Court clarifies that this is not the case. On the contrary, the CJEU holds that this principle imposes a strong duty on each Member State.

However, mutual trust should not be considered equal to blind trust. As the CJEU explains in cases such as *N.S. and Aranyosi and Căldăraru*, trust must be ‘earned’ by the Member State of origin through effective compliance with EU fundamental rights standards.⁴⁵ Nevertheless, any limitations on the principle of mutual trust must remain exceptional. This approach aims to strengthen legal cooperation and provide certainty in the application of EU law. Even though these goals are in functional cohesion to the idea of EU and integration in EU itself, it was obvious at first glance that the principle of the mutual trust would not be out of scepticism. The reason lies in the fact that trust is not a matter of rules, even legal rules, but the process that could take time to be completed. In addition to this, a more sociological aspect of mutual trust, which is demonstrated through the mutual recognition of decisions, raises concerns among legal minds experts. They worry that recognising foreign decisions without a prior approval process could jeopardise sovereignty and weaken legal certainty in the receiving state.

To observe the scope of the principle of mutual trust in civil law matters, some illustrative cases will be presented.

7. CJEU Cases of Relevance for Understanding ‘Mutual Trust’

In the *Achmea* case,⁴⁶ the CJEU issued a ruling that had a significant impact on the interpretation and application of the principle of mutual trust within the EU. The Court ruled that the bilateral investment agreement between two EU Member States posed a serious risk to this fundamental principle. The agreement, which allowed for arbitration outside the EU legal framework, was considered a threat to the autonomy of EU law, as it could undermine the alignment of Member States with EU legislation.

The CJEU emphasised that the existence of such an arbitration mechanism could weaken the legal coherence and cohesion that is essential for the functioning of the EU. Arbitration proceedings that do not take place within the EU legal system could challenge the effectiveness and integrity of the EU’s legal framework, as they might create parallel legal pathways that are not aligned with EU law. In this context, the

⁴⁵ Lenaerts, 2017, p. 805.

⁴⁶ Judgment of the Court (Grand Chamber), of 6 March 2018 (request for a preliminary ruling from the Bundesgerichtshof – Germany) – *Slowakische Republik v Achmea BVC*-284/16.

Court held that such a system could seriously undermine the core principles of EU law, including the principle of mutual trust among Member States.

This ruling underscores the CJEU's position that any challenge to the perceived compliance with EU law, particularly in relation to fundamental rights, can have broad consequences for the functioning of the Union. When there are doubts about a Member State's adherence to EU legislation, this not only threatens the trust between Member States, but could also destabilise the EU's legal structure, potentially jeopardising the very foundation of the Union. The Court thus sent a strong message that any practice that could undermine the integrity of EU law, and particularly weaken mutual trust among Member States, must be seriously reconsidered.

In the *Eurofood IFSC* (2005) case,⁴⁷ which concerned insolvency proceedings, a key area of judicial cooperation in civil matters, the CJEU once again reaffirmed its traditional approach based on the principle of mutual trust between Member States. The case dealt with the issue of the recognition and enforcement of judicial decisions within the EU, which is crucial for effective judicial cooperation within the Union, especially in areas such as insolvency, where cross-border legal proceedings are common.

In this case, the Court clarified that the simplified mechanism for recognising and enforcing judgments between Member States is not merely an administrative procedure but is based on the deep trust that the judicial systems and procedures of other Member States are aligned with the fundamental values of the EU, such as fairness, impartiality, and transparency. Essentially, the EU assumes that all Member States have developed and reliable judicial systems that respect legal rules and human rights, thereby ensuring the smooth functioning of the internal market and judicial cooperation.

This ensures that judicial decisions, such as those made in insolvency proceedings, can have legal force and be effectively enforced in other Member States without the need for re-examining their legality or content. The reasoning in the *Eurofood IFSC* (2005) case highlights another important aspect in the interpretation of the principle of mutual trust, particularly in relation to the mutual recognition of judgments. Namely, the Court emphasised that the starting assumption for mutual recognition is based on the responsibility of the court in the Member State of origin to ensure that it has jurisdiction over the insolvency of the entity concerned in accordance with the relevant EU regulations. As the Court stresses, this check must be carried out in compliance with basic procedural guarantees to ensure a fair legal process. However, the court in the Member State of destination, where the insolvency judgment is recognised, does not have the authority to review the jurisdictional assessment made by the court in the Member State of origin. Through this approach, the CJEU essentially lays the foundation for the interpretation of the principle of mutual trust: on the one hand, this principle obliges the court in the Member State of origin to confirm its

47 Judgment of the Court (Grand Chamber), of 2 May 2006, *Eurofood IFSC Ltd.*, C-341/04.

jurisdiction, so that the court in the Member State of destination can automatically recognise the judgment.⁴⁸

8. Lisbon Treaty (2009) and the Institutionalisation of Cooperation Without Uniformity

With the entry into force of the Lisbon Treaty in December 2009, judicial cooperation in civil matters was significantly integrated into the broader framework of the European Union. Specifically, it was moved to Title V of the TFEU, which deals with the AFSJ. This shift marked an important institutional change, as judicial cooperation in civil matters is now subject to the ordinary legislative procedure (OLP), alongside other areas of EU policy, as defined in Art. 289 TFEU. This procedure requires that key legislative measures in the field of judicial cooperation be adopted through a co-decision procedure, involving both the European Parliament and the Council of the European Union, which aims to create greater democratic accountability and transparency in the decision-making process.

The explicit legal basis for judicial cooperation in civil matters under the Lisbon Treaty is found in Art. 81 TFEU, which provides the framework for measures in areas such as the recognition and enforcement of judgments, conflicts of law, and the harmonisation of judicial procedures. According to Art. 81(1) TFEU, the EU aims to 'ensure the proper functioning of the internal market' by establishing minimum rules that enhance judicial cooperation between Member States in cross-border civil and commercial matters. This cooperation is designed to improve access to justice for EU citizens and businesses, fostering legal certainty and mutual trust across Member States.⁴⁹

In addition to Art. 81 TFEU, the Lisbon Treaty also maintained a differentiated approach when it comes to family law. While judicial cooperation in civil matters is now part of the community method, family law issues continue to be dealt with through a more intergovernmental method. This exception is explicitly recognized in Art. 81(3) TFEU, which allows Member States to decide unanimously whether

48 The CJEU further reinforced its commitment to the principle of mutual trust between EU Member States in its *MG Probud* decision of 2010. This ruling emphasised the balance between judicial responsibility and the limitations on judicial review of judgments rendered in other Member States. In its judgment, the CJEU clarified that mutual trust in the judicial systems of EU Member States is a foundational principle of the EU's system of mutual recognition. The Court reaffirmed that this trust entails limitations on the ability of national courts to review the substance of judgments issued by courts in other EU countries, reinforcing the importance of respecting the effectiveness of cross-border judicial cooperation. See: Judgment of the Court (First Chamber) of 21 January 2010, *MG Probud Gdynia sp. z o.o.*, C-444/07.

49 Fillers, 2018, p. 478.

to adopt EU measures in the area of family law. This exemption reflects the sensitive nature of family law, which involves deeply rooted national values and traditions, including those related to marriage, custody, and inheritance. For this reason, family law remains largely within the control of Member States, with EU action limited to areas where cooperation can be achieved without interfering with national sovereignty.

In practice, this means that family law remains subject to unanimity among Member States, as stipulated in Art. 81(3) TFEU, which states:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt measures in the field of judicial cooperation in civil matters, except in the field of family law, where such measures are adopted by the Council acting unanimously.

This preserves the sovereign rights of Member States over family law, while still facilitating cooperation where necessary, such as in matters involving cross-border child custody or divorce cases with an international element.

This differentiated approach demonstrates the balance between national sovereignty and the EU's objective to create a more harmonised legal framework across Member States. The EU recognises the importance of respecting national identities and cultural practices in family law matters, even as it promotes greater legal certainty and coordination in civil matters more broadly.

9. Current Developments and the Impact of Judicial Authority in a Diverse Union: Developments and Effects Post-Lisbon

Since the Lisbon Treaty, the European Union has adopted numerous regulations and directives designed to enhance judicial cooperation in civil matters. These legal instruments aim to ensure the free movement of judgments, foster legal certainty, and streamline judicial processes across borders, to reach efficiency of the cooperation system in the community justice, figuratively named an 'Esperanto in the world of law'.⁵⁰ Notable examples include the Brussels I Regulation (recast), which deals with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the European Small Claims Procedure, both of which exemplify the EU's ongoing commitment to improving cross-border legal processes.

⁵⁰ Costache, 2009, p. 1.

9.1. Brussels I Regulation (Recast)

The Brussels I Regulation (Regulation (EU) No 1215/2012) is one of the key pieces of legislation in the area of judicial cooperation in civil matters. It provides a framework for determining which courts have jurisdiction in civil and commercial disputes between parties in different EU Member States. Additionally, it establishes mechanisms for the recognition and enforcement of judgments across the EU, eliminating the need for re-examination of judgments in the country of enforcement. Under Art. 36 of the Brussels I Regulation, judgments given in one Member State are automatically recognised in all other EU countries, subject to certain exceptions, such as public policy concerns. The recast of this regulation, which entered into force in 2015, aimed to simplify and clarify procedures, making cross-border legal disputes more efficient.

The Brussels I Regulation (Recast) also enhances legal certainty by providing clear rules on jurisdiction, which determine which court has authority over a case based on factors such as the location of the defendant, the place where the contract was performed, or the location of the damage. By establishing these rules, the regulation reduces the likelihood of forum shopping (the practice of selecting a court perceived to be more favourable) and contributes to a predictable legal environment for individuals and businesses engaged in cross-border activities. Furthermore, it ensures that judgments rendered in one EU country can be enforced in another without the need for complex and time-consuming procedures, thus encouraging greater legal efficiency and cooperation among Member States.

9.2. European Small Claims Procedure as a Reflection of Unity in Judicial Diversity

Another important development is the European Small Claims Procedure (Regulation (EC) No 861/2007), which aims to simplify and expedite the process for individuals pursuing small claims in cross-border disputes within the EU. The procedure allows for claims of up to €5,000 to be dealt with through a streamlined process, minimising the need for costly and lengthy litigation. By providing a simplified procedural framework, the European Small Claims Procedure grants easier access to justice for individuals and small businesses engaged in cross-border trade and contractual relationships.

This regulation is significant because it enhances access to justice by providing a clear, low-cost, and efficient alternative to traditional legal proceedings. Apart from simplifying the procedure, the key feature of this model lies in its emphasis on judicial cooperation with the parties and the proactive role of the court in managing proceedings.⁵¹ Additionally, the small claims procedure further promotes the EU's internal market, encouraging individuals and businesses to engage

⁵¹ Mesquita and Marques, 2022, p. 10.

in cross-border transactions without fear of lengthy or expensive legal processes. It represents a key aspect of the EU's effort to create a legal environment that supports economic activity and facilitates the free movement of goods, services, and people within the Union.

Although the European Small Claims Procedure introduced a simplified framework, it has drawn criticism on the ground that courts risk being perceived merely as debt-recovery agencies. Critics argue that the low monetary value of a claim does not necessarily imply procedural or legal simplicity, as such cases may still involve complex factual or legal issues.⁵²

9.3. Legal and Economic Consequences of Fragmented, Yet Functioning Judicial Cooperation in the EU

These developments have profound legal and economic implications for individuals and businesses operating within the EU. By creating a legal framework that facilitates the recognition and enforcement of judgments, the EU ensures that individuals and businesses can rely on cross-border legal processes to resolve disputes, thereby reducing uncertainty. For businesses engaged in cross-border trade and commercial transactions, this predictability is essential for efficient planning and risk management. The EU's efforts in this area help in creating a more integrated internal market, where legal barriers to trade and business activities are minimised.

For individuals, the clearer procedures offered by instruments like the Brussels I Regulation and the European Small Claims Procedure enhance access to justice, especially in cross-border cases. Whether resolving contractual disputes, enforcing judgments related to personal injury, or addressing family law matters with a transnational element, these regulations provide more accessible and efficient mechanisms for resolving legal issues. This not only strengthens legal certainty but also fosters a sense of trust in the EU's legal system.

By enhancing cooperation between Member States' judicial systems, these measures support the EU's overarching goal of promoting freedom, security, and justice, as outlined in Title V of the TFEU. They contribute to the achievement of the EU's vision of an internal market where individuals and businesses can operate across borders with confidence, knowing that there are clear and predictable legal avenues for resolving disputes.

52 Silvestri, 2018, p. 14.

10. Conclusion

In conclusion, since the Lisbon Treaty, the EU has made significant strides in improving judicial cooperation in civil matters through the enactment of regulations such as the Brussels I Regulation (Recast) and the European Small Claims Procedure. These instruments reflect the EU's commitment to creating a more efficient, predictable, and accessible legal framework for cross-border activities. By ensuring the recognition and enforcement of judgments and providing clear procedural mechanisms, the EU has fostered greater legal certainty, encouraged economic activity, and improved access to justice across its Member States, ultimately contributing to a more integrated and cohesive internal market.

This expanded version incorporates key legal references and explains the broader legal and economic implications of EU regulations aimed at improving judicial cooperation in civil matters. Additionally, it provides a deeper understanding of the practical significance of these regulations for individuals and businesses within the EU, highlighting how they promote legal certainty and economic integration.

The evolution of judicial cooperation in civil matters within the EU illustrates a gradual shift from a predominantly intergovernmental approach to a more integrated, community-based framework. The principles established through the Maastricht, Amsterdam, and Lisbon Treaties reflect the EU's commitment to fostering mutual trust, cooperation, and the protection of rights among Member States. As the EU continues to navigate complex legal landscapes, the time ahead of us will provide the answer whether the ongoing development of judicial cooperation will play a vital role in ensuring a cohesive and effective legal system across Europe.

The application of mutual trust without safeguards may expose the EU legal system to risks that could undermine its founding values. These include situations where a Member State's legal system does not comply with the EU's core values, such as respect for fundamental rights, freedom of movement, or non-discrimination. For example, if a judicial decision issued in one Member State involves a violation of the right to a fair trial or freedom from torture (as enshrined in Art. 6 of the TEU and the EU Charter of Fundamental Rights), its enforcement in another Member State could violate EU law.⁵³

In the field of judicial cooperation in civil and commercial matters, the principle of mutual trust plays a crucial role in ensuring the recognition and enforcement of judgments across EU Member States. However, this principle is not without its complexities and challenges, particularly in light of value disagreements between Member States. These disagreements, especially in areas related to the rule of law and fundamental rights, can have significant implications regarding the effectiveness of mutual trust in judicial cooperation.

It is noteworthy that the AFSJ is built on the foundation of shared values, including respect for democracy, the rule of law, and fundamental rights as outlined in

53 Ozoráková, 2022, p. 198

the TEU and the Charter of Fundamental Rights of the European Union. These values underpin the principle of mutual trust, which assumes that all EU Member States uphold these core principles in their national legal systems.

However, value disagreements can pose challenges to this trust. In particular, Member States that are perceived to be experiencing a deterioration in the rule of law or failing to adequately protect fundamental rights may undermine confidence in the judicial decisions emanating from those states. This can create tensions when one Member State is requested to recognise and enforce judgments of another that may be seen as falling short of the EU's standards on fundamental rights.

The CJEU has been grappling with these issues, and while it has so far maintained a relatively strict interpretation of mutual trust, there is growing recognition that the relationship between mutual trust and fundamental rights protection needs to be more nuanced, particularly in civil and commercial matters. The question of limits to the application of mutual trust becomes, particularly relevant when the state of the rule of law in a Member State deteriorates as this could affect the fairness and legality of judgments issued by national courts.

One of the most important safety valves in the AFSJ that can address these challenges is the public policy exception (*ordre public* clause). This exception allows a Member State to refuse to recognise or enforce a foreign judgment if doing so would violate its fundamental principles, particularly regarding fundamental rights.

While the public policy exception serves as an important safeguard, it is crucial to note that its application must not be abused or used as a blanket excuse to challenge judgments based on perceived differences in legal systems or values. The CJEU has consistently maintained that this exception should be applied narrowly and only in extreme cases, where the judgment clearly violates core EU values. A lenient interpretation could allow for a more contextual approach to the recognition and enforcement of judgments, where fundamental rights considerations are weighed more heavily in cases of serious rule of law concerns. The idea behind this more lenient interpretation is that the protection of fundamental rights should be the cornerstone of mutual trust. In other words, mutual trust cannot be blind or unconditional; it must be contingent on the adherence to EU values, particularly those enshrined in the TEU and the EU Charter of Fundamental Rights.

The relationship between mutual trust and the protection of fundamental rights is not merely a legal or procedural issue; it is a matter of ensuring that the EU legal order remains consistent with the Union's founding values. The mutual recognition of judicial decisions is important for the functioning of the internal market, but it must not come at the cost of justice or individual rights.⁵⁴

The analysis presented in this chapter emphasises that the EU's approach to judicial cooperation primarily aims to ensure the effective protection of rights in civil and commercial matters through mutual trust and recognition of court decisions. In doing so, the formal inequality between different national procedural systems

54 Ozoráková, 2022, p. 200.

is relativised, while the efficiency of the EU internal market is preserved precisely through the retention of traditional procedural rules of the Member States.

The benefits arising from facilitated cross-border legal protection and the faster enforcement of judgments largely outweigh the disadvantages. In other words, the broader interest in legal certainty and economic efficiency within the Union justified the diversity among equal members.

It is true that the EU does establish uniform procedural rules in specific areas – such as consumer protection – particularly where there is a clear need to safeguard individual rights or maintain market balance.⁵⁵ However, such targeted harmonisation does not undermine the EU's fundamental commitment to achieving functional efficiency through respect for the legal diversity of its Member States.

⁵⁵ Barnard and Mišćenić, 2019, pp. 127–130.

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FIGHTING CRIME ACROSS BORDERS: SOVEREIGN EQUALITY AND JUDICIAL COOPERATION IN CRIMINAL MATTERS



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Abstract

The article examines the role of equality as a fundamental principle in judicial cooperation within the EU, tracing its evolution and impact concerning criminal law. The discussion begins with an outline of the significance of equality in the EU's formation and its early stages of cooperation. It explores the historical development of judicial cooperation in criminal matters, highlighting its transformation into a key element of EU integration. The analysis focuses on the principle of equality within the current framework of judicial cooperation, emphasising the adoption of common minimum standards for criminal proceedings as a basic model. These standards ensure uniformity and fairness while preserving equality among the Member States. The article delves into how these standards influence the equality of the Member States in criminal law enforcement and judicial processes. Key areas of criminal law are explored to illustrate the practical application of equality in judicial cooperation, including efforts to combat terrorism, corruption, cybercrime, fraud and money laundering, alongside measures to protect victims. The article addresses the challenges posed to equality by European integration, discussing sovereignty, the rule of law and the emerging role of the European Public Prosecutor's Office. Additionally, it highlights the pivotal role of the Court of Justice of the European Union in upholding the principle of equality in judicial cooperation. The article concludes by summarising the complex interplay between equality, sovereignty and judicial cooperation in the EU, underscoring the continued importance of this principle in fostering integration and addressing contemporary challenges.

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1. Introduction

The EU, within which an intensive process of integration has been ongoing for years, is a *sui generis* international organisation uniting states to achieve its designated objectives.¹ The goals set by its Member States must be pursued according to a plan and within certain boundaries. The establishment of these goals and the methods for their achievement ensures the efficiency and effectiveness of a complex mechanism such as the EU. It is necessary to reconcile diverse individual interests of the Member States, varying economic positions and consider the peculiarities and characteristics of all the Member States, including their heterogeneous legal systems. Therefore, at the EU's inception, several fundamental principles were laid down, forming its foundation and guiding the future coexistence of the Member States.

One such principle has been the principle of equal cooperation among the EU Member States. This is a foundational principle, shaping further rules and operational frameworks for all the Member States. Without cooperation among the Member States, neither the EU's creation nor its continued functioning would be possible. The cooperation is based on equality, a necessary and indispensable element.² This cooperation serves as the cornerstone for the positive future of the European integration process. Therefore, it is worth examining equality as the primary substrate of cooperation among the Member States. This equality among the cooperating Member States is particularly impactful in areas tied to the individuality, uniqueness or sovereignty of each Member State. In the context of the present analysis, the area of cooperation being considered is the domain of justice in criminal matters, where the equality of cooperating Member States is key to integration in this unique field.

2. Equality As a Fundamental Element of Cooperation in the Initial Process of Shaping the EU

It is generally accepted that the emergence of the concept of the EU began in 1950, with the activities of legendary figures, such as Jean Monnet and Robert Schuman. The former was a French politician and economic advisor, while the latter

1 Wunderlich, 2012, pp. 653–669.

2 Rossi, 2017, pp. 3–42.

was a qualified lawyer and the French Minister of Foreign Affairs.³ They presented a set of resolutions, objectives and methods of cooperation as a vision for a united Europe, which was intended to be a modern, efficient, secure and rationally integrated structure. This formulated position, as a proposal of the French government, was known as the Schuman Plan.⁴ Subsequently, this document became the catalyst for the signing of the Treaty of Paris in 1951, which established one of the first European communities, the European Coal and Steel Community (ECSC).⁵ This is widely recognised as the beginning of the idea of European cooperation, now known as European integration, which later developed into the present-day EU.

The Schuman Plan was announced on May 9, 1950, to build strong and lasting foundations for the stabilisation and integration process in post-war Europe.⁶ The goal was to preserve peace in Europe, which had just emerged from World War II. Thus, the objective was to initiate cooperation among certain key European states, which would provide predictability and guarantees to prevent the outbreak of further conflicts, alongside a vision of prosperity and modernity for a united Europe. Hence, the economy was prioritised, with only partial emphasis on the political sphere. At the time, the foundation of the economy consisted of fossil fuels and other related resources. Consequently, the signing of the treaty (Treaty establishing the European Coal and Steel Community and related instruments (ECSC treaty)) aimed to establish principles for the cooperation and distribution of natural resources that dominated the European and global economy. It sought to create stable frameworks for cooperation in managing coal and steel production, which was expected to translate into Europe's economic stability. The countries that initiated European cooperation in this area included France, West Germany (the Federal Republic of Germany), Italy, Belgium, the Netherlands and Luxembourg.

In its original version, the Schuman Plan included the following declarations. First, the aforementioned attempt to ensure stabilisation and lasting peace in Europe. Second, the establishment and observance of strict rules for the management of strategic resources, such as coal and steel. Third, European integration, as the tightening of economic cooperation, is reflected in the inclusion of additional sectors of the economy and the establishment of a common European market. Fourth, although the primary objective was strong economic cooperation, slow indications of future tightening of political cooperation were emerging, signifying collaboration based on shared values. Fifth, a forward-looking openness to new members in the integration process, that is, openness to other European countries and the possibility of their accession to the integration process, intending to initiate the integration of the entire continent. Sixth, international cooperation, as the activity of states on a supranational level towards a common goal, which, at that time, implied, to some extent,

3 Anta, 2021, pp. 773–784; Wells, 2022, pp. 9–13.

4 Perkowski, 2006, p. 27.

5 Petzina et al., 1981, pp. 450–468.

6 McKesson, 1952, pp. 18–35.

the relinquishment of certain elements of sovereignty. However, this was done in a rational and comprehensible manner, respecting the individuality of each Member State (the concept of a ‘Europe of Nations’).⁷

At the outset, as the foundation for implementing the Schuman Plan, the fundamental principles of this nascent cooperation among European states were delineated. Based on the common objectives, cooperation among states was grounded in several key principles that became the bedrock of the functioning of the EU. These principles included the joint management of strategic resources, the assurance of peace and security in the European region, the principle of economic solidarity and interdependence, the simultaneous sovereignty and integration of states, the principle of a single market, the free movement of persons, goods, services and capital, the principles of subsidiarity and proportionality, the respect for community law and the principle of equality among Member States. These principles formed the foundation of the integration process, which led to the establishment of the EU, evolving and adapting to changing political, economic and social conditions. Cooperation based on these principles among the six founding states laid the groundwork for further integration, leading to the establishment of the European Economic Community (EEC) and later the development of the EU.⁸

This concise, retrospective overview of the beginnings of European integration reveals that, from the beginning, European integration was based on cooperation and equality of the states and rested on the aforementioned principles. For instance, each Member State, at the inception of modern integration, was assured equal voting rights. Member States were represented on equal terms, regardless of their size or economic strength. The same applied to the early judicial bodies. The Court of Justice was established to resolve disputes and ensure adherence to common principles.⁹ This Court treated all states equally. However, with the expansion of the EU’s competences following the ratification of the Lisbon Treaty and the adoption of the Regulation on conditionality related to the rule of law, an issue began to evolve. This was a turning point that directly contributed to changes in the approach of the European courts, which acquired new areas of adjudication, a development that is not self-evident and remains debatable regarding its compatibility with the Treaties.¹⁰

A similar approach was applied to decision-making mechanisms, which recognised the interests of all states. While voting mechanisms (e.g., majority voting) have evolved towards stark inequalities, in the early stages, particular care was taken to ensure that no state felt dominated by another. Key decisions required consensus, which prevented larger states from imposing solutions on smaller partners. Thus, the equality of the Member States, at the early stages of integration, was crucial and respected. Equality, as a driving force for integration, was a fundamental component

7 Sienko, 2021, pp. 29–48.

8 Vandermeersch, 2017, pp. 79–101.

9 Garrett et al., 1998, pp. 149–176.

10 Du Vall, 2024, pp. 177–197.

in building trust and faith. If the smaller states had felt dominated by larger ones, the cooperation would have collapsed. Hence, the principle of equality was foundational to the success of the initial European communities and should remain a significant aspect of the EU's functioning today.¹¹

3. Judicial Cooperation in Criminal Matters in the EU – A Historical Overview

The equality of the Member States, which has been a foundational principle of European integration, was intended, over time, to extend to the highly sensitive area of judicial cooperation, particularly in the complex domain of criminal law. Broadly speaking, the judiciary can be defined as a function of the state aimed at resolving disputes through competent authorities. It is an integrated and interdependent system of institutions (e.g., courts), whose scope of operation is delineated by law and values (such as the rule of law, fairness and truth), with legal principles enshrined in the highest-ranking legal acts (e.g., constitutional principles of equality before the law, judicial independence, the presumption of innocence, the right to defence, etc.) and procedural frameworks (e.g., criminal procedure, civil procedure, administrative procedure and alternative dispute resolution methods).¹² This system fulfils specific societal functions, such as the protection of law and public order and the safeguarding of human and civil rights.¹³

Closely tied to the judiciary is the process of administering justice, which involves determining legal liability (whether civil, criminal or administrative) and enforcing penalties that may be imposed.¹⁴ The judiciary plays a central role in administering justice. For instance, Art. 175 of the Polish Constitution¹⁵ explicitly states that the judiciary in the Republic of Poland is exercised by the Supreme Court, common courts, administrative courts and military courts. Consequently, the judiciary holds a pivotal role in building a democratic state governed by the rule of law, where every citizen can expect the protection of their rights and fair treatment. Thus, the concept of the judiciary, and the judicial function within it, has become a subject of consideration within the broader process of European integration.

The current form of administering justice, including judicial cooperation in criminal matters within the EU, is the result of a significant evolution, a convergence of numerous historical events and phenomena and political factors and economic

11 Defeis, 2004, p. 73; Howard, 2009, pp. 19–38.

12 Hensler, 2003, p. 165.

13 Cross, 1999, pp. 87–98.

14 Hylton, 2005, pp. 175–201.

15 The Constitution of the Republic of Poland of April 2, 1997 (Journal of Laws 1997 No. 78, item 483).

processes that have been observed through the years of integration. The beginning of fundamental changes and the gradual development of judicial cooperation in criminal matters became the provisions of the Maastricht Treaty.¹⁶ It introduced the three pillars of European cooperation. First was the Pillar of the European Communities, based on the existing communities: the EEC, the ECSC and the European Atomic Energy Community (EURATOM).¹⁷ It was characterised by a supranational nature, meaning that decisions were made within the framework of community institutions (European Commission, Council of the EU, European Parliament and European Court of Justice). Second was the Common Foreign and Security Policy (CFSP), concerning the cooperation of the Member States in foreign and security policy for maintaining peace and international security, promoting international cooperation, strengthening democracy, human rights and the rule of law.¹⁸ It was based on an intergovernmental nature, meaning that decisions required consensus among the Member States and were not subject to control of the EU institutions. Third was cooperation in the area of Justice and Home Affairs (JHA),¹⁹ which covered matters such as asylum and immigration policy, combating organised crime, terrorism, human trafficking and judicial and police cooperation in criminal matters. This pillar was intergovernmental, meaning that decisions were made by agreement among the Member States. Under this pillar, the Member States began cooperation for criminal justice.

Judicial cooperation in criminal matters under the Maastricht Treaty (1992) was framed in a different context than today, as the EU's institutional and legal framework was still taking shape. At the time, the principle of unanimity was largely respected; hence, for judicial cooperation in criminal matters, all the decisions required unanimity among the Member States. Each Member State could veto proposals. An important element of this cooperation was its voluntary nature, which was primarily based on voluntary agreements between the Member States. There was no mechanism enforcing uniform legal standards across the Union. It was a forum for the exchange of information and best practices, rather than an integrated legal system. However, there was a noticeable lack of harmonisation of criminal law, because the Maastricht Treaty did not foresee the harmonisation of criminal law provisions across the Member States.

Each Member State retained full sovereignty. Hence, the main areas of cooperation within the third pillar focused on aspects such as combating transnational crime, including drug trafficking, human trafficking and terrorism, the exchange of information between law enforcement authorities and courts of Member States and the issue of extradition as a form of cooperation in the transfer of individuals sought by the Member States. Furthermore, there was a complete lack of EU competencies at

16 Treaty on European Union. OJ C 191, 29.7.1992, pp. 1–112.

17 Radivojevic, 2004, p. 61; Scheinman, 1965.

18 Sjursen, 2003, p. 34.

19 Wolff et al., 2009, pp. 9–23.

the time; hence, within the third pillar, no EU judicial body had any competence to settle disputes or interpret provisions regarding judicial cooperation. This was due to the intergovernmental nature of this pillar and the strong respect for the sovereignty of the Member States. Therefore, the Maastricht Treaty limited judicial cooperation in criminal matters to intergovernmental exchange of information and voluntary actions, without harmonisation of criminal law or strong institutional mechanisms.

Although this was an important step towards building trust among Member States, real integration and effective judicial cooperation began in subsequent treaties. The Treaty of Amsterdam,²⁰ signed in 1997, reformed the third pillar by transferring some competences (e.g., cooperation in visa, asylum and immigration matters) to the first pillar, thereby increasing the role of EU institutions. The Treaty of Amsterdam, entered into force in 1999, introduced new mechanisms and institutions for improving the effectiveness of this cooperation and gradually harmonising the legal systems of the Member States. Most notably, it established the Area of Freedom, Security and Justice (AFSJ) as a key objective of the EU.

Regarding criminal law, the third pillar continued to operate on an intergovernmental basis; however, with greater coherence in actions. The Treaty of Amsterdam laid the foundation for the principle of mutual recognition of judgments and judicial decisions between the Member States. This was believed to be essential for streamlining judicial cooperation in criminal matters, allowing for the swift and effective recognition of criminal judgments and decisions across the EU. Furthermore, it strengthened the protection of fundamental rights. Member States were required to respect fundamental rights, such as the right to defence, the presumption of innocence, etc., in judicial cooperation. Moreover, there was a noticeable development of judicial cooperation instruments. Cooperation in criminal matters was expanded to include new mechanisms, including initiatives aimed at harmonising laws concerning combating organised crime, countering terrorism and fighting cross-border crime, including human trafficking and the illegal drug trade.

Eurojust was officially established in 2002, as the Treaty of Amsterdam provided the legal basis for its creation.²¹ Eurojust was created to support judicial cooperation among the Member States in criminal matters through coordination between law enforcement authorities and judicial bodies of different countries. The popular tool in criminal proceedings, the European Arrest Warrant (EAW), was introduced. While the EAW was formally introduced after the Treaty of Amsterdam (pursuant to the 2002 Framework Decision of the Council), the Treaty had established its legal basis. The EAW was a response to the noticeable problems with extradition between EU states, which was a very lengthy, highly formalised and inefficient process. The EAW allowed for the simplification and acceleration of the process, eliminating the aforementioned traditional barriers. It was during this time that the EU's judicial

20 The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts OJ C 340, 10.11.1997, pp. 1–144.

21 Suominen, 2016, pp. 13–32.

competencies were expanded. For instance, compared to the Maastricht Treaty, the Treaty of Amsterdam foresaw such competences in judicial cooperation, although they were limited to the third pillar. However, the EU judicial body gained the right to interpret EU legal acts related to judicial cooperation to strengthen the coherence of the legal system across the Member States.²²

Additionally, the Treaty of Amsterdam paved the way for the adoption of the Tampere Programme,²³ which set specific goals and actions for the ‘area of freedom, security and justice’, including the development of judicial cooperation in criminal matters. The programme emphasised the importance of mutual recognition of judicial decisions and the harmonisation of minimum standards in criminal matters. Hence, the Treaty of Amsterdam was a crucial step in the evolution of judicial cooperation in criminal matters within the EU. It transitioned from the purely intergovernmental cooperation model of Maastricht to a more integrated system. It laid the groundwork for modern judicial cooperation tools, such as Eurojust, the EAW and directed future cooperation through closer harmonisation of criminal law.

The next legal act, the Lisbon Treaty (2009), fully integrated judicial cooperation in criminal matters into the EU’s legal framework, transferring it into a unified EU legal system and providing certain but concrete mandates for the Court of Justice of the EU (CJEU). The Lisbon Treaty introduced fundamental changes in judicial cooperation in criminal matters, integrating it more deeply into the EU legal system.²⁴ As a part of the treaty reforms, the three-pillar division was abolished, allowing for full integration of cooperation in JHA into the EU’s general legal framework. Judicial cooperation in criminal matters was transferred to the section covering the AFSJ. Hence, judicial cooperation became a part of EU policy, governed by common legislative procedures and EU institutions (European Commission, European Parliament, Council of the EU). The Lisbon Treaty expanded the EU’s competences in criminal law and introduced the possibility of harmonising minimum standards of criminal law across the EU.

According to Art. 83 of the Treaty on the Functioning of the European Union (TFEU), the Union may establish minimum rules concerning, for example, the definitions of crimes and penalties in areas of particularly serious transnational crimes (such as terrorism, human trafficking, drugs and cybercrime).²⁵ Further harmonisation of regulations occurred in areas related to the protection of the EU’s financial interests. The Lisbon Treaty enabled the establishment of the EPPO, which was tasked with conducting investigations and prosecuting crimes against the financial interests of the EU, such as fraud involving EU funds.²⁶ In 2017, the EPPO was formally established as an entity of significance in cross-border judicial cooperation in

22 Willems, 2019, pp. 468–495.

23 Carrera, 2020, pp. 3–9.

24 Ladenburger, 2008, pp. 20–40.

25 De Pasquale and Celeste, 2021, pp. 1581–1596.

26 Wade, 2019, pp. 165–180.

criminal matters. The Lisbon Treaty reinforced the principle of mutual recognition of judicial decisions, which became the primary mechanism for judicial cooperation. It was assumed that mutual recognition would allow quicker and more effective recognition of judgments and judicial decisions across the Member States, forming the basis for an efficient use of legal instruments, such as the EAW and the new European Investigation Order (EIO).

The Lisbon Treaty expanded the CJEU's competences in the area of judicial cooperation in criminal matters. The CJEU gained the authority to, among other things, resolve disputes between the Member States in this area. A simplified legislative procedure was introduced, as decisions regarding judicial cooperation in criminal matters were made under the ordinary legislative procedure by the Council and the European Parliament, which was intended to enhance democratic oversight. The requirement for unanimity was abolished in several areas and replaced by qualified majority voting, speeding up decision-making processes. The Treaty strengthened the catalogue of fundamental rights and made the EU Charter of Fundamental Rights (CFREU) legally binding, meaning that all actions of the EU, including those of judicial cooperation in criminal matters, must comply with the Charter. Greater guarantees were provided for the protection of the rights of the accused, suspects and victims in criminal proceedings.

Furthermore, it strengthened the position of bodies such as Eurojust, which coordinates judicial cooperation between the Member States and supports justice in cross-border matters,²⁷ and Europol, which, while primarily focused on police cooperation, supports judicial bodies by providing intelligence data.²⁸ There was a harmonisation of minimum procedural standards, as minimum standards concerning the rights of accused persons in criminal proceedings and the rights of crime victims (e.g., protection of victims of violence, access to information about proceedings) were introduced as a part of judicial cooperation. Hence, the Lisbon Treaty was a turning point in the development of judicial cooperation in criminal matters within the EU.²⁹ It laid the foundation for further development of instruments and institutions for combating cross-border crime and set the course for a stronger harmonisation of criminal law in Europe.

27 Weyembergh and Theodorakakou, 2023, pp. 157–182.

28 Deflem, 2006, pp. 336–359.

29 Öberg, 2011, pp. 60–82.

4. The Principle of Equality Within Present Judicial Cooperation in the EU

The current legal foundation for judicial cooperation in criminal matters within the EU is the Treaty on EU (TEU),³⁰ which is the primary document defining the principles, main objectives and values of the EU. Furthermore, the TFEU³¹ regulates specific issues related to the EU's competences, the functioning of its institutions and its policies. These are the two legal pillars on which the analysis of judicial cooperation in criminal justice matters among the Member States should be based. From the perspective of the principle of equality, a key component of judicial cooperation in criminal matters within European integration, the most important provisions in the TEU and TFEU are Art. 4 (TEU) and the provisions of Arts. 82 to 86 (TFEU).³²

Art. 4 of the TEU emphasises that any competences not conferred upon the EU by the Treaties belong to the Member States. Furthermore, the EU respects the equality of the Member States under the Treaties, including their national identity, which is linked to their political and constitutional structures, and regional and local self-government. It respects the essential functions of the State, particularly those ensuring its territorial integrity, maintaining public order and protecting national security. Particularly, national security remains the exclusive responsibility of each Member State. Additionally, following the principle of loyal cooperation, the EU and the Member States respect each other and provide mutual support in carrying out the tasks arising from the Treaties. The Member States take all appropriate general and specific measures to ensure the implementation of the obligations of the Treaties or the acts of the EU institutions. They facilitate the EU's task fulfilment and refrain from adopting any measures that could jeopardise the achievement of the EU's objectives. Hence, the EU respects the national identity of the Member States, which is inextricably linked to their constitutional and political structures, including the principle of equality of the Member States. Therefore, according to the provision, the national identity of the Member States is of value in itself and this identity, combined with sovereignty, expresses the equality of the Member States.

A closer examination of Art. 4, particularly through the lens of the principle of equality, highlights that Art. 4(2) strongly emphasises that the EU respects the national identity of the Member States, which is linked to their constitutional and political structures, including the principle of equality. Based on the wording of this provision, the equality of the Member States under EU law means that each

30 Consolidated version of the Treaty on European Union. OJ C 326, 26.10.2012, pp. 13–390.

31 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Consolidated version of the Treaty on the Functioning of the European Union Protocols. Annexes to the Treaty on the Functioning of the European Union Declarations annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon, signed on December 13, 2007, OJ C 202, 7.6.2016, pp. 1–388.

32 Mitsilegas, 2019, p. 565; Jimeno-Bulnes, 2003, pp. 614–630.

Member State, regardless of its size, population or economic power, has equal rights and obligations within the EU. No country can be treated in a privileged or discriminatory manner. Moreover, constitutional and national identities are of great importance, as they protect the unique constitutional and cultural characteristics of each State, which is tied to respecting their diversity within the Union. Hence, the Member States may preserve their unique institutions, legal traditions, administrative structures, values and legal culture. The key to the respect for this provision lies in the respect for the sovereignty of each Member State, because the EU, as a voluntary organisation of states, although possessing competences, ensures that the Member States retain full autonomy in matters not conferred upon it (such as national security, judiciary, etc.). Therefore, regarding equality, Art. 4(2) forms the foundation for dialogue between the Member States and EU institutions, ensuring the unequivocal equal treatment of all countries within the EU. It underscores that the EU cannot act in a manner that undermines the autonomy, identity and sovereignty of the Member States.³³

Regarding Chapter 4 of the TFEU, Arts. 82–86 contain detailed issues of judicial cooperation in criminal matters and reveal certain characteristics of procedures of justice within EU Member States. Chapter 4 of the TFEU is entitled ‘Judicial Cooperation in Criminal Matters’.³⁴ This cooperation between the Member States is of a special nature and is highly sensitive to any disruptions. This cooperation pertains to the essence of the existence of each Member State and concerns the crucial area of criminal law, which is directly linked to the sovereignty of each EU Member State.

Judicial cooperation in criminal matters within the EU includes the approximation of legislative and executive provisions of the Member States in areas such as, *inter alia*, terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illegal arms trade, money laundering, corruption, counterfeiting of currency, cybercrime and organised crime.³⁵ Thus, judicial cooperation in criminal matters between the Member States is based on the principle of mutual recognition of judgments and court decisions.³⁶ To achieve this, certain legal instruments are required to establish specific frameworks of influence. Therefore, the EU, by influencing national legislation, may establish minimum standards regarding the admissibility of evidence in criminal cases, the rights of individuals in criminal proceedings (e.g., the right to defence, the presumption of innocence) or the catalogue of victims’ rights.

Regarding the tools for influencing the Member States, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, adopt measures aimed at establishing rules and procedures ensuring the recognition of all forms of judgments and court decisions across the EU, preventing and resolving

33 Muszyński, 2023, pp. 5–40.

34 Pavaleanu, 2009, pp. 348–351.

35 Mancano, 2023, pp. 962–981.

36 Sicurella, 2024, pp. 61–89.

jurisdictional disputes between the Member States, supporting the training of judges and other judicial staff, facilitating cooperation between judicial authorities or equivalent bodies of the Member States for criminal prosecution and the enforcement of judgments. Furthermore, to facilitate the mutual recognition of judgments and court decisions, and police and judicial cooperation in cross-border criminal matters, the European Parliament and the Council may establish minimum standards. Such standards should take into account the differences between the traditions and legal systems of the Member States. This includes the mutual admissibility of evidence between the Member States, respect for individual rights in criminal proceedings, respect for the rights of victims of crime and other specific aspects of criminal proceedings.

Subsequently, the foundations for the harmonisation of criminal law in specific areas, such as organised crime, terrorism, human trafficking, corruption, drugs and cybercrime, were established. This involved specifying minimum criminal requirements in areas recognised as ‘particularly serious crimes’.³⁷ Therefore, additionally, the European Parliament and the Council, acting through directives in accordance with the ordinary legislative procedure, may establish minimum standards relating to the definition of crimes and penalties in areas of particularly serious cross-border crime, arising from the nature or consequences of such crimes or the specific need for their joint prosecution. However, depending on the development of criminal activity, the Council may adopt a decision identifying other areas of crime following Art. 83(2) of the TFEU. The Council acts unanimously after obtaining the consent of the European Parliament. The focus is on a specific body within the structures of cooperation between the Member States, Eurojust, which is an agency responsible for supporting cooperation between judicial authorities in criminal matters.³⁸ Hence, the EU has enabled the development of Eurojust’s role and competence to support the judiciary and effectively prosecute cross-border crimes.

Detailed tasks were established for Eurojust to support and strengthen coordination and cooperation between national investigative and prosecutorial bodies. These concern serious crimes affecting two or more Member States or requiring joint prosecution, based on operations carried out and information provided by the authorities of the Member States and Europol. Hence, the European Parliament and the Council determine the Eurojust’s structure, functioning and scope of activities and tasks. These tasks may include initiating investigations and requesting the prosecution of relevant national authorities, particularly concerning crimes against the EU’s financial interests, coordinating investigations and prosecutions, strengthening judicial cooperation, including resolving disputes over jurisdiction and close cooperation with the European Judicial Network.³⁹

37 Kompatsiari, 2024, pp. 104–111.

38 Busuioc, 2016, pp. 13–32; Claes, 2012, pp. 100–114.

39 Claes, 2012, pp. 100–114.

Therefore, the concept of establishing an institution such as the EPPO was introduced. The idea was for the EPPO to have the competence to investigate and prosecute crimes against the EU's financial interests (e.g., fraud related to EU funds).⁴⁰ In the future, the competencies of the EPPO may be expanded to include other serious cross-border crimes. However, at present, it investigates, prosecutes and brings to trial, in cooperation with Europol (where appropriate), perpetrators and accomplices of crimes against the EU's financial interests. It has jurisdiction to bring public charges before the competent courts of the Member States for such crimes. EU regulations determine the statute of the EPPO, the conditions for fulfilling its functions, the procedural rules applicable to its activities, the rules of evidence admissibility and judicial review of its procedural actions taken in the exercise of its functions. The Council may, either simultaneously or later, adopt a decision to extend the EPPO's powers to combat cross-border crimes and amend provisions relating to the perpetrators and accomplices of such crimes affecting more than one Member State. It acts unanimously, after obtaining the consent of the European Parliament and consulting with the European Commission.

Evidently, Arts. 82–86 fully address judicial cooperation in criminal matters within the EU.⁴¹ Analysing them in the context of the principle of equality highlights that they aim to ensure that all EU citizens are treated equally in matters related to criminal law and access to justice, regardless of borders. This includes, *inter alia*, the harmonisation of procedural rules in criminal matters, facilitating the mutual recognition of judicial decisions (Art. 82) and ensuring that all the defendants are afforded basic rights, such as the right to a defence or a fair trial. Furthermore, the principle of equality requires that all EU citizens be treated equally by the judiciary across the EU.⁴² These provisions reinforce the creation of a victims' rights catalogue, ensuring that the victims have equal access to support and compensation, regardless of the location of the crime, and equal treatment of accused persons in criminal proceedings, for example, by ensuring uniform standards of procedural rights protection.

Moreover, Art. 83 allows for the harmonisation of criminal law within the EU, particularly for serious cross-border crimes, such as terrorism, human trafficking or corruption. This ensures the uniformity of provisions, preventing unequal treatment of citizens from different Member States and aligning penalties for the same crimes across the EU, reinforcing the principle of equality before the law.⁴³ Art. 82 introduces the principle of mutual recognition of judicial decisions between the Member States. This guarantees equal enforcement of the law across the EU, eliminating discrimination between citizens of different countries regarding justice.⁴⁴ Hence, Arts. 82–86, following the principle of equality, standardise criminal justice procedures

40 Ligeti, 2013, pp. 7–21.

41 Muraru–Ključica, 2023, pp. 28–34.

42 Schiek, 2009, pp. 35–60; Hindelang, 1969, pp. 306–313.

43 Hindelang, 1969, pp. 306–313.

44 De Witte, 2011, pp. 157–178.

within the EU, providing equal rights for victims and defendants and enhancing the consistency and transparency of justice across the EU, particularly in the fight against cross-border crime.⁴⁵

5. Common Minimum Standards for Criminal Proceedings – Basic Model

In developing the mechanisms for judicial cooperation in criminal matters within the EU, a decision was made to establish common, to some extent, minimum requirements and guidelines, to define the boundaries of such cooperation between the Member States. Through the implementation of these guidelines, the Member States would gradually harmonise criminal law. Hence, the EU developed what are known as the minimum standards for criminal proceedings.

The general objectives of these standards focused on ensuring justice, protecting individuals' rights and strengthening criminal law cooperation between the Member States. For instance, to ensure equality and protect individuals' rights, the commitment to adhere to a series of fundamental guarantees for the proper position and rights of the accused was established, such as the right to defence and the right to a fair trial, and, for victims, the right to an interpreter. These guarantees were developed based on the CFREU and the ECHR.⁴⁶

Another example is the facilitation of cross-border cooperation through the harmonisation of standards in criminal procedures, aimed at streamlining cooperation between countries, especially in matters related to extradition, the EAW and joint investigations. Another challenge was, among other things, increasing the efficiency of the justice system, where these minimum standards would assist in speeding up criminal procedures and enhancing their effectiveness, while ensuring greater transparency and striving to address criminal cases within a reasonable time. Furthermore, an important issue was the increased protection of crime victims, as these standards addressed the need to protect victims by ensuring information access, protection from re-victimisation and the opportunity to participate in proceedings.

For the implementation of these objectives, common minimum standards for criminal procedure began to operate within EU law. The legal basis for these standards is provided by Art. 82(2) of the TFEU, which allows for the adoption of regulations harmonising procedural rights within the EU. This provision explicitly states that, to the extent necessary to facilitate the mutual recognition of judgments

⁴⁵ Bort, 2003, pp. 191–212.

⁴⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on November 4, 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2. (Journal of Laws 1993, No. 61, item 284).

and judicial decisions, and police and judicial cooperation in cross-border criminal matters, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish minimum standards. Such standards take into account the traditions and legal systems of the Member States.⁴⁷ They mainly concern issues such as the mutual admissibility of evidence between the Member States and the development and respect for the rights of individuals in criminal proceedings, including the rights of victims. Therefore, the provision has an open scope, as the adoption of these minimum standards does not prevent the Member States from maintaining or establishing a higher level of protection for individuals.

Regarding specific legal regulations, a set of interrelated directives from the European Parliament and the Council is currently in place. For instance, Directive 2010/64/EU of the European Parliament and the Council of October 20, 2010, on the right to interpretation and translation in criminal proceedings,⁴⁸ guarantees the right of any person suspected or accused in criminal proceedings to receive oral and written translation if they do not understand the language of the proceedings. Additionally, it ensures high-quality translations, which are essential for a fair trial. Similarly, Directive 2012/13/EU of the European Parliament and the Council of May 22, 2012, on the right to information in criminal proceedings,⁴⁹ requires that suspected or accused persons be informed of their rights in a language they understand. It is necessary to convey information about the nature of the charges and the available defence options. In the case of detention, the accused must receive a 'Letter of Rights'.

Directive 2013/48/EU guarantees the right of access to a lawyer in criminal proceedings and in proceedings related to the EAW, and the right to inform a third party of the deprivation of liberty and the right to communicate with third parties and consular authorities during detention.⁵⁰ It introduces an absolute obligation to provide legal assistance to the accused from the outset of the criminal proceedings. The individuals have the right to contact a third party (e.g., family) and notify a consulate in the case of detention. Furthermore, Directive 2016/343/EU of March 9, 2016, on strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, emphasises the importance of one of the most fundamental principles of criminal proceedings (presumption of

47 Akaliyski, 2019, pp. 388–411.

48 Directive 2010/64/EU of the European Parliament and the Council of October 20, 2010, on the right to interpretation and translation in criminal proceedings. OJ L 280, 26.10.2010, pp. 1–7.

49 Directive 2012/13/EU of the European Parliament and the Council of May 22, 2012, on the right to information in criminal proceedings. OJ L 142, 1.6.2012, pp. 1–10.

50 Directive 2013/48/EU of the European Parliament and the Council of October 22, 2013, on the right of access to a lawyer in criminal proceedings and EAW proceedings, and on the right to have a third party informed upon deprivation of liberty and communicate with third persons and consular authorities while deprived of liberty. OJ L 294, 6.11.2013, pp. 1–12.

innocence).⁵¹ According to this Directive, the presumption of innocence applies until guilt is proven following the law. The defendants have the right to be present at the trial and the right not to incriminate themselves. The issue of legal aid plays a significant role here.

Directive (EU) 2016/1919 of the European Parliament and the Council of October 26, 2016, on legal aid for suspects and accused persons in criminal proceedings and for persons subject to an application in proceedings concerning the EAW,⁵² introduced minimum standards concerning access to legal aid for individuals who cannot cover the costs of defence. Similarly, Directive (EU) 2016/800 of the European Parliament and the Council of May 11, 2016, on procedural safeguards for children who are suspects or accused in criminal proceedings,⁵³ includes special procedural safeguards for children, such as the requirement for the presence of a parent or guardian during questioning and the obligation to conduct the trial in a manner suitable to the child's age and needs.

6. The Impact of Minimum Standards in Criminal Law on Member State Equality

The idea of creating the above-mentioned set of minimum standards for criminal proceedings within the Member States is a positive challenge. Criminal proceedings, which are a restrictive, sanction-based and unequal legal process, should have clearly defined boundaries. The aim is to ensure that such proceedings are conducted fairly, particularly for the most vulnerable parties, namely the victim and the accused. Their positions are often at risk of being undermined or ignored by stronger participants in the process, such as the prosecution. The prosecution, as the principal party in criminal proceedings, sets the direction of the case and determines the potential scope of criminal liability. This determination is made by the court, which decides the extent to which an individual will bear criminal responsibility or be acquitted. Therefore, the directives establishing minimum standards for criminal proceedings create a framework of fair criminal process, with real instruments to assert that a

51 Directive (EU) 2016/343 of the European Parliament and the Council of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings. OJ L 65, 11.3.2016, pp. 1–11.

52 Directive (EU) 2016/1919 of the European Parliament and the Council of October 26, 2016, on legal aid for suspects and accused persons in criminal proceedings and requested persons in EAW proceedings. OJ L 297, 4.11.2016, pp. 1–8.

53 Directive (EU) 2016/800 of the European Parliament and the Council of May 11, 2016, on procedural safeguards for children who are suspects or accused in criminal proceedings. OJ L 132, 21.5.2016, pp. 1–20.

person guilty of a crime will be held liable, while providing a robust guarantee that an innocent person will be acquitted. Therefore, both the prosecution and the court must respect the laws of the State in which they operate, which, in turn, would implement and adhere to the directives analysed here, introducing minimum standards into the national legal order.

This is precisely where the issue of the principle of equality of the Member States in relation to the implementation and respect of directives establishing the minimum standards by the Member States arises. Unfortunately, the connection between the EU's minimum standards in criminal proceedings and the principle of equality among the Member States is not uniform. One can distinguish both positive aspects and specific challenges, or negative impacts. A positive influence is evident in the attempts to align the means of protecting the rights of individuals, who are the most vulnerable participants in the criminal proceedings. Hence, minimum standards reduce the differences between the legal systems of the Member States, contributing to a uniform protection of the rights of suspects, defendants and victims throughout the EU. Individuals participating in criminal proceedings are treated comparably, regardless of the jurisdiction of the proceedings.

To an extent, the harmonisation of criminal procedure standards contributes to greater transparency and predictability, which can translate into increased public trust in national justice systems. The same applies to cooperation between states, as the introduction of uniform standards strengthens mutual trust between the Member States regarding judicial cooperation (e.g., surrendering suspects under the EAW, recognising specific evidence, enforcing judicial decisions, etc.). However, a challenge lies in better promoting equal access to justice, which is driven by citizens' trust in the fairness of the proceedings. Fair criminal proceedings are those in which the rights and obligations of each participant are defined and fully respected, and each decision has its justification, with the possibility of correction in case of error. Therefore, minimum standards prevent situations in which citizens of one Member State are treated worse than citizens of other EU countries in similar legal situations.

Nonetheless, certain challenges must be addressed. Given the general nature of these minimum standards, there is the potential for varying implementation levels by the Member States. Despite the minimum standards, Member States differ in how they implement them into their national laws. Some countries may adopt a stringent approach, while others may be more lenient, leading to inequalities in practice. However, the greater issue is the impact on the legal sovereignty of individual Member States. The harmonisation of standards may be considered an encroachment on the autonomy of the States in shaping their legal systems, provoking resistance in countries with established legal traditions. The interference of EU law, especially in criminal law, broadly, could be perceived as an intrusion into their sovereignty.⁵⁴ Equally important are the costs that a state may incur in adapting its

54 Anghel, 2010, p. 19; Mamudu, 2009, pp. 73–97.

criminal legislation to the minimum standards. Another challenge is the potential for superficiality and formalism. The introduction of minimum standards could lead to situations where the Member States merely fulfil them superficially and formally, without genuinely raising the level of protection for the participants in criminal proceedings.

Therefore, although the minimum standards in criminal proceedings significantly contribute to the realisation of the principle of equality among the Member States, levelling the protection of individual rights and strengthening trust between legal systems, their implementation and compliance within a state must be strongly supervised and thoroughly analysed concerning rationality. The full achievement of equality requires a reasonable, effective and consistent implementation of standards across the EU based on the consensus of all Member States, the creation of rational mechanisms for monitoring and enforcing compliance with these standards in a Member State, the necessary consideration of differences in administrative, economic and cultural capacities, the acknowledgment of the characteristics of the legal system in a Member State and the categorical respect for the sovereignty of a Member State.⁵⁵

7. Main Areas of Criminal Law in Concerning Cooperation and Equality in the EU

7.1. The Fight Against Terrorism

The fight against terrorism is currently one of the greatest challenges in the process of European integration. The EU has developed several legal initiatives to assist in preventing and combating it. The process of countering terrorism in the EU involves close cooperation among the Member States. In the Polish legal system, the Penal Code (Act of June 6, 1997) contains, under Art. 115 § 20, the concept of a 'terrorist offence'. It refers to a prohibited act, punishable by imprisonment with a maximum term of 5 years, committed with the intent to: 1) Seriously intimidate a large group of people, 2) Compel a public authority of the Republic of Poland, another state or an international organisation to take or refrain from certain actions or 3) Cause significant disruption to the political or economic structures of the Republic of Poland, another state or an international organisation, including threats to commit such an act.

At the EU level, the fight against terrorism is based on international cooperation for preventing acts of terror, prosecuting offenders and protecting citizens. Among the key legal acts and instruments is Directive (EU) 2017/541 of the European

55 Bellamy, 2017, pp. 547–570.

Parliament and the Council of March 15, 2017, on combating terrorism, which replaces the Council Framework Decision 2002/475/JHA and amends Council Decision 2005/671/JHA.⁵⁶ This Directive defines terrorist offences, including planning, executing or supporting terrorist acts, financing terrorism, recruiting terrorists and travelling for terrorist purposes (e.g., joining a terrorist organisation). It obliges Member States to criminalise terrorism-related offences, including disseminating terrorist propaganda and supporting terrorist activities. It provides for the protection of victims of terrorism, offering psychological, legal and financial support.

The Council Regulation (EU) No. 2580/2001 of December 27, 2001, on specific restrictive measures directed against certain persons and entities for combating terrorism,⁵⁷ introduces provisions for freezing the financial assets of individuals and organisations suspected of terrorist activities. Furthermore, it prohibits making funds available to entities linked to terrorism. The Directive (EU) 2015/849 of the European Parliament and of the Council of May 20, 2015, on the prevention of the use of the financial system for money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC,⁵⁸ imposes obligations on financial institutions to identify suspicious transactions related to terrorism. It introduces requirements for customer identification and the reporting of suspicious activities. Furthermore, Regulation (EU) 2021/784 of the European Parliament and of the Council of April 29, 2021, on addressing the dissemination of terrorist content online,⁵⁹ requires online platforms to remove terrorist content within one hour of being reported by the competent authorities. It establishes penalties for platforms that fail to comply with these provisions.

Another segment of cooperation in combating terrorism pertains to institutional frameworks. For instance, the EU Agency for Law Enforcement Cooperation (Europol) plays a key role by coordinating actions related to information exchange and providing support in terrorism-related cases. Furthermore, the Europol Counter-Terrorism Centre (ECTC) assists the Member States in investigations concerning

56 Directive (EU) 2017/541 of the European Parliament and the Council of March 15, 2017, on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA. OJ L 88, 31.3.2017, pp. 6–21.

57 Council Regulation (EC) No 2580/2001 of December 27, 2001, on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. OJ L 344, 28.12.2001, pp. 70–75.

58 Directive (EU) 2015/849 of the European Parliament and the Council of May 20, 2015, on the prevention of the use of the financial system for money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and the Council and repealing Directive 2005/60/EC of the European Parliament and the Council and Commission Directive 2006/70/EC (Text with EEA relevance). OJ L 141, 5.6.2015, pp. 73–117.

59 Regulation (EU) 2021/784 of the European Parliament and the Council of April 29, 2021, on addressing the dissemination of terrorist content online (Text with EEA relevance) PE/19/2021/INIT. OJ L 172, 17.5.2021, pp. 79–109.

terrorism. Additionally, joint databases and information systems have been established, such as the Schengen Information System (SIS II), which facilitates the exchange of information on individuals suspected of terrorism and persons subject to entry bans, and Eurodac and VIS (Visa Information System), which enable monitoring the movement of individuals across the EU's external borders. The Passenger Name Record (PNR) system requires airlines to share passenger data to identify potential terrorist threats. Hence, for judicial cooperation and information exchange, Eurojust plays a vital role by supporting collaboration between law enforcement agencies and the judiciary in cross-border cases.

Legislations related to combating terrorism impact human rights.⁶⁰ Therefore, it is crucial to strike a balance between ensuring security and protecting civil rights, which are among the highest values within the EU. Actions taken to counter terrorism must be proportional, in accordance with the rule of law and respectful of privacy.⁶¹ The principle of equality among the Member States for combating terrorism requires a rational harmonisation of security measures, respect for differences in legal systems and the protection of fundamental rights. This necessitates that every Member State applies counter-terrorism instruments uniformly and effectively. However, Member States may vary regarding resources allocated to counter-terrorism efforts, such as budgets for security services, intelligence capabilities and technological infrastructure. Moreover, not all Member States face the same level of terrorist threats. Countries such as France, Belgium and the United Kingdom, due to their diverse social structures shaped by an inadequately planned migration policy, have experienced numerous attacks. Consequently, their priorities differ from those of the less-affected countries. This disparity can lead to differences in the commitment to EU-level actions, potentially disrupting the principle of equality in implementing a common security policy.

Another crucial issue concerning the principle of equality is the divergence in legal systems. Member States differ in their approach to balancing security with individual rights. For instance, some countries have adopted stricter measures, such as extended preventive detentions, while others prioritise the protection of human rights, potentially causing tensions in the application of common measures. A further challenge arises in operational cooperation among Member States' intelligence services. Intelligence cooperation is paramount and elements such as information exchange, speed and reliability are highly valued. Hence, the principle of equality requires that all the Member States have equal access to intelligence related to terrorist threats. Agencies such as Europol and Eurojust play a critical role in coordinating counter-terrorism efforts.⁶² The equality of Member States mandates that all countries have an equal say in shaping the policies of these agencies and equitable access to their resources.

60 Hoffman, 2004, pp. 932–955.

61 Pagallo, 2021, pp. 111–127.

62 Bures, 2010, pp. 236–256; Deflem, 2006, pp. 336–359.

Hence, the principle of equality among the Member States in combating terrorism within the EU is essential for maintaining the effectiveness and coherence of actions. However, differences in resources, capabilities, threat perceptions and approaches to the protection of fundamental rights lead to inequalities in practice. To minimise these disparities, the EU must strive for greater harmonisation of security policies, ensure equal access to resources and information, monitor compliance with common standards and foster solidarity in the distribution of burdens and responsibilities.

7.2. The Fight Against Corruption, Cybercrime, Fraud and Money Laundering

The fight against corruption, cybercrime, fraud and money laundering within the EU is a key element of its policy, ensuring that all the Member States operate according to the principle of equality and comply with common standards regarding the rule of law, security and the protection of the EU's financial interests. In this context, the EU recognises corruption as a serious threat to economic and social stability and public trust. As a part of its anti-corruption efforts, the EU has introduced common standards and regulations to ensure that citizens can trust that their money is being used appropriately. To safeguard its financial interests, the EU, in collaboration with the Member States, protects its resources. Monitoring and oversight of activities and supporting actions to combat abuse and irregularities in the implementation of the EU's budget are crucial. Hence, legal instruments, such as the United Nations Convention against Corruption⁶³ and the Directive of July 5, 2017, on the fight against fraud to the EU's financial interests by means of criminal law, have been introduced.⁶⁴ Member States are obliged to implement preventive measures and sanctions against corruption. The European Commission prepares reports on the rule of law and the corruption level in the Member States. An equality assessment mechanism (e.g., through the European Semester) is used to identify countries requiring targeted anti-corruption measures. The activities of OLAF (the European Anti-Fraud Office) focus on investigating cases of corruption and fraud involving EU funds. Additionally, within the EU's structures, certain tasks are assigned to the EPPO, which prosecutes financial crimes, including corruption, that affect the EU's budget.

The EU views cybercrime as a global threat that requires cross-border cooperation. Hence, it adopted the Directive of August 12, 2013, concerning attacks on information systems.⁶⁵ Europol, particularly its European Cybercrime Centre (EC3), supports the Member States in combating cybercrime, including ransomware attacks,

63 The United Nations Convention Against Corruption, adopted by the United Nations General Assembly on October 31, 2003 (Journal of Laws 2007, No. 84, Item 563).

64 Directive (EU) 2017/1371 of the European Parliament and the Council of July 5, 2017, on the fight against fraud to the EU's financial interests by means of criminal law. OJ L 198, 28.7.2017, pp. 29–41.

65 Directive 2013/40/EU of the European Parliament and the Council of August 12, 2013, on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. OJ L 218, 14.8.2013, pp. 8–14.

the illegal trade of goods on the dark web and online fraud. The EU pursues an active policy against money laundering, based on the harmonisation of regulations across the Member States. It has adopted anti-money laundering directives (AML Directives),⁶⁶ which impose obligations on financial institutions and other entities, such as the registration of beneficial owners.

The European Anti-Money Laundering Authority (AMLA) has been established. Starting in 2024, a specialised office began operating to oversee compliance with AML rules within the EU and coordinate cross-border cooperation. In this context, the principle of equality among the Member States means that each State should act in accordance with the same standards and regulations. However, in practice, differences may arise in the implementation of these tasks, which the EU seeks to minimise through the standardisation of regulations, that is, through the adoption of common directives and regulations to align standards. Furthermore, monitoring and support mean that the European Commission, OLAF and other institutions oversee the implementation of regulations and assist the Member States in fulfilling their obligations. The initiation of sanctions is possible, as the EU can impose sanctions or financial restrictions on states that do not adhere to the principles of the rule of law (e.g., the conditionality mechanism linked to EU funds).

7.3. Protection of Victims

The protection of victims' rights in the EU and the principle of equality among the Member States are closely linked. The EU has introduced several regulations and measures for protecting the rights of crime victims, regardless of their Member State. Key provisions include Directive 2012/29/EU of the European Parliament and the Council of October 25, 2012, establishing minimum standards for the rights, support and protection of victims of crime and replacing the Council Framework Decision 2001/220/JHA.⁶⁷ It upholds the right to information, as victims are entitled to clear information about their rights and legal procedures in a language that they understand. It ensures access to information about available assistance, compensation and rights in criminal proceedings. Furthermore, it provides right to support, as victims must have access to support services, such as psychological counselling, legal aid or assistance for particularly vulnerable groups (e.g., children or victims of domestic violence). It respects the right to protection, as victims, particularly children or elderly persons, should be protected from secondary victimisation, intimidation and retaliation. Moreover, participation in criminal proceedings is important. Victims have the right to be heard, with their accounts being considered during court proceedings. Access to translation and interpretation should be provided if the victim

⁶⁶ Bergström, 2018, pp. 33–56.

⁶⁷ Directive 2012/29/EU of the European Parliament and the Council of October 25, 2012, establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA. OJ L 315, 14.11.2012, pp. 57–73.

does not speak the language of the proceedings. An individual assessment of victims has been introduced. Therefore, each victim should be individually assessed in terms of their specific protection needs.

Another instrument in the area of victim assistance is the introduction of the European Protection Order through Directive 2011/99/EU of December 13, 2011.⁶⁸ In general, it allows the transfer of protective measures (e.g., restraining orders) from one Member State to another. A European Protection Order (EPO) is a decision by a court or another authority of a Member State for transferring the protection of a crime victim to another Member State.⁶⁹ This applies to individuals who, for example, move, travel or stay in another EU country. The order allows victims under protection in one country (e.g., subject to a restraining order, contact ban or other protective measures) to obtain similar protection in the country to which they move. The order is issued in the country where the victim was residing and was granted protection (the issuing state). If the protected person plans to travel to another EU country (the executing state), the EPO may be issued upon their request. The executing state, based on the EPO, implements the appropriate protection measures following its national law.

Examples of protective measures in this instrument include various prohibitions, such as restraining the offender from approaching the victim, prohibiting contact (e.g., by phone, SMS or email) and prohibiting presence at specific locations (e.g., the victim's home or workplace). The EPO is intended for persons who are particularly at risk, including victims of domestic violence, stalking or intimidation, and victims of other crimes where there is a threat of further violence. Hence, it applies exclusively to crimes involving violence or a direct risk to the victim's safety. Protection measures must have been granted in the issuing state because the EPO does not introduce new protection measures, only transfers the existing ones. Additionally, under the Council Directive 2004/80/EC of April 29, 2004, concerning compensation to crime victims,⁷⁰ guarantees have been introduced, ensuring that crime victims have the right to compensation throughout the EU, even if the crime occurred abroad. In this context, the principle of equality ensures that all victims of crime are treated equally, regardless of the location of the incident within the EU. However, full harmonisation of the protection of victims' rights requires continuous oversight and cooperation among the Member States.

68 Directive 2011/99/EU of the European Parliament and the Council of December 13, 2011, on the European protection order. OJ L 338, 21.12.2011, pp. 2–18.

69 Bieńkowska, 2012, pp. 151–173.

70 Council Directive 2004/80/EC of April 29, 2004, relating to compensation to crime victims. OJ L 261, 6.8.2004, pp. 15–18.

8. European Integration vs. Challenges to Equality in Judicial Cooperation

8.1. The Concept of Sovereignty in the Context of the Principle of Equality in Judicial Cooperation in Criminal Matters.

When analysing the functioning of the principle of equality within the EU in the context of cooperation in criminal matters, one cannot overlook the issue of the sovereignty of the Member States. It is interesting to juxtapose the issue of sovereignty with the current form, course and future of the European integration process. Sovereignty is expressed through the respect for the internal criminal justice system of each Member State. However, the participation of each State in the EU, a unique international organisation, requires the transfer of certain competences to the Union at the expense of sovereignty.⁷¹ Therefore, in this triangular relationship between the sovereignty of each state, the fate and character of criminal regulations within that state and the harmonisation of community laws, one must look for elements of the near future.

On the one hand, regardless of how sovereignty is defined, it remains, and should always remain, one of the most important attributes of every state in the world. This is because sovereignty means the state's independence in making decisions within its territory and in relation to other states. Therefore, sovereignty is divided into internal and external sovereignty. Internal sovereignty allows the state to exercise power over its territory and population, whereby it has the exclusive right to establish laws, exercise power and control institutions. This further means that no other forces (e.g., foreign states or international organisations) may interfere in the internal affairs of the state. External sovereignty concerns international relations. It means that the state is independent from other subjects of international law, has the right to conduct its foreign policy and can decide to join international organisations or treaties. The main features of sovereignty include autonomy, because the state establishes its laws and norms, independence, because there is no subordination to other states, unity of power, because all state organs operate within a unified system, and territoriality, as sovereignty applies within a defined territory.

On the other hand, there is the rapidly advancing process of European integration, which simultaneously brings several benefits and negative consequences. Objectively, the aim of the European integration process is the gradual rapprochement and cooperation of European states in various areas of political, economic, social and cultural life to ensure peace, stability and prosperity on the European continent. However, every integration, harmonisation or unification, irrespective of the term, requires consensus. Therefore, currently, one of the consequences of the dynamic

71 Hinsley, 1967, pp. 242–252.

growth of the integration process is the extent to which the Member States have entrusted certain aspects of their sovereignty to the governance of the EU bodies.

This is where criminal law within the state comes into play. In every sovereign state participating in the European integration process, criminal law exists as an inherent part of its legal system. Criminal law is one of the most sensitive areas of legal regulation in any state.⁷² It is endowed with crucial features that no other area of law within the state possesses. For instance, among the characteristic features of criminal law, there exists a strong lack of equality in the positions of the subjects of legal relationships. On one side is the state and its bodies, while the other side is an individual functioning in the state, who, *in esse*, is subject to the authority of that state. Furthermore, there is a monopoly on the use of repressive measures by the authorities. Repression can be defined as a set of sanctions anticipated as a reaction to illegal behaviour by all members of society, a severe, often violent, measure used as a form of pressure, punishment or retaliation.⁷³ Repression is an inherent feature of criminal law, necessary to ensure the effectiveness of its enforcement, observance and prevention.

There exists axiological collision, that is, the frequent clashes and conflicts of certain values that guide criminal law. *Prima facie*, the nature and assumptions of criminal law, when juxtaposed simply, provoke conflicts. An example could be the value of human dignity, which is a guiding value; however, it may, at times, be limited, although within strictly defined boundaries (e.g., examining the body of the accused during criminal proceedings, temporary detention as a deprivation of liberty for a person not yet convicted, etc.). Moreover, there is the concept of full hermeticity, understood as something closed and inaccessible to external influences. Criminal law is primarily the internal law of a country, with minimal international connotations and influences. As the core and primary element of state criminal policy, it is a closed system that is created and modelled internally. Therefore, the hermetic nature of criminal law lies in the fact that each state creates its criminal law system, solutions and criminal policy for its citizens, who will be subject to criminal responsibility for committing an offence.

Considering the speed and direction of various aspects of European integration, there is little doubt that issues of cooperation between states in criminal matters still resist full integration. This area of criminal law avoids deep legal integration within the EU, which we currently observe in other areas of legal regulation. In fact, it is precisely in this context that the question arises: should criminal law, broadly speaking, be subject to European integration to the further the process of harmonising European law?

The answer is complex and depends on what the EU is at present and what it will be in the near future. This is because the shape and competencies of the EU determine whether criminal law will be subject to further integration or whether

72 Ouwerkerk, 2015, pp. 11–31.

73 Great Dictionary of the Polish Language.

it is unsuitable for such integration. Against this backdrop, two main issues arise regarding the structure, character, organisation, integration and competencies of the EU. First, one could assume that the EU is a community of relatively equal, yet sovereign states, united by a common economic goal that boils down to strong economic, scientific and commercial cooperation. In this scenario, the EU is a community similar to the one formed at the beginning of the integration, during the time of Monnet and Schuman. Second, one could assume that the EU is moving towards a full federalist concept, understood as a single, centrally managed entity, in which the Member States are merely parts of a large and complex organism, with significant competencies transferred to the central decision-making body. However, this second scenario is completely different from the original assumptions of European integration.

The EU is a massive entity, with a large number of people, in which countless transactions take place and several different problems arise. The establishment of such a large community requires the transfer of certain competences from the Member States to the decision-making centre. However, the transfer must be organised in a manner to ensure effective cooperation between the Member States. Regarding competences, the EU model is simple, as it is based on the principle that the EU only has those competences that have been granted to it by the treaties. Key to this are the fundamental principles of the functioning of the EU, which are directly derived from the treaties.

The principle of conferral ensures that any competences not conferred on the EU by the treaties belong to the Member States.⁷⁴ The principle of subsidiarity ensures (only in non-exclusive competences) that decisions are made at the lowest possible level of authority, closest to the citizens, yet at a level that ensures the effectiveness of their implementation.⁷⁵ It aims to limit excessive centralisation of power at the EU's level and guarantees that the EU acts only when actions taken at the national, regional or local levels are insufficient to achieve an objective. The principle of proportionality, which is closely linked to the principle of subsidiarity, regulates how the EU exercises its competences to ensure that the actions taken are appropriate to the intended objectives and do not exceed what is necessary to achieve them.⁷⁶ The principle of proportionality ensures that the actions taken by the EU institutions are adequate and necessary to achieve the intended objectives, without imposing excessive burdens on the Member States, citizens or economic entities.

Hence, the EU only has the powers that have been granted to it by the treaties and cannot, of its own accord, increase, limit or modify its competences. The scope of the competences is determined solely by its Member States. Changes to this scope can only occur within the framework of the ordinary procedure for amending the

74 Van de Velde-Van Rumst, 2018; Knežević-Predić and Radivojević, 2018, pp. 108–128; Oręziak, 2024a, pp. 187–212; Oręziak, 2024b, pp. 213–260.

75 Gosepath, 2005, pp. 157–170; Melé, 2005, pp. 293–305; Spicker, 1991, pp. 3–14.

76 Engle, 2012; Harbo, 2010, pp. 158–185; Poto, 2007, pp. 835–869.

treaties. It is often assumed that the EU is a *sui generis* international organisation, possessing certain competences from its Member States. Additionally, the Lisbon Treaty clarified the final division of competences between the EU and its Member States. The competences are divided into three categories. Exclusive competences are policy areas in which only the EU may adopt laws and take binding actions. Member States cannot regulate these matters independently unless authorised by the EU to introduce specific provisions or implement EU law. Shared competences are policy areas in which both the EU and Member States may take legislative actions and exercise their competences. This means that the Member States may act in these areas only when the EU has not taken action or has decided not to exercise its competences. Supplementary competences (also called supporting competences) are areas where the EU can support, coordinate or complement the actions of the Member States; however, does not have the authority to harmonise national regulations or replace their actions. This means that the primary responsibility for conducting policy in these areas lies with the Member States, with a limited role of the EU.

In this model of European integration, should there be room for the integration of criminal law as a new area and trend in the EU's judicial cooperation in criminal matters? The consent to the full intervention of the EU in the criminal law system constitutes consent to shaping the criminal policy of the Member States. This could lead to the establishment of joint law enforcement bodies, methods for appointing judges, structuring courts within the state, ways in which crimes are defined, the catalogue of punishments, types of correctional facilities and the shaping of criminal proceedings. However, internal criminal legislation is a key element of the state's criminal policy and represents an important aspect of sovereignty. Hence, criminal policy is a crucial concept which should always belong to the autonomous competence of the Member States and should never be transferred externally to an international organisation, such as the EU.

Criminal law is directly related to sovereignty and the application of criminal sanctions to the citizens of a country. Its fundamental feature is that the power to punish citizens for a crime belongs solely to the state. This concept, derived from Roman times, is known as the monopoly of the state on the application of *ius puniendi*, that is, the state's right to impose criminal sanctions. *Ius puniendi* is a characteristic of the sovereign power of the state. Hence, only the state has the right to establish criminal law, apply it and enforce penalties. The enforcement of *ius puniendi* is aimed at protecting the legal order, societal interests and individual rights. Punishment has a repressive character (retaliation for unlawful conduct) and a preventive purpose (preventing future violations of the law). *Ius puniendi* is limited by human rights principles, the principle of proportionality, legality (punishment only for acts prohibited by law) and the prohibition of inhuman punishments.⁷⁷ According to Hobbes, Locke and Rousseau, citizens relinquish a part of their freedom to the state, which, in return, ensures order and security, including the right to punish

77 De Wet, 2004, pp. 97–121.

criminals. Therefore, the right to punish, belonging solely to state authority, makes it dominant over the individual in a given state. Thus, the comprehensive integration of criminal law should not be fully implemented within the EU.

The EU, as an international organisation, has several internal bodies completely devoid of universal suffrage, lacking knowledge of the specifics and the social structures of a country, yet having a significant impact on the legislation of the interested Member States. Therefore, it does not have the right to directly interfere with the criminal law of a Member State. Criminal law is closely linked to culture, history and legal traditions. Hence, it is difficult to accept full control of the EU over criminal law. Another obstacle is the existence of various legal traditions within the EU, such as the continental system and common law, which differ in their approach to criminal proceedings, the definition of crimes and punishments. Additionally, differences in the standards of protection of civil rights in different countries may hinder full harmonisation. Therefore, this integration of criminal law takes the form of point integration, such as protection of the rights of victims, improving the position of children in criminal cases or the EAW. Hence, full unification of criminal law at the European level is unlikely due to strong national traditions and sovereignty. In a sovereign state, state bodies, such as courts, prosecutors and police, act based on and within the scope of criminal law, whose source is the will of the legislator, which, in turn, is an expression of the will of the society.

8.2. The Concept of the Rule of Law in the Context of the Principle of Equality in Judicial Cooperation in Criminal Matters

The rule of law, as one of the main characteristics of a modern democratic state, involves the 'strict application of the law by all state authorities, for which the law should be the foundation of their activities, and the adherence to the law by both social organisations and citizens'.⁷⁸ In a democratic state, the rule of law is entrusted with the special task of protecting individuals from the arbitrariness and subjectivism in the actions of state bodies. This secures and ensures the individual's free enjoyment of the basic rights granted to them by the state, and establishes effective protection against potential subjectivism and arbitrariness by state organs. For instance, in the 1997 Polish Constitution, the principle of the rule of law is reflected in several provisions; however, its most direct expression is Art. 7, which states that public authorities act based on and within the limits of the law.⁷⁹

Hence, it can be assumed that the rule of law in criminal matters means, in relation to state authorities, that all actions by law enforcement and the judiciary must be based on law and all decisions made within the framework of judicial cooperation must meet the standards of the rule of law.⁸⁰ States cooperating in criminal

78 Ehrlich, 1979, p. 205.

79 Kondek, 2023, pp. 149–163.

80 Varga, 1995.

matters must comply with international and national legal provisions and international agreements. Criminal procedures must guarantee respect for the rights of the accused and victims, including the right to defence and the principles of a fair trial. Therefore, key aspects of the rule of law include the legality of actions by public authorities operating within the realm of criminal law. This means that every decision must have a legal basis and comply with established standards. Moreover, there must be mutual trust, upon which the EU Member States and other countries base their judicial cooperation on the assumption that each country respects the rule of law and human rights.

In the procedural realm, the principle of equality refers to the equal treatment of all parties in criminal proceedings and within the framework of judicial cooperation, regardless of nationality, legal status or the place of crime. Thus, the principle of equality means equal procedural rights. The accused, victims and parties to criminal proceedings have the same rights to present evidence, appeal decisions and access legal assistance. There must be no discrimination, as judicial cooperation cannot be carried out in a discriminatory manner based on nationality, religion, origin, gender or other characteristics. It is necessary to base judicial cooperation on the principles of mutual recognition of court rulings and mutual trust. These principles assume that all the Member States operate in accordance with the rule of law and respect the principle of equality.

Evidently, the rule of law and the principle of equality are the foundations of judicial cooperation in criminal matters. They ensure that judicial proceedings are conducted in accordance with the law, without discrimination and with respect for the rights of all parties. In practice, their implementation requires mutual trust between states and consistent adherence to international human rights protection standards. A lack of the rule of law or inequality in the treatment of parties may lead to the limitation or suspension of judicial cooperation.

8.3. The EPPO and Its Position in the Context of the Principle of Equality in Judicial Cooperation in Criminal Matters

The concept of sovereignty and the rule of law define a certain area of institutional activities. The realisation of both in the context of the principle of equality in the European integration process requires the rational functioning of the entire institutional structure within EU law. Thus, accounting for the increasingly accelerating European integration, a completely new institutional entity has emerged, namely, the EPPO. It represents a significant and bold step in European integration, as until now, prosecutorial bodies have been strongly linked to internal relations within individual states.

The prosecutorial body plays a key role in the judicial system of any state. Its primary task is to protect the legal order and oversee the prosecution of crimes. The prosecutor's office acts in the public interest, representing the state in criminal proceedings and other matters where public authority intervention is required.

It plays a crucial role in ensuring justice and legal order within the state, as its actions influence the effectiveness of crime prosecution, citizens' safety, the protection of civil rights and the public's trust in the judiciary. Hence, the prosecutor's office, as an institution, operates at the intersection of law and society, serving as a tool for the implementation of criminal policy and the protection of public interest.

Never before in European integration has a supranational body been established to directly operate in the area of criminal law, which, as demonstrated, is strongly linked to the sovereignty of each state. The EPPO was established under the Council Regulation (EU) 2017/1939,⁸¹ which entered into force in October 2017. The body began its operations on June 1, 2021. It is an EU institution responsible for conducting investigations, prosecuting and bringing to court cases involving crimes against the EU's financial interests. It is the first supranational prosecuting authority within the EU, with competences extending beyond the borders of the Member States.

The EPPO was created in response to the need for more effective combating of financial crime within the EU. Therefore, it is tasked with conducting investigations, which means it has the right to initiate proceedings independently in cases concerning crimes against the EU's financial interests. It can bring charges before national courts and collaborate with states that are not a part of the EPPO framework and EU institutions, such as OLAF, Europol and international organisations. It operates under the Directive on the protection of the EU's financial interests (2017/1371), including, *inter alia*, the embezzlement of funds from the EU budget (e.g., structural funds), improper spending of grants or subsidies, cross-border VAT fraud exceeding 10 million euros, corruption and bribery and money laundering.

However, the establishment of the EPPO has sparked considerable controversy, both in the context of judicial cooperation in criminal matters and in relation to the principle of equality within the EU.⁸² One of the main criticisms is that its activities may limit the sovereignty of the Member States, particularly in criminal law, which has traditionally been within the competence of national authorities. The concern is that the EPPO has the authority to initiate investigations and conduct criminal proceedings in the Member States, which may be perceived as interference in national justice systems. Furthermore, the increasing competencies of supranational EU bodies could weaken the independence of the Member States in deciding their criminal justice priorities.

Countries differ in their approach to criminal law, for instance, in terms of penalties for crimes or rules of evidence. The EPPO's actions may be hindered by the lack of uniform legal standards. Member States may challenge EPPO decisions if they consider them contrary to their national legal order. Moreover, not all EU Member States have joined the EPPO. Countries such as Hungary, Ireland, Denmark, Sweden,

81 Council Regulation (EU) 2017/1939 of October 12, 2017, implementing enhanced cooperation on the establishment of the EPPO. OJ L 283, 31.10.2017, pp. 1–71.

82 Wade, 2019, pp. 165–180; Wade, 2013, pp. 439–486; Bugarski and Pisaric, 2019, p. 17; Öberg, 2021, pp. 164–181.

and, until recently, Poland (which is now a member of the EPPO), have chosen not to participate in this initiative. The voluntary approach to participation could lead, for example, to inequality between the Member States, where participating countries must align their legal systems with EPPO requirements, while others do not, or may create potential difficulties in combating cross-border financial crimes when cases involve countries that are not a part of the EPPO. Such a division could be seen as a violation of the principle of equality.

Non-participating countries may be accused of a subjective lack of engagement in protecting the EU's financial interests. Other concerns may arise from the possibility that the EPPO could become a political tool, exerting pressure on the Member States in the context of advancing European integration. Undoubtedly, the EPPO will be viewed as a strong step towards the federalisation of the EU, where EU institutions take on increasingly broad powers at the expense of national states. Hence, the EPPO could be used to pressure Member States in political matters, such as the issue of the rule of law. There exists the possibility of investigations against politicians or institutions in countries that are hostile to deeper European integration.

Furthermore, the scope of the EPPO's competences is unclear and may be expanded, which raises concerns about excessive interference in national legal systems. Although it is tasked with addressing crimes affecting the EU's financial interests, there is a concern that its competences will be expanded to cover other cross-border crimes or internal matters of a country. Critics argue that, in the long term, the EPPO will evolve into a quasi-European Attorney General's Office, with broad powers. It may be perceived as a violation of the principle of subsidiarity, which holds that actions at the EU level should only be taken when objectives cannot be achieved at the national level. The argument is that financial crimes affecting the EU could be effectively prosecuted by national law enforcement bodies within existing cooperation mechanisms (e.g., Europol and OLAF). Undoubtedly, the EPPO introduces a new layer of bureaucracy and procedural complexities, which may undermine its effectiveness.

There exist concerns about the EPPO's independence. Although it is meant to operate as an independent body, its independence may be undermined in practice. Since it is subject to oversight by the European Commission, it raises concerns about political influence. The EPPO's budget is determined by EU institutions, which may limit its independence. Prosecutors delegated from Member States may face pressure from national governments, which could influence their procedural decisions. Moreover, critics argue that the differences in national legal systems are too great for the EPPO to function efficiently and fairly. Member States differ in their rules regarding evidence, the rights of suspects, investigation procedures and criminal systems. Difficulties in harmonising procedures could lead to conflicts of competence and inconsistencies in the EPPO's actions. Suspects in different countries may be treated differently within the same EPPO procedure, which would undermine the principle of equality. Moreover, it may lack the financial and personnel resources to effectively conduct investigations in multiple Member States simultaneously.

Due to a limited budget and staff, it may have to prioritise cases, which could reduce its effectiveness. Focusing on large financial cases might lead to the neglect of smaller, yet important crimes affecting local communities. There is the possibility of significant centralisation and coordination between the EU and national levels, delaying and increasing costs. A human rights conflict could emerge, as the EPPO has wide investigative powers, including the ability to search, detain and freeze assets. These powers could be abused, leading to violations of the right to defence, the right to privacy and the principle of equal treatment.

8.4. The Role of the CJEU in the Context of the Principle of Equality in Judicial Cooperation in Criminal Matters

The CJEU is one of the key bodies of the EU and the only one responsible for ensuring the uniform interpretation and application of EU law across all the Member States. Its current form allows the CJEU to settle legal disputes between EU institutions, Member States and, in certain cases, individuals and legal entities. Depending on the situation, an individual or legal entity from a Member State may be involved in disputes adjudicated by the CJEU, particularly when these involve breaches of EU law by EU institutions, Member States or cases related to the interpretation of EU law by national courts. The CJEU ensures the protection of the rights of EU citizens and economic entities, guaranteeing a uniform interpretation of EU law and providing an effective means for pursuing claims at the European level.⁸³

Regarding judicial cooperation in criminal matters within the EU, the CJEU currently has limited competencies. Its main role is to ensure that EU law is interpreted and applied uniformly across the EU. In criminal law, it primarily operates for judicial cooperation between the Member States and the protection of fundamental rights arising from EU law. It deals with the interpretation of provisions related to judicial cooperation, the protection of procedural rights, the protection of the EU's financial interests and the monitoring of the compatibility of national and EU laws. Its case law shapes the standards of judicial cooperation within the EU and influences the development of the area of freedom, security and justice.

Among the specific competences of the CJEU, it issues preliminary rulings in criminal matters. The legal basis for this is Art. 267 of the TFEU. The CJEU issues preliminary rulings at the request of national courts that have doubts regarding the interpretation or validity of EU law concerning ongoing criminal proceedings.⁸⁴ Preliminary rulings are binding on national courts and ensure the uniform application of EU law in criminal matters. An example may involve the EAW, whereby the CJEU would address potential doubts regarding, for example, the grounds for refusing an EAW, such as the risk of human rights violations in the issuing state.⁸⁵

⁸³ Zalnierute, 2022, pp. 198–218.

⁸⁴ Billis, 2016, pp. 20–38.

⁸⁵ Hinarejos, 2007, pp. 793–811.

However, these limited competences in criminal matters have evolved as the EU developed and its ambitions for cooperation in the area of justice increased. Initially, the CJEU did not deal with criminal matters, as it fell within the exclusive competences of the Member States. However, over time, as European integration progressed, mechanisms emerged that allowed the CJEU to play an increasingly larger role in criminal matters. The founding treaties (1951 – ECSC, 1957 – EEC) established that criminal law was fully within the domain of the Member States. The CJEU only had competences regarding the protection of the economic interests of the European Communities, without extending to criminal law. Cooperation in criminal matters took place solely based on intergovernmental agreements (e.g., the European Convention on Mutual Assistance in Criminal Matters of 1959, within the framework of the Council of Europe (CoE)).

The transformation of the CJEU's competences began with the Maastricht Treaty (1993), which introduced the EU's three-pillar structure, with cooperation in criminal matters and justice under the third pillar. The CJEU acquired limited competences to interpret acts adopted within this pillar; however, references for preliminary rulings could only be made by the highest courts of the Member States. Development of tools, such as the EAW, began to influence the CJEU's competences, as it started to rule on matters related to the interpretation of the EAW and other mechanisms of judicial cooperation. A key moment came with the Amsterdam Treaty (1999), which partially integrated the JHA into the EU legal system, increasing the CJEU's role in criminal matters. The CJEU began interpreting EU acts related to justice, including directives concerning the protection of victims of crime and the procedural rights of the accused.

The Lisbon Treaty was a turning point, when the three-pillar structure was abolished and judicial cooperation in criminal matters was incorporated into the core of EU law (Title V TFEU – Area of Freedom, Security and Justice). As a result, the CJEU gained full competence in the interpretation of EU law concerning cooperation in criminal matters. New areas under the CJEU's jurisdiction included the EAW, mutual recognition of judicial decisions, the EIO, directives on the protection of the procedural rights of the accused (e.g., the right to interpretation and the right to counsel), issues related to crimes affecting the EU's financial interests (PIF Directive – Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law) and matters of cooperation with the EPPO.

Hence, there has been a gradual expansion of the CJEU's competences, initially concerning areas of law closely related to EU law, yet outside criminal law, which remained within the domain of each Member State's domestic law. However, given the dynamics of the integration process, the trend of extending the CJEU's jurisdiction to encompass criminal law could be significantly broadened. Although criminal law is not yet directly under the CJEU's jurisdiction, its competences concerning criminal law are being gradually expanded.

However, this should be analysed cautiously, as it directly concerns the sovereignty of each Member State. We are currently witnessing a process of the CJEU appropriating competences at the expense of the jurisdictional sovereignty of the Member States, which, through its rulings, has led to an interference with the sovereignty and legal autonomy of the Member States, violating the principle of equality. Therefore, a controversial question arises as to whether, in the current judicial structure of the EU, the CJEU has inadvertently become a kind of super-arbiter through the expansion of its jurisdictional influence beyond the provisions of the treaties?

According to the EU primary law, CJEU rules in accordance with the treaties that define the boundaries of the EU's competences. These treaties are international agreements that specify what the Member States have agreed to and the commitments undertaken. Therefore, the matters in which the CJEU may intervene have been clearly defined by the treaties.⁸⁶ Since Roman times, we are familiar with the principle of *pacta sunt servanda*, that is, agreements must be upheld in the form in which the parties concluded them, and if any changes are to be made, a proper procedure, based on the consensus of the parties to the agreement, must be followed. Nonetheless, the CJEU has ruled on matters in which the EU lacks competence. The CJEU's judgments are treated as a form of legal precedent. However, for example, in Poland, the common law system, with binding legal precedents, does not apply.

Moreover, CJEU judgments autonomously decide on the EU law's interpretation and construction. One could argue that the rulings exhibit the characteristics of authentic interpretation. This leads to numerous absurdities and the attribution of competences to the EU, with the basis of this attribution not being the principle of their transfer, but because the CJEU considers it so. This has happened in the context of the judicial system organisation in Poland.⁸⁷ Hence, the CJEU can unilaterally bypass the treaty amendment procedure and, disregarding the fundamental principles of international law, change the content of the commitments of the Member States. The expansion of CJEU competences into such non-treaty areas is known as the 'spillover effect' or 'competence creep'.⁸⁸ It refers to the process of the EU administration appropriating, or even 'stealing', competences that are unequivocally assigned to the Member States. In Poland, Jacek Saryusz-Wolski described this as a harmful process, stating:

We are witnessing the creeping appropriation of competences by the EU. The creeping appropriation of competences is a process that has been ongoing for decades and is described in European literature as 'competence creep'. In short, it involves the gradual and unlawful takeover of competences by EU institutions at the expense of

86 Guzman, 2005, pp. 579–612.

87 Gajda-Roszczyńska and Markiewicz, 2020, pp. 451–483.

88 Garben, 2019, pp. 205–222.

the Member States, with the goal of a non-treaty change in the EU's structure and the creation of an oligarchic superstate.⁸⁹

Therefore, the potential expansion of the competences of the CJEU into criminal law must be halted at the current stage. Expanding them further could directly limit the sovereignty of the Member States, as criminal law reflects the specific values, traditions and legal systems of individual States. Imposing CJEU standards may lead to their erosion and political conflicts, especially in countries that are sceptical about deepening European integration. The expansion could be perceived as a step towards the federalisation of the EU, which is unacceptable to some states. Concerning the principle of equality, the CJEU is not directly subject to democratic control, as its judges are appointed and not elected by the citizens. Therefore, it raises concerns that the Tribunal's decisions may contradict the will of the citizens of a country. The CJEU may act independently of national parliaments and governments, making it difficult to take local interests into account in its judgments.

Cases involving Hungary and Poland before the CJEU, as nation-states that are critical of the current formula of EU intervention in internal matters, may serve as important examples of the expansion of the CJEU's competences and attempts to impose external standards. For instance, contrary to the principle of equality, in its rulings on judicial reforms in Poland, the CJEU unfairly concluded that changes introduced by the Polish government might undermine judicial independence and EU standards. Poland criticised this as interference in the internal affairs of a Member State. Thus, certain judgments may have a political rather than a legal character and could be used to exert pressure on countries that hold differing political positions within the EU. This is a clear instrumentalisation of the CJEU, which can be perceived as an aggressive tool of EU institutions, such as the European Commission, to enforce compliance with rules that these countries view as externally imposed.⁹⁰

The Polish example illustrates the essence of the misunderstanding. In Poland, through erroneous interpretations of CJEU judgments, it has mistakenly been concluded that these rulings became a source of law. In the Polish legal system, the catalogue of legal sources is clearly and explicitly defined by the highest-ranking legal act, the Constitution of the Republic of Poland. According to Art. 87, the sources of universally binding law in the Republic of Poland are the Constitution, statutes, ratified international agreements and regulations. Poland does not operate under a precedent-based legal system that would render court decisions, including those of the CJEU, as sources of law. The issue of uncritical affirmation of CJEU judgments at the expense of the constitutional catalogue of legal sources in Poland became evident during the judiciary reform. One decision within this reform was the establishment of the Chamber of Extraordinary Control and Public Affairs in the Supreme Court. At a certain point, a belief emerged in Poland that this body was not a court and

⁸⁹ Wnp.pl, 2025.

⁹⁰ Du Vall, 2024, pp. 177–197.

that the judges appointed to this Chamber did not meet the standard of a judge. This led to a harmful campaign of discrediting these individuals, including offensively labelling them as ‘neo-judges’.

To date, no changes have been made to the legal basis governing the functioning of the Supreme Court in Poland. The matter was brought before the CJEU, which issued a judgment stating that the circumstances surrounding the appointment of judges to this Chamber could raise legitimate doubts about their independence and impartiality, undermining the trust that the judiciary should inspire in a democratic society and a state governed by the rule of law. However, the CJEU did not declare that this Chamber was not a court.⁹¹ A CJEU judgment can never serve as a source of law in Poland. In the context of the principle of equality, the organisation of the judiciary is, under the constitutional principles of the Member States, a competence reserved to each state. Therefore, the CJEU, by interfering in the Polish judicial system, is likely encroaching upon an area that was not conferred upon the EU under the treaties.⁹² The Constitution of the Republic of Poland remains the supreme law, providing for autonomy in shaping the judiciary and imposing no obligation to adhere to CJEU decisions. Consequently, while CJEU judgments influence the interpretation of EU law, they do not constitute a direct source of law in Poland regarding the organisation of the judiciary, which is regulated by the Constitution and national statutes.

In this instance, the principle of equality was not upheld, as there was a selective interpretation of the law by the CJEU. It expansively interpreted Art. 19(1) of the TEU and Art. 47 of the CFREU, asserting that the Polish Chamber of Extraordinary Control and Public Affairs does not meet the requirements of independence. Such actions can be criticised as an attempt to create new legal norms that go beyond the treaties and interfere with Poland’s sovereign decisions regarding the functioning of its judiciary. Furthermore, this breaches the principle of the sovereignty of the Member States, which allows them the right to independently shape the structure of their judiciary.

In Poland, the Constitutional Tribunal has explicitly ruled in several judgments that EU law does not take precedence over the Polish Constitution in matters not transferred to the EU under the treaties.⁹³ Hence, the CJEU rulings that interfere with the Polish judicial system can be seen as conflicting with the Constitution, which guarantees sovereignty in this domain.⁹⁴ This justifiably concludes that the CJEU’s actions have a political character and are being used as a tool to exert pressure on Poland in its disputes with EU institutions. It is argued that the CJEU exceeds its powers by favouring certain interpretations of EU law, which undermines

91 Judgment of the CJEU of December 21, 2023, ECLI:EU:C:2023:1015.

92 Case no. 15/2014 Dansk Industri (DI) acting for Ajos A/S vs. The estate left by A.

93 The judgment of the Constitutional Tribunal of the Republic of Poland of October 7, 2021, case file no. K3/21.

94 Ibid.

the sovereignty of the Member States. There is significant concern that continued CJEU interference in the internal judicial affairs of Member States could establish a dangerous precedent, threatening the principle of state autonomy within the EU.

Other Member States may find themselves under pressure from EU institutions, weakening the foundations of cooperation based on the principle of equality and the balance of competences. Notably, the CJEU has not explicitly declared that the Polish Supreme Court's Extraordinary Control and Public Affairs Chamber 'is not a court', as it lacks competence to 'recognise' or 'reject' national institutions. In its rulings, the CJEU only examines whether these bodies meet the requirements of EU law, such as the principles of independence and impartiality under Art. 19 of the TEU and Art. 47 of the CFREU. Moreover, CJEU judgments do not formally annul the Extraordinary Control and Public Affairs Chamber or question its existence in the national legal order. Instead, they assess whether the decisions of this Chamber (e.g., those related to EU law) comply with EU legal principles. Notably, in its published opinion of October 14, 2024, the Venice Commission, an advisory body of the CoE on constitutional law, analysed these issues in light of democratic standards and the rule of law. The Commission did not challenge the formal status of the Extraordinary Control and Public Affairs Chamber or that of its judges.

Hence, the potential expansion of the CJEU's competencies, as one of the most significant judicial bodies within the EU, in criminal matters is controversial, particularly due to the concerns outlined regarding the infringement of state sovereignty in criminal law, challenges arising from differences in the legal systems of Member States, risks of politicising conflicts between Member States and the EU and issues related to mutual trust and the effectiveness of the CJEU.

9. Conclusion

The principle of equality is, undoubtedly, an integral part of the EU and the on-going integration process. It should fundamentally ensure balanced, respectful and effective cooperation between the Member States. Initiatives such as the Schuman Plan (1950) and the Paris Treaty (1951) laid the foundations for equal European cooperation by prioritising economic stability and peace in post-war Europe. These early agreements emphatically highlighted equality as an essential feature for building trust between the Member States, ensuring that smaller or less powerful states could participate in decision-making processes on equal terms with larger states. The establishment of principles, such as joint resource management, solidarity and mutual respect for sovereignty, created a fertile ground for more complex forms of cooperation and integration. Over time, these principles were institutionalised through key treaties, such as the Maastricht Treaty (1992), the Amsterdam Treaty (1997) and the Lisbon Treaty (2009). These agreements gradually incorporated judicial cooperation

into the EU framework, transitioning from voluntary intergovernmental agreements to coherent legal structures.

However, equality in judicial cooperation in criminal matters has encountered several challenges and concerns because it is a particularly sensitive area within the functioning of the EU. It is an area deeply connected to the sovereignty of each state, and today's integration trends inevitably aim to limit this sovereignty. Historically, judicial systems in criminal matters were strictly guarded by individual states due to their significance in maintaining national security and public order. While the EU recognised the need for international cooperation in combating cross-border crimes, such as terrorism, human trafficking and organised crime, equality has not become a genuine and reliable element of that cooperation. During the formative period of integration, the principle of equality served as a foundation for building trust among the Member States and ensuring that cooperation did not undermine national legal systems. However, one can observe several actions within the framework of European integration where this equality does not align with its natural understanding.

Hence, although the concept of equality is presented as a key element of integration and cooperation within the EU, including criminal matters, a deeper analysis reveals the existence of a harmful concept of 'apparent' equality. The principle of equality does not always translate into actual parity of Member States in the practical functioning of the EU. Among other things, under the treaties, all EU Member States formally have equal rights in decision-making processes. Furthermore, judicial cooperation in criminal matters is based on mutual recognition of judgments, which requires the equal treatment of legal systems. However, in reality, larger states are dominant in the EU. Larger countries (e.g., Germany and France) have a greater influence on shaping EU policy due to their economic and political power. The increasingly advancing integration, rather than enhancing mutual trust among the Member States, creates a direct asymmetry of interests, leading smaller states to struggle to pursue their interests, especially in matters requiring unanimity, where the pressure from larger states is decisive.

In judicial cooperation, the equality of legal systems may be illusory, as there are differences in resources, efficiency and legal traditions. This apparent equality is particularly evident in the establishment of the EPPO. At first glance, it represented a significant innovation in judicial cooperation. Its mandate focused on investigating and prosecuting crimes against the EU's financial interests, such as fraud and corruption. These were valid premises deserving initial approval and full support. While the EPPO, according to its objectives, addresses the inefficiency in cross-border prosecution, its creation gives rise to several challenges, particularly concerning equality. First is the risk to state sovereignty, as the EPPO is authorised to act in all Member States, even bypassing traditional national controls if required. This raises concerns about the infringement of the prosecutorial autonomy of the Member States. Furthermore, concerns are raised regarding the unequal participation of states in this initiative, as not all Member States are part of the EPPO. States with reservations about this initiative emphasise that it may lead to a loss of sovereignty in prosecuting

financial crimes and, in an uncontrolled manner, increase EU oversight over internal legal systems and government policies that are internally autonomous.

There are concerns related to the excessive centralisation of EU power, which is seen as a step towards the federalisation of Europe. The internal prosecutorial systems and existing mechanisms for protecting the financial interests of the EU are sufficiently developed and do not require the support of an individual body, such as the EPPO. The States have effective systems for countering financial crimes and cooperate with other Member States within existing structures (e.g., OLAF and Eurojust), which is sufficient. This asymmetry undermines the principle of equality, as citizens of non-participating states are subjected to different prosecutorial standards. Another issue concerns the EPPO's accountability and oversight due to its operational independence. Ensuring accountability while maintaining efficiency is a delicate balance. There are concerns that the mandate of the EPPO may eventually be expanded to include further categories of crime, which further infringe on state sovereignty.

Similarly, the principle of equality in the judicial cooperation in criminal matters takes on the appearance of a mere formality regarding the CJEU's jurisdiction. Its growing role is noticeable, with its increasingly broadening jurisdiction over matters extending beyond the treaties. This process is often referred to as 'competence creep'. Among the concerns, a controversial judicial activity stands out, as the CJEU is increasingly interpreting the provisions of the treaties, effectively expanding its jurisdiction beyond the intentions of the Member States. For example, its rulings on the independence of courts in Member States have sparked significant debates about the boundaries of oversight and EU influence on the States. Through such activities, the CJEU's role is seen as contributing to the erosion of sovereignty, as 'competence creep' threatens to undermine the autonomy of national courts, particularly in sensitive areas, such as criminal law.

Member States may consider CJEU rulings as overreaching, undermining trust in the EU legal framework and jeopardising the principle of equality. This is especially true if smaller states perceive CJEU interpretations as disproportionately favouring larger or more influential Member States. Such actions are in direct contradiction to the original spirit of European integration. According to the treaty provisions, the CJEU is the guarantor of the uniform application of EU law. Although CJEU decisions are formally equal for all, they may favour the interests of larger states, which have more influence on EU policy and legal interpretation during negotiations. Furthermore, the protection of rights appears uniform; however, while the CJEU strives for harmonisation of laws, differences in legal cultures and traditions lead to inequalities in practice. Smaller states, which rely on different legal traditions, may feel that the imposition of EU standards constitutes a form of inequality and discrimination.

To reduce or eliminate the 'apparent' equality within the EU, it is necessary to strengthen the monitoring of implementation. Therefore, the EU should develop more effective control mechanisms to ensure real, not just formal, implementation of

EU standards in criminal proceedings. The issue of funding is significant, as equal financial support for EU Member States is essential. Smaller and less wealthy Member States should receive financial and technical support to adapt their legal systems to EU requirements. The competencies of the EPPO and the CJEU should be limited to eliminate ‘competence creep’. Hence, they should be clearly defined and restricted to avoid perceiving their actions as violations of the sovereignty of the Member States. The specificity of the Member States must be taken into account. Harmonising policies should be flexible, allowing the Member States to consistently align their legal culture with EU requirements.

The apparent equality of EU Member States in judicial cooperation in criminal matters arises from the asymmetry of resources, political influence and differences in legal traditions. While formal principles of equality ensure legal consistency, in practice, smaller countries often experience inequalities resulting from the dominance of larger States and the centralisation of power in EU institutions, such as the EPPO and CJEU. To address these challenges, it is necessary to strengthen monitoring mechanisms, provide greater support for weaker states and adopt a flexible approach to harmonisation, accounting for the diversity of legal traditions within the EU. The principle of equality is observed in the EU only in the formal sphere, its practical implementation often raising doubts. In several cases, equality is only apparent, stemming from differences in the political, economic and administrative capacities of the Member States and the functioning of EU institutions. These need to be addressed for an effective European integration.

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FISCAL SOVEREIGNTY VS. COORDINATION: THE STRUGGLE FOR EQUALITY IN TAX REGULATION



MICHAL RADVAN

Abstract

This chapter primarily aims to find the relationship between the cooperation and harmonisation tendencies of the EU in the area of taxation, as well as the competition between the tax systems of individual EU Member States. The request for unanimous consent in tax harmonisation in the area of direct taxes regulation is also an issue to be investigated. To achieve these aims, the chapter defines basic terms such as tax law and tax itself. Subsequently, the role and position of the tax law in the EU law are analysed and specified, and the essential terms ‘tax sovereignty’ and ‘tax harmonisation’ are defined. The chapter investigates the limits of taxation at the EU level and national levels in the EU Member States according to the Treaty on European Union and the Treaty on the Functioning of the European Union. Specific parts of the chapter focus on direct and indirect taxes. These parts analyse the EU politics published on the EU website and describe the EU law dealing with individual types of taxes by considering selected national specifics in the legal regulation of the EU Member States. The conclusions state that the ideal path is somewhere in the middle of tax harmonisation and tax sovereignty: tax issues should never become a coordinated policy at the EU level, and the EU’s task should be to prohibit tax discrimination, i.e., tax neutrality, to fight against harmful tax competition and tax evasion, and to promote greater cooperation between tax administrations in ensuring control and combating fraud.

Keywords: tax cooperation, tax harmonisation, tax sovereignty, tax law, tax discrimination

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1. Introduction

The draft of the project ‘Equality in an Ever-Integrating Europe’ states that the tax law of the European Union is characterised not only by unanimity but also by the existence of a number of exceptions, in primary law, including accession treaties as well as in secondary law. The old Member States appeared to be in a more advantageous position than the new Member States due to these exceptions. The draft enquires whether this is really the case and how this system works in terms of cooperation and equality between States (in law and in fact).

I am afraid that the statements in the project draft are too simplified. Much deeper research in the area of tax law at the EU level and the national levels of EU Member States is required to answer both the questions. The statement that the free movement of persons, goods, services, and capital is the most important goal of the EU and that taxes play a crucial role in the harmonisation process is a fact. However, the national economic and political interests and historical and cultural traditions are the arguments for tax competition. From a historical perspective, it is also visible that gradual integration in the area of taxation is not only possible and acceptable but is also a fact, especially in the legal regulation of indirect taxes. It is crucial to pay attention to the definitions, as, for example, taxes on motor vehicles are considered indirect taxes by the EU but direct taxes according to most EU Member States. Regardless of the fact that EU Member States mostly prefer independent and non-harmonised tax systems, it is evident that there are successful harmonisation initiatives, mainly in the sphere of tax administration and tax administration cooperation, fight against tax havens, ambition to tax multinational online platforms and cooperation in the recovery of arrears.

These are the reasons leading to the extension of the purpose of the chapter. As the main aim, finding the relationship between the cooperation and harmonisation tendencies of the EU in the area of taxation, as well as the competition between the tax systems of individual EU Member States is necessary. The request for unanimous consent in tax harmonisation in the area of direct taxes regulation is also an issue to be investigated. The chapter is based on the hypothesis that the balance between the tax harmonisation at the EU level and tax cooperation of national tax administrations on one side and the tax competition between EU Member States on the other side expresses the equality among EU Member States.

To achieve the aims of the chapter, basic terms such as tax law and tax itself must be defined. This part generally brings no new knowledge, as it is based on the findings I have published several times previously.¹ Only this part necessitates dealing specifically with customs duties and their characteristics, as they play a key role within the EU and have many tax characteristics. However, the text itself is not focused on customs duties (customs). Subsequently, the role and position of the tax law in the EU law must be analysed and specified. Within this subchapter,

1 E.g., Radvan, 2024.

the essential terms ‘tax sovereignty’ and ‘tax harmonisation’ are defined. The limits of taxation at the EU level and national levels in the EU Member States according to basic treaties should be investigated: Treaty on European Union and Treaty on the Functioning of the European Union. There are several books dealing with the general EU policies and legal regulations. When investigating these issues mainly from Czech perspectives, Týč² and Tomášek³ are the most detailed and cited authors in the Czech Republic. Concerning the tax law itself, the relations between the EU tax law regulation and the Czech national regulation, Šíroký⁴ and Nerudová⁵ are to be considered. The next area that must be analysed in sufficient detail is the sphere of EU taxation principles. The best books dealing with this topic are those by Kokott⁶ and Pistone.⁷

The general part of the chapter is succeeded by the specific part with its two sub-parts. The first focuses on direct taxes, while the second investigates indirect taxes. The structure of these parts is more or less the same: it analyses the EU politics published on the web of the EU and describes the EU law dealing with individual types of taxes by considering selected national specifics in the legal regulation of the EU Member States. The findings demonstrate whether national taxes are and/or should be in line with EU law (cooperation and harmonisation aspects) or whether the EU Member States use them to enforce their own national (not just tax) policies (competition aspects).

All the observations and lessons learned are summarised in the concluding part of the chapter so that the hypothesis can be confirmed or refused, research questions as stated above can be answered, and the relationship between the cooperation and harmonisation tendencies of the EU in the area of taxation, as well as the competition between the tax systems of individual EU Member States can be determined.

2. Tax Law and Taxes (*Sensu Lato*)

In old EU Member States, tax law is regarded as an independent branch of law. Tax law science and tax law have a longstanding tradition in Western Europe. Contrarily, in Central and Eastern Europe (new EU Member States), according to the local legal sciences, tax law is (still) a sub-branch of financial law. Particularly, it belongs to the fiscal part of financial law, which deals with specific legal relationships. These relationships are created, implemented, and expired in connection with

2 Týč, 2017.

3 Tomášek et al., 2021.

4 Šíroký, 2018.

5 Nerudová, 2008.

6 Kokott, 2022.

7 Pistone, 2018.

public budgets, specifically when creating, distributing, and using public monetary funds. This fiscal part deals not only with tax law (a legal regulation of public budget revenues) but also with the budgetary law, and the public subsidies law (legal relationships concerning public budget expenditures).⁸

The tax law is defined as a system of legal norms regulating social relationships created, implemented, and expired in the process of creating public monetary funds. These social relationships regulated by the tax law are taxes *sensu lato* (in the broader sense). Taxes as social and legal relationships (similar to other legal relationships) have three structural components: subjects, objects, and content.

There are two or three subjects of tax law relationships. The weaker party, having fewer rights and more obligations, is the taxpayer or paying agent. The taxpayer is a person whose income, property, or acts are liable to tax. This person is directly affected by the tax burden. The paying agent is responsible for collecting the tax from the taxpayer and remitting it to the tax authorities. The tax administrator is the stronger party in tax law relationships. The tax administrator is the party with the decision-making powers. There are also other subjects (third parties) in the tax proceedings, such as witnesses, experts, interpreters, etc.

The object of the tax law relationship is tax in the economic sense, that is, public payment into public funds. The most important public funds are the State budget and local self-government budgets, State funds, etc. Taxes *sensu stricto* are those public payments called 'tax'. Simultaneously, taxes *sensu lato* also include charges, fees, customs duties, and similar levies such as contributions, levies, tolls, excises, tariffs, insurance, etc., incl. many other varieties in national languages. Regardless of the chosen title for taxes *sensu lato* by the legislator, each such public payment to the public fund will always theoretically be classified as either a tax or a charge (fee).⁹ Therefore, from a legal perspective, the tax as the tax relationship can be defined as a power relationship of an economic nature, monetary, irrecoverable, usually regular, with no equivalent and no direct counter-performance by the public monetary fund to the entity fulfilling its tax law obligation (e.g., paying taxes). Charges (fees) are also economic, monetary, and irrecoverable power relationships; however, they are usually irregular, with certain direct counter-performance to the person paying them. The *conditio sine qua non* for every tax *sensu lato* is the act imposing a tax (*nullum tributum sine lege* principle).

The content of the tax law relationship is the rights and obligations of both parties of the relationship (taxpayer or paying agent and the tax administrator).

Tax law relationships are specific legal relationships with a specific legal regulation. When studying the structure of legal acts regulating taxes and charges, more specific structural components of tax law relationships can be identified, such as the

8 Mrkývka, 2012; Boháč, 2006, pp. 6–10. In this subchapter, several parts from Radvan, 2020; Hulkó and Radvan, 2022, pp. 63–73; Radvan, 2024, are used.

9 Hulkó and Radvan, 2022, p. 63.

object of taxation, tax subject, tax base, tax rate, corrective elements, payment conditions, tax administrator, and budget destination.

It should be highlighted that a very specific method of legal regulation is being applied in tax law, that is, a modified version of the administrative law method.¹⁰ Compared to administrative law, there is a much lower level of application of sub-statutory regulations in tax regulation. The legal regulation includes many economic instruments to affect recipients, such as tax credits and other corrective elements, including tax holidays, etc. Tax law uses some private law elements, mainly in tax administration (possibilities of tax negotiations, tax postponing, repayment plans, etc.), and elements of choice moderating the mandatory nature of tax law relationships (voluntary value-added taxpayer, method of depreciation, lump-sum tax, lump-sum expenditures for income taxes, etc.) in the substantive part of tax law. Some private law entities can also (to a certain limit) replace the tax administrators, as specific administrative activities can be delegated to them. For example, in a labour law relationship, this private law entity is the employer who must deduct a personal income tax advance payment, social security contributions, and health contributions (or even other levies stipulated by law) from the employee's wages. The employee must permit such conduct. The same procedures are applied in the case of withholding taxes: e.g., a bank is responsible for the tax on the interest accrued, a joint-stock company for the tax on dividends, etc.

The most essential modification is the principle of self-application, rarely used in public law. According to this principle, the taxpayer applies tax law norms to itself and its specific conditions. The taxpayer, using its knowledge, determines the tax base, uses the relevant tax rate, and may apply the corrective elements. The taxpayer must know when and how to deliver the completed tax return to the tax administrator. The tax administrator ideally assesses the tax tacitly, i.e., implicitly. In practice, such an approach means that the tax office has no reservations regarding the tax return and its correctness and completeness. When applying the self-application principle in this way, no direct interaction between the tax administrator and the taxpayer takes place.

A tax system is created by taxes *sensu lato*. According to the tax law theory described above, the division between taxes and charges (fees) is the most common. Dealing with taxes *sensu stricto*, the most traditional is the classification of taxes according to their impact. Direct taxes are paid directly by the taxpayer based on their income or property. In contrast, indirect taxes are paid in the prices of goods and services; they do not respect the taxpayer's personal situation. EU law defines direct and indirect taxes differently. While direct taxes are levied on income, wealth, and capital, all other taxes, such as VAT and excise taxes, including energy and other environmental taxes, belong to the group of indirect taxes. Nonetheless, EU law does not fully follow this approach. For example, the tax on motor vehicles should be a direct tax as the object of taxation is the property (wealth). However, for the EU,

¹⁰ Hulkó and Radvan, 2022, pp. 59–60.

it is environmental, and environmental taxes belong to the group of indirect taxes. The reason is that the tax base is somehow connected with CO₂ emissions or other environmental criteria in several countries.

All EU Member States collect two direct income taxes: personal and corporate income taxes. Besides, there are other income taxes or surcharges to traditional income taxes, such as gambling taxes or windfall taxes on profits from a sudden windfall gain to a particular industry or company. Additionally, social security contributions and health contributions are income taxes *sui generis*.¹¹ Typical property taxes are recurrent taxes on immovable property and motor vehicles. Some Western European countries collect general wealth taxes. In many Central and Eastern European countries, traditional property transfer taxes were abolished in the last decade. The abolishment applies in particular to inheritance tax, gift tax, and different types of immovable transfer taxes (on the acquisition of immovable property and from the sale of immovable property). According to the Minimum Corporate Taxation Directive,¹² from 2024, the Global Anti-Base Erosion Model Rules (GloBE rules) shall be applied in all EU Member States, and the additional amount of tax (a top-up tax) should be collected.

The group of indirect taxes is more complex compared to direct taxes. The reasons are probably the harmonisation efforts of the EU, which is why all EU Member States collect VAT as the general tax on consumption. Moreover, the basic list of selective taxes on consumption – the excise taxes – is obligatory: every EU Member State must have taxes on mineral oils, spirits, beer, wine, tobacco products, gas, solid fuels, and electricity. As certain ecological aspects exist in the construction of the last three excise taxes, some authors prefer a specific group of ecological (excise) taxes. However, I prefer not to call them ecological or environmental taxes, as some constructions contrast with ecology, and, generally, almost all tax regulations include some ecological elements. Under certain conditions (see below), EU Member States can impose other selected non-harmonised excise taxes. Usually, these taxes have some connection to the environment (such as registration taxes on motor vehicles, taxes on fertilisers, etc.) or health (different taxes on sugar or salty products).

Concerning charges (fees), three basic groups of charges can be identified: court charges connected with court proceedings, administrative charges for the activities of administrative bodies, and local charges. Local charges vary widely from State to State, usually covering tourist charges, charges on communal waste, charges connected with the usage of public places, and charges on advertisements. Less frequently, municipalities collect local charges on animals (usually dogs). In several countries, parking fees create a specific group of local public payments, while in other countries, drivers pay (regulated and private law) prices for parking. Besides three basic groups of charges, there are many other charges connected with ecology

11 This chapter does not deal with social security contributions and health contributions.

12 Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

and environmental protection, charges connected with the usage of highways (tolls and vignettes), radio and television charges, etc.

As stated above, all public payments (taxes *sensu lato*) can have only tax or charge characteristics, no matter what the official title of the payment is. However, previous paragraphs did not deal with customs duties (customs). From my theoretical perspective, a customs duty fulfils all the characteristics of a charge: it is an economic, monetary, and irrecoverable power relationship, mostly irregular, with a direct counter-performance to the person paying customs duty in the form of the possibility to import or export goods to or out of the country or other (EU) territory.¹³ Even if customs duties play a crucial role in the EU, from the EU perspective, they have a different purpose and nature, unlike other taxes *sensu lato*. These are the reasons why the following text does not deal with customs in detail. The TFEU also includes the term ‘charges having equivalent effect as customs duties on imports and exports’.¹⁴ This term is not defined in the treaty or in secondary law. However, the case law states that it is

any pecuniary charge, however small and whatever designation and mode of application, which is imposed unilaterally on domestic or foreign goods when they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of Arts. 9, 12, 13 and 16 of the treaty, even if it is not imposed for the benefit of the state, is not discriminatory or protective in effect or if the product on which the charge is imposed is not in competition with any domestic product.¹⁵

3. Role and Position of Tax Law in the EU Law

Every EU Member State has its own financial and fiscal policy, and the competencies of the EU in this area are only limited. Tendencies to keep the *status quo* are evident, as the fiscal policy is *conditio sine qua non* for the proper functioning of every State.¹⁶ Taxes *sensu lato* are the crucial source of public budget revenues, and the power to impose taxes is a critical part of the sovereignty of every EU Member State. Tax policy and tax sovereignty have always been measured as symbols of the national sovereignty of the State.¹⁷ Only a sovereign State has the power to impose (and also collect and subsequently enforce) taxes and autonomously redistribute the

¹³ This chapter does not deal with customs.

¹⁴ Art. 28 and Art. 30 TFEU.

¹⁵ Judgment of the Court of 1 July 1969. *Commission of the European Communities v. Italian Republic*. Case 24/68.

¹⁶ Kosikowski, 2008, p. 169.

¹⁷ Široký, 2018, p. 21.

tax revenue at its own discretion and need.¹⁸ Tax sovereignty is closely connected to political and economic sovereignty: every government needs to retain decision-making power over how to spend tax revenues and how to finance public goods and services according to its primarily political intents.¹⁹ In this regard, Kokott distinguishes between two kinds of fiscal sovereignty: the power to adopt tax legislation and the power to dispose tax revenues.²⁰ The primary political intent is to win over voters who will re-elect the government in the next term. Every government needs enough power to create an adequate mix of taxes and use optimal tax rates as one of the instruments of domestic economic policy.

Additionally, the structure of tax systems is based on historical consequences and traditions. Sometimes, the structure of tax administrators can influence the system of taxes. Every state reflects a different economy and economic background in terms of taxation issues. Sociological aspects and economic conditions may also play an important role when adopting a tax law regulation (individual taxes, persons liable to tax, objects of taxation, tax bases, tax rates, exemptions from taxation, etc.). It is also important to highlight the competitiveness issues. Competitiveness requires a complex set of individual tax regulations; however, the general public usually imagines low taxes attracting workers, business people, and companies to become tax residents in the given country.

All the arguments for tax sovereignty, as stated above, are the reasons why the tax law regulation in EU Member States (sometimes significantly) differs. Nevertheless, taxes influence the prices of goods and services. Indirect taxes (mainly VAT but also selective excise taxes) directly affect the price of every product or service offered. Direct taxes are not so evident, but the prices are increased by all the taxes imposed on and paid by the taxpayer (income taxes, property taxes, etc.), as these taxes are the costs associated with the offered goods and services. As the free movement of goods and services is the basis of an internal EU market and taxes are reflected in the prices of goods and services, the differences in taxation and the resulting tax competition between individual EU Member States is a disruptive element negatively influencing the internal market and its smooth running.

An opinion from the Neumark Report should be highlighted in this context:

The negative influence on the competition between the Member States is caused to a lesser degree by differences in the extent of the total tax burden but to a greater degree by structural diversification concerning specific taxes or groups of taxes. This is the source of the problem of adopting an adequate harmonization model.²¹

18 Mrkývka, 2015, p. 111.

19 Týč, 2017, p. 275.

20 Kokott, 2022, p. 299.

21 Kosikowski, 2008, p. 169.

The other argument for why uniform rules in taxation and tax harmonisation within the EU are needed is the globalisation and corresponding issues, such as the increase in international trade, increased number and associated importance of multinational companies and their subsidiaries, and movement of capital and people (e.g., workers with a residency in one country working in another country).²² The reason concerns the increasing efforts by taxpayers to avoid taxes, especially in the international context. National governments have to cooperate in fighting tax avoidance. One of the tools for fighting tax avoidance is the effective sharing of information about taxpayers and their tax duties. The EU should play a crucial role in these areas.

3.1. Tax Unification vs. Tax Harmonisation

Authors use several terms when discussing the elimination of tax differences within the EU. Týč prefers two stages in this area: tax coordination and tax harmonisation. The first stage interferes less with the sovereignty of EU Member States, as the coordination sets the common schemes of taxation by way of recommendations. The second stage – the harmonisation – creates common rules in the form of directives, especially to set the tax, tax base, and tax rates.²³ Kosikowski, referring to Dosser,²⁴ describes three forms of harmonisation of tax systems: (1) levelling tax rates; (2) levelling tax system structures with maintaining the diversification between tax rates (diverse conception); (3) standardised approach.²⁵ Economic science in the Czech Republic usually uses just one term: tax harmonisation. Kubátová defines tax harmonisation at the EU level as the process of approximation of the tax systems of the EU Member States on the basis of common rules.²⁶ Nerudová offers a more complex definition of tax harmonisation as a mechanism used to eliminate tax provisions that either create obstacles to the functioning of the single internal market or distort competition. However, she also recognises that tax harmonisation is not aimed at achieving a single tax system but rather at the approximation and synchronisation of the individual tax systems.²⁷

My opinion is similar to the concept presented by Šíroký.²⁸ When eliminating tax differences within the EU and approximating tax systems, the first necessary stage is tax coordination. Tax coordination aims to limit harmful tax competition using the conclusion of agreements and recommendations. The aim is to set minimum transparency standards and to ensure the exchange of information necessary for fair tax administration. Tax coordination is not meant for uniform tax systems.

22 For tax harmonisation issues, several parts from Radvan, 2011 are used.

23 Týč, 2017, p. 275.

24 Dosser, 1967, pp. 33–40.

25 Kosikowski, 2008, pp. 169–170.

26 Kubátová, 1998, pp. 2–7.

27 Nerudová, 2008, p. 18.

28 Šíroký, 2010, p. 28.

The most common tools of tax coordination are bilateral agreements focused on the avoidance of double taxation and on the exchange of information between national tax administrations (in the assessment procedures or for the purposes of tax recovery). Even unilateral and spontaneous acts can be seen as tax coordination. Decreasing rates of corporate income taxes in European countries are the result of the tax competition between EU Member States, and they can serve as a good example of unilateral tax coordination.

The second stage in eliminating tax differences within the EU Member States is the approximation of tax systems. Tax harmonisation itself is then the third and final stage.

European tax law science connects the definition of tax harmonisation with fundamental EU principles. E.g., Terra defines tax harmonisation as an instrument leading to the main objective, i.e., creating a single market. He recognises several obstacles to a single market: the taxation of the free movement of, in particular, legal persons and free transboundary movement of goods, services, capital, and revenues; the difference in the tax treatment of domestic and imported goods and services; substantial differences between national tax legislations that result in distorted market; and differences in the tax treatment of residents and non-residents and domestic and foreign investments and income (particularly, double taxation of income from sources located outside the territory of the country).²⁹

In summary, tax harmonisation means adapting and aligning tax systems and individual taxes on the principle of compliance with the common rules of participating countries. Tax harmonisation covers not only the construction of individual taxes but also the tax administration (tax collection, tax control, etc.). The tax harmonisation process has three stages. First, the tax to be harmonised must be identified. In the second stage, the tax base (and possibly other structural components of the tax, e.g., a taxpayer) can be harmonised. The third stage is the harmonisation of the tax rate(s). Monitoring the historical development at the EU level, the third stage of tax harmonisation is not always necessary. EU Member States are left with discretion regarding the available rates; different rates lead to a competitive environment.³⁰

Kokott also confirms that the EU is not a tax union; it has neither comprehensive competencies to adopt tax laws nor the power to collect taxes or to dispose of the tax revenues. The EU can only tax its civil servants and other staff.³¹ She highlights the principle of safeguarding the balanced allocation of taxing powers, i.e., safeguarding taxing powers in cross-border transactions between EU Member States.³² However, Kokott also warns that at the moment, when the EU borrowed 750 billion euros on the capital markets for transfers to EU Member States in need of recovery assistance and for generally improving the economies in the mid and long term, making them,

29 Terra and Wattel, 2008, p. 1.

30 Radvan, 2024, pp. 488–489.

31 Kokott, 2022, p. 300.

32 Kokott, 2022, p. 354.

for example, greener and more digitalised ('Next Generation EU'), the EU took a remarkable step towards a fiscal union.³³

In summary, tax harmonisation is not merely a resulting objective. It can also be seen as the actual process, both positive and negative. Positive harmonisation means the process of approximation of the national tax systems when implementing directives (and also other European legislative instruments). Under the condition that the directives are correctly implemented, the final stage means that all EU Member States apply the same rules. Negative harmonisation is the result of the decisions of the Court of Justice of the European Union: measures are taken in national laws on the basis of the tax-related case law of the CJEU. One may argue that only the party to the proceedings (a specific EU Member State) must remove the defective provision concerned. However, the case law also forces other EU Member States to control their national regulation. If there is any conflict, they must adopt the necessary amendments. The other role of case law is in the legal interpretations: decisions provide good interpretation guidance.³⁴

3.2. Legal Regulation of EU Tax Policy

Art. 4 of the TEU states that the EU shall respect the equality of Member States before the Treaties as well as their national identities. Moreover, the EU shall respect essential State functions. Particularly, national security remains the sole responsibility of each Member State. In this regard, it must be stated that tax systems reflect national identities. State functions cannot be executed without adequate tax revenues. Tax collection is also a condition to ensure national security. Considering the importance of tax sovereignty for every EU Member State, tax issues never became a coordinated policy at the EU level. The aim of the EU is relatively minimal: the prohibition of tax discrimination, i.e., tax neutrality. The primary EU law generally grants the EU Member States the right to an autonomous tax policy and to adopt their own tax acts. However, these rights are limited. Primarily, it is the principle of equality expressed in multiple provisions of the TEU and the TFEU. For example, Art. 18 TFEU prohibits any discrimination on grounds of nationality. Art. 107 sets the prohibition of State aid, while Art. 110 TFEU prohibits discriminatory internal taxation on the products of other EU Member States. The equality principle is also mentioned in the Charter of Fundamental Rights of the EU.³⁵ However, this Charter includes more fundamental rights and principles with regard to taxation, such as the protection of privacy,³⁶ protection of personal data,³⁷ freedom to choose an

³³ Kokott, 2022, p. 300.

³⁴ Radvan, 2024, p. 489.

³⁵ Art. 20. TFEU.

³⁶ Art. 7. TFEU.

³⁷ Art. 8. TFEU.

occupation and right to engage in work,³⁸ freedom to conduct a business,³⁹ right to property,⁴⁰ right to good administration,⁴¹ and right to fair justice.⁴²

The following two limitations of the right of EU Member States to an autonomous tax policy and to adopt their own tax acts are expressed in the TFEU, specifically in its ‘tax provisions’:⁴³ the prohibition of tax restrictions on free movement and tax harmonisation. The prohibition of tax restrictions on free movement relates to goods, services, persons, and capital. This principle is one of the pillars of the EU and its functioning. Especially, Art. 30 TFEU prohibits any customs duties on imports and exports, charges having equivalent effect, and customs duties of a fiscal nature between EU Member States as the basis of the customs union. This rule cannot be interpreted in the way that every imported good must not be taxed. The EU law

does not prohibit Member States from establishing a system of taxation differentiated according to various categories of products provided that the tax benefits granted serve legitimate economic or social purposes. (...) a system of taxation (...) (must be) free from any discriminatory or protective effect. Therefore, a system of taxation (...), which is intended to achieve legitimate social objectives and which procures no fiscal advantage for domestic products to the detriment of similar or competing imported products, is not incompatible with (...) the Treaty.⁴⁴

Art. 110 TFEU prohibits discriminatory and protectionist measures in the national tax system, stating that

No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.

In other words, imported products must not be liable to more strict taxation than equivalent domestic products. Art. 110 TFEU creates one of the pillars of a single internal market not only because it ensures a non-discriminatory approach but also eliminates protectionist taxation (i.e., protection of own national products or own market). Typical examples include cases of different taxation of bananas and other

38 Art. 15. TFEU.

39 Art. 16. TFEU.

40 Art. 17. TFEU.

41 Art. 41. TFEU.

42 Arts. 47–50 TFEU; Kokott, 2022, p. 2.

43 Arts. 110–113.

44 Judgment of the Court of 3 March 1988. *Gabriel Bergandi v. Directeur général des impôts*. Case 252/86.

fruits in Italy⁴⁵ or different tax rates on beer and wine in the United Kingdom.⁴⁶ It must be highlighted that discrimination and protectionism are not reflected only in tax rates but also in other structural components such as the definition of the object of taxation, taxpayer, tax base, or any corrective elements.

Art. 111 TFEU prohibits any repayment of internal taxation higher than internal taxation imposed directly (on final products) or indirectly (on semi-finished products and raw materials) on products exported to the territory of any Member State. The same prohibition applies to re-exports.

Tax harmonisation is the third possibility of limiting the rights of EU Member States to an autonomous tax policy and adopting their own tax acts. Important provisions in the TFEU are included in chapters on tax provisions⁴⁷ and approximation of laws.⁴⁸ Art. 113 TFEU requires unanimity (in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee) when adopting provisions for the harmonisation of legislation concerning turnover taxes, excise duties and other forms of indirect taxation; i.e., tax measures must be adopted unanimously by the Member States. Moreover, harmonisation must be necessary to ensure the establishment and functioning of the internal market and to avoid distortion of competition. The interesting fact is that indirect taxes are included in specific Art. 113 TFEU, while direct taxes are included in a general chapter on approximation of (not only tax) laws, specifically in Art. 115 TFEU. The phrasing itself is more or less analogous:

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.

However, in practice, distinguishing between the usage of Art. 113 TFEU and Art. 115 TFEU is absolutely necessary because the CJEU does not accept European legislation that is passed on the basis of incorrect provisions establishing the EU's competence to adopt legislation. While Art. 113 TFEU allows harmonisation 'necessary to ensure the establishment and functioning of the internal market and to avoid distortion of competition', Art. 115 TFEU allows approximation directly affecting 'the establishment or functioning of the internal market'. As a food-related example,

45 Judgment of the Court of 7 May 1987. *Commission of the European Communities v. Italian Republic*. Case 184/85.

46 Judgment of the Court of 27 February 1980. *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*. Case 170/78.

47 Art. 113.

48 Art. 115.

the Titanium Dioxide case⁴⁹ and corresponding papers by Barents⁵⁰ and Dougan⁵¹ should be mentioned. The term ‘internal market’ is used for both indirect taxes⁵² and direct taxes.⁵³ De Búrca draws attention to the fact that ‘the ‘internal market’ is a very general notion, and its ‘proper functioning’ could mean many things, depending on how strong a vision of the internal market is being adopted’.⁵⁴ He gives examples of product liability, tobacco advertising, and equal pay between men and women, where the centrality of such matters to the functioning of the single market could certainly be debated. He concludes that ‘almost any difference in the laws of the different Member States is capable of being construed as a potential distortion in the conditions of competition between states, or as a barrier to the effective functioning of the single market’.

Similarly, Antón points out the lack of univocal meaning of the ‘internal market’ in relation to the coexistence of several approaches to access the compatibility of national measures with the EU freedoms. He also adds two other difficulties and uncertainties connected with the EU Rousseauian ‘social contract’ in which EU Member States have limited their tax sovereign rights in exchange for achieving the goal of the internal market: the rise of territoriality in the case law of the CJEU erecting barriers that lead to a compartmentalisation of the internal market, and the doubts regarding the competence to harmonise in areas like anti-avoidance confirming that the goal of the internal market goes beyond the mere elimination of distortions in trade.⁵⁵

In accordance with de Búrca, I believe that the issue of harmonizing direct taxation in Europe is precisely the case of these debates.

The other difference when comparing Arts. 113 and 115 TFEU are the requests to avoid distortion of competition, which are included only in Art. 113 TFEU. To conclude, the differences between Arts. 113 and 115 TFEU are essential for setting the basis of regulations for direct and indirect taxes. That is why having specific and very detailed definitions of direct and indirect taxes is crucial. I am afraid the differences in these definitions in individual EU Member States, different law schools, and within the EU itself are one of the obstacles to proper harmonisation processes.

Other provisions relevant to tax policy are hidden in the TFEU Arts. connected with the free movement of persons, services, and capital, the environment, and competition. Enhanced cooperation⁵⁶ can be applied in respect of tax matters.⁵⁷

49 Judgment of the Court of 11 June 1991. *Commission v. Council*. Case 300/89.

50 Barents, 1993.

51 Dougan, 2000.

52 Art. 113 TFEU.

53 Art. 115 TFEU.

54 De Búrca, 1999.

55 Antón, 2018, pp. 482–483.

56 Arts. 326–334.

57 Paternoster, 2016, p. 1.

The other essential documents dealing at least partially with taxation are the accession treaties, i.e., intergovernmental treaties of the EU specifying the terms under which an applicant State becomes an EU Member State. Concerning taxes, the accession treaties stipulate that the tax law of the applicant State must comply with EU tax law. However, accession treaties also grant temporary exceptions for an applicant State not to have to apply European law. The most significant exceptions are connected to indirect taxes: in the 1970s–1990s, deadlines were set by which the new Member States had to apply the VAT system or certain excise taxes. For countries acceding after 2000, the conditions were in some ways stricter, as all VAT and excise tax rules had to be met at the time of accession. However, for example, each country could negotiate a different length of exemption for the new so-called energy taxes (on coal, gas, and electricity).

In the area of secondary EU law, the role of directives is crucial. EU Member States must implement the directives into the national legal system within the deadline set in the directive. The form is free; however, the content of directives is usually transposed into the acts and not into bylaws. The transposition itself (i.e., the formal transfer of the directive's content into national regulation without immediate practical effect) does not imply compliance with the obligation of the EU Member State to achieve the result set out in the directive. Only if the EU Member State did all that was under the circumstances reasonable to require so that the citizens can claim their rights under the directive will the aims of the directive be met. Such a resulting state is called implementation.

The directives generally do not have a direct effect compared to the regulations. Only if several conditions are fulfilled, the directive gets the direct effect: the implementation period is over, and the directive was not implemented into the national legal system within the deadline; the text of the directive is clear and understandable; the directive has a vertical effect (i.e., it concerns relations between the State and the citizen) and upward effect (only the citizen can claim the direct effect). In tax issues, it means that the direct effect can be claimed only by the taxpayer, never by the tax administrator to the taxpayer's disadvantage. Moreover, the indirect effect of the directive is possible in tax issues if the directive is not implemented within the deadline. Such a situation might happen when defining and interpreting terms in tax law, where the 'euroconform' interpretation is needed. The interpretation then becomes binding for tax administration bodies, also retrospectively.⁵⁸

Besides regulations and directives, the important role in the interpretation and application of European tax law also plays other legal acts not generally binding, such as opinions and recommendations. These acts belong to the group of soft law. Usually, these acts show possible future developments in the area of (not only) taxation. They may serve as drafts for future directives. Opinions also often summarise the existing status quo, while recommendations include advice for future development. The soft law cannot be enforced, and non-compliance cannot be sanctioned.

58 Široký, 2013, pp. 60–61. See also Král, 2011; Sehnálek, 2008; Týč, 1999; Timmermans, 1979.

The soft law also includes White Books and Green Books (less specific) that are sets of proposals for action that the Commission considers appropriate to achieve a particular objective. Kokott further expands the list of soft laws to include OECD model conventions, their comments and guidelines, International Financial Reporting Standards, explanatory notes by the Customs Code Committee, VAT Committee guidelines, Explanatory notes on VAT, opinions of VAT Expert Group, etc.⁵⁹

The role of the CJEU case law as a negative legislator is also crucial. Even if the case law is directed to national regulation, the interpretation is the same for all EU Member States. The case law then pushes all EU Member States to check if the national regulation is in line with the decision. If not, necessary amendments must be adopted. These results, called negative tax harmonisation, have the consequent positive effect of integrating tax systems.

European tax law and tax law in EU Member States are also influenced by international tax law. In these circumstances, the most frequently mentioned are (usually bilateral) double-tax treaties. However, in the last decade, the OECD initiatives started to play an important role. The initiative to combat base erosion and profit shifting (BEPS) emphasised the need to ensure that taxes are paid where profits and value are generated. In order to increase the level of protection of the tax system of the individual EU Member States against aggressive tax planning within the internal market, the EU adopted the Anti-Tax Avoidance Directive (ATAD).⁶⁰ The ATAD aims to harmonise the laws of all Member States to establish rules against the erosion of the corporate tax base in the internal market and, simultaneously, to prevent the shifting of profits outside the internal market. The ATAD also seeks to prevent the emergence of further obstacles in the internal market, such as double taxation.

Another OECD initiative aimed to address the problem of international taxation of the provision of digital services. Consequently, the so-called Pillar 2, which is part of the OECD/G20 project ‘Tax Challenges Arising from the Digitalisation of the Economy – Global Anti-Base Erosion Model Rules (Pillar 2)’, was enshrined. The result is the Model Rules of December 2021, which enshrine a common approach by the Member States of the BEPS Inclusive Framework to minimum effective taxation of large (multinational) corporations. The stated objectives of Pillar 2 are to minimise exorbitant tax competition between countries (in other words, to reduce the so-called race to the bottom in corporate taxation). The introduction of a minimum tax will result in large companies’ profits being taxed at least at a minimum effective level of 15%. The results of the initiative are also part of the Minimum Corporate Taxation Directive, which ensures a global minimum level of effective taxation of multinational enterprise groups and large domestic groups in the EU.⁶¹ However,

⁵⁹ Kokott, 2022, pp. 9–17.

⁶⁰ Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

⁶¹ Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. See also Haslehner et al., 2024.

the Directive provides for exemptions in relation to selected types of entities. In the Czech Republic, the Directive was implemented by the Act on equalisation taxes for large multinational groups and large domestic groups.

However, the adoption of the Model Rules, Directive, and national legal act is not the end of the work on these projects. Negotiations are ongoing, particularly in the OECD field, focusing on specific contentious issues with the aim of unifying procedures and thereby ensuring a consistent and uniform approach sustainable across the cross-section of all jurisdictions involved, taking into account legislative, tax, and accounting diversity. These discussions have resulted in the production of supporting material referred to as ‘Administrative Guidance’, the results of which jurisdictions have committed to implement in already adopted legislative standards. The ‘Administrative Guidance’ is binding on jurisdictions applying the Pillar 2 rules. There is a presumption that, in addition to the Administrative Guidance already adopted, other such materials will be approved on an ongoing basis at the OECD level, additionally specifying certain aspects of the application of the Model Rules, which will also trigger the need for their subsequent implementation in the national law.

Dourado also warns that the measures to implement minimum taxation raise serious doubts about their compatibility with tax treaties and recommends a multi-lateral treaty to amend the existing bilateral treaties.⁶²

Art. 8.3 of the Model Rules obliges implementing jurisdictions to ensure that national regulations are consistent with any Administrative Guidance issued. The Directive adopts a similar approach in Point 24 of its explanatory memorandum. This obligation is then reflected in national law.⁶³ Therefore, it is not technically possible for the amendment of the Directive and the amendment of national law to be adopted in time, thus violating the principle of retroactivity. Although it is debatable whether such retroactivity is possible, I believe that it is not unconstitutional. First, it is due to the construction of the Directive and national law, which implicitly provides for retroactivity. Second, other conditions must be met: it must be a clarification of the implementing framework of the Model Rules, not a clarification of the Model Rules themselves, the functionality of the system of equalisation must not be impaired, and the taxpayer must not be harmed. The legitimate expectations of all the stakeholders regarding the proper functioning of the system of equalisation taxes must also be met.

⁶² Dourado, 2024.

⁶³ Art. 2(4d) of the Act No. 416/2023 Sb., on compensatory taxes for large multinational groups and large domestic groups.

4. A Few Notes on EU Taxation Principles

EU tax law is built on several principles and rules. The most complex study about the principles of EU tax law was published by Kokott.⁶⁴ Most of the principles are derived from constitutional traditions common to EU Member States and they are being applied by the European legislator and also by the CJEU. Principles are important not only for the uniform interpretation and application of harmonised tax law in the EU Member States but also for the uniform interpretation of directives, with regard to the Art. 288 TFEU stating that ‘directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods’. Kokott,⁶⁵ referring to Papis,⁶⁶ adds that the ‘teleological interpretation of a directive’s provisions in the light of general principles can serve to determine how a directive is to be interpreted with regard to the result to be achieved’. Thus, general principles must be used not only when interpreting EU secondary law but also when dealing with national law: general principles take precedence over national law.

Kokott defined several categories of principles being applied in EU tax law. The ‘general, general’ principles are those whose application is not restricted to tax law. The group of ‘general, general’ principles includes principles of legality, legal certainty, proportionality, equality, effectiveness, and equivalence, etc. Some general principles have developed a specific meaning in tax law (e.g., the principle of equality with its tax-specific subprinciples of ability to pay, neutrality, and cohesion of tax systems). The principle of prohibition of abuse and the principle of economic reality follow the ‘general, general’ principles. Other State-related general principles of autonomy of legal systems, territoriality, and mutual recognition are connected with the aim of avoiding double taxation.⁶⁷

The principle of legality seems to be one of the most important legal principles in general and is also extremely important in tax law. Very often, the principle of legality is connected with the rule of law; according to Art. 2 TEU, the EU is founded on the rule of law. The Charter of Fundamental Rights of the EU, in its Art. 52(1), provides a rule that ‘any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms’. The principle of legality provides that national Constitutions and EU law take priority over lower-ranking law and also expresses that infringements of individual rights require a legal basis. The principle ‘no taxation without representation’ (*nullum tributum sine lege*) is strongly connected to the principle of legality. The question is whether this principle is applicable in the globalised world and whether and how it applies to the taxation of residents who are nationals of

64 Kokott, 2022, pp. 18–228.

65 Kokott, 2022, p. 20.

66 Papis, 2014, p. 365.

67 Kokott, 2022, p. 21.

another country (they do not have the right to vote in the country of residency) or of citizens (entitled to vote) who are residents in other countries.

The principle of legal certainty requires that legal rules are precise and clear to allow individuals to ascertain unequivocally what their rights and obligations are and take steps accordingly.⁶⁸ To achieve this principle, tax provisions should be included in separate legal acts. Simultaneously, following a uniform terminology in law is necessary. The tax law should not provide tax-specific definitions, but the definitions from other branches of law should be applied, generally even without an express reference.⁶⁹ It is inappropriate to impose unorthodox tax⁷⁰ or tax components. The tax law norms must be unambiguous in formulating the addressees' rights and obligations in an understandable and unambiguous form. Ideally, there will be no need to apply any of the contradictory principles *in dubio pro libertate* (*in dubio mitius*) and *in dubio pro fisco*. Concerning the self-application of tax law norms, tax duties should be formulated briefly and clearly; they should consider the level of legal and economic knowledge of the taxpayers. The title of the legislative instrument must clearly suggest that it concerns tax matters. It is necessary to keep an adequate *vacatio legis* so that the taxpayers have enough time to get acquainted with the new law's content.

The principle of legal certainty is tightly connected to the principle of legitimate expectations, the principle of time limits, and the principle of non-retroactivity (*lex retro non agit*). The last principle means the prohibition of taxation of facts that occurred in the past. It means that the obligation arising during the effectiveness of a particular regulation is governed by this regulation until its fulfilment. It can be breached if the new regulation is advantageous for the obligated tax subject. Concerning the retroactivity in the case of minimum effective taxation of large (multinational) corporations, see above.

The other general principle is the principle of proportionality, expressing the rule that measures adopted by EU institutions shall not exceed the limits of what is appropriate and necessary to attain the objective legitimately pursued by the legislation. Additionally, if there is a choice of appropriate measures, the resource must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.⁷¹

The group of general principles also includes the principle of effectiveness and the principle of equivalence. Effectiveness means that national procedural rules must not render the exercise of the rights practically impossible or excessively difficult. The equivalence requires equal treatment of claims based on a breach of national law and EU law.⁷²

68 Kokott, 2022, pp. 27–28.

69 Nykiel and Sęk, 2015, p. 202.

70 Nykiel and Sęk, 2015, p. 203.

71 Kokott, 2022, p. 37.

72 Kokott, 2022, pp. 39–41.

Kokott adds one more ‘general, general’ principle of the reimbursement of unjust enrichment.⁷³ She also gives the principle of equality a separate space in a specific chapter. Generally, the principle of equality is expressed in Art. 20 of the Charter of Fundamental Rights of the EU: ‘Everyone is equal before the law’. Equality means not only equal application of tax law but also tax neutrality, tax consistency (coherence), and the ability to pay taxes. The last principle of ability to pay is related to the principle of endurance: the tax must not be of a liquidating nature. The implementation of corrective components (exemptions, relieves, etc., or deferral and waiver of the tax by administrative means) should ensure that the tax does not have a choking effect. There should be no double taxation, not only internationally but especially in the interstate tax system. Of course, protecting the interests of the majority from the intrusion of different lobbies’ interests is necessary. The ability to pay principle is also reflected in tax progressivity; however, Kokott connects tax progression with the principle of social welfare state or redistributive justice.⁷⁴

The principles of equality and proportionality are closely connected to the principle of (tax) justice. It is being applied in two ways: as a horizontal tax justice and vertical tax justice. A horizontal tax justice means that the same objects of taxation should be taxed equally. A vertical tax justice expresses that an entity with higher incomes (or higher valued property, higher consumption) should pay a higher tax, but not in the sense that the tax rate will increase highly progressively with an increasing tax base; the tax rate should remain the same or be progressive proportionally.

Kokott adds several more tax law principles. The principle of ‘prohibition of abuse’ expresses that ‘law cannot be relied on for abusive or fraudulent ends and that the application of legislation cannot be extended to cover abusive practices by economic operators’.⁷⁵ The principle is most commonly reflected in the general anti-avoidance rule (GAAR) as expressed in Art. 6(2) of the Anti-Tax Avoidance Directive (ATAD). Very close to GAAR are also the principle of economic reality and the ‘substance over form’ principle.

Other tax law principles are connected with the territory where the law is applied. The principle of territoriality encompasses the unimpeded exercise of sovereignty on one’s own territory,⁷⁶ and it is reflected in the distinction between residents and non-residents. The principle of autonomy of tax systems expresses that EU Member States do not have a duty to adapt their own tax systems to those of other EU Member States in order to prevent taxable persons from being adversely affected.⁷⁷ The principle of mutual recognition includes recognition of foreign acts of the State (judgments and administrative acts) and admitting their legal consequences in domestic legal order.⁷⁸ Dealing with territorial principles, the principle of avoiding

73 Kokott, 2022, p. 41.

74 Ibid., p. 132.

75 Ibid., p. 54.

76 Ibid., p. 76.

77 Ibid., p. 85.

78 Ibid., p. 89.

double taxation should also be mentioned. However, such a principle is not fully applicable within the EU: the EU is not a tax union. Nevertheless, there are certain efforts to limit double taxation, primarily in the common VAT system.

The last (but not least) tax law principle is strictly connected to tax law drafting only: tax law should be drafted exclusively by professionals. The proposals for the acts and other norms should be consulted with stakeholders and discussed by the professional committees. An adequate explanatory report should be provided regarding the legal norm, etc. Amendments by the members of the Parliament and other non-professionals seem to be breaking many tax law principles. The argument for amendments in the Parliament procedure is the democracy and the legislative power of the Parliament. Interestingly, in the USA (the cradle of democracy), tax bills are sometimes voted under so-called close rules, i.e., ‘yes or no vote’ without the possibility of introducing amendments.⁷⁹

5. Direct and Indirect Taxation in the EU

The general knowledge about taxes and tax law, the role and position of tax law in the EU law, tax unification and tax harmonisation, legal regulation of EU tax policy, and EU taxation principles allows us to deal with specific regulation of taxes in the EU. As stated above, the differences between Arts. 113 and 115 TFEU are essential for setting the basis of regulations for direct and indirect taxes.

As stated above several times, the EU does not have a direct role in tax law; the level of taxation is at the discretion of national governments. Nevertheless, in some areas, the EU oversees national tax rules to ensure a single market (the free flow of goods, services, and capital), fair competition (businesses in one EU Member State do not have an unfair advantage over competitors in another), and non-discrimination (taxes do not discriminate against consumers, workers or businesses from other EU Member State). The EU efforts are visible mainly in VAT and excise taxes regulation, less noticeably in corporate and personal income taxation.⁸⁰

5.1. Direct Taxes

Concerning the direct taxes, the importance of Art. 115 TFEU, which allows approximation directly affecting ‘the establishment or functioning of the internal market’, was explained above. Generally, it can be stated that the harmonisation process stagnates. However, there are certain areas where the cooperation works

⁷⁹ Nykiel and Sęk, 2015, p. 198.

⁸⁰ European Union, 2024.

well: avoiding double taxation, tax heavens fights, sharing tax information,⁸¹ tax recovery,⁸² tax dispute resolution mechanisms (i.e., a harmonised procedure to resolve disputes over the interpretation and application of double taxation treaties),⁸³ faster and safer relief of excess withholding taxes,⁸⁴ or global minimum tax (see below). All these primarily procedural tax law areas support the establishment or functioning of the internal market.

Concerning substantive tax law, the main reason why the harmonisation efforts are much less successful is mainly the aversion of the EU Member States to relinquish sovereignty. I also strongly support the other reason expressed by Šíroký, which are the differences in accounting systems (tax accountings in continental Europe vs. Anglo-Saxon accountings). It is nearly impossible to harmonise the (corporate income) tax base without harmonizing the accounting rules.

Direct taxes are divided into two groups: income taxes and property taxes. The income taxes group includes personal income tax and corporate income tax. The property taxes group usually covers recurrent (annual) property taxes (incl. wealth taxes), property transfer taxes, and taxes on motor vehicles. With regard to the harmonisation efforts at the EU level, the only taxes totally unaffected by these efforts are recurrent property taxes. The primary reason is the impossibility of transferring immovable property between EU Member States. In most States, the annual property tax is also a local tax: municipalities have the right to influence the amount of tax by setting tax rates and exemptions from taxation, and they are the beneficiaries of the tax revenue. The probability that the EU will start any harmonisation process in the area of recurrent property taxes is close to zero. Harmonisation is not required from an economic perspective. Recurrent property taxes cannot influence the establishment or functioning of the internal market.

The same conclusions are applicable to property transfer taxes (on sale or on acquisition) and partially to gift taxes. However, inheritance taxes (estate taxes) could cause double taxation of the same inheritance in different EU Member States, as some States apply a tax on the heirs while others do so on the basis of the estate. Moreover, the tax liability could be determined based on the residence, domicile, or nationality of the deceased and/or of the beneficiary, the location of the property, etc. EU Member States also apply different valuation methods for the same property. While several EU Member States abolished the inheritance tax in the last two

81 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value-added tax.

82 Council Directive 2010/24/EU of 16 March 2010 on mutual assistance for the recovery of claims relating to taxes, duties, customs duties and other measures.

83 Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union.

84 FASTER Directive - Council Directive on Faster and Safer Relief of Excess Withholding Taxes. European Commission, 2024e.

decades (e.g., the Czech Republic,⁸⁵ Slovakia, and other Central and Eastern European countries), some other States apply extremely high inheritance tax rates (up to 80% over a certain threshold amount), especially in cases where the deceased and the beneficiary are not related. Some solutions to face double taxation on estate and inheritance tax are possible at the national legal level (tax relief) or bilaterally in double tax treaties. Considering double inheritance taxation, the EU presented a Recommendation consisting of suggestions in the forms of credit for tax paid in another EU Member State or an exemption of certain items of foreign property from the domestic tax base. The Commission also recommended an order of taxing rights (i.e., which EU Member State has the primary right to tax inheritance).⁸⁶ These rules are also partially applicable to gift taxes. Currently, EU Member States imposing inheritance tax more or less follow the recommendations, and there is no need to harmonise inheritance and estate taxes at the EU level.

The level of motor vehicle taxation in individual EU Member States differs in the number and type of taxes imposed on motor vehicles and in the legal construction of individual structural components (taxpayer, object of taxation, tax base, tax rate, corrective elements, etc.). At the European level, only the Council Directive 83/182/EEC restricts the rights of Member States to apply consumption taxes to vehicles. In all other aspects, each EU Member State has almost full discretion to regulate car taxation, especially the recurrent (circular, annual) taxes on motor vehicles. Taxes on motor vehicles are an ideal example of reflecting environmental elements such as CO₂ emissions. In the future, it would be helpful to solve the problems connected with extremely high registration taxes on motor vehicles in some EU Member States, causing significant differences in final prices for consumers. The proposal of the Directive on passenger car related taxes⁸⁷ from 2005 aiming to abolish registration taxes altogether was unfortunately withdrawn in 2015.⁸⁸ Moreover, in November 2022, the Czech Republic opened the discussion and presented a proposal to amend the Eurovignette Directive⁸⁹ so that there is no obligatory tax on motor vehicles.⁹⁰

Personal income taxes are in the competence of the EU Member States. However, they have to follow the fundamental TFEU principles on the free movement of workers, services, and capital and the freedom of establishment, eliminate tax obstacles to cross-border activities, and prevent any direct or indirect discrimination on the basis of nationality. All EU Member States collect personal income tax. Generally, there are three categories of incomes of natural persons to be taxed: incomes from employment and other dependent activities, income from business and other independent activities (e.g., from intellectual property, rent), and other incomes

85 Boháč, 2022; Radvan, 2022; Radvan and Svobodová, 2021

86 European Commission, 2024l.

87 European Commission, 2005.

88 Radvan, in press.

89 Directive 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures.

90 Ministry of Finance, 2022.

(typically incomes from the capital and other similar incomes liable to withholding tax, and occasional minor incomes). However, individual EU Member States are free to set more specific categories with specific construction of partial tax bases. For example, in the Czech Republic, between 2008 and 2020, the tax base for incomes from employment was the ‘super-gross wage’: the brutto salary increased by social and health contributions paid by the employer at 34% (later 33.8%).⁹¹

The sovereignty of EU Member States in personal income taxation is evident from many other provisions. Typically, the lower taxation of self-employed persons than employees expresses the motivation to run a business. The efforts to make tax administration easier for small businessmen lead to a lump-sum tax. Different rules are used for the deductibility of a tax loss and costs for research and development. Western European countries prefer progressivity in tax rates, while Eastern European countries turned to one linear tax rate, usually much lower compared to old EU Member States. Tax benefits for low-income subjects can be defined as non-taxable income, amount deductible from the tax base, or basic tax relief⁹² deductible from the tax itself. The most significant differences are reflected in ‘social’ correction elements: tax exemptions (e.g., no taxation of pensions, scholarships, social benefits, alimony payments, specific time-tests for incomes from the sale of immovable property), tax allowances (e.g., motivating charitable gifts, pension insurance and life insurance, living in own apartment or house), and tax reliefs general for all natural persons (e.g., reflecting children in the family, spouse with limited income, disability of the taxpayer, studies) or specific for businessmen (e.g., stimulating the employment of disabled employees or research and development).

The double tax treaties are the most crucial legal acts in the international taxation of personal income. The only EU legal act connected with the personal income tax is the Savings Directive.⁹³ The Savings Directive was adopted to avoid distortions to the movement of capital and to ensure effective taxation of interest payments received by individuals in EU Member States other than the EU Member State of residence. The Savings Directive enables such interest payments to be made subject to effective taxation in accordance with the laws of the EU Member State of residence.⁹⁴

From the economic perspective, the most significant direct tax is the corporate income tax when discussing harmonisation. However, business entities are liable to a number of other corporate taxes, usually in various forms of windfall tax. A windfall tax usually means a higher tax rate on profits that ensue from a sudden windfall gain to a particular company or industry.⁹⁵ It is, in fact, a special tax on profit or a surcharge to existing (corporate) income tax. Additional taxes on the financial and banking sectors (Austria, Bulgaria, Cyprus, Hungary, Poland, etc.) and gambling,

91 Radvan and Neckář, 2016; Radvan and Svobodová, 2021, pp. 79–80.

92 Tyniewicz and Kozieł, 2021, p. 67.

93 Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments.

94 European Commission, 2024f.

95 Wikipedia, 2023.

including lotteries (Croatia, Czech Republic, Estonia, Lithuania, Netherlands, etc.) are typical.⁹⁶ The Czech Republic also adopted a levy on electricity from solar radiation in 2012.⁹⁷ The second Czech windfall tax – extraordinary tax on unexpected profits – is closely related to the global energy crisis in 2021–2023 and the Russian aggression in Ukraine and follows the IMF recommendations to institute windfall profits taxes targeted at economic rents in the energy sector, excluding renewable energy, to prevent hindering its further development.⁹⁸ Besides electricity and gas producers and traders, fossil fuel miners, fuel wholesalers, and refineries, provided annual sales are more than CZK 2 billion, it is also applied to banks whose annual interest yield exceeds CZK 6 billion.⁹⁹

Differences in taxation of business entities can cause differences in their competitive position and influence mergers and acquisitions. Higher taxation decreases the effect of invested capital, while lower taxation stimulates the inflow of capital. All these facts historically led to increasing competition between EU Member States. For example, the German tax rate on corporate income, including corporation tax, solidarity surcharge, and local trade tax, decreased from 37% in 1995 to 30% in 2008.¹⁰⁰ Moreover, the Czech corporate income tax fell from 45% in 1993 to 19% in 2010.¹⁰¹ Decreasing corporate income tax rates are visible not only in the EU but in almost all countries worldwide.

The first two directives, partially harmonising corporate income taxes, were adopted in 1990. The Merge Directive¹⁰² regulates the common system of taxation applicable to mergers, (partial) divisions, transfers of assets, and exchanges of shares. The Directive aims to remove fiscal obstacles to cross-border reorganisations involving companies situated in two or more EU Member States.¹⁰³

The Parent-Subsidiary Directive¹⁰⁴ is designed to facilitate smooth functioning in the taxation of groups of companies across the EU. The Directive aims to exempt dividends and other profit distributions paid by subsidiary companies to their parent company¹⁰⁵ from withholding taxes and to eliminate the double taxation of such

96 European Commission, 2024n.

97 Act No. 165/2012 Sb., on Supported Energy Sources and on Amendments to Certain Acts, as amended.

98 Wikipedia, 2023.

99 Mazars, 2023.

100 European Commission, 2008.

101 Ernst & Young, 2022.

102 Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States.

103 European Commission, 2024i.

104 Council Directive (EU) 2015/121 of 27 January 2015 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

105 A parent company is a company from an EU Member State that has a minimum holding of 10% in the capital of a company from another EU Member State.

income at the level of the parent company. In 2015, the anti-abuse rule was added to the Directive to prevent misuse in terms of tax evasion, tax fraud, or abusive practices. These rules are designed to tackle arrangements that are not genuine and do not reflect economic reality.¹⁰⁶

The third important Directive called the Interest & Royalty Directive was passed in 2003.¹⁰⁷ The Directive ensures that cross-border intra-group interest and royalty payments are treated as purely domestic payments (when the conditions of the Directive are met). It aims to avoid double taxation by abolishing withholding taxes on royalty and interest payments levied at the EU Member State of source when received by a group company in another EU Member State.¹⁰⁸

Given the need to ensure that taxes are paid where profits and value are generated, the Anti-Tax Avoidance Directive (ATAD)¹⁰⁹ was adopted in 2013 as one of the consequences of the OECD's initiative to combat base erosion and profit shifting (BEPS).¹¹⁰ The ATAD aims to harmonise the laws of all EU Member States to establish rules against the erosion of the corporate tax base in the internal market and simultaneously prevent the shifting of profits outside the internal market. At the same time, the ATAD seeks to prevent further obstacles in the internal market, such as double taxation. The ATAD contains five anti-abuse measures against common forms of aggressive tax planning. The CFC rule (controlled foreign company rule) deters profit shifting to a low/no tax country. The switchover rule prevents the double non-taxation of certain income. The exit taxation rule prevents companies from avoiding tax when re-locating assets. The interest limitation rule discourages artificial debt arrangements designed to minimise taxes. The rule on hybrid mismatches aims to prevent companies from exploiting national mismatches to avoid taxation.¹¹¹ Besides these substantial law rules, one more procedural rule was adopted within the ATAD: the GAAR (general anti-abuse rule) to counteract aggressive tax planning when other rules do not apply.¹¹²

As mentioned above, the GloBE rules shall be applied in all EU Member States. A global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the EU was unanimously agreed by EU Member States in 2022 and is ensured from 2024 by the Minimum Corporate Taxation Directive.¹¹³ The Directive rules apply to any large group, both domestic and international, with

106 European Commission, 2024k.

107 Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States.

108 European Commission, 2024h.

109 Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

110 Boháč and Hrdlička, 2018.

111 Council Directive (EU) 2017/952 of 29 May 2017 amending Directive (EU) 2016/1164 as regards hybrid mismatches with third countries.

112 European Commission, 2024o.

113 Council Directive (EU) 2022/2523 of 14 December 2022 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union.

combined annual financial revenues of more than EUR 750 million, with a presence in an EU Member State. The minimum corporate tax rate should be 15%. For example, if the effective tax rate for the entities in a particular jurisdiction is below the 15% minimum, the group must pay a top-up tax to increase its rate to 15%.¹¹⁴

The efforts of the EU to achieve the gradual harmonisation and alignment of tax law have not ended. One of the most important initiatives is the ‘Business in Europe: Framework for Income Taxation’ (BEFIT) adopted in September 2023, introducing common rules for computing the taxable results of group members that operate in the internal market. The purpose is for all members of the same group (the ‘BEFIT group’) to calculate their tax base in accordance with a common set of rules applied to their already prepared financial accounting statements. BEFIT should decrease tax compliance costs, support cross-border investments, and increase tax certainty for businesses operating in more than one EU Member State.¹¹⁵

For micro, small, and medium-sized enterprises (SMEs), the ‘Head Office Taxation System (HOT)’ is proposed to allow SMEs operating cross-border by way of permanent establishments the option to interact with only one tax administration that of its Head Office.¹¹⁶

The other proposal from September 2023 aims to set new rules to harmonise transfer pricing: a mechanism to determine the pricing of transactions between companies that are part of the same group (intra-group transactions). Nowadays, the ‘arm’s length’ principle (international OECD’s standards) is being applied: transactions between related entities of a multinational group must be priced on the same basis as transactions between third parties under comparable circumstances.¹¹⁷

Other older proposals are focused on the fight against the misuse of shell entities (entities in the EU with minimal to no economic activity) for tax purposes (the ‘Unshell proposal’ of 2021) so that they cannot benefit from any tax advantages.¹¹⁸ A debt-equity bias reduction allowance proposal (the ‘DEBRA proposal’ of 2022) aims to support businesses by introducing an allowance that will grant the same tax treatment to equity as debt.¹¹⁹

5.2. *Indirect Taxes*

The harmonisation efforts of the EU in the area of taxation are focused primarily on indirect taxes. Art. 113 TFEU which renders harmonisation ‘necessary to ensure the establishment and functioning of the internal market and to avoid distortion of competition’ is crucial. Regarding the proper functioning of the internal market, harmonisation is related to VAT (as general excise tax) and selected excise

114 European Commission, 2024j.

115 European Commission, 2024.

116 European Commission, 2024g.

117 European Commission, 2024m.

118 European Commission, 2024p.

119 European Commission, 2024a.

taxes. However, EU Member States have the right to adopt additional indirect taxes within their sovereignty, provided that these excise taxes follow the principles of free movement of persons, services, and capital.

When the European Economic Community was founded, except for France, all its Member States applied a multi-stage cumulative tax. Such a cascade tax was assessed on every transfer of raw materials, components, or final product, which led to the tendency of companies to become artificially concentrated. In 1954, France introduced a new type of indirect tax – a value-added tax – assessed only on the added value in every stage of the production of the final product. A new French tax served as an example of the first harmonised indirect tax being effective since 1970.

The core EU legislative text on VAT is now the VAT Directive.¹²⁰ According to the Directive, VAT is applied to transactions in various economic activities, encompassing the supply of goods and services, intra-Community acquisitions, imports, and other relevant transactions. It sets basic rules for VAT rates, rules for determining the place of supply, invoicing and record-keeping, deductions procedures for VAT refunds, and it accommodates special VAT schemes for specific categories of taxpayers, such as small businesses, and exemptions for certain types of supplies. Concerning the rates, EU law requires a standard VAT rate of at least 15% to be applied to most goods and services. EU Member States have the competence to set up to two reduced rates of at least 5%, one super-reduced rate lower than 5%, and one zero rate to a limited set of goods and services. To support small businesspersons, EU Member States may exempt taxable persons up to a certain annual turnover; interestingly, Hungary, Slovakia, and the Czech Republic negotiated the highest possible turnover. The other special schemes are VAT One Stop Shop – rules on cross-border business-to-consumer (B2C) e-commerce from 2021, and special schemes for farmers (engaged in agricultural, forestry, or fishing activities), travel agents, businesses dealing with second-hand goods (incl. works of art, collectors' items, and antiques; also incl. organisers of public auctions), and investment gold activities.¹²¹ EU Member States are allowed to use the reverse charge mechanism as an anti-fraud tool within the EU. Reverse charge means the liability to pay tax is on the recipient of the supply of goods or services instead of the supplier of such goods or services in respect of notified categories of supply.

Besides the VAT Directive, other legal documents are important for the proper functioning of VAT in the EU. There are two Council Regulations: VAT Implementing Regulation¹²² and VAT Administrative Cooperation Regulation,¹²³ and several other

120 Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax.

121 European Commission, 2024q.

122 Council Implementing Regulation (EU) No 282/2011 of 15 March 2011 laying down implementing measures for Directive 2006/112/EC on the common system of value added tax.

123 Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax.

Directive dealing with VAT refunds (EU business¹²⁴ and non-EU business),¹²⁵ VAT-free importation,¹²⁶ private consignments,¹²⁷ and travellers' allowances.¹²⁸ Based on Art. 395 of the VAT Directive, EU Member States may be authorised to derogate from common VAT rules to simplify the procedure for charging VAT or to prevent certain types of tax evasion or avoidance. The list of VAT derogations currently applied throughout the EU is available on the EU web page.¹²⁹

New forms of digital businesses are reflected in the EU's ambition to amend existing European rules in the area of indirect taxation. The 'VAT in the Digital Age (ViDA)' is a proposal to modernise and improve the EU's VAT system in connection with the development of the platform economy.¹³⁰

Selected excise taxes are imposed on the sale or use of specific products. The harmonised excise taxes are those on alcohol, tobacco, and energy. Harmonisation aims to prevent trade distortions in the single market. A unified approach should also ensure fair competition and reduce administrative burdens. The most important legal act at the European level is the 'Horizontal Directive',¹³¹ which lays down the general arrangements for excise tax and includes common provisions applicable to all products liable to excise taxes under EU law. The Directive defines the categories of products liable to excise taxes, principles of how to assess excise taxes, the types of authorised excise operators, and rules on the production, storage, and movement of excise products, incl. tax warehouses regulation. Tax warehouses are facilities authorised to produce, receive, store, and dispatch excise goods in duty suspension. If the goods are moving to another tax warehouse (or registered consignee), the excise tax is not paid. However, once these goods are released for consumption, the excise taxes must be paid. With regard to these rules, supervision is essential. Since 2013, the supervision has been fully digitalised, using the Excise Movement Control

124 Council Directive 2008/9/EC of 12 February 2008 laying down detailed rules for the refund of value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State.

125 Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes – Arrangements for the refund of value added tax to taxable persons not established in Community territory.

126 Council Directive 2009/132/EC of 19 October 2009 determining the scope of Art. 143(b) and (c) of Directive 2006/112/EC as regards exemption from value added tax on the final importation of certain goods.

127 Council Directive 2006/79/EC of 5 October 2006 on the exemption from taxes of imports of small consignments of goods of a non-commercial character from third countries.

128 Council Directive 2007/74/EC of 20 December 2007 on the exemption from value added tax and excise duty of goods imported by persons travelling from third countries.

129 European Commission, 2024r.

130 European Commission, 2024s.

131 Council Directive (EU) 2020/262 of 19 December 2019 laying down the general arrangements for excise duty.

System (EMCS). The administrative cooperation in the field of excise taxes is also included in the Council Regulation.¹³²

Excise taxes are regulated by the ‘Structural Directives’ and the ‘Rates Directives’ (directives on the approximation of rates), particularly for alcohol, tobacco products, and energy products, including electricity. Concerning alcohol, the directives¹³³ set the structures of excise taxes on alcohol and alcoholic beverages (beer, wine, intermediate products like port or sherry, and spirits), the categories of alcohol and alcoholic beverages liable to excise tax, and the tax bases. The directives include some special provisions; for example, small breweries and small distilleries benefit from reduced rates. Additionally, certain products and geographical regions are advantageous at lower rates (certain Greek, Italian, and Portuguese regions, ‘traditional’ rum produced in Guadeloupe, French Guiana, Martinique, and Réunion, certain alcoholic products produced in the autonomous regions of Madeira and of the Azores). The directives set only minimum rates that must be applied to each category of alcoholic beverage; EU Member States are free to set excise tax rates above these minima, according to their own national needs.¹³⁴

The directive regulating excise taxes on manufactured tobacco¹³⁵ defines the categories of manufactured tobacco products (cigarettes and ‘other tobacco products’), the principles of tobacco products’ taxation, and also the minimum rates to be applied. The minimum rate for cigarettes must consist of a specific component (of between 7.5% and 76.5% of the total tax burden expressed as a fixed amount per 1000 cigarettes) and an ad valorem component expressed as a percentage of the maximum retail selling price. The minimal tax of EUR 90 per 1000 cigarettes or at least 60% of the weighted average retail selling price must be achieved. However, if the excise tax of EUR 115 or more is applied, the criterion of 60% of the weighted average retail selling price must not be met. Portugal regions of the Azores and Madeira are allowed to use a reduced rate of up to 50% less than the required overall minimum excise tax on cigarettes. For ‘other tobacco products’, EU Member States are free to decide between a specific component or an ad valorem component, or a mixture of the two (50% of the weighted average retail selling price or EUR 60 per kilogram of the fine-cut smoking tobacco, 5% of the retail selling price or EUR 12 per 1000 items or per kilogram of cigars and cigarillos, 20% of the retail selling price or EUR 22 per kilogram of other smoking tobacco.¹³⁶

132 Council Regulation (EU) No 389/2012 on administrative cooperation in the field of excise duties as regards the content of electronic registers (subsequently amended by Council Regulations 2020/263, 2021/774 and 2023/246).

133 Council Directive 92/83/EEC of 19 October 1992 on the harmonization of the structures of excise duties on alcohol and alcoholic beverages; Council Directive 92/84/EEC of 19 October 1992 on the approximation of the rates of excise duty on alcohol and alcoholic beverages.

134 European Commission, 2024b.

135 Council Directive 2011/64/EU of 21 June 2011 on the structure and rates of excise duty applied to manufactured tobacco.

136 European Commission, 2024c.

The Energy Tax Directive¹³⁷ covers the excise taxes on all energy products used for heating and transport and on electricity. Fiscal marking of gas oils and kerosene to identify gas oil and kerosene subject to a reduced excise rate is regulated by the specific directive.¹³⁸ Similar to other excise taxes, the Directive sets the minimum excise tax rates that EU Member States must apply to energy products for fuel and transport and electricity (motor fuels: leaded and unleaded petrol, gas oil, kerosene, LPG, and natural gas; motor fuels used for commercial and industrial use: gas oil, kerosene, LPG, natural gas; heating and electricity: gas oil, heavy fuel oil, kerosene, LPG, natural gas, coal and coke, and electricity). The exemption for aircraft fuel (other than that used in private pleasure flying) from taxation is generally set in the Directive. However, EU Member States can tax aviation fuel for domestic flights and even for intra-EU flights (in the second case, under the bilateral agreements), not following the minimum excise tax rates.¹³⁹

Excise taxes on alcohol, tobacco, and energy are the only harmonised excise taxes in the EU. However, following the principles of free movement of persons, services, and capital, EU Member States can adopt additional indirect taxes (excise taxes) within their sovereignty. Several types of non-harmonised excise taxes collected in EU Member States can be identified. Taxes connected with motor vehicles were analysed above in the chapter on direct taxes. The other group of excise taxes aims to limit the consumption of unhealthy (sweet or salty) food and beverages: Denmark taxes ice cream, chocolate, and sweets, and non-alcoholic soft beverages are taxed in Belgium, Croatia, and Finland. Coffee is liable for tax in Croatia, Denmark, and Belgium. To limit the number of plastic bags, tax regulation is applied in Denmark, Sweden, Ireland, and Portugal. Finland has a specific tax on beverage packages. Additionally, Denmark collects tax on certain packaging. Almost all EU Member States have (usually local) taxes or charges on waste. Some others impose additional excise taxes on pollution (e.g., Denmark, Lithuania, Sweden, Slovenia, Estonia, and Italy) or fertilisers (Denmark, Sweden, etc.). Scandinavian and Baltic countries in particular, collect many more taxes connected with environmental protection (e.g., taxes on sealed NiCad-batteries in Denmark, tax on petroleum and natural gas resources in Lithuania, natural resources tax in Latvia, tax on natural gravel, and tax on chemicals in certain electronics in Sweden). Moreover, Finland adopted a pharmacy tax, and Malta, Greece, and Hungary taxed telecommunication services. Several EU Member States imposed taxes in connection with nuclear power plants (Sweden, Slovakia, and Germany). As there are several alternatives to harmonised tobacco products, several countries collect other non-harmonised taxes on tobacco products, such as chewing tobacco, heated tobacco products, and electronic cigarette

137 Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.

138 Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene.

139 European Commission, 2024d.

liquid (Denmark, Lithuania, Sweden, France, etc.).¹⁴⁰ The Czech Republic adopted four additional excises to the list of harmonised excise taxes on tobacco products: tax on rough tobacco, tax on heated tobacco products, tax on other tobacco products (with nicotine), and tax on products related to tobacco products (electronic cigarette liquids, nicotine sachets).¹⁴¹

6. Concluding Part

Tax law is defined as a system of legal norms regulating social relationships created, implemented, and expired in the process of creating public monetary funds. These social relationships regulated by the tax law are taxes *sensu lato* (in the broader sense). However, this chapter is focused only on several taxes *sensu lato* and deliberately omits charges and fees (because they are not harmonised and this situation does appear to remain unchanged in the future), customs (because the EU is the customs union and from the EU perspectives, customs have a completely different purpose and nature than taxes), and social security and health contributions (neither the EU nor the EU Member States consider these contributions as taxes).

Tax harmonisation in the EU is not merely an aim and a resulting condition. It is also the actual (positive or negative) process. Positive harmonisation means the process of approximation of the national tax systems when implementing directives and other legal instruments. Negative harmonisation results from the activities of the CJEU. The positive harmonisation process is politically complicated because of the importance of tax sovereignty for every EU Member State. A good example might be the corporate income tax rate. For several countries, mainly in Western Europe, low corporate income taxes might be an obstacle in terms of higher tax revenues, and they tend to harmonise the tax. Contrarily, economically weaker states prefer tax competition. They believe it might be a tool for catching up with economically more developed countries. This conflict of interest can also be perceived as a battle between (but not exclusively) old and new EU Member States. Simply, a car with the same engine cannot catch the car in front of it.¹⁴² Tax competitiveness issues play a crucial role when dealing with tax harmonisation. In addition, there are other arguments for national tax sovereignty: EU Member States should have the power to impose taxes to autonomously redistribute the proceeds of these taxes at their own discretion and need. They should use tax rates as one of the instruments of domestic economic policy with regard to specific economic backgrounds and development and historical consequences.

¹⁴⁰ European Commission, 2024n.

¹⁴¹ Act No. 353/2003 Sb., Excise Taxes Act, as amended.

¹⁴² Kysilka, 2019.

Supporters of tax harmonisation disagree with the benefits of tax competition. For example, Nerudová¹⁴³ states that

tax competition and the exploitation of mismatches between national tax systems have allowed many of the multinationals that use European infrastructure and other European public goods to use tax planning tools in a very aggressive way. ... Their economic power even allows them to negotiate with EU Member States on the tax advantages they will grant them in order to build a warehouse or a factory in that country.

Nerudová believes that unification would mean significantly eliminating aggressive tax planning techniques. However, Nerudová is a fan of competition in the area of tax rates. Skořepa¹⁴⁴ adds that low tax rates could serve as ‘an incentive to use low-taxed profits for reinvestment in the Czech Republic instead of sending them abroad’.

I believe that the ideal path is somewhere between tax harmonisation and tax sovereignty. Taxes are definitely a national tool that affects economic development. Tax issues should never become a coordinated policy at the EU level. The role of the EU should be relatively minimal and rather complementary. The EU’s task should be to prohibit tax discrimination, i.e., tax neutrality. I agree with Angerer that the EU should focus on ‘the elimination of tax obstacles to cross-border economic activity, the fight against harmful tax competition and tax evasion, and the promotion of greater cooperation between tax administrations in ensuring control and combating fraud’.¹⁴⁵ Tax coordination and harmonisation at the EU level can also solve new problematic issues such as the taxation of electronic businesses, demographic trends and pension system reforms, taxation of artificial intelligence, etc. Tax harmonisation can limit threats such as overexploitation of foreign capital and excessive protection of the national markets. Fair taxation of every taxpayer based on economic stimulation should be supported by sharing information between tax administrators so that the fight against tax evasion and tax avoidance¹⁴⁶ can be effective.

However, if tax harmonisation exceeds its limits, it could cause the ineffectiveness of the tax systems (both at the EU level and in individual countries) and increase administrative costs. Excessive harmonisation could also eliminate new good practices and sharing existing ones. I am not an advocate of unanimous decision-making in tax law issues at the EU level.¹⁴⁷ I believe that the rules stated in TFEU concerning taxation and the taxation principles expressed in the EU law and analysed in this

143 Nerudová, 2019.

144 Skořepa, 2019.

145 Angerer, 2023. European Commission, 2015.

146 Kozieł, Krügerová and Bučková, 2021, p. 267.

147 Pros and cons of the unanimous decision-making in tax law issues at the EU level are discussed by Vanistendael, 2018, pp. 99–121; and Schoueri, 2018, pp. 123–127.

Art. are sufficient for the future development of the EU tax law and tax law in EU Member States.

I have faith that the EU tax law is characterised by unanimity, and the EU tax law system works in terms of cooperation and equality between EU Member States in law and in fact. Old EU Member States are not in a more advantageous position than the new EU Member States with regard to these exceptions. Historically, an exception has been granted to all new EU Member States to provide for a transitional period within which the national tax regulation must be in line with European law. Exceptions were granted, for example, for VAT regulations in the late 1960s and early 1970s or for newly acceding countries in 2004, 2007, and 2013 with respect to energy excise taxes. National taxes are in line with EU law, where it is necessary with regard to cooperation and harmonisation aspects. EU Member States have adequate powers to enforce their own national policies, including tax policies. Contrary to popular belief, it should be stressed that harmonisation and cooperation policies at the EU level are focused mainly on intra-Union business when prohibiting tax discrimination, strengthening tax neutrality, eliminating tax obstacles to cross-border economic activities, fighting against harmful tax competition and tax evasion, promoting greater cooperation between tax administrations in ensuring control and combating fraud, sharing information between tax administrators, etc.

All these statements and findings are also confirmed by the fact that new initiatives significantly amending substantive tax law are not coming from the EU but from the OECD.¹⁴⁸ The two most important examples are the initiative to combat base erosion and profit shifting (BEPS), which emphasises the need to ensure that taxes are paid where profits and value are generated, and the minimum effective taxation of large (multinational) corporations introduction of 15% replacing any debates concerning the common consolidated corporate tax base. Moreover, the new initiatives of the EU itself focus on intra-Union and international business. This applies, for example, to BEFIT, HOT, new transfer pricing rules, Unshell, or DEBRA in the area of direct taxes, or ViDA, FitFor55 package, or Europe's Beating Cancer Plan in the area of indirect taxes. I strongly believe that digital and green transitions will significantly influence the EU tax law in the future.

All the concluding remarks confirm the hypothesis that the balance between the tax harmonisation at the EU level and tax cooperation of national tax administrations on one side and the tax competition between EU Member States on the other side expresses the equality among EU Member States.

148 Kokott, 2022, pp. 4–5; Tenore, 2018, pp. 19–20.

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PART V

COMMON REGULATION
FOR STRENGTH – UNITED
TO BE EFFECTIVE

EQUAL RULES, UNEQUAL EFFECTS: CHALLENGING MEMBER STATE EQUALITY THROUGH ONE-SIZE-FITS-ALL REGULATIONS



SANJA SAVČIĆ

Abstract

The EU aims to improve the living and working conditions of its citizens while fostering economic unity, with a particular focus on reducing regional disparities. The EU holds exclusive competence in certain areas, with Member States only able to legislate when authorised or required by EU law. In areas of shared competence, both the EU and Member States can legislate, but Member States must act only when the EU has not already exercised its authority. Although the EU does not have general competence over private law, it harmonises certain aspects of private law to support its broader objectives. The EU primarily uses directives to regulate general private law, allowing flexibility for Member States to adapt laws to their legal systems. However, the shift towards regulations is seen as a response to the interconnectedness between trade and private law, promoting uniformity across Member States. This approach enhances the single market but raises questions about its compatibility with diverse national legal traditions. The effectiveness of this regulatory shift in promoting equality will depend on the EU's ability to balance uniformity with respect for national legal practices.

This chapter also aims to evaluate the development trends in the unification of law and their outcomes, presented through an explanatory study of the General Data Protection Regulation, an act that has changed not only the legal framework for the protection and processing of personal data but also the business environment. Given that Member States do not have the economic strength as the EU, a question has

Sanja Savčić (2026) 'Equal Rules, Unequal Effects: Challenging Member State Equality Through One-Size-Fits-All Regulations'. In: David Sehnálek (ed.) *Unequal Equals? The Status of Member States in an Integrating European Union*, pp. 459–485. Miskolc–Budapest, Central European Academic Publishing.



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arisen as to whether the regulation has limited the ability of some states to shape an appropriate but protective framework for their own economic interests.

Keywords: private law, legal tradition, directives, regulations, unification of private law, harmonisation of private law, data protection

1. Introduction

This chapter examines the implications of the EU's increasing reliance on regulations in place of directives as its preferred legislative instrument, with a particular focus on the principle of equality among Member States. The transition from directives, which afford national authorities discretion in transposition and implementation, to directly-applicable regulations has marked a significant evolution in the EU's legislative practice. While often justified by the need for legal certainty, uniformity, and efficiency, this development also raises important questions on the distribution of power and preservation of equality within the EU's multi-level legal order.

The principle of equality of Member States, enshrined in Art. 4(2) of the Treaty on European Union (TEU), is a cornerstone of the EU's constitutional architecture. It affirms the equal status of all Member States under EU law, irrespective of their demographic, economic, or political weight, and entails a commitment to mutual respect for national identities and legal traditions. However, the replacement of directives with regulations may unsettle this balance by diminishing national autonomy in areas traditionally subject to domestic legal, political, or cultural differentiation. While the uniformity imposed by regulations ensures consistent application, it may inadvertently obscure or aggravate underlying asymmetries among Member States in terms of administrative capacity, legal infrastructure, or institutional trust. This is of particular relevance to civil law, since the private interest is exceptionally attractive to state intervention.

This leads to the central question this study seeks to address: Has the replacement of directives with regulations endangered the principle of equality among the EU Member States? This chapter addresses this question in five sections. The first section examines general rules on the competence of the EU in civil law. The second examines the legal tradition in civil law, which aims to illustrate the importance of national laws in civil law. The third section evaluates approximation or harmonisation in civil law, and the fourth section examines the limitations of these processes. The fifth section outlines explanatory studies on legal protection of data from directives to regulation.

2. On EU Competence in Civil Law Matters

The EU and its historical predecessors have approached governance without clearly differentiating public and private sectors.¹ The founders adopted a functional perspective, aiming to establish a cohesive entity that promotes collective goals. When Member States decided to join the EU, they agreed to transfer a portion of their sovereignty to the Union, aiming to foster economic and social progress across the Member States by collaborating with each other to dismantle barriers that have historically divided Europe.²

The EU mainly aimed to enhance the living and working conditions of its citizens while promoting economic unity. This involves a commitment to reducing disparities between regions, focusing on uplifting less advantaged areas. The EU seeks to ensure that all regions develop constantly to achieve the essential objective of the improvement of the living and working conditions across Europe and strengthen the unity of economies, reducing the differences between Member States.³ According to Art. 2(1) of the Treaty on the Functioning of the European Union (TFEU), the EU holds exclusive competence in specific areas, meaning that only the EU can legislate and create legally binding acts in those domains. Member States can legislate only if the EU specifically authorises the legislation.⁴

In areas of shared competence, both the EU and Member States have the authority to legislate and adopt binding acts. However, Member States may exercise their legislative competence only when the Union has not already acted in that area, or if the Union has decided to cease exercising its competence.⁵ This framework is designed to maintain a balance of authority between the EU and its Member States, ensuring that actions are coordinated and effective in achieving common objectives.⁶

Discussion on traditional division of law into private and public is not particularly relevant in the EU law.⁷ The function of the legislature matters more. Unlike traditional legal frameworks in Member States, the EU's legislative approach is rather

- 1 Distinction between public and private sectors is typical for traditional legal systems, even without is common criteria in theory for making clear boundaries between these two parts of law. Vodinić, 1982, pp. 657–709; Padjen, 2007, pp. 443–461.
- 2 Treaty on the Functioning of the European Union, Preamble, para. 3.
- 3 TFEU, Preamble, paras. 4, 6.
- 4 TFEU, Art. 2/1. The unity as such could not be reached merely by unification of laws. Namely, the coherence of a country's legal system can be disrupted by how European law, once implemented, is interpreted. EU directives must be interpreted based on their wording and intended purpose. However, this approach often conflicts with traditional methods of interpreting national law, which tend to focus more on legislative history and the overall structure of the legal system. Smits, 2011a, p. 118.
- 5 TFEU, Art. 2/2.
- 6 Smits, 2006, pp. 68–74.
- 7 According to Semmelmann, two aspects raise important constitutional questions related to the public-private distinction. One is the thorny issue of the legal basis for the adoption of private law measures, and the second is the increasing influence of what is referred to as 'social', 'constitutional', or 'political', in other words 'public' values in private law. Semmelmann, 2012, p. 27.

functional, meaning that the criterion for legislative action is whether the impending issue holds common relevance for the Member States and the Union as a whole.⁸ Consequently, the EU does not possess general competence over all aspects of private law. Certain important elements that fall under the scope of private law in traditional meaning are addressed within the EU framework. However, while the EU may have a limited role in private law, it still plays a crucial part in harmonising certain private-law matters that are essential for achieving common goals and ensuring cohesion among Member States. To date, limited attention has been given to the normative question of what the diminishing role of the state in shaping private law implies for the regulation of private legal relationships. A revised theory of the sources of private law is clearly needed – one that places less emphasis on the nation-state and instead considers the appropriate level of regulation (whether local, regional, national, European, or supranational), relevant actors (such as legislators, regulatory bodies, courts, or the parties themselves), and specific subjects to be governed.⁹

With respect to this, the TFEU obtains the EU's legislative authority regarding private law in Arts. 114, 115, and 352. Art. 114 empowers the European Parliament and the Council to adopt measures aimed at harmonising laws, regulations, or administrative actions within Member States which are essential for the establishment and functioning of the internal market.¹⁰ This process is followed in accordance with the ordinary legislative procedure, which involves collaboration with the Economic and Social Committee to ensure that various perspectives are considered. Additionally, Art. 115 outlines a special legislative procedure in which the Council, acting unanimously, is responsible for issuing directives to align the laws and regulations of Member States that directly affect the establishment or functioning of the internal market.¹¹

Finally, Art. 352 provides a flexible legal basis for the EU to take necessary measures in areas not explicitly covered by other provisions, if such measures are necessary for achieving the EU's objectives.¹² Using the procedure for monitoring the subsidiarity principle, the Commission shall draw national Parliament's attention to proposals based on this provision.¹³ Since its establishment, the EU has focused on several private-law issues deemed essential for the internal market, including the regulation of freedom of establishment, which facilitates cross-border business operations, and company law, which aims to foster entrepreneurship, consumer protection, credit contracts, intellectual property law, and the recently regulated usage

8 Considering the functionality of the EU private law, scholars emphasises that this approach could lead to injustice in European private law, for which Eurocentrism should be responsible. Hesselink, 2022, p. 116.

9 Smits, 2011b, p. 8.

10 TFEU, Art. 114/1.

11 TFEU, Art. 115.

12 TFEU, Art. 352/1.

13 TFEU, Art. 352/2.

of Artificial-Intelligence systems. This comprehensive approach fosters trust and security for both consumers and businesses in the EU.

Under the scope of general private law, the EU primarily uses directives as its legislative tool. This approach helps it set specific goals for Member States to achieve while allowing each country the flexibility to develop its laws to meet these objectives. By doing so, states can create provisions that align with their unique legal systems, traditions, and the interests of their citizens, ensuring that the regulations are more relevant and accessible.

According to the principle of subsidiarity, the EU should only act in areas that do not fall under its exclusive competence when the objectives of such an action cannot be effectively achieved by Member States at central, regional, or local levels.¹⁴

Moreover, when EU takes action on matters not explicitly governed by its law, the principle of proportionality applies: the content and form of EU actions should not exceed what is necessary to achieve the objectives set forth in the Treaties.¹⁵ This ensures that EU measures are appropriate and tailored to their goals, balancing the need for effective action with respect for the autonomy of Member States. While special conditions apply, the expansive nature of Art. 352 permits the EU to act in situations when it is essential to create new legal frameworks rather than merely harmonising or replacing the existing national laws.¹⁶

According to the principle of subsidiarity, enshrined in Art. 5(3) of TEU, the EU should act in areas outside its exclusive competence only when the objectives of proposed actions cannot be sufficiently achieved by the Member States, whether at the central, regional, or local levels. Complementing this, the principle of proportionality, as outlined in Art. 5(4) of TEU, requires that the content and form of the EU action must not exceed what is necessary to achieve the objectives of the Treaties. These principles are designed to safeguard the autonomy of Member States and ensure that the EU action remains both appropriate and restrained.

However, in practice, tensions have emerged, particularly in areas traditionally reserved for national regulation, such as private law, family law, or inheritance law. The broad but ambiguous wording of Art. 352 of TFEU, which allows the EU to adopt measures deemed necessary to attain treaty objectives even in the absence of specific legal bases, has raised concerns about an expansive interpretation of EU competences. Rather than limiting itself to coordination or harmonisation, the EU has sometimes created new legal frameworks, potentially encroaching upon legal

¹⁴ TFEU, Art. 5/3.

¹⁵ TFEU, Art. 5/4.

¹⁶ Mañko, 2015, p. 12.

domains deeply rooted in national traditions and sensitive to domestic constitutional identities.¹⁷

When such circumstances arise, the Council must act unanimously, based on a proposal from the Commission and after securing the consent of the European Parliament. This ensures that any measures taken are well-considered and reflect a consensus among Member States.¹⁸

Given the EU's functional legislative approach aimed at protecting the single market, the shift from directives to regulations can be understood in the context of the close relationship between trade, which is at the core of European integration, and private law, as it is understood in traditional approaches. Therefore, targeting issues as the EU goal rather than pure national matters, leads to the movement on legal acts area. Namely, obvious expansion of regulations is the natural consequence of the current understanding of the objectives of a single market. Considering that regulations provide a uniform legal framework that applies directly across all Member States, this uniformity enhances the efficiency of cross-border trade and ensures that businesses and consumers operate under the same set of rules. The transition to regulations may strengthen interrelationships within the EU by fostering a more cohesive legal environment.

However, from the perspective of private law, the implications of this legislative shift warrant deeper examination. On the one hand, the use of regulations can promote equality by ensuring that all citizens and businesses are subject to the same legal standards, thereby preventing unequal treatment arising from varying national laws.¹⁹ On the other, one could argue that an over-reliance on regulations might signal a failure to adequately address the unique legal traditions and contexts of Member States. If regulations are perceived as top-down impositions rather than

17 Court of Justice of the European Union (CJEU) has generally supported a broad interpretation of EU competences. In *Spain v. Council* (C-36/98) and *Germany v. Parliament and Council* (C-376/98), the Court has emphasised the Union's ability to legislate where internal market objectives are at stake, sometimes at the expense of national regulatory autonomy. While this jurisprudence strengthens the legal basis for the EU action, it also fuels debates over whether the principles of subsidiarity and proportionality are effectively limiting EU overreach. The principles of subsidiarity and proportionality have come under increasing scrutiny in a recent case law. In C-662/23 (*Zimir*), the CJEU imposed procedural obligations on national asylum systems, raising concerns over EU overreach.

18 TFEU, Art. 352/1.

19 Ugo Mattei emphasised that the development of a regulatory framework should not be limited to a purely technocratic effort aimed at achieving harmonisation or uniformity. Instead, it must evolve into a political dialogue through which fundamental values are balanced and agreed upon via democratically accountable mechanisms. For European citizens to view new institutional arrangements as legitimate, they must develop trust and confidence in them as instruments for advancing social justice. If key decisions about the social justice model underpinning the market order are obscured behind technical procedures, it will risk generating widespread disillusionment with the ideals and legitimacy of the EU. Accordingly, the Commission, the Council of Ministers, and the European Parliament are urged to reorient the initiative, critically reassess the scope and aims of the Action Plan, and take responsibility for guiding the development of European private law so as to ensure the legitimacy of its vision of social justice. Mattei, 2004, pp. 673–674.

collaborative frameworks, they could create challenges for Member States in aligning their legal systems with EU mandates. This could inadvertently highlight disparities rather than promote equality, especially if Member States struggle to implement these regulations effectively within their legal contexts.

To conclude, while the shift towards regulations can enhance integration and promote equality within the EU, assessing whether these measures are genuinely responsive to the diverse legal landscapes of Member States is essential. The effectiveness of this approach in achieving true equality will depend on the EU's ability to balance uniformity with national legal traditions and practices.

3. On Legal Tradition in Civil Law Matters

The six European nations that signed the Treaty of Rome in 1957 maintained their distinct civil laws, functioning independently from one another. These laws were applied and interpreted within national judicial systems, and their autonomy was thus emphasised. Even when the legal provisions of two countries overlapped because of historical factors, their courts were not expected to operate in the same manner or share insights when handling similar cases.²⁰

National private law was not merely the product of historical legislative acts from individual countries; it was deeply intertwined with the political and ideological developments that shaped modern European states. Civil codes symbolised the existence of these nations as political and legal entities, carrying significance comparable to that of constitutional documents.²¹

Given these dynamics, unsurprisingly, the Treaty of Rome was primarily oriented towards public law. The four freedoms it sought to establish – the free movement of goods, services, people, and capital – could be achieved without intervening in national civil laws. This approach not only protected European civil codes from the forces of Europeanisation but also, to some extent, safeguarded the sovereignty of the Member States. However, over time, this regulatory framework proved unsustainable. As the EU expanded and the market evolved, the line between public and private law began to blur under the pressures of functionalism.²²

EU legislation derives its legitimacy from a partial surrender of national sovereignty, explicitly articulated in the founding Treaty. However, the enumerated powers of the community did not explicitly encompass private law. Consequently, EU legislators found it necessary to demonstrate that a common market could not be created without harmonising the private laws of Member States. In accordance

²⁰ Caruso, 1997, pp. 8–9.

²¹ Caruso, 1997, p. 9.

²² Caruso, 1997, p. 9.

with Art. 100A, they had to persuasively argue that national private laws ‘directly impact the establishment and functioning of the common market’, thus justifying the issuance of directives for the approximation of such laws.²³

4. On Approximation of Law

In the context of EU law, the terms approximation and harmonisation are related but not identical. Approximation refers to the earlier practice of gradually bringing national laws closer together, especially in cases in which legal differences could disrupt the internal market. This approach, which dates back to the early European Economic Community treaties, allowed Member States more freedom and did not require full legal consistency. Conversely, harmonisation gained importance with later EU treaties and involves a more structured and binding method for aligning laws. It usually takes the form of directives that set common rules for all Member States, either setting minimum requirements or enforcing complete alignment. Essentially, approximation is a looser, more flexible process, while harmonisation seeks a more unified legal system across the EU.

‘Approximation of laws’ involves aligning the national laws of EU Member States with a common set of rules, standards, or regulations established at the EU level. This process is typically executed through EU directives, which require Member States to adjust their national laws to comply with certain European norms.²⁴ Harmonisation has a clear goal, to serve a common objective. Moreover, harmonisation is a means of achieving legal consistency and maintaining balance between different legal traditions. By guarding legal traditions and the core of particular legal systems, harmonisation has a potential to ensure greater legal certainty and predictability in cross-border legal matters. This process facilitates horizontal cooperation between Member States and reduces barriers to the free movement of people, goods, services, and capital within the EU. Thus, the approximation of laws plays a crucial role in advancing integration and the functioning of the EU’s single market.²⁵

Approximation or harmonisation of certain legal concepts refers to the process of gradually eliminating or reducing divergences in the laws of different countries. These differences often arise from varying national legal traditions, interpretations, and practices. The goal is to ensure a more consistent and unified approach to key legal principles across all EU Member States, thereby fostering greater coherence within the broader European legal framework. As mentioned earlier, the harmonisation process is intrinsically linked to the broader EU objectives, which varies

²³ Caruso, 1997, p. 10.

²⁴ LexisNexis EU Law expert, 2024.

²⁵ Vukadin, 2015, p. 194.

depending on the specific context. In sectors aimed at achieving a high level of harmonisation, the usual measure is the adaptation of regulations at the European level. Regulations do not require national transposition but are directly applicable in all Member States. This significantly reduces the margin for individual interpretation or adaptation by national governments, ensuring the uniform application of laws across the EU.²⁶ Maximum harmonisation seeks to establish uniform legal standards across the EU, leaving little room for variation among Member States.

Maximum harmonisation is typically pursued in areas where a high degree of consistency is necessary to ensure the functioning of the EU's single market, such as in trade, competition, and consumer protection laws.²⁷ When this is not the case, directives are more appropriate instruments, as they establish a framework for further legislation in each Member State or a mandatory common standard that must be met. However, Member States retain some degree of discretion in how they implement the directive. This allows national laws to reflect local conditions, traditions, or specific circumstances, while still achieving a degree of convergence on key issues. In the context of the principle of 'different but equal', directives seem to protect the interests of both the EU and those of the Member States, as this approach facilitates the preservation of the diversity of legal and cultural systems in each Member State.

Nonetheless, both approaches share the same goal: the reduction of legal fragmentation and the elimination of obstacles to greater, and eventually complete, integration within the EU. By narrowing gaps between national laws, the EU seeks to eliminate barriers to the free movement of goods, services, people, and capital, while enhancing cooperation between Member States. The approximation of law flows in accordance with two guiding principles: subsidiarity and proportionality. To clarify, subsidiarity means that the EU only acts when objectives cannot be achieved at the national, regional, or local level. When this is the case, the EU's intervention is limited to measures that are strictly necessary to achieve the defined goals. Regardless of the level of harmonisation or the chosen approach, the approximation of law is an ongoing, and often never-ending, process. It involves not only the adoption of EU-originated legal acts but also the adaptation of national legal systems.

26 Certain authors perceive elements of state interventionism within the mechanisms of legal harmonisation, which may be regarded as unwarranted within the domain of private law. Nikolić, 2008, p. 430.

27 Novković, 2010, p. 276.

5. Weak Points of Approximation of Law in Civil Matters

Although the core goals of the European Communities have largely remained unchanged since their inception, the environment in which these goals are pursued has evolved significantly. Direct and indirect factors have played a crucial role in reshaping the EU. Key events and developments, such as the EU's enlargement, bringing in states with different legal and cultural traditions, the 2008 global financial crisis, Brexit, the COVID-19 pandemic, conflicts in Ukraine and Gaza, and advancements in digitalisation and artificial intelligence, have all had profound impacts. These events have affected not only the politics, economy, and market but also the environment and human rights within the EU and its Member States. To understand the issue of the approximation of law in civil law matters, it is important to define the core challenges involved.

Typically, discussions on EU law often focus on whether the EU act should apply directly, as in the case of regulations, or whether national law should be adopted to implement a directive. This can give the impression that the question of harmonisation is simply about the mode of application. However, the process is much more complex than it may appear when reduced to a formal explanation of procedures for application or adoption.

First, notably, that EU law lacks the characteristics of a fully developed legal system, despite the existence of tens of thousands of regulatory acts. In the absence of comprehensive normative competence, only certain aspects of legally relevant matters are addressed. This sector-specific regulation is often fragmented and unclear, complicating its application and rendering the overall legal framework dysfunctional.²⁸ From the perspective of Member States, harmonising national laws requires not only the implementation of directives but also the adaptation of numerous sector-specific regulations. The challenge lies not just in the complexity of the implementation process, but in its consequences for the national legal system. When a single directive is to be implemented, a Member State typically needs to amend multiple legal acts. For citizens, this can create instability and uncertainty, particularly in civil law matters where private interests and the autonomy of will are paramount.

Moreover, in the context of civil law, it is essential to recognise that written legal acts are not the only source of legal rules; customs also hold significance. Additionally, public order – which is not exhausted in the term of written regulations but encompasses legal principles, societal morals, and good customs – has an obligatory nature in private law relationships.

The situation is not much different when it comes to regulations that Member States apply directly.²⁹ To bring national law into compliance with a regulation, numerous legal acts may need to be amended, adopted, or repealed. This issue arises

²⁸ Nikolic, 2004, p. 187.

²⁹ Bobek, 2013, pp. 143–153.

even with regulations that introduce entirely new sectors, such as those regulating artificial intelligence. To be precise, the exponential use of digital technologies and its continuous and dynamic development, especially in the case of artificial intelligence and blockchain technology, present new challenges for legislative authorities of Member States. The task is burdensome for Member States, considering that national laws do not necessarily align with EU standards set by new regulations. New EU members have been facing this issue since their accession. Unfortunately, the gap between ‘old’ and ‘new’ EU members seems more pronounced than ever.³⁰

One of the key challenges faced by national legislators is the need for rapid legislative changes. This urgency often leads to significant consequences for legal systems that are inadequately prepared. A major contributing factor is the lack of a clear and coherent strategy for national law development. In many cases, regulations are drafted hastily, often with the primary goal of meeting external standards or deadlines. As a result, the legislative process frequently lacks the necessary depth and foresight, hindering the creation of a stable and well-structured legal framework. Furthermore, economic impacts of specific regulations are rarely assessed, which means that decisions are made without a full understanding of their long-term effects on the economy and society.³¹

Moreover, EU expectations often overlook the crucial fact that a legal norm can only be truly effective if it aligns with the level of legal awareness within the population and the specific socio-economic conditions of a given society. Even the most well-crafted and technically effective legal solutions in one Member State may not be directly applicable or suitable for another, particularly when social, cultural, and legal contexts differ significantly. For example, legal standards adopted in more developed Member States, though technically achievable, often require much higher material investments in less developed countries. In these cases, whether the benefits of these standards outweigh the associated costs is not always clear.

Furthermore, the imposition of high legal standards without sufficient flexibility to adapt them to the unique circumstances of each national society can create a significant disconnect between the normative framework and the real-world conditions to which these standards must be applied. This growing misalignment can lead to unwilling situations where regulations, despite being officially enacted, are not effectively implemented or adhered to in practice, mainly because the content of these regulations is out of traditional understanding of law in a particular state. The result is often a proliferation of laws and regulations that, while formally adopted, fail to achieve their intended goals or are disregarded by those they are meant to govern.³²

30 Micklitz, 2008, pp. 37–47.

31 Nikolic, 2004, p. 202.

32 Nikolic, 2004, p. 203.

The insistence on unifying legal frameworks by imposing normative solutions can disrupt the internal coherence of national legal systems.³³ This undermines trust in the legal system as a whole, ultimately eroding its effectiveness. When legal norms are imposed without considering the specificities of the domestic context, it can lead to a mismatch between the objectives and practical application of law, which diminishes the legitimacy of the legal system in the eyes of the public. As a result, not only does the legal system become less effective in achieving its goals, but public confidence in the rule of law is also weakened.³⁴

Finally, though both directives and regulations are appropriate mechanisms for achieving the goal of the EU, the transformation of directives to regulations garnered the attention of the EU institutions and scholars. Arguments for this tendency are found in explanatory documents, accompanied to recent regulation and directives. Some of them could be outlined in the context of the topic. Initially, recent directives are, from the normative perspective, closed to regulations, since they contain detailed provisions. This left narrow space for Member States' manoeuvres. Besides, expenditure for the transposition of directives is out of clear and full evaluation, about which the Member States are not overtly concerned. They oppose the adoption of regulations not solely on principled grounds, but rather out of a preference for directives, which – despite their susceptibility to inefficiencies such as delayed or flawed transposition and resulting legal fragmentation – facilitate greater national discretion. While regulations offer the prospect of immediate and uniform application, some Member States appear to favour the flexibility inherent in directives, even at the cost of coherence. If the complexity of internationalisation and Europeanisation is introduced as a relevant factor – contexts in which directives are employed at an especially intensive level – consideration of whether regulations or directives constitute the appropriate legal instrument must necessarily include the requirement of legal certainty.³⁵

6. Explanatory Study: Data Protection – From Directive to Regulation: Step Forward or Step Backward the Equality?

The adoption of regulations in areas initially governed by directives reflects a broader tendency within the EU to establish a more unified legislative framework – one intended to ensure a formally equal legal environment across all Member States. However, this shift has given rise to significant debate over whether such a transformation may, in practice, place Member States in an unequal position. Disparities are

33 Cherednychenko, 2023, pp. 2–6.

34 Barbic, 2004, p. 111.

35 Křepelka, 2021, pp. 793–795.

largely attributed to variations in legal culture, financial capacity, and institutional ability to integrate new rules into national legal systems.

Despite these concerns, regulations continue to be adopted, and new proposals are being prepared. Nevertheless, a consensus has yet to be reached on whether this legislative instrument is the most appropriate mechanism – and more fundamentally, whether the transformation brings more benefits than drawbacks. Although numerous studies have examined the effects of this shift with examples,³⁶ the present study offers an explanatory case study focused on data protection. This area is particularly illustrative, as the implications of the regulatory transformation extend well beyond the boundaries of data protection alone.

The origins of the European data-protection regime can be traced to national and international legal instruments introduced throughout the 20th century which aimed to address the evolving challenges surrounding privacy, personal data, and the increasing flow of digital information across borders. A pivotal milestone in this development was the 1980 Organisation for Economic Co-operation and Development (OECD) Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.³⁷ While these guidelines were non-binding, they marked a significant shift in global awareness of risks associated with data processing and international data transfers. It was a clear sign that the need for a balance between the growing use of digital technology and the protection of individuals' privacy rights were recognised. OECD Guidelines also set the framework for further legislative actions.

Another significant development was the adoption of the Council of Europe's Convention 108 in 1981.³⁸ Convention 108 was the first legally binding international treaty designed to protect individuals' personal data and regulate its cross-border movement; therefore, it remains one of the foundation legal instruments in European data-protection history. It provided a framework for legislation on the national level, which led to adoption of national data-protection laws, aiming to ensure the security of personal information, with full respect for individuals' privacy rights.

In 1995, the EU took significant steps to strengthen privacy protection with the enactment of Directive 95/46/EC.³⁹ This directive aimed to address challenges posed by the increasing use of automated data processing, ensuring that individuals' personal data were processed fairly, transparently, and in compliance with stringent safeguards. The directive also sought to facilitate the free movement of personal data across EU Member States by establishing a uniform set of rules, requiring each Member State to implement national laws that met minimum standards for data protection. This approach was grounded in the recognition of privacy as a fundamental right, as enshrined in Art. 8 of the European Convention on Human Rights.

36 Křepelka, 2023, pp. 289–313; Křepelka, 2024, pp. 22–35.

37 OECD, 2002.

38 United Nations, 1948.

39 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and on the free movement of such data, Official Law Journal L 281, 23.11.1995.

Simultaneously, with technology and data practices expansion, society faced the situation in which the directive does not sufficiently address emerging challenges.⁴⁰ In response, the EU introduced Regulation (EU) 2016/679, commonly known as the General Data Protection Regulation (GDPR),⁴¹ which came into force in 2018. The GDPR underscores an effort of the European legislatures to harmonise data-protection standards within the EU and particularly targets the need for a comprehensive framework for addressing the issue of handling personal data in the digital age. Imposing robust obligations on businesses and organisations, the GDPR established global data-protection practices, setting a legal framework for privacy protection worldwide. In short, the European data-protection regime has evolved over several decades, moving from non-binding guidelines to a robust and comprehensive regulatory framework designed to safeguard individual privacy in an increasingly interconnected and digital world.⁴² We also present the relevant provisions of Directive 95/46 in the next section.

6.1. General Remarks on Data Protection Directive (Directive 95/46)

Privacy has been recognised as a fundamental right in several international documents, adopted in the aftermath of World War II. Among them, the most important are the Universal Declaration of Human Rights (UN, 1948),⁴³ the European Convention on Human Rights (Council of Europe, 1950),⁴⁴ and the International Covenant on Civil and Political Rights (UN, 1966).⁴⁵ Each of these documents recognised the importance of protecting individuals from abuses of power, particularly by safeguarding their personal data. It is not just the sign of shifting attention of authorities to individuals, but the sign of willingness to keep the development of measures for privacy and data protection. Reinforcing the right to privacy as a

40 The structure of the legislative package – comprising both a regulation and directive – highlights concerns regarding its overall coherence and completeness. The primary weakness lies in the significantly lower level of protection provided by the proposed directive than the regulation. This discrepancy can be analysed on several levels. Most Member States found the idea of a regulation extending into the field of criminal law enforcement unacceptable, even with appropriate safeguards. An alternative approach – a directive mirroring the regulation in substance but allowing for national flexibility – was feasible but not adopted by the Commission. As a result, inconsistencies have emerged, which are particularly problematic in light of the growing exchange of information between public and private entities (such as law enforcement, banks, telecom providers, and travel agencies). A lack of consistency at this interface risks serious practical consequences. Notably, related areas such as taxation, customs, and border control, already covered by Directive 95/46/EC, would fall under the scope of the proposed Regulation, further complicating the legal landscape. Hustinx, 2014, p. 28.

41 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal of the European Union, L 119, 04.05.2016.

42 Uribe, 2024.

43 United Nations, 1948.

44 European Courts of Human Rights, 1950.

45 United Nations, 1966.

fundamental aspect of human dignity and freedom, international documents shaped legal frameworks or the foundation for the later development of specific privacy- and data-protection laws.

The broad use of personal data by the private sector began in earnest with the advent and rapid adoption of Information and Communication Technology (ICT) in the 1970s. This shift raised significant concerns about the potential misuse of personal data, underscoring the need for regulatory measures to safeguard individuals' privacy. In response, a series of specific regulations were introduced during the 1970s and 1980s to govern the processing of personal data. These included international instruments such as the Council of Europe Convention No. 108 (1981),⁴⁶ the OECD Privacy Guidelines (1980),⁴⁷ and national laws.⁴⁸

However, these rules were not sufficiently harmonised at the EU level. While some Member States imposed strict controls and procedures on data processing, others had no regulations in place. This lack of uniformity created significant barriers to the development of the EU's internal market, particularly the free movement of goods, services, and people. To address this issue, the EU created the Data Protection Directive,⁴⁹ which aimed to harmonise data-protection laws across Member States. The directive was designed not only to safeguard individual privacy but also facilitate cross-border trade and ensure that data-protection standards were consistent throughout the EU, thus strengthening the internal market (the 'first pillar').⁵⁰

The distinction between the broader right to privacy and the specific protection of personal data is clearly articulated in more recent legal texts, such as the Charter of Fundamental Rights of the European Union.⁵¹ The charter distinguishes these two aspects by dedicating separate provisions to each: Art. 7 protects the right to respect private and family life, while Art. 8 specifically addresses the protection of personal data. This distinction highlights the growing recognition that while privacy encompasses a broad range of personal freedoms, the protection of personal data requires distinct legal safeguards owing to the increasing role of digital information in modern life.

In response to rising concerns over personal data processing, the EU focused its legislative efforts on data protection, culminating in the adoption of the Data Protection Directive. This directive was designed to regulate the processing of personal data, whether through automated means or not. Its core principle is that

46 Council of Europe, 1981.

47 OECD, 2002.

48 Among the first states that explicitly regulated data protection were France (Acts on Informatics, Files and Liberties of 1978) and UK (Data Protection Act of 1984).

49 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23.11.1995. (hereinafter referred to as Data Protection Directive).

50 Robinson et al., 2009, p. 24.

51 Charter of Fundamental Rights of the European Union, 2000/C, Official Journal of the European Communities, C 364, 18.12.2000.

personal data should not be processed unless certain conditions under three fundamental categories are met: transparency, legitimate purpose, and proportionality. Transparency ensures that individuals are informed about how their data will be used and processed.⁵² Legitimate purpose requires that data should be processed for a clear, lawful reason consistent with the rights of the individuals involved.⁵³ Proportionality ensures that the amount of data collected and its use are limited to what is necessary to fulfil the intended purpose.⁵⁴ Altogether, these principles form the foundation of the Directive, aiming to protect individuals' privacy while allowing for the responsible use of personal data. Since Directive 95/46 does not have direct effect, all Member States were obliged to transpose it into national laws, which was done by the end of 1998.

Directive 95/46 required each EU Member State to establish a supervisory authority, an independent body responsible for overseeing the implementation and enforcement of data protection regulations within the country. These authorities had several key responsibilities, including monitoring the level of data protection, advising the government on administrative measures and regulations, and initiating legal proceedings in cases of data-protection violations (Art. 28). Additionally, individuals were granted the right to lodge complaints about data-protection violations either directly with the supervisory authority or through courts, ensuring that citizens could seek redress if their data protection rights were infringed upon.

The directive significantly emphasised the transfer of personal data to third countries, which was generally restricted. According to Art. 25 of Directive 94/46, personal data could only be transferred to a third country if that country ensured an adequate level of data protection. Understandably, the decision of whether data should be transferred to a third country or not were taken considering the data-protection provided in a certain country. Speaking in legal language, the third country had to be aligned with EU law.

6.2. Crisis of the Data Protection System – Challenges of the Digital Age

Directive 95/46 was not profoundly innovative in its conceptual approach.⁵⁵ However, it has had a significant practical impact on the EU. It is widely recognised as the legal foundation for consistent data protection principles across all Member States. This framework was crucial in ensuring that privacy rights were upheld in a uniform manner, fostering greater trust in the handling of personal data across the EU.

52 Data Protection Directive, Preamble, ad 63 and Arts. 10, 11.

53 Data Protection Directive, Preamble, ad 28, 30, 33, 39, etc. In particular, Section II.

54 Data Protection Directive, Preamble, ad 40, Arts. 11, 12.

55 The definition of privacy as 'a right to be left alone' is dated in the nineteenth century, and a numerous legal documents were adopted worldwide, setting standards of personal rights.

In terms of privacy goals and principles, Directive 95/46 addressed a number of core elements that formed the basis of data-protection law, such as legitimacy,⁵⁶ purpose limitation (which encompasses data quality, purpose specification, and proportionality),⁵⁷ security and confidentiality,⁵⁸ transparency,⁵⁹ data subject participation,⁶⁰ and accountability.⁶¹

Though Directive 95/46 offered a widely acceptable legal framework, it was enforced in a period of significant dynamism and change in legal, technological and social contexts. The EU's legal and market landscape evolved, influencing the shift in approach of relevant figures regarding the protection of data.

The first circumstance of rethinking on the actual legal framework was the fact that the enforcement of the directive coincided with substantial enlargement of the EU. As new Member States joined, aligning their national laws and practices with the directive's provisions became increasingly complex. This expansion needed continuous efforts to harmonise data-protection standards across a more diverse and broader Union.

However, technological and social changes brought new light to the existing data-protection environment. The rise of digital technologies – such as the internet, social media, cloud computing, big data analytics, and artificial intelligence – meant that personal data was being collected, stored, and processed on an increasingly vast scale. This rapid digitalisation heightened the risk of personal-data misuse, security breaches, and unauthorised access.⁶² As data became a valuable commodity, the vulnerability of individuals' personal information grew, demanding stronger safeguards and more robust enforcement mechanisms.

These technological advancements and the evolving societal landscape underscored the limitations of Directive 95/46, prompting calls for greater flexibility, stronger protections, and more comprehensive privacy laws that could keep pace with the digital age. The rules of the directive were introduced when many online services and technologies that we use today – social networking platforms, cloud computing, location-based services, and smart cards – had not yet come into existence.

The sheer scale and complexity of personal data processing have grown exponentially in recent years, making the challenges associated with protecting personal

56 Art. 7.

57 Art. 6.

58 Arts. 16–17.

59 Arts. 10 and 11.

60 Art. 12.

61 Arts. 22–23. Robinson et al., 2009, p. 8.

62 The context in which the European Data Protection Directive was established has changed significantly. Personal data have become more dynamic, with its use, purpose, and ownership constantly shifting. People in Europe are now more active in controlling their data – for example, by deciding who can access it or by allowing apps to reuse it via social media platforms. This kind of user involvement was not anticipated when the Directive was written. As a result, the Directive faced serious challenges in keeping up with rapidly evolving digital environment. Robinson et al., 2009, pp. 18–19.

data more intricate and widespread. For instance, the rise of social media has blurred lines between private and public spheres, while the vast amounts of data stored in the cloud and the growing reliance on location-based services have created new risks for individuals' privacy.⁶³ At the same time, modernising data protection rules is not just about safeguarding individuals' privacy; it also offers significant opportunities for the development of the digital economy. A robust, transparent, and harmonised set of data-protection rules can provide businesses with clear guidelines, build consumer trust, and foster innovation in the digital sector. In the end, a balanced approach to privacy and data protection is meant for supporting the growth of the digital economy and simultaneously ensuring that individuals' fundamental rights are respected in the digital age.

All these show that the introduction of GDPR, designed to address emerging challenges in data protection while offering more comprehensive rights and protections for individuals, was an expected, or at least inevitable, consequence.

6.3. GDPR and Its Impact on Data Protection

GDPR⁶⁴ maintains essential principles set forth by the 1995 Data Protection Directive but adapts them to a new social, technological, and even political environment. Adoption of the GDPR corresponds to the need to provide effective protection of the privacy rights in a dynamic and, hence, uncertain digital landscape. Seen from this perspective, one can observe that the GDPR puts more power in the hands of individuals, making them crucial concerning the control over their personal data. Speaking in a normative context, individuals are supplied with clearer and more accessible rights, compared to the previous legal act, which include the right to access, rectify, erase, and transfer their data (data portability). By harmonising data-protection laws across all EU Member States, the regulation establishes a more consistent approach to privacy, enabling cross-border data flows both within the EU and internationally.

Furthermore, the GDPR introduces stronger enforcement mechanisms, including the potential for significantly higher fines for non-compliance. National data-protection authorities are empowered to take decisive action, holding organisations accountable for the breaches of data-protection laws.

The regulation also establishes clearer rules for transferring personal data outside the EU, ensuring that data remains protected regardless of where it is processed or stored. This is particularly important in today's interconnected world, where data are frequently handled by companies located across the globe. Beyond strengthening

63 Official Journal of the European Union, 2011, pp. 5–6.

64 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Official Journal L 119, 04.05.2016.

privacy within the EU, the GDPR has set a global benchmark for data protection, influencing the development of similar laws in other countries and encouraging them to adopt comparable standards.

These changes are designed to provide individuals with greater control over their personal data, facilitating easier access and management of their information. The regulation ensures that personal data remains protected – no matter where it is sent, processed, or stored – within or outside the EU. This is particularly crucial in today's interconnected world, where data is often processed across borders, especially via the internet.⁶⁵

Although the GDPR was designed to bring more certainty and clarity to the processing of personal data, its broad scope has led to confusion in some cases. Under the regulation, data protection law applies to any operation or set of operations performed on personal data, whether automated or not. This includes activities such as collection, storage, alteration, retrieval, consultation, use, disclosure, and erasure of data. As a result, nearly any activity involving personal data, especially in today's increasingly digital world, can be considered processing.

Given this expansive definition, to identify any digital activity that would not fall under the scope of the GDPR is a challenge. Whether it is browsing a website, using an app, or engaging in online marketing, all these actions likely involve some form of personal data processing. In this sense, the GDPR has indeed become 'the law of everything applied to everyone'.⁶⁶

Comparing the period of the legal power of the directive, the CJEU, which plays a major role in personal-data protection through its function of interpreting EU law and faces even greater challenges in making the legal framework effective. While 'the provisions of a directive must be interpreted in the light of the aims pursued by the directive and the system which it establishes', the GDPR embodies a dual-purpose approach. It seeks to achieve two seemingly contradictory goals: ensuring a high level of protection for the rights of natural persons, while also facilitating the free flow of personal data across the EU to promote the functioning of the internal market. This dual focus is central to the Regulation's design, aiming to balance individual-privacy rights with economic considerations.

However, despite this hybrid model – where both data protection and internal market objectives are intertwined – the case-law of the CJEU has consistently reinforced the primacy of protecting individuals' rights. The Court has interpreted the GDPR so as to prioritise the safeguarding of personal privacy over the free movement of data. Judicial interpretation has thus underscored that the core purpose of the regulation is to protect individuals' fundamental rights. Any limitations on data flow must be justified by privacy and security concerns.

Therefore, while the GDPR aims to promote the smooth operation of the internal market by ensuring consistency across EU Member States, this goal is secondary

65 General Data Protection Regulation (hereinafter referred to as GDPR), Art. 3.

66 Lynskey, 2023, p. 300.

when weighed against the Regulation's primary objective of protecting individual rights. The CJEU's rulings reinforce that the protection of personal data cannot be compromised in favour of economic interests, emphasising the Regulation's overarching commitment to privacy as a fundamental right.⁶⁷

To conclude, while the intent of the regulation was to provide comprehensive protection for personal data, its all-encompassing nature means that businesses, organisations, and even individuals may find themselves navigating a complex web of compliance requirements, even for seemingly minor activities. This broad application has made the GDPR both a powerful tool for safeguarding privacy and a source of complexity for those who seek to understand the full extent of their obligations.

6.4. The GDPR – Side Effects

For the purpose of this research, a detailed analysis of the GDPR would be left aside. However, its side effects should not be overlooked. The most discussed limitation is that the GDPR imposes strict obligations on companies concerning the collection, processing, storage, and use of personal data. One of its core requirements is that businesses must obtain explicit consent from individuals before collecting or processing their personal information, which shall be freely given, in relation to specific situations, based on proper and unambiguous information. The GDPR actually set a standard for assuring the full awareness of individuals and under their control over the method and objective of data usage. To be more precise, companies are required to provide clear and transparent information to consumers about what data is being collected, how it will be used, and whether it will be shared with third parties. This transparency ensures a complete understanding of data processing and usage, empowering them with greater control over their information.

Moreover, the GDPR's data-protection requirements extend far beyond initial transactions between businesses and consumers. Companies that collect and process personal data must be equipped to handle requests from individuals, such as those who seek access to their data, corrections of inaccuracies, or the erasure of their information. Organisations are obligated to fulfil these requests within a specified timeframe, and failure to comply can lead to significant fines, underscoring the importance of data protection and consumer rights.⁶⁸

Besides these obligations, the GDPR mandates that companies cannot retain personal data longer than necessary for the purposes for which it was originally collected. Data retention must be strictly limited, and businesses must regularly review data to ensure compliance with this principle. This means that once the data are

67 Judgment of the Court (Grand Chamber) of 16 July 2020 *Data Protection Commissioner v. Facebook Ireland Limited and Maximillian Schrems* Case 311/18; *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH* Case 210/16, Judgment of the Court (Second Chamber) of 29 July 2019 *Fashion ID GmbH & Co.KG v. Verbraucherzentrale NRW eV* Request for a preliminary ruling from the *Oberlandesgericht Düsseldorf* Case 40/17.

68 GDPR, Art. 83.

no longer needed for their original purpose, they must be securely deleted or anonymised to prevent unnecessary exposure or misuse.⁶⁹

Yet, the GDPR has extraterritorial scope and its provisions apply not only to businesses based in the EU but also to any organisation, anywhere in the world, that collects or processes data from EU residents.⁷⁰ This global reach ensures the protection of EU citizens' privacy rights, regardless of where their data are processed, making the GDPR one of the most comprehensive global data-protection frameworks.⁷¹

Additionally, the limitations on data sharing under the GDPR can create significant challenges, especially for smaller firms, which must not only comply with data-protection itself but also ensure that any third parties with which they share data are fully compliant with the regulation. This responsibility imposes a substantial burden on organisations, as they are now liable for privacy violations committed by their partners, vendors, or service providers. Data controllers are required to establish contracts with third parties that stipulate compliance measures, and failure to do so can result in serious penalties.⁷²

If a company shares user data externally, whether with third-party processors or other entities, it is obligated to ensure that those parties uphold the same stringent data-protection standards mandated by the GDPR. This requires maintaining thorough diligence on third-party contracts and data-processing agreements, ensuring that these parties are legally committed to safeguarding personal data in accordance with GDPR provisions.⁷³

Failure to meet these compliance requirements can result in severe financial penalties. Organisations may face fines of up to €20 million or 4% of their global annual revenue, whichever is higher. These substantial penalties can have a significant impact, particularly on smaller businesses that may lack the resources to navigate complex data-protection compliance. As a result, the high cost of potential violations compels companies to adopt a far more cautious approach to data collection, processing, and sharing.⁷⁴

Non-compliance with these measures, which could be considered strict and robust, brings substantial financial risk for companies. Requirements set in the GDPR makes data privacy management a priority in business planning. They need to implement robust policies, establish comprehensive contracts, and maintain effective monitoring systems to protect their users' privacy and their bottom line.⁷⁵

69 GDPR, Preamble ad 39, 49, 81, 83, Art. 5(1)(e), etc.

70 Ryngaert and Taylor, 2020, p. 9.

71 GDPR, Preamble ad 101, 116, Arts. 2, 3.

72 In accordance with GDPR, Art. 2 and Art. 3. Vardanyan and Kocharyan, 2022, pp. 100–101.

73 GDPR, Art. 42.

74 GDPR, Art. 83(5).

75 Businesses prefer to contract with large web-technology providers as they are better positioned to fulfil the legal requirement. A study found that a week after GDPR implementation market concentration increased by 17 percent because websites dropped smaller vendors. Prasad, 2020, p. 2.

7. Conclusion

The GDPR stands as a prime example of a regulation with far-reaching global influence. Widely recognised as the ‘gold standard’ for privacy and data protection, it not only establishes a high bar for EU Member States but also serves as a model for countries outside the EU. For businesses within the EU, compliance with the GDPR is a legal obligation, forming the backbone of their data-protection practices and ensuring that individuals’ privacy rights are safeguarded across all member nations.

Beyond the EU, the GDPR has set a benchmark for third countries that seek to engage with EU residents or operate within the European digital market. Nevertheless, the high standard of data protection overreached boundaries of the EU market, since companies outside the EU must comply with its requirements when processing the personal data of EU citizens, regardless of where the company is based. Thus, the regulation has a global reach, influencing data protection laws worldwide. Therefore, many countries have changed their data-protection legal framework in response to GDPR standards, recognising that meeting its requirements is essential for accessing the EU market.

This global influence underscores the growing importance of data privacy and security in today’s interconnected world, where businesses and governments face increasing pressure to protect individuals’ personal information and uphold their privacy rights. However, critics of the GDPR often describe it as a form of ‘data imperialism’, arguing that it imposes EU standards for data protection on foreign jurisdictions without fully considering diverse cultural, political, and economic realities of other countries. They contend that the regulation’s extraterritorial reach extends EU influence and overlooks the unique needs and contexts of non-EU nations.

Additionally, critics highlight the significant compliance costs, particularly for businesses in developing countries. These countries often lack the financial, legal, and technical resources required to meet the GDPR’s stringent standards, placing them at a competitive disadvantage compared to businesses in wealthier, developed nations. As a result, while the GDPR aims to safeguard privacy, its broad application and high compliance costs may unintentionally exacerbate global inequalities in the digital economy.⁷⁶

Finally, when observing the disproportionate benefits of the GDPR within the EU, it becomes clear that the principle of ‘united in diversity’ faces a significant challenge in maintaining its integrity while enforcing such a regulation. It appears that owing to its legal nature, Directive 95/46 is much closer to Aristotle’s understanding of justice: equal treatment of equals, and unequal treatment of unequals, in proportion to inequality. This approach, Aristotle argued, makes justice more permanent than law itself. Although data protection is adopted in this chapter as an illustrative case study, it must be noted that an overly formalistic approach to the principle of equality may inadvertently jeopardise diversity – a value that holds particular significance

⁷⁶ Uribe, 2024.

within the normative framework of the EU. While data protection is unquestionably relevant across various policy areas, similar concerns regarding the balance between formal equality and substantive diversity may extend to broader EU legislative efforts, especially in the context of sector-specific regulations.

Law should not be perceived merely as an isolated normative act, but rather as an integral element of an already established legal order – one that ensures coherence, continuity, and legal certainty for citizens throughout the EU, and in the Member States as such.

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REGULATING THE FUTURE: THE AI ACT, EU PRINCIPLES, AND THE CHALLENGE OF MEMBER STATE EQUALITY



BARTŁOMIEJ ORĘZIAK

Abstract

This chapter analyses the legal regulations regarding artificial intelligence (AI) adopted within the EU. The primary objective is to highlight the benefits and costs borne by EU Member States as they adapt to an increasingly unified EU legal system. The analysis examines AI-related EU secondary law through the lens of the legal principles of the EU's primary law, focusing on the principles of conferral, subsidiarity, proportionality and equality. The chapter investigates the compatibility of the newly adopted AI Act with the overarching legal principles, particularly the considerations concerning its legal basis in EU primary law. Hence, the conclusions are presented based on linguistic, systemic and teleological interpretations. The concluding section is divided into two segments. The first presents the core insights derived from the analysis, without reiterating each finding. The second offers observations on how the EU should approach AI regulation to ensure adherence to the equality principle among the Member States.

Keywords: artificial intelligence, European Union law, new technologies law, law unification, EU principles

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1. Introduction

The present chapter analyses the effects of the EU's legal framework on artificial intelligence (AI), weighing the attendant benefits and costs of legal unification following the principle of equality of the EU Member States. The central research question is whether the costs exceed the benefits. A related issue is whether such harmonisation furthers or undermines the equality principle.

EU's decision to regulate AI through Regulation (EU) 2024/1689 of the European Parliament and the Council of 13 June 2024, laying down harmonised rules on AI, and by amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (AI Act)¹ inaugurated a new, albeit controversial, phase in the enduring tension between the drive to integrate the internal market and the duty to respect the diversity of the EU Member States. This chapter placed that tension within the broader framework of the monograph, which tracked the EU's responses to contemporary global challenges by resorting to increasingly uniform legal instruments. The point of departure was the equality clause of the EU primary law, which obliged the EU to accord all its Member States equal standing, irrespective of significant economic, technological and constitutional disparities.

The analysis proceeded along four closely connected lines. First, competence, that is, whether the existing treaty provisions truly empowered the EU to regulate AI extensively. Secondly, the choice of legal instrument, that is, whether scrutiny under the principles of subsidiarity and proportionality justified a directly applicable regulation or whether a directive would have sufficed. Thirdly, equality, that is, how the adopted measures affected the practical equality of the Member States, including who gained, bore the costs, and risked falling behind. Fourthly, policy guidance, that is, how the EU should approach the legal AI regulation in the future.

These lines prompted four corresponding research questions. First, on which precise legal bases does the AI Act rest, and are they adequate under the principle of conferral? Second, does the AI Act respect or bypass the safeguards of subsidiarity and proportionality that protect EU Member State autonomy? Third, how do its uniform and exacting standards (e.g., regulatory sandboxes, market-surveillance authorities) interact with the principle of equality among the EU Member States? Fourth, how should the EU regulate AI to conform with EU's primary law?

The above questions determined the five-part structure of the chapter, whereby the individual parts remained in a close logical relationship with one another. First, 'Introduction to AI and Justification for its Normatization in the EU' presents the definition and scope of the concept of AI, outlines the main regulatory challenges at the European level and indicates the normative needs. Second, 'Legal Form Selection: Struggle between EU Regulation and EU Directive' discusses the doctrinal

1 Regulation (EU) 2024/1689, Official Journal of the European Union, L 1689, 12 July 2024.

differences between a directive and a regulation, reconstructs the treaty-based criteria for the selection of a legal instrument and analyses the implications of the chosen form following the equality principle.

Third, ‘Legal Form Selection: AI Act Case’ presents the legislative process leading to the adoption of the AI Act, outlines the general competence of the EU and verifies the compliance of the chosen instrument with the principles of subsidiarity and proportionality, referring to personal data protection and the harmonisation of medical device regulations. Fourth, ‘AI Act: Legal Characterisation’ conducts a three-track (linguistic-logical, systemic and teleological) analysis of the EU’s specific competences in the light of EU primary law and assesses the indicated legal bases of the AI Act regarding their adequacy. Fifth, ‘AI Act vs. Principle of Equality’ presents the general arguments of a systemic nature, focusing on competence and arguments related to the potential effects of the AI Act’s practical application.

The chapter concludes with findings and recommendations. The overarching theme of the structure is the main aim of the chapter: to highlight the benefits and costs borne by EU Member States as they adapt to an increasingly unified EU legal system.

2. Introduction to AI and Justification for Its Normalization in the EU

2.1. Definition and Scope of AI

A review of AI technologies shows that it is a broad term encompassing several designations. It is a dynamic term, where its scope and the list of AI technology types are constantly changing and being updated. Nevertheless, establishing such a list is not impossible. However, this list will neither be closed-ended nor will it exhaustively represent all AI technology designations. Based on available sources, it is possible to determine that the subject matter of AI technologies includes Machine Learning (ML),² Natural Language Processing (NLP),³ Computer Vision,⁴ Deep Learning,⁵ Reinforcement Learning,⁶ Generative Adversarial Networks (GANs),⁷ Neural Networks,⁸

2 Janiesch, Zschech and Heinrich, 2021, pp. 685–695.

3 Khurana et al., 2023, pp. 3713–3744.

4 Sivkov et al., 2020, pp. 662–667.

5 Sarker, 2021, p. 420.

6 Cao, 2007, pp. 289–340.

7 Goodfellow et al., 2020, pp. 139–144.

8 Wun and Feng, 2018, pp. 1645–1656.

Automated Machine Learning (AutoML),⁹ Speech Recognition,¹⁰ Robotics,¹¹ AI Ethics and Bias Mitigation,¹² Explainable AI (XAI),¹³ Transfer Learning,¹⁴ Federated Learning,¹⁵ Quantum Machine Learning,¹⁶ Edge AI,¹⁷ AI in IoT (AIoT),¹⁸ Cognitive Computing,¹⁹ AI in Cybersecurity²⁰ and Data Mining.²¹ However, the presented list does not provide much information, merely indicating that the scope of AI technologies is extremely broad.

Each designation on the list has been the subject of numerous publications and practical issues, including from a legal perspective. This is a noticeable drawback of defining through division, where a logical error may occur by explaining the unknown through the unknown. Hence, it is better to refer to descriptive definitions. It is worth noting that organisations, such as the Organisation for Economic Cooperation and Development (OECD), the International Organization for Standardization (ISO), the United Nations (UN), the Institute of Electrical and Electronics Engineers (IEEE) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) have proposed their own definitions. For example, according to the ISO, AI is ‘a technical and scientific field devoted to engineered systems that generate outputs such as content, forecasts, recommendations, or decisions for a given set of human-defined objectives’.²² According to the UN:

AI is generally considered to be a discipline of computer science that is aimed at developing machines and systems that can carry out tasks considered to require human intelligence. Machine learning and deep learning are two subsets of AI. In recent years, with the development of new neural network techniques and hardware, AI is usually perceived as a synonym for ‘deep supervised machine learning’.²³

Meanwhile, according to the IEEE, ‘Artificial Intelligence is that activity devoted to making machines intelligent, and intelligence is that quality that enables an entity to function appropriately and with foresight in its environment’.²⁴ However, several definitions are preceded by the caveat that AI is either variously defined or possesses

9 Chauhan et al., 2020, pp. 205–212.

10 King et al., 2007, pp. 723–742.

11 Hofmann, Samp and Urbach, 2020, pp. 99–106.

12 O’Connor and Liu, 2024, pp. 2045–2057.

13 Holzinger et al., 2022, pp. 13–38.

14 Zhuang et al., 2020, pp. 43–76.

15 Xu et al., 2021, pp. 1–19.

16 Biamonte et al., 2017, pp. 195–202.

17 Li et al., 2019, pp. 447–457.

18 Baccour et al., 2022, pp. 2366–2418.

19 Modha et al., 2011, pp. 62–71.

20 Stevens, 2020, pp. 164–170.

21 Witten et al., 2005, pp. 403–413.

22 International Organization for Standardization, 2024.

23 United Nations Regional Information Centre for Western Europe, 2024.

24 Institute of Electrical and Electronics Engineers, 2024.

multiple definitions. This is a drawback of such definitions, as they are not binding in nature. Hence, they only stimulate discussion in this area, generating further and diverse definitions. Such a mechanism leads to terminological chaos, where almost every text about AI has its own definition.²⁵

A remedy would be the introduction of legal regulations that define the meaning and scope of AI in a binding manner.²⁶ One could argue that almost every legal definition is dangerous; however, a definition does not necessarily have to be closed-ended and is often essential for an approximate understanding of the subject of regulation. To date, two significant legal regulations concerning AI can be noted in international law. First, is the increasingly well-known AI Act, and second, is the not yet in force Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (AI Convention).²⁷ According to Art. 3 of the AI Act:

An AI system means a machine-based system that is designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment, and that, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments.

Meanwhile, according to Art. 2 of the AI Convention:

Artificial intelligence system means a machine-based system that, for explicit or implicit objectives, infers from the input it receives how to generate outputs such as predictions, content, recommendations, or decisions that may influence physical or virtual environments. Different artificial intelligence systems vary in their levels of autonomy and adaptiveness after deployment.

At first glance, both definitions seem similar, and the differences mainly arise from linguistic formulation. However, concluding that they have the same meaning is hasty. This meaning derives from the exegesis of the legal text and the application of appropriate interpretative techniques. Therefore, it is necessary to wait for competent entities to voice their opinions on this matter.

Regarding the AI Act, this would be the Court of Justice of the European Union (hereafter, CJEU), and regarding the AI Convention, according to its Arts. 23 and 29, it would be the Conference of the Parties. The statements of these entities would shape the actual definition of AI in Europe. This is because these definitions would

25 Stewart, Davis and Igoche, 2020, pp. 135–142; Corea, 2019, pp. 25–29; Modgil et al., 2022, pp. 130–149; Holmes, Sacchi and Bellazzi, 2004, pp. 334–338; Brunette, Flemmer and Flemmer, 2009, pp. 385–392; Adams, 2021, pp. 176–197.

26 Schuett, 2023, pp. 60–82; Leith, 1988, pp. 31–46; Greenstein, 2022, pp. 291–323; Hacker et al., 2020, pp. 415–439.

27 Council of Europe Treaty Series – No. 225.

be international in nature (region of application: Europe), and would directly affect national legal systems by introducing and imposing the terminology. Such actions are aimed at unifying the conceptual framework and eliminating diversity in defining AI in the literature (which will likely fail) and the national law. Such a move does not seem unreasonable, as, in principle, the national laws of European countries do not provide their own definitions of AI.²⁸ The actions of international bodies with a European scope, at least in the EU, where a Union regulation directly applicable in EU Member States has been issued, supplement their normative systems in this regard, irrespective of the will of these states.²⁹

It is noteworthy that the situation appears different outside the European continent, where attempts are being made within national laws to issue AI-related legal regulations.³⁰ For instance, in Brazil,³¹ the currently pending '*Senado Federal Projeto De Lei N° 2338, De 2023*',³² in its Art. 4(I), provides a definition, according to which an 'artificial intelligence system' is:

A computational system, with varying degrees of autonomy, designed to infer how to achieve a given set of objectives, using approaches based on machine learning and/or logic and knowledge representation, through input data originating from machines or humans, with the purpose of generating predictions, recommendations, or decisions that may influence the virtual or real environment.

This definition does not differ significantly from the AI Act or the one proposed in the AI Convention. However, their meanings are not identical. The Brazilian definition may be interpreted similarly; however, this is unlikely due to the lack of a direct connection between the country and the EU or the Council of Europe (hereafter, CoE). Brazil, a South American country not often cited as an example of avant-garde legal solutions,³³ highlights a currently noticeable global legal trend of normatively regulating AI. On the European continent, if not for the legislative initiatives, primarily by the EU, several countries would likely be proceeding with their own legislation in this area, without the possibility or obligation to consider common unification standards.

28 Martini, 2020, pp. 100–135.

29 Craig, Craig and de Búrca, 2020; Chalmers, Davies and Monti, 2019; Judgment of the Court of Justice of the European Union of 10 October 1973, C-34/73 (ECLI:EU:C:1973:101).

30 Surden, 2019, pp. 1306–1337; Verheij, 2020, pp. 181–206.

31 Belli, Curzi and Gaspar, 2023.

32 Projeto de Lei no. 2338, de 2023.

33 However, certain legal solutions that have proven effective should not be overlooked. de Oliveira Dias and Teles, 2019, pp. 1–12; Lopes and Freitas Filho, 2014, pp. 91–103.

2.2. *Regulatory AI Challenges in Europe*

As mentioned, in Europe, due to the activities of the EU and CoE, AI is being subjected to international and regional normative regulation to address the challenges or legal problems arising from the practical application of this new technology.³⁴ In the EU, the AI Act has been adopted, where its significance for the EU Member States, their national legal orders and the practice of applying and utilising AI can be assessed as having comparable, or even greater, importance than the already famous Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereafter, GDPR).³⁵

The GDPR has shown, regarding personal data protection, the significant impact that an EU regulation can have on the national laws of its Member States and the principles governing the functioning of the internal market. It can be assumed that this scenario will, at least, repeat itself regarding the AI Act, whereby this act could exert an even greater influence on the legal systems of the EU Member States. Hence, it is worth noting that the intention of the EU legislator was to introduce harmonised AI standards as a legal model for AI throughout the EU and counteracting the particularism of the EU Member States, justified by AI's cross-border nature. A direct confirmation of such an intention is found in Recital 3 of the AI Act, according to which:

AI systems can be easily deployed in a large variety of sectors of the economy and many parts of society, including across borders, and can easily circulate throughout the Union. Certain Member States have already explored the adoption of national rules to ensure that AI is trustworthy and safe and is developed and used in accordance with fundamental rights obligations. Diverging national rules may lead to the fragmentation of the internal market and may decrease legal certainty for operators that develop, import or use AI systems...

Thus, since this is explicitly stated in the AI Act, it further justifies the prediction of a strong influence of this legal instrument on the national laws of the EU Member States, where even the form of the legal act has far-reaching consequences. However, the emphasised influence of the AI Act on national law is not limited to its direct application. This is because the adoption of the AI Act does not absolve the EU Member States from action. They cannot adopt the position that all issues are regulated in the EU regulation and its simple or mechanical application in the territory would be sufficient. It is the duty of the EU Member States to adapt their legal systems to

34 Feuerriegel, Dolata and Schwabe, 2020, pp. 379–384; Al Ridhawi et al., 2020, pp. 372–379; Kon-ovalova, 2023, pp. 520–530.

35 OJ L 119, 4 May 2016, pp. 1–88.

enable the effective enforcement of the AI Act.³⁶ For example, according to Art. 5(5) of the AI Act:

A Member State may decide to provide for the possibility to fully or partially authorise the use of ‘real-time’ remote biometric identification systems in publicly accessible spaces for the purposes of law enforcement within the limits and under the conditions listed in para. 1, first Subpara., Point (h), and paras. 2 and 3. Member States concerned shall lay down in their national law the necessary detailed rules for the request, issuance and exercise of, as well as supervision and reporting relating to, the authorisations referred to in para. 3. Those rules shall also specify in respect of which of the objectives listed in para. 1, first Subpara., Point (h), including which of the criminal offences referred to in Point (h)(iii) thereof, the competent authorities may be authorised to use those systems for the purposes of law enforcement. Member States shall notify those rules to the Commission at the latest 30 days following the adoption thereof. Member States may introduce, in accordance with Union law, more restrictive laws on the use of remote biometric identification systems.

Thus, for Art. 5(5) to be effectively enforced, if specific EU Member States decide to do so due to its optional nature, it is necessary to adopt appropriate national measures. Another similar example is Art. 31(1) of the AI Act, which states: ‘A notified body shall be established under the national law of a Member State and shall have legal personality’. In this instance, it is necessary to issue appropriate national legal acts to establish the notifying body, with the distinction that the cited provision is obligatory.

These examples demonstrate that the issuance of the AI Act is a challenge in its application by EU Member States, referring to the daily application of this legal act by appropriate national authorities, and a legislative challenge, including institutional aspects. This situation may, in some ways, resemble the challenges that the EU Member States faced after the adoption of the GDPR. For example, in Poland, it was decided to enact the Personal Data Protection Act of 2018.³⁷ This act serves as the main legal instrument enabling the effective enforcement of GDPR provisions in Poland. A similar approach cannot be ruled out concerning the AI Act, where the Member States may decide to adopt particular legal measures and entire legal acts dedicated to adapting the national legal order for effective enforcement of the AI Act. In the future, this will be one of the greatest legal challenges for EU Member States, confirmed by the legislative actions being initiated in Poland for adopting the Act on Artificial Intelligence Systems.³⁸

36 This should not be confused with the obligation to implement into national law, as this obligation applies exclusively to the EU directives.

37 Act of 10 May 2018 on the Protection of Personal Data (Consolidated text: Journal of Laws from 2019, item 1781).

38 Draft Bill on Artificial Intelligence Systems (Project Number: UC71; Document Type: Draft Bills; Document Type: C – EU Implementing Drafts).

Conversely, within the CoE, the adoption of the AI Convention is underway. However, this convention has not yet entered into force, unlike the AI Act. Although it contains several significant AI-related legal norms, it is currently uncertain how many CoE members will accede to this Convention and how the follow-up mechanism and cooperation specified within it (Chapter VII of the AI Convention) will function in practice. In other words, the future territorial scope of applicability of this legal instrument and the effectiveness of its control mechanism are presently unknown, unlike the AI Act, which is an EU regulation applicable in all EU Member States, where CJEU ensures its correct application.

However, the current text of the AI Convention does not provide for the jurisdiction of the European Court of Human Rights (ECtHR), leaving this judicial body of the CoE dedicated exclusively to adjudicating matters related to the ECHR.³⁹ Additionally, it is worth considering the relationship that the simultaneous validity and application of the AI Convention will have with the AI Act's application. This will be a significant issue because all EU Member States are CoE members. Hence, the substantive compatibility of the simultaneous application of both legal acts, if a specific EU Member State accedes to the AI Convention, will become important for the practical interpretation of legal regulations applicable to AI in such a country, originating concurrently from the EU and the CoE.

A subtle hint in this regard may be the mild design of the control mechanism and conflict resolution in the AI Convention, as reflected in Arts. 23 and 29. This may suggest an auxiliary role of the CoE, supporting the EU's leading role. However, as exemplified by the current relationship of the ECtHR to the Charter of Fundamental Rights of the EU and the associated relationship between the CJEU and the ECtHR, this remains uncertain. Nonetheless, this example pertains to the protection of human rights, which is a fundamental objective of the CoE, justifying the assertion that the CoE's aspirations may not be as high in other areas. This is one of the regulatory challenges of AI that can currently be anticipated in Europe.

Other regulatory challenges of AI remain, which are no longer exclusively European but global in nature. These include challenges related to legal and ethical or moral aspects, such as the scope of decision-making by AI systems, the issue of AI replacing human labour (the impact of AI on human dignity) or the problem of the dehumanisation of interpersonal relationships. Although these issues do not originate in the legal sphere, law as a regulatory instrument should address such aspects of AI. Such regulatory challenges in Europe, if approached strictly, should be related to the AI Act, as it is a legal act already issued, in force in the EU, and subject to mandatory application by the EU Member States. The content of the AI Act is known and certain, unlike the AI Convention, which may be subject to modification. Hence, due to this reason, and given that the topic of this paper focuses on the orbit of EU law, the remainder of the study will concentrate on the EU's AI Act.

39 Convention for the Protection of Human Rights and Fundamental Freedoms.

2.3. Justification for EU Normalization

Regarding the justification for legal regulation by the EU, there are several reasons cited as benefits resulting from EU norm-setting. There are talks of harmonising legal standards across the EU and, consequently, building a coherent internal market.⁴⁰ Furthermore, consumer protection,⁴¹ sustainable development,⁴² safety and public health⁴³ and supporting innovation are mentioned.⁴⁴ These certainly are the advantages of EU norm-setting, whether as harmonisation (EU directives) or unification (EU regulations).

Moreover, one can mention the benefits for the functioning of the society and the institutional advantages for the EU. By issuing EU regulations in an increasing number of areas and more frequently, the EU gains significance. It becomes increasingly powerful in competencies and has a greater influence on the national laws of its Member States. From the EU's perspective, increasingly aspiring to the title of a super international organisation or a so-called *sui generis* international organisation, these beneficial aspects justify its active legislative actions. This is somewhat related to the increasingly advocated concept of federal integration of the EU.⁴⁵ For example, if the EU had not issued the AI Act, it would have become a passive observer of the issuance of AI legal standards by successive EU Member States. Instead, it is now in the role of the player and supervisor of the implementation of its standards.

However, from the perspective of EU Member States, this is not so straightforward. The norm-setting carried out by the EU, its harmonising or unifying actions, directly impacts the preservation of cultural diversity or constitutional identity and the scope of the Member States' sovereignty. Their sovereignty is diminished each time the EU issues its secondary legislation, particularly in areas previously unregulated by EU law, such as AI, and when the EU decides to issue an EU regulation, such as the AI Act. Another significant issue concerning the justification for EU normalization is the frequent breach of the equality principle among EU Member States in this context. This provides an impetus to evaluate the developmental trends in the unification of law within the EU and their outcomes. Hence, one must consider whether the fundamental loss of equality in the EU is a price worth paying for the benefits of a common EU regime. This is the main objective of this study.

40 de Vries, Kanevskaia and de Jager, 2023, pp. 583–610; Ferguson and David, 2022, pp. 51–114.

41 Graef, 2022, pp. 1–10; Llorente, 2020, pp. 169–193.

42 Constantin et al., 2021, pp. 948–963; Leitao, Ferreira and Santibanez-Gonzalez, 2021, pp. 2077–2090.

43 Greer and Jarman, 2021, pp. 23–47; Könönen, 2024, pp. 601–619.

44 Amann and Essig, 2015, pp. 282–292; Musch, Borrelli and Kerrigan, 2023, pp. 135–152.

45 In this context, the recently proposed treaty amendments by the European Parliament are noteworthy. European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

3. Legal Form Selection: Struggle Between EU Regulation and EU Directive

3.1. Definitions and Legal Implications

In the EU, there are two main types of secondary legislation. Therefore, when the EU decides to exercise its competence and regulate a certain area, it must choose whether to do so by means of an EU directive⁴⁶ or an EU regulation.⁴⁷ The difference between them is significant. An EU directive harmonises national law by indicating the objective that EU Member States must achieve, generally with the freedom regarding the means to achieve the objective.⁴⁸ An EU directive does not, in principle, have direct effect on the normative systems of the Member States.⁴⁹

An EU regulation, with direct effect on the national law of the Member States, unifies legal standards across the EU, leaving no discretion in terms of the objective or the means of achieving that objective.⁵⁰ However, this does not mean that EU Member States can remain passive regarding an EU regulation, because such acts entail a range of obligations to ensure effective enforcement, using their institutions and laws to uphold the unified EU legal standards. Hence, the Member States are the implementers of the legal standards enacted in the EU. It should be remembered, as mentioned, that secondary legislation negatively affects the sovereignty of the Member States and their competences to varying degrees, whereby, in the case of EU regulations, this impact is noticeable *prima facie*.

3.2. Rules of Selection EU Regulation vs. EU Directive

The EU is founded on three fundamental principles that define its role and the limits and use of its competences. The limit is the principle of conferral, which sets the boundaries of its competences. The use refers to the principles of proportionality and subsidiarity (only in areas of non-exclusive EU competences), which determine how the EU exercises its competences. All these principles are regulated by Art. 5 of the Treaty on European Union⁵¹ (hereafter, TEU), where para. 1 states: ‘The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality’.

46 Haas, 1998, pp. 17–37; Dickson, 2011, pp. 190–212; Karayığit, 2016, pp. 59–95.

47 Rotondo, 2013, pp. 437–445; Blom-Hansen et al., 2023, pp. 2786–2806.

48 Hopwood, 1994, pp. 241–254; Givens and Luedtke, 2004, pp. 145–165.

49 However, sometimes, an EU directive, according to the case law of the CJEU, can produce direct effect (see CJEU judgments in the cases of *Ratti* (Case C-148/78), *Van Duyn* (Case C-41/74) and *Marks & Spencer* (Case C-62/00)).

50 Crettez and Deloche, 2006, pp. 203–214; Hugenholtz, 2012, pp. 4–16.

51 Consolidated version of the Treaty on European Union (OJ C 202, 7 June 2016, pp. 13–47).

According to Art. 5(2) of the TEU, the essence of the principle of conferral is that: ‘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’.⁵² Although the wording of this provision is clear, meaning that linguistic interpretation (exegesis of the legal text) should suffice for understanding this legal norm, Art. 5(1) of the TEU emphasises that competences not conferred upon the EU under the Treaties remain under the jurisdiction of the Member States.⁵³ This principle, in conjunction with other relevant provisions of the TEU and the Treaty on the Functioning of the European Union (hereafter, TFEU), determines whether a specific field falls within the EU’s competences and, if so, whether the EU is empowered to issue secondary legislation in that field, that is, to adopt appropriate legal measures.

However, sometimes the situation is not so clear. For example, regarding AI, there is no explicit legal basis in the Treaties granting the EU legitimacy to act.⁵⁴ Nonetheless, the principles of proportionality and subsidiarity (concerning non-exclusive competences) define the rules according to which the EU should exercise its competences. This means they set out the principles guiding the choice of the appropriate form of secondary legislation, since each form differs in the degree of impact on the legislation of the EU Member States. The principle of subsidiarity (in areas which do not fall within its exclusive competence), following Art. 5(3), para. 1 of the TEU, states that the EU shall act only if and insofar 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 Union level.⁵⁵

Meanwhile, the principle of proportionality, according to Art. 5(4), para. 1 of the TEU, requires that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.⁵⁶ The exercise of the EU’s competences occurs mainly through the issuance of secondary legislation, among which EU directives and regulations are the most important. As noted, directives harmonise the provisions of the Member States, while regulations directly introduce uniform legal standards within the Member States. Therefore, the choice of legal act must comply with the principle of subsidiarity (the legal act should correspond to the difficulty of achieving objectives that the EU Member States cannot accomplish on their own or whose implementation would be less effective) and proportionality (the legal measure must not exceed what is necessary).

52 See, for example, Judgment of the Court of Justice of the European Union of 14 June 2016, C-361/14 P.; Judgment of the Court of Justice of the European Union of 5 December 2017, C-600/14.; Judgment of the Court of Justice of the European Union of 25 October 2017, C-687/15.

53 See, for example, Lohse, 2015, pp. 165–182; Żelazna, 2022, pp. 593–606.

54 The issue will be discussed in more detail in the later sections of this study.

55 Melé, 2005, pp. 293–305; Spicker, 1991, pp. 3–14; Follesdal, 2013, pp. 37–62.

56 Hermerén, 2012, pp. 373–382; Portuese, 2013, pp. 612–635; Poto, 2007, pp. 835–869.

Hence, the EU should first resort to directives as a less invasive measure towards the legal systems of the Member States. Issuing an EU directive in a specific area, aimed ‘only’ at harmonisation, would test whether unification is a necessary step, given that the unification of legal standards is not a normatively prescribed goal of the EU. Only after the failure to ensure a harmonised approach to legal regulations across the EU, the possibility or, in some cases, the necessity⁵⁷ of legal unification through EU regulations arises. These observations become more relevant when the EU addresses areas previously unregulated by its institutions, where the impact of the principles set out in Art. 5 of the TEU becomes more pronounced. Therefore, it is surprising to observe the EU’s legislative practice trending towards the unification of legal standards, with an increasing number of EU regulations being issued in ever-expanding areas.

This trend can only be justified if accompanied by a thorough rationale demonstrating compliance with the principles of proportionality and subsidiarity. Unfortunately, as illustrated by the AI Act, this requirement is often disregarded in the EU’s legislative practice.⁵⁸ This fact must be assessed negatively, as it often leads to conclusions about the arbitrariness of the EU’s decisions regarding the issuance of regulations unifying the legal standards across the EU. Furthermore, it sparks discussions about the true normative nature of EU regulations, particularly regarding their function of subordinating the Member States to their will and authority or of certain Member States that strongly influence the EU’s directions. Hence, EU regulations can be viewed as inappropriate instruments of authority.⁵⁹ This gives the impression that the decision of the choice of the secondary legislation is arbitrary and not based on substantive reasons, even though EU primary law explicitly requires it.

3.3. Legal Form Selection and Principle of Equality

It is noteworthy that the choice of the secondary legislation in the EU is influenced by Arts. 5 and 4(2) of the TEU. According to the latter provision:

The Union shall respect the equality 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. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

57 The necessity indicator here refers rather to areas where, *prima facie*, there is an apparent advantage in using the same legal standards across the EU.

58 It will be further discussed below.

59 Minogue, 1998, pp. 17–37; Ackerman, 2017, pp. 395–490; Samuels, 2009, pp. 703–726.

This is a normatively defined principle of equality within the EU concerning its Member States. The Member States are equal before the Treaties; hence, equal under the EU law, in relation to the EU, and among themselves. Hence, there are no ‘better’ or ‘worse’ Member States. The EU respects their equality⁶⁰ and, as Art. 4(2) states, their diversity, as all the EU Member States are not identical. This observation is significant because, if the Treaties emphasise the diversity or specificity of the Member States, the question arises whether treating them equally will render them equal, given their cultural, national, constitutional, economic and technological differences.

Therefore, the principle of equality, in this case, must consider the diversity of the Member States and may conflict with the application of identical requirements for all. The inclusion of the equality principle in the same paragraph of Art. 4 of the TEU, where the diversity of the Member States is emphasised, is unlikely to be coincidental. These two elements are profoundly and strongly interconnected, whereby understanding one element influences the interpretation of the other. Hence, it should be advocated that, instead of imposing unified legal standards across the EU, compliance with the equality principle should involve efforts to introduce requirements tailored to the needs and developmental capacities of the Member States. This would ensure that, in the future, the EU becomes a conglomerate of states, representing comparable technological or economic levels, regardless of geographical location. Alternatively, compliance with the equality principle could involve introducing a fair mechanism for sharing resources, knowledge, experience and technology to support those Member States that demonstrate such a need. This argument leads to the conclusion, which is neither novel nor groundbreaking, that treating everyone equally may not always be the appropriate course of action if the goal is to achieve equality in practice. Under specific circumstances, particularly when dealing with inherently different entities, the only way to realise equality is to treat them according to their needs.

Furthermore, this discourse leads to a conclusion regarding the choice of the secondary legislation. Given the specificity and nature of EU directives and regulations, the selection of a particular legislative instrument significantly impacts the realisation of the equality principle. Issuing an EU directive assumes that the Member States will implement the directive within their legal systems. Hence, the Member States are bound by the directive’s objective, with discretion in selecting the means to achieve the objective. In contrast, an EU regulation does not afford such discretion.⁶¹ It has a direct effect through its objective and the set of provisions specifying the means to achieve the objective. The Member States have no discretion and are obliged to adapt their legal systems to the rigid provisions of the EU regulation. Hence, all Member States are treated the same.

60 Rossi, 2017, pp. 3–42; Bayefsky, 2017, pp. 71–104; Raz, 2018, pp. 37–58; Wouters and Schmitt, 2017, pp. 43–82.

61 De Witte, 2008, pp. 79–108; Chalmers, 2015, pp. 303–326.

This distinction highlights that, with an EU directive, the Member States play a decision-making role in determining how to achieve the objective, accounting for their diversity. However, an EU regulation, if it is a typical rigid regulation, has no room for considering such diversity. The Member States are merely executors of the EU's will, as they must adapt their legal systems to ensure the effective implementation of the directly applicable EU law, often, as practice shows, even through the adoption of dedicated national legislation. It is noteworthy that the content of EU law is significantly influenced by economically and politically powerful Member States. Hence, the choice of the secondary legislation is crucial from the perspective of the equality principle.

Choosing an EU directive should be favoured from the perspective of the significance of Art. 4(2) of the TEU. An EU regulation neither promotes the realisation of the equality principle nor accommodates the diversity of the Member States. However, objectively, this does not mean that such an accommodation is impossible. It is possible, yet it depends on the EU's willingness and inclusion within the specific regulation of legal instruments. Considering the diversity of the Member States while realising the equality principle is crucial because, when diversity is not considered, it is difficult to speak of true equality. Hence, the equality principle and the respect for the diversity of the Member States are closely linked in Art. 4(2).

However, a potential departure from the equality principle within the EU does not have universally adverse effects for all the Member States. The consequence of such inequality is that some Member States may find themselves in a disadvantaged position, while others may find themselves in a more favourable position. A situation in which a departure from the equality principle takes the form of assigning the EU a hierarchically superior position to the Member States does not imply that all the Member States will have the same practical position in relation to the EU. The EU's practical functioning demonstrates that some Member States, while seemingly agreeing to transfer sovereignty or take on a theoretically subordinate role, actively and effectively influence the direction of EU actions and policies. Therefore, for some Member States, departing from the equality principle and the respect for diversity among Member States becomes a pathway to achieving supremacy within the EU.

4. Legal Form Selection: AI Act

4.1. General EU Competence for AI Normalization

The starting point for AI regulatory actions in the EU was 2020, when, on 1–2 October, the European Council, during its Brussels summit, called on the European Commission to take appropriate measures to ensure that the EU becomes a global

leader in the development of safe, trustworthy and ethical AI (Conclusion No. 13).⁶² Subsequently, on 21 April 2021, the Commission proposed the AI Act as a legislative proposal for an EU regulation.⁶³ On 6 December 2021, the Council of the European Union (hereafter, the Council) adopted its position on the AI Act, emphasising the need for safe AI in compliance with fundamental rights.⁶⁴ On 26 January 2024, a preliminary agreement⁶⁵ between the Council and the European Parliament on the AI Act was issued, following negotiations held on 6–9 December 2023.⁶⁶ On 21 May 2024, the Council approved the AI Act,⁶⁷ which entered into force on 1 August 2024.

An important aspect of selecting the legal form for AI regulations in the EU is determining the nature of the EU's general competence to adopt AI-related legal measures. It is necessary to establish whether this is an exclusive competence of the EU following Art. 5 of the TEU, as it decides whether the principle of subsidiarity applies to this competence. According to Art. 5, the principle of subsidiarity applies to EU competences that are not exclusive. It is noteworthy that this issue has a different legal significance than identifying the legal bases in the EU Treaties for adopting the AI Act (discussed later), as it pertains to the already specified competence to adopt a particular EU secondary law act.

In contrast, general competences are outlined in Art. 4 of the TFEU. Art. 4(2) specifies that one of the shared competences is the area of freedom, security and justice, further specified in Arts. 77 and 78. Art. 4(2) refers to the EU's general competence, while Arts. 77 and 78 provide for the competence to adopt specific legal measures in the form of EU secondary law. Thus, regarding AI, it is necessary to determine the general competence, which poses little difficulty in light of the opening section of Recital 1 and Art. 1 of the AI Act, which emphasises that 'the purpose of this Regulation is to improve the functioning of the internal market...'. Hence, the EU derives its general competence to regulate AI under Art. 4(2)(a) of the TFEU, where the internal market is listed as a shared competence. Furthermore, since this is a shared competence, the principle of subsidiarity applies. Consequently, all the above considerations and observations regarding the selection of the legal form of EU secondary legislation apply to the AI Act.

62 European Council conclusions, 1–2 October 2020.

63 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM/2021/206 final.

64 Artificial Intelligence Act: Council calls for promoting safe AI that respects fundamental rights.

65 Analysis of the final compromise text with a view to agreement.

66 Artificial Intelligence Act: Council and Parliament strike a deal on the first rules for AI in the world.

67 Artificial Intelligence (AI) Act: Council gives final green light to the first worldwide rules on AI.

4.2. Subsidiarity, Proportionality and Choice of Instrument

The AI Act was designed as an EU regulation, which was reflected in the legislative proposal of the European Commission.⁶⁸ In the justification of the legislative proposal, reference was made to the principles of proportionality and subsidiarity and the reasons for selecting a legal instrument as an EU regulation. Regarding the principle of subsidiarity, it was stated:

The nature of AI, which often relies on large and varied datasets and which may be embedded in any product or service circulating freely within the internal market, entails that the objectives of this proposal cannot be effectively achieved by Member States alone. Furthermore, an emerging patchwork of potentially divergent national rules will hamper the seamless circulation of products and services related to AI systems across the EU and will be ineffective in ensuring the safety and protection of fundamental rights and Union values across the different Member States. National approaches in addressing the problems will only create additional legal uncertainty and barriers, and will slow market uptake of AI. The objectives of this proposal can be better achieved at Union level to avoid a further fragmentation of the Single Market into potentially contradictory national frameworks preventing the free circulation of goods and services embedding AI. A solid European regulatory framework for trustworthy AI will also ensure a level playing field and protect all people, while strengthening Europe's competitiveness and industrial basis in AI. Only common action at Union level can also protect the Union's digital sovereignty and leverage its tools and regulatory powers to shape global rules and standards.⁶⁹

Regarding the principle of proportionality, the EU emphasised:

The proposal builds on existing legal frameworks and is proportionate and necessary to achieve its objectives, since it follows a risk-based approach and imposes regulatory burdens only when an AI system is likely to pose high risks to fundamental rights and safety. For other, non-high-risk AI systems, only very limited transparency obligations are imposed, for example in terms of the provision of information to flag the use of an AI system when interacting with humans. For high-risk AI systems, the requirements of high quality data, documentation and traceability, transparency, human oversight, accuracy and robustness, are strictly necessary to mitigate the risks to fundamental rights and safety posed by AI and that are not covered by other existing legal frameworks. Harmonised standards and supporting guidance and compliance tools will assist providers and users in complying with the requirements laid down by the proposal and minimise their costs. The costs incurred by operators are

68 Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on Artificial Intelligence.

69 Ibid., Point 2.2.

proportionate to the objectives achieved and the economic and reputational benefits that operators can expect from this proposal.⁷⁰

Regarding the arguments supporting the use of an EU regulation as the legal form, it was noted:

The choice of a regulation as a legal instrument is justified by the need for a uniform application of the new rules, such as the definition of AI, the prohibition of certain harmful AI-enabled practices, and the classification of certain AI systems. The direct applicability of a Regulation, in accordance with Art. 288 TFEU, will reduce legal fragmentation and facilitate the development of a single market for lawful, safe, and trustworthy AI systems. It will do so, in particular, by introducing a harmonised set of core requirements with regard to AI systems classified as high-risk and obligations for providers and users of those systems, improving the protection of fundamental rights and providing legal certainty for operators and consumers alike. At the same time, the provisions of the regulation are not overly prescriptive and leave room for different levels of Member State action for elements that do not undermine the objectives of the initiative, in particular the internal organisation of the market surveillance system and the uptake of measures to foster innovation.⁷¹

It is noteworthy that the AI Act, in its current version, explicitly refers to the principles of subsidiarity and proportionality. Recital 176 of the AI Act states:

Since the objective of this Regulation, namely to improve the functioning of the internal market and to promote the uptake of human-centric and trustworthy AI, while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection against harmful effects of AI systems in the Union and supporting innovation, cannot be sufficiently achieved by the Member States and can rather, by reason of the scale or effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Art. 5 TEU. In accordance with the principle of proportionality as set out in that Art., this Regulation does not go beyond what is necessary in order to achieve that objective.⁷²

In this context, and in a form lacking substantiating arguments, assertions or claims are made that the objective of the AI Act cannot be sufficiently achieved by the Member States; due to the scale and effects of the action, the objective of the AI Act can be better achieved at the EU level; the AI Act does not go beyond what is necessary to achieve its objective; and the choice of an EU regulation is justified

⁷⁰ Ibid., Point 2.3.

⁷¹ Ibid., Point 2.4.

⁷² Tacconi, 2017, pp. 23–41; Budianto, 2020, pp. 1339–1346.

by the need for unification. *Prima facie*, it is evident that these statements are not accidental, as under the EU primary law, they represent the conditions that must be met to comply with the principles of proportionality and subsidiarity.⁷³ To conclude that the specific conditions of these principles have been met, a thorough analysis and exhaustive evidence are necessary.

This requirement becomes even more critical when addressing an area previously unregulated by the EU, where efforts to justify any regulation should be rigorous and meticulous. However, the proponents or drafters of the AI Act deemed it sufficient to present arguments that were unsupported by analyses or studies. These arguments were based on the nature of AI, which prevents the Member States from sufficiently achieving the objectives of the Act, and the emergence of a ‘potentially’ divergent patchwork of national laws that could hinder the free circulation of AI-related products and services within the EU, while failing to ensure the protection of fundamental rights and EU values in individual Member States. Yet, no specific examples of such laws or evidence of their existence were provided, leaving an unsubstantiated claim. The assumption was that national approaches would result in additional legal uncertainty and barriers while slowing down AI’s market adoption.

Furthermore, it was forecasted that robust European regulatory AI frameworks would ensure a level playing field, protect all citizens and strengthen Europe’s competitiveness and industrial base in AI. They asserted that ‘only’ common EU action could protect its digital sovereignty⁷⁴ and leverage its regulatory tools to shape global rules and standards. The presumption was that the AI Act aligned with the principle of proportionality because it applied a risk-based approach, imposing regulatory burdens only when AI posed high risks to fundamental rights and safety. The term ‘strictly necessary’ was used to justify the legal requirements for high-risk AI systems, such as high-quality data and documentation, essential to mitigating risks to fundamental rights and safety not covered by the existing legal frameworks. However, no details were provided about which legal frameworks were being referenced.

These arguments were presented to justify compliance with the principles of proportionality and subsidiarity. Regarding the choice of an EU regulation as the legal instrument for the AI Act, additional arguments were used, which lacked substantiation as well. The need for the unification of EU law on AI was cited, which seemingly justified choosing a regulation over a directive. The role of a regulation in preventing legal diversity and ensuring a unified AI market was emphasised. It was argued that the AI Act, as a regulation, was not ‘overly prescriptive’, leaving room for multidimensional actions by the Member States, particularly regarding the internal organisation of monitoring systems and measures to support innovation. However, it was specified that these actions must not undermine the objectives of the AI Act, effectively requiring compliance with its provisions. Nonetheless, the last argument demonstrated that the Member States could not rely on the adoption of the AI Act by

73 Cannizzaro, 2002, pp. 889–916; Christodoulou, 2018, p. 16.

74 At this point, setting aside whether the EU has any sovereignty, including digital sovereignty.

the EU. Instead, they bore the responsibility to ensure its effective implementation within their national jurisdictions, including adapting their domestic laws to align with the AI Act. Thus, the last argument for choosing an EU regulation should be read through the lens of obligations imposed on the Member States rather than their legislative freedom.

The evaluation of the quality of the presented arguments highlights that they represent a low substantive standard, characteristic of a popularising publication rather than a legislative document⁷⁵ or a scientific article. All the mentions, assumptions, forecasts, premises, needs, theses and facts presented in the justification of the AI Act form a good starting point for a draft rationale; however, they should not constitute the final result. The arguments should have been supplemented with robust analyses that lent credibility to and proved their validity. Accepting the justification, as presented by the EU, would allow almost any objective to be simultaneously classified by the EU as achievable by the Member States and unachievable by them. The same applies to the principle of proportionality, as it becomes easy to state that any legal measure either goes beyond what is necessary or does not. Without thorough analysis and arguments, this justification becomes simplistic, exemplifying the Latin maxim *charta non erubescit* (paper does not blush).

This method of justifying the compliance of EU actions with the principles of proportionality and subsidiarity exhibits unacceptable arbitrariness. The arbitrariness, or even frivolity, lies in the fact that, under such rules, the EU can, at any time, issue a statement asserting that any of its actions fall within its scope and are compliant with the principles of subsidiarity, proportionality, or conferral, without presenting analyses, supporting arguments or evidence. The same applies to the reasoning behind the choice of a secondary legal act. The mechanism promoted in the AI Act appears to be insufficient and broad. Using an academic analogy, when a scholar wishes to publish their thesis in a scientific journal, they must conduct research or analysis to substantiate their claims. Without such evidence, the thesis would be deemed baseless and devoid of substantive merit. The standards that lawmakers should meet should be no lower than those applied to researchers. Therefore, if the EU declares that its actions comply with the principles outlined in Art. 5 of the TEU, it must provide proof to substantiate such a declaration.

This necessity arises because the EU, like the Member States, is bound by the primary EU law, which constitutes the foundation of its functioning. This explains why, before adopting the GDPR, the EU undertook several measures for harmonising national data protection laws, starting with an EU directive as a less intrusive measure.⁷⁶ This was intended to ensure that the EU could demonstrate its compliance with the principles of subsidiarity and proportionality. The Member States, as the creators and guardians of the EU primary law, incorporated the principles outlined in Art. 5 of the TEU into the Treaties to protect their sovereignty from unjustified

75 Staniszevska, 2019, pp. 119–128; Urbaniak, 2017, pp. 71–86.

76 Moerel, 2011a, pp. 92–110; Moerel, 2011b, pp. 28–46; Custers et al., 2018, pp. 234–243.

interference by the EU, particularly when such interference lacked supporting arguments, analyses or evidence.⁷⁷ Hence, the principles of subsidiarity and proportionality are protective in nature, outlining how the EU should exercise its competences. It is logical, purposeful and consistent with the function of these principles to assert that, since the EU is obliged under its primary law to ensure its activities comply with the principles of proportionality and subsidiarity, the burden of proving, or at least significantly substantiating or adequately justifying, this compliance lies with the EU. In other words, the burden of proof should rest with the EU, as it pertains to the actions it undertakes in the exercise of its competences.

This aligns with the general principle that the burden of proving a fact falls on the party relying on the fact to derive legal consequences.⁷⁸ Hence, when regulating AI at the EU level, the EU should conduct exhaustive analyses, present arguments, hold consultations, publish national reports and initiate discussions that are open to diverse perspectives. This is essential to comprehensively substantiate or prove that the EU's actions are justified, necessary and in compliance with the principles of proportionality and subsidiarity. Furthermore, the EU should justify the form of its potential legal acts, if issuing legal acts is indispensable in light of the need to harmonise or unify the Member States' regulations. If a legal act is warranted, the EU should assess whether a directive would suffice, as with the GDPR. Only after comprehensively substantiating or proving such necessity should the EU consider issuing a regulation, which would unify the national laws of the Member States.

In regulating AI, this process of deduction was missing. Instead, the EU directly issued a regulation (the AI Act) without substantiating or proving its compliance with the required principles. Such an approach should be negatively evaluated, despite the EU, in theory, having the authority to issue a regulation outright in certain areas. The justification for issuing an EU regulation, especially in a new regulatory area, is exceedingly challenging to substantiate concerning the compliance with the required principles. However, it is worth observing that while the issuance of an EU directive may be easier to justify, this does not mean that it can be taken lightly. In other words, issuing an EU directive must be thoroughly justified in light of the principles outlined in Art. 5 of the TEU, which cannot merely be based on the failure to meet the requirements for issuing a regulation.

The case of the AI Act illustrates a dangerous trend within the EU: the issuance of regulations without substantiating their compliance with the principles of subsidiarity and proportionality, arbitrarily unifying the Member States' laws. This is a tendency towards harmonising legal standards within the EU and a trend of unconditional unification. Hence, the issuance of the AI Act is one of the more concerning precedents, given the direct impact that EU regulations have on the sovereignty of the Member States.⁷⁹

77 Blanke and Mangiameli, 2013, pp. 255–286.

78 Adrych-Brzezińska, 2017, pp. 29–37; Ronald and Stein, 2013, p. 557.

79 Pavel, 2022, pp. 596–603; Bellamy, 2017, pp. 188–209; Mardanov, 2023, p. 128.

4.3. Lesson From History: Personal Data Protection and Medical Devices in EU

The case of regulating data protection and medical devices by the EU demonstrates a different approach to unifying legal standards across the Member States. The well-known and iconic GDPR unified data protection standards across the EU. However, before this regulation was issued and it was determined that such a measure was necessary and compliant with the principles of subsidiarity and proportionality, the area was governed by the EU's 1995 directive on the same subject (Directive 95/46/EC).⁸⁰ Hence, the EU initially issued a directive to harmonise the laws of the Member States, and after 21 years of efforts in this area, it decided to adopt a regulation as a more intrusive legal instrument. In other words, the EU tested the legal form and the provisions of Directive 95/46/EC in practice. As a result, it demonstrated that data protection required EU regulation because the objective could not be achieved by the Member States alone or because their efforts were insufficient.

To validate this justification, it was necessary to issue a less intrusive legal act, such as an EU directive, and allow sufficient time for its implementation and potential amendments. This aligned more closely with the principles of subsidiarity and proportionality. The adoption of the GDPR was further supported, albeit not primarily, by the growing importance and urgency of data protection, driven by the scale and pace of changes in the 21st century. While this was a secondary justification that supported the decision to issue an EU regulation, it was relevant and worth considering. Regarding AI, a similar rationale could apply, as the growing importance and transformative potential of AI systems provide a supporting argument. However, as with data protection, such considerations should complement, rather than replace, the substantive justification required to meet the principles of subsidiarity and proportionality.

The EU took a similar approach for regulating medical devices. Setting aside sectoral regulations, it issued a directive on active implantable medical devices on 20 June 1990.⁸¹ This was followed by a directive on medical devices on 14 June 1993, and another directive on in vitro diagnostic medical devices⁸² on 27 October 1998. These directives represented the initial step in regulating this area. After 27 years from the issuance of the first directive, on 5 April 2017, the EU adopted

80 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals regarding the processing of personal data and the free movement of such data. OJ L 281, 23 November 1995, pp. 31–50.

81 Council Directive 90/385/EEC of 20 June 1990 on the approximation of the laws of the Member States relating to active implantable medical devices. OJ L 189, 20 July 1990, pp. 17–36.

82 Council Directive 93/42/EEC of 14 June 1993 concerning medical devices. OJ L 169, 12 July 1993, pp. 1–43.

two regulations repealing the aforementioned directives. The first regulation addressed medical devices,⁸³ while the second pertained to in vitro diagnostic medical devices.⁸⁴

This analysis reveals an established pattern within the EU. When the EU possesses competence and there is a necessity to regulate a specific area at the Union level, the initial approach is the adoption of an EU directive. Some directives would prove sufficient to achieve the objectives, eliminating the need for further, more intrusive legal acts. However, assuming that an EU directive will suffice is somewhat naive, as practice demonstrates that some directives fail to achieve the intended objectives. In such cases, the natural progression involves adopting a more robust legal act, including stricter regulations or an EU regulation, as a different form of secondary law. This pattern was guided by an underlying principle: not to pre-emptively issue regulations without thorough justification. Although this approach was not explicitly codified in the Treaties, it arose from the interpretation of the principles of subsidiarity and proportionality and became a customary practice.

However, in recent years, a notable shift has emerged within the EU – prioritising the unification of legal standards through regulations rather than harmonisation via directives. This is evident in new legislative areas where the EU is yet to issue secondary legal acts, such as AI. Furthermore, it extends to ‘older’ legislative areas, where directives are gradually being replaced by regulations. If this trend is not underpinned by substantive reasons, which seems difficult given its current scale, it contradicts the spirit of the Union enshrined in the Treaties.⁸⁵ It undermines the balance

83 Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC. OJ L 117, 5 May 2017, pp. 1–175.

84 Regulation (EU) 2017/746 of the European Parliament and of the Council of 5 April 2017 on in vitro diagnostic medical devices and repealing Directive 98/79/EC and Commission Decision 2010/227/EU. OJ L 117, 5 May 2017, pp. 176–332.

85 In addition to the previously presented examples related to data protection and medical devices, attention should be drawn to the harmonisation processes in most areas of EU legislation. For example: (1) Under the Dublin system, Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024, on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No 604/2013. OJ L, 2024/1351, 22 May 2024. (2) As part of the qualification system, Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024, on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, was issued. OJ L, 2024/1347, 22 May 2024. (3) As part of the procedural system, Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024, establishing a common procedure for international protection in the Union, was issued. OJ L, 2024/1348, 22 May 2024. However, while the trend towards unification applies to most areas of EU legislation, there are some exceptions. One such exception is the issuance of another directive within the reception system, where Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024, laying down standards for the reception of applicants for international protection, was adopted. OJ L, 2024/1346, 22 May 2024.

between harmonisation and respect for the diversity and sovereignty of the Member States, which are protected by the principles of subsidiarity and proportionality.

5. AI Act: Legal Characterisation

5.1. Specific EU Competence – Linguistic-Logical Interpretation

As mentioned above, the EU, in adopting the AI Act, derives its general competence from Art. 4(2)(a) of the TFEU, which pertains to the internal market. However, the EU's possession of general competence in a specific area does not authorise it to adopt specific secondary legal acts. This is because the competences outlined in Art. 4 of the TFEU are of a general nature, preliminarily and abstractly indicating certain areas as being subject to the transfer of competences by the Member States. The normative nature of the TFEU's provisions concerning shared competences, interpreted through linguistic analysis based on the exegesis of the legal act and systemic and teleological interpretation, precludes the view that this abstract and general delimitation of areas results in their full transfer to the EU. A full transfer means that the EU, in such a case, would be legitimised to undertake any available activities within the subject matter of a specific area, limited only by the type of competence. However, accepting such a position appears inadmissible in light of the below-presented interpretation of Art. 4 of the TFEU.

According to Art. 4(1) of the TFEU, 'the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Arts. 3 and 6'. The linguistic construction of this provision is intriguing, as it is based on conditional syntax. The norm in this provision, linguistically and logically, could mean that if the EU primary law confers competence on the EU in an area other than those specified in Arts. 3 and 6, such competence is shared with the Member States. If one were to assume that Art. 4(2) constitutes what Art. 4(1) defined as 'where the Treaties confer on it a competence', then Art. 4(1) would become meaningless and redundant, as a simple enumeration of shared competences would suffice. However, this approach was not taken. Instead, Art. 4(2) stated that 'shared competence between the Union and the Member States applies in the following principal areas:...', listing, for instance, the internal market, environment and area of freedom, security and justice.

Notably, the language emphasised that competences did not encompass these areas as a whole; instead, they were applied 'in the following principal areas'. Here, the use of 'in' indicated that something was contained within something else; in this context, shared competences were contained within the enumerated areas. If the Treaties drafters had intended to confer competence to the EU over the entire subject matter of the areas listed in Art. 4(2), they would likely have used a more

precise term, such as ‘within’ or ‘covering’. Moreover, the term ‘principal areas’ suggested that these were general, broad or abstractly defined domains, without specific subject-matter delineation within Art. 4. This interpretation effectively precluded treating this provision as an independent basis for detailed EU competences. The phrase ‘Shared competence [...] applies in the following principal areas: ...’ emphasised that shared competences applied to the principal areas listed in Art. 4(2); instead of the shared competences being those areas. Hence, linguistically and logically, the areas indicated in this provision are domains for the application of shared competences, framed as matrices for their potential use, and not competences in and of themselves.

Combining the observations concerning the terms ‘in’, ‘principal areas’ and ‘applies in’ concludes that the EU Treaty drafters constructed this provision with the linguistic and logical intent that shared competences do not encompass the areas listed in Art. 4(2) of the TFEU in their entirety. Instead, shared competences pertain to parts of those areas, which must be further specified in subsequent Treaty provisions concerning the subject matter of a particular shared competence applied within one of the principal areas of Art. 4(2). This interpretation is reinforced by the use of ‘competence’ twice in Art. 4(1). According to this provision, ‘The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Arts. 3 and 6’. If the meaning of ‘competence’ were identical in both instances, the provision would not need to use the term twice. A simpler construction could either state, ‘The Union shall share competence with the Member States within areas indicated in para. 2’, or consolidate the paragraphs and declare that the EU has shared competences over the entirety of the listed areas.

However, this approach was not taken, and the current wording of Art. 4(1) included a condition. The provision explicitly states that the EU has shared competences on the condition that the Treaties confer such competences, while para. 2 of the same Art. specifies the principal areas in which such competences are applied. In other words, Art. 4(2) legitimises the potential for specifying the subject matter of detailed EU competences. Hence, the first use of ‘competence’ refers to the EU’s general competences, and the second use refers to its specific competences. Therefore, a linguistic-logical interpretation reveals that the EU Treaty drafters did not use the term ‘competence’ uniformly in Art. 4. Instead, the meaning of this provision should be as follows: the EU shares competences with the Member States in the principal areas listed in Art. 4(2) (general EU competences) provided that further Treaty provisions specify the subject matter of these general competences by conferring specific competences on the EU.

Considering that the objectivity of research and scientific analysis is paramount, additional steps should be undertaken to verify the result achieved through the linguistic-logical method. Given that the linguistic interpretation of Art. 4 may evoke strong reactions, mainly because it diverges from the mainstream interpretative approach commonly presented within the EU, it is necessary to refer to systemic and

teleological interpretations. These can either refute or reinforce the validity of the result obtained.

5.2. Specific EU Competence – Systematic Interpretation

Based on systemic interpretation, it is essential to refer to the structure of the TFEU as the EU treaty that contains the relevant provisions regarding the conferral of specific competences by the Member States in substantive areas. The systematic structure of the TFEU is organised as follows: Part One includes Title I, ‘Categories and Areas of Union Competence’, and Title II, ‘Provisions Having General Application’. Part Two addresses ‘Non-Discrimination and Citizenship of the Union’. Part Three is dedicated to ‘Union Policies and Internal Actions’ and is subdivided into 24 titles: The Internal Market; Free Movement of Goods; Agriculture and Fisheries; Free Movement of Persons, Services and Capital; Area of Freedom, Security and Justice; Transport; Common Rules on Competition, Taxation and Approximation of Laws; Economic and Monetary Policy; Employment; Social Policy; The European Social Fund; Education, Vocational Training, Youth and Sport; Culture; Public Health; Consumer Protection; Trans-European Networks; Industry; Economic, Social and Territorial Cohesion; Research and Technological Development and Space; Environment; Energy; Tourism; Civil Protection; and Administrative Cooperation.⁸⁶ Following Arts. 3, 4, 5 and 6 of the TFEU, it becomes clear that the titles correspond directly, or indirectly, to the areas indicated in these provisions, which characterise the categories and areas of EU competences.

The linguistic interpretation of Art. 4 of the TFEU suggests that the structure of the TFEU should be understood as Part One, Title I referring to general competences, while the subsequent parts and titles specify the ‘principal areas’ by setting out detailed competences. For instance, Art. 4(2)(j) states that one of the principal areas is the ‘area of freedom, security and justice’. This is also the title of Title V in Part Three, which contains Arts. 67 to 89. Hence, we understand that the competence referred to in Art. 4(2)(j) is confined to a specific subject matter that outlines the possible and concrete actions the EU may take in this area. These actions pertain to policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation. Hence, we understand the actual subject matter of the principal area referred to as the ‘area of freedom, security and justice’ and the specific actions for which the EU is empowered.

Furthermore, under Art. 77(2), the EU has been granted specific competence to adopt measures, acting under the ordinary legislative procedure, concerning the common policy on visas and other short-stay residence permits, the checks to

⁸⁶ Cherchye et al., 2007, pp. 749–779; Greer and Jarman, 2021, pp. 23–47; Vickerman, 1995, pp. 237–254; Giubboni, 2007, pp. 360–379; Hofmann, 2013, pp. 24–38; Minor, 2012, pp. 163–168; Ekengren et al., 2006, pp. 457–476.

which persons crossing external borders are subject, the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period, any measure necessary for the gradual establishment of an integrated management system for external borders and the absence of any controls on persons, irrespective of their nationality, when crossing internal borders. These EU competences are defined precisely and concretely. Without such specifications, the principal area indicated in Art. 4(2)(j) would lack the actual subject matter of EU competence, which should preclude the adoption of legal acts, as outlined in detailed provisions. Furthermore, without such specification, the areas listed in Art. 4(2) would have to be regarded merely as programmatic norms, lacking the element necessary to constitute a basis for the EU to take specific actions, particularly in the TFEU's current structure. In other words, without Art. 77(2), the EU would not be authorised to adopt, for instance, secondary legal acts relating to the checks to which persons crossing external borders are subject, even though 'area of freedom, security and justice' is listed as a principal area in Art. 4(2)(j). This is because, as confirmed by the linguistic-logical interpretation, the TFEU's structure indicates that the principal areas listed in Art. 4(2) require the EU to possess specific competences (detailed competences), as defined in subsequent treaty provisions, to act within those areas. Hence, the result of the systemic interpretation concerning the structure aligns with and supports the linguistic-logical interpretation.

5.3. Specific EU Competence – Teleological Interpretation

Accounting for the complementary linguistic-logical and systemic interpretations, it is possible to refer to the arguments based on teleological interpretation. This interpretation of Art. 4 of the TFEU is challenging, as it relies on the intent of the creators of the EU primary law. Legally, under international law, these creators are the Member States. Decoding their intent is difficult, as such analyses are based on assumptions. This approach seems inappropriate, mainly due to the interpretative difficulties that make such assumptions less reliable, and their scientific utility is often questioned. Therefore, would be more accurate to refer to the function that a particular legal norm is intended to serve. However, even in this case, we may encounter vague concepts with undefined scope, unless the function of the specific legal norm is indisputable.

Concerning Art. 4 of the TFEU, assumptions about an indisputable function could be considered hasty or biased. In such cases, it is necessary to rely on linguistic-logical and systemic interpretations. Since their results are known, the teleological interpretation would either definitively confirm their conclusions or cast doubt upon them. Therefore, it is necessary to refer to the function of another legal norm whose purpose is indisputable and try to infer, based on this, the function of Art. 4. In this context, it is noteworthy that the function of Art. 5 of the TEU is fundamentally clear. Its purpose is to guarantee, by the Member States for the Member States, that the EU will act only within the scope of the competences conferred upon it and, in cases

where such competences are conferred, it will act subsidiarily (except for exclusive competences) and proportionally. This raises the question whether the EU has competence to regulate AI, making the principle of conferral of central importance.

Concerning Art. 4(1) of the TFEU and Art. 5(2) of the TEU, the principle of conferral establishes that the EU ‘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’ and creates a legal presumption. This presumption holds that in cases of doubt as to whether a particular competence has been conferred upon the EU, it must be concluded that such competence has not been conferred. This would counteract the phenomenon of ‘competence creep’.⁸⁷ This presumption is based on the general principles of public international law concerning national sovereignty or conclusions regarding state sovereignty, tied to the natural prerogatives of exercising public authority. Furthermore, it rests on the rule repeated twice in the TEU, in Arts. 4 and 5, that ‘competences not conferred upon the Union in the Treaties remain with the Member States’.

Adopting the protective character of the principle of conferral and the legal presumption embedded within it is crucial for determining the function of Art. 4 of the TFEU, especially because the drafters of both the TEU and TFEU are the Member States, as a unified actor. Thus, assigning a specific function to Art. 4 of the TFEU must align with the unified spirit of the Treaties, as expressed in the legal norms crafted by the Member States. If the Member States chose to define Art. 5 of the TEU in a protective manner regarding themselves and framed the principle of conferral as a safeguard, then treating Art. 4 of the TFEU as an open gateway for competences, not requiring further specification in subsequent treaty provisions in the form of detailed competences, would be illogical. Moreover, this approach would undermine the real significance and impact of the principle of conferral. To interpret Art. 4 of the TFEU in a manner inconsistent with the linguistic-logical and systemic interpretations would lead to a fundamental inconsistency between Art. 5 of the TEU and Art. 4 of the TFEU. However, such inconsistency cannot exist, as the EU Treaties, forming a single legal framework, must be treated as a cohesive and consistent whole.⁸⁸ This coherence and consistency can only be achieved if the functions of Art. 5 of the TEU and Art. 4 of the TFEU complement each other. However, if one denies the protective and safeguarding nature of Art. 5 of the TEU, which influences the understanding of the function of Art. 4 of the TFEU, then either the function of Art. 5 must be interpreted through the lens of Art. 4, or vice versa. To resolve any doubts arising from such an interpretative dilemma, it is necessary to refer to the normative character of the TEU and TFEU. The TEU defines the foundations of the EU, as established in Art. 1:

87 Prechal, 2010, pp. 5–22; Fisicaro, 2022, pp. 334–356; Garben, 2020, pp. 429–447; De Witte, 2015, pp. 434–457.

88 Duic, 2015, p. 537; Gauttier, 2004, pp. 23–41; Franklin, 2011, pp. 42–85.

By this Treaty, the High Contracting Parties establish among themselves a European Union, hereinafter called ‘the Union’, on which the Member States confer competences to attain objectives they have in common. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.

Hence, the TEU is constitutive for the entire EU. The TFEU defines far more procedural and formal aspects of the EU’s functioning, as stated in Art. 1: ‘This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences’. Thus, the TFEU has an executive character for the EU.

Nonetheless, to negate potential counterarguments, this does not conclude that these instruments have different legal weight. Such reasoning is excluded under Art. 1 of the TEU and TFEU, which contain the same provision: ‘These two Treaties, which have the same legal value, shall be referred to as the Treaties’. However, there is a distinction between the legal value and method of interpreting the norms contained in the TEU and TFEU, which relies on their mutual coherence and consistency. Both treaties, with the same legal value, must be interpreted as a whole.

A comprehensive view of the EU’s treaty system leads to the observation that Art. 5 of the TEU establishes legal principles, whereas Art. 4 of the TFEU does not possess such normative significance. Legal principles, by encapsulating a fundamental goal, establish guiding ideas for the legal system, determining the interpretation and meaning of other types of legal norms.⁸⁹ Such a perception of Art. 5 of the TEU aligns fully with its protective and safeguarding essence and constitutive nature. This unequivocally means that even if the argument about the protective and safeguarding character of Art. 5 of the TEU is not accepted, the function of Art. 4 of the TFEU, concerning shared competences, should be understood through the lens of the legal principles established in Art. 5 of the TEU, including the principle of conferral. This implies that the objectives of Art. 4 of the TFEU and Art. 5 of the TEU cannot conflict. This teleological interpretation provides compelling arguments that support the linguistic-logical and systemic interpretations of Art. 4 of the TFEU.

5.4. Legal Basis of the AI Act

The AI Act was adopted with reference to the TFEU, particularly Arts. 16 and 114. It is in these two provisions that the EU identifies its specific competence to regulate AI. This is legally significant because, as demonstrated above, the possession of general competence, such as that outlined in Art. 4(2)(a) of the TFEU, is insufficient.

⁸⁹ Akehurst, 1976, pp. 801–825; Goldman, 1987, pp. 113–125; Lammers, 1980, pp. 53–75.

Art. 16 relates to the protection of personal data within the EU.⁹⁰ It emphasises that everyone has the right to the protection of personal data and the EU has the competence to establish rules concerning the protection of individuals regarding the processing of personal data by EU institutions, bodies, offices and agencies, and by the Member States when carrying out activities within the scope of the EU law. It sets out principles for the free movement of such data, and stresses that compliance with these rules is subject to control by independent authorities. Art. 16 was the primary legal basis for adopting the GDPR. Regarding the AI Act, as the European Commission pointed out in its Explanatory Memorandum accompanying the legislative proposal for the AI Act:

In addition, considering that this proposal contains certain specific rules on the protection of individuals with regard to the processing of personal data, notably restrictions of the use of AI systems for ‘real-time’ remote biometric identification in publicly accessible spaces for the purpose of law enforcement, it is appropriate to base this regulation, in as far as those specific rules are concerned, on Art. 16 of the TFEU.

Hence, within the scope indicated by the Commission, Art. 16 contains a specific EU competence to regulate issues related to data protection within a defined subject matter. Consequently, it can serve as the legal basis for any EU secondary law that includes data protection. Given that certain provisions of the AI Act pertain to data protection, citing Art. 16 as the specific legal basis for the AI Act appears justified.

However, Art. 114, as a legal basis for the AI Act, is particularly interesting.⁹¹ It pertains to the approximation of Member States’ legislation. According to Art. 114(1):

Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Art. 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

The referenced Art. 26 lays the groundwork for defining the EU’s specific competences in the area of ‘The Internal Market’. According to Art. 26, (1) The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties, (2) The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the

⁹⁰ Hijmans and Hijmans, 2016, pp. 511–564.

⁹¹ Van Cleynenbreugel, 2014, pp. 64–88; Varju, 2020, pp. 471–486.

provisions of the Treaties and (3) The Council, on a proposal from the Commission, shall determine the guidelines and conditions necessary to ensure balanced progress in all the sectors concerned.

Hence, the use of Art. 114 as the legal basis for the AI Act seems inappropriate. The Art. may serve as a subsidiary, yet not an independent, legal basis for adopting legislation on matters related to the internal market. This is only permissible to the extent that the Treaties, specifically through the existence of a specific competence, authorise the EU to do so. Similarly, Art. 26, referenced in Art. 114, cannot serve as an independent basis for adopting the legislation. The wording of these provisions indicates that they do not contain specific competences for concrete EU actions. Such provisions are important; however, they serve as a subsidiary basis for general competences, offering additional detail, yet not enough to constitute a source for adopting legislation on matters not specified in other primary EU law provisions. Accepting a different interpretation would encounter the same objections raised regarding the interpretation of Art. 4 of the TFEU as an open competence gateway.

Hence, Art. 26 should be understood as a provision initiating the specification of the scope of the EU's detailed competences in the area of the internal market. Art. 26(1) authorises the EU to adopt legal measures for the establishment and functioning of the internal market, while Art. 26(2) contains a legal definition of the internal market. This definition states that the internal market, in simplified terms, refers to the free movement of goods, persons, services and capital across national borders. However, both paras. 1 and 2 of Art. 26 refer to the necessary specification of competences through further treaty provisions. This specification occurs in Part Three of the TFEU, particularly in Title II: Free Movement of Goods⁹² and Title IV: Free Movement of Persons, Services and Capital,⁹³ which provides further examples of such provisions, including Arts. 34 and 47 of the TFEU.

Art. 34 prohibits quantitative restrictions on imports and any measures having an equivalent effect between the Member States. According to Art. 47, the Member States promote the exchange of young workers as part of a joint program. These provisions establish specific EU competences, yet do not directly confer authority on EU institutions to adopt secondary legislation. However, some provisions in the specified titles of the TFEU include such authorisation. For example, Art. 48 of the TFEU grants the EU a specific competence to adopt legislation in the field of social security. Assuming that only provisions like Art. 48 create specific EU competences enabling legislative action would render several provisions in Part Three, Titles II and IV incomplete specific competences. Such competences would not provide a basis for the EU's legislative action. Legally, this would indeed be the case if not for Art. 114 of the TFEU.

Art. 114 functions as a corrective provision, transforming incomplete specific competences into fully actionable ones, yet only within the strictly defined subject

92 Weatherill, 2012, pp. 541–550; Akkermans and Ramaekers, 2013, pp. 237–266.

93 Connor, 2010, pp. 159–209; Leemann, 2018, pp. 857–876.

matter of the internal market, as determined by the provisions in Part Three, Titles II and IV of the TFEU. An alternative interpretation would treat Art. 114 as an open competence gateway, which cannot be considered valid under Art. 5 of the TEU or the arguments previously presented regarding the interpretation of Art. 4 of the TFEU. Additionally, Art. 114 pertains to the approximation of the Member States' legislation rather than the unification of legal standards across the EU. Therefore, even if it applies under the Treaties, it leads to the adoption of directives rather than regulations, particularly in new areas without a legislative history in the EU.

Hence, the AI Act was issued on an incorrectly identified legal basis. This is not surprising, as the Treaties lack a provision authorising the EU to regulate AI, even if AI is treated as a service or a good. Although AI can be a good or a service, it can exist as intangible software, falling outside these categories. There is no suitable legal basis in Titles II or IV of Part Three of the TFEU granting the EU a specific competence to regulate AI. In other words, the Treaties do not provide a legal basis for the AI Act, meaning its adoption violated the principle of conferral, which, alongside the principles of subsidiarity and proportionality, forms one of the EU's foundational principles. This has implications for the equality principle outlined in Art. 4 of the TEU as well.

Additionally, the subject matter of the AI Act (as outlined in its table of contents: General Provisions; Prohibited AI Practices; High-Risk AI Systems; Transparency Obligations for Providers and Deployers of Certain AI Systems; General-Purpose AI Models; Measures in Support of Innovation; Governance; EU Database for High-Risk AI Systems; Post-Market Monitoring, Information Sharing, and Market Surveillance; Codes of Conduct and Guidelines; Delegation of Power and Committee Procedure; Penalties; and Final Provisions) demonstrates that it does not exclusively pertain to the area specified in Art. 4(2)(j) of the TFEU, which grants the EU general competence to regulate AI. This is because the AI Act addresses more than AI-related issues. From the perspective of the internal market, it touches on several other matters, including the protection of fundamental rights, ethics and morality. This observation aligns with the objectives of the AI Act, as stated in its Art. 1:

The purpose of this Regulation is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation.

Hence, even if Art. 114 was considered an independent legal basis under the Treaties, it would remain insufficient for the AI Act. This conclusion does not change with the inclusion of Art. 16 of the TFEU as a part of the legal basis for the AI Act, as it pertains exclusively to the protection of personal data and does not extend to other issues addressed by the AI Act.

6. AI Act vs. Principle of Equality

6.1. Introduction

In light of all the above analyses and discussions, it is important to address the relationship between the AI Act and the principle of equality among the EU Member States. The considerations can be divided into two groups. The first group pertains to general arguments of a systemic nature, focusing on issues of competence. This analysis highlights the significance, role and impact of the AI Act on the current perception of the relationship between the EU and its Member States. However, these arguments will refer to the principles and essence of the EU law, including the EU's position as determined by public international law, notably the primary EU law. The demarcation in this case is the adoption of the AI Act, particularly its entry into force. The second group concerns arguments related to the potential effects of the AI Act's practical application. This group is significant for the relationships among the Member States. Hence, the first group can be referred to as systemic legal determinants, while the second group can be called operational effects of the application.

Although the equality principle in Art. 4(2) of the TEU has been discussed, it is necessary to recall its most important elements.⁹⁴ This principle obligates the EU, as is evident from its wording, which is clear and does not require additional legal interpretations.⁹⁵ The EU is obligated to respect the equality of the Member States concerning the Treaties, and their national identities, which are inextricably linked to their political and constitutional structures, including regional and local self-government. Hence, under this provision, the Member States are to be treated equally, instead of the Member States and the EU. As noted, the EU is not a beneficiary of Art. 4(2) but rather its addressee. Even if one were to accept that the EU has gradually, through treaty changes and in accordance with them,⁹⁶ evolved into a *sui generis* international organisation,⁹⁷ this does not alter the fact that its role should not be to lead or eliminate the diversity of the Member States. Rather, its role is to proportionately and subsidiarily support the development of the Member States according to the principles of conferral.

The EU must respect the fundamental functions of the Member States, particularly those ensuring territorial integrity, maintaining public order and protecting national security, with national security being the exclusive responsibility of each Member State. Therefore, it is clear that the EU is obligated to respect the fundamental

94 Wouters, Schmitt, 2017, pp. 43–82; Rossi, 2017, pp. 3–42.

95 Choduń, 2014, pp. 134–140; Grabowski, 2015, pp. 67–97.

96 This refers to amending treaties, such as Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ C 80, 10.3.2001, pp. 1–87); Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ C 340, 10.11.1997, pp. 1–144).

97 Klabbers, 2016, pp. 1–15.

functions of the Member States, which, in conjunction with the principles outlined in Art. 5 of the TEU, portrays the EU as an entity obliged to ensure equality while adhering to firmly established standards that set boundaries for its actions. Thus, while the equality principle, in its entirety, might suggest equality across the EU, the principle of equality among Member States, as defined in Art. 4(2), assigns specific roles and positions to the Member States and the EU separately. In this arrangement, the EU is the obligated entity serving the Member States, a view supported by Art. 4(1) of the TEU.

6.2. Group I: Systemic Legal Determinants

In the analysis of systemic legal determinants, and in light of a comprehensive evaluation, it is reasonable to assert that the AI Act does not uphold the equality principle in the EU as presented above, particularly regarding the relationship between the EU and its Member States. This excludes, in principle, its impact on the relationship among the Member States, where the analysis of operational effects of application will be more relevant. However, this division is not rigid, as the actual functioning of the EU indicates that some Member States exert a strong guiding influence on the forms, directions and values of EU actions. This can lead to the conclusions of the analysis of systemic legal determinants being applicable to the relationship among the Member States. This is because a strong guiding influence ties the relational position of the Member States to the EU's position and status. Hence, it is not surprising that, for some Member States, a strong EU represents a beneficial solution. Nonetheless, leaving aside this fact – mainly because, from a legal perspective, it remains imperceptible and unproven – it is necessary to present several arguments supporting the validity of the thesis proposed above.

It is undeniable that there is a need for legal regulation of AI.⁹⁸ The essence, definitions and subject matter of AI indicate the need for effective and well-thought-out legal solutions, particularly for cross-border situations.⁹⁹ However, the goal does not justify all the means, particularly actions that conflict with the principles and rules of the legal system in general and the EU legal system. The current EU legal framework is founded on and determined by the Lisbon Treaty,¹⁰⁰ which, on the one hand, opened the EU to a new stage of integration but, on the other hand, effectively halted changes to the primary EU law until the adoption of a new treaty or treaties.¹⁰¹ Hence, EU actions regarding AI that go beyond the boundaries of EU primary law, regardless of the existing need, constitute a violation of the equality principle

98 Selvakumar, 2022, pp. 186–195.

99 Regarding the cross-border case: Bu-Pasha, 2017, pp. 213–228.

100 Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (OJ C 306, 17.12.2007, pp. 1–271); Reh, 2009, pp. 625–650; Biernat, 2011, pp. 279–296.

101 European Parliament, 2023, Resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties.

of Art. 4(2) of the TEU. They undermine the autonomy and constitutional identity of the Member States by interfering in areas that, according to the treaties, remain within national competence. This encroachment can result in unequal treatment of the Member States concerning their sovereign right to regulate critical technological issues, such as AI, per their legal principles and constitutional values,¹⁰² which inherently require respect for diversity.¹⁰³

Directly connected to the first argument, the AI Act was adopted without the EU possessing a specific competence to do so. While the EU holds general competence to regulate the internal market, provisions such as Arts. 4, 26 and 114 of the TFEU do not grant it the authority to adopt secondary legislation concerning AI. Such authority can only be derived from explicit competences concretised in the EU primary law. The EU's adoption of the AI Act without a proper legal basis constitutes a blatant violation of EU law, particularly the principle of equality under Art. 4(2) and the principle of conferral in Arts. 4(1) and 5(2). The EU's reliance on false legal grounds to inadequately justify the adoption of the AI Act should be seen in the context of 'competence creep'. However, this does not mitigate the negative assessment and consequences of the EU's actions. The breach of the equality principle lies in the total disregard for the fundamental functions of the Member States and the limits of competences conferred on the EU by them. By undertaking such actions, the EU seeks to reverse the equality principle under Art. 4(2), attempting an extra-legal and *de facto* attribution of a leading role over the Member States. Such conduct must be deemed unacceptable and contrary to the rule of law.¹⁰⁴

The AI Act was issued as an EU regulation without complying with the principles of subsidiarity and proportionality. The lack of a well-founded and substantive analysis, providing arguments that either prove or strongly substantiate such compliance, results in a violation of Art. 5 of the TEU but renders the decision to adopt this form of legal act arbitrary. The legislative mechanism employed by the EU may justify the assertion that, by exhibiting an impermissible degree of discretion, it breached the treaty principles governing its use of competences. The adoption of a legal act as an EU regulation, particularly in a new legislative area, should be accompanied by compliance with the principle of subsidiarity (outside exclusive competences) and proportionality. In the AI Act, this essential element is missing. Given that the EU is obligated to demonstrate the compatibility of its actions with the limits and use of its competences, the absence of this justification results in the allegation of unlawful action and has significant implications for the equality principle. It breaches the fundamental functions of the state, one of which is the sovereign and autonomous determination of the scope and manner of the exercise of competences delegated to an international organisation.¹⁰⁵

102 Wielec, 2017, pp. 53-68.

103 Joos and Lang, 1994, pp. 141-168.

104 Varga, 1995, p. 183; Varga, 2021, pp. 245-278.

105 Tóth, 2023, pp. 175-195; Karakamisheva-Jovanovska, 2023, pp. 69-94.

EU activities that are inconsistent with, or unjustified in compliance with, the principles of proportionality and subsidiarity, such as the unjustified issuance of a legal act or the unwarranted adoption of a regulation instead of a directive, limit the manner in which Member States exercise their competences, indirectly affecting their scope. Such actions can result in a reversal of the intent behind the principles of proportionality and subsidiarity, as enshrined in Art. 5 of the TEU. These arguments conclude that, from the perspective of the systemic legal determinants, the adoption of the AI Act in this manner, form and on such a legal basis was legally inadmissible.

6.3. Group II: Operational Effects of the Application

Turning to the arguments belonging to the operational effects of the application, it should be noted that these will pertain to the potential consequences of applying the AI Act. This means that such arguments will not account for the arguments presented under the first group, systemic legal determinants. To discuss the operational effects of the application, it must be acknowledged that the AI Act has been adopted and is currently an operative piece of secondary EU legislation. In this context, considering the analysis conducted in this chapter, it is reasonable to assert that the application of the AI Act could have serious negative implications for the equality principle under Art. 4(2) of the TEU, particularly regarding ensuring equality among the Member States.

The regulations contained in the AI Act have been adopted as an EU regulation, constituting binding laws directly applicable in all the Member States. The Act applies uniformly to all the Member States, obligating them to comply and treating them equally. However, equal treatment in this context does not necessarily align with the equality principle.¹⁰⁶ This is because the Member States are not identical; in other words, they are diverse.¹⁰⁷ The AI Act's approach to treating the Member States equally fails to recognise their inherent diversity. Consequently, uniform treatment of diverse Member States may exacerbate existing inequalities. This outcome is unsurprising, as the AI Act was adopted as a binding EU regulation, devoid of compensatory mechanisms that account for varying economic and technological advancements across the Member States. Regulations, by their nature, do not favour the respect for diversity, which is a core component of the equality principle. An important related provision is Art. 27 of the TFEU, which mandates the European Commission, when drafting proposals to achieve the objectives outlined in Art. 26 of the TFEU, to consider the level of effort required from economies with varying levels of development to establish the internal market.

Had the AI Act been adopted as an EU directive, the diversity of the Member States would have been safeguarded through their own implementation of the directive's

¹⁰⁶ Callinicos, 2000; Williams, 2016, pp. 135–140.

¹⁰⁷ Cerna, 2013, pp. 180–200.

objectives, retaining flexibility in choosing the means to achieve them. However, since the AI Act was adopted as a binding EU regulation, directly effective in the Member States and not accommodating their diversity, it may lead to increasing disparities, particularly in economic and technological domains. In this context, the choice of legal instrument is crucial. While EU directives allow for the consideration of Member States' diversity, regulations do not inherently facilitate such consideration, though it is not impossible. Unfortunately, the AI Act, in its current form, does not incorporate these considerations.

Complementing the first argument, it is necessary to highlight specific provisions of the AI Act that may contribute to increasing inequalities. Art. 70 of the AI Act obliges the Member States to designate at least one notifying authority and one market surveillance authority. It further requires the Member States to provide these authorities with adequate technical, financial and human resources, and the infrastructure necessary to effectively carry out the tasks assigned under the AI Act. Art. 57 of the AI Act mandates that the Member States ensure that their competent authorities establish at least one regulatory sandbox for AI at the national level.¹⁰⁸ This sandbox must be operational by 2 August 2026. Although such regulatory sandboxes may be established jointly by more than one Member State, according to Art. 3, Point 55 of the AI Act, they should provide AI system providers or potential providers with the opportunity to develop, train, validate and test innovative AI systems based on a sandbox action plan, within a limited timeframe and under regulatory supervision.

Art. 62 of the AI Act outlines measures for providers and deployers, particularly small and medium enterprises, including start-ups. Under this regulation, the Member States are obligated to ensure that small and medium enterprises have access to regulatory sandboxes under the AI Act, provided they meet the qualification requirements and selection criteria. Moreover, it mandates the Member States to organise informational and training events tailored to the application of the Act's provisions, addressing the needs of small and medium enterprises, start-ups and local public authorities. Furthermore, it requires the Member States to utilise existing special communication channels or establish new ones as necessary to provide guidance and respond to small and medium enterprises' inquiries regarding the implementation of the AI Act. It obliges the Member States to facilitate small and medium enterprises and other relevant stakeholders in the development of standards.

Art. 71 of the AI Act obliges the European Commission, in cooperation with the Member States, to create and maintain an EU database containing information about high-risk AI systems registered under Arts. 49 and 60 of the AI Act, and AI systems not deemed high-risk under Art. 6(3) and registered under Arts. 6(4) and 49. While the European Commission is identified as the responsible entity, the obligation specifies that this task must be carried out in collaboration with the Member States, meaning that the national segment will lie with the Member States, from whom the

108 Buocz, Pfortenhauer and Eisenberger, 2023, pp. 357–389.

European Commission will require cooperation. This demonstrates the significant obligation foreseen for the Member States under this Art..

These examples lead to interesting conclusions about the practical implications of applying and implementing the AI Act concerning the equality principle. They raise concerns, as the AI Act lacks compensatory mechanisms that account for varying economic and technological advancement levels across the Member States. Addressing this issue requires answering the question of what the consequences might be of treating all the Member States uniformly, without considering their diversity. This uniform approach could exacerbate disparities in technological resources. Member States with higher economic and technological development will adapt more efficiently and swiftly to the AI requirements, while less advanced Member States may face significant difficulties in implementing the Act's full scope and meeting additional obligations.

Furthermore, it could hinder innovation in economically and technologically weaker Member States. The implementation of relatively stringent legal regulations might leave such Member States unable to provide the same level of financial, technological and advisory support as their more developed counterparts. This could influence entrepreneurs' decisions about where to launch their businesses and impact national technological advancements. It might lead to the centralisation of the AI market, negatively affecting the business competitiveness in certain Member States. Moreover, it could result in dependence on foreign technology providers. Member States unable to develop their own AI technologies may be forced to import solutions from technologically advanced Member States, potentially leading to dependency and, over time, a reduction in technological sovereignty. These considerations indicate that the equal treatment of the Member States may not necessarily ensure equality, given their cultural, national, constitutional, economic and technological differences.

In such cases, the equality principle must acknowledge diversity and avoid uniform standards. Instead, requirements should be tailored to developmental needs and capabilities to ensure a balanced technological and economic advancement across the EU, regardless of geography. The equality principle calls for sharing resources, knowledge, experience and technology to support the Member States in need, preventing them from falling behind. Hence, achieving true equality may require differentiated treatment based on developmental needs. Furthermore, the above examples of regulations imposing additional, albeit extensive, obligations on the Member States are just a part of their responsibilities. The fundamental duty of every Member State is to implement the AI Act by aligning national laws to ensure its effectiveness. For instance, in Poland, a draft law on AI systems is currently being processed. It aims to introduce regulations for applying the European Parliament and Council Regulation (EU) 2024/1689 of 13 June 2024 on harmonised rules concerning AI and amending related EU regulations, referred to as the '2024/1689 Regulation'

or the ‘AI Act’. The draft law is designed to enable the direct application of certain provisions (Chapters I, II, III (Section 4), V, VII, IX and XII) of the AI Act.¹⁰⁹

The AI Act grants the European Commission the authority to issue delegated acts, as provided in its Art. 6, paras. 6 and 7, Art. 7, paras. 1 and 3, Art. 11, para. 3, Art. 43, paras. 5 and 6, Art. 47, para. 5, Art. 51, para. 3, Art. 52, para. 4 and Art. 53, paras. 5 and 6. According to Art. 96, para. 2 of the AI Act, the European Commission has this authority for a period of five years, starting from 1 August 2024. However, pursuant to Art. 96, para. 3, this authority may be revoked at any time by the European Parliament or the Council through a decision. The mechanism for adopting delegated acts by the European Commission could lead to negative consequences concerning the principle of equality among the Member States. This is because it may result in the Member States losing control over the direction of changes in EU law and being deprived of the ability to represent their national interests. In practice, this could lead to the marginalisation of less politically influential Member States or those with lower economic or technological levels, where the possibility of opposition by the European Parliament or the Council, under Art. 97, para. 6, may prove insufficient. There is no equality mechanism ensuring that the European Commission exercises its powers in accordance with Art. 4, para. 2 of the TEU, particularly respecting national identity, which is closely linked to national interest. The risk of marginalisation of less influential Member States and the potential deepening of inequalities could raise doubts about the compliance of this mechanism with the equality principle and the EU’s fundamental values.¹¹⁰

7. Conclusions

It is not true that the AI Act lacks legislative measures that can be assessed in terms of benefits, including benefits for the Member States. For instance, the AI Act addresses threats specifically related to AI applications, prohibits AI practices that pose unacceptable risks, establishes requirements for high-risk AI systems, specifies detailed obligations for entities implementing and supplying high-risk AI applications, mandates conformity assessments before an AI system is deployed or placed on the market, introduces enforcement measures after an AI system is placed on the market and establishes governance structures at European and national levels. All of this constitutes the benefits of the AI Act for the EU Member States, including their citizens. However, as demonstrated, there are costs borne by the Member States for such a defined common legal regime.

109 Government of Poland, n.d., Draft Bill on Artificial Intelligence Systems (Project Number: UC71).

110 Williams, 2009, pp. 549–577.

One such cost is the deviation from or abandonment of the equality principle in Art. 4(2) of the TEU. Another significant cost is the EU's non-compliance with the protective principles in Art. 5 of the TEU, namely the principles of conferral, subsidiarity and proportionality. The adoption of the AI Act, in some instances, even leads to conclusions about a reversal of these principles. It is worth noting that this is not the case for the principle of equality and the principles under Art. 5. Their relationship is close; a violation of one of these provisions often results in a violation of the others as well. Therefore, by adopting the AI Act, the EU targeted its foundations, legal principles and values. Through the adoption of the AI Act, particularly regarding the rationality of the chosen legal instrument and the lack of a legal basis, the EU acts beyond its conferred competences, disproportionately, without regard for subsidiarity and in violation of the equality principle. This is the greatest cost that the Member States must bear for the establishment of a common AI regulatory regime.

The consequences appear even worse, as it would mean accepting that the EU can act in any area of competence of the Member States ('principle' of appropriation), not always adhering to the principles of proportionality and subsidiarity, without respect for their equality before the Treaties, their national identity, which is inseparably linked to their political and constitutional structures, including regional and local self-government, and respect for the essential functions of the Member States. Perhaps such a vision is exaggerated at this moment; however, an overt violation of the fundamental principles expressed in the EU primary law is a step towards recognising the supremacy of the EU and transforming it into an entity operating in the spirit of federalism,¹¹¹ without respect for the diversity and sovereignty of the Member States.

In this context, the AI Act represents another powerful measure in the EU's arsenal for subordinating the actions of the Member States to the dictates of the EU or certain Member States, which, by influencing EU operations, carry out their national functions through the Union's administration. Incidentally, for such Member States, the breach of the equality principle or the principles outlined in Art. 5 might not have negative consequences. On the contrary, it may positively influence their position within the EU. For example, a departure from the equality principle logically results in some Member States being placed higher than the others. Such a situation may resemble the concept of a multi-speed or a two-speed Europe.¹¹² Adopting a different interpretation seems challenging, particularly concerning the violation of EU primary law in the adoption of the AI Act. While answering the question of whether the loss of equality and other principles has been a fair price to pay for the benefits of a common EU AI regime, the analysis leads to a negative conclusion.

The EU, to regulate AI thoroughly and in compliance with its primary law, should notify the Member States of the need to amend the TFEU in a manner that the TFEU

¹¹¹ Loughlin, 1996, pp. 141–162.

¹¹² Prisecaru, 2017, pp. 54–61.

would foresee general and specific competences, authorising the issuance of a legal act concerning AI. In this way, the EU would expand the scope of its competences following the principle of conferral. Subsequently, it should conduct an in-depth analysis of the compatibility of the planned actions with the principles of subsidiarity and proportionality, including the selection of the appropriate secondary legal act. In such a case, if the TFEU's updated version does not provide direct authorisation for the adoption of an EU regulation, an EU directive would be the most likely option, though not the only one.

The selection of a specific secondary legislation would depend on the results of the analyses of compatibility with the principles of subsidiarity and proportionality, where the justification for choosing an EU regulation is not impossible; however, it is exceptionally challenging, particularly in a new legislative area. The next step would be an additional analysis of the compatibility of the content of the planned secondary legal act with the equality principle, especially through the lens of compensatory or adaptive mechanisms. Such an analysis would influence the choice of the legal instrument. The final step would be a comprehensive analysis of the compatibility of the content of the planned secondary legal act with the EU's legal system, particularly human rights, and the determination of the regulatory impacts. Only after following such a process would it be reasonable to initiate the procedure for adopting a secondary legal act concerning AI.

Nonetheless, this highlights an imperfection in the EU primary law, which currently does not provide mechanisms for adapting to emerging legislative needs without undergoing the formal treaty amendment process. It seems reasonable for the Member States to consider that, in situations such as the need for AI regulation, there should not be a necessity to follow the formal procedure for treaty amendments. This underscores the need for introducing an additional mechanism within the EU primary law to allow for adjustments to such requirements. A potential solution might involve a treaty amendment that authorises, as a justified exception, the European Council, acting unanimously, to create specific competences for the EU in new legislative areas. If the EU were to take such steps, particularly concerning the real need for AI regulation and ensuring effective international cooperation, it would be positively received by the Member States. Acting in the spirit of the principles of equality, conferral, subsidiarity and proportionality, the Member States would likely engage in cooperation, as they did when they originally established the EU or acceded to it.

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MANAGING MIGRATION: THE CLASH BETWEEN SOLIDARITY AND SOVEREIGNTY



BARTŁOMIEJ ORĘZIAK

Abstract

This paper analyses migration law regulations adopted within the European Union, focusing on the benefits and costs of the unification process of EU law. It first provides an overview of policies on border checks, asylum, and immigration, tracing the evolution of relevant legal norms in EU primary law. It then examines how development directions are shaped, examining analysing key areas of secondary EU legislation and decision-making processes in light of primary law principles. Next, the chapter outlines the unification of EU standards to enhance cooperation, using the examples of the Dublin system, qualification, reception, and procedures. This forms the basis for assessing the benefits and costs of deeper cooperation through unification. The chapter concludes by evaluating whether the expenses borne by EU Member States outweigh the benefits of implementing unified legal regulations in areas such as the Dublin system, qualification, and procedures, and separately, the reception system, within the broader framework of border checks, asylum, and immigration policies.

Keywords: migration, asylum, border checks, EU law, EU law unification

1. Introduction

This chapter examines the unification of European Union law in the field of migration regulation, with particular emphasis on its impact on the principle of

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equality among EU Member States. The topic fits into the broader context of this scientific monograph, which among other things, explores how adopting uniform legal rules responds to global challenges while raising questions about their alignment with fundamental EU law principles.

The chapter aims to determine whether the costs borne by the EU Member States in implementing unified legal frameworks, covering the Dublin, qualification, reception, and the procedural systems, outweigh the benefits derived from their application. Particular attention is paid to the tension between unification and the principle of equality enshrined in EU primary law, which obliges the EU to respect the equality of Member States and their national identity.

The chapter is structured as follows. Part One briefly presents EU policies on border control, asylum, and immigration, outlining their development against the background of EU primary law. Part Two discusses how development directions are shaped, considering the principles of conferral of competences, subsidiarity, and proportionality. Part Three analyses the unification of EU standards across the Dublin system, qualification, reception, and procedural systems, showing how these measures affect the EU Member States to varying degrees. Part Four assesses the benefits and costs of deepened cooperation through unification, focusing on its impact on equality. Finally, Part Five summarises key findings and reflects on the legitimacy of current unification trends in light of the fundamental principles of EU law.

The analysis shows that while unification brings measurable benefits in international cooperation and operational efficiency, it can also weaken the principle of equality among Member States and erode their constitutional identity and sovereignty. The conclusions indicate that current unification trends should be assessed for compliance with EU primary law and may require a discussion on potential treaty amendments. Maintaining a balance between effective migration cooperation and respect for the diversity and autonomy of the EU Member States remains crucial.

2. Policies on Border Checks, Asylum, and Immigration – Brief Characteristics

2.1. Developmental Art of Normatisation in the EU Primary Law

The current primary law of EU concerning ‘Policies on Border Checks, Asylum, and Immigration’ (hereinafter ‘PBCAI’) is contained in the Treaty on the Functioning of the European Union (TFEU).¹ According to Art. 67 of the TFEU:

1 Consolidated version of Treaty on the Functioning of the European Union (OJ C 202, 7.6.2016, pp. 47–200).

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.
2. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.
3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.
4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.²

The provision forms the basis for implementing PBCAI within the EU. However, the subsequent Arts. are also legally significant, as they specify the objectives and competencies in this area. Art. 77 TFEU concerns the Union's policy on border control. According to its paragraph 1:

The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders.³

Art. 78 TFEU addresses the common policy on asylum, subsidiary protection, and temporary protection. Paragraph 1 provides:

The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.⁴

Art. 79 TFEU addresses the common immigration policy, paragraph 1 states:

² Ibid.

³ See for example: Van der Woude and van der Leun, 2017, pp. 27–45; Hobbing, 2016, pp. 155–182; Geiger, 2016, pp. 135–149.

⁴ See for example: Hatton, 2015, pp. 605–637; Toshkov and de Haan, 2013, pp. 661–683; Costello and Mouzourakis, 2016, pp. 47–73; Ripoll Servent and Trauner, 2014, pp. 1142–1162.

The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention.⁵

In this context, Art. 80 TFEU plays a crucial role, stating that:

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.⁶

The significance of this provision lies in its applicability to all EU policies set out in Arts. 77 to 79 TFEU.⁷

These legal foundations reflect years of negotiations and competing visions of European integration. From a historical perspective, provisions on border control, asylum, and immigration first appeared in the Maastricht Treaty,⁸ where Art. K.1 stated:

For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest: 1. asylum policy; 2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon; 3. immigration policy and policy regarding nationals of third countries: (a) conditions of entry and movement by nationals of third countries on the territory of Member States; (b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment; (c) combatting unauthorised immigration, residence and work by nationals of third countries on the territory of Member States.⁹

The Maastricht Treaty, which established the EU, marked the first step in the evolution of EU primary law toward creating today's PBCAI. This shows that EU competences in this field are relatively deeply rooted in the Union's genesis. The second step was the Amsterdam Treaty,¹⁰ which introduced significant legal regula-

5 Consolidated version of Treaty on the Functioning of the European Union.

6 Ibid.

7 Ibid.

8 Official Journal of the European Communities, OJ C 191, 29 July 1992, pp. 1–112. See: Musaraj, 2023, pp. 92–102; Baun, 1995, pp. 605–624; Grieco, 1996, pp. 261–306.

9 Official Journal of the European Communities, OJ C 191.

10 Official Journal of the European Union, C 340, 10 November 1997, pp. 1–144. See: Moravcsik and Nicolaïdis, 1999, pp. 59–85; Johansson, 1999, pp. 85–101; Shaw, 1998, pp. 63–86.

tions in Arts. 73i to 73k. These provisions, among other things, (a) established the obligation to progressively establish an area of freedom, security, and justice; (b) required measures within five years to remove internal border controls, regulate the crossing of external borders, and set conditions under which nationals of third countries may travel freely within EU Member States for up to three months; (c) required measures within five years as an asylum, refugees, displaced persons, immigration policy, and the rights and conditions for legally resident third-country nationals to reside in other Member States. The provisions of the Amsterdam Treaty represented a significant EU move toward creating today's PBCAI.

Maastricht Treaty concretised the general foundations laid by granting the EU competence to adopt key legal measures that became prototypes for many current acts of EU secondary law in this area. The third step was the Nice Treaty.¹¹ Although mainly technical and focused on procedural rules, its significance should not be underestimated. It reformed decision-making processes, enabling the EU to function more efficiently in adopting legal acts related to PBCAI. In essence, after the EU gained competences (substantive law) under the Amsterdam Treaty, the Nice Treaty enabled their effective implementation (procedural law). The final step was the Lisbon Treaty, adopted in 2007,¹² which formulated the current content of EU primary law, including Arts. 67 and 77 to 80 TFEU. It laid the legal foundations for a fully integrated PBCAI and significantly strengthened the role of the EU and its institutions in these matters. Additionally, the Lisbon Treaty granted the Charter of Fundamental Rights of the European Union in the same legal force as the treaties, making it part of EU primary law. This is particularly significant for PBCAI, as Art. 18 of the EU Charter provides the right to asylum. Subsequent EU actions focused not on further modifying the provisions of EU primary law but on utilizing them in practice through numerous acts of EU secondary law in the PBCAI domain.

2.2. Planned Milestones of EU Integration: From the Schengen Convention Through Tampere to the New Pact on Migration and Asylum

From today's perspective, the EU's development of PBCAI reflects several planned milestones, with changes to primary law serving as either their materialization, final outcome, or part of ongoing planning stage.¹³ First, the milestone Schengen Agreement of 1985, aimed at gradually eliminating internal border controls and

11 Official Journal of the European Union, C 80, 10 March 2001, pp. 1–87. See: Felsenthal and Machoer, 2001, pp. 431–464; Moberg, 2002, pp. 259–282; Heinemann, 2003, pp. 17–31.

12 Official Journal of the European Union, OJ C 306, 17 December 2007, pp. 1–271. See: Reh, 2009, pp. 625–650; Lee, 2008, pp. 131–138; Wouters, Coppens and De Meester, 2008, pp. 143–203.

13 In this context, it is worth referring to the recently proposed treaty amendments by the European Parliament: European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

enabling free movement of people.¹⁴ Second, the Schengen Convention of 1990 complemented the Agreement by establishing conditions and safeguards for an area without internal border controls.¹⁵ Together with the accompanying agreements and principles, they form the Schengen *acquis*.¹⁶ Third, in 1999, the European Council meeting in Tampere set forth the future legislative actions in the EU concerning asylum and immigration, including qualification, reception, and procedure systems, as well as the Dublin system.¹⁷ Fourth, the Hague Programme of 2004, set goals in the area of freedom, security, and justice for the years 2005 to 2010.¹⁸ Fifth, in 2008, the European Pact on Immigration and Asylum was adopted, which imposed requirements on the EU to create a legal framework on asylum, regulate legal immigration, control irregular immigration, and improve border control effectiveness.¹⁹ Sixth, the Stockholm Programme, adopted in 2009, reaffirmed the European Council's commitment to creating a common area of protection and solidarity by 2012, based on a common asylum procedure and uniform status for persons granted international protection.²⁰ Seventh, in 2015, the European Agenda on Migration was adopted, a strategic document presenting a comprehensive migration management approach and outlining steps to ensure strong borders, fair procedures, and a sustainable system capable of anticipating future challenges in the context of asylum and migration.²¹ Eighth, most recently, in 2020, the European Commission adopted the New Pact on Migration and Asylum, aiming for a comprehensive reform of PBCAI, by replacing many previously harmonised legal standards with unified counterparts.²² By 2024, its legal regulations are already in force in the EU. These regulations include eight EU regulations, such as in the areas of qualification and reception, which were previously regulated by corresponding EU directives; one directive in the procedural system.

These milestones indicate that regulatory area has been influenced by a currently observable trend in the EU toward the unification of legal standards. It cannot be conclusively proven whether this was the plan from the outset; nevertheless, the aforementioned milestones form a logical sequence progressively tightening the enforcement of EU standards. This occurs because, initially, PBCAI development involved the introduction of norms with a lightly binding character, with

14 See: Davis and Gift, 2014, pp. 1541–1557; Walsch, 2008, pp. 81–90; The Schengen Agreement and the Schengen '*acquis*'.

15 Bevers, 1993, pp. 83–107; O'Keeffe, 1991, pp. 185–219.

16 Huybrechts, 2015, pp. 379–426; Official Journal of the European Union, L 239, 22 September 2000, pp. 19–62.

17 Tampere European Council, 15 and 16 October 1999, Presidency Conclusions.

18 Official Journal of the European Union, OJ C 53, 3 March 2005, pp. 1–14.

19 European Pact on Immigration and Asylum.

20 Official Journal of the European Union, OJ C 115, 4 May 2010, pp. 1–38.

21 Official Journal of the European Union, OJ C 71, 24 February 2016, pp. 46–52.

22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact On Migration and Asylum, COM/2020/609 final.

decision-making authority resting on the side of state entities. This phase can be referred to as the conceptual or initiating phase. Following this, came a phase characterised by the use of the method of harmonizing the provisions of the Member States of the European Union, ranging from minimum harmonization to exhaustive harmonization, while maintaining a relative balance of decision-making authority between the EU and its Member States. This phase may be termed the transposition phase. Finally, the phase of legal unification became apparent, characterised by uniform legal standards across the EU, with a shift in decision-making toward the EU or selected Member States influencing the direction of EU actions. This phase appears to be currently underway.

3. Shaping Development Directions on PBCAI

3.1. Overview of Key EU Secondary Law Areas

The provisions of EU primary law may serve as the sole legal basis for adopting corresponding acts of secondary EU law. This also applies to PBCAI, whose legal basis consists of Arts. 77 to 79 of the TFEU. These provisions determine the thematic areas that may be regulated at the EU level and establish a legislative framework to be developed through secondary EU law. First, under Art. 77(2) TFEU, the EU is competent to adopt legal measures in areas such as: the common policy on visas and other short-stay residence permits; checks persons crossing external borders; conditions under which nationals of third countries may freely travel within the EU for short periods; measures necessary for the gradual establishment of an integrated management system for external borders; and the absence of internal border controls, regardless of nationality. Examples of adopted legal acts in this regard include: Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code),²³ Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624²⁴ and Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry, exit, and refusal data of third-country nationals crossing external borders of the Member States and determining law enforcement across conditions, amending the Schengen Agreement and Regulations (EC) No. 767/2008 and (EU) No. 1077/2011.²⁵

23 Official Journal of the European Union, OJ L 77, 23 March 2016, pp. 1–5.

24 Official Journal of the European Union, OJ L 295, 14 November 2019, pp. 1–131.

25 Official Journal of the European Union, OJ L 327, 9 December 2017, pp. 20–82.

These legal acts form part of the EU's policy on border control. Second, under Art. 78(2) TFEU, the EU is empowered to adopt legal measures concerning: a uniform asylum status for nationals of third countries, valid throughout EU; a uniform status of subsidiary protection for nationals of third countries needing international protection without qualifying for asylum; a common temporary protection system for displaced persons during massive inflows; common procedures for granting and withdrawing asylum or subsidiary protection status; criteria and mechanisms for determining which Member State is responsible for examining applications for asylum or subsidiary protection; standards concerning the reception of applicants; and (g) partnership and cooperation with third countries to manage inflows of applicants for asylum or subsidiary or temporary protection.

Examples of adopted legal acts in this area include: Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in an EU Member State by a third-country national or a stateless person;²⁶ Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council;²⁷ Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.²⁸

These legal acts form part of EU policy on asylum, subsidiary protection, and temporary protection, with the latter two regulations adopted under the New Pact on Migration and Asylum. Third, under Art. 79(2) TFEU, the EU is competent to adopt legal measures in areas such as: conditions of entry and residence, and standards on the issuance by Member States of long-term visas and residence permits, including for family reunification; the rights of third-country nationals residing legally in a Member State, including conditions governing freedom of movement and of residence in other Member States; illegal immigration and unauthorised residence, including removal and repatriation; combating trafficking in persons, particularly women and children. Examples of legal acts adopted in this area include: Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994;²⁹ Regulation (EU) No. 1231/2010 of the European Parliament and

26 Official Journal of the European Union, OJ L 180, 29 June 2013, pp. 31–59.

27 Official Journal of the European Union, OJ L, 2024/1347, 22 May 2024.

28 Official Journal of the European Union, OJ L, 2024/1348, 22 May 2024.

29 Official Journal of the European Union, OJ L 311, 17 November 2016, pp. 13–19.

of the Council of 24 November 2010 extending Regulation (EC) No. 883/2004 and Regulation (EC) No. 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality,³⁰ and; Regulation (EU) No. 514/2014 of the European Parliament and of the Council of 16 April 2014 laying down general provisions on the Asylum, Migration and Integration Fund and on the instrument for financial support for police cooperation, preventing and combating crime,³¹ and crisis management.³² These legal acts form part of the segment of the EU policy on immigration.

Notably, even this brief overview of EU secondary law concerning PBCAI demonstrates how readily relevant EU regulations can be identified, confirming and aligning with the current EU trend toward legal standard unification. Additionally, it supports the observation made in the context of discussing the milestones of PBCAI that the EU is currently in the stage of legal unification within the Union.

3.2. Decision-Makers of Development Directions in the Context of the EU Primary Law Principles

The competences of the EU are governed by three fundamental principles outlined in Art. 5 TEU.³³ According to Art. 5(1) TEU, ‘the limits of EU competences are governed by the principle of conferral, and the use of EU competences is governed by the principles of subsidiarity and proportionality’.³⁴ This distinction highlights a crucial difference between the limits and the use of EU competences. Pursuant 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.³⁵

Further, under the first paragraph of Art. 5(3) TEU,

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union 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

30 Official Journal of the European Union, OJ L 344, 29 December 2010, pp. 1–3.

31 Wielec, 2024, pp. 361–384.

32 Official Journal of the European Union, OJ L 150, 20 May 2014, pp. 112–142.

33 Consolidated version of the Treaty on European Union, OJ C 202, 7 June 2016, pp. 13–46.

34 Ibid.

35 Regarding the literature on the principle of conferral in the EU, see e.g.: Radivojević and Knežević-Predić, 2018, pp. 108–128; Cremona, 2018, pp. 27–62; Želazna, 2022, pp. 593–606; Conway, 2010, pp. 966–1005; Guastaferrero, 2012, pp. 230–248.

or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.³⁶

Finally, under the first paragraph of Art. 5(4) TEU, ‘under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties’.³⁷ These provisions should play a decisive role in determining the directions of PBCAI development. The principle of conferral determines whether the EU can act in a given area at all. Two preliminary options arise: either the EU has the competence, or it does not. Where no competence is conferred, the EU lacks both factual and legal authority to act, serving as a negative prerequisite.³⁸ In cases where EU treaties provide and confer a specific competence to the EU, it is necessary to determine the nature of that competence through Arts. 2, 3, 4, 5, and 6 TFEU – specifically, whether it is exclusive. This distinction is legally significant for Art. 5 TEU, as it indicates whether the principle of subsidiarity applies in a given case. For the principle of proportionality, however, this distinction is irrelevant.

Where the EU holds exclusive competence, the principle of proportionality primarily guides the direction of development. This principle focusses on necessity and the objectives enshrined in the treaties, requiring the EU to meet two considerations: (I) the necessity criterion outlined in Art. 5(4) TEU, and (II) consistency with the treaty objectives of EU primary law. Conversely, when the EU has shared or non-exclusive competence, subsidiarity complements the principle of proportionality. It requires EU to take into account the role and significance of Member States as the first line of legislative authority, respecting their autonomy and refraining from interference where Member States are capable of adequately achieving the intended goal. In practice, this means that subsidiarity imposes additional constraints on the EU in setting directions for development, requiring it to respect the capacity and sovereignty of Member States.

According to Art. 4(2)(j) TFEU, the area of freedom, security, and justice is a shared competence, meaning both the principle of proportionality and the principle of subsidiarity apply to PBCAI. It is therefore justified to treat the principles outlined in Art. 5 TEU as normative decision-makers for determining EU’s development direction. These principles serve as guarantees ensuring that EU action remains within the scope of activities permitted by the principles in Art. 5 TEU. As the creators of

36 Regarding the literature on the principle of subsidiarity in EU, see e.g.: Granat, 2018, pp. 27–56; Kumar, 2021, pp. 45–62; Fabbrini, 2016, pp. 78–102; De Sadeleer, 2012, pp. 63–70; Portuese, 2010, pp. 231–250.

37 Regarding the literature on the principle of proportionality in EU, see e.g.: Kosta, 2019, pp. 189–216; Portuese, 2013, pp. 612–635; Haguenuau-Moizard, 2015, pp. 102–118; Harbo, 2010, pp. 158–185; Sauter, 2013, pp. 439–464.

38 However, in this context, it is worth noting the increasingly analysed phenomenon of ‘Competence Creep’ in EU, see e.g.: Vėlyvytė, 2023, pp. 45–78; Corrias, 2011, pp. 1–23; Garben, 2019, pp. 295–314; Dougan, 2024, pp. 33–67; Reuter, 2013, pp. 12–36.

EU primary law, the Member States should also act as watchdogs, exercising a disciplining role in borderline situations. From a legal perspective, this interpretation is justified by the Member State sovereignty, which establishes their fundamental and original subjectivity in international public law. This appears to be a desirable state of interpretation from a legal standpoint. However, it must also be noted that the current practice of EU activities demonstrates significant erosion of Art. 5 TEU, driven by non-substantive considerations.³⁹

However, current EU practice shows significant erosion of Art. 5 TEU, driven by non-substantive considerations. The EU is now in a standard unification phase, where issuing EU regulations increasingly serves as the default approach. The trend toward unifying legal standards in the EU applies both to ‘established’ areas, where the EU already has a considerable body of legal achievements, and to ‘new’ areas lacking such a legislative history. The latter, for instance, includes the legal regulation of artificial intelligence.⁴⁰ A principled legislative approach, as derived from subsidiarity, proportionality, and instrument choice in new areas like artificial intelligence regulation, should proceed in these steps: First, exhaustively determine whether EU legislative intervention is legally justified. Second, if it is deemed justified, the EU should initially attempt to adopt a directive as a less intrusive instrument for the national legislation of Member States. Third, only when proven insufficient, consider issuing an EU regulation as a well-justified exception. This three-step approach clearly indicates that, when EU-level legal regulations are necessary, the default should be to use a directive, with the issuance of a regulation being treated as a particularly well-justified exception. This observation applies to both ‘new’ and ‘established’ legislative areas. Regarding ‘new’ legislative areas, reference should be made to the chapter on artificial intelligence included in this publication. Additionally, the analysis and assessment of the unification process undertaken by the EU in ‘established’ legislative areas are the subject of this chapter. For this reason, the following sections analyse and assess the EU’s unification process in established areas, using Dublin system, qualification, reception, and procedure system, which form the core of PBCAI.

39 Mańko, 2005, pp. 165–177; Łacny, 2022, pp. 101–132.

40 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No. 300/2008, (EU) No. 167/2013, (EU) No. 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). OJ L, 2024/1689, 12 July 2024.

4. The Process of Unifying EU Standards to Enhancing Mutual Cooperation

4.1. *Example of the Dublin System*

The unification process of the Dublin system consists of four general stages. These have consistently led the EU to introduce unified standards for managing migration and asylum issues. This is particularly evident in the criteria and mechanisms for determining which Member State is responsible for examining an application for international protection submitted in one of the Member States by a third-country national or a stateless person.⁴¹

The first stage was the adoption of the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention).⁴² Its objective was to establish the fundamental principles and criteria for determining responsibility for examining an asylum application submitted in a Member State. The ultimate goal was to designate the responsible state, while allowing an exception, as stated in the Convention:

Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto.⁴³

The mechanism established by the Dublin Convention was pioneering but imprecise. In practice, this led to numerous interpretative challenges that exposed its weaknesses, particularly during EU enlargement. These challenges sparked discussions about initiating legislative efforts to improve the Dublin system.

The second stage was the adoption of Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (hereinafter: Dublin II Regulation).⁴⁴ Replacing the Dublin Convention, its aim, as stated in Art. 1, was to establish criteria and mechanisms for determining the responsible Member. Recital 5 noted that, at this stage of building the Common European Asylum System, it was necessary to introduce improvements based on experience with the Dublin Convention and to reaffirm its principles. The application of the Dublin II Regulation highlighted

41 Moreno-Lax, 2012, pp. 1–31; Kasperek, 2016, pp. 59–78; Thielemann and Armstrong, 2013, pp. 148–164.

42 Official Journal of the European Union, OJ C 254, 19 August 1997, pp. 1–12.

43 Ibid.

44 Official Journal of the European Union, OJ L 50, 25 February 2003, pp. 1–10.

both strengths and weaknesses, eventually justifying further legislative action in this area.

The third stage was the adoption of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter: Dublin III Regulation).⁴⁵ Art. 1 reiterated the purpose of setting criteria and mechanisms for determining the responsible Member State for applications for international protection submitted by third-country nationals or stateless persons. This objective appears nearly identical to the goal of the Dublin II Regulation, reflecting mainly terminological rather than substantive change. This synonymy in objectives is appropriate, as the EU's underlying aim remained unchanged. What did change were the measures and actions to achieve it. Recital 9 of the Dublin III Regulation noted that improvements were introduced '...based on experience gained, to increase the efficiency of the Dublin system and the effectiveness of the protection granted to applicants under this system'.⁴⁶ However, the Dublin III Regulation did not eliminate all deficiencies, particularly regarding fairness and the system's capacity to respond to migration or refugee crises.⁴⁷ These shortcomings again prompted legislative reconsideration within the EU framework.

The fourth stage was the adoption of Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) No. 604/2013 (hereinafter: Asylum and Migration Management Regulation).⁴⁸ This regulation is part of the New Pact on Migration and Asylum. The purpose of this new EU regulation is outlined in Art. 1, which states:

In accordance with the principle of solidarity and fair sharing of responsibility, as enshrined in Art. 80 TFEU, and with the objective of reinforcing mutual trust, this Regulation: (a) sets out a common framework for the management of asylum and migration in the Union, and for the functioning of the Common European Asylum System; (b) establishes a mechanism for solidarity; (c) lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection.⁴⁹

The implementation of this objective, particularly with respect to point (c), as highlighted in Recital 40 of the Asylum and Migration Management Regulation,

45 Official Journal of the European Union, OJ L 180, 29 June 2013, pp. 31–59.

46 Ibid.

47 Scipioni, 2018, pp. 1357–1375; Buonanno, 2017, pp. 100–130; De Genova et al., 2016, pp. 15–21; Gerlach and Ryndzak, 2022, pp. 17–29.

48 Official Journal of the European Union, OJ L, 2024/1351, 22 May 2024.

49 Ibid.

build on the experience gained through the application of the Dublin III Regulation. Additionally, Art. 85 states that this regulation enters into force 20 days after publication in the Official Journal of the European Union and applies from 1 July 2026. However, certain provisions – namely Arts. 7–15, Art. 22(1) fourth para., Art. 23(7), Art. 25(6) and (7), Art. 34(3) and (4), Art. 39(3) second para., Art. 40(4), Art. 40(8) second para., Art. 41(5), Art. 46(1) fifth para., Art. 46(4), Art. 48(4), Art. 50(1) second para., Art. 50(5), Art. 52(4), Arts. 56–57, Art. 64(3), Art. 67(14), and Arts. 78 and 84 – apply from 11 June 2024. Furthermore, Art. 83 of the Asylum and Migration Management Regulation specifies that the Dublin III Regulation will be repealed with effect from 1 July 2026. This means that between 11 June 2024 and 1 July 2026, the Dublin III Regulation and the Asylum and Migration Management Regulation will be applied in a parallel and complementary manner.

Referring to the objective of the Asylum and Migration Management Regulation, it is *prima facie* evident that this objective has been framed more broadly than in the previous legal acts adopted under the Dublin system. The primary objective of the Dublin system has always been to ‘lay down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection’. To this, two new areas have been added. This confirms that the Dublin system is undergoing legal standard unification. From its inception, it harmonised legal standards among the Member States of the European Communities under the Dublin Convention, and subsequently among EU Member States through the Dublin II and Dublin III Regulations. The Asylum and Migration Management Regulation marks a significant step forward by extending unification to two additional areas: a mechanism for solidarity, and the management of asylum and migration, including the functioning of the Common European Asylum System. This significantly broadens the material scope of legal standard unification within the EU in this context.

4.2. Example of the Qualification System

The unification process of the qualification system consists of three fundamental steps that have led to the unification of legal standards within the EU regarding criteria for determining whether an individual qualifies as a beneficiary of international protection, enjoys a uniform refugee status, or qualifies for subsidiary protection.⁵⁰

The first step was the adoption of Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons otherwise in need of international protection, and the content of the protection granted (hereinafter: the Qualification Directive I).⁵¹ According to Art. 1, its aim was to lay down minimum standards for the qualification of third-country nationals or stateless persons as refugees or as

50 Lambert, 2006, pp. 161–192; Zaun, 2016, pp. 136–154; Hatton, 2005, pp. 106–119.

51 Official Journal of the European Union, OJ L 304, 30 September 2004, pp. 12–23.

persons otherwise in need of international protection, and the content of the protection granted.

The second step was the adoption of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter: the Qualification Directive II).⁵² The objective of this secondary law act, as stated in its Art. 1, is to lay down standards for qualification, uniform status, and content of protection. Additionally, Recital 10 adds that this directive reaffirms the principles of Qualification Directive I while striving for greater approximation of rules on recognition and scope of international protection based on higher standards.

The third step was the adoption of Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council (hereinafter: the Qualification Regulation). According to Art. 1 of the Qualification Regulation:

This Regulation lays down standards for: (a) the qualification of third-country nationals or stateless persons as beneficiaries of international protection; (b) a uniform status for refugees or for persons eligible for subsidiary protection; (c) the content of the international protection granted.⁵³

Art. 42 stipulates that the Qualification Regulation entered into force 20 days after its publication in the Official Journal of the European Union and will apply from 1 July 2026. Pursuant to Art. 41, Qualification Regulation, the Qualification Directive II will be repealed as of 12 June 2026. Until then, both legal acts will remain in force, with Qualification Directive II continuing to apply. From 1 July 2026, the Qualification Regulation will take full effect.

In this context, the objective defined across these EU legal acts has not fundamentally changed; what has evolved is the method of establishing legal standards. The first step harmonised minimum standards, the second harmonised standards, and the third introduced of strict, directly applicable unified standards. This progression clearly illustrates that the qualification system serves as a typical example confirming the trend toward the unification of law within the EU.

⁵² Official Journal of the European Union, OJ L 337, 20 December 2011, pp. 9–26.

⁵³ Ibid.

4.3. *Example of the Reception System*

The unification process of the reception system demonstrates a certain specificity, potentially even constituting an exception to the EU's trend of adopting legal acts that unify legal standards. However, for the sake of research integrity, the reception system, as one of the four key systems of PBCAI, cannot be overlooked.⁵⁴ The lack of a unification trend through a regulation may stem from the fact that the conditions for receiving applicants for international protection are highly diverse and largely dependent on the specific circumstances provided by individual Member States. The EU legislator may have refrained from issuing a regulation because imposing uniform legal standards could provoke significant controversies regarding compatibility with national interests. Alternatively, the timing may have been deemed premature, particularly considering the inherently unifying nature of the New Pact on Migration and Asylum. This reasoning aligns partly with the justification provided by the European Commission in its 2016 legislative proposal for a new Reception Conditions Directive, where it was stated: 'Considering the current significant differences in Member States' social and economic conditions, it is not considered feasible or desirable to fully harmonised Member States' reception conditions'.⁵⁵ Nonetheless, the same proposal also emphasised:

A recast of the Reception Conditions Directive together with an extended mandate for the European Union Agency for Asylum to promote a uniform implementation of reception standards in practice is considered sufficient in order to meet the objectives of further harmonising Member States' reception conditions and applicants' integration prospects and reducing reception-related incentives for migrants to move irregularly to and within the EU.

At the time, this meant that the Commission proposed issuing a new piece of EU secondary legislation in the form of a directive, while extending the mandate of the European Union Agency for Asylum⁵⁶ to promote uniform implementation of reception standards across the EU. In practice, this approach can be viewed as an attempt to unify EU law without adopting a regulation. Nevertheless, the process of building and improving the reception system consists of three fundamental steps.

The first step was the adoption of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers⁵⁷ (hereinafter: the Reception Directive I). Its objective, as stated in Art. 1, was to

54 Glorius et al., 2019, pp. 19–30; Campesi, 2018, pp. 44–70; Vianelli, 2022, pp. 41–59.

55 Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (COM/2016/0465 final - 2016/0222 (COD)).

56 Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010. OJ L 468, 30 December 2021, pp. 1–54.

57 Official Journal of the European Union, OJ L 31, 6 February 2003, pp. 18–25.

establish minimum standards for the reception of asylum seekers in EU Member States.

The second step was the adoption of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter: the Reception Directive II).⁵⁸ Its objective was defined in a manner synonymous with those of Reception Directive I. Building on experience gained from the earlier directive, Reception Directive II pursued the same goal. The difference lay solely in the terminology used, where the term ‘*asylum*’ was replaced with ‘international protection’.

The third and final step was the adoption of Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 laying down standards for the reception of applicants for international protection⁵⁹ (hereinafter: the Reception Directive III). According to Art. 1, its objective is to ‘lay down standards for the reception of applicants for international protection in Member States’.⁶⁰ Notably, the objective of legal acts within the reception system has remained unchanged since the Reception Directive I of 2003. Pursuant to Art. 37, Reception Directive III entered into force on the twentieth day following its publication in the Official Journal of the European Union. As is typical for directives, a transposition deadline was established. Art. 35 requires Member States to ‘bring into force the laws, regulations and administrative provisions necessary to comply with Arts. 1 to 10, 12, 13, 17 to 29, and 31 to 34 by 12 June 2026’.⁶¹ This means that although Reception Directive III is in force, it is in its implementation phase. Art. 38 specifies that it ‘is addressed to the Member States in accordance with the Treaties’.⁶² Consequently, Reception Directive III did not repeal Reception Directive II immediately but will do so on 12 June 2026. Until then, both the Reception Directive III and Reception Directive II remain in force. However, only the latter has passed its transposition deadline, making it a functional instrument influencing the national laws of Member States and the rights of individuals.⁶³

Although, as noted at the outset, the reception system may be seen as an exception to the EU’s current trend of unifying law through regulations rather than directives, it is worth considering whether it also constitutes an exception to the broader unification phase. This broader phase includes not only regulations but also less intrusive instruments. In this context, the role of the European Union Agency for Asylum (EUAA), established under Regulation (EU) 2021/2303 of the European

58 Official Journal of the European Union, OJ L 180, 29 June 2013, pp. 96–116.

59 Official Journal of the European Union, OJ L, 2024/1346, 22 May 2024.

60 Ibid.

61 Ibid.

62 Ibid.

63 Judgment of the Court of Justice of 4 December 1974, *Yvonne van Duyn v. Home Office*. Request for a preliminary ruling: High Court of Justice, Chancery Division – United Kingdom. Case 41/74; Judgment of the Court of Justice of 5 April 1979, Criminal proceedings against Tullio Ratti. Request for a preliminary ruling: Pretura di Milano – Italy. Case 148/78.

Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010,⁶⁴ may prove pivotal.

According to Art. 1(2) of the aforementioned regulation and Recitals 4 and 6 of the Reception Directive III, the agency's purpose, in this context is to ensure the efficient and uniform application of EU asylum law in the Member States, including facilitating and supporting the implementation of the Common European Asylum System, which includes the Reception Directive III. Thus, for the reception system, the EU chose not to unify legal standards through a regulation but rather extended the agency's mandate to promote the uniform implementation of reception standards across the Union, as announced in the Commission's legislative proposal. While 'promoting' is not the same as issuing a regulation, the EU pursued a soft form of legal unification. Therefore, although the reception system constitutes an exception to the process of unifying EU law, it does not represent an exception to the broader trend of legal unification within the EU.

4.4. Example of the Procedure System

The construction of a uniform procedural system consists of three legislative steps, which have established unified legal norms, directly applicable in EU Member States, concerning the procedures for granting and withdrawing international protection.⁶⁵

The first step was the adoption of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status⁶⁶ (hereinafter: the Procedural Directive I). According to Art. 1, its objective was 'to establish minimum standards on procedures in Member States for granting and withdrawing refugee status'.⁶⁷

The second step was the adoption of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter: the Procedural Directive II),⁶⁸ the objective of which is 'to establish common procedures for granting and withdrawing international protection pursuant to the II Qualification Directive'.⁶⁹ The adoption of Procedural Directive II was driven by the need to amend the earlier directive substantially. This need stemmed from the adoption of the Qualification Directive II, as legal acts within the procedural system perform an executive function. The relationship between procedural and qualification systems can be compared to the traditional relationship between substantive and procedural law, as exemplified by the

64 Official Journal of the European Union, OJ L 468, 30 December 2021, pp. 1–54.

65 Schittenhelm, 2019, pp. 229–244; Costello, 2005, p. 35; Costello and Hancox, 2016, pp. 375–445.

66 Official Journal of the European Union, OJ L 326, 13 December 2005, pp. 13–34; Official Journal of the European Union, OJ L 175M, 29 June 2006, pp. 168–189.

67 Ibid.

68 Official Journal of the European Union, OJ L 180, 29 June 2013, pp. 60–95.

69 Ibid.

Criminal Code and the Code of Criminal Procedure. Thus, a change in substantive law (the Qualification Directive II) necessitated changes in the procedural system, which directly confirms the objective of the Procedural Directive II.

The third step was the adoption of Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereinafter: the Procedural Regulation).⁷⁰ According to Art. 1, its objective is to ‘establish a common procedure for granting and withdrawing international protection pursuant to the Qualification Regulation’.⁷¹ As with other legal acts discussed earlier, the Procedural Directive II and the Procedural Regulation coexist but are not applied in parallel. Art. 79 of the Procedural Regulation stipulates that it entered into force on the twentieth day after publication in the Official Journal of the European Union but applies from 12 June 2026. It governs procedures for granting international protection for applications submitted after that date, while applications submitted earlier will be subject to Procedural Directive II. For procedures withdrawing international protection, the Procedural Regulation applies if the procedure began after 12 June 2026. If the procedure was initiated earlier, Procedural Directive II applies. Additionally, Art. 78 of the Procedural Regulation specifies that the Procedural Directive II will be repealed as of 12 June 2026.

The example of the procedural system is a typical case that, similar to the Dublin and qualification systems, aligns with the observable trend of legal unification within the EU.

5. Benefits and Costs of Enhancing Cooperation Based on Unification

5.1. Benefits of Unifying the Legal Framework for EU Member States

Turning to the benefits of unifying legal standards in PBCAI, whether through EU regulations or softer means, one can observe a common advantage: unified international cooperation aimed at solving cross-border problems, including crises that individual EU Member States struggle to manage alone. In this regard, it is indeed reasonable to acknowledge that international cooperation facilitates – or even enables – addressing inherently cross-border issues. PBCAI exemplifies such a domain, where coordinated actions and goodwill among Member States are indispensable. However, it is not self-evident that such cooperation requires full legal unification, particularly considering the costs borne by Member States, as discussed below.

⁷⁰ OJ L, 2024/1348, 22.5.2024, ELI.

⁷¹ Ibid.

Focusing on the effects of unifying EU legal standards, these can be categorised as general or specific. Member States of the European Union are not a single organism, nor are they identical – they are diverse.⁷²

General benefits are those that apply to all Member States of the European Union, while specific benefits pertain to certain groups of Member States of the European Union. General benefits include: First, greater transparency and predictability of the system, as uniform standards reduce inter-state and facilitate coordination. Second, enhanced international cooperation, improving legal efficiency, especially in enforcement, while reducing administrative costs dedicated to handling cross-border issues. Third, uniform legal frameworks across the EU could also contribute to strengthening internal security by facilitating the exchange of data and coordination of public service activities. Fourth, as part of a unified EU legal system, Member States of the European Union could benefit from the strong position of the EU in relations with third countries. Fifth, Member States of the European Union may perceive an advantage in having an equal scope of responsibilities, valuable in crises, such as a mass influx of migrants affecting only one part of the EU.

Specific benefits depend on the actual differences among Member States: The first group consists of Member States with comprehensive legal systems offering numerous financial, social, and welfare benefits to PBCAI beneficiaries. The second group includes Member States with standardised or limited legal systems in these areas. The third group comprises Member States facing high migratory pressure, while the fourth group includes those experiencing standardised or low migratory pressure.

For the first group, the primary benefit is the substantial reduction or elimination of migration tourism. Uniform legal standards can limit migrants' movement within the EU in search of the most favourable social, financial, or welfare conditions. This could enable a more even distribution of responsibilities among Member States of the European Union, alleviating the burden on the most 'attractive' ones.⁷³ Additionally, legal unification allows these countries to maintain the integrity of their welfare systems without unilaterally reducing privileges, which could be socially and politically controversial in modern societies.

For the second group – those with standardised or limited legal systems in terms of financial, social, and welfare solutions for PBCAI beneficiaries – legal unification could theoretically open new opportunities to align with European standards. Regulatory uniformity would help these countries integrate more effectively into EU structures, though it may also require resource flexibility. While unified laws could raise standards, implementation may demand measures that seems ambitious for countries with limited budgets. EU financial support might address these difficulties;

72 Akaliyski, 2019, pp. 388–411; Berkhout, Hanegraaff and Braun, 2017, pp. 1109–1131.

73 Kahanec, Zaiceva and Zimmermann, 2009, pp. 3–45.

however, practical experience shows that implementing such mechanisms often tends to be a rather arduous path.⁷⁴

For the third group, the greatest benefit lies in improved management of migratory pressure through solidarity mechanisms and unified procedures. Such Member States can, at least in theory, expect a fairer distribution of responsibility for hosting migrants seeking international protection within the EU. In this context, the relocation system, which reduces the burden on border states, could be particularly significant. Additionally, the legal unification enables effective identification and repatriation of individuals who do not qualify for international protection.

For the fourth group – those facing standardised or low migratory pressure – legal unification can be seen as a step toward greater European cohesion. These states may value being part of a community equipped to address future migration challenges, even if such challenges currently seem distant. Implementing common standards, while demanding, could help these states prepare for hypothetical crises. While countries with migratory stability may view complex regulations as excessive, such actions, in the spirit of European solidarity, can strengthen their sense of belonging, even if the benefits in migration management benefits remain largely potential for now.

5.2. The Cost of Enhancing Mutual Cooperation Through Unification

It is worth noting that the European Union itself is also a beneficiary of legal unification, albeit in a different dimension that determines the costs for the Member States of the European Union. For the EU, the primary benefit lies in strengthening its position as a decision-maker in legal and political matters. By harmonizing laws across the EU, the Union reduces diversity among Member States, creating a quasi-state-like entity with highly similar, ideally identical, legal standards. This approach aligns with the concept of federalizing the EU.⁷⁵ Nonetheless, such activity is inconsistent with current EU primary law, particularly Art. 4(1) and (2) and Art. 5 of the TEU, with significant consequences. These consequences will be described below.

Setting aside questions of legitimacy to maintain research objectivity, several benefits of legal unification within the EU, impacting Member States' costs can be highlighted. First, uniform law simplifies management of cross-border issues and facilitates PBCAI objectives without undermining core state functions and diversity. Second, cohesion and operational effectiveness improve, as unified legal standards across the EU enable faster responses by eliminating delays associated with national legislation, which begin to be treated as a necessary evil. Such a situation evokes Latin maxim '*necessitas non habet legem*'.⁷⁶ Third, the EU's credibility and interna-

74 This is confirmed by the blocking of funds from the NRRP (Poland's National Recovery and Resilience Plan) for Poland, see: Molibog, 2023, pp. 24–48.

75 Loughlin, 1996, pp. 141–162.

76 Korpiola and Øyrehagen Sunde, 2024, pp. 681–711.

tional standing are enhanced, strengthening its ability to promote PBCAI compliance and enforce legal standards effectively. These benefits illustrate an inverse proportionality between the EU's benefits and the costs imposed on Member States through legal unification.

The greatest cost to Member States of the European Union must bear for a unified regime within the PBCAI systems is the departure from, or even the neglect of, the principle of equality as defined in Art. 4(2) of the TEU.⁷⁷ The European Union, established to exercise conferred competences proportionally and subsidiarily (in the realm of non-exclusive competences). It can therefore be reasonably argued that its role differs from that of the Member States of the European Union. This observation, though self-evident, is explicitly confirmed by Art. 4(2) of the TEU. According to this provision, the EU is obliged to respect the equality of Member States in relation to the treaties, as well as their national identity, which is inextricably linked to their fundamental political and constitutional structures, including respect for regional and local self-government and the essential functions of the state.⁷⁸ The adoption of unified legal standards often diminishes the diversity of Member States, encompassing their national and constitutional identities.⁷⁹

EU unification processes within PBCAI systems, such as the Dublin system, reception, qualification, and procedural systems – ultimately lead to largely identical legal standards, even though, as noted earlier, the reception system has its own particularities. The differences that exist or emerge between Member States are minimal, primarily involving national legal acts that ensure the effectiveness of unified EU legal norms. In this way, by eliminating legal differences, the national sense of belonging to a domestic legal system is also diminished, which can impact the national and constitutional identity of Member States and blur distinctions between them. The erosion of these differences may restrict state sovereignty and traditional state functions.⁸⁰ The legal unification may weaken the ability of Member States to independently make decisions in areas crucial to internal governance and public policy. In practice, this can limit their ability to express national identity and implement policies aligned their cultural, historical, or social specificities. While legal unification aims to enhance EU functionality, it may be perceived as a tool of centralization that marginalises the diversity and uniqueness of Member States. This, in turn, can lead to political tensions and weaken the EU's legitimacy.

Additionally, the diversity of Member States of the European Union, as enshrined in Art. 4(2) of the TEU, is not only a historical, cultural, or social fact but also financial, economic, and technological. Member States differ significantly from one another. Introducing uniform legal standards without compensatory mechanisms can deepen existing inequalities because treating diverse entities in exactly the same

77 Williams, 2016, pp. 135–140.

78 Rossi, 2017, pp. 3–42; Wouters and Schmitt, 2017, pp. 43–82.

79 Tribl, 2023, pp. 197–210.

80 Tóth, 2023, pp. 175–195.

way does not produce equality. On the contrary, differences may grow as responses to equal treatment vary. Some entities may thrive, while others may struggle, leading to a 'race to the bottom'. As has long been understood, achieving equality in practice sometimes requires treating entities according to their specific needs rather than identically. The European Union should take this principle into account in its activities.

6. Conclusions

In concluding this analysis, it is essential to address whether the costs borne by EU Member States, as outlined above, outweigh the benefits derived from implementing unified legal regulations in the Dublin, qualification, and procedural systems, as well as, in a different manner, the reception system within the PBCAI framework. In other words, the key question is whether this process is ultimately advantageous for Member States.

To answer this, this study must first refer to the previously identified benefits stemming from the EU's tendency to unify legal standards in PBCAI, particularly through the dominance of the selected systems under examination. Next, it is necessary to revisit the costs incurred by Member States. The final step involves comparing these two categories to determine the overall profitability of this approach, provided that such a comparison is feasible.

The benefits essentially concern the quality and efficiency of international cooperation. This cooperation involves interaction among Member States within the EU framework, including collaboration with EU institutions. Some benefits are institutional, relating to the status and role of the EU as a whole. However, from the Member States' perspective, such benefits may appear secondary, connecting to them only through the argument of belonging to a strong international organization and deriving international status from this affiliation. This argument seems flawed, as international prestige would primarily attach to the EU itself. This could result in such a benefit being illusory in external relations. Nevertheless, even if this argument is accepted, the benefits for Member States fall into a general category of internationally-oriented benefits.

By contrast, the costs incurred by the Member States predominantly concern national matters reflecting the characteristics of a sovereign state. These costs relate to sovereignty, fundamental state functions, and national and constitutional identity. Protecting these attributes motivated the inclusion of principles in the EU primary law, such as the principle of equality respecting Member State diversity (Art. 4(2) TEU) and the principles of conferral, proportionality, and subsidiarity (Art. 5 TEU). Abandoning these national attributes, including as a result of implementing certain concepts of EU integration, may gradually erode or even reverse these principles.

This phenomenon is concerning, as it occurs without a formal amendment of the treaties, raising legitimate doubts about its compliance with those treaties.

Recognizing that the benefits offered by the EU reflect costs borne by Member States in a manner inconsistent with Arts. 4(2) and 5 TEU leads to the conclusion that a cost-benefit comparison cannot be made legally. The consequences of the costs affect matters legally protected by EU primary law in the form of the aforementioned principles. From a legal standpoint, actions that result in non-compliance with legal principles cannot be legitimised through the lens of any potential benefits. In such cases, a formal amendment of the EU treaties is necessary. Only then would the trend toward legal unification in PBCAI be legally legitimate. Although the PBCAI segment includes numerous and extensive legal bases in the Treaty on the Functioning of the European Union (TFEU), it does not authorise the EU to fully unify all systems (Dublin, qualification, reception, and procedure). In this respect, perceptions of centralization or even federalization arise. If the EU intends to introduce such tools in PBCAI, it should initiate a discussion on amending primary law.⁸¹ During such discussions, each Member State should consider whether it values internationally-oriented benefits more than domestically-oriented costs.

In this context, it is worth recalling that national law is closest to the people and, rooted in national history, provides instruments tailored to the domestic identity, values, and culture. Furthermore, international regulations ultimately emerge from national. These international regulations, while facilitating international cooperation, enhance the efficiency and reach of national law by offering broader opportunities, occasionally requiring a degree of adaptation. Such adaptation should result from sovereign national decisions, undertaken at an appropriate time through the legal incorporation of international agreements. In other words, the purpose of international law is to enable what would otherwise be extremely difficult or impossible to achieve domestically. A good example of this is the regulation of migration law, which by definition contains a cross-border element. This is the primary goal of regulations agreed upon between states or issued by international organizations to which they belong. It seems evident that this goal has never been, nor should it be, the marginalization or even the elimination of national law, nor the status and role of sovereign and national states.

81 In this regard, it should be noted that on 22 November 2023, the European Parliament adopted a resolution calling for treaty amendments, one of the topics of which is migration (see: European Parliament resolution of 22 November 2023 on proposals of the European Parliament for the amendment of the Treaties (2022/2051(INL)).

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PART VI

BEYOND THE UNION:
PARTNERS OR MODELS –
OUTSIDE, YET INVOLVED
OR INSPIRING

THE OUTER CIRCLE: MODELS OF ASSOCIATION FOR NON-MEMBERS (EEA, SWITZERLAND, UK, TURKEY)



BOJAN TUBIĆ

Abstract

This chapter explores the various alternatives to direct involvement in the European Union international framework, particularly concerning the European Economic Area (hereinafter: EEA). The principle of homogeneity, which underpins the EEA's functioning, is critically analysed in terms of its implications for non-EU countries seeking integration with EU markets while maintaining sovereignty. The relationship between the EU and Turkey is examined, with a focus on the complex dynamics of Turkey's customs union and its aspirations for full EU membership. Additionally, the chapter investigates the deep and comprehensive free trade areas between the EU and countries such as Moldova, Georgia, and Ukraine, analysing how these agreements serve as tools for economic and political integration without full EU membership. Lastly, the post-Brexit relationship between the EU and the UK is discussed, highlighting the intricacies of trade agreements, regulatory alignment, and the ongoing political and economic negotiations that define this new phase of European cooperation. By examining these multifaceted relationships, the chapter aims to provide insights into the evolving dynamics of European integration and the alternatives to EU membership for countries and regions within its sphere of influence.

Keywords: European Union, European Economic Area, Deep and Comprehensive Free Trade Area, Turkey, Brexit

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1. Introduction

This section will address the issue of alternative forms of cooperation with the EU short of membership, focusing on arrangements that may be perceived as alternatives to EU accession. The following issues will be analysed: The EEA, a deepened and comprehensive free trade zone created with Moldova, Ukraine and Georgia, and the examples of Turkey and UK.

The chapter will focus primarily on legal issues (e.g. the interpretation of law and principle of homogeneity in EEA from the perspective of equality) as well as political issues. Different models of cooperation with third countries will be compared. The key consideration will be equality on the one hand and a common interest in further or wider integration on the other. Do either of these forms represent a worthy alternative to membership of the European Union, or do their disadvantages outweigh their benefits, making EU membership the clearly preferable option? Particular attention will be given to the UK, which left the EU after almost 50 years of membership, and Turkey, which has been waiting for the EU membership for more than a half a century.

2. European Economic Area: Equality in Law, but Not in Interpretation and Law-Making

The European Economic Area Agreement represents a particular form of cooperation between the European Union and countries that are not part of the EU, which shows that collaboration between the EU and these countries can be structured in different forms. Considering that Norway, Iceland and Lichtenstein¹ are not state members of the EU, the function of this association agreement² is to bring these countries into line with the EU, its homogeneous mechanism, associated dynamism,³ and institutional structure. In this way, these states are included in the EU's internal market.

From the EU perspective, the EEA is a means of projecting EU norms and values onto neighbouring states. However, from the perspective of the European Free Trade Association States, this agreement shows common values, shared aspirations and concrete ideas on how to manage cross-border relations with close neighbours.⁴

1 The European Free Trade Association (EFTA) consists of four countries: Iceland, Lichtenstein, Norway, and Switzerland. We can say that the EEA is an agreement between EFTA countries and the EU, although Switzerland is not part of the EEA.

2 European Union and Norway, Iceland and Lichtenstein, the European Economic Area Agreement, Porto, 1 January 1994.

3 Sejersted, 1997, p. 68.

4 Hillion, 2011, p. 501.

EFTA States do not have a role in process of making decisions in the EU, but they can provide input during the preparatory phase when the Commission prepares proposals for new legislation to be adopted in the EEA.

The EEA guarantees four freedoms – the free movement of goods, persons, services, and capital.⁵ It also includes non-discrimination and equal competition rules throughout the EEA.⁶ Art. 1, para. 2(f) of the EEA provides that this association shall entail closer cooperation in other fields such as research and development, environment, education, and social policy between the EU and three EFTA countries.⁷

Products of EEA origin can enter the internal market freely, in line with the principle of free movement of goods. Pursuant to Art. 10 of the EEA, customs duties and quantitative restrictions on trade in these products are forbidden within the EEA.⁸

Art. 28 of the EEA ensures that freedom of movement eliminates any discrimination based on nationality between workers of EU Member States and EFTA States regarding employment, remuneration, and other working conditions.⁹ The right to reside in another EEA State also applies to students, pensioners, and persons not in paid employment.

Under the EEA, the freedom of establishment and the right to provide services under the same conditions throughout the EEA apply to both individuals and companies.¹⁰

The free movement of capital allows EEA residents and companies to invest across borders without discrimination on the grounds of nationality, place of residence or place of establishment. Citizens and companies can transfer money between EEA countries and there is a possibility for them to open bank accounts to invest in shares and funds and to borrow money in other EEA countries.¹¹

Some areas – such as the EU's economic and monetary union or common commercial policy, development policy, customs union, common agricultural and fisheries policy, justice and home affairs, and common foreign and security policies – are not covered by the EEA.¹²

Cooperation with the EU in the areas of justice and home affairs is facilitated through the Schengen Association Agreement and other agreements. Norway also participates in the EU's foreign and security policy.¹³

5 The European Economic Area Agreement, Art. 1, para. 2(a) to (d).

6 *Ibid.*, Art. 4.

7 *Ibid.*, Art. 1, para. 2(f).

8 *Ibid.*, Art. 10.

9 *Ibid.*, Art. 28.

10 *Ibid.*, Art. 36.

11 *Ibid.*, Art. 40.

12 Jonsdottir, 2013, p. 5.

13 Wivel et al., 2015, p. 208.

2.1. Institutions and Bodies According to the EEA

As these three EFTA States are not members of the EU, they cannot accept direct decisions from the European Commission or the Court of Justice of the EU. Separate institutions have therefore been set up to mirror these EU institutions. This is known as the two-pillar structure. In this context, joint bodies such as the EEA Council and the EEA Joint Committee have been established to implement the EEA.

The EEA Council, composed of members of the EU Council and Commission and one member of the government of each of the EFTA States, is the highest political body in the EEA.¹⁴ Providing political impetus for the implementation and development of the Agreement is the responsibility of the EEA Council.¹⁵ The EEA Council is responsible for policy discussions and consultations within the framework of developing new EEA provisions.¹⁶ In addition, Art. 129 states of the EEA that an application by a new EU Member State or an EFTA State to become a Member State to Agreement should be addressed to the EEA Council.¹⁷ Although the EEA is a so-called mixed agreement, the EEA Council is only common EEA institution where the EFTA States interact with EU representatives.¹⁸

Art. 92 of the EEA provides that the EEA Joint Committee shall ensure the effective implementation and operation of the EEA, which is the legal basis for the establishment of this Committee.¹⁹ Representatives of the EFTA countries belong to the EEA Joint Committee.²⁰ In addition, Art. 98 of the EEA empowers the EEA Joint Committee to adopt decisions on amendments to the Annexes and Protocols to the EEA.²¹ One of its most important tasks is also to incorporate new EU legislation into the EEA and to apply the rules of the internal market to the EFTA States. However, it also plays an essential role in safeguarding one of the most important principles of the EEA, namely the principle of homogeneity in the interpretation and application of the Agreement.²² In addition, the EEA Joint Committee has other responsibilities that are quite unique, in particular the quasi-legislative competence to incorporate new provisions in the Agreement²³ and to maintain a homogeneous interpretation of the Agreement.²⁴

The EFTA Surveillance Authority (hereinafter: ESA) has responsibilities similar to those of the European Commission, i.e. the monitoring role. The purpose of this institution is to ensure that the EFTA States comply with their responsibilities provided in the EEA

14 The European Economic Area Agreement, Art. 90.

15 Ibid., Art. 89.

16 Norberg et al., 1993, p. 120.

17 The European Economic Area Agreement, Art. 128.

18 Fenger et al., 2005, p. 89.

19 The European Economic Area Agreement, Art. 92.

20 Ibid., Art. 93.

21 Ibid., Art. 98.

22 Haukeland Fredriksen, 2015, p. 100.

23 The European Economic Area Agreement, Art. 98.

24 Ibid., Art. 105.

and that undertakings in these countries comply with the common competition rules. In addition, the ESA has the power to investigate possible violations of EEA rules. The Commission and the Authority are constantly in contact and co-operate with one another.²⁵ Moreover, under Art. 5 of the EEA, the EFTA States have established a Surveillance Authority and a Court of Justice, the ESA has the following responsibilities:

- (a) take decisions and other measures in cases provided for in this Agreement and in the EEA;
- (b) formulate recommendations, deliver opinions, and issue notices or guidelines on matters dealt with in the EEA, if that Agreement or the present Agreement expressly so provides or if the EFTA Surveillance Authority considers it necessary;
- (c) carry out cooperation, exchange of information, and consultations with the Commission of the EU as provided for in this Agreement and the EEA;
- (d) carry out the functions which, through the application of Protocol 1 to the EEA, follow from the acts referred to in the Annexes to that Agreement, as specified in Protocol 1 to the present Agreement.²⁶

The EFTA Court is the counterpart of the Court of Justice of the EU in matters concerning EEA States. It handles infringement cases brought by the ESA against an EEA State and cases involving disputes between two or more EEA States.²⁷ Reflecting the number of EFTA States party to the EEA, the EFTA Court consists of three judges.²⁸

Although formally independent, the ESA and EFTA Court's competences are defined by the homogeneity principle of the EEA. The EEA regulates that the ESA and the Commission should collaborate, exchange information and discuss with each other to guarantee consistent monitoring across the EEA.²⁹ As a general rule, Art. 6 EEA provides for the application of the interpretation of substantially identical rules of the European Community Treaty and the EEA referring corresponding jurisprudence of the CJEU.³⁰ Similarly, the EFTA States decided to give 'due account' to the principles set out in some judgments of the CJEU, including those given after the date of signature of the EEA.³¹ Art. 34 of the EEA gives the possibility to the EFTA Court to issue 'advisory opinions on the interpretation of the EEA to courts in EFTA

25 Arnesen et al., 2018, p. 984.

26 EFTA States, Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, 31 January 1994, Art. 5.

27 The European Economic Area Agreement, Art. 108.

28 Hillion, 2011, p. 502.

29 The European Economic Area Agreement, Art. 109.

30 Brandtner, 1992, p. 322.

31 EFTA States, Art. 3, para. 2.

States requesting them'.³² Taking this into account, the EFTA Court has shown itself to be 'playing the homogeneity game' and has been instrumental in the introduction of main principles of EU law into the EEA legal order.³³

2.2. Principle of Homogeneity

Homogeneity, which implies that all economic actors within the EEA are subject to the same rules and compete under the same conditions, is a central principle of the EEA. The EEA will be continuously updated and amended so that EEA/EFTA legislation remains consistent with EU single market legislation maintaining homogeneity.

According to Art. 1(I) and the preamble, the objective of the EEA, represents the creation of a dynamic and homogeneous EEA. The basic idea was to extend the single market to the EFTA countries.³⁴ This objective was based on two key elements – the rules of the EEA need to be consistent with the provisions of the internal market, and there must be legal mechanisms in order to ensure that these provisions were interpreted in the same way.³⁵ The most important of these mechanisms are found in Art. 6 of the EEA, which, in essence, require that EEA rules be interpreted according to the jurisprudence of the CJEU.

In accordance with the Art. 6 of the EEA, the most important criterion for a uniform interpretation is that the relevant EEA and now EU rules must be 'identical in substance'.³⁶ Some authors argue that this concept extends the scope of homogeneous interpretation: 'identical in substance does not mean identical in wording'.³⁷ It is also true that it is possible to envisage a homogeneous interpretation of provisions which, as these commentators note, are identical in terms of their wording, except for those elements which have not been transposed because they are relevant only to internal Community procedures.³⁸ However, the notion of 'identical in substance' also means that an identical wording is not a sufficient reason for a uniform interpretation. It is therefore a qualification of the scope of uniform interpretation.

Art. 6 EEA is clearly understood to mean that EEA rules should be constructed in the line with EC provisions, the wording of which has been reproduced in the EEA, and that mere technical or linguistic differences in the wording are not sufficient to bring a provision outside the scope of Art. 6 of the EEA.³⁹

Moreover, absolute obligation to interpret and apply EEA provisions in accordance with the rules of the CJEU does not exist, even if a provision falls within the

32 Petter Graver, 2002, p. 73.

33 Bronckers, 2007, p. 605.

34 Case-452/01, *Margarethe Ospelt*, Judgment of 23 September 2003, para. 29.

35 Case-9/97, *Erla María Sveinbjörnsdóttir v. Iceland*, Judgment of 10 December 1998, para. 52.

36 The European Economic Area Agreement, Art. 6.

37 Skouris, 2014, p. 5.

38 Norberg et al., 1993, p. 190.

39 Fenger et al., 2005, p. 68.

scope of Art. 6 EEA. The introductory phrase of Art. 6 EEA and the introductory phrase of recital 15 of the preamble to the EEA make it clear that Art. 6 EEA is without prejudice to the development of future case law and does not affect the independence of the courts concerned.

International treaties must be interpreted not only according to their text, but also according to their purpose and context. Moreover, as the CJEU stated in Opinion 1/91, the fact that provisions of the EEA and corresponding Community provisions have the same wording does not necessarily mean that their interpretation is the same.⁴⁰ The CJEU therefore concluded that homogeneity could not be ensured by having identical wording in the Community legislation and in the corresponding provisions of the EEA.⁴¹

The presumption of a uniform interpretation applies to a large extent to the main part of the EEA, including the rules on free movement of goods, competition and State aid. A uniform interpretation of these provisions has become established case-law, irrespective of whether the objectives and context of these provisions were exactly the same as their counterparts in the EU Treaty. The EFTA Court jurisprudence, to which the CJEU eventually warmed, has superseded the reservations in Opinion 1/91.⁴²

National authorities are thus obliged to provide a homogeneous interpretation of EEA law according to Art. 6 of the EEA. Although the wording of this provision is addressed to the EFTA Court, the underlying objective of homogeneity also requires national courts to consider CJEU rulings handed down after the EEA became effective. It is therefore not a question, if national courts must have regard to this principle, but rather how they are to do it.

2.3. Application of the Principle of Homogeneity

The national courts are inevitably the most important guardians of the principle of homogeneity. They can, however, seek opinions from the EFTA Court on the application of EEA law. These opinions are advisory, which means that they are not binding the national courts.⁴³ However, national courts continue to be bound by the principle of loyal collaboration of Art. 3 of the EEA from the point of view of the EFTA Court.⁴⁴ In fact, EEA law tends to be interpreted unilaterally by the CJEU.⁴⁵

The EFTA Court usually has an advantage over national courts to be a guarantor of homogenous interpretation. However, it is not impossible to imagine that the EFTA Court and the CJEU end up ruling against each other. However, it is likely that there will be cases where there is an CJEU judgment which the EFTA Court has not

40 Opinion of the Court of 14 December 1991, Opinion 1/91, para. 14.

41 Ibid., para. 22.

42 Case-452/01, *Margarethe Ospelt*.

43 Case E-18/11, *Irish banks*, Judgment of 28 September 2012, para. 57.

44 Ibid., para. 58.

45 Skouris, 2014, p. 5.

taken into consideration, or where the EFTA Court has taken into account the CJEU judgment but has come to a different conclusion.

The EFTA Court rules on cases concerning the EFTA States and the CJEU does the same with regard to the Member States of the EU. They work together to secure that EEA law gets interpreted in a homogenous manner. This is to be supported by the exchange of information on each other's judgments, as stated in Art. 106 of the EEA.⁴⁶ Such a system, although not yet operational, requires that each court takes into account and, where appropriate, relies on the judgments of the other.

In accordance with Art. 105 of the EEA,⁴⁷ all judgments of the EU courts and the EFTA Court shall be notified to the EEA Joint Committee. This is to enable EFTA States to monitor the jurisprudence of these courts and to act in such a way as to maintain a uniform interpretation of the EEA. Nevertheless, Art. 105 EEA does not prescribe how to obtain a homogenous interpretation of the EEA. In fact, Art. 105 of the EEA only provides a forum in which the Contracting Parties can discuss the different case law. Moreover, Art. 105(3) of the EEA explicitly foresees the possibility that these efforts fail and provides for the application of the provisions on the settlement of disputes in the event of such failure.⁴⁸

Although on the face of it the principle of homogeneity would seem to require the EFTA States to implement EU law in the EEA collectively and reactively, the above analysis shows that the principle of homogeneity is in fact counterbalanced by the equally significant principle of autonomous decision-making.

While the EEA is based on the fact that the EFTA States should strive for a uniform EEA and facilitates the achievement of this objective by allowing the EFTA States to take part in the EU decision-making process, it expressly provides that the EFTA States may agree to different degrees of homogeneity in the EEA.

Consequently, the principle of homogeneity should not be seen as an absolute principle. Rather, it is a political guideline that sets an objective that can be achieved to varying degrees. It is for the EFTA States to assess, on a case-by-case basis, the degree of homogeneity they consider necessary and sufficient for the good functioning of the EEA.

Provisions of EEA law, when they are identical in substance to corresponding EU law provisions, must be interpreted and applied in line with the rulings of the CJEU. Consequently, the decisions of the CJEU are decisive for national courts and the EFTA Court when interpreting EEA law. This also applies in cases where the EFTA Court has given a contradictory ruling. In order to assess whether the provisions are indeed identical in substance, their wording, context and objectives must be taken into account. Provisions with identical wording are assumed to be interpreted in the same way, though this assumption can be challenged by considering their context and objectives. On the other hand, the principle of homogeneity does not require

46 The European Economic Area Agreement, Art. 106.

47 Ibid., Art. 105.

48 Ibid., Art. 105, para. 3.

EEA law to be interpreted in line with EU rules that do not have a counterpart in the EEA.

3. Turkey

As regards its importance to the EU, Turkey ranks alongside Russia in the neighbourhood and follows the United States and China in the global arena. The historical ties between the two sides, dating back to the Ottoman period, underpin Turkey's importance to Europe. Turkey has always been an integral part of European history, whether through trade, diplomacy, war, art or cuisine. Over the centuries, their relationship has been one of cooperation and rapprochement, as exemplified by the extensive exchanges between the Ottomans and European powers and city-states in the fifteenth through to the seventeenth centuries, in the fields of economy, culture, art, and society. At the same time, until the 'European balance of power' in the eighteenth century, conflict and competition were rampant, especially in the Ottoman-Habsburg wars. However, there was also an honorary code of conduct between the warring parties in times of war, as a sign of mutual recognition and legitimisation.⁴⁹ By the middle of the nineteenth century, the Ottoman Empire had been accepted into the concert of Europe⁵⁰ and was rapidly becoming a participant in the emerging rudimentary international law.⁵¹ However, Turkey's relationship with the European integration project has been close, contentious, and tortuous from the very beginning.⁵² In spite of its intensity and duration, the final outcome of the relationship is still not known.

Turkey entered into an association agreement with the European Community on 12 September 1963, known as the Ankara Treaty,⁵³ becoming an associate member of the EC. In 1970, the association was further extended through the Additional Protocol,⁵⁴ which set the goal of establishing a customs union between Turkey and the EC by 1995. Turkey submitted its application for full membership of the EC on 14

49 Deringil, 2007, p. 710.

50 The Concert of Europe was a general agreement between the great powers of 19th-century Europe to maintain the European balance of power, political boundaries, and spheres of influence. The beginnings of the Concert of Europe, known as the Congress System or the Vienna System after the Congress of Vienna (1814–1815), was dominated by the five great powers of Europe: Austria, France, Prussia, Russia, and the United Kingdom.

51 Hale, 2002, p. 35.

52 LaGro and Jorgensen, 2007, p. 47.

53 Agreement establishing an Association between the European Economic Community and Turkey, Ankara, 12 September 1963, Official Journal of the European Communities, No. L 361/29.

54 Additional Protocol and Financial Protocol, annexed to the Agreement establishing an Association between the European Economic Community and Turkey, 23 November 1970, Brussels, Official Journal of the European Communities, No. L 361/59.

April 1987. However, in 1989, the EC issued an opinion stating that although Turkey was eligible for membership, it was not yet the right time to begin accession negotiations. The EC proposed the implementation of the Association Agreement and the realisation of a customs union as provided for in the Treaty of Ankara of 1963 and the Additional Protocol of 1970, instead of full membership.

At its summit in Luxembourg on 12 December 1997, the European Council decided to begin accession negotiations with all candidate countries except Turkey. It was concluded that while Turkey met the eligibility criteria for membership, its chances of joining the EU in the near future were very limited. The EU-Turkey Association Council affirmed that Turkey will have same standards and criteria as other applicants (Poland, Hungary, the Czech Republic, Slovenia and Estonia) regarding accession process on April 1997. As mentioned, Turkey was not included in the decisions made at the December 1997 Luxembourg summit or in the EU's Agenda 2000 enlargement plans. Despite submitting its application for full membership in 1987, Turkey was excluded from the process due to the EU's concerns over human rights violations, Turkey's military presence in Cyprus, and the ongoing tensions between Turkey and Greece. Then, the European Council offered a Pre-Accession Strategy, which the Turkish government rejected, leading to the relationship between Turkey and the EU being in crisis.

The relationship between Turkey and the EU is more complicated than those with other European countries seeking to join. It is complicated by questions about Turkey's European identity. As this issue can never be addressed directly, the EU's refusal is based on political considerations, namely Turkey's failure to respect the principles of democracy, law and human rights. Obviously, Turkey's political system is an obstacle to EU membership, giving the EU an excuse to reject it. The EU's position is that Turkey cannot join because it does not meet the democratic requirements of membership. Moreover, there is also the opinion that the reason why Turkey cannot be part of the EU is the opposition between European and Turkish identities.⁵⁵ Nevertheless, Turkey remains an important partner for the EU, regardless of whether it joins or not, given its economic size, as the sixth largest economy in Europe, and its geographical location.⁵⁶

A turning point occurred in December 1999 in Helsinki, when the European Council officially recognised Turkey's long-awaited candidacy. However, unlike the other countries involved in the enlargement process at the time – such as the Central and Eastern European countries, Cyprus, and Malta – Turkey's candidacy did not lead to the opening of accession negotiations. This decision was due to the fact that Turkey needed to fulfil the Copenhagen political criteria for membership and make progress on issues related to Cyprus and its relations with Greece before negotiations could begin.⁵⁷ The Commission was tasked with monitoring Turkey's progress on

55 Muftuler-Bac, 1998, p. 242.

56 Cemal Karakaş, 2013, p. 1060.

57 Oniş, 2000, p. 470.

domestic issues and preparing the Accession Partnership for Turkey, which outlined recommended areas for reform. Additionally, the EU increased and reallocated its financial assistance to Turkey, focusing the aid more directly on supporting reforms within the country.

Turkey's rapid reform progress, particularly since late 2001 – often described as a 'silent revolution' – played a significant role in advancing its EU accession process. This progress influenced the European Council's decision in December 2004 to determine whether and when to open accession negotiations with Turkey. The Justice and Development Party (hereinafter: AKP), which came to power in November 2002, established clear targets and timelines in its reform program. As a result of Turkey's strides in implementing reforms, the European Council concluded in December 2004 that Turkey had 'sufficiently' met the political criteria, paving the way for the opening of accession negotiations in October 2005.⁵⁸

Paradoxically, despite the opening of accession negotiations in 2005, Turkey's EU accession process stalled. The negotiations progressed slowly in the initial years and came to a complete halt between 2010 and 2013. By mid-2014, only 14 of the 35 negotiation chapters had been opened, and just one chapter (on science and research) had been provisionally closed. A series of vetoes by the European Council, France, and the Republic of Cyprus led to the freezing of most of the negotiation chapters and the provisional closure of all others.⁵⁹

Although the accession process was formally launched decades after Turkey's treaty commitment to the European integration project, the process was paused for almost the last two decades.⁶⁰ For all candidate countries prior to Turkey, the ultimate goal of the accession process has always been full membership. In the case of Turkey, however, the road to membership has been littered with obstacles that have made reaching the final destination uncertain at best.

3.1. Customs Union Agreement

A Customs Union Agreement (hereinafter: CUA) between Turkey and the EU was signed on 6 March 1995 and entered into force on 1 January 1996, creating a customs free zone between them.⁶¹ The Customs Union serves as evidence that Turkey is capable of meeting the economic conditions outlined in the Copenhagen criteria for EU membership. It demonstrates that the Turkish economy can handle the competitive challenges posed by free trade in goods, as well as the trade, competition, and intellectual property components of the EU.

CUA required Turkey to eliminate all customs duties, quantitative restrictions, charges equivalent to customs duties, and measures similar to quantitative

58 Oniş, 2010, p. 10.

59 Muftuler-Baç, 2017, p. 421.

60 Arisan and Eralp, 2012, p. 57.

61 Togan, 2012, p. 1.

restrictions on trade in industrial goods with the EU starting from 1 January 1996. Additionally, Turkey was obligated to adopt the EC Common Customs Tariff (hereinafter: CCT) on imports from third countries by the same date, along with all preferential agreements with third countries. As a result of these obligations, from 1 January 1996, all industrial products – except for European Coal and Steel Community (hereinafter: ECSC) products – aligned with EC standards could circulate freely between Turkey and the EU. Regarding ECSC products, Turkey signed a Free Trade Agreement (hereinafter: FTA) with the EU in July 1996, and customs duties on ECSC products between the parties were removed starting in 1999.⁶²

With regard to Turkish goods' access to the EU, it should be noted that the EU eliminated nominal duties for imported industrial goods from Turkey in September 1971. But then they did make some exceptions. The EC reserved the right to levy customs duties on the import of certain oil products in excess of a fixed quota and to apply a progressive reduction of customs duties on the import of certain textile products. Trade in products within the ECSC province was protected by the EC through the application of non-tariff barriers, particularly anti-dumping measures.

The main effect of a Customs Union is to increase trade flows among Member States, often at the cost of trade with non-Member States. This expansion is typically analysed in terms of trade creation and trade diversion. When trade diversion outweighs trade creation, the customs union can lead to a reduction in overall welfare. In Turkey's case, since the CCT is lower than the tariff that existed before the Customs Union, it allowed Turkey to adopt a more liberal trade regime. As a result, there was less potential for a change of supplier, and the result has been the reversal of the potential for trade diversion. Consumers benefited from lower prices, and tariff revenues collected on imports from non-member countries offset the effect of increased competition from non-member countries on domestic producers.

3.1.1. Customs Reform

CUA obliges Turkey to adopt EU customs provisions concerning: (a) origin of goods, (b) customs value of goods, (c) introduction of goods into the territory of the CU, (d) customs declarations, (e) release for free circulation, (f) suspensive arrangements and customs procedures with economic impact, (g) movement of goods, (h) customs debt, and (i) right of appeal.

CUA Member States must secure that the appropriate implementation and enforcement capacities are in place. This includes links to the relevant EU computerised customs systems. Customs services needed to ensure adequate capacity to implement and enforce specific provisions in related areas of the *acquis*, such as external trade.

An example of this is Turkey's signing of a loan agreement with the World Bank in 1995 to implement a series of institutional reforms aimed at strengthening public

⁶² Togan, 2012.

financial management within the government. Additionally, Turkey entered into a technical assistance agreement with the IMF. The agreement provides for international consultants to work with the Turkish Customs Service in Turkey on a long-term basis. The Turkish Customs Modernisation Project was aimed at speeding up the release of goods, efficiently collecting duties and related fees, streamlining the clearance process, and simplifying procedures. At the same time, it sought to enhance customs control and produce timely, reliable statistical data.⁶³

As a result, the project focused on revising customs legislation to align with the requirements of the CUA and international customs standards set by organisations like the World Customs Organisation (hereinafter: WCO). It also emphasised the development and implementation of computer systems, as well as the reorganisation of the customs administration to strike a balance between customs control and trade facilitation, in line with other international agreements and conventions to which Turkey was a party.⁶⁴

3.1.2. Competition

For a long time, Turkey lacked specific competition legislation, resulting in the absence of competition policy enforcement. In the 1980s, to foster competition, Turkey removed quantitative restrictions on foreign trade and significantly reduced both nominal and effective protection and subsidies. However, these measures alone were not sufficient to ensure that markets continued to function effectively.

The CUA provides for the adoption by Turkey of the EU competition rules, including measures in the field of state aid, within a period of two years. Turkey had to bring its competition legislation into line with the EC legislation and ensure its effective application. In December 1994, Turkey introduced its competition policy through the 'Law on the Protection of Competition'. The Competition Authority, which operates with administrative and financial autonomy, is tasked with ensuring the creation and development of markets for goods and services within a free and healthy competitive environment, for supervising the implementation of the Competition Law and for carrying out the tasks provided for by the Law.⁶⁵

The EU-Turkey customs union, established in 1995, has been an important tool for Turkey's integration into the EU and world markets and has provided effective instruments for reforming the Turkish economy. Furthermore, it represents Turkey's credible commitment to a liberal foreign trade regime for manufactured goods and its participation in the EU internal market for these goods. As a result, Turkish producers of industrial goods now face import competition and operate within one of the largest free trade areas for industrial goods globally. They are shielded from external competition by tariffs to the same extent as EU producers and are therefore

63 Togan, 2010, p. 12.

64 Oktem, 2004, p. 214.

65 Togan, 2012, p. 11.

required to compete with duty-free imports of manufactured goods from global, pan-European companies.

It can be said that the political will exists in Turkey to achieve economic integration with the EU as it strives to become a full member. As a result, Turkey has adopted the EU's customs regulations, its approach to tariff elimination and harmonisation, competition policy, and trade policy regulations. Additionally, Turkey has opened its markets to EU industrial imports and aligned itself with all of the EU's preferential agreements with third countries. Moreover, public opposition to the integration process in Turkey has been almost non-existent.

For other countries, the prospect of joining the EU is remote, but they might nevertheless want integration with the EU as a means of achieving relatively high but sustainable economic growth. In this instance, the country could try to sign free trade agreements with the EU but only adopt those EU policies that can be described as growth-enhancing.

4. Deep and Comprehensive Free Trade Areas

The Deep and Comprehensive Free Trade Area (hereinafter: DCFTA) between the EU and Georgia, Moldova, and Ukraine has been provisionally in force since 2014. It serves as the economic and trade foundation of the EU's Association Agreements with these countries. The aim of the DCFTA is to strengthen the political relationship and enhance economic cooperation between the EU and its associated countries at a deeper level. To achieve this objective, the DCFTA outlines a broad and gradual alignment with EU legislation in areas related to trade, as well as progressive mutual market opening. With these particular elements, it goes beyond the 'new generation' of Free Trade Agreements (hereinafter: FTAs) and represents 'a unique type of trade agreement'.⁶⁶

At the beginning 2016, only four DCFTAs were finalised, namely with Armenia, Georgia, Moldova, and Ukraine. These have been provisionally applied since 2014 but entered into force in 2016. A major point of contention with Russia, which opposed them, were the DCFTAs with the Eastern Partnership countries. As regards Ukraine, there was an unsuccessful attempt to persuade the country to join the Eurasian Economic Union.⁶⁷ As regards Armenia, however, the government's decision to join the EU was the result of Russian pressure, with the result that the DCFTA negotiated in 2013 never entered into force.

⁶⁶ Koeth, 2014, p. 25.

⁶⁷ Eurasian Economic Union consists of five member states: Russia, Belarus, Kazakhstan, Kyrgyzstan, and Armenia.

Political, rather than economic, reasons are the main motivation for both sides to sign DCFTAs.⁶⁸ These countries have repeatedly underlined their aspirations to become members of the EU.⁶⁹ They see DCFTAs not as the final destination, but as the first stage towards becoming a full member, whilst leaving Russian orbit.⁷⁰ For the EU, which is unable to offer these countries the prospect of membership, the DCFTA at least offers the partner countries the another possibility of a privileging relationship through a contractual relationship with some substance (e.g. mutual rights and obligations), as opposed to the previous more declaratory agreements, which seem rather inadequate in the present geostrategic context.⁷¹

Although the Association Agreements or DCFTAs did not provide for EU membership ‘the prospect of increasing exports to the EU and access to single market has been a strong incentive for structural reforms in neighbouring economies with EU membership aspirations’.⁷² Meanwhile, the implementation of the DCFTA, in addition to providing access to the large EU market, can be expected to induce profound changes in the environment of the beneficiary countries, increasing the competitiveness and efficiency of their economies.⁷³ As a result, DCFTAs introduced a significant innovation in trade policy towards Eastern neighbours, promoting regulatory alignment and convergence in numerous trade-related areas. This has led to substantial policy changes across many economic sectors in these countries, including Georgia.⁷⁴

Pursuing deeper trade agreements allows for alternative approaches to enhancing market integration, meaning that partner countries do not necessarily need to fully align with the EU’s Internal Market to access the EU market for goods and services or for companies to invest and operate within EU countries. DCFTAs stand out from other preferential trade agreements in that they require significant alignment with EU norms and legislation, yet provide partner countries with little or no influence over the rules.⁷⁵ Even if partner countries are not candidates for EU accession, it is assumed that the elements of the EU’s internal market are suitable for them. For countries without the prospect of EU membership, the key issue is whether DCFTAs help address the specific constraints to growth in each partner country – which will vary from one country to another – and do so in a way that minimises the cost-benefit ratio.⁷⁶

DCFTAs establish binding, specific rules and aim to align policies in the covered areas with those of the EU. One particularly important area for growth addressed by

68 Muravska and Berlin, 2016, p. 25.

69 Fromage, 2024, p. 334.

70 Van der Loo, 2014, p. 15.

71 Koeth, 2014, p. 26.

72 Panagiota Manoli, 2013, p. 63.

73 Adarov and Havlik, 2016, p. 16.

74 Eteria, 2012, p. 165.

75 Hoekman, 2011, p. 96.

76 Messerlin, 2011, p. 19.

DCFTAs is trade and investment in services. Examples of policy commitments in existing DCFTAs with the above countries are as follows: (a) elimination of import duties on agricultural and industrial products; (b) customs and trade facilitation provisions, including content and administration of customs laws and regulations reflecting EU standards; (c) investor national treatment; (d) commitment to the application of EU product standards and norms for food, animal products and industrial goods and the establishment of effective enforcement mechanisms to ensure compliance; (e) requirements for the protection of intellectual property rights and the application of the EU's internal rules in this area; (f) agreement on the progressive adoption of all EU laws and procedures to open public procurement markets to EU competition; and (g) measures for the opening of access to services markets.⁷⁷

All the DCFTAs contain clauses on sectors excluded from liberalisation and have the same provisions on national law, postal and courier services, financial services, telecommunications, and services that will increase transparency. This ensured better access to the EU services market once standards have been harmonised.⁷⁸

From both the EU and partner countries' perspectives, it is crucial to identify forms of international cooperation that provide a clear focus. When EU accession is uncertain, concentrating on enhancing economic governance through the adoption of international standards may be more effective than focusing solely on EU law and practices. Trade agreements can have a significant impact on reduction of policy uncertainty and building credibility for reform, but it is not clear whether a DCFTAs will be more credible than preferential trade agreements based on adoption of international standards and good regulatory practice. Regardless of the form of the preferential trade agreement, it should be kept in mind that the benefits of reform would be better when applied to all trading partners. In this respect, it may be easier to extend to other countries more 'generic' trade agreements and cooperation based on international best practices and standards.⁷⁹

The EU–Turkey Customs Union and the EU's DCFTAs both promote economic integration by removing tariffs on goods and requiring alignment with some EU standards. However, DCFTAs go much further by covering services, public procurement, and broader legal and regulatory reforms. While neither arrangement grants participation in EU decision-making, DCFTA countries have deeper political ties and participate in more EU programs. Overall, both frameworks connect non-EU countries to the EU market, but DCFTAs represent a more comprehensive and politically integrated approach.

77 Hoekman, 2016, pp. 6–7.

78 Boldea and Sigmirean, 2020, p. 312.

79 Dreyer, 2012, p. 90.

4.1. The Deep and Comprehensive Free Trade Area With Georgia

The EU-Georgia DCFTA with its detailed texts and extensive annexes, was an integral part of the Association Agreement, which was signed in June 2014. As already mentioned, the DCFTA was provisionally applied in September 2014 and entered into force in July 2016.⁸⁰ Conditionality to ensure regulatory convergence and approximation of legislation in some areas was the EU's approach to starting negotiations with Georgia on a DCFTA. Acknowledging the political significance of strong ties with the EU, Georgia has developed and begun implementing strategies and action plans across all relevant areas (e.g., competition policy). Moreover, in Georgia's case, there was no transition period for trade liberalisation since both parties eliminated import duties on almost all products by 1 September 2014.⁸¹

The EU-Georgia DCFTA offers Georgia a framework for enhanced trade and economic growth by removing tariffs and quotas and extensively aligning trade-related laws and regulations with those of the EU. This has facilitated Georgia's gradual integration into the EU.

It is important to note that before signing the Association Agreement, Georgia benefited from a preferential trade regime with the EU under the Generalised System of Preferences, a program promoting sustainable development and good governance, which Georgia was granted in 2005. This scheme had 7,200 products and provided Georgian exports with nearly tariff-free access to the EU market. Following the signing of the Association Agreement, there was a transition period from this system to the DCFTA, which lasted until 31 December 2016.⁸²

It is important to emphasise that the EU-Georgia agreement is founded on a deep and comprehensive free trade arrangement, along with an extensive program for aligning Georgian legislation with that of the EU.⁸³ In particular, in a number of economic sectors, Georgia should have achieved regulatory integration and legal approximation. In addition, Georgia should have taken all the necessary measures to ensure that developments in EU law were reflected in its national legislation.⁸⁴

On the basis of some trade analyses, the EU-Georgia DCFTA has not had a significant impact on Georgia's trade performance. Clearly, the benefits of the DCFTA, in particular the increase in Georgian exports to the EU, depended on the degree of alignment with the EU, and Georgia should continue reforms in all trade-related sectors. Therefore, it is a key requirement for boosting exports to the EU, as the benefits of the free trade area are more likely to materialise in the medium term, following further alignment of Georgian legislation.⁸⁵

80 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 2014.

81 Emerson and Kovziridze, 2018, p. 36.

82 Eteria, 2020, p. 201.

83 Kawecka-Wyrzykowska, 2015, p. 78.

84 European Commission, 2017, p. 3.

85 Eteria, 2019, p. 7.

The EU-Georgia Association Agreement is seen as the best tool for the promotion of exports, the attraction of foreign direct investment and the promotion of Georgia's economic development. Nevertheless, some trade analyses indicate that, despite certain positive results, the impact of the DCFTA on Georgia's trade performance remains limited. It is clear that the positive results of the DCFTA depend directly on the level of legal approximation and regulatory convergence, which is not an easy process given the rapid approximation of Georgian legislation to that of the EU. However, Georgia must transform its economy through well-designed and sequenced reforms to ensure the timely establishment of an EU-compatible legislative and regulatory framework, which is a crucial condition for the successful implementation of the DCFTA.

4.2. The Deep and Comprehensive Free Trade Area With Moldova

The DCFTA between the Republic of Moldova and the EU, which entered into force on 1 September 2014, has been instrumental in strengthening economic relations between the Republic of Moldova and the EU. Following the successive extensions of the trading arrangements Moldova had with the EU since 2008 (from the Generalised System of Preferences to the Autonomous Trade Preferences), it has reached a new level of economic collaboration: the creation of the DCFTA. The DCFTA involves the reciprocal removal of barriers to bilateral trade.⁸⁶ However, trade with the EU needed to be liberalised slowly, so that Moldovan companies can adapt to the new economic situation.⁸⁷

Notably, the DCFTAs with Georgia and Moldavia had a modest impact on the development of trade with the EU, whereas the DCFTA with Ukraine did not affect trade flows with the EU in a statistically significant way. Compared to Georgia, Moldova's DCFTA is less beneficial for the country. Since 2014, Georgia's trade with the EU has increased by approximately 18% as a result of the agreements, which is double the growth seen in Moldova's trade with the EU (a 9% increase). As mentioned earlier, the Georgian DCFTA has had a positive impact on trade creation, while in Moldova, it has led to a negative impact on trade with other countries, creating a trade diversion effect. In Ukraine, however, the DCFTA appears to be an unproductive tool for welfare gains, as indicated by the negative and statistically insignificant coefficients for trade creation and trade diversion variables.⁸⁸

While there are similarities in terms of structure, provisions, and degree of trade liberalisation, there are also differences in terms of degree of market opening and pace of transition in all three DCFTAs. In terms of border trade barriers, the DCFTAs

86 Savga, 2018, p. 59.

87 Luecke et al., 2011, p. 13.

88 Tskhomelidze, 2022, p. 973.

eliminate import and export tariffs and establish tariff-free quotas and entry price regimes for some products.⁸⁹

In terms of differences, the DCFTAs with Moldova and Georgia require both parties to remove all tariffs on goods except for those listed in the Association Agreements, regarding the scope. In the case of Ukraine, the scope of the preferential exclusions is much broader and only specific goods that will benefit from reduced or eliminated tariffs are specified in the agreement. Moreover, since Georgia and Moldova export much less to the EU than Ukraine, it was easier for the EU to negotiate tariff liberalisation provisions with them.⁹⁰ The DCFTA between the EU and Georgia introduced asymmetric trade liberalisation without a transitional period. In contrast, Ukraine and Moldova adopted a more gradual, albeit still asymmetric, approach to trade liberalisation. The asymmetry means that the EU removed import tariffs more quickly than the partner countries, immediately after the DCFTAs came into effect for most goods. Moldova and Ukraine, on the other hand, are opting for gradual liberalisation, with transition periods of 3 to 10 years for selected product categories, giving their domestic producers the opportunity to expand exports to the EU before being exposed to greater competition on the domestic market.⁹¹

As regards public procurement, the provisions in DCFTA with Moldova and Ukraine are generally very similar, with two major differences. The agreement with Moldova contains a clause on minimum rules for public procurement, while the agreement with Ukraine does not. Furthermore, since competition from European Union suppliers could have a negative impact on Ukrainian industry, the provisions for Ukraine excluded the defence sector. Regarding competition, anti-competitive practices such as cartels, abuses of dominant position and mergers aimed at eliminating competition are forbidden. Ukraine and Moldova had to align their competition laws and adopt practices that were consistent with those of the EU.⁹²

4.3. The Deep and Comprehensive Free Trade Area with Ukraine

The EU-Ukraine DCFTA is characterised by an impressive level of internal market integration and regulatory approximation sought by Ukraine. In parallel, The EU has financed several assistance programs in Ukraine aimed at supporting DCFTA-related reforms. The ambitious scope of the DCFTA makes the EU-Ukraine ‘deep’ trade agenda a powerful instrument for facilitating internal reforms in Ukraine, complemented by the EU’s sectoral approach to supporting its implementation.⁹³

The Association Agreement between the EU and Ukraine is an extremely ambitious international agreement, which provides for in-depth political dialogue

89 Van der Loo, 2017, p. 2.

90 Van der Loo, 2016, pp. 243–244.

91 Cai, 2022, p. 4.

92 Boldea and Sigmirean, 2020, p. 312.

93 Rabinovych, 2022, p. 2.

between the parties, cooperation and converging foreign policies, and ‘deep’ trade and regulatory convergence. The Association Agreement deals with ambitious political obligations and has ‘enhanced the adaptability of the national constitutional order to the European integration project and European common values’.⁹⁴

Creating the preconditions for further development of economic and trade relations between the EU and Ukraine is the first stated objective of the DCFTA; to be done in such a way that they contribute to the gradual integration of Ukraine into the internal market.⁹⁵ The DCFTA undeniably offers an ambitious ‘integration without membership’ framework that lays the foundation for further developing economic and trade relations between the EU and Ukraine. This is supported by the fact that the DCFTA includes provisions to liberalise trade in goods and services between them and progressively grant access to each other’s public procurement markets. It also envisions extensive legislative alignment in areas such as non-tariff barriers, competition, public procurement, and trade and sustainable development, allowing businesses in both countries to fully benefit from the DCFTA.⁹⁶

Pursuant to Art. 1(d) of the EU-Ukraine Association Agreement, the DCFTA has two interrelated policy objectives: first, to create the conditions for closer economic and trade relations, facilitating Ukraine’s gradual integration into the EU’s internal market; and second, to support Ukraine in its efforts to complete the transition to a functioning market economy, including through the progressive alignment of its legislation.⁹⁷ A number of features of the EU-Ukraine DCFTA helped to achieve the above objectives.⁹⁸ These are primarily detailed substantive standards in the ‘deep’ areas, such as competition, public procurement, and sustainable development. Second, the DCFTA includes two types of conditionality: common values and market access conditionality. The first, common values conditionality links the benefits of trade liberalisation to Ukraine’s commitment to upholding fundamental values. This kind of conditionality can be found in a wide range of EU trade agreements. However, the DCFTA uses the so-called ‘market access conditionality’ to make the EU’s market opening to Ukraine conditional on Ukraine implementing its commitments to approximate legislation. In addition, the implementation of the DCFTA will be ensured through the operation of the monitoring, consultation and dispute settlement mechanism.⁹⁹

It can be said that the EU-Ukraine DCFTA is characterised by moderate effectiveness, with major concerns related to corruption, the rule of law, and oligarchic influence. Trade liberalisation between the EU and Ukraine has resulted in a significant increase in the EU’s share of both Ukraine’s exports and imports.

94 Petrov, 2018, p. 99.

95 Petrov et al., 2015, p. 13.

96 Oleksyuk and Balistreri, 2018, p. 510.

97 Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, Official Journal of the European Union, 2014, Art. 1(d).

98 Ibid., Part IV, Chapter 13.

99 Ibid., Arts. 475–477.

However, Ukraine continues to face negative economic externalities due to the abrupt shift from Russian to Western markets. Additionally, challenges in trade include the low level of Ukrainian service exports to the EU and limited investment cooperation between the EU and Ukraine.

5. United Kingdom

The United Kingdom (hereinafter: the UK) was one of the two most efficient and ambitious EU Member States in the fields of foreign and defence policy.¹⁰⁰ Furthermore, within the EU, the UK was one of the ‘big three’ – together with France and Germany – in terms of population and economy.¹⁰¹ With almost half of UK exports, the EU is also an attractive destination for UK services. However, the EU is much less important as a source of services for the UK, with only a third of services imports coming from the EU.¹⁰² In addition, the United Kingdom was the fourth largest financial supporter of the EU budget.¹⁰³

Following the results of the June 2016 referendum, significant attention was focused on the future economic relations between the UK and the EU, as well as the prospects for the UK’s trade relations with third countries after leaving the EU.¹⁰⁴ None of the proposed models for future trade relations between the UK and the EU (such as EEA membership or a bilateral agreement) included a defined foreign and security policy relationship.¹⁰⁵ Furthermore, Art. 50 of the Treaty on the European Union, which outlines the process for a Member State’s withdrawal from the EU, does not provide a clear framework for defining the future foreign, security, and defence policy relations between the EU and the departing country.¹⁰⁶

The UK officially left the European Union at 11pm on 31 December 2020, following a series of negotiations with the EU, known as Brexit. This has been seen as part of a wider chain of events that has tarnished the image of the EU abroad for over ten years.¹⁰⁷ For the UK, Brexit signifies a shift from being an EU member to becoming an independent country, engaging with other nations globally.¹⁰⁸

100 Tim and Williams, 2016, p. 548.

101 Whitman, 2016, p. 3.

102 Mulabdic et al., 2017, p. 9.

103 Martill and Sus, 2018, p. 848.

104 Jia, 2022, p. 40.

105 Lehmann and Zetzsche, 2016, p. 2.

106 The Treaty on the European Union, 26 October 2012, Official Journal of the European Union, C 326/13, Art. 50.

107 Chaban et al., 2020, pp. 3–4.

108 Fan and Liu, 2017, p. 116.

For the UK, this means leaving the EU's single market and customs union, with EU law no longer applying to the UK.¹⁰⁹

Ursula von der Leyen, President of the European Commission, stated:

It was worth fighting for this deal because we now have a fair and balanced agreement with the UK, which will protect our European interests, ensure fair competition, and provide much needed predictability for our fishing communities. Finally, we can leave Brexit behind us and look to the future. Europe is now moving on.¹¹⁰

Broadly speaking, there are three main reasons for Brexit. The Brexit referendum result was surprising, but also understandable. The UK has consistently upheld a sense of British exceptionalism, viewing itself not as part of the EU, but as an independent country in relation to it.¹¹¹ Membership in the EU brought numerous benefits to the UK, including free trade within the EU. However, it also led to certain challenges and pressures for the country.

As a result of the EU's labour mobility policy, a significant number of EU citizens have moved to the UK for work. For these EU citizens, Britain has to cover social welfare. There is no doubt that this fact has increased the cost to the UK. In last years, people in the UK have become dissatisfied with the EU's policy on labour mobility due to high unemployment and a wide gap between rich and poor. Moreover, the EU's handling of economic and refugee problems is not popular. As a result, people in EU countries were also dissatisfied with the way the EU dealt with these issues.¹¹²

Secondly, the establishment of the EU does not imply that the concept of European citizenship is embraced by all Member States, particularly in the UK. The British generally have a low sense of European citizenship, influenced by the unique geography of Britain as an island and its distinct cultural and imperial history, which differs significantly from that of continental Europe. This is why people in the UK generally expected to recover their sovereignty and recreate the glory of the empire.¹¹³ Low-income groups often do not have an opportunity to be employed in other EU country or to be engaged in cross-border trade because they do not have passports and live in the UK perennially. This implies that they have not benefited much from being part of the EU. However, they generally support Brexit because people from EU countries have taken away the few job opportunities they have.¹¹⁴

Third, from a political standpoint, it was Cameron, the Conservative party's leader, who first suggested Brexit. As part of his campaign for votes, Cameron promised an immediate Brexit referendum if elected. However, he was not in favour

109 Walker, 2021, p. 84.

110 Writer, 2020.

111 Gifford, 2010, p. 323.

112 Ling, 2016, p. 131.

113 Jie, 2016, p. 77.

114 Jingkun, 2019, p. 81.

of Britain leaving the EU.¹¹⁵ Instead, he was hoping that the result of the Brexit referendum would help to get a better position in the EU, meaning greater benefits. Indeed, his actions coincidentally gave a voice to those in Britain dissatisfied with the EU. As a consequence, Britain eventually left the EU and began a series of prolonged negotiations with the EU.¹¹⁶

Following Brexit, the UK no longer had the status of a Member State of the EU. Nevertheless, it has acquired more independence and freedom by no longer being tied to the EU at the political, diplomatic, economic, and trade levels. The UK then seized the opportunity to focus more on countries outside the EU, while maintaining, as much as possible, various forms of cooperation and exchange with the EU.¹¹⁷ The UK considered that greater economic and political interaction with emerging economies can help its economy prosper. That is why, after Brexit, the UK pursued a new kind of foreign policy. Britain sought to reclaim its sovereignty and present itself as a more confident, globalised, and outward-looking nation on the world stage, free from the intervention of the EU.¹¹⁸

As a member of the EU, the UK expected to gain from the EU's free trade market and reciprocal preferential policies.¹¹⁹ But it also feared that EU integration would undermine British national identity and British economic and diplomatic independence.¹²⁰ The UK has therefore been a problem in the EU, with many special exceptions in EU affairs. For example, the UK did not participate in the Schengen cooperation and still controls citizens and goods entering the UK from Schengen countries. It did not want to join the euro area and also rejected the 1989 Charter of Fundamental Social Rights of Workers in the EC.¹²¹

5.1. Consequences of Brexit

The EU-UK Trade and Cooperation Agreement (hereinafter: the TCA) was signed on 30 December 2020 and entered into force on 1 May 2021.¹²² TCA covers preferential arrangements in different areas, such as trade in goods and services, intellectual property, public procurement, investment, data protection, etc. It is supported by provisions to ensure equal conditions of competition and the observance of fundamental rights. The TCA provides a solid basis for maintaining long-standing friendship and

115 Zhongping, 2016, p. 62.

116 Shuzhen and Runnan, 2019, p. 125.

117 Biao, 2018, pp. 63–64.

118 Huaipu, 2020, p. 59.

119 Xingmin, 2018, p. 38.

120 Yan and Jian, 2016, p. 168.

121 Zhanpeng, 2016, p. 40.

122 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, signed on 30 December, Official Journal of the European Union, L 149/10.

cooperation. It represents a new EU cooperation form, which could also serve as a potential model for relations with non-member states such as Turkey.¹²³

The EU-UK TCA comprises an FTA with collaboration on the economy, society, the environment and fisheries, partnership on the security of citizens, and comprehensive governance framework. Some areas are not included in the TCA because the UK did not wish to negotiate, such as external security and defence cooperation or foreign policy. As a result, there is no mechanism for developing and coordinating responses to foreign policy issues, such as the imposition of sanctions on third countries. However, there are some sectors that are unilateral EU decisions and are not negotiable, like financial.

As the TCA consists of three pillars, the EU–UK Free Trade Agreement is described first, seen as a new economic and social partnership between the EU and the UK. It establishes zero tariffs and zero quotas for all products that satisfy the relevant rules of origin. Moreover, a new joint management framework for fish stocks in EU and UK waters has been established. It allows for the growth of British fishing, while safeguarding the activity and existence of European fishing communities and conserving natural resources. In the transport sector, the agreement ensures continued and sustainable connectivity in air, road, rail, and maritime transport, although market access does not fully match the level provided by the single market. It includes provisions to ensure that passenger rights, workers' rights, and transport safety are upheld, while ensuring that competition between EU and UK operators occurs on a level playing field. On energy, the agreement guarantees open and fair competition, including on offshore safety standards and renewable energy production, and provides a new model for trade and interconnectivity. Finally, the agreement allows the UK to continue to participate in some key EU programs from 2021 to 2027 (subject to the UK contributing financially to the EU budget), such as Horizon Europe.

Secondly, the TCA provides an innovative framework on criminal and judicial cooperation. It recognises that, particularly in the fight against and prosecution of cross-border crime and terrorism, there is a need for close cooperation between national police and judicial authorities. This created new operational possibilities, recognising that as a non-Schengen member of the EU, the UK will not have the same facilities as previously.

Third, to provide maximum legal certainty for businesses, consumers, and citizens, a dedicated chapter on governance outlines how the TCA will be monitored. A Joint Partnership Council has been set up to ensure the correct interpretation of the Convention and to discuss any problems that may arise. The rights of businesses, consumers and individuals should be respected through binding enforcement and dispute settlement mechanisms. This ensures that companies in the EU and the UK compete on a level playing field, with neither party able to use its regulatory autonomy to grant unfair subsidies or distort competition. In case of a breach of the

123 Whitman, 2016, p. 49.

agreement, both parties may implement cross-sectoral retaliatory measures. This cross-cutting retaliatory measure applies to all areas of the Economic Partnership.

The Withdrawal Agreement – and in particular, the Protocol on Ireland and Northern Ireland – was implemented on 1 January 2021 thanks to intensive discussions between the EU and the UK in the Joint Committee and the various technical committees. The Withdrawal Agreement remains valid and protects, *inter alia*, the rights of EU and UK citizens, the financial interests of the EU and, most importantly, peace and stability on the island of Ireland. The EU is committed to ensuring that this Agreement is implemented in full and in a timely manner.¹²⁴

Action was needed at both EU and the UK level to implement the Withdrawal Agreement. Agreements are only useful if they are applied effectively.¹²⁵ Implementing the Withdrawal Agreement involves the adoption of legal acts by the EU, its Member States, and the UK, as well as implementing by adopting policies and measures related to the withdrawal of the UK. It also involves the responsibility for monitoring implementation by both parties and ensuring compliance. From 1 January 2021, a number of areas were particularly work intensive, in particular: (a) the continuation of the work of the Joint Committee for the monitoring of the implementation of the withdrawal agreement, including representatives from the EU and the UK; (b) implementation of the Ireland/Northern Ireland Protocol, which entails unprecedented arrangements in some areas, notably customs, veterinary, and phytosanitary measures; (c) implementation of the citizens' rights provisions, which will also be subject to monitoring by the European Commission; and (d) implementation of the financial settlement, ensuring that the UK and the EU meet all financial commitments made while the UK has been in the EU.¹²⁶

6. Conclusion

Economic integration in the EU remains the deepest and most efficient with rules governing almost all relevant economic areas. There have been alternatives in the field of free trade through the history. However, none of these forms have reached the level of integration as the one in the EU. EFTA states are included in its internal market, with the EEA and its homogeneity mechanism.

There are states focused on the EU membership, which are reforming their legislation in order to achieve this goal. In that process, they have been involved in certain free trade arrangements with the EU, showing that economic integration is needed. The UK has chosen a reverse process, leaving the EU, apparently deciding

124 Fabbrini, 2020, pp. 12–14.

125 Peers, 2020, pp. 4–5.

126 Hayward, 2021, p. 205.

that its future will be more perspective outside this organisation. However, it signed an FTA with the EU showing that certain economic arrangements with it are inevitable. As we saw, the EU engages in different forms of cooperation with non-member countries, each balancing market access with political autonomy in distinct ways. The EEA provides full access to the EU single market in exchange for adopting large parts of EU law, but EEA countries have no voting rights in EU institutions, creating a democratic deficit that undermines equality. In the EU–Turkey Customs Union, Turkey aligns with EU trade rules and external tariffs for industrial goods but lacks any say in EU trade policy, making the relationship highly asymmetric. The DCFTAs with countries like Ukraine and Moldova offer deep trade and regulatory integration alongside political cooperation, yet the heavy reform obligations without participation in EU decision-making reflect a power imbalance. In contrast, the EU–UK TCA is based on sovereign equality, avoiding institutional subordination, but at the cost of reduced market access – illustrating how equality and integration are often in tension across these models.

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COMPARATIVE PERSPECTIVES: FEDERAL AND INTERNATIONAL MODELS AS AN INSPIRATION FOR EU MEMBER STATE EQUALITY



BENJAMIN FLANDER

Abstract

This chapter explores how selected federal states, confederations, and international organisations with supranational elements compare to the EU in terms of structure and functioning and whether they can serve as models for strengthening equality amongst EU Member States. The author examines (con)federalism and supranationalism as concepts of governance and provides an analysis of the structural and functional characteristics of selected (con)federal systems and international organisations with supranational elements, focusing specifically on the implementation of the principle of equality amongst their constituent parts. In doing so, the goal is to determine whether federal, confederal, and supranational governance arrangements can offer valuable insights and inspiration for the EU. The definition of key concepts is followed by a brief synthetic introduction of each selected (con)federation and international organisation, as well as an analysis of how the principle of equality amongst their units/Member States is normatively defined and practically applied. The discussion emphasises the principle's importance, its implications, and the challenges it poses in promoting cooperation amongst units/Member States within each selected state/organisation.

Keywords: equality, European Union, federalism, confederalism, international organisations

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1. Introduction

This chapter explores how selected federal states, confederations, and international organisations with supranational elements compare to the EU in terms of structure and functioning and whether they can serve as models for strengthening equality amongst EU Member States. The author undertakes an examination of (con)federalism and supranationalism as concepts of governance and analyses the structural and functional characteristics of selected (con)federal systems and international organisations with supranational elements, focusing particularly on the implementation of the principle of equality amongst their constituent parts. In doing so, the author seeks to determine whether federal, confederal, and supranational governance arrangements can offer valuable insights and inspiration for the EU. The defining of the key concepts precedes a brief synthetic introduction of each selected (con)federation and international organisation, as well as an analysis of how the principle of equality amongst units/Member States is normatively defined and practically applied. The discussion emphasises the principle's importance, its implications, and the challenges it poses in promoting cooperation amongst units/Member States within each selected state/organisation.

Specifically, the chapter addresses the following key questions: How do federal systems function in comparison to the EU? Can the selected federal states (e.g. the U.S., Germany, Switzerland, Belgium, Canada, and Yugoslavia) inspire the EU to strengthen equality and cooperation amongst its Member States? How do other integration initiatives, such as confederations and international organisations with supranational elements (e.g. the African Union, the Union of South American Nations, and the South Asian Association for Regional Cooperation), compare to the EU? Can these organisations offer models for enhancing the principle of equality amongst EU Member States?

2. Federalism and Federal Systems

Federalism, as both a political philosophy and a system of governance, is based on the division of power between a central authority and constituent units, typically regions or states. This structure stands in contrast to unitary systems, where political power is centralised at the national level, and confederal systems, where regional governments retain most authority, delegating only limited powers to the central government. The origins of federalism can be traced back to antiquity or even earlier, to the Old Testament. The Hebrew term *brit*, similar to the Latin *foedus* (from which the word 'federal' is derived), frequently appears in the Old Testament

in connection with the concept of a covenant. It refers to a covenant between people and God, amongst individuals forming a political community, and between separate communities establishing broader political entities.¹

The modern concept of federalism was pioneered by Johannes Althusius, who developed a theory centred on contractual arrangements amongst political communities. His theory emphasised the preservation of sovereignty whilst addressing shared interests and needs at various levels of integration. Another key figure in the development of modern federalism was Montesquieu, who advocated for the integration of smaller states into a confederal community to defend against external threats and prevent the abuse of power or domination by individual members of the union.²

Theoretical debates on (con)federalism also encompass historical proposals for European peace and integration, as suggested by thinkers such as Dubois, Dante, Podiebrad, Sully, Penn, Saint-Pierre, Kant, and others. Proudhon is notable for his theory of federalism, which highlights the importance of balancing unity and diversity.³ Generally, the pioneers of federalism theory emphasised dispersing state power and integrating autonomous parts into a cohesive whole. They did not strictly differentiate between federalism and confederalism or other specific (hybrid) formations in the integration of states or political communities. Instead, they recognised the potential of a (con)federal interstate arrangement to ensure peace.⁴

The earliest examples of (con)federations can be traced back to alliances amongst ancient Greek city-states. One notable instance of a 'hegemonic federal arrangement' is the Peloponnesian League, led by Athens in the 6th century BC. Another is the Corinthian League, established by Philip of Macedon in the 3rd century BC.⁵ Philip's successor, Antigonos, reportedly secured an agreement with opposing factions, leading to an oath by all Greeks to collectively defend freedom and autonomy.⁶ The 3rd century BC appears to be a pivotal period for the development of (con)federations, as various unified empires around the Mediterranean and in southern and central Europe allowed for locally autonomous cities within their territories. These cities could form (con)federations under the overarching authority of the empire.⁷

1 See Elazar, 1994, p. 15. See also Accetto, 2007, p. 29.

2 Accetto, 2007, p. 31.

3 See Accetto, 2007, p. 32.

4 See Accetto, 2007, pp. 32–33.

5 Žagar, 1990, pp. 48–50.

6 Accetto, 2007, p. 30.

7 Accetto, 2007, p. 32. The historical predecessors of modern (con)federations grappled with the halting task of balancing conflicting tendencies within their associations. On the one hand, there was a push for unity, centralisation, hegemony, and the efficiency of a leading member. On the other hand, there was a desire for autonomy and independence amongst the other members, as well as the need to uphold the principle of consensus in making key decisions for the entire union. These contradictions and tensions continue to exist in modern (con)federal systems. See Žagar, 1990, p. 50; and Accetto, 2007, p. 30.

A modern form of (con)federalism emerged in the late 18th century with the creation of the Articles of Confederation in 1777 and later the United States Constitution in 1787. The American Founding Fathers designed federalism as a system of governance to balance the competing interests of a strong central government and the autonomy of individual states. The Federalist Papers, written by Alexander Hamilton, James Madison, and John Jay, were instrumental in articulating the principles of federalism, advocating for a system that would prevent tyranny by dividing governmental powers. The U.S. Constitution became a model for other countries, including Canada (1867), Switzerland (1848), and Germany (1871), which transitioned from previous confederal alliances to federal systems to accommodate diverse populations and regional identities.

The 20th century witnessed a significant expansion of federalism and the establishment of federations, despite being marked by the rise of nationalism and the proliferation of nation-states. Today, nearly 30 countries worldwide – including the U.S., Canada, Australia, India, Brazil, Germany, Austria, and Switzerland – can be regarded as having a constitutional or operational form of federal governance, depending on how a federal system is defined. Additionally, more than 50 countries have adopted elements of federalism. As of 2022, federal countries accounted for 44.4% of the world's landmass, 48.5% of global GDP, and 41.5% of the world's population.⁸ Federalism is particularly significant in large or diverse countries where geographical, ethnic, linguistic, or cultural differences require a balance between regional autonomy and national unity.

2.1. Defining Federalism and Federal Systems

Federalism is both a political theory and a principle of governance with broad implications. According to Croisat, the term federalism encompasses 'ideas, values, and representations' about the world that embody the philosophy of 'diversity in unity'. The terms federation and federal system are derived from federalism and represent its concrete application in governance. They refer to various institutional arrangements for uniting autonomous units under a central (e.g. federal) authority whilst maintaining a degree of autonomy.⁹

Federal governance encompasses a spectrum of institutional forms, ranging from archetypally federal systems to loose confederal arrangements, giving rise to several ambiguities. Whilst certain countries unquestionably qualify as federations, others may incorporate some federal elements but cannot be classified as federations *strictu sensu*. Additionally, some systems may function as federal in practice without being officially recognised as such, whilst others may be officially federal but lack substantive federal characteristics. Finally, some systems exhibit diminished federal qualities due to excessive centralisation or the absence of democracy.

8 Kincaid and Leckrone, 2023, pp. 1–3.

9 Ibid.

These variations highlight the need for a defensible conception of the principles and practices of federalism and, based on that, the formulation of a clear and workable definition.¹⁰

In his strict definition, Wheare, for example, characterised a federal government as one that primarily embodies a division of powers between general and regional authorities, each of which is coordinated with and independent of the others within its own sphere. He considered the U.S., Switzerland, Canada, and Australia to be the best examples of such a system.¹¹

Elazar, another distinguished figure in federal theory, described a federal system as ‘self-rule plus shared rule’, where self-rule refers to the ability of constituent units to exercise some degree of self-government, and shared rule pertains to the existence of an overarching central government that serves the collective interests of the federation.¹² He outlined five essential elements of a federal system: a written constitution, non-centralisation, mechanisms to maintain non-centralisation, a genuine division of powers, and a ‘federal principle’, which reflects the popular will to form a federal system.¹³

Additionally, scholars such as Watts have emphasised dual sovereignty as another crucial feature of federal governance.¹⁴ Most federalism scholars ultimately aim to distinguish federal systems from unitary governance and from systems that may appear federal in form but lack substantive federal characteristics. For many, democracy is a vital element of federalism because respect for separate spheres of power seems to necessitate it.¹⁵

In general terms, in a federal system of governance, supreme power is divided between a central authority and constituent units. This arrangement, known as a federation, involves a permanent but limited union of states or other political entities. It is characterised by a constitutional distribution of powers that enables the pursuit of common goals whilst preserving the autonomy of the member units. Contemporary federal states comprise two or more political-territorial units, such as ‘*Länder*’ in Germany, ‘States’ in the U.S., or ‘Cantons’ in Switzerland. These states are governed by a federal constitution that delineates the distribution of powers between the central federal government and the constituent federal units. In most federations, the federal government holds the highest level of sovereignty, representing the federation as a single sovereign entity in international affairs.

The survival of federal systems is particularly relevant in today’s world, as they offer the potential to accommodate deep diversities and reduce conflict. The functioning of federations encompasses various institutions and processes, including the practical operation of the division of powers, the representation of constituent units

10 Fenna, 2022, p. 23.

11 *Ibid.*, p. 25.

12 *Ibid.*, pp. 25–26.

13 See Skillen, 2017, p. 4.

14 *Ibid.*

15 Fenna, 2022, p. 27.

in central institutions, intergovernmental relations, vertical and horizontal fiscal arrangements, constitutional amendments, and the management of conflict through judicial and other dispute resolution mechanisms.¹⁶

Federal units should operate independently within the limits set by the federal constitution and are represented at the federal level, often in a special chamber that exists alongside the general house of representatives. Generally, federations do not grant the right to secede, except where such a right is explicitly provided for in the federal constitution or the constitutions of the federal units. However, in practice, exercising the right to secede through peaceful and legal means is typically challenging and often impossible.¹⁷

Contemporary theory of federalism and federal systems has focused on the so-called ‘paradox of federalism’, whereby autonomy is seen as potentially either encouraging or mitigating separatism. This paradox arises from the perception that federations are often destined for relentless centralisation and may either hinder or facilitate policymaking.¹⁸

Defining contemporary federalism and federal systems, as well as understanding their complexities, is one of this chapter’s central objectives. The findings will help address key questions of the chapter, such as how federal states function in comparison to the EU and whether they can serve as an inspiration for enhancing equality amongst EU Member States.

2.2. Principles and Types of Federalism and Federal Systems

2.2.1. The Principle of Equality Amongst Constituent Units and Other Main Principles of Federal Systems

Graves noted that the essence of federalism is generally captured by the principle of ‘association for specific purposes while maintaining independence for others’.¹⁹ More specifically, several fundamental principles are commonly associated with federalism. In this regard, various classifications exist within federalism theory. Drawing on Kinski, Žagar identified four core principles: autonomy, cooperation and legal dispute resolution, division of competencies with subsidiarity, and participation.²⁰ Drawing from Graves’ classification,²¹ this chapter focuses on the principle of division of competencies, the principle of autonomy, and the principle of cooperation, adding the principle of equality amongst constituent units as the fourth core principle of federal systems.

16 Fenna, 2022, p. 27.

17 Cerar, 2007.

18 See Fenna, 2022, pp. 28–29.

19 Accetto, 2007, p. 38.

20 See Žagar, 1990, pp. 144–146.

21 Accetto, 2007, p. 38.

In accordance with the principle of division of competencies, all areas of authority should be precisely delineated between the federal union and its Member States, particularly regarding legislative functions. In practice, the only competencies typically transferred to the union are those that are either in the collective interest or by nature extend beyond the borders of individual members. The principle of autonomy, closely related to the principle of division of competencies, ensures that members of the federation retain a significant degree of autonomy within the bounds of their designated powers. The third principle, namely the principle of cooperation, includes two key elements: cooperation between the federation and its members across various fields and, equally important, the opportunity for Member States and their citizens to participate in shaping federal policies and making federal decisions.²² Finally, the principle of equality aims to ensure that no single unit within the federation is disproportionately privileged or disadvantaged in its relationship with the central government or other constituent units.

These principles reflect the tension between the constituent parts' desire to cooperate in pursuing collective interests and their desire to maintain as much autonomy and independence as possible. On the one hand, the said principles emphasise a unified constitutional framework, involving a division of powers between the federal units and the federation, the adoption of binding, supreme decisions at the federal level, sufficient financial and administrative resources for the union, and overall unity. On the other hand, these principles emphasise the autonomy of the federal units in decision-making, sincere cooperation, and the principle of both symmetrical and asymmetrical representation within the federal structure.²³ Føllesdal argued that these principles reflect the fundamental normative contradictions within a federal system, particularly between autonomy and equality. In his view, federalism theory, grounded in liberalism, demands a fair distribution of goods and burdens to prevent domination and ensure equitable procedures and outcomes of cooperation. Simultaneously, it allows for a degree of inequality amongst federal units, which is a necessary outcome of autonomy. This autonomy protects against dominance by other members and enables institutions and policies to be shaped according to the specific needs of individual units.²⁴

Federalism, as a system of governance, seeks to balance unity with diversity by combining 'self-rule and shared rule'.²⁵ As a critical component of this balance, the principle of equality amongst the constituent units of a federal system underpins the stability and functionality of federal governance by fostering cooperation and

22 Ibid.; Drawing on Verney, it is stated that, in addition to a democratic political system and a constitutionally structured division of powers, the federal state includes three additional principles: the separation of legislative and executive branches, the division of the legislative body into two more or less equal chambers, and a special role for the parliament in protecting the interests of the federation's Member States. See Verney, 2002, pp. 21–24.

23 See Accetto, 2007, p. 39.

24 Ibid.

25 See Da Silva, 2023. See also Elazar, 1987.

upholding legitimacy. Whilst federal constitutions often explicitly enshrine the principle of equality amongst constituent units, the principle is upheld through various mechanisms, institutional frameworks, and practices, which vary depending on the specific federal system. For example, many federal systems ensure equality by giving constituent units equal representation in one house of the federal legislature – often the upper house. This structure balances representation by population (typically in the lower house) with equal representation by states in the upper house. Equality is also reflected in the division of powers between the federal and state levels, with constituent units exercising autonomy over matters assigned to them. In most federal systems, the constitution clearly delineates which powers are reserved for the federal government and which are exclusive to the constituent units. This framework ensures that all units operate as equals within their areas of competence. Furthermore, federal constitutions and laws often include clauses to prevent discrimination amongst constituent units, ensuring that no state or region is favoured over another. In most federal systems, federal constitutional courts or supreme courts act as arbiters to ensure that the principle of equality is upheld. Key mechanisms that uphold the principle of equality amongst federal units include financial equalisation and equal participation in constitutional amendments. Federal systems often incorporate fiscal arrangements to address economic disparities amongst constituent units and promote equal opportunities for all regions. Equalisation payments or grants ensure that wealthier regions contribute to supporting less affluent regions without compromising the autonomy of any unit. Finally, constituent units are often granted equal participation or veto powers in the process of amending the federal constitution. This ensures that no single unit or group of units can unilaterally impose changes that would disadvantage others. Overall, the principle of equality amongst constituent units is both a cornerstone and a challenge in federal systems: whilst it fosters stability and cooperation, it must adapt to the realities of interest diversity, economic disparity, and demographic variation.

2.2.2. Types

Federalism and federal systems, as concrete manifestations of federal governance, vary in their distribution of powers and degree of centralisation. Scholars have identified several types of federalism. Croisat, for example, distinguished between centralised, decentralised, and balanced federalism.²⁶ Verney also distinguished between three types of federal systems: parliamentary federation (examples being Germany and Canada), confederation (exemplified by the American Confederation

26 Accetto, 2007, p. 40.

of the 1770s), and federal state (examples including the U.S. and Switzerland).²⁷ Føllesdal discussed, *inter alia*, asymmetric and symmetric federations.²⁸

Further classifications distinguish between dual, fiscal, and cooperative federalism and federal systems. Dual federalism, often described as ‘layer-cake federalism’, assumes a clear distinction between the functions of the national and state governments (i.e. a vertical separation of powers). This form of federalism emphasises the institutional autonomy of different levels of power, each operating independently within its own sphere of influence.²⁹ The USA during the 19th century is a prime example of dual federalism. Fiscal federalism focuses on the allocation of financial resources and responsibilities. It involves the transfer of funds from the central government to the states, often through grants or revenue-sharing programmes, to address disparities in wealth and ensure equitable service delivery across regions. Finally, cooperative federalism, also known as ‘marble-cake federalism’, is based on the functional distribution of competencies between different levels of power. It blurs the distinction between national and subnational responsibilities, encouraging collaboration between different levels of government.³⁰ Whilst cooperative federalism is typical of Germany, it also became prominent in the USA during the New Deal era of the 1930s, when state and federal governments worked together on programmes such as social security and infrastructure development.

The distinction between different types of federalism and federations, which has received significant attention in federalism theory, includes the concepts of ‘coming together’ and ‘holding together’ federations. According to Riker’s theory, federal systems – led by the model established by the U.S. Constitution – were formed on the basis of a ‘coming together’ federal bargain.³¹ In this model, independent units join to form a nation whilst maintaining distinct identities. There is minimal power-sharing or retention of separate nationalities. The responsibilities of the federal units are constitutionally detailed and generally rigid. Each state retains individual powers with no direct interference from the federal level. In parliamentary composition, the ‘territorial principle’ typically guides representation in the upper house, whilst the ‘population principle’ guides representation in the lower house.³² Examples of *coming-together* federations include the U.S., Switzerland, and Australia.

Conversely, holding-together federalism is designed to prevent the disintegration of a unitary state. In this type of federal arrangement, the constitution seeks to ensure a sufficiently strong democratic majority in the lower house of parliament, enabling the passage of legislation that upholds the union’s cohesion. In exceptional cases, the constitution permits the democratic majority in the lower house to modify

27 Accetto, 2007, p. 38.

28 Accetto, 2007, p. 40. Accetto stated that Føllesdal also refers to separate (compact) federalism, where members have no role in making federal decisions.

29 See Accetto, 2007, pp. 39–40.

30 Ibid.

31 Ibid.

32 Ibid.

the boundaries between federal units.³³ An example of holding-together federalism is Belgium, which transitioned from a unitary state to a federal structure for the Flemish and Walloon communities with the 1993 constitution.³⁴

Traditionally, a federal state is conceived as a symmetric federation, that is, a form of state organisation composed of two or more uniform component units (such as states, republics, provinces, entities, regions, cantons, or communities) that maintain equal relationships with one another and with the federal government. Each subnational unit or region is treated equally by the federation, enjoying the same degree of autonomy and influence within the federal system.³⁵ As a core characteristic of traditional federal systems, symmetry is valued for its integrative and centralising potential.³⁶

Consequently, traditional federal systems are not necessarily designed to protect diversity but rather to support processes of nation-building, which are viewed as unifying and centralising forces.³⁷ Like holding-together federalism, symmetric federalism aims to preserve the cohesion of federal systems through equal and uniform status amongst component units, promoting national unity. Examples of symmetric federalism include the ‘model federations’ of the USA and Germany.

In contrast to symmetric systems, in an asymmetric federation, certain subnational units possess more autonomy than others. Asymmetry was long viewed as a potential disintegrative factor and a deviation from the principle of equality amongst a federation’s constituent parts; thus, this form of federalism has only recently gained recognition. The concept was introduced by Tarlton to describe variations in the relationships between certain component units and the central government in federal systems.³⁸

Asymmetry often arises in countries with significant ethnic or linguistic diversity. For instance, Canada grants its province of Quebec greater control over cultural and language policies, reflecting its Francophone identity. Additionally, asymmetric federalism can serve as a ‘solution’ in traditionally symmetric federal systems that were not initially designed to accommodate diversity but where internal conflicts and separatist trends threaten stability. To alleviate tensions, federal, quasi-federal, regionalised, and even unitary systems – including Belgium, Canada, China, Indonesia, Iraq, Italy, Russia, Spain, and the United Kingdom – have adopted asymmetric

33 Accetto, 2007, pp. 39–40.

34 Accetto cited the Austro-Hungarian monarchy and post-war Yugoslavia as historical examples of the potential emergence of a holding-together federation. Before the collapse of the Austro-Hungarian monarchy, there were discussions regarding the possibility of establishing a federation within the monarchy. In the context of a holding-together federal formation, the post-war Yugoslav federation could have been transformed – had it not disintegrated – into a looser form of asymmetric (con) federation. According to some, such a transformation might have effectively prevented the state’s disintegration. See Accetto, 2007.

35 See Halberstam, 2012; Kincaid, 2005; Sahadžić, 2023, p. 165.

36 Sahadžić, 2023.

37 Ibid.

38 See Sahadžić, 2023, pp. 165–166.

arrangements to preserve cohesion.³⁹ In these cases, there is a merging of two federalism models: asymmetric and holding-together federalism.

In an asymmetric federation, asymmetries exist both amongst component units and between these units and the federal authorities. Whilst *de facto* asymmetries arise from differences in population size, territorial area, economic wealth, and the ethnic, religious, linguistic, cultural, and political characteristics of subnational units, *de jure* asymmetries are established by the constitution and other legal acts. These *de jure* asymmetries create differences in the status of various subnational units in areas such as representation, participation and veto power in federal institutions, distribution of powers, and fiscal autonomy.⁴⁰ According to Sahadžić, the primary driving force behind asymmetries is the desire for identity preservation, as different groups (national, ethnic, racial, linguistic, or religious) seek to protect their identities by advocating for legal recognition of their distinctiveness. However, to create asymmetric constitutional arrangements, identity concerns are typically reinforced by additional factors such as economic wealth, separatist movements, or historical considerations.⁴¹

In his comprehensive analysis of asymmetric federations, Žagar noted that, in addition to federal units, territorial-administrative units with varying statuses, degrees of autonomy, and roles within the federation can easily emerge.⁴² He emphasised that these units are often a reflection of the internal structure and administrative divisions of individual federal units and do not typically exist at the federation level; this constitutes asymmetry if the corresponding organisational and administrative regulations are not applied uniformly across all federal units. In contrast to such arrangements, Žagar referred to examples where, in addition to the federal units, other territorial-administrative units of differing statuses exist at the federation level. In these cases, the essential elements of asymmetry include not only the usual differences in the sizes of federal units and other specific distinctions but also the varying statuses and positions of individual federal and territorial-administrative units within the federation.⁴³

Some theorists of federalism, including Verney, Føllesdal, and Žagar, consider confederation to be one of the forms of federal systems, viewing it as the opposite of

39 Sahadžić, 2023, pp. 165–166.

40 Sahadžić, 2023, p. 166. Sahadžić gave, *inter alia*, the following examples: three of nine judges on Canada's Supreme Court are from Quebec, and the Basque Country has different fiscal agreements than Spain's other autonomous communities. On asymmetries in federal states, see also Žagar, 1990, pp. 334–335.

41 Sahadžić, 2023, p. 166. An example is, according to Sahadžić, the three language communities in Belgium (Flemish, French, and German).

42 Žagar, 1990, pp. 336–337.

43 *Ibid.* Žagar identified examples of asymmetric federations in the former Soviet Union and the post-war Yugoslav federation. He found the Yugoslav arrangement under the 1974 Constitution particularly interesting, as it recognised the autonomous provinces of Kosovo and Vojvodina as constitutive elements of the federation. This status was reflected, amongst other things, in the representation of their officials in the bodies of the federation.

a federation. According to them, confederal systems are characterized by a weaker central authority, which lacks its own sovereignty and possesses only the powers explicitly assigned to it by the Member States. In principle, decisions made by the central authority are binding on the Member States, however, in many areas Member States retain the option to veto its decisions. Members of a confederation also have the right to withdraw freely.⁴⁴

In conclusion, the examination of various forms of federalism and federal systems highlights the broad scope of federalism as a concept. At its core, federalism represents diverse approaches to organising the governance of political entities, aiming to balance the integration of common interests with the preservation of Member States' autonomy. At a more specific level, the term federalism refers to a nearly limitless range of arrangements of federal significance, or federal systems, which can be further classified into distinct types and subtypes. Ultimately, every formally structured federation is a *sui generis* example.⁴⁵

2.3. Federal States and the Principle of Equality Amongst Their Constituent Units

Drawing on the assumptions of comparative federalism, which seeks to go beyond the insights gained from studying a single federation by examining the practices and experiences of multiple cases,⁴⁶ this section explores how several federal states – both existing (USA, Germany, Switzerland, Belgium, and Canada) and defunct (Socialist Federal Republic of Yugoslavia) – function in terms of key institutional aspects of federal systems. In particular, the study emphasises the constitutional foundations, practical mechanisms, and challenges associated with upholding the principle of equality amongst constituent parts and fostering cooperation between them.

2.3.1. The United States

2.3.1.1. An Outline of the U.S. Federal System

The USA is a federation comprising 50 states, each with its own government and constitution, operating within the overarching framework of the U.S. Constitution. As the first modern federation, the USA has served as a model for subsequent federal systems and is widely regarded as the archetype of federalism.⁴⁷

The federal arrangement established by the U.S. Constitution reflects the colonies' conflicting aspirations to preserve their independence whilst addressing the pressing need for a unified and stable nation, achievable only through a common

44 Confederation as a form of interstate arrangement will be discussed in more detail in Sec. 3.

45 See Žagar, 1990, p. 65; and Accetto, 2007, p. 43.

46 See Fenna, 2022, pp. 28–29.

47 Grad et al., 2004, pp. 131–134.

national framework. This compromise allowed states to retain authority over most areas, except for those matters that required federal oversight to ensure collective interests vital to all U.S. citizens and the federation as a whole, as articulated in the Constitution's preamble.⁴⁸ However, whilst the Tenth Amendment reserves powers not delegated to the federal government for the states,⁴⁹ thereby aiming to balance federal and state sovereignty, this balance has gradually shifted over time, favouring the federal government.

The Federal Constitution establishes the principle of the supremacy of the federal legal order over the legal acts of the federal units; thus, the legal acts of the states, including their constitutions, must be consistent with the Federal Constitution and federal laws, which apply throughout the entire territory.⁵⁰

The institutional framework of the American federal system is based on the distribution of power amongst the legislative, executive, and judicial branches at both the federal and state levels. The competencies of federal bodies are defined by rules that categorise them as exclusive powers (express powers), implied powers derived from expressed powers, and inherent powers that can be exercised by both the federation and the states. Over time, the collective exercise of authority by the federation and the states has become increasingly important, leading to a transformation in U.S. federalism, evolving from exclusive federalism to cooperative federalism.⁵¹

In the structure of the Federal Government, the U.S. Congress is the carrier of the legislative branch. It is established under Art. 1 of the U.S. Constitution, which outlines its structure, qualifications for office, terms, and specific powers. The Framers' intent to create a system of checks and balances within the legislative branch, as well as between the federal government and the states, resulted in the establishment of a bicameral parliament composed of the House of Representatives and the Senate.⁵² The House of Representatives, the lower chamber of Congress, is composed of 435 members chosen by the states' citizens. Each member of the House of Representatives is elected to a two-year term.⁵³ The U.S. Senate is the upper chamber of Congress. Each of the 50 states is represented by two senators who serve staggered six-year terms.⁵⁴ In total, the Senate comprises 100 members. Senators must be at least 30 years old, a U.S. citizen for at least nine years, and a resident of the state they represent.⁵⁵

48 Grad et al., 2004, p. 138. These goals are: ensuring justice, individual freedom, general well-being, stability, and collective defence. See U.S. Const., Preamble.

49 U.S. Const., Amend. 10.

50 See Grad et al., 2004, p. 138.

51 Grad et al., 2004, p. 139.

52 The decision to create a bicameral legislature was also intended to balance the interests of states with large and small populations. The result is a House of Representatives, with seats apportioned by population, and a Senate, where each state has equal representation with two senators.

53 U.S. Const., Art. 1, Sec. 2, para. 1.

54 U.S. Const., Art. 1, Sec. 3, para. 1.

55 U.S. Const., Art. 1, Sec. 3, para. 3.

In Art. 1, Sec. 8, the Constitution explicitly lists several powers of Congress, often referred to as the ‘enumerated powers’. Some of the most significant enumerated powers include making laws, declaring war, raising and providing public money and overseeing its proper expenditure, impeaching and trying federal officers, approving presidential appointments, approving treaties negotiated by the executive branch, and conducting oversight and investigations.⁵⁶

The President, as the head of the executive branch, is established in Art. 2 of the U.S. Constitution, which outlines the qualifications, powers, and responsibilities of the office. This article, though shorter than Art. 1, establishes the President as the chief executive, granting a combination of specified and implied powers. The President is elected for a four-year term through an indirect electoral process, namely the Electoral College. This system was designed to balance popular influence with state representation. The President can be impeached and removed from office for ‘high crimes and misdemeanours’.⁵⁷ This power of removal rests with Congress, reflecting a critical check on presidential authority.

The Constitution specifies, in Art. 2, Sec. 3, several key powers of the President. The so-called ‘Take Care Clause’ mandates that the President ‘shall take Care that the Laws be faithfully executed’, establishing the President’s role as the chief enforcer of federal laws. This clause forms the foundation of the executive’s administrative duties and has been interpreted as granting implied powers necessary for law enforcement. Furthermore, the President has the power to oversee federal agencies, grant pardons for federal offences, and conduct foreign policy by appointing ambassadors and negotiating treaties. In addition to ambassadors, the President appoints federal officials, including judges and executive department heads, with Senate confirmation required for major appointments. Other key powers of the President specified by the Constitution include military leadership, diplomacy, and law enforcement.⁵⁸

The President plays a crucial role in federal–state relations through the use of executive orders, administrative regulations, and federal grants. Additionally, the President must periodically inform Congress about the state of the union and recommend measures for consideration. This requirement serves both as a ceremonial duty and as an opportunity for the President to set a legislative agenda.

Under the supreme leadership of the President, laws are executed by the federal state administration, which is extensive, complexly organised, and difficult to review. The said administration comprises various administrative bodies (executive departments), offices, agencies, commissions, and boards, which are established either by law or by presidential decree. However, only those administrative bodies established by law can enact regional regulations.⁵⁹

56 U.S. Const., Art. 1, Sec. 8.

57 U.S. Const., Art. 2, Sec. 4.

58 U.S. Const., Art. 2, Sec. 2.

59 See Grad et al., 2004, pp. 157–158.

The most notable amongst these are the 14 executive departments, whose heads form the Cabinet. A special place is reserved for independent agencies and commissions, which have an independent status. Although they do not belong to the state administration in the strictest sense, their heads are appointed by the President of the United States with the agreement of the Senate and are subject to hearings in Congress.⁶⁰

The activities of administrative bodies are supervised by all three branches of government, most directly by the President, who also appoints high-ranking officials. Initially, the employment of most civil servants was governed by the so-called spoil system, under which the political party of the President replaced a significant portion of officials with its supporters. This system was gradually replaced by the so-called 'merit system', which requires the hiring of officials based on their professional qualifications, thereby strengthening the durability and political neutrality of official positions.⁶¹

The judicial branch is primarily defined by Art. 3 of the U.S. Constitution, which establishes the Federal Supreme Court and grants Congress the authority to create lower federal courts as needed. The Federal Supreme Court is the highest U.S. court. Its decisions serve as final interpretations of constitutional issues and create precedents that lower courts are bound to follow. It has both original and appellate jurisdiction in cases appealed from lower federal courts and state supreme courts, particularly when constitutional questions are involved. The federal court system beneath the Supreme Court comprises two levels: District Courts (trial courts with original jurisdiction) and Courts of Appeals (intermediate appellate courts that review District Court decisions). Federal judges hold their offices during 'good behaviour', effectively meaning they have life tenure unless impeached and removed for misconduct.⁶² This tenure, combined with protection against salary reduction whilst in office, ensures judicial independence, allowing judges to make decisions free from political influence.

Although not explicitly stated in the Constitution, judicial review is one of the most significant powers of the judiciary. It allows the federal courts to interpret the Constitution, federal statutes, regulations, and executive actions to ensure their consistent application and alignment with the Constitution and to invalidate laws, executive orders, or state actions that contradict it.⁶³ Judicial review positions the judiciary as a guardian of constitutional rights and a check on the legislative and executive branches, preventing the government from enacting or enforcing unconstitutional measures. Federal courts also resolve disputes involving federal laws, constitutional questions, and conflicts between states or between a state and the federal

60 Ibid.

61 Ibid.

62 U.S. Const., Art. 3, Sec. 1.

63 This power, though not explicitly stated in the Constitution, was firmly established in the landmark case *Marbury v. Madison* (1803).

government. This function provides a legal pathway for individuals, organisations, and states to address grievances that involve federal interests or rights protected by the Constitution. In resolving disputes between the federal and state governments, federal courts play a critical role in shaping the balance between federal and state power.⁶⁴

The U.S. Constitution establishes a robust system of checks and balances to prevent the concentration of power in any single branch of government.⁶⁵ Members of Congress are accountable to the electorate, with House members facing re-election every two years and senators every six years. Elections serve as a powerful check on congressional power, with public opinion shaping legislative agendas and the composition of Congress. The bicameral structure of Congress itself serves as a check, since both the House and Senate must agree on the text of any bill before it becomes law. This internal division encourages deliberation and compromise, often slowing the legislative process but preventing hasty or extreme legislative actions. Additionally, Congress is restrained by its relationship with the executive and judicial branches. However, Congress also exercises significant oversight of the executive branch, with the power to investigate executive actions, conduct hearings, and request testimony from federal officials. It holds the authority to impeach the President for 'high crimes and misdemeanours'.⁶⁶

The interaction between federal and state governments occurs in various contexts, including policy implementation, fiscal coordination, and legal disputes. Despite the federal constitutional framework, the federal government has increasingly encroached upon areas that traditionally fall under state jurisdiction, driven by the expanding mandates of the modern state. This encroachment is often necessary for the interests of the entire federation, especially in activities that exceed the financial capabilities of individual states. This development gradually led to 'co-operative federalism' as a new model of federalism, marking a departure from the original form established by the Constitution. In cooperative federalism, federal, state, and local governments collaborate to implement policies, even though, according to the Constitution, the distinction of authority is based on the exclusive powers of the federal government and the states.⁶⁷

2.3.1.2. The Principle of Equality of States

Although the U.S. Constitution does not explicitly reference the principle of equality amongst States as a general principle, it contains several provisions that

64 Grad et al., 2004, pp. 158–162.

65 Grad et al., 2004, p. 163.

66 The House of Representatives initiates impeachment proceedings, whilst the Senate conducts the trial. This process serves as a direct check on abuses of presidential power, ensuring accountability to the public and the Constitution.

67 Grad et al., 2004, p. 169. Programmes such as Medicaid, where federal funding is combined with state administration, exemplify this collaborative approach.

address this principle in various ways. Art. 1, Sec. 3 mandates equal representation in the Senate. Additionally, Art. 5, which outlines the process for amending the Constitution, explicitly states that ‘no State, without its Consent, shall be deprived of its equal Suffrage in the Senate’. The Constitution also mandates equal treatment of States in other areas, including sovereign immunity under the Eleventh Amendment, as well as through the Tax Uniformity Clause and the Port Preference Clause. Several constitutional provisions support the idea of equal sovereignty by establishing baseline requirements for States to remain part of the Union, such as the Privileges or Immunities Clause, the Full Faith and Credit Clause, and the Guarantee Clause; this ensures a republican form of government. These provisions suggest that the Founders envisioned States as holding an equal position within the federal system for specific purposes.⁶⁸

The issue of providing equality amongst States has also been invoked in several U.S. Supreme Court decisions interpreting these constitutional provisions. Notably, the Court has declared that ‘the United States was and is a union of states, equal in power, dignity, and authority’.⁶⁹ Through its rulings, the Court has developed several interpretative principles and doctrines, with the principle of equal sovereignty and the equal footing doctrine standing out as particularly significant.

Overall, and as reflected in Supreme Court jurisprudence, the principle of state equality manifests across multiple dimensions of the U.S. federal system, including legislative representation and decision-making processes, the admission of new states, the electoral process, and intergovernmental relations.

The decision to create a bicameral legislature was intended to balance the interests of states with large and small populations. The result is a House of Representatives, with seats apportioned by population, and a Senate, where each state has equal representation. According to Art. 1, Sec. 3, the U.S. Senate grants each state two senators, regardless of size or population. This provision is a direct manifestation of the formal equality of states, ensuring that smaller states have an equal voice in the legislative process and a meaningful role in federal policymaking.⁷⁰ By allocating power in the Senate equally amongst the states irrespective of the differences between them, the Framers counterbalanced the allocation of power in the House of Representatives based on proportional (‘relative’) equality, depending on a state’s

68 See Molitor, 2014, p. 1857.

69 *Shelby County v. Holder*, 570 U.S. 529, 544 (2013), and *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

70 This provision has its roots in the Constitutional Convention of 1787, where the Framers of the Constitution sought to balance the interests of large and small states. At the time, small states such as Delaware feared that their influence would be diminished if representation in the new federal government were solely based on population, as favoured by larger states such as Virginia. To resolve this conflict, the Framers adopted a compromise that became one of the defining features of American federalism: the Connecticut Compromise (or Great Compromise). This agreement established a bicameral legislature with two chambers: the House of Representatives, where representation is proportional to population, and the Senate, where each state is granted equal representation, with two senators per state, regardless of population, size, wealth, or power. See United States Senate, 2024.

share of the national population. By arranging for the House and Senate to exercise legislative power jointly, the Framers required U.S. law to have both national and federal approval – a majority vote in the House of Representatives demonstrates national approval, whilst a majority vote in the Senate expresses federal approval.⁷¹

In Art. 4, Sec. 3, the Constitution provides that new States may be admitted into the Union. In its case law involving the admission of new States, the Supreme Court in the nineteenth century developed the equal footing doctrine, which generally requires that Congress admit new States on equal terms with the original States and with the same rights and sovereignty as existing States. The Supreme Court held, in *Coyle v. Smith*, that this doctrine forbids Congress from imposing ‘restrictions upon a new state which deprive it of equality with other members of the Union’. However, since the Court observed, in *South Carolina v. Katzenbach*, that ‘[T]he doctrine... applies only to the terms upon which States are admitted to the Union’, the applicability of the equal footing doctrine outside the State admission context was questionable.

In *Northwest Austin*,⁷² the Supreme Court invoked the fundamental principle of equal sovereignty amongst the States as a limitation on congressional power. Although not making clear whether the principle is based on the Tenth Amendment or some other constitutional provision, the Court observed that ‘not only do States retain sovereignty under the Constitution, there is also a fundamental principle of equal sovereignty among the States’ and that ‘the equal sovereignty principle limits Congress’s ability to enact legislation that subjects different States to unequal burdens without a sufficient justification’.⁷³ It follows from this interpretation that the principle of equal sovereignty extends beyond the formal equality of States, implying the idea of ‘substantive’ (e.g. relative or proportional) equality. When there are ‘sufficient reasons’, sovereign States may and should be treated differently. According to the Supreme Court, even laws that are drafted in facially non-discriminatory terms will almost always have an unequal (greater or smaller) impact on different States.⁷⁴

The equal sovereignty principle was also applied by the Supreme Court in two cases ruled upon in 2009 and 2013. Both cases concerned the constitutionality of the Voting Rights Act of 1965 (VRA).⁷⁵ To remedy racial discrimination in voting, Sec. 4 of the VRA contained a ‘coverage formula’ identifying jurisdictions with a history of racial discrimination against voters, whilst Sec. 5 required those jurisdictions to obtain ‘preclearance’ from the Department of Justice or a federal court before changing their voting procedures.⁷⁶

71 See Constitution Annotated, 2024.

72 *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009), and *Shelby County*, 570 U.S., 544.

73 *Ibid.*

74 See Colby, 2016, p. 1147. Colby argued that, although nearly all laws treat states differently, a refined understanding of equal sovereignty demonstrates that the vast majority of congressional discrimination amongst the states does not run afoul of the Constitution.

75 See Legal Information Institute, 2024.

76 *Ibid.*

Although, compared to other States, jurisdictions covered by Sec. 4 were subject to more stringent requirements when seeking to change their voting laws, the Court ruled in *Katzenbach* that this arrangement was in line with the Constitution. Almost half a century later, in *Northwest Austin*, the coverage formula and preclearance requirements were upheld, although the Court observed that the coverage formula, by differentiating between the States, departs from ‘the fundamental principle of equal sovereignty’ and raises ‘serious constitutional questions’.⁷⁷

Ruled upon four years after *Northwest Austin*, *Shelby County* resolved the constitutional question left open, relying primarily on principles of federalism and the equality of the sovereign States to strike down (by a majority of 5 to 4) the VRA’s coverage formula and preclearance requirements as unconstitutional. The Court argued that, in the nearly 50 years since the VRA was first upheld in *Katzenbach*, ‘things have changed dramatically’, pointing to increases in African American voter registration rates and turnout in covered jurisdictions. According to the Court, in contrast to the ‘exceptional conditions’ present in *Katzenbach*, current conditions did not justify applying the preclearance formula to only certain States and counties.⁷⁸

Shelby County has drawn significant criticism both for its substantive effect on minority representation in States that were formerly covered by the formula and for its reliance on the principle of equal sovereignty. Commentators have also argued that the Court invoked equal sovereignty as a guise for the (conservative) political motivations behind its decision – motivations which severely limited the efficacy of voting rights legislation.⁷⁹

As the U.S. Supreme Court has not decided on any new case concerning the principle of equal sovereignty since *Shelby County*, it remains unclear whether and how it should apply outside the voting rights context. Attempting to discover the origins and evolution of the principle in American law, Molitor asserted that threads of the idea of equal sovereignty can be seen at several points in American history and in varied areas of legal doctrine. According to Molitor,

[This] idea has alternately been known as the ‘doctrine of the equality of States’, the ‘equal footing doctrine’, and, most recently, ‘equal sovereignty’. Tidy analogies prove difficult due to the contested and evolving concept of federalism inherent in considerations of State sovereignty.⁸⁰

77 *Northwest Austin*, 557 U.S., 202–204.

78 See Legal Information Institute, 2024.

79 Molitor, 2014, p. 1839. See also Colby, 2016, p. 1093. Colby described *Shelby County* as ‘the superficially compelling case against the equal sovereignty principle’.

80 Molitor, 2014, p. 1839.

2.3.2. Germany

2.3.2.1. A Summary of the German Federal System

The federal system of the Federal Republic of Germany is rooted in the tradition of (con)federalism from the 19th and early 20th centuries, specifically during the era of the German Empire and the Weimar Republic. Although the Weimar Republic was divided into States, its system resembled a decentralised unitary state more than a fully developed federation. Following the rise of the National Socialist regime in 1933, the autonomy of the *Länder* was abolished. After World War II, Germany was divided into eastern and western regions by the Allies, who sought to prevent the country from becoming a power that could threaten peace again. In the western part, a federal system was established with newly created federal units that differed from the former German *Länder*, except for Bavaria and the Hanseatic cities. Conversely, the eastern part of the country saw the abolition of its federal structure, leading to the establishment of the German Democratic Republic as a unitary state. After the fall of the Berlin Wall, German reunification occurred relatively swiftly. The Unification Treaty established a new preamble to the Basic Law (*Grundgesetz*), which now lists 16 *Länder* instead of the previous 11.⁸¹

Federalism in Germany is enshrined in the 1949 *Grundgesetz*, which established the Federal Republic of Germany. This framework was designed to prevent the concentration of power that characterised earlier autocratic regimes by dividing authority between the federal government (*Bund*) and the 16 constituent States (*Länder*). It ensures cooperation, subsidiarity, and regional autonomy. Germany's federal system is recognised as one of the most sophisticated and historically evolved examples of federalism in the world.

The *Grundgesetz* affirms Germany's federal structure in Art. 20, declaring that the country is 'a democratic and social federal state'. The federal power is composed of several key entities: the Federal President (*Bundespräsident*), who serves as a largely ceremonial head of state; the Federal Assembly (*Bundestag*), the primary legislative body directly elected by the citizens; the Federal Council (*Bundesrat*), which represents the *Länder* at the federal level and ensures their participation in federal law-making; and the Federal Government (*Bundesregierung*), led by the Federal Chancellor (*Kanzler*), the Head of Government responsible for national policies and executive decisions. Additionally, the Federal Ministries execute policies and manage areas of federal competence.

Germany has a bicameral legislative system. Members of the *Bundestag* are elected through general, direct, free, equal, and secret elections, serving as representatives of the entire population. According to the provision which stipulates that details regarding the electoral system shall be regulated by federal law,⁸² a combined

⁸¹ Grad et al., 2004, p. 107.

⁸² *Grundgesetz*, Art. 38, para. 3.

electoral system (also referred to as a personalised proportional electoral system) was introduced, integrating the advantages of both majority and proportional systems. In this system, half of the deputies are elected directly in constituencies using a relative majority system, whilst the other half are elected based on State party lists according to a pure proportional system. The entire country is divided into as many constituencies as there are deputies in the *Bundestag*. For the election of the other half of the deputies (using the pure proportional system), the country functions as a single electoral unit, and the seats are distributed amongst the party lists using the Hare–Niemeyer coefficient.⁸³

Representing the interests of the *Länder* at the federal level, the *Bundesrat* does not consist of directly elected deputies but rather of members from the governments of all 16 *Länder*. The composition of the *Bundesrat* does not adhere to the principle of parity, which is typical for the second chamber in federal systems. Instead, it strikes a compromise between the principle of parity and the principle of pure proportional representation by taking population size into account. After the unification of the two German States, the number of members in the Federal Council increased from 45 to the current 68 members, with an equal number of alternates.⁸⁴ Each *Land* has at least three votes; those with more than 2 million inhabitants have four votes, those with more than 6 million inhabitants have five votes, and those with more than 7 million inhabitants have six votes. Each *Land* may appoint as many members as it has votes.⁸⁵

The *Bundesrat* has several powers, including the legislative initiative in the legislative process. The Constitution specifies which laws (*Zustimmungsgesetze*) require the *Bundesrat*'s consent – approximately half of all laws fall into this category, giving the *Bundesrat* an absolute veto over them. The *Bundesrat* can also exercise a decisive veto (*Einspruchrecht*) on other laws, in addition to providing consent for certain regulations issued by the federal government or federal ministers. Moreover, it participates in federal supervision of State administration and can request the recall of police units to prevent threats to the constitutional order in individual *Länder*. Furthermore, the *Bundesrat* is involved in the swearing-in of the Federal President and elects half of the judges of the Federal Constitutional Court (*Bundesverfassungsgericht*). It can also establish a special body for EU affairs, known as the 'European Chamber' (*Europakammer*), whose decisions hold the same validity as those of the *Bundesrat*.⁸⁶

Arts. 70–91 of the *Grundgesetz* outline the competencies of the federal government and the *Länder*, as well as the roles and mechanisms for federal and state interaction, ensuring a clear division of responsibilities. The federal government has exclusive jurisdiction over matters such as foreign policy, defence, currency, and

83 Grad et al., 2004, pp. 114–115.

84 Ibid.

85 *Grundgesetz*, Art. 51.

86 Grad et al., 2007, p. 116.

immigration (Arts. 70–73). The *Länder* hold powers in areas not explicitly assigned to the federal government, including police and cultural affairs. Both levels of government share responsibilities in areas such as environmental policy, education, and health. In cases of conflict, federal law supersedes state law (Art. 31).

The German judiciary is organised into a federal and a state level, with the federal judiciary addressing issues of national importance and the state judiciary focusing on regional matters. Whilst at the federal level the judiciary comprises several key courts, each with specific competencies, the Federal Constitutional Court (*Bundesverfassungsgericht*) is the highest authority on constitutional matters in Germany. It has the power to review laws and regulations for compliance with the *Grundgesetz*, adjudicate disputes between federal and state authorities, and protect fundamental rights. The Court's decisions are binding, and it plays a critical role in maintaining the constitutional order in general and federalism in particular.⁸⁷

The *Grundgesetz* stipulates that relations with foreign states are to be conducted by the Federation. However, before concluding any treaty that affects the specific circumstances of a *Land*, that *Land* must be consulted in a timely manner. The *Länder* may enter into treaties with foreign states, provided they have the consent of the Federal Government.⁸⁸

Whilst federal law takes precedence over *Land* law,⁸⁹ the principle of subsidiarity embedded in German federalism ensures that decisions are made at the most local level possible. This principle preserves *Länder* autonomy and control over local and regional matters whilst allowing for federal intervention in broader issues.

Germany employs a robust model of public finances and fiscal federalism to address regional disparities. The financial equalisation system (*Finanzausgleich*) redistributes resources between wealthier and poorer states, promoting economic equity. The *Länder* also collect taxes, such as their share of income and corporate taxes, in addition to federal levies.⁹⁰

German federalism is described by German scholars as 'dual federalism' in the sense that the federal level is responsible for passing most legislation and the *Länder* for implementing this legislation on their own responsibility, usually with only legal supervision by the Federation. It is also sometimes referred to as 'functional federalism', meaning that the legislative function is largely a national responsibility and the administrative function largely a matter for the *Länder*. However, unlike competitive federalism models, German federalism is also referred to as 'cooperative federalism' and 'participatory federalism', the former characterised by close collaboration between the federal government and the *Länder* to address shared responsibilities

87 *Grundgesetz*, Arts. 92–104.

88 *Ibid.*, Art. 32, para. 3.

89 *Ibid.*, Art. 31.

90 *Ibid.*, Arts. 104a–115.

and achieve national policy goals, and the latter by the *Länder's* participation in federal legislation⁹¹

2.3.2.2. The Principle of Equality Amongst *Länder*

The principle of equality amongst the *Länder* is a cornerstone of German federalism, ensuring that all constituent states enjoy equal rights and status within the federal framework. Codified in the *Grundgesetz*, this principle seeks to balance regional autonomy with national cohesion, prevent dominance by larger states, and address disparities in economic and political influence. Despite significant variations in size, population, and economic capacity amongst the 16 *Länder*, German federalism strives to guarantee equal standing for each state within the constitutional and political order. By emphasising the equality of all *Länder*, the federal system in Germany reflects a commitment to both unity and diversity.

The *Grundgesetz* enshrines the principle of equality amongst *Länder* through Art. 20 by establishing Germany as a democratic and federal state, requiring equal treatment of its constituent units. Based on this basic provision, it introduces several mechanisms for supporting equality amongst *Länder*.

One such mechanism is equal representation in federal decision-making bodies. A platform for *Länder* to influence federal legislation is provided by the composition and weighted voting in the *Bundesrat*. Although vote distribution varies (e.g. the *Länder* have different vote counts based on population), all *Länder*, irrespective of size or economic strength, have an institutional role in shaping national policies and participate in decisions affecting their jurisdiction.⁹²

The principle of (proportional) equality of federal units is also considered in the composition of the Federal Convention, the body responsible for the election of the Federal President. The Federal Convention comprises the Members of the *Bundestag* and an equal number of members elected by the parliamentary assemblies of the *Länder* on the basis of proportional representation.⁹³

Another mechanism implementing the principle of equality amongst the *Länder* is Fiscal Equalisation (*Finanzausgleich*) and Equalisation of Burdens. To address economic disparities, Germany employs robust financial equalisation tools including Revenue Sharing and Redistribution Grants. Taxes, including income and corporate taxes, are distributed amongst federal and state levels, with mechanisms ensuring a fair allocation to all *Länder*. *Länder* with below-average revenue capacity receive financial transfers to ensure their ability to provide public services at comparable levels. Additionally, laws implementing the equalisation of burdens may, with the

91 See Gunlicks, 2003, pp. 385–387.

92 *Grundgesetz*, Art. 51.

93 *Ibid.*, Art. 54, para. 3.

consent of the *Bundesrat*, provide that, with respect to equalisation payments, they shall be executed partly by the Federation and partly by the *Länder*⁹⁴

By utilising *Finanzausgleich* and Equalisation of Burdens, wealthier *Länder* contribute to a central pool that supports less affluent states, promoting economic equity and equal access to resources.

In practice, the German federal system faces numerous challenges when it comes to implementing equality amongst federal units. Population-based representation in the *Bundesrat* is occasionally perceived by smaller *Länder* as a limitation on their influence, as the weighted voting system gives more populous states a greater voice.⁹⁵ Similarly, despite financial equalisation, economic gaps and infrastructural disparities persist between *Länder*, particularly between the western and eastern regions. Larger, wealthier states such as Bavaria and Baden-Württemberg occasionally express concerns about the financial burden of redistribution.⁹⁶ Indeed, balancing autonomy and uniformity has proved to be a major challenge, since the principle of equality sometimes conflicts with the need for regional autonomy. *Länder* with stronger economies and infrastructure, advanced digitalisation, or unique cultural identities may resist federal policies aimed at uniformity, creating tensions within the system. Federal initiatives aim to bridge these gaps, but implementation varies across states. As such, given that the principle of equality often requires extensive negotiation between *Länder* and the federal government, disputes over fiscal policies, infrastructure projects, and EU funding allocations underscore the complexity of maintaining balance.⁹⁷ In that regard, the Federal Constitutional Court has played a crucial role in interpreting and upholding the principle of equality. Landmark cases have clarified the limits of financial redistribution and the balance of powers between federal and state governments.

The principle of equality amongst *Länder* is fundamental to the stability and fairness of the German federal system. Through constitutional provisions, institutional representation, and fiscal mechanisms, Germany ensures that all *Länder*, regardless of size or economic capacity, have an equal voice in governance. However, addressing challenges such as economic disparities, demographic shifts, and the

94 Ibid., Art. 106, para. 3; Art. 107, para. 2; and Art. 120a. ‘The Federation and the *Länder* shall share equally the revenues from income taxes and corporation taxes [...] The Federation and the *Länder* shall have an equal claim against current revenues to cover their necessary expenditures [...] A federal law requiring the consent of the *Bundesrat* shall ensure a reasonable equalisation of the disparate financial capacities of the *Länder*, with due regard for the financial capacities and needs of municipalities (associations of municipalities)’.

95 Benz, 2013, pp. 70–90.

96 Reforms in 2017 adjusted the *Finanzausgleich* system to simplify redistribution and reduce the burden on wealthier states. These reforms emphasise direct federal funding to weaker *Länder*, by-passing inter-state transfers. See also Gunlicks, 2003, pp. 168–169.

97 See Scharpf, 1988, pp. 265–271. The EU integration presents both opportunities and challenges for equality amongst *Länder*. Whilst EU cohesion funds support underdeveloped regions, compliance with EU directives sometimes limits *Länder* autonomy, raising questions about their equal status.

demands of EU integration makes the ongoing adaptation of this principle a critical task for Germany's federal institutions.

2.3.3. *Switzerland*

2.3.3.1. An Outline of the Swiss Federal System

Swiss federalism is unique in many ways. Its roots go back to the 13th century, when three proto-cantons – Uri, Schwyz, and Unterwalden – formed a confederation. In the 16th century, the union grew to 13 cantons, which were part of the German Confederation for a certain period. Part of Swiss history is also connected with France, as at the end of the 18th century Napoleon occupied Switzerland and proclaimed the Helvetic Republic (*Helvetische Republik*). The constitution of this state formation introduced a radical change in the Swiss state system, replacing the (con) federal one with a unitary system based on the French model. With the fall of Napoleon, Switzerland got rid of the French protectorate and re-established a federal union between the cantons, which lasted until 1848, when a historical turning point occurred in Switzerland. Instead of the previous confederal union of sovereign cantons, the concept of a federation was established, and the first Swiss Federal Constitution (*Bundesverfassung*) was adopted. In 1874, the second Swiss Federal Constitution was enacted, which was amended through a process of total revision that took several years to complete. The new text of the Federal Constitution was adopted in a referendum in 1999.⁹⁸

The official name of Switzerland is expressed differently in the Federal Constitution in each of the three official languages (German, French, and Italian). The official abbreviation of Switzerland, 'CH', is derived from the preserved old name '*Confederatio Helvetica*', maintaining continuity from the period when Switzerland was a union of cantons (i.e. a confederation). The designation 'confederation' no longer corresponds to the actual situation today, as Switzerland is not a confederation (union of states) but a federation (federal state), which also stems from the German name of the country '*Eidgenossenschaft*' – the latter commonly replaced by the term *Bund* (federation). The German name '*Schweizerische Eidgenossenschaft*' can thus be meaningfully translated as the Swiss Federation.⁹⁹

The new text of the 1999 Federal Constitution,¹⁰⁰ which entered into force in January 2000, was based on the 1874 Federal Constitution, which had been amended more than 130 times by 1994, and approximately the same number of proposed amendments were approved by citizens in constitutional referendums.

The principle of the federal state is one of the four fundamental principles highlighted by the Federal Constitution (in addition to the principle of the rule of law,

98 Grad et al., 2004, pp. 213–214.

99 Grad et al., 2004, p. 215.

100 Federal Constitution of 18 April 1999 of the Swiss Confederation.

the principle of the democratic state and direct democracy, and the principle of the welfare state). The principle of the federal state is expressed in the regulation of mutual relations between the Federation and the cantons through the following principles and instruments: (a) the principle of the autonomy (sovereignty) of the cantons, unless limited by the Federal Constitution; (b) the principle of the presumption of jurisdiction in favour of the cantons (Art. 3); (c) the guarantee of the autonomy of the cantons by the Federation (Art. 47); (d) the cooperation of the cantons in the exercise of the Federation's competencies (Arts. 45 and 46); (e) the principle of the primacy of federal law over cantonal law (Art. 49); and (f) the bicameral structure of the federal parliament, where the second chamber (*Nationalrat*) represents the cantons (Art. 149).

Art. 1 of the Federal Constitution defines Switzerland as a confederation composed of the united peoples of 26 sovereign cantons and half-cantons. The federal structure of the state is detailed in Part Three (Arts. 42–135), which constitutes nearly half of the Constitution. These provisions establish Switzerland's three-tiered system of government, comprising the Federation, the cantons, and the municipalities. They delineate the competencies of the Federation and the cantons and define the mutual relations between them. The Federation and the cantons are mandated to cooperate and support one another in carrying out their responsibilities. The Federation is responsible for tasks explicitly assigned to it by the Federal Constitution, as well as those requiring uniform regulation across the country. The Constitution also stipulates that the cantons must participate in federal decision-making, particularly in the legislative process. Cantonal autonomy is further protected, and the independence of municipalities is guaranteed in accordance with cantonal law. In cases of conflict between federal and cantonal law, Art. 49 of the Constitution establishes that federal law takes precedence.

Part Five (Arts. 143–191) of the Federal Constitution defines the organs of the Federation: the Federal Assembly (*Bundesversammlung*); the Federal Government, termed the Federal Council (*Bundesrat*); the Federal President (*Bundespräsident*); and the Federal Court (*Bundesgericht*).

The Federal Assembly (parliament) is the highest authority at the federal level in Switzerland. As a federation, Switzerland has a bicameral legislature comprising the National Council (*Nationalrat*) and the Council of States (*Ständerat*). This bicameral structure aligns with the traditional model of federations: the lower house represents the population at large, whilst the upper house represents the cantons as federal units. Both houses hold equal power, reflecting a symmetrical bicameral model.¹⁰¹

Since 1918, elections to the Federal Assembly have followed a proportional electoral system. Unlike other systems that may create separate electoral districts, each canton and half-canton in Switzerland serves as its own electoral district, resulting in 26 electoral districts across the country. The number of deputies that each canton sends to the National Council depends on population, with the Federal Constitution

101 Grad et al., 2004, pp. 226–227.

guaranteeing each canton at least one parliamentary mandate. Under Switzerland's proportional electoral system, mandates are distributed solely at the cantonal level, without national-level equalisation of votes, which contrasts with the German model. The Hagenbach-Bischoff method is used for the distribution of parliamentary mandates. However, the proportional system is not fully implemented across the country; in five cantons with small populations that are entitled to only one parliamentary mandate, a system of relative majority is instead applied.¹⁰²

The cantons are represented in the Council of States, with each canton electing its deputies and independently determining the method of election, as permitted by the principle of parity outlined in the Constitution. Each canton elects two deputies, whilst the three cantons divided into half-cantons each elect one deputy. As both chambers of the Federal Assembly hold equal power, decisions must be adopted in identical terms by both the National Council and the Council of States. The two chambers convene as a single Federal Assembly only for specific matters expressly defined in the Constitution. Deputies, along with members of the Federal Council, enjoy parliamentary immunity. This protection ensures they cannot be held legally accountable for opinions expressed during sessions of the assemblies or their committees.¹⁰³

Given that the two houses of the Federal Assembly hold equal powers, a majority of the total Swiss population can effectively influence, and even veto, national decisions. Any federal act that results in or amounts to a constitutional amendment must be ratified through a mandatory popular referendum. To pass, this process requires both a majority of the voting electorate and the approval of a majority of the cantons and half-cantons – accounting for a total of 23 cantonal votes. Through direct participation in federal politics, the cantons may assume functions typically reserved for the national parliament or its individual members. Cantonal governments possess the right of initiative, enabling them to initiate the legislative process at the highest constitutional level. They also hold the right of referendum, granting them the ability to submit a generally binding act of parliament to a popular vote. Whilst the right of initiative can be exercised by any individual canton, the right of referendum requires the cooperation of at least eight cantons. This participatory role elevates the Swiss cantons beyond the status of mere regional authorities. Instead, they serve as influential partners in shaping national decision-making, ensuring their voices are integral to the federal system.¹⁰⁴

The Federal Council is the highest governing and executive body of the Swiss Federation. It comprises seven members, who are, in principle, responsible for the seven departments. The members of the Federal Council are elected by the Federal Assembly after each full renewal of the National Council. Care shall be taken to

102 Ibid.

103 Grad et al., 2004, pp. 227–228.

104 Grad et al., 2004, pp. 223–226.

ensure that the various geographical and language regions are adequately represented in the Federal Council.¹⁰⁵

The Federal President and their deputy are elected by the Federal Assembly from amongst the members of the Federal Council for a one-year term of office. The President chairs the Federal Council.¹⁰⁶ Unlike in other countries, Switzerland does not have a separately elected head of state. Instead, this role is fulfilled by one of the members of the Federal Council – a unique feature of the Swiss political system.

The judiciary in Switzerland is organised at federal and cantonal levels, but the Federation has priority in determining the foundations for the establishment of courts (determining the position of the Federal Court and the basic procedural principles for the exercise of rights). According to the Constitution, the Federal Court is also entrusted with the function of constitutional justice.¹⁰⁷ Federal law determines the jurisdiction of the Federal Court in civil, criminal, and administrative matters. The judges of the Federal Court are elected by the Federal Assembly. In nominations and elections, representation of all three official languages must be ensured.

A canton or half-canton is a member of the Federation and, as such, a self-governing entity fully equipped with a regional government, administrative apparatus, parliament, and judiciary. Art. 3 of the Constitution sets out the guiding principle for defining the balance between cantonal sovereignty and central powers: the cantons are sovereign insofar as this sovereignty is not limited by the Federal Constitution, and they exercise all powers not conferred upon the Confederation. Following this principle, the federal powers include defence, foreign affairs, foreign economic affairs and customs, domestic economic affairs in certain fields such as labour relations, assistance to regional development, assistance to endangered trades or sectors, civil and criminal legislation, the major infrastructure of communications, social security, and general control over nuclear energy. The competencies remaining with the cantons are less weighty, consisting mainly of education, health, culture, the administration of justice, police, utilities, and environment. There are also competencies, such as town planning, local traffic, recreation, and the like, that fall under communal authority, and these are as jealously guarded against cantonal encroachments as the cantons defend their rights *vis-à-vis* the Confederation. However, as Schweitzer pointed out, it is firmly established in the Swiss system that – no matter how extensive the powers conferred upon the Confederation – execution of these powers

105 Federal Constitution, Art. 175.

106 Federal Constitution, Art. 176.

107 Federal Constitution, Art. 189.

is generally left to the cantons.¹⁰⁸ Similarly, *Füglister* and *Wasserfallen* noted that the Swiss constitutional setup puts the cantons in an overall strong position: apart from the subsidiarity principle, the federal government's power is even restricted in some policy areas that fall within the federal sphere of influence, as the cantons implement many federal policies.¹⁰⁹

2.3.3.2. The Principle of Equality Amongst Cantons

Switzerland's federal system is defined by its decentralisation, cultural diversity, and commitment to equality amongst its 26 cantons. This equality is essential for maintaining unity in a nation with significant linguistic, cultural, and economic diversity. Whilst the Federal Constitution aims to promote the greatest possible equality of opportunity amongst citizens and enshrines the principle of equality before the law,¹¹⁰ it does not explicitly reference the principle of equality amongst cantons. Nevertheless, the imperative of equality amongst the cantons is implied in a series of provisions of the Federal Constitution. Key provisions include Art. 1, declaring Switzerland a confederation of 26 sovereign cantons; Art. 2, ensuring the greatest possible equality of opportunity amongst its citizens; Art. 3, ensuring the autonomy of cantons by reserving all powers to the cantons except those explicitly delegated to the federal government; Art. 45, guaranteeing the cantons' right to participate in federal decision-making, regardless of size or population; and Art. 47, guaranteeing respect for the autonomy of the cantons. Based on these key provisions, the principle of equality amongst cantons is implemented through representation of cantons in the Federal Assembly, referenda and direct democracy, as well as through financial equalisation mechanisms.

Each canton, regardless of population or size, sends two representatives to the Council of States (*Ständerat*), with half-cantons represented by one member. In contrast, representation in the National Council (*Nationalrat*) is based on population size, providing a counterbalance to the equal representation (e.g. formal equality) in the Council of States. Together, the chambers uphold the principle of equality whilst reflecting the demographic realities of the nation.¹¹¹

Under the previous constitution, only one member from each canton could be elected to the Federal Council. However, this provision was removed in the 1999

108 Schweitzer, 1991, p. 164. For instance, the cantons are sovereign tax masters as far as direct taxation is concerned. The federal government only has the tax powers allotted to it from time to time, in periodic amendments to the constitution, besides the competence for indirect taxation and customs revenues. With the latter having been drastically reduced in recent years owing to GATT, European free trade, and preferences for developing countries, the federal government finds itself in a considerable financial squeeze, and there is little readiness on the part of the population to allot new tax sources to the federation as their primarily cantonal outlook prevents, at times, the electorate and the politicians from fully comprehending the needs of a central government.

109 Füglister and Wasserfallen, 2014, p. 418.

110 Federal Constitution, Art. 8.

111 Federal Constitution, Arts. 149–150.

Constitution, which instead emphasises ensuring that Switzerland's various geographical and linguistic regions are adequately represented in the Federal Council.¹¹²

Another safeguard for cantonal equality is the double-majority requirement for constitutional amendments. Pursuant to the Federal Constitution, in addition to the majority of the national electorate (*Volksmehr*), the majority of the cantons (*Ständemehr*) must also approve a proposal for a constitutional amendment.¹¹³ This system ensures that smaller cantons cannot be overridden by the preferences of larger ones.

Lastly, the Swiss Federal Constitution incorporates cantonal organisational autonomy and the duty of the federal authorities to contribute towards ensuring that all cantons have sufficient financial resources required to fulfil their tasks.¹¹⁴ Additionally, the Federal Constitution establishes a fiscal equalisation system to address economic disparities amongst cantons, ensuring all cantons can fulfil their responsibilities and provide comparable public services. This system includes the redistribution of federal and cantonal revenues to support less-affluent cantons (resource equalisation) and targeted transfers to help cantons address specific challenges, such as geographic disadvantages (cost compensation).¹¹⁵

The implementation of the principle of equality amongst cantons faces many challenges in practice. The principle of canton equality must be balanced with the cantons' autonomy. Whilst all cantons are legally equal, differences in size, population, and resources can lead to disparities in their practical influence and capacities.¹¹⁶ The same applies to economic disparities: despite fiscal equalisation, economic differences between cantons persist. Wealthier cantons sometimes express concerns over the financial burdens of redistribution. Furthermore, the equality principle ensures that cantons representing minority linguistic or cultural groups (e.g. Ticino, Grisons) have a voice equal to those of majority-language regions, but maintaining effective representation can be complex. Finally, Switzerland's relationship with the EU challenges the traditional dynamics of canton equality. As cantons must collaborate more closely on transnational issues, these can test their autonomy and equality.¹¹⁷

In conclusion, the principle of equality amongst cantons is a cornerstone of Swiss federalism, ensuring that all cantons, regardless of their size or economic power, retain equal standing in governance. Through robust constitutional safeguards, institutional mechanisms, and fiscal policies, Switzerland has maintained this equality whilst accommodating the diversity of its multilingual, multicultural society.

112 Federal Constitution, Art. 175.

113 Federal Constitution, Art. 195.

114 Federal Constitution, Art. 75.

115 Federal Constitution, Art. 135.

116 See Vatter, 2018.

117 Schweitzer, 1991, pp. 161–169. See also Linder and Mueller, 2021, pp. 265–270.

2.3.4. *Belgium*

2.3.4.1. The Belgian Federal System – An Outline

Belgium, the host country of the EU, is characterised by a unique and intricate system of federal governance. Its path to federalism was driven by its deep-seated linguistic and regional divides. Established as a unitary state in 1830, Belgium's governance structure initially centralised power in Brussels. However, tensions between the Dutch-speaking Flemish population in the north and the French-speaking Walloons in the south led to a series of constitutional reforms. Initiated with the 1970 and 1980 state reforms, the federalisation process culminated in the 1993 revision of the Belgian Constitution, which officially transformed Belgium into a federal state.¹¹⁸ As opposed to being the product of a coming-together of independent entities, its rationale was and remains one of holding together a united Belgium. There were, in all, six state reforms, the last carried out in 2014.¹¹⁹

The 1993 constitutional reform solidified Belgium's unique federal system, characterised by a dual division of authority: between the federal government and three regions, and between the federal government and three linguistic communities. This bifurcation creates a complex but balanced distribution of power.¹²⁰ On the one hand, the Dutch-speaking Flemish Region (Flanders), the French-speaking Walloon Region (Wallonia), and the bilingual Brussels-Capital Region exercise authority over territorially defined matters, such as urban planning, transport, and economic policy. On the other hand, using language rather than territory as a criterion, Belgium is divided into three linguistic communities: the Flemish Community (bringing together Dutch-speakers who live in Flanders and in Brussels), the French Community (assembling French-speakers who live in Wallonia and in Brussels), and a tiny German-speaking Community in the east of the country. These communities have jurisdiction over person-related matters, such as education, culture, and health.¹²¹

118 Constitution, Art. 1. According to Art. 1, 'Belgium is a federal State composed of Communities and Regions'.

119 Wouters and Andriene-Moylan, 2020–2021, pp. 755–756.

120 The initial version of Belgian-style dual federalism (created with the 1970 and 1980 state reforms) as based on the principle of exclusive powers and a complete juxtaposition of the federal government, the regions, and the communities. These foundations were aimed at protecting subnational autonomy by excluding further intergovernmental cooperation and federal oversight and avoiding further interaction between the political representatives of the different language communities. Stefan Sottiaux argued that the paradigm of dual federalism has faced growing pressure due to the emergence of complex intergovernmental policy challenges, including terrorism, pandemics, climate change, and migration. Consequently, Belgium, like other originally dual multi-tiered systems, has recognised that a strictly exclusive distribution of powers is impractical. To address this, constitutional and special courts have developed several constraining doctrines – such as the principle of proportionality, federal loyalty, and the obligations of cooperative federalism – to manage the increasing interdependence of federal and state policies. In summary, Belgian federal practice has introduced significant nuances to the principles of dual federalism. See Reybrouck, 2022.

121 Swenden, 2003, p. 6.

The dual structure means that some citizens fall under the jurisdiction of both a region and a community, adding to the system's complexity. Additionally, the Brussels-Capital Region, being bilingual, interacts with both the Flemish and French Communities. Each region and each community has its own parliament and government and is entrusted with constitutionally assigned powers. In practice, there is a significant overlap between the concept of a Region and a Community. For example, the Flemish Region and Flemish Community merged their institutions, creating a single parliament and government. Contrastingly, separate Regional and Community parliaments and governments continue to exist in the French Community and Walloon Region, although the French Community parliament is entirely composed of MPs who have been directly elected to the Brussels and Walloon regional parliaments, respectively.¹²²

According to Sweden, the incomplete congruence between Regional and Community borders (i.e. Brussels is a Region but not a Community, and the German speakers have been recognised as a Community but not as a Region) has led to the frequently made assumption that Belgium is a major example of asymmetric federalism. However, unlike in Spain or the United Kingdom, the competencies assigned to each of the Regions or each of the Communities are almost identical. For example, although the German-speaking Community is almost 100 times smaller than the Flemish Community, both Communities share similar powers in educational or cultural policies.¹²³

The competencies and responsibilities of the Federation and the Regions and Communities are specified by the Constitution,¹²⁴ and, to a much larger extent, by federal laws. Whilst defence, justice, internal security, taxation policy, and social security (including, for instance, unemployment insurance, pensions, and the bulk of health care) are federal competencies, the competencies assigned to the regional and community level are very detailed and extensive in scope.

In addition to the powers within the Communities' sphere of competence, which are determined by the Constitution (cultural issues, some parts of education, and the use of language), the Communities also have competencies assigned to them by federal laws adopted with a 'special majority' (arts, youth policy, tourism, preventive health care, and some parts of welfare policy). The main regional competence listed by these laws is regional economic development, which includes employment policy, industrial restructuring, environment, nature conservation and rural development, housing, land-use planning and urban renewal, water resources and sewage, energy policy (except for national infrastructure and nuclear energy), road building, waterways, regional airports and public local transport, local and provincial government, agriculture, and external trade. Where no constitutional article listing the powers of the federal government has been approved, the residual power, that is the

122 Swenden, 2003, p. 6.

123 Swenden, 2003, p. 7. See also Swenden, 2002; Agranoff, 1999; Bogdanor, 1999.

124 Constitution, Chapter 2 and Chapter 3, Sec. 2, Sub-Secs. 1, 2, and 3.

powers or competencies which have not been assigned to either level of government, remain in federal hands.¹²⁵

There are several features which distinguish Belgian federalism from federalism in most other federal states. For example, Belgian federal and regional law stand on equal footing, both being subordinate only to the Constitution, except for the power of the Regions to raise income taxes. However, the autonomy of the Regions and Communities does not match their legislative and administrative responsibilities: the Regions have some autonomous tax capacity, but these taxes generate only around 10 to 15% of what they spend.¹²⁶

A second feature that distinguishes the Belgian federal arrangement from most other federal systems lies in the fact that, in Belgium, federal laws are implemented by federal departments or agencies, and Regional or Community laws are implemented by regional departments or agencies. Thus, the extensive legislative autonomy of the Regions and Communities is paralleled by autonomous Regional and Community administrations.¹²⁷

Additionally, in contrast to other federal EU Member States, Belgium is marked by the absence of federation-wide political parties: national policymaking operates under consociational rules, which prescribe the co-operation of political parties representing a majority of the electorate within the Dutch- and French-speaking communities. Political parties representing different linguistic groups must collaborate to form governments at both the federal and regional levels.¹²⁸

Belgium's federal government is composed of the Parliament, the Council of Ministers, and the Monarch. The Belgian Federal Parliament is bicameral, comprising two chambers. The House of Representatives (*Chambre des Représentants/Kamer van Volksvertegenwoordigers*), with 150 members, is directly elected through proportional representation in 11 electoral districts, corresponding to Belgium's Dutch-speaking and French-speaking provinces and the Brussels-Capital Region. Seats are distributed based on the population size of each district. The House holds primary legislative authority and exercises oversight over the government.¹²⁹ The Senate (*Sénat/Senaat*), comprising 60 senators, is not directly elected. Fifty senators are appointed by the parliaments of the regions and linguistic communities,¹³⁰ whilst 10 co-opted senators are selected by their peers based on election results. The Senate serves as a chamber of reflection and coordination between the federated entities. Its primary role is to

125 Swenden, 2003, p. 8.

126 Swenden, 2003, p. 9.

127 Ibid.

128 Ibid.

129 Constitution, Chapter 1, Sec. 1, Arts. 61–66.

130 29 Flemish Parliament appointees, 10 French-speaking Community Parliament appointees, eight Walloon Regional Parliament appointees, two from the French-speaking group of the Brussels-Capital Region Parliament, and one from the German-speaking Community Parliament.

address laws concerning the constitutional structure and the relationships between the federal government and the regions and communities.¹³¹

The federal government comprises the Council of Ministers, headed by the Prime Minister (PM). It consists of up to 15 ministers (including the PM) who are appointed by the King based on the coalition agreement formed after parliamentary elections. They are responsible for various federal ministries, such as finance, justice, and defence. The Council must include an equal number of Dutch-speaking (Flemish) and French-speaking (Vallon) members (excluding the PM). This parity reflects Belgium's linguistic and cultural diversity. Ministers cannot be members of the Federal Parliament. Members of the executive branch also include State Secretaries, who assist ministers in specific areas but do not have voting rights in the Council.¹³²

The King of Belgium is the ceremonial head of state and part of the executive branch. The King formally appoints the Prime Minister and ministers and signs laws, which require countersignature by a minister to take effect. The King's role is largely symbolic, with powers exercised on the advice of the government.¹³³

Belgium's federalism is underpinned by a commitment to consensus and cooperation. Whilst power-sharing mechanisms – such as proportional representation and the requirement for linguistic parity in the federal government (e.g. in the Council of Ministers) – ensure inclusivity, special bodies, such as Consultation Committees, facilitate dialogue between federal, regional, and community authorities to resolve disputes and coordinate policies. However, certain constitutional changes or major decisions require a two-thirds majority in parliament and a majority within each linguistic group. These and other mechanisms can also lead to gridlock, particularly when competing interests arise between regions and communities. Despite its challenges, the Belgian federal model has enabled peaceful coexistence amongst diverse linguistic groups by providing each with significant autonomy.

2.3.4.2. Belgian Federal System and the Principle of Equality Amongst Regions and Communities

As a unique model of governance, Belgium's federal system evolved in response to linguistic, cultural, and political complexities, transforming Belgium into a highly decentralised state that seeks to balance regional autonomy with national unity. Although the Constitution does not explicitly reference the principle of equality amongst Regions and Communities, the imperative to ensure equality amongst them is manifested in several ways throughout Belgium's constitutional framework, including through: (a) legislative autonomy, (b) institutional parity, (c) consensus-based decision-making, and (d) fiscal equalisation.

131 Constitution, Chapter 1, Sec. 1, Arts. 67–73.

132 Constitution, Chapter 3, Sec. 2, Arts. 96–104.

133 Constitution, Arts. 85–95.

Whilst each region and community has its own parliament and government, enabling them to legislate independently in their areas of competence, federal decision-making often requires broad agreement, fostering cooperation amongst Regions and Communities. The use of special majority laws, which require approval from both linguistic groups, underscores this commitment.

According to the Constitution, in the composition of the House of Representatives, Regions and Communities do not play a determinant role, with one exception: the law determines special rules with a view to protecting the legitimate interests of French- and Dutch-speaking people in the former province of Brabant.¹³⁴

Regarding the composition of the Senate, amongst its 60 senators, 29 are Flemish Parliament appointees (plus six senators appointed by them), 10 are French-speaking Community Parliament appointees, eight are Walloon Regional Parliament appointees, two are senators from the French-speaking group of the Brussels-Capital Region Parliament, and one is a senator from the German-speaking Community Parliament.¹³⁵

As for the composition of the Council of Ministers, representation from both major linguistic groups is ensured. For example, the Council of Ministers must have an equal number of Dutch- and French-speaking members.¹³⁶

Another mechanism for upholding equality amongst federal units is fiscal transfers, aimed at reducing economic disparities between regions. This instrument supports economically weaker regions, ensuring equitable access to resources and public services.

Generally, Belgium's federalism is underpinned by a commitment to consensus and cooperation. Power-sharing mechanisms, such as proportional representation in the Senate and the requirement for linguistic parity in the federal government (e.g. the Council of Ministers), ensure inclusivity and equality amongst regions and communities. However, these mechanisms can also delay decision-making and lead to gridlock, particularly when competing interests arise between regions and communities.¹³⁷ Moreover, the divergent political landscapes and cultural identities sometimes hinder consensus, with nationalist movements advocating for greater autonomy or even secession. As a bilingual and multicultural city, Brussels poses additional governance challenges, requiring special arrangements to balance regional and linguistic interests. Another challenge the Belgian federal system faces is the significant economic differences that exist between Flanders, Wallonia, and Brussels.

134 Constitution, Chapter 1, Sec. 1, Art. 63, para. 4.

135 Constitution, Art. 67.

136 Constitution, Art. 99.

137 For example, after a transition period which ended in 1999, federal block grants were redistributed amongst the Regions and Communities in proportion to their population figures. If the destination principle (or principle of 'juste retour') were observed, the Flemish Region would stand to benefit more, whilst the Brussels Capital Region, and Wallonia in particular, would lose some of their resources. All in all, the size of interregional transfers which can be attributed to the method of allocating federal block grants is relatively limited. See Swenden, 2003, p. 9.

Flanders boasts a robust economy with high levels of industrialisation and exports, whilst Wallonia faces challenges related to deindustrialisation and unemployment. These disparities frequently lead to debates over fiscal transfers and resource allocation in view of equality amongst regions and communities.

All in all, the Belgian federal system is a testament to the country's commitment to balancing diversity with unity. As a model of federalism, Belgium demonstrates both the potential and complexity of managing diversity in a deeply divided society.

2.3.5. *Canada*

2.3.5.1. A Summary of the Canadian Federal System

Established in 1867 in the British North America Act, which was renamed the Constitution Act, federalism in Canada is a reflection of its unique geography and history. It is the third oldest federation in the world today, after the U.S. and Switzerland, and second only to Russia in territorial size. Originally a union of four provinces, Canada is nowadays composed of 10 provinces and three territories. Over a century and a half, its federal structure has shaped and protected fundamental aspects of contemporary Canadian society, such as bilingualism, bijuralism, multiculturalism, and a respect for human rights.¹³⁸

The Constitution Act of 1867 created the Dominion of Canada by uniting the provinces, provided the framework for the admission of other parts of British North America, and established the division of legislative powers between the Federal Parliament and the provincial legislatures. The Constitution established a federation that was highly centralised. The federal government was granted more exclusive powers than were held in the already-existing federations of the U.S. and Switzerland. In contrast to the Swiss and the U.S. systems, residual powers were also given to the federal government through its general power over 'peace, order and good government'.¹³⁹ Nowadays, the federal system in Canada reconciles a desire for overall unity with a desire for regional autonomy. Political power is shared by the federal government on the one hand and the provincial governments on the other.

In 1982, the Charter of Rights and Freedoms was adopted as part of the Constitution Act. In Canada, constitutional law contains 25 constitutional texts that make up Canada's Constitution. Additionally, a large part of Canada's Constitution comprises unwritten principles and rules (e.g. constitutional conventions), which are considered rules of political behaviour that are regarded by political actors as binding but are not enforced directly by the courts. For example, the assumption that a Cabinet Minister will hold a seat in the House of Commons, and the practice that the

¹³⁸ See Richard, 2005, p. 5. Whilst, similar to Switzerland, Canadians often use the term 'confederation' to refer to the union established in 1867, the term actually describes the process of uniting the provinces into a federation, rather than the creation of a confederal structure.

¹³⁹ Swenden, 2003, pp. 11–12.

defeat of a major piece of government legislation is also a defeat of the government, are constitutional conventions and are not specified in the written Constitution or in any other document.¹⁴⁰

In Canada, the federal legislative branch is based on the principle of parliamentary democracy and is responsible for making laws, debating national issues, and overseeing government administration. The federal legislature is bicameral, composed of the directly elected House of Commons and the Senate, whose members are appointed rather than elected. The Canadian bicameralism is asymmetric, as the Senate is dominated by the House of Commons.

The House consists of 338 MPs, each representing one electoral district (or riding) across Canada (their number may change based on population shifts).¹⁴¹ These MPs are elected using a first-past-the-post system during federal elections, which are typically held every four years. Provinces and territories are divided into electoral districts. The number of seats in the House of Commons is periodically adjusted to reflect population changes, ensuring effective representation for all provinces and territories. MPs are typically members of political parties, although independents can also be elected. The party with the most seats usually forms the government. If it holds more than half the seats, it forms a majority government; otherwise, it governs as a minority.¹⁴²

The Senate comprises 105 Senators and represents regions to ensure balance in national decision-making. Senators are appointed by the Governor General on the advice of the Prime Minister. Rather than each province having an equal number of Senators (like in the U.S. Senate), the Canadian Constitution specifies the number of Senators allocated to each province.¹⁴³

Executive functions in Canada are divided between the Governor General, who serves as the ceremonial Head of State and formal executive, and the Prime Minister and their cabinet, who function as the political executive. A distinct body within the executive branch is the Privy Council, which provides advice to the government. As is typical in parliamentary systems, real executive power resides with the Prime Minister and their cabinet. It is a well-established convention that the Governor General acts only on the advice of the government. By tradition, the Prime Minister and other Ministers are members of either the House of Commons or the Senate. The party holding a majority of seats in the legislature also controls the executive branch. The cabinet is collectively accountable to the legislature for its actions and remains in office only as long as it retains the confidence and majority support of the legislature.¹⁴⁴

140 Swenden, 2003, pp. 12–13.

141 As of May 2024, the number of members of the House of Commons was increased to 343.

142 Constitution Act 1867, Point 4, Art. 37.

143 Constitution Act 1867, Arts. 21–36. The Senate usually comprises 105 members.

144 Ibid.

The government of the Canadian provinces mirrors that of the national government. The executive is split between a Premier and a Lieutenant-Governor, with one important exception: the provinces have all abolished their Senates and are no longer bicameral.¹⁴⁵

The Supreme Court of Canada is the highest court in the country, addressing cases of national importance, constitutional issues, and appeals from provincial, territorial, and federal courts. It comprises nine justices, who are appointed by the Governor General on the advice of the Prime Minister. The Federal Court of Canada handles cases involving federal statutes, such as immigration, intellectual property, and maritime law, whilst the Federal Court of Appeal reviews decisions from the Federal Court and specific federal tribunals. The Tax Court of Canada deals with disputes between taxpayers and the federal government regarding tax assessments. Each province and territory has its own court system, generally structured into three levels: Courts of First Instance, Superior Courts, and Courts of Appeal. Additionally, there are Specialised and Administrative Tribunals that resolve disputes in specific areas, such as labour, human rights, and regulatory compliance. These tribunals are not part of the formal court hierarchy, but their decisions may be subject to judicial review. Canada's court system operates under the principles of federalism, with both federal and provincial/territorial governments playing roles in its administration.¹⁴⁶

Canada's federalism is intrinsically linked to the concepts of bilingualism and bijuralism. Canada has two legal systems – civil law and common law – which were officially enshrined in the Constitution Act of 1867 under Subsec. 92(13). This provision grants provinces exclusive jurisdiction over property and civil rights. Based on this framework, Quebec has established the Civil Code of Quebec as the foundation of its private law, whilst the rest of Canada adheres to the common law system. The duality of Canada's legal system is also reflected in the composition of the Supreme Court of Canada: under the Supreme Court Act, three of its nine judges must be selected from Quebec.¹⁴⁷

Bijuralism is closely tied to bilingualism, as legislators effectively draft laws for four distinct audiences: Francophones under civil law, Francophones under common law, Anglophones under civil law, and Anglophones under common law.¹⁴⁸

As noted by the Honourable Claire L'Heureux-Dubé and Richard, Canada's official legal culture today transcends being exclusively French or English, civil law or common law. Instead, it encompasses all these elements simultaneously, embracing the inherent ambiguity and complexity of such a pluralistic system.¹⁴⁹

Federalism has been a defining feature of Canada's political system since the country's inception in 1867. This governance model, which involves the division of

145 Constitution Act 1867, Arts. 21–36.

146 Constitution Act 1867, Point 7.

147 Richard, 2005, pp. 22–23.

148 Ibid.

149 Ibid.

powers between federal and provincial/territorial governments, reflects Canada's diverse geography, cultural composition, and historical development. Designed to balance the need for a strong central government with the autonomy of provinces, federalism remains central to Canada's governance and identity, enabling the accommodation of diversity whilst fostering unity.

2.3.5.2. The Principle of Equality Amongst Constituent Parts in the Canadian Federal Model

Canada's federal system is characterised by a division of powers and responsibilities between the federal and provincial governments, supplemented by the unique status of the territories. Whilst the principle of equality amongst Provinces and Territories is not explicitly referenced in the Constitution Act of 1867, the concept is central to the principles of federalism, democracy, and the rule of law. An example of this can be seen in the Canadian Charter of Rights and Freedoms, which guarantees individual rights that indirectly support the principle of equality amongst Provinces and Territories by fostering national standards.

The original confederation included four provinces with proportional representation in the House of Commons and equal representation in the Senate. Over time, the entry of additional provinces and the creation of Territories reshaped the federal landscape, raising questions about how equality should be defined and maintained.

According to the Constitution Act of 1867, the House of Commons uses population-based representation, meaning that individual Provinces and Territories are represented according to the principle of proportional equality,¹⁵⁰ which can create tensions between populous and less-populous provinces and territories. Nevertheless, the composition of the House reflects Canada's population and includes MPs from diverse regions and linguistic communities.

The Senate is structured to provide equitable regional representation, ensuring smaller Provinces and Territories have a voice in federal decision-making. Seats are distributed as follows: 24 from the Maritime provinces, 24 from Quebec, 24 from Ontario, 24 from the Western provinces, six from Newfoundland and Labrador, and one from each Territory.¹⁵¹ The Senate's structure serves as a counterbalance to the population-based representation of the House of Commons, ensuring that Provinces (except for Newfoundland and Labrador) are represented according to the principle

150 Constitution Act 1867, Point 4, Art. 37. In accordance with the Constitution Act of 1867, the House of Commons originally consisted of 308 members, distributed amongst the Provinces and Territories as follows: 106 for Ontario, 75 for Quebec, 11 for Nova Scotia, 10 for New Brunswick, 14 for Manitoba, 36 for British Columbia, four for Prince Edward Island, 28 for Alberta, 14 for Saskatchewan, seven for Newfoundland, one for the Yukon Territory, two for the Northwest Territories, and one for Nunavut. Since the adoption of the Constitution Act, these numbers have been periodically adjusted to reflect changes in population distribution and to ensure equitable representation across the country's Provinces and Territories.

151 Constitution Act 1867, Point 4, Art. 22.

of parity and that less-populous areas are not overshadowed in federal decision-making. Although the current system of appointment of Senators aims to reflect the diversity of Canadian society, including linguistic and cultural backgrounds, proposals have been raised for reforming the Senate to enhance provincial representation and better reflect regional interests and equality.

The Constitution Act of 1867, and subsequent amendments, establish the distribution of powers, ensuring equal authority for provinces in decision-making in areas under their jurisdiction, whilst territories are governed by federal legislation, giving them a different status.

As in most other federations, in Canada one of the major challenges when implementing the principle of equality is economic disparities. Provinces and territories have varying levels of economic development, natural resources, and fiscal capacity, complicating the implementation of equal policies.

Another challenge is the country's cultural and linguistic diversity. The country is officially bilingual, meaning legislative and other legal proceedings occur in both English and French. However, balancing the distinct identities of provinces such as Quebec and Indigenous nations with a commitment to equality requires nuanced policy approaches.

In interpreting federal–provincial relations, a crucial role is played by the courts. For instance, the Supreme Court's decisions in cases such as *Reference re Secession of Quebec* (1998) emphasise respect for the principles of federalism and equality.¹⁵²

The principle of equality amongst Provinces and Territories is both a cornerstone and a challenge of Canadian federalism. Balancing equality with recognition of diversity requires ongoing dialogue, cooperation, institutional innovation, and a commitment to justice.

2.3.6. Defunct Federal Systems: The Principle of Equality Amongst Republics and Nations in the Socialist Federal Republic of Yugoslavia

On the formal side, the constitutional arrangement of post-war socialist (also called 'second') Yugoslavia placed great emphasis on the principle of equality amongst nations and federal units. The 1974 Constitution, as the last of the three constitutions of the second Yugoslavia, repeatedly emphasised the unity of Yugoslavia's nations and that these nations 'united on a freely expressed will into a federal republic of free and equal nations and nationalities'.¹⁵³

The Basic Principles of the 1974 Constitution further asserted that the Socialist Federal Republic of Yugoslavia (SFRY), in the interest of each individual nation and nationality, as well as collectively, strives to establish 'a system of socioeconomic relations and a unified political foundation that ensures the common interests of the working class and all working people, along with the equality of nations and

¹⁵² Supreme Court of Canada, *Reference re Secession of Quebec*, (1998) 2 SCR 217.

¹⁵³ Constitution of the SFRY 1974, Basic Principles, Sec. I.

nationalities'. Additionally, the Basic Principles underscored the equal participation of the republics and autonomous regions within the federation's governing bodies, promoting communication, solidarity, and reciprocity amongst the republics and regions.¹⁵⁴

Employing typical socialist terminology, the Basic Principles of the 1974 Constitution also stressed the importance of upholding the principle of equality amongst nations and republics in the context of the socialist economy. The principles stipulated that, with the goal of establishing a material foundation for the equality of Yugoslavia's nations and nationalities, and for levelling the material conditions of social life and work for all working people, special attention must be given to the economically less developed republics and autonomous regions. Additionally, the Constitution highlighted the importance of ensuring equality amongst nations and nationalities, as well as in republics and autonomous regions, in areas such as workers' self-management, education, and international cooperation.¹⁵⁵

The normative part of the 1974 Constitution established that the SFRY is a federal state founded, amongst other principles, on the equality of nations and nationalities. Art. 178 of the 1974 Constitution stipulated that any propagation or implementation of national inequality was unconstitutional and criminal. The Constitution contains several other explicit references to the principle of equality amongst nations and republics regarding participation and responsibility of the republics and autonomous regions for determining and implementing the federation's policies:¹⁵⁶ prohibition of laws, regulations, or actions that place organisations of united labour or working people from other republics and autonomous regions – and consequently those republics and autonomous regions – in an unequal position;¹⁵⁷ the unified Yugoslav market;¹⁵⁸ and the contributions of the republics and autonomous regions, which form part of the federation's income.¹⁵⁹

The composition of the bicameral Federal Assembly and other federal bodies was outlined in the Fourth Part of the 1974 Constitution. The Federal Assembly comprised the Federal Council and the Council of the Republics and Regions. The Federal Council was made up of delegates from self-governing communities and socio-political organisations within the republics and autonomous regions, and the Council of Republics and Regions comprised delegations from the assemblies of the republics and the assemblies of the autonomous regions. Whilst the Federal Council included 30 delegates from each republic and 20 delegates from each autonomous region, the Council of Republics and Regions comprised 12 delegates from each republic's assembly and eight delegates from each autonomous region's assembly. Members of the working bodies of the Council of Republics and Regions were elected from amongst

154 Constitution of the SFRY 1974, Basic Principles, Sec. I.

155 Constitution of the SFRY 1974, Secs. 2–8.

156 Constitution of the SFRY 1974, Third Part, Chapter 1, Art. 244.

157 Constitution of the SFRY 1974, Art. 254.

158 Constitution of the SFRY 1974, Art. 256.

159 Constitution of the SFRY 1974, Art. 279.

the delegates, following the principle of equal representation of the republics and appropriate representation of the autonomous regions.¹⁶⁰

In order for laws to be passed and other powers of the Council of Republics and Regions to be exercised, the consent of the assemblies of all republics and autonomous regions was required, whereby the assembly of a federal unit could authorise its delegation in the Council of Republics and Regions to grant such consent.¹⁶¹ If the assemblies of the republics and autonomous regions failed to reach consensus on a draft law, the Federal Assembly could, under special conditions, on the proposal of the Federal Executive Council, enact a law on temporary measures without the consent of the assemblies of the republics and autonomous regions.¹⁶²

According to the 1974 Constitution, the Yugoslav Federation had a collective Presidency, consisting of one member from each republic and autonomous region, elected by the assembly of that republic or autonomous region.¹⁶³ The Presidency made decisions based on 'the coordinated positions of its members'.¹⁶⁴

The Federal Executive Council, the executive body, was also elected according to the principle of equal representation of the republics and with 'adequate representation' of the autonomous regions. The same applied to the appointment of federal secretaries and other officials who headed federal administrative bodies and organisations and were members of the Federal Executive Council. The Federal Executive Council made decisions by majority vote of the members present at the meeting. However, it issued regulations for the implementation of laws and other general acts adopted by the Council of Republics and Regions with the consent of the competent republican and regional bodies, provided that these laws and acts required the harmonisation of the positions of the federal units.¹⁶⁵

The 1974 Constitution also addressed the situation where the Federal Executive Council failed to reach a consensus with the competent republican and regional authorities on a proposed regulation for the enforcement of a law. In such cases, the Federal Executive Council could adopt a special regulation on temporary measures, provided the Presidency of the SFRY agreed that such a regulation was necessary. The Federal Executive Council adopted the regulation on temporary measures by a majority vote of all its members.¹⁶⁶

The federal judicial system comprised the Constitutional Court and the Federal Court of the SFRY. The Constitutional Court consisted of a President and 13 judges

160 Constitution of the SFRY 1974, Fourth Part, Chapter 1, Arts. 291–292 and 297.

161 Constitution of the SFRY 1974, Arts. 297–298.

162 Constitution of the SFRY 1974, Art. 301.

163 Constitution of the SFRY 1974, Art. 321.

164 Constitution of the SFRY 1974, Art. 330. Whilst Art. 333 of the 1974 Constitution made the election of the President of the Republic optional rather than obligatory, in recognition of his historical role in the National Liberation War and the socialist revolution, Josip Broz Tito was elected as President of the Republic without a term limit already in 1953.

165 Constitution of the SFRY 1974, Art. 355.

166 Constitution of the SFRY 1974, Art. 356.

elected by the Federal Assembly. Two members from each republic and one member from each autonomous region were elected to the Constitutional Court. Decisions and resolutions were adopted by a majority vote of all members of the Constitutional Court. The principle of equal representation of all republics and adequate representation of autonomous regions was also taken into account in the composition of the Federal Court.¹⁶⁷

Before assuming their duties, the highest officials of the federal authorities took an oath to uphold the sovereignty and independence of the country, to defend socialist values, and to ensure the equality of nations and nationalities.¹⁶⁸

In summary, in the constitutional law of the post-war Yugoslav federation, especially according to the 1974 Constitution, the principle of equality of nations and republics played an important role. The principle of equality of nations and/or republics was repeatedly highlighted in various contexts, both in the Basic Principles and in the normative part of the Constitution.¹⁶⁹ Any actions that would promote inequality between the nations of Yugoslavia were considered not only unconstitutional but also criminal. In its later stage, the Yugoslav Federation exhibited several elements of a confederal arrangement, since both chambers of the Federal Assembly were composed according to the principle of parity. The nations and republics (i.e. federal units) were equally represented not only in the lower chamber of the legislative body, which is common in federal systems, but also in the upper chamber. The Presidency of the SFRY and other key federal bodies (i.e. the executive and judicial branches) were also composed based on parity, and any changes to the federal constitution required the consent of all federal units. As a representative body of federal units, the Council of Republics and Regions made decisions in principle by consensus amongst the Assemblies of the Republics or their representatives. However, if this could not be achieved, decision-making was transferred to the Federal Executive Council. The Federal Executive Council itself issued regulations for the implementation of laws and other general acts adopted by the Council of Republics and Regions with the consent of the competent republican bodies.

In contrast to a considerably dynamic and differentiated enforcement of the principle of equality amongst federal units in most existing federations, in the Yugoslav federal system the principle of equality amongst the republics was enforced significantly more rigidly, due to the formal equality of the members of the federation, which was based on the principle of parity (e.g. numerically equal representation of the republics, regardless of the size and number of inhabitants, in the federal bodies on the one hand, and decision-making by consensus in matters related to the position and rights of the federation's members on the other hand). In the late 1980s, this

167 Constitution of the SFRY 1974, Art. 370.

168 Constitution of the SFRY 1974, Chapter 8, Art. 397.

169 The 1974 Constitution contains more than 60 direct references to the principle of equality amongst either nations or republics, or both.

rigid system and the confederal elements in the Yugoslav federal system¹⁷⁰ fuelled the centralist tendencies of the federal authorities and Serbia, the largest republic, on the one hand, and, on the other hand, efforts towards decentralisation, greater autonomy, and, eventually, separation from Yugoslavia and independence of the northern, more developed republics. In the last three years before the disintegration of the SFRY, the confederal nature of the country, along with the ambitions of one federal unit to secure a dominant position over the others, escalated to the point of irreconcilable differences between some nations and republics, as well as between the federation and certain republics. Resultantly, neither the federal nor the confederal system could be maintained, leading to the country's eventual collapse.

2.4. Confederations and the Principle of Equality Amongst Their Member States

2.4.1. Concept, Origins and Characteristics of Confederatism and Confederations

Confederalism and confederation are terms frequently used in legal and political discourse to describe systems of governance that prioritise regional autonomy within a loosely integrated framework. Confederalism, defined by the voluntary association of sovereign states or regions, is distinguished by its strong emphasis on regional autonomy and limited central authority. Confederations, conversely, represent the practical implementation of confederal principles. Drawing from Wheare, Ola defined a confederation as 'an association or union of sovereign states, such a union being so arranged that the central government, in the exercise of its functions, is dependent on the regional governments'.¹⁷¹ Both confederalism and confederation emphasise the importance of autonomy, cooperation, and voluntary association amongst Member States. Although there are few modern examples of confederal arrangements, these concepts remain highly relevant in contexts that require flexible, multilateral approaches to governance.

As shown in the previous sections, a federal system divides powers between the central and regional governments, so that each operates independently and is coordinated within its respective sphere of authority. A federation ensures a more balanced sharing of sovereignty, with both levels of government enjoying constitutionally protected powers. Other distinguishing features of a federal system include the presence of dual authority, whereby both the regional and central governments

170 The fundamental relationship between the republics, as federal units, and the federation was structured in such a way that, at least in principle, the republics were the primary holders of state power. The federation held state power only in areas where the federal constitution explicitly transferred powers to it. Furthermore, and as mentioned earlier, the 1974 Constitution of the SFRY emphasised that the Yugoslav Federation was founded on the voluntary and consensual union of the nations of Yugoslavia, based on the right of each nation to self-determination and secession.

171 Ola, 1968, p. 271.

exercise powers independently within their jurisdictions, and judicial review, which Dicey famously described as the ‘inner essence of federalism’. Judicial review ensures that conflicts between the central and regional governments are resolved through an impartial legal framework, reinforcing the constitutional balance inherent in federal systems. Unlike federal systems, confederalism places sovereignty firmly with the Member States. In a confederation, central authority is typically weak and derives its powers from voluntary agreements or treaties amongst the states. Additionally, decision-making at the central level in a confederation usually follows the principle of unanimity rather than majority rule. Resultantly, no decision by the central government is binding on any regional government unless the latter explicitly agrees to it.¹⁷²

Jean-Jacques Rousseau and Immanuel Kant, amongst others, have significantly contributed to the intellectual foundations of confederalism. Rousseau’s concept of a confederation emphasised collective security whilst maintaining the autonomy of individual states.¹⁷³ Kant envisioned a league of nations to manage conflicts, promote peace, and prevent war amongst states, foreshadowing the modern application of confederal principles in international organisations such as the EU.¹⁷⁴

Several historical examples illustrate the implementation of confederal principles, one notable case being the Swiss Confederation (1291–1848). Switzerland operated as a confederal system for approximately five centuries, during which much of its history was shaped by the struggle against a common external adversary – the Habsburgs. As discussed in Sec. 2.3.3 of this chapter, the country transitioned from a loose confederation, established by three German-speaking cantons in 1291, to a federal state.¹⁷⁵

Other historical instances of confederation include the Articles of Confederation (1781–1789) and the German Confederation (1815–1866). The establishment of the American confederation was driven by motivations similar to those of Switzerland, particularly a shared fear of an external threat – in this case, Great Britain. When British imperial policies became intolerably oppressive, the 13 American colonies organised their resistance. The Articles of Confederation, adopted by the Continental Congress on November 15, 1777, served as the U.S.’s first constitution. This document remained in effect from March 1, 1781, until 1789, when the current U.S. Constitution was enacted.

The origins of the German Confederation differ somewhat from those of the American and Swiss confederations. A loosely organised dominion of Germanic tribes existed during the thousand-year span of the Holy Roman Empire. This ‘First Reich’ (800–1806), a semi-confederal system, emerged as a result of Charlemagne’s consolidation of imperial authority. The German Confederation was formally established

172 McWhiney, 1962, pp. 5–6.

173 Rousseau, 1917.

174 See Kleingeld, 2004, pp. 304–325.

175 Ola, 1968, p. 273.

after the Napoleonic Wars, aiming to balance the autonomy of German states with a framework for collective governance. Following Napoleon's conquest of Europe, he reorganised over 300 German states into the Confederation of the Rhine. In 1815, the Congress of Vienna established the German Confederation, comprising 39 states, as part of the post-Napoleonic reordering of Europe.¹⁷⁶

Modern examples of confederal arrangements are uncommon, as the model often faces inefficiencies and challenges in decision-making. Moreover, a confederal model of government is often difficult to distinguish from an international or supranational organisation. The decision-making process in a confederal system is notably similar to that of international organisations such as the United Nations, where decisions are not binding on members unless they consent. However, an international organisation represents a looser association than a confederation. Whilst it may act as a corporate entity for certain activities, each member nation retains its own system of external relations and distinct legal personality under international law.¹⁷⁷ A confederation can be seen as occupying a middle ground between an international organisation and a federation.

Similar challenges apply when distinguishing between a confederation and a supranational organisation. For instance, the EU, as a supranational organisation, exhibits certain confederal elements, particularly through its decentralised structure and consensus-driven decision-making processes. Whilst not a confederation in the strict sense, the EU shares features such as the preservation of Member-State sovereignty. However, it differs from a confederation in that it is a body composed of distinct 'corporate personalities' under international law. The EU, as a supranational organisation, also exhibits certain characteristics of a federal system. These include the establishment of its own legal order, known as the *acquis communautaire*, and the fact that specific decisions made by its institutions are directly binding on Member States. Furthermore, the principle of the supremacy of primary EU legal sources over the domestic laws of Member States has been firmly established (further discussion of the EU will be provided in Sec. 4 of this chapter).

Whilst elements of confederalism can be observed in various international and supranational organisations as well as regional unions, the Commonwealth of Independent States (CIS), established following the dissolution of the Soviet Union, may be considered one of the few remaining examples of a loosely confederal model aimed at economic and political cooperation.

176 Plischke, 1962, p. 3.

177 Ola, 1968, p. 272.

2.4.2. *The Commonwealth of Independent States*

2.4.2.1. Origins and History

Following the collapse of the Soviet Union in late 1991 and the failure of the proposed New Union Treaty of the Union of Soviet Socialist Republics (USSR), a separate economic, political, and military union, known as the Commonwealth of Independent States (CIS), was established. It was initially formed by the new leaders of Belarus, Russia, and Ukraine as a framework for cooperation after the dissolution of the Soviet Union. Georgia later joined, whilst the Baltic States opted not to participate. Ultimately led by the Russian Federation, recognised as the legal successor to the Soviet Union, the CIS is often regarded as a largely symbolic union (e.g. a confederation) with limited practical impact. However, as Linich argued in his study, there is more to the CIS than meets the eye: its creation, original objectives, and subsequent evolution highlight its significance as a key element of Russia's foreign policy.¹⁷⁸

By the early 1980s, the Soviet Union was facing mounting challenges, including economic stagnation (centralised planning had resulted in declining productivity), a technological lag (particularly in consumer goods and information technology), geopolitical pressures stemming from the Cold War (the costly arms race with the U.S. placed immense strain on the Soviet economy), and growing social discontent (citizens became increasingly frustrated with shortages of goods and limited freedoms). Upon assuming power in 1985, Mikhail Gorbachev launched sweeping reforms collectively known as *Perestroika*, meaning 'restructuring' in Russian. Coupled with *glasnost* (openness), *Perestroika* represented an ambitious effort to tackle systemic economic stagnation, bureaucratic inefficiency, and the Soviet Union's waning global influence. It marked a radical departure from the rigid policies of Gorbachev's predecessors.

Perestroika aimed to address systemic issues through a series of economic, political, and social reforms.¹⁷⁹ Whilst ambitious in scope, its implementation encountered significant obstacles, leading to far-reaching consequences. Instead of delivering the anticipated economic revival, the reforms worsened economic conditions, intensifying shortages and unemployment. Moreover, as the Communist Party's

¹⁷⁸ Linich, 2023, p. 2.

¹⁷⁹ The first version of the *Perestroika*, which placed a priority on boosting the economy quickly (involving, inter alia, greater pressure placed on the labour industry to make the USSR as productive as possible), lasted only one year. Gorbachev then took the policy in a direction he thought would be much more effective. The second phase saw more radical changes, such as the introduction of competitive elections and the encouragement of the emergence of opposition parties and groups. Believing that the only way to modernise the USSR economy was to embrace a more left-wing approach to government, his *Glasnost* policy, which granted never-before-seen freedoms and rights in the USSR – such as freedom of expression, more access to information, and a relaxation of censorship – was an attempt to create a more interactive society. See Linich, 2023, p. 14.

control weakened, previously suppressed political movements gained traction. Ultimately, the combined effects of economic instability, political fragmentation, and nationalist uprisings culminated in the gradual dissolution of the Soviet Union.

Opposition groups, rising nationalism, and economic challenges threatening the survival of the USSR compelled Gorbachev to propose a reformed union – one based on voluntary membership, allowing each republic the freedom to choose its participation. In November 1990, a special committee drafted a new constitution for the USSR, known as the New Union Treaty. The treaty proposed sweeping changes aimed at fundamentally transforming the structure and nature of the Soviet Union since its inception.¹⁸⁰

Gorbachev decided to submit the New Union Treaty to a referendum, but only nine republics agreed to participate. Six republics – Armenia, Georgia, Moldova, and the Baltic states – not only refused to join the proposed new union, but outright rejected the treaty and pushed for independence from the USSR. In March 1991, the referendum was held in the nine republics that agreed to the treaty, signalling their willingness to proceed with a restructured USSR. The treaty was approved by voters and was set to be formalised, under the new name Nine Plus One Agreement, in August 1991.¹⁸¹

However, the signing did not occur due to a coup attempt provoked by resistance to Gorbachev's efforts to reshape the USSR. Although the coup failed, significant political shifts followed. Boris Yeltsin, who had won Russia's first presidential election in June 1991, emerged as a vocal critic of the Soviet government and called for greater democratic reforms. His election marked a pivotal moment, as Gorbachev no longer had a compliant ally in the role of Russia's president.¹⁸²

These developments led to the ultimate failure of the New Union Treaty and the collapse of the USSR in December 1991. This marked the end of a major geopolitical entity and gave rise to a collection of independent nations. To manage the transition and maintain some level of cooperation, 11 nations initially formed the CIS, which serves as a platform for dialogue and collaboration on issues ranging from trade and security to cultural exchange.

The CIS was formally established on December 8, 1991, with the signing of the Belovezh Accords by Belarus, Russia, and Ukraine. This agreement declared the dissolution of the Soviet Union and created the CIS as its successor organisation for participating states. Shortly afterward, eight other former Soviet republics joined,

180 The draft of the New Union Treaty contained, *inter alia*, a principle that each party to the treaty has: the right to sovereignty; a full power to run their own matters without interference or the blocks of a centralised USSR government; independently determine their national-state; the right to manage their own foreign affairs; and the right of every citizen to travel and leave the territories of the union (which was not a freedom in the USSR previously). The draft Treaty also included the right to a voluntary membership, which was also a right included in the original 1922 Soviet Union Constitution but was never exercised by any USSR republic. Linich, 2023, p. 21.

181 Nuclear Threat Initiative, 2024.

182 *Ibid.*

bringing the total membership to 11. Turkmenistan later became an associate member, whilst the three Baltic states – Estonia, Latvia, and Lithuania – chose not to join.

Upon its establishment, the CIS members adopted the Alma-Ata Declaration, which affirmed their commitment to cooperation across various areas of external and internal policy. The declaration also guaranteed the implementation of international commitments previously undertaken by the Soviet Union.¹⁸³

2.4.2.2. Structure, Functioning, and the Principle of Equality Amongst Member States

The CIS operates through a decentralised structure, with decisions primarily made by consensus. The key bodies of this regional union, often described as a confederation, include: (a) Council of Heads of State, the highest decision-making body, responsible for setting strategic priorities; (b) Council of Heads of Government, which focuses on economic cooperation and the implementation of agreements; (c) Councils of Foreign Ministers, Defence Ministers, and Border Troops Commanders; (d) Inter-Parliamentary Assembly; (e) Executive Committee, a body based in Minsk, Belarus, which coordinates the activities of the CIS and facilitates the implementation of decisions; (f) Interstate Economic Committee of the Economic Union; and (g) Sectoral Councils, which address specific areas of cooperation, such as economic collaboration, defence, transportation, and education.¹⁸⁴ Additionally, the CIS includes institutions such as the Economic Court and the Commission on Human Rights. Meetings of CIS bodies are held periodically on a rotating basis in the capitals of Member States.

The functions of the CIS include coordinating Member States' policies regarding their economies, foreign relations, defence, immigration, environmental protection, and law enforcement. In particular, the CIS aims to foster cooperation amongst its Member States in areas such as economic integration, facilitating trade, and enhancing economic collaboration through agreements such as the CIS Free Trade Area (CISFTA), established in 2011.

In the realm of security collaboration, the CIS addresses regional security concerns, including counterterrorism and border management, often in conjunction with the Collective Security Treaty Organization (CSTO) – a separate but closely related entity. The CIS also promotes cultural ties and works to protect the rights of ethnic groups across Member States. Regarding conflict resolution, it provides a platform for mediating disputes amongst Member States, although its effectiveness has been limited.

¹⁸³ Nuclear Threat Initiative, 2024.

¹⁸⁴ Ibid.

The CIS operates in accordance with its Charter, adopted by the Council of Heads of States on January 22, 1993.¹⁸⁵ This foundational document outlines the Commonwealth's goals, principles, and the rights and responsibilities of its member countries. The Charter emphasises that the CIS is based on the principle of sovereign equality amongst all members, affirming their independence and equal status under international law. The spheres of joint activity amongst the Member States are founded on those states' equality of rights.¹⁸⁶

Additionally, the Charter highlights the CIS's role in fostering the development and strengthening of friendship, inter-ethnic harmony, trust, mutual understanding, and collaboration amongst Member States. The Commonwealth does not possess supranational powers; interactions amongst countries within the CIS are conducted through its coordinating bodies. However, obligations arising during participation in the CIS Charter are binding on the relevant states until full compliance is achieved. Violations of the Charter by Member States, or a systematic failure by a state to fulfil its obligations under agreements concluded within the framework of the Commonwealth, or decisions made by its bodies, will be examined by the Council of Heads of States. Measures permitted under international law may be imposed on such states.¹⁸⁷

According to the Charter, the Council of Heads of States is the highest body of the CIS, in which all Member States are represented at the top level. It discusses and takes decisions on the principal issues relating to the activity of the Member States in the field of their mutual interests. Whilst the Council holds its regular meetings twice a year, extraordinary meetings may be convened at the initiative of any of the Member States.¹⁸⁸

The second most important body of the CIS is the Council of Heads of Governments, in which all Member States are represented by their prime ministers. It coordinates cooperation amongst the executive power organs of Member States in economic, social, and other spheres of mutual interest. Whilst the Council of Heads of States and the Council of Heads of Governments take decisions on the basis of consensus, Heads of States and Heads of Governments preside over the meetings on a rotating basis according to the Russian alphabetical order of the names of the Commonwealth Member States.¹⁸⁹

Other main bodies of the Commonwealth include the Council of Ministers for Foreign Affairs, the Council of Defence Ministers, the Council of the Frontier Troops Chief Commanders, and the Coordination and Consultative Committee. As a permanent executive and coordinating body of the Commonwealth, the latter comprises

185 Multilateral Charter of the Commonwealth of Independent States (with declaration and decisions). Adopted in Minsk on 22 January 1993.

186 Charter of the Commonwealth of Independent States, Chapter 1, Arts. 1 and 4.

187 Charter of the Commonwealth of Independent States, Chapter 4. See also Nuclear Threat Initiative, 2024.

188 Charter of the Commonwealth of Independent States, Chapter 4, Art. 21.

189 Charter of the Commonwealth of Independent States, Arts. 22–24.

permanent full-fledged representatives who are appointed according to the parity principle – two representatives from each state.¹⁹⁰

Two CIS bodies also merit attention: the Economic Court and the Commission on Human Rights. The Commission is a consultative body comprising representatives of all Commonwealth Member States.¹⁹¹

Despite its broad objectives, the CIS has faced numerous challenges. The organisation's effectiveness and relevance have been subjects of debate since its inception. Member States often pursue conflicting national interests, which limit the effectiveness of collective decision-making. Some members, such as Georgia, have reduced their engagement, whilst others, like Ukraine, have withdrawn entirely due to political tensions.¹⁹²

Although the Charter enshrines certain principles, in practice, the CIS lacks binding authority and relies on voluntary compliance, undermining its ability to implement agreements. Furthermore, Russia's dominance within the CIS poses a significant challenge to realising the principle of equality amongst Member States, as well as other principles such as sovereignty and the goals outlined in the Charter. This dominance raises concerns about the continued existence of the CIS itself.

A clear illustration of Russia's informal status as a leading and privileged member of the CIS is the designation of the official language. The original agreement to establish the CIS in December 1991 granted equal status to the languages of the three founding members – Russia, Belarus, and Ukraine – by creating three official copies of the agreement, each in one of the languages. However, the Charter designates Russian as the CIS' official language, and there is only one official copy of the Charter, which is in Russian. This situation undermines the status of the other two founding members.¹⁹³

Additionally, the initial text of the Agreement to Create the CIS included a significant provision stating that the CIS would have 'singular control' over nuclear arms. In practice, however, the CIS allowed Russia to maintain control over its neighbours similar to that exercised by the Soviet Union. Furthermore, the Charter permitted a Russian military presence in various CIS countries as part of their agreement to join the organisation.¹⁹⁴

190 Charter of the Commonwealth of Independent States, Art. 29.

191 Charter of the Commonwealth of Independent States, Arts. 32–33.

192 The Charter does have provisions that allow Member States to formally leave the CIS (Art. 9), but only Georgia and Ukraine have attempted to do so. Both countries were attacked by Russia shortly after indicating their intentions to withdraw from the CIS and have endured either direct annexation by or significant occupation from Russia. Ukraine severed all ties with the CIS in 2018; however, its departure has not been recognised by either the CIS or any of its Member States, as Ukraine is still listed as a founding and active member on the official CIS website. Contrastingly, Georgia was eventually permitted to fully leave the CIS. See Linich, 2023, p. 77.

193 Linich, 2023, p. 43.

194 Linich, 2023. Georgia, Belarus, Armenia, Moldova, Tajikistan, Kazakhstan, and Kyrgyzstan have had Russian troops in their countries as part of CIS military cooperation.

Several other developments support the claim that Russia, as a Member State, plays a leading role and that the equal status of other Member States is diminished. For instance, after significantly reducing its involvement in the CIS and considering an exit from the Russian-dominated organisation, Moldova's pro-Western government submitted a formal application for EU candidate status in 2022. It now seems more likely than ever that Moldova will leave the CIS and Russia's sphere of influence. The Moldovan leadership did not attend the CIS summit in Astana, Kazakhstan, in October 2022, and they have gradually withdrawn their representatives from the organisation over the past few years.¹⁹⁵

Despite its limitations, the CIS has made notable contributions. For example, the CIS Free Trade Area has facilitated trade amongst participating states, albeit with varying levels of implementation. The CIS has supported cultural and educational programmes, fostering ties amongst its nations. Whilst its influence has waned in recent years, it continues to serve as a platform for cooperation amongst its Member States and a forum for dialogue.

3. The Principle of Equality Amongst Member States in International Organisations With Supranational Elements

*Just as a midget is a man no less than a giant, so a tinny republic
is no less sovereign than the most powerful of kingdoms.*
Emmerich de Vattel

The principle of equality amongst Member States in international organisations is grounded in the concept of sovereign equality – a fundamental tenet of international law. This principle asserts that every sovereign state is entitled to be regarded as equal to all other states and that all states, regardless of their size, wealth, or power, share equal legal rights and responsibilities. In legal literature, the principle of state equality initially emerged as a development of natural law theory during the Enlightenment, drawing an analogy between the rights of individuals and those of states.¹⁹⁶

Over time, a principle initially conceived as a declaration of formal equality before the law evolved into a widely accepted postulate. Its original purpose was to protect smaller or weaker states from domination by larger, more powerful ones. This principle affirmed the independence of states, prohibited interference in their

¹⁹⁵ Linich, 2023, p. 78. Linich argued that these are the exact methods of pressure used with Georgia from 2004–2008. Unlike Ukraine and Georgia, Moldova does not share a border with Russia, nor do the two have any cultural or linguistic ties.

¹⁹⁶ See Rossi, 2017, pp. 4–5.

internal affairs, and granted each state immunity from the jurisdiction of others. However, it soon became evident that formal equality amongst states rarely translated into substantive equality – namely, an equality of power relations. Consequently, the principle faced criticism from proponents of legal positivism.¹⁹⁷ Hans Kelsen, amongst others, contended that the principle of equality – which holds that under identical conditions, states possess the same rights and duties – is an empty formula, as it remains applicable even in cases of extreme inequalities amongst states.¹⁹⁸

The principle of sovereign equality amongst states was upheld at the international peace conferences held at The Hague in 1889 and 1907, encapsulated in the motto ‘One State, one vote’. However, this principle was not mentioned in the Covenant of the League of Nations. Contrastingly, the United Nations Charter explicitly states, in its Preamble, that all nations, both large and small, have equal rights. Article 2(1) further emphasises that the organisation is founded on the principle of sovereign equality amongst its members.

The UN General Assembly recognises this principle as ‘the principle of the sovereign equality among States’ in its Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.¹⁹⁹ The Declaration outlines the specifics of ‘sovereign equality’ by asserting that all states possess equal rights and responsibilities and are equal members of the international community, regardless of any economic, social, political, or other differences. According to the Declaration, sovereign equality encompasses several key elements: (a) States are judicially equal; (b) Each state enjoys the rights inherent in full sovereignty; (c) Each state has a duty to respect the personality of other states; (d) The territorial integrity and political independence of each state are inviolable; (e) Each state has the right to freely choose and develop its political, social, economic, and cultural systems; (f) Each state is obligated to comply fully and in good faith with its international obligations and to live in peace with other states.

Rossi argued that this Declaration reflects a time when decolonisation was underway, and equality amongst states was widely viewed as a natural consequence of their independence as subjects of international law.²⁰⁰

In the fields of international relations and international law, it is widely recognised that the principle of formal equality amongst states, as outlined in international treaties, can lead to inequality and unfairness due to the unequal power dynamics that exist between them. To address this issue, international law has introduced exceptions to the principle of formal equality whilst still upholding it conceptually. These exceptions are based on the assumption that states within the international community are interdependent and voluntarily limit their sovereignty through the organisations and treaties they choose to join. However, these agreements can also

197 Rossi, 2017, p. 5.

198 Ibid.

199 Resolution 2625, 24 October 1970.

200 Rossi, 2017, p. 6.

provide a basis for substantive limitations on their formal equality, whilst considering other fundamental principles of international law, such as the principle of state sovereignty and the principle of sincere cooperation amongst states.²⁰¹

International and supranational organisations implement the principle of equality amongst their members – whether in its formal or substantive form – through two primary mechanisms: (a) quantitative representation in decision-making bodies and (b) voting rules. Rooted in democratic principles, both global and regional organisations often face the challenge of balancing diverse interests with equitable participation for all Member States. This tension highlights a central question in international law: is it more democratic and just to adopt a decision-making system that grants equal weight to all states based on their equal sovereignty, or is the principle of equality better realised through a system that accounts for the populations of individual states? In practice, relatively few international and supranational organisations have moved away from formal equality – such as the ‘One State, One Vote’ model – towards approaches that aim to reflect substantive equality, though interpretations of what substantive equality entails vary.²⁰²

In theory, the principle of equality amongst states implies that any decision affecting a state should require its consent, and no majority of states should impose decisions against the will of a single state. Consequently, in an international organisation, this principle would ideally manifest as a unanimous voting rule, granting smaller states veto power to protect their interests. However, because the unanimity rule often results in gridlock and undermines the organisation’s effectiveness,²⁰³ many international organisations seek to balance equality with efficiency by curtailing the former to enhance the latter. Notably, organisations that incorporate supranational elements into their structures increasingly adopt voting systems designed for efficiency, often excluding the veto power altogether.²⁰⁴

This Sec. focuses on three regional international organisations – distinct from the EU – that incorporate supranational elements into their structures or exhibit a clear tendency to develop such elements and to evolve from international to supranational entities. Each organisation will be introduced briefly, followed by an analysis of how the principle of equality is defined and applied in practice amongst Member States. The discussion highlights the significance of this principle, its implications, and the challenges it presents in fostering cooperation amongst Member States within each organisation.

201 Rossi, 2017, p. 7. The Declaration on Principles of International Law asserts, *inter alia*, that the basic principles of international law outlined in the Declaration are interconnected.

202 Rossi, 2017, p. 8.

203 Such an example is the League of Nations, whose decision-making ability had been paralysed by the unanimous voting rule. See Rossi, 2017, p. 9.

204 *Ibid.*

3.1. *The African Union*

3.1.1. *An Outline of the Creation, History, Objectives, Structure, and Functioning of the African Union*

The African Union (AU) is a continental body comprising 55 Member States (all 54 African UN members plus the Sahrawi Arab Democratic Republic) that make up the countries of the African continent. It was officially launched in 2002 as a successor to the Organisation of African Unity (1963–1999). The AU recognises democratic governance, peace, and security as the foundations of regional integration and sustainable development on the continent.

In May 1963, 32 leaders from independent African nations met in Addis Ababa, Ethiopia, to sign the Charter establishing the Organisation of African Unity (OAU)²⁰⁵ – the continent’s first institutional framework after gaining independence. The OAU represented a pan-African celebration of the continent’s cultural and shared heritage, reflecting a commitment to the communal values inherent in African societies and a vision for a united, liberated Africa that could determine its own future. This vision was articulated in the OAU Charter, where the founders emphasised the importance of freedom, equality, justice, and dignity in fostering collaboration amongst African nations. They sought to address the common desire for solidarity and unity amongst Africans, aiming to realise aspirations for cohesion that transcended ethnic and national divisions.²⁰⁶

The OAU Charter outlined several key objectives, including the elimination of the remnants of colonisation and apartheid from the continent, fostering unity and solidarity amongst African nations, enhancing cooperation for development, protecting the sovereignty and territorial integrity of Member States, and promoting international collaboration.²⁰⁷ The OAU Coordinating Committee for the Liberation of Africa played a crucial role in uniting the continent’s efforts and securing global support for the liberation movement and the fight against apartheid. Additionally, the OAU served as a vital platform for Member States to align their positions on common concerns, effectively advocating for Africa’s interests on the international stage.

Following the OAU’s decision in September 1999, to create a new continental organisation to build on its work,²⁰⁸ the AU was officially launched in July 2002 in Durban, South Africa. The decision to re-launch a pan-African organisation was the outcome of a consensus by African leaders that, in order to realise Africa’s potential,

205 Charter establishing the Organisation of African Unity, completed in the City of Addis Ababa, Ethiopia, 25 May 1963.

206 Charter establishing the Organisation of African Unity, Art. 3. See also Mattheis et al., 2023, pp. 4–5.

207 Charter establishing the Organisation of African Unity, Art. 2.

208 On 9 September 1999, the leaders of the OAU adopted the Sirte Declaration, which proposed the creation of the AU.

there was a need to refocus attention towards increased cooperation and integration of African states to drive Africa's growth and economic development. Article 3 of the Constitutive Act of the African Union²⁰⁹ and the Protocol on Amendments to the Constitutive Act of the African Union²¹⁰ lay out the aims of the AU, which include, amongst others: (a) achieving greater unity and solidarity between African countries and their people; (b) defending the sovereignty, territorial integrity and independence of its Member States; (c) accelerating the political and socio-economic integration of the continent; (d) promoting and defending African common positions on issues of interest to the continent and its peoples; (e) encouraging international cooperation; (f) promoting peace, security, and stability on the continent; (g) promoting democratic principles and institutions, popular participation, and good governance; (h) establishing the necessary conditions that enable the continent to play its rightful role in the global economy and in international negotiations; (i) promoting cooperation in all fields of human activity to raise the living standards of African peoples; (j) coordinating and harmonising policies between the existing and future regional economic communities for the gradual attainment of the objectives of the Union; (k) advancing the development of the continent by promoting research in all fields, particularly in science and technology; (l) working with relevant international partners in the eradication of preventable diseases and the promotion of good health on the continent; (m) ensuring the effective participation of women in decision-making, particularly in the political, economic, and socio-cultural areas; (n) developing and promoting common policies on trade, defence, and foreign relations to ensure the defence of the continent and the strengthening of its negotiating positions; (o) inviting and encouraging the full participation of the African Diaspora as an important part of the African continent in the building of the AU.

Amongst the AU's key objectives is also the promotion and safeguarding of human and peoples' rights in alignment with the African Charter on Human and Peoples' Rights and other pertinent human rights frameworks.

The AU comprises several decision-making organs and other key bodies. The most important of these is the Assembly of Heads of State and Government, composed of Heads of State and Government or their duly accredited representatives. The Assembly is the supreme policy and decision-making body, assisted by the AU Bureau, which comprises three vice chairpersons and one rapporteur, the latter being the outgoing AU Assembly Chairperson.²¹¹

The Executive Council is composed of Ministers or equivalents designated by the governments of the AU Members. It coordinates and takes decisions on policies in areas of common interest for Member States. This Council reports to the AU

209 Constitutive Act of the African Union, completed at Lome, Togo, 11 July 2000.

210 Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extraordinary Session of the Assembly of the Union in Addis Ababa, Ethiopia, 3 February 2003, and by the 2nd Ordinary Session of the Assembly of the Union in Maputo, Mozambique, 11 July 2003.

211 Constitutive Act of the African Union, Arts. 6–9.

Assembly, considers issues referred to it, and monitors the implementation of policies formulated by the Assembly.²¹²

The Permanent Representatives Committee (PRC) is composed of Permanent Representatives of Member States accredited to the Union. The PRC is responsible for preparing the work of the Executive Council and acting on its instructions.²¹³

Specialised Technical Committees (STCs) address sectoral issues at Ministerial Level, such as rural economy and agriculture; monetary and financial affairs; trade, customs and immigration; industry, science and technology; energy, natural resources and environment; transport, communications and tourism; health, labour and social affairs; and education, culture and human resources.²¹⁴

The Pan-African Parliament ensures the full participation of African peoples in governance, development, and economic integration of the continent.²¹⁵ In June 2014, the protocol relating to the composition, powers, functions, and organisation of the Pan-African Parliament was adopted by Member States.²¹⁶

The Economic, Social and Cultural Council (ECOSOCC) is an advisory organ composed of different social and professional groups from the Member States of the Union.²¹⁷

The AU Commission, based in Addis Ababa, Ethiopia, serves as the AU's Secretariat. It comprises an elected chairperson, a deputy chairperson, six commissioners, and an estimated 1,700 staff members, half of whom hold administrative functions. The Commission plays a central role in the day-to-day management of the AU. It represents the Union and defends its interests; elaborates draft common positions; prepares strategic plans and studies for the consideration of the Executive Council; elaborates, promotes, coordinates, and harmonises the programmes and policies of the Union with those of the RECs; and ensures the mainstreaming of gender in all programmes and activities of the Union.²¹⁸

The Peace and Security Council, created following the decision of the Summit of Lusaka in July 2001, is the AU's organ for the prevention, management, and resolution of conflicts. It comprises representatives of 15 elected Member States, serving 3-year terms.

Organs handling judicial and legal matters, as well as human rights issues, include the African Commission on Human and Peoples' Rights (ACHPR); the African Court on Human and Peoples' Rights (AFCHPR); the AU Commission on International Law (AUCIL); the AU Advisory Board on Corruption (AUABC); and the African Committee of Experts on the Rights and Welfare of the Child.

212 Constitutive Act of the African Union, Arts. 10–13.

213 Constitutive Act of the African Union, Art. 21.

214 Constitutive Act of the African Union, Arts. 14–16.

215 Constitutive Act of the African Union, Art. 17.

216 Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament, adopted by the 23rd Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, 17 June 2014.

217 Constitutive Act of the African Union, Art. 22.

218 Constitutive Act of the African Union, Art. 20.

The AU's financial institutions include the African Central Bank, the African Investment Bank, and the African Monetary Fund.

Regional Economic Communities (RECs) and the African Peer Review Mechanism are also integral components of the AU's framework.

A protocol to set up the Court of Justice was adopted in 2003 and entered into force in 2009. However, it was superseded by a protocol creating the African Court of Justice and Human Rights. The merger protocol was adopted during the 11th African Union Summit in July 2008. The united court is based in Arusha, Tanzania.

To achieve its goals and fulfil the Pan-African Vision of a unified, prosperous, and peaceful continent, Agenda 2063 was established as a strategic blueprint for Africa's long-term socio-economic and integrative development.²¹⁹ This agenda emphasises the importance of enhanced cooperation and support for African-driven initiatives to realise the aspirations of the continent's people.

In their analysis of the African political integration process and its impact on EU–AU relations, Mattheis et al. argued that the AU is an intergovernmental regional organisation with supranational elements. However, the emphasis on national sovereignty by AU Member States, and their efforts to safeguard it, has resulted in an institutional structure with limited delegation of power to supranational bodies. Additionally, the governance structures for integration face significant challenges, including the lack of robust dispute resolution mechanisms.²²⁰

The AU Assembly is theoretically empowered to make decisions, monitor progress, and enforce policies, though it can delegate these powers to other organs. The AU Commission serves as the technical secretariat, but its role is primarily confined to providing expertise rather than executing policies, reflecting its constrained capacity. In practice, the implementation of major decisions largely depends on the Member States. Strategic matters are typically directed to the Executive Council, composed of foreign ministers, via the PRC, comprising ambassadors and representatives of Member States.²²¹

Resultantly, the enforcement of binding obligations from the AU Assembly hinges on the willingness of Member States, acting through the Executive Council, to delegate certain sovereign powers to the AU Secretariat, enabling it to function as a fully empowered Commission. A similar dynamic affects the African Court of Justice, whose limited authority undermines its ability to establish binding rules or impose sanctions on non-compliant Member States. Despite ongoing discussions to strengthen these institutions, the vision of a federalist 'United States of Africa' continues to lack widespread consensus across the continent.²²²

219 The African Union Agenda 1063, Framework Document, September 2015.

220 See Mattheis et al., 2023, p. 10. See also African Union, 2013, p. 7

221 Ibid.

222 Ibid.

3.1.2. *The Principle of Equality Amongst Member States of the African Union*

The principle of equality amongst Member States can be traced back to the founding of the Organization of African Unity (OAU), the AU's predecessor. The OAU's Charter emphasised the sovereign equality of all African states as a response to colonial legacies that had divided the continent.²²³ This foundational ideal was carried forward into the AU, reflecting a commitment to inclusivity and non-discrimination.

Pursuant to Art. 4 of the Constitutive Act of the AU, 'the Union shall function in accordance with the sovereign equality and interdependence among Member States of the Union'. Whilst this is the only provision of the Constitutive Act that explicitly refers to the principle of equality amongst Member States, the principle is also upheld by the design of the AU's institutional structures and decision-making rules.

The Assembly of the Union, as the supreme decision-making body, operates on a one-country, one-vote system, ensuring equal representation. The Assembly elects its Bureau based on rotation, agreed geographical representation, and regional consultations. At the request of any Member State and upon approval by a two-thirds majority of the Member States, the Assembly shall meet in extraordinary session. The Assembly takes its decisions by consensus or, failing that, by a two-thirds majority of the Member States. Procedural issues, including the question of whether a matter is one of procedure, are decided by a simple majority. Two-thirds of the total membership of the Union shall form a quorum at any meeting of the Assembly.²²⁴

Composed of foreign ministers, the Executive Council reflects the collective will of Member States without privileging any single nation. The same voting rules that apply to the Assembly also apply to the Council. The latter takes its decisions by a two-thirds majority if there is no consensus amongst the Member States. The Council also meets in an extraordinary session at the request of any Member State and upon approval by two-thirds of all Member States.²²⁵

The Peace and Security Council (PSC) includes both rotating and elected seats, selected on the basis of regional representation to serve 3-year terms. Its decisions require consensus or majority voting, preserving balance amongst members. A clear example of this balance is the conflict mediation in Sudan, where the AU's equal representation principle enabled diverse Member States to contribute to peace negotiations, ensuring a balanced approach.²²⁶

The principle of equality amongst AU Member States fosters inclusivity, which is essential for addressing diverse challenges such as conflict resolution, economic integration, and public health crises. By ensuring equal participation, the AU seeks to promote consensus-building and collective ownership of policies, boost smaller

223 Charter establishing the Organisation of African Unity, Art. 3.

224 Charter establishing the Organisation of African Unity, Arts. 6–7.

225 Charter establishing the Organisation of African Unity, Arts. 10–11.

226 See Mbaku, 2024.

states' confidence in the organisation's fairness, and strengthen regional integration by prioritising mutual benefits over individual dominance.²²⁷

Despite its significance, the principle of equality faces numerous challenges, including economic disparities amongst Member States, political instability, and gaps in implementation. Whilst financial contributions are adjusted to reflect the economic capabilities of Member States, this should not, in principle, result in unequal influence over decision-making. However, wealthier states may exert disproportionate influence through their financial contributions or bilateral agreements. Conversely, fragile states often face difficulties in fully exercising their rights within the AU framework. As noted by De Melo and Tsikata, small, fragmented, and isolated economies with resources distributed very unequally amongst them make a compelling case for African countries to integrate regionally to reap efficiency gains, exploit economies of scale, and reduce the thickness of borders. At the same time, in the absence of compensation mechanisms, the unequal distribution of gains has hampered progress.²²⁸ Ultimately, the disconnect between formal equality and practical realities risks eroding trust in the AU's processes.²²⁹

The principle of equality amongst Member States is fundamental to the AU's mission of fostering unity and collective progress. Despite ongoing challenges, upholding this principle is crucial for building trust, promoting inclusivity, and advancing sustainable development across the continent. To ensure that equality becomes a tangible reality within the AU framework, it will be essential to strengthen institutional mechanisms and address economic and political disparities.²³⁰

3.2. The Union of South American Nations

3.2.1. The Union of South American Nations in a Nutshell

The Union of South American Nations (*Unión de Naciones Suramericanas*, UNASUR) was initially established as the Community of South American Nations (CSN) during the Third South American Summit on December 8, 2004, in Cusco and Ayacucho, Peru. This founding moment, marked by the Cusco Declaration, outlined a vision to unite the region's two existing free trade blocs – the Southern Common Market (MERCOSUR) and the Andean Community of Nations (CAN) – whilst preserving their individual autonomy.²³¹

The CSN aimed to create a cohesive South American framework spanning political, social, economic, environmental, and infrastructural domains, thereby fostering a unique regional identity. Its strategic plan emphasised integration through

227 During the COVID-19 crisis, for example, the equal participation in AU-led health initiatives allowed equitable distribution of resources, such as vaccines and medical equipment.

228 See De Melo and Tsikata, 2014, p. 19.

229 Ibid.

230 Murithi, 2008.

231 Paredes Sanchez, 2011, p. 26.

South–South cooperation, with a strong focus on social and cultural dimensions. Core priorities included reducing inequalities, promoting fair integration, drafting a new South American social contract, advancing energy collaboration, improving regional connectivity through infrastructure, encouraging trade and industrial development, celebrating cultural diversity, and addressing environmental sustainability and defence concerns.²³²

In 2007, during the South American Energy Summit, Hugo Chávez, the President of Venezuela, proposed a deeper level of integration by establishing the UNASUR, with a permanent secretariat located in Quito, Ecuador. This transition from the CSN to UNASUR represented more than just a change in name; it embodied a vision for enhanced integration and marked a significant advancement in consolidating ideas debated in earlier diplomatic efforts. The shift demonstrated a political commitment to reconfiguring the region's structural framework.²³³

The Constitutive Treaty of the Union of South American Nations²³⁴ was signed on May 23, 2008, during the Third Summit of Heads of State and Government held in Brasília, Brazil. In 2010, the Additional Protocol to the Constitutive Treaty on Commitment to Democracy was approved, obligating Member States to promote and uphold the rule of law, democratic institutions, human rights, and fundamental freedoms, particularly the freedom of opinion and expression.

The UNASUR comprises 12 nation-states: Bolivia, Colombia, Ecuador, and Peru (also members of CAN); Argentina, Brazil, Paraguay, Uruguay, and Venezuela (also members of MERCOSUR); and Guyana, Surinam, and Chile. The establishment of UNASUR was characterised by its holistic approach to integration and cooperation, differing from previous processes of integration in the South American region. The Union has expressed its commitment to a multi-dimensional integration approach, focusing on areas such as infrastructure, education, health, energy, and security. Its goal is to promote long-term social and human development, aiming to enhance the quality of life for its population by reducing poverty and addressing regional inequalities. Alongside fostering social unity, the Union pursues significant macro-level economic and political objectives, striving to strengthen political cohesion and enhance the region's influence in international negotiations.²³⁵

The Constitutive Treaty outlines its primary goal as fostering integration and unity amongst its peoples in cultural, social, economic, and political domains. This process is to be achieved through a participatory and consensual approach, emphasising political dialogue, social policies, education, energy, infrastructure, financing, and environmental initiatives. UNASUR aims to eliminate socio-economic inequalities, promote social inclusion, and encourage civil society participation, whilst strengthening democracy and addressing regional asymmetries. All these efforts are

232 Paredes Sanchez, 2011, p. 26.

233 Paredes Sanchez, 2011, pp. 26–27. See also Diaz and Cano, 2007.

234 Constitutive Treaty of the Union of South American Nations, 23 May 2008, OXIO 179.

235 Paredes Sanchez, 2011, p. 25.

pursued within a framework that upholds and reinforces the sovereignty and independence of Member States.²³⁶

The Council of Heads of State and Government serves as the highest authority within UNASUR. Its responsibilities include setting policy directions, developing action plans, initiating and supporting programmes, and determining implementation priorities. Additionally, it has the authority to convene Sectoral Ministerial Meetings and establish Ministerial Councils. The Council also reviews and acts on proposals submitted by the Council of Ministers of Foreign Affairs and establishes political guidelines for relations with third parties.²³⁷

The President Pro Tempore is responsible for organising, convening, and presiding over meetings of UNASUR's bodies. Their duties include presenting an annual programme of activities, representing UNASUR at international events, fulfilling commitments made by UNASUR entities, and signing declarations with third parties, subject to the approval of the appropriate UNASUR bodies.²³⁸

The Council of Foreign Affairs Ministers is responsible for implementing the decisions made by the Council of Heads of State and Government. It adopts resolutions to this end and proposes draft decisions, coordinates positions on key integration issues, and fosters political dialogue and coordination. The Council also approves the annual programme of activities, adopts resolutions and regulations, and establishes working groups aligned with the priorities set by the Council of Heads of State and Government.²³⁹

The Council of Delegates is tasked with implementing the decisions of the Council of Heads of State and Government and the Council of Foreign Affairs Ministers, in collaboration with the President Pro Tempore and the General Secretariat. It organises meetings, drafts decisions, resolutions, and regulations, ensures compatibility, and coordinates UNASUR's initiatives with other ongoing regional processes.²⁴⁰

The UNASUR permanent General Secretariat, based in Quito, Ecuador, was established to eliminate the inefficiencies associated with rotating pro tempore secretariats amongst Member States. Under the leadership of the Secretary General, the Secretariat executes the directives of UNASUR's governing organs and represents them accordingly. Its responsibilities also include supporting various councils, proposing initiatives, overseeing the implementation of decisions made by the organisation's governing bodies, and preparing annual reports.²⁴¹

236 Constitutive Treaty of the Union of South American Nations, Art. 2.

237 Ibid., Art. 6.

238 Ibid., Art. 7.

239 Ibid., Art. 8.

240 Ibid., Art. 9.

241 Constitutive Treaty of the Union of South American Nations, Art. 10.

The Thematic Councils serve as UNASUR's primary mechanisms for achieving sustainable, long-term integration amongst its Member States. These councils are established based on the specific needs and priorities of the Union's countries.²⁴²

The Energy Council of South America, created by the Declaration of Margarita (17 April 2007), is also part of UNASUR.²⁴³

Pursuant to Art. 14 of the Constitutive Treaty, political consultation and coordination amongst UNASUR Member States shall be based on harmony and mutual respect, strengthening regional stability and supporting the preservation of democratic values and the promotion of human rights.

Erika Paredes Sanchez's analysis highlights that the challenges facing UNASUR stem partly from unmet agendas and overly ambitious goals from previous integration efforts. South America has a history marked by military coups and governments led by the Armed Forces, contributing to these difficulties. Additionally, financial constraints arise from increased competition for development and investment resources. Reducing asymmetries is essential for the success of UNASUR, as it is a prerequisite for sustainability and legitimacy. Although this issue has been acknowledged at the highest political levels, UNASUR struggles to turn this recognition into action. The presence of major regional powers, such as Brazil and Argentina, further complicates efforts to address these asymmetries. However, existing social agreements and their connections to economic objectives may help mitigate these disparities. Finally, within UNASUR, a plethora of integration proposals exists that dilute the effectiveness of initiatives. Many of these proposals lack a strong institutional framework capable of transferring capabilities and making sovereign decisions.²⁴⁴

UNASUR aimed to model its framework after the EU; however, it is challenging to identify any supranational elements within its institutional and decision-making structures. According to para. 5 of Art. 12 of the Constitutive Treaty, legislative measures issued by UNASUR's organs become binding on Member States only after being integrated into each Member State's domestic law, following their respective internal legal procedures.

3.2.2. The Principle of Equality Amongst Member States of the Union of South American Nations

UNASUR was established as a regional organisation aimed at fostering political dialogue, economic cooperation, and social development amongst its 12 Member States. Central to its mission is the principle of equality, which the Union understands

242 Currently, the active thematic Councils include the Council of Health; the Council of Education, Science, Culture, Technology, and Innovation; the Council of Infrastructure and Planning; the Council of Energy; the Council of Social Development; the Council to Fight Drug Trafficking; the Council of Defence; the Council of Economy and Finances; and the Electoral Council.

243 Constitutive Treaty of the Union of South American Nations, Art. 5.

244 Paredes Sanchez, 2011, pp. 33–34. See also Rojas, 2007; and Diaz and Cano, 2007.

as a normative value promoting solidarity and mutual respect amongst Member States.²⁴⁵ The principle is enshrined in the UNASUR Constitutive Treaty with a view to eliminating socio-economic inequalities, achieving social inclusion and participation, and reducing asymmetries within the framework of strengthening the sovereignty and independence of Member States.²⁴⁶ Establishing inclusive and equitable social and human development, in order to eradicate poverty and overcome inequalities in the region, is explicitly listed amongst UNASUR's Specific Objectives.²⁴⁷

In UNASUR, the principle of equality amongst Member States is upheld, *inter alia*, through ensuring equal representation and equitable participation in the Union's decision-making bodies and processes. The Presidency Pro Tempore of UNASUR is held successively by each Member State, in alphabetical order, for periods of one year.²⁴⁸ Extraordinary meetings of the Council of Heads of State and Government may be summoned through the Presidency Pro Tempore upon the request of any Member State, subject to the consensus of all Member States.²⁴⁹ Ordinary meetings of the Council of Ministers of Foreign Affairs may be convened by the Presidency Pro Tempore on an extraordinary basis at the request of half of the Member States.²⁵⁰ In the selection of employees of the General Secretariat, equitable representation for each Member State is guaranteed.²⁵¹ Whilst the Secretary General is appointed by the Council of Heads of State and Government for a term of two years, renewable only once, they shall not be succeeded by a person of the same nationality.²⁵²

Decisions within UNASUR are made based on consensus, ensuring that all voices are heard and that no single state can dominate the decision-making process. Decisions of the Council of Heads of State and Government, Resolutions of the Council of Ministers of Foreign Affairs, and Provisions of the Council of Delegates may be adopted with the presence of at least three-quarters (3/4) of the Member States.²⁵³ The Working Groups hold sessions and make proposals as long as a quorum of half plus one of the Member States is present.²⁵⁴ Each Member State may submit, for the consideration of the Council of Delegates, proposals for the adoption of policies, as well as the creation of common institutions, organisations, and programmes, which shall be adopted in a consensual manner.²⁵⁵

The financing of the ordinary budget for the functioning of the General Secretariat is based on differentiated contribution quotas of the Member States, taking

245 See Viana, 2018, pp. 1036–1058.

246 Constitutive Treaty of the Union of South American Nations, Art. 2.

247 Constitutive Treaty of the Union of South American Nations, Art. 3.

248 Ibid., Art. 7.

249 Ibid., Art. 6.

250 Ibid., Art. 8.

251 Ibid., Art. 10, para. 10.

252 Ibid., Art. 10, para. 3.

253 Ibid., Art. 12, para. 2.

254 Ibid., Art. 12, para. 4.

255 Ibid., Art. 13.

into account their economic capacity, shared responsibility, and the principle of equity.²⁵⁶

The principle of equality amongst Member States is a foundational element of UNASUR, promoting cooperation and solidarity in the face of diverse challenges. Whilst the commitment to equality is enshrined in UNASUR's governance framework, the practical implementation of this principle faces significant challenges due to political, economic, and social disparities amongst Member States. Larger and more economically powerful countries, such as Brazil and Argentina, may wield more influence in decision-making processes, potentially undermining the principle of equality.²⁵⁷ Moving forward, UNASUR must strengthen its institutional mechanisms to ensure that the principle of equality is upheld in practice, thereby enhancing regional integration and cooperation.

3.3. The South Asian Association for Regional Cooperation

3.3.1. An Outline of the Origin, Objectives, Structure, and Challenges of the South Asian Association for Regional Cooperation

The South Asian Association for Regional Cooperation (SAARC) is a regional intergovernmental organisation and geopolitical union of states in South Asia. It was established on 8 December 1985, with the aim of promoting economic growth, social progress, and cultural development amongst its Member States. The Secretariat of the Association was set up in Kathmandu, Nepal, on 17 January 1987. SAARC comprises eight member countries: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

The SAARC's primary objectives, as outlined in the Charter of the South Asian Association for Regional Cooperation,²⁵⁸ include: (a) promoting the welfare of the peoples of South Asia and improving their quality of life; (b) accelerating economic growth and fostering social progress; (c) strengthening collective self-reliance amongst the Member States; (d) enhancing regional integration; (e) promoting active collaboration and mutual assistance in economic, social, cultural, technical, and scientific fields; (f) strengthening cooperation amongst themselves in international forums on matters of common interest and cooperation with other developing countries; and (g) cooperating with international and regional organisations with similar aims and purposes.²⁵⁹

²⁵⁶ Ibid., Art. 16.

²⁵⁷ For example, the response to the political crisis in Venezuela showcased the difficulties of achieving consensus amongst Member States with differing political alignments. Similarly, the challenges of addressing economic disparities amongst Member States have raised questions about the equitable distribution of resources and benefits derived from regional integration efforts.

²⁵⁸ Charter of the South Asian Association for Regional Cooperation, completed in Dhaka, Bangladesh, 8 December 1985.

²⁵⁹ Charter of the South Asian Association for Regional Cooperation, Art. 1.

In line with the Charter, cooperation within the framework of SAARC is based on respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of other states, and mutual benefit. Such cooperation is intended to complement, rather than substitute for, bilateral and multilateral cooperation and must not conflict with bilateral or multilateral obligations.²⁶⁰

SAARC's structure includes several key components. The Meetings of the Heads of State and Government constitute the highest decision-making authority and are held annually or biennially.²⁶¹

Comprising foreign ministers of Member States, the Council of Ministers formulates policies, reviews progress, decides on new areas of cooperation, establishes additional mechanisms as needed, and address other matters of general interest.²⁶²

Made up of foreign secretaries, the Standing Committee monitors and coordinates programmes of cooperation; approves projects and programmes and their financing modalities; determines inter-sectoral priorities; mobilises regional and external resources; and identifies new areas of cooperation based on appropriate studies. The Standing Committee submits periodic reports to the Council of Ministers and may establish Action Committees comprising the Member States concerned with implementing projects involving more than two, but not all, Member States.²⁶³

Comprising representatives of Member States, the Technical Committees are responsible for implementing, coordinating, and monitoring programmes in their respective areas of cooperation. They determine the potential and scope of regional cooperation, formulate, coordinate, and monitor programmes and projects, assess financial implications of sectoral programmes, and make recommendations regarding cost apportionment. The Technical Committees submit periodic reports to the Standing Committee.²⁶⁴

The SAARC Secretariat, located in Kathmandu, facilitates coordination and implementation of activities.²⁶⁵

The last Summit of Heads of State was held in Kathmandu in 2014. Since then, Nepal has been organising informal meetings of SAARC Foreign Ministers annually, with the most recent hosted virtually by Kathmandu in September 2020 on the margins of the UNGA.²⁶⁶

Areas identified for cooperation amongst Member States include agriculture and rural development; health and population; women, youth, and children; environment and forestry; science and technology; metrology; transport; and human resource development. Working groups have been established in the areas of information and

260 Ibid., Art. 2.

261 Ibid., Art. 3.

262 Ibid., Art. 4.

263 Ibid., Arts. 5 and 7.

264 Ibid., Art. 6.

265 Charter of the South Asian Association for Regional Cooperation, Art. 8.

266 European External Action Service, 2024.

communications technology, biotechnology, intellectual property rights, tourism, and energy. Additionally, under the auspices of the Association, various regional centres covering agriculture, tuberculosis, documentation, meteorological research, human resource development, culture, coastal zone management, and information operate from different SAARC capitals.²⁶⁷

Although the SAARC's movement in terms of achieving the objectives for which it was formed has been slow, and it is criticised as a house of cards or a house built on sand, which can fall apart at any time, Dhungel's analysis shows that the association can boast of some important achievements. Worth pointing out is the adoption of the SAARC's 1990 Convention on Narcotic Drugs and Psychotropic Substances, the 2002 Convention on Preventing and Combating the Trafficking of Women and Children for Prostitution, the 2002 SAARC Convention on the Regional Arrangements for the Promotion of Child Welfare in South Asia, the 2002 SAARC Plan of Action on Poverty Alleviation, the 2004 SAARC Regional Convention on Suppression of Terrorism, and the 2004 SAARC Social Charter. In the economic sector, in 2004, the SAARC first founded the South Asian Preferential Trading Arrangement (SAPTA) and then the South Asian Free Trade Area (SAFTA) to promote trade and commerce by reducing tariffs.²⁶⁸

Despite its achievements, the SAARC faces several challenges. Many agreements and initiatives remain unimplemented due to bureaucratic and political hurdles. Conflicts, particularly between India and Pakistan, the two nuclear powers, hinder cooperation. Challenges in achieving common goals are also generated by the wide gaps in economic development amongst Member States. The SAARC's cohesion is slowed by geopolitical dynamics and the influence of global powers. According to Dhungel, to enhance its effectiveness, the SAARC must consider, *inter alia*, establishing mechanisms for conflict resolution to mitigate political tensions; strengthening economic ties through deeper trade agreements and cross-border projects; strengthening inter-institutional cooperation and the transportation, transit, and communication links across the region; and addressing climate change, cybersecurity, and public health crises collaboratively.²⁶⁹

3.3.2. *The Principle of Equality Amongst Members States of the South Asian Association for Regional Cooperation*

The Charter of the SAARC states that 'cooperation within the framework of the association shall be based on respect for the principles of sovereign equality, territorial integrity, political independence, non-interference in the internal affairs of

267 See Dhungel, 2004, pp. 933–934. Beyond official linkages, the SAARC facilitates cooperation in the private sector through the SAARC Chamber of Commerce and Industry (SCCI), the SAARC Law, and the South Asian Federation of Accountants (SAFA).

268 Dhungel, 2004, p. 938.

269 Dhungel, 2004, pp. 939–941.

other States and mutual benefit'. Additionally, according to the Charter, cooperation within the framework of the SAARC 'shall not be a substitute for bilateral and multilateral cooperation but shall complement them and shall not be inconsistent with bilateral and multilateral obligations'.²⁷⁰

In a region characterised by stark disparities in size, population, and economic power amongst its members, the principle of equality is of particular importance. This is reflected in the Charter's provisions, which mandate equal representation, unanimity in decision-making, rotational leadership, and equitable resource allocation.

The representation of Member States in the highest organs of the SAARC is based on the principle of parity, as each Member State is represented by their Heads of State and Government, Foreign Ministers, and Foreign Secretaries. Their decision-making framework operates on the basis of consensus (e.g. decisions at all levels are taken on the basis of unanimity), granting each Member State an effective veto.²⁷¹ Whilst an extraordinary session of the Council of Ministers may be held only by agreement amongst the Member States, the Chairmanship of the Technical Committees normally rotates amongst them in alphabetical order every two years.²⁷² These mechanisms prevent the concentration of power, ensure balanced representation, and guarantee that no single state dominates the organisation's agenda, preserving the region's collective interests.

The SAARC institutions and programmes, such as the SAARC Development Fund (SDF), are designed to distribute resources equitably, prioritising projects that benefit multiple Member States and address shared challenges.

Despite its foundational commitment to equality amongst Member States, the SAARC faces several challenges in upholding this principle, such as disparities in economic and political power, bilateral tensions amongst members, and resource constraints. For example, India, as the largest and most economically powerful member, often plays a dominant role in regional affairs. Whilst this can drive initiatives, it sometimes creates perceptions of imbalance and undermines smaller states' confidence. Moreover, conflicts between Member States, notably India and Pakistan, frequently spill over into the SAARC proceedings, hampering consensus and the organisation's overall efficacy. Practical barriers to equality may also occur due to the limited financial and administrative resources of smaller states, which struggle to participate fully in the SAARC's activities.

270 Charter of the South Asian Association for Regional Cooperation, Art. 2, paras. 2 and 3.

271 Charter of the South Asian Association for Regional Cooperation, Art. 10.

272 Charter of the South Asian Association for Regional Cooperation, Art. 6.

4. The European Union: Federalism, Confederalism, Supranationalism, and the Principle of Equality Amongst Member States

4.1. *Between Federal, Confederal, and Hybrid*

Debates regarding the structure of the EU position it as federal, confederal, a hybrid integration combining elements of both, or *sui generis*, as a supranational formation. Elazar, for instance, described the EU – then the European Community – as a community rather than a union. He contended that it is more confederal than federal, as the primary expression of its constituent parts occurs at the national, Member-State level rather than through EU institutions. According to Elazar, whilst the EU exhibits some federal principles, it may be reluctant to fully commit to a federal structure, influenced by cultural, political, and social considerations that complicate the implementation of a fully federal system.²⁷³

Cerar observed that the EU's foundation on international treaties reflects the confederal principle, whilst the operation of the European Commission predominantly embodies the federal principle.²⁷⁴ Contrastingly, Skillen contended that the EU effectively has a written constitution through a series of overlapping treaties. Although the proposed 'European Constitution' (e.g. the Treaty establishing a Constitution for Europe) failed ratification, the Lisbon Treaty incorporates most of its key provisions and functions as a *de facto* constitution. This treaty framework emphasises non-centralisation of power and delineates different competencies between the EU and its Member States. The Court of Justice of the European Union (CJEU) plays a crucial role in interpreting these powers, thereby maintaining the balance of non-centralisation. The 'federal principle' is also reflected in the aspiration for an 'ever-closer union'.²⁷⁵

However, as Skillen argued, the federal principle within the EU is not particularly strong. The EU lacks a clear and real division of powers and does not fully embrace a strong federal principle. Similarly, it does not fit the definition of a confederation, as it possesses supranational elements and has directly elected representatives of its constituents. Drawing from Watts, Skillen contended that the EU is structured to govern for 'certain limited purposes'. Nevertheless, with the enhanced role of the European Parliament following the Lisbon Treaty, it is evident that the EU is not merely composed of delegates from Member States' governments. Moreover, the EU exercises certain supranational powers rather than being purely intergovernmental. The European Parliament employs various forms of majority voting in its legislative

273 Skillen, 2017, pp. 4 and 7. Skillen highlighted that the limitations identified by Elazar are also apparent in the current climate of Euroscepticism.

274 Cerar, 2007.

275 Skillen, 2017, p. 4.

procedures, and whilst consensus is generally sought in the Council of the EU, qualified majority voting is also utilised.²⁷⁶

Whilst the EU does not meet the criteria of a federation, it is more than a simple confederation. It exists between the two models, incorporating elements and tendencies of both. Consequently, both constituencies are represented within the EU – citizens as in a federation, and Member States as in a confederation.²⁷⁷ A key question for the future is whether one principle will ultimately prevail: will the EU evolve into a federal supranational power with broad legislative authority, revert to a confederal alliance based on consensus amongst sovereign states, or remain a hybrid supranational organisation that blends both principles?

4.2. On the Principle of Equality Amongst Member States in EU law

In the EU system, the principle of equality amongst Member States is set out in para. 2 of Art. 4 of the Treaty on European Union (TEU), which states, *inter alia*, that ‘[T]he Union shall respect the equality 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 [...]’. This same provision also enshrines the principle requiring the EU to respect the Member States’ national identities, and the principle is coupled with that of sincere cooperation, which is set forth in the following para. 4(3) TEU and regarded as the true cornerstone of European integration.

Prior to the Lisbon Treaty, no explicit mention of the principle of equality amongst Member States was made in the Union’s primary law. However, before finding its place in the EU Treaties, the principle had already been expressed by the CJEU in its early rulings through the principle prohibiting discrimination by reason of nationality, which was enshrined in the Treaty Establishing the European Economic Community.²⁷⁸

The principle of equality amongst Member States is reflected in the institutional rules of the EU in various ways. Most prominent is the principle in the representation of each Member State in the Union’s institutions and in decision-making processes (e.g. in the voting rules). Legal provisions on both evolved throughout the European integration process, each EU charter introducing its own regimes.

The Lisbon Treaty redefined the composition and representation of Member States in the institutions, so that in the European Parliament the seats are allocated proportionally to the population of each Member State. A principle of degressive proportionality is applied, meaning larger states have more MEPs, but smaller states

²⁷⁶ Skillen, 2017, p. 7.

²⁷⁷ Skillen, 2017, p. 8.

²⁷⁸ See CJEU, Case 13/63 *Italian Republic v. Commission of the European Economic Community* EU:C:1963:20, and Case C-44/94 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen’s Organisations and others, and Federation of Highlands and Islands Fishermen and others* EU:C:1995:325, cited in Rossi, 2017, pp. 23–24.

have more MEPs per capita, whilst no Member State can have fewer than six seats or more than 96 seats.²⁷⁹

In the European Council, each Member State is represented by its Head of State or Government. Decisions are typically made by consensus, but some decisions are subject to qualified majority voting, which reflects both the population size and the number of Member States.²⁸⁰

The Council of the EU comprises government ministers from each Member State (each Member State sends one minister for the relevant policy area). The Lisbon Treaty introduced a reformed qualified-majority voting system, also known as the double majority system, which requires 55% of the Member States (at least 15 states out of 27) voting in favour, representing at least 65% of the total EU population. A blocking minority requires at least four Member States representing more than 35% of the EU population. The office of President of the Council shall be held in turn by each Member State for a term of six months.²⁸¹

The European Commission comprises one Commissioner from each Member State. Although the Treaty initially intended to reduce the number of Commissioners to two-thirds of the number of Member States, a political agreement maintained the rule of one Commissioner per Member State.²⁸²

The appointment of judges to the CJEU and to the General Court is now based on the rule of one or two seats per Member State. An exception to the rule, in favour of larger States, is only made in appointing Advocate Generals.²⁸³

These institutional arrangements reflect a balance between ensuring equality amongst Member States and recognising differences in population size, thus indicating a clear tendency towards enforcement of the principle of differentiated equality (e.g. dynamic, advanced equality).²⁸⁴

Important implications for the implementation of the principle of equality amongst Member States also arise from case law. According to the CJEU, the principle should be regarded, in the first place, as a duty of the EU institutions not to treat similar situations in different ways and different situations in the same way when addressing Member States. The Court used the principle as a basis for not admitting exceptions to common rules, especially in regard to the transitional period granted to new Member States, treating newer and older States differently on the grounds that they find themselves in a different situation. In the second place, according to the CJEU, the principle also sets some prohibitions for Member States, such as the prohibition of seeking positions of advantage to the detriment of other States.²⁸⁵

279 Art. 14 TEU.

280 Art. 15 TEU.

281 Art. 16 TEU.

282 Art. 17 TEU.

283 Art. 19 TEU.

284 Rossi, 2017, pp. 14–15.

285 Rossi, 2017, pp. 24–25.

In practice, disparities amongst Member States in terms of economic development, political influence, and legal integration continue to challenge the principle of equality within the Union. Despite its legal recognition, the principle is often compromised by power asymmetries amongst EU members. Larger economies, such as Germany and France, wield greater influence in shaping EU policies, particularly in areas requiring economic coordination, such as the Economic and Monetary Union (EMU). Differentiated integration – whereby some countries opt out of specific policies (e.g. the Schengen Area or the euro area) – further complicates the notion of equal participation. Considering that the EU enforcement mechanisms sometimes apply differently to different states, the CJEU and the European Commission have been criticised for selective enforcement of legal obligations, particularly in cases of rule-of-law disputes and economic governance, where more politically influential states may receive more lenient treatment.

Examining the relationship between the principle of equality amongst Member States and the differentiation mechanisms used in the EU integration process, Rossi argued that, in the EU system, the principle of equality amongst Member States is sometimes overshadowed by the idea of differentiated integration. The EU treaties provide different forms of differentiated integration for specific cases if freely accepted by the Member States.²⁸⁶ If all members agree, differentiated statuses amongst them can also be introduced under the protocols added to the founding Treaties. In these cases, a differentiated status in favour of the requesting State will be set up by relieving it of obligations it would otherwise have under the relevant treaty (an example being Protocol No. 30 on the application of the EU Charter of the Fundamental Rights to Poland and the United Kingdom). Alongside the modification of the founding Treaties, another form of differentiated integration is the possibility of States resorting to the classic instrument of international law by forming agreements amongst themselves. According to Rossi, one of the CJEU's duties is to assess the extent to which the individual examples of differentiated integration accord with the principle of equality amongst Member States and to offer a coherent and homogeneous reading of the fundamental principles and objectives of the founding treaties.²⁸⁷

286 Rossi, 2017, p. 20. In the provisions of the Union's founding Treaties, differentiation can be found in various limitations on the territorial scope of the Treaties, specific and temporary derogations, and a variety of safeguard clauses. For example, temporary derogations have been frequently applied in accession Treaties in order to enable new Member States to benefit from transitional periods. Similarly, the founding Treaties' rules on the EMU not only differentiate between Member States forming part of the euro area and those who do not form part thereof, but in the latter category still further between Member States with a derogation and Member States with an opt-out (i.e. Denmark and the United Kingdom before Brexit). Furthermore, whilst according to the Amsterdam Treaty, Ireland and Denmark are allowed to not participate in the rules concerning civil cooperation, immigration, and asylum, the Lisbon Treaty extended the possibility to opt out for these two countries in police and criminal law cooperation. See Wouters and Schmitt, 2017, p. 56.

287 See Rossi, 2017, p. 20.

5. Enhancing Equality Amongst Member States in the European Union: Synthesis and Conclusion

The concluding section of the chapter summarises, in a synthetic way, how selected federations, confederations, and international organisations with supranational elements compare to the EU in terms of structure and functioning and in view of ensuring equality amongst members. The author aims to derive lessons applicable to fostering greater equality amongst EU Member States.

The outline of the selected federal systems shows that each system's unique evolution reflects historical, cultural, and political influences, shaping how power is allocated and exercised. Whilst these systems share certain similarities in constitutional governance, distribution of power (e.g. multiple levels of authority), institutional design, fiscal mechanisms, and dispute resolution mechanisms, their implementations differ based on local contexts.

All selected countries enshrine federalism in a written constitution, serving as the supreme law that delineates powers and responsibilities. Each system has a bicameral legislature where one chamber represents the population and the other safeguards the interests of federal units. Furthermore, each federation has a formal division of powers existing between central and subnational governments, addressing legislative, executive, and judicial functions. In all selected federal systems, a judiciary with constitutional authority resolves disputes over power distribution. States, provinces, territories, or cantons possess varying degrees of autonomy, reflecting local priorities and preferences.

Significant differences between the five federal systems can be identified in their historical context and formation, power distribution, legislative structures, fiscal arrangements, and conflict resolution mechanisms. For example, the U.S. adopted federalism in 1787, emphasising a strong central government whilst preserving state sovereignty to unify independent colonies. Germany implemented federalism post-World War II to decentralise power and prevent authoritarianism. Belgium transitioned to federalism in the 1990s to address tensions between Flemish and Walloon communities. Switzerland evolved a confederal system into federalism to manage linguistic and cultural diversity. Similarly, Canada adopted federalism in 1867 to balance unity amongst provinces with significant linguistic and cultural differences. Whilst the U.S. and Switzerland are examples of coming-together federations, Belgium is an example of holding-together federalism.

Regarding power distribution, the U.S. employs a dual federalism model, with distinct responsibilities for federal and state governments. Contrastingly, Germany follows cooperative federalism, with extensive collaboration between federal and state levels. Switzerland and Belgium have introduced unique federal arrangements: whilst the former operates with high autonomy for cantons and significant direct democracy mechanisms, the latter model is tailored to linguistic divisions, granting

considerable autonomy to its regions and communities. Canada emphasises asymmetrical federalism, providing Quebec and other provinces specific powers.

The five federal systems resort to similar but distinct conflict resolution mechanisms for resolving federal–state disputes. Whilst the U.S. Supreme Court and the German Federal Constitutional Court safeguard constitutional compliance by the federal units, in Switzerland, conflicts between cantons are mediated through the judicial system and referendums. Canada’s Supreme Court adjudicates disputes, particularly regarding Quebec’s unique status. Belgium addresses inter-regional tensions by relying on negotiation and constitutional amendments.

Notable differences amongst federations can also be traced in their legislative frameworks and in finances and taxes. These two components of federal arrangements are particularly relevant in view of the effective application of the principle of equality amongst federal entities.

Federal constitutions often explicitly guarantee the equal status of constituent units within the federation. The principle ensures fairness, balance, and unity whilst maintaining the diversity inherent in federal systems. Equality amongst federal units ensures that the voices of smaller or less-powerful regions, whether defined by ethnicity, language, culture, or geography, are heard and respected. It helps avoid excessive disparities in political power or economic development across regions. If certain states or provinces are perceived as more privileged or less influential, this can lead to resentment, conflict, and fragmentation. The principle is typically upheld through the representation of federal units in central governing bodies and the decision-making rules at the federal level.

In the U.S., each state, regardless of size or population, has equal representation in the Senate, with two senators per state. This ensures that smaller states have a voice equal to that of larger states in the legislative process. By allocating power in the Senate equally amongst the states irrespective of the differences between them, the Framers counterbalanced allocating power in the House of Representatives based on proportional (‘relative’) equality, depending on a state’s share of the national population.

Similarly, in the Swiss Federal Assembly, the National Council is proportional to the population, whilst in the Council of States each canton has two representatives, ensuring symmetric equality amongst the cantons in the legislative body. Another safeguard for cantonal equality is the double-majority requirement for constitutional amendments. The Federal Constitution provides that the majority of the cantons must approve a proposal for a constitutional amendment. This ensures that smaller cantons cannot be overridden by the preferences of larger ones.

Germany’s Bundesrat represents the 16 *Länder* and gives them a direct role in national legislation. Each state has a number of votes based on its population, but all states have representation irrespective of size or economic strength, ensuring their interests are considered. The principle of (proportional) equality of federal units is also reflected in the composition of the Federal Convention – the body responsible for the election of the Federal President.

In Belgium, the Senate represents the regions and linguistic communities, with proportional representation for each region and community. This structure promotes the interests of smaller regions alongside larger ones, maintaining a balance in national governance. Both major linguistic groups are also represented in the Council of Ministers, composed of an equal number of Dutch- and French-speaking members.

The Senate in Canada is composed of appointed members from various provinces, with regions represented equally regardless of their population. This ensures that smaller provinces have a voice in federal decisions. The Senate's structure serves as a counterbalance to the population-based representation of the House of Commons, ensuring that provinces (except for Newfoundland and Labrador) are represented according to the principle of parity and that less-populous areas are not overshadowed in federal decision-making.

Overall, the principle of state equality manifests across multiple dimensions of the federal systems. For example, constituent units have equal rights to self-governance in areas of their exclusive jurisdiction, as outlined in the federal constitutions. Equality is reflected in the division of powers between the federal and state levels, with constituent units exercising autonomy over matters assigned to them. Federal constitutions and laws often include non-discrimination clauses, and constitutional courts or supreme courts in federal systems act as arbiters to ensure the principle of equality is upheld.²⁸⁸ In most federal systems, constituent units are granted equal participation or veto powers in the process of amending the federal constitution. Additionally, the principle of equality is relevant in the admission of new states, the electoral process, intergovernmental relations, and fiscal arrangements.²⁸⁹

Unlike federal systems, confederalism places sovereignty firmly with the Member States. In a confederation, central authority is typically weak and derives its powers from voluntary agreements or treaties amongst the states. Decision-making at the central level in a confederation usually follows the principle of unanimity rather than majority rule. Resultantly, no decision by the central government is binding on any regional government unless the latter explicitly agrees to it. The spheres of joint activity amongst the Member States of a confederal system are founded on the equality of rights of those states.

Historical examples of the implementation of confederal principles are the Swiss Confederation (1291–1848), the Articles of Confederation (1781–1789), and the German Confederation (1815–1866). Modern confederal arrangements are uncommon, as the model often faces inefficiencies and challenges in decision-making. However, elements of confederalism can be observed in various international and supranational organisations as well as regional unions. The CIS, established following

288 In most federal systems, the issue of providing equality amongst states has been invoked by court decisions interpreting relevant constitutional provisions. Notably, the U.S. Supreme Court has developed several interpretative principles and doctrines, including the principle of equal sovereignty and the equal footing doctrine.

289 Instruments such as fiscal equalisation, as seen in Germany, Switzerland, and Canada, redistribute resources to maintain relative parity amongst federal units, enhancing national cohesion.

the dissolution of the Soviet Union, may be considered one of the few remaining examples of a loosely confederal model aimed at economic and political cooperation.

A confederal model of government is often difficult to distinguish from an international or supranational organisation. The decision-making process in a confederal system is notably similar to that of international organisations such as the United Nations, where decisions are not binding on members unless they consent. However, an international organisation represents a looser association than a confederation. Whilst the former may act as a corporate entity for certain activities, each member nation retains its own system of external relations and distinct legal personality under international law. Similar challenges apply when distinguishing between a confederation and a supranational organisation.

Section 3 of this chapter examines the structural frameworks and operational mechanisms of three prominent regional international organisations: the AU, the UNASUR, and the SAARC. Section 3 focuses on their objectives, governance structures, decision-making processes, and challenges. These organisations play a crucial role in fostering collaboration amongst Member States and represent significant efforts to promote political, economic, and social integration within their respective regions. In particular, Section 3 examines how the principle of equality amongst the Member States of these regional organisations is operationalised. Furthermore, it explores whether these organisations can serve as models for enhancing equality amongst EU Member States, drawing comparisons between their structures, decision-making processes, and implementation mechanisms.

The AU, established in 2001, replaced the OAU. It aims to promote unity and cooperation amongst African nations. It comprises various organs, including the Assembly of Heads of State and Government, the Executive Council, the Commission, and specialised agencies. The AU's decision-making is characterised by a commitment to consensus, although voting mechanisms exist. The Constitutive Act of the African Union explicitly upholds the equal sovereignty of its 55 Member States. In the AU Assembly, each Member State has one vote, regardless of size or economic status. The AU Commission's leadership is rotated amongst regions, ensuring equitable representation across the continent. However, challenges such as disparities in financial contributions, economic capacity, and political stability amongst Member States hinder the effective realisation of equality. Larger economies often wield disproportionate influence, creating tension within the union.

Formed in 2008, the UNASUR seeks to enhance political dialogue and integration in South America. Its structure includes a Council of Heads of State and Government, a Council of Ministers, and various operational bodies. The UNASUR's consensus-based decision-making requires unanimity, ensuring that all Member States have an equal say. Leadership roles within the organisation are rotated amongst Member States to prevent dominance by larger countries such as Brazil and Argentina. Despite these measures, the UNASUR has faced significant challenges, including political polarisation and economic disparities.

Established in 1985, the SAARC comprises eight Member States with significant disparities in size, population, and economic power. It focuses on promoting economic and regional integration amongst South Asian countries. Its decision-making setup includes a Summit of Heads of State or Government, a Council of Ministers, and a Secretariat. The SAARC operates on the principle of non-interference in domestic affairs, which shapes its decision-making process and limits its effectiveness in addressing regional issues. The organisation's charter emphasises sovereign equality, and its structures reflect this commitment. Each Member State has one vote in the SAARC Council, ensuring formal equality. The presidency of SAARC rotates annually, allowing all Member States to share leadership responsibilities. However, geopolitical tensions, particularly between India and Pakistan, have significantly undermined the principle of equality.

Turning to the EU, whilst it does not meet the criteria for classification as a federation, it exceeds the characteristics of a mere confederation. Scholars analysing the EU's structure often associate it with federalism or confederalism, describe it as a hybrid system combining elements of both, or argue that it is neither, instead characterising it as a *sui generis* supranational organisation. Consequently, the EU is widely recognised as a unique and distinctive model of regional political and economic integration that balances supranational governance with national sovereignty.

When comparing the nature, structure, and functioning of the EU with those of federal systems, several key differences emerge. EU Member States retain their sovereignty and remain independent entities under international law. The delegation of powers to the EU is voluntary and limited to specific areas. Moreover, Member States have the right to withdraw from the EU under Art. 50 of the TEU.

In contrast, the constituent units of federal states are not sovereign entities under international law; sovereignty resides with the federal state as a whole. The powers of these constituent units are constitutionally granted and cannot be unilaterally withdrawn or reclaimed. Since the constituent units are permanently integrated into the federal state, secession is typically prohibited or subject to significant restrictions under federal constitutions.

The EU is based on treaties agreed upon by Member States, who remain the masters of the treaties. Changes to the EU's legal framework require unanimous consent of all Member States. Whilst primary law (e.g. founding treaties) retains supremacy in relation to the internal law of Member States, the EU's legal system allows for considerable autonomy in how Member States implement EU directives. By contrast, federal constitutions clearly delineate the powers of the federal government and the constituent units. Amendments to the constitution typically require participation of constituent units. Federal law is supreme and uniformly applicable, with limited scope for local variation.

The EU operates on the principle of subsidiarity, where powers are exercised at the most local level possible unless they can be better managed collectively. Member States retain control over critical areas such as defence, taxation, and social policy, with shared competencies in areas such as trade and environmental policy.

Member States can negotiate treaties and engage in international diplomacy independently of the EU. Comparing the operation of the EU with constituent units of federal states, in the latter, powers are divided between federal and state governments as defined by a constitution. States have exclusive control over certain matters, whilst federal powers typically cover national concerns such as defence and foreign policy. Additionally, states cannot engage in international diplomacy or act independently in matters of federal jurisdiction.

In the EU, legal disputes are resolved by the CJEU, which ensures uniform interpretation of EU law. However, Member States often retain the ultimate authority to interpret their own constitutional compatibility with EU law, leading to occasional conflicts (e.g. Germany's and Poland's constitutional court rulings on EU matters). In federal states, disputes between constituent units and the federal government are resolved by a federal constitutional or supreme court. Federal courts generally have the final say, and constituent units must comply.

The principle of equality amongst Member States is enshrined in the EU's foundational treaty, the TEU. The Union's decision-making processes include mechanisms designed to balance formal equality with proportionality. For example, in the European Parliament, seats are allocated based on the population of each Member State, but a principle of degressive proportionality is applied – larger states have more MEPs, whilst smaller states have more MEPs per capita.

In the European Council and the Council of the EU, the Heads of State and Government and ministers from each Member State ensure equal participation in high-level decision-making. However, a reformed qualified-majority voting system, also known as the double-majority system, allocates votes according to population size whilst ensuring that smaller states retain significant influence. Furthermore, policies such as the Cohesion Fund aim to reduce disparities amongst Member States, fostering both economic equality and deeper integration.

Despite these mechanisms, tensions remain regarding the equal treatment of larger and smaller, as well as newer and older, Member States. Whilst the EU demonstrates a clear inclination towards differentiated integration – its treaties providing various mechanisms for specific cases that are voluntarily accepted by Member States – the CJEU has emphasised that, in the context of newer and older Member States, the principle of equality obligates EU institutions to avoid treating similar situations differently or different situations in the same way when addressing Member States. Ultimately, the EU's experience underscores the challenge of achieving genuine equality within a framework marked by significant economic and political asymmetries.

In conclusion, the principle of equality is a shared ideal across (con)federations as well as international and supranational organisations, but its implementation varies significantly. This principle functions differently in the context of EU Member States compared to the constituent units of federal states. The primary distinction lies in the fact that the EU is a supranational organisation of sovereign states, whereas federal states are unified political entities with a single federal sovereignty.

In both federations and the EU, representation in the legislative process balances population size with state equality. However, in the EU, this balance is achieved through a more sophisticated and differentiated approach. Many federations, such as Germany and Canada, employ fiscal equalisation mechanisms to reduce regional wealth disparities, ensuring all constituent units can provide comparable public services. This reflects a stronger commitment to internal equality compared to the EU, where the budget includes mechanisms such as structural and cohesion funds aimed at promoting economic cohesion and reducing disparities amongst Member States.

Another notable difference is in the process of amending the legal framework. Changes to the EU's legal framework require unanimous consent from all Member States. Contrastingly, constitutional amendments in federal systems typically involve participation from constituent units but do not necessarily require unanimous consent from each unit.

Turning to regional organisations, the AU has established robust institutional mechanisms to promote equality, whereas the UNASUR and the SAARC rely heavily on consensus-based decision-making. The EU's legal and institutional framework serves as a model for resolving disputes, whereas such mechanisms are notably absent in the SAARC and UNASUR.

Economic and, to a lesser extent, political asymmetry present a challenge – in terms of equality – across all four organisations, with wealthier or more influential states often exerting disproportionate influence. The EU's experience underscores the importance of balancing formal equality with proportionality, whilst the AU's focus on solidarity emphasises consensus-driven decision-making and the value of rotational leadership. The struggles of the UNASUR and SAARC highlight the critical need for strong institutions and effective conflict resolution mechanisms.

The central question posed by the author of this chapter is whether the EU's structure can benefit from analysing governance models such as federations, confederations, and international organisations that manage diverse and asymmetrical memberships. In particular, the author aims to establish whether the Union can derive valuable lessons from these models in its efforts to ensure equality amongst its Member States.

The EU, compared to federations for example, has greater economic diversity with significant gaps between wealthier and poorer nations. If the EU were to introduce a stronger federal system, this might impose uniform policies that do not account for these differences, potentially disadvantaging less-developed regions.

Some EU countries advocate for more integration (e.g. France, Germany), whilst others resist (e.g. Scandinavian countries, Eastern European states). Further federalisation of the EU would require consensus, which is difficult to achieve given these divisions. This corresponds with the fact that most federations benefit from a strong national identity that supports federal authority, whereas the EU has diverse national identities and languages, making federal governance more complex.

Without a unified political culture, enforcement of federal laws and redistribution policies could face resistance.²⁹⁰

Drawing insights from federal systems, the EU could enhance equality amongst Member States and advance sustainable integration by, for instance, further adjusting voting structures in the European Parliament and the Council to ensure even fairer representation of smaller states. Additionally, strengthening the role of the CJEU could promote more consistent legal interpretation and implementation of EU law. Considering that the EU, with its current intergovernmental approach, struggles with disparities due to varied national policies, a stronger federal system could enhance equality amongst Member States by enforcing more uniform standards in taxation, labour laws, and social benefits.

In the realm of economic and fiscal integration, the EU could establish a more structured financial and fiscal equalisation system and expand developmental support initiatives. Most federal governments have extensive fiscal powers, including taxation and budgetary control, allowing them to implement programmes that reduce economic disparities between states. Were the EU to adopt a stronger federal model, a centralised fiscal policy could help redistribute wealth more effectively, directing funds to less-developed Member States to enhance equality.

Considering international organisations with supranational elements (such as the AU, UNASUR, and SAARC), it can be argued that bodies and institutions of these organisations have weaker enforcement powers, meaning their models may not be directly applicable to the EU's more integrated legal and economic system. Nevertheless, the EU can be inspired by other organisations with supranational elements in areas such as political balance, legal enforcement, fiscal oversight, and solidarity mechanisms.

For example, drawing from these organisations, the EU could explore models where smaller nations have stronger representation in EU decision-making, preventing dominance by larger economies. It could enhance financial oversight mechanisms and expand funding for economic convergence programmes, particularly in response to social, economic, or health crises. Furthermore, the EU could take inspiration from these organisations in areas where harmonisation rather than deep centralisation is needed. For instance, a more flexible economic framework could allow Member States to align gradually on social and tax policies whilst preserving national control where necessary. Inspired by the AU, for example, the EU could enhance its cohesion funds and structural funds, ensuring that economic disparities amongst Member States are addressed more effectively, thus creating a more solidarity-driven redistribution mechanism. However, full adoption of these models is unlikely due to the EU's unique structure, economic disparities, and political divisions. Instead, the

290 Unlike federal units in federations, which cede significant powers to the federal government, EU Member States are reluctant to give up national control over taxation, social policies, and legal systems. Many countries (e.g. Hungary, Poland) resist deeper political integration, making federalisation politically difficult.

EU could selectively integrate best practices, whilst maintaining its distinct governance system.

Overall, by improving its representation mechanisms and conflict resolution frameworks, as well as financial and fiscal redistribution instruments, the EU could further uphold the principle of equality whilst reinforcing its resilience, cohesion, and sustainable integration. Therefore, ensuring equality amongst Member States remains essential for maintaining the stability and legitimacy of the European project, requiring continuous institutional and policy evolution.

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CONCLUSION AND IMPLICATIONS



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This monograph examines the relationship between equality and integration, two values that may seem contradictory. The contributing authors address whether deeper European integration can occur while preserving the equality of Member States, and, if so, identify the legal and institutional conditions required.

The analysis in the individual chapters demonstrates that this question does not have a clear or universal answer. Public international law, which is based on the principle of sovereign equality of states, as discussed in the introductory part of the book (K. Šmigová), is often used as a reference point. However, this ideal faces practical limitations. In reality, state equality is constrained by responsibility and power dynamics. Hierarchical, and thus both *de facto* and *de jure* unequal, relationships exist among states within major international organisations, such as the veto power in the UN Security Council. While legal equality formally protects weaker states, it does not prevent stronger states from pursuing their interests. Therefore, sovereignty and sovereign equality are fundamental principles of public international law, but they are not absolute.

Restrictions on equality should not automatically be viewed negatively. In some contexts, they are necessary for international organisations to function effectively, as they enable more influential actors to participate actively. This participation is voluntary and typically linked to a corresponding influence on decision-making. Without such arrangements, these institutions risk losing their relevance, as demonstrated empirically by the League of Nations. A certain level of inequality can therefore support the stability, peaceful coexistence, and development of the international community.

The key concept for a balanced response to the research question is ‘restraint’. This should guide both the European Union, particularly the European Commission and the Court of Justice of the European Union as central institutional actors, and the Member States. The requirement of restraint is closely connected to the idea of

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‘shared and responsible sovereignty’, as discussed by M. Safta and T. Toader. Here, sovereignty is not seen as an absolute barrier but as a commitment to exercising public power responsibly within a political and legal community.

The analyses in the monograph indicate that EU institutions meet the requirement of restraint only to a limited extent. In contrast, national constitutional courts are generally more restrained, intervening in conflicts with EU law only on issues they consider fundamental. However, it is also clear that the dynamic development of European integration has largely depended on the active, rather than restrained, approach of key EU institutions. Had their approach been significantly different, the European Union or its predecessors would likely have developed more as an inter-governmental organisation with limited supranational features, operating mainly under public international law.

It is increasingly evident that EU law is not without limits. Member States have repeatedly attempted to define these boundaries, most recently through the concept of national or constitutional identity. However, as chapter by F. Staničić shows, the Court of Justice of the European Union interprets the concept of *constitutional identity* restrictively, thereby weakening its function as a protective mechanism against the absolutization of the primacy of EU law.

To answer the research question affirmatively, national constitutional courts must be recognised as equal partners within the European constitutional space. The equality of Member States requires the preservation of at least a minimal form of *Kompetenz–Kompetenz*, particularly regarding the constitutional core of national legal systems. This also requires restraint from constitutional courts and, by extension, constitutional legislators. They should not allow issues only loosely connected, or unrelated, to constitutional identity to be included for expedient reasons.

Closely linked to this restraint is the issue of ‘competence creep’. A positive answer to the research question is only possible if the principle of conferred powers is consistently upheld. The fundamental premise should be the recognition of Member States’ right to differ in areas outside the exclusive competence of the European Union, which is also related to the selection of legal instruments.

These conclusions apply not only to primary law but also have significant implications for secondary law, especially regarding the choice of legal instruments. Although an apparently equal approach may seem fair, it can result in unequal outcomes. Recent developments show increased unification through regulations rather than directives, but this trend does not adequately consider the diverse economic, political, technological, and legal circumstances of Member States. Consequently, smaller and less well-resourced states may face higher relative costs when implementing and applying uniform EU regulation, which can worsen inequality under the guise of equality. From the perspective of equality among Member States, harmonisation through directives appears to be a more suitable approach.

The monograph tested four hypotheses related to equality. The first hypothesis, which states that absolute sovereignty does not exist and is exchanged for certain advantages, was confirmed. The Westphalian concept of sovereignty has been largely

replaced in current public international law. States do not have absolute independence or unconditional legal and factual equality. As K. Šmigová demonstrates, the operation of the UN, the Security Council, and responses to international crises show that states are not fully equal. Although public international law is based on the principle of equality, it modifies this principle through pragmatic and realistic mechanisms. This modification is not necessarily negative, as the Security Council's structure shows that limiting equality can lead to more effective solutions to global problems. This conclusion is even more relevant to cooperation within the European Union. It concerns not only the political and economic benefits that states receive in exchange for limits on sovereignty and equality, but also the functional consequences of integration across different regulatory frameworks.

This applies both to areas of EU law where Member States retain full control because EU law is limited to coordination, and to areas where national regulation is harmonised or replaced by EU law. S. Savčić's chapter demonstrates that although Member States maintain their own courts, these courts' roles are limited by obligations of mutual recognition and mutual trust. As a result, Member States have given up some ability to adjudicate disputes and enforce their own law independently, but have gained the ability to cooperate effectively and quickly across borders. A similar pattern appears in data protection, where reduced normative autonomy is balanced by increased global regulatory influence and participation in the Digital Single Market.

An analysis of the European Union's external relations (B. Tubić, M. Siman) shows that alternative forms of involvement in European integration, such as the European Economic Area or the post-Brexit model of the United Kingdom, do not restore absolute sovereignty. EEA states must respect the principle of homogeneity and adopt EU law without direct or meaningful influence on its creation. As a result, sovereignty remains a negotiable concept even outside the EU.

The second hypothesis, which assumes a systematic expansion of EU powers (*competence creep*) and a weakening of the principle of conferred powers, is also confirmed. B. Oreziak demonstrates, using Art. 114 TFEU and the regulation of artificial intelligence as examples, that this legal basis is used to intervene in areas beyond the internal market, including ethical issues and fundamental rights. Expansion of powers also occurs through case law, as M. Wielec notes in relation to criminal law and the European Public Prosecutor's Office, where there is a gradual erosion of the state's exclusive right to exercise criminal jurisdiction (*ius puniendi*).

The third hypothesis was confirmed by the finding that formal equality does not ensure de facto equality. A. Varga's chapter demonstrates that, regarding the rule of law, new Member States face requirements not applied to the same extent to original Member States. R. Malachta adds that this asymmetry undermines mutual trust, which is necessary for effective judicial cooperation. These developments disadvantage new and small Member States. L. Trócsányi and L. Sándor argue that changes in the conceptual foundations and institutional structure of the EU, especially after the Lisbon Treaty, have transformed the EU into an entity that guarantees

political equality among citizens of the Member States, while moving away from the principle of sovereign equality of states, to the ongoing benefit of larger Member States.

S. Savčić notes that even formally unified regulation can create inequalities, as shown by the GDPR, which may favour states with developed infrastructure and place a disproportionate burden on less developed states. Thus, while the principle of mutual trust may formally treat Member States equally, in practice it benefits those with a 'good reputation' and imposes greater scrutiny on others.

The fourth hypothesis, which claims that unification is the only guarantee of effectiveness, was challenged in the monograph. Unification can create inequality, particularly in areas where economic and institutional diversity among Member States is significant. In tax law, M. Radvan shows that tax competition can be a legitimate economic policy tool for weaker states, whereas blanket unification would entrench existing differences. Similarly, B. Oręziak's analysis of replacing directives with regulations finds that this approach reduces the ability to consider national specificities and conflicts with the principle of subsidiarity.

The main consequence of the identified trends is the risk of weakening the legitimacy of the European integration project. For the European Union to remain sustainable in the long term, its development must not rely solely on hierarchy, unification, or political equality among citizens of the Member States. Instead, it should also respect the constitutional identity and diversity of Member States.

Another important question is whether the European Union's goals can be achieved through other means. B. Tubić and B. Flander address this issue in their chapters. The first author examines alternative forms of state involvement in European integration to determine whether removing the principle of supranationality could result in greater equality for the state concerned. B. Tubić's chapter shows that models based on external cooperation with the EU, such as the European Economic Area, Turkey's special relationship with the EU, deep and comprehensive free trade agreements, or the post-Brexit arrangement of the United Kingdom, do not provide genuine equality or sovereignty for the third countries involved. Instead, these countries are in an unequal position compared to the EU and its Member States, with the relationship being significantly asymmetrical in favour of the EU. This is due to the limited influence these countries have on EU lawmaking, which leads them to adopt much of EU regulation without corresponding participatory rights. From the perspective of equality, these arrangements are structurally less advantageous than full membership of the European Union.

B. Flander's chapter examines whether the European Union could operate in a fundamentally different manner, considering other integration projects based on federal, confederal, and supranational structures. Analysis of selected federal states and hybrid integration models shows that equality among constituent units is neither absolute nor clearly defined in any of these systems. From this perspective, the main issue for the European Union is not the existence of asymmetries, but rather their insufficient normative basis and legitimacy.

These findings support an important conclusion: critical reflection on the current model of European integration does not suggest that leaving the European Union or replacing it with purely intergovernmental cooperation would be a realistic or normatively acceptable alternative. Although this form of cooperation cannot be entirely dismissed, as shown in D. Sehnálek's chapters, intergovernmental cooperation can lay the groundwork for future supranational collaboration. Its strengths include greater democratic legitimacy and a stronger focus on legislative quality than what is typically achieved within European Union institutions.

Despite the shortcomings identified in the monograph, the European Union remains the most advanced effort to institutionalise shared sovereignty while upholding the formal equality of states. Therefore, questions of internal legitimacy, respect for the constitutional identity of Member States, and careful exercise of delegated powers are crucial. While the European Union offers clear advantages, it is also necessary to acknowledge its shortcomings to enable constructive criticism and improvement of the European integration project, which serves the common interest of all participating state and non-state actors.

