

CHAPTER 6

EQUALITY IN INSTITUTIONAL PRACTICE: THE TREATMENT OF MEMBER STATES BY EU INSTITUTIONS



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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.

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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 supra-national 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

